

Bam! Pow! Splat! Ssssss . . .

FCC's proposal to restrict violence on television won't work for the Constitution or the kids.

By Paul M. Smith and Katherine A. Fallow

Is it finally time for Congress to do something about violence on television? The Federal Communications Commission, in a much-publicized report, seems to say yes. And in the current political climate, especially after the massacre at Virginia Tech, it's a good bet that Congress wants to heed the FCC's call. But before lawmakers rush in, they need to pause and focus on the First Amendment and the values that it protects.

The FCC report, which was released on April 25, says that Congress likely has the power to restrict some violent programming on broadcast stations to the late-night hours, when children are less likely to be watching. According to the report, evidence exists that exposure to violence on TV can increase "aggressive behavior" in children, "at least in the short term." In making its recommendation, the FCC draws on precedents applying a lower level of First Amendment scrutiny to laws regulating "indecent" speech on broadcast TV. As for cable stations, the FCC recommends that their violent programming be addressed by requiring an "a la carte" system, whereby customers are allowed to pick and choose among individual cable channels.

Lawmakers should not be tempted. There are strong reasons—including the bedrock First Amendment principles reflected in a recent string of decisions striking down restrictions on violent video games, the limits of the social science on the effects of televised mayhem, and the difficulty of developing a workable definition of "violence"—why Congress should decline the invitation to impose government-mandated limits on television violence.

REMEMBER THE FIRST

First, it is important to understand that there is no "violence exception" to free speech. Thus, every court addressing video game censorship has recognized that restrictions on access to expression because of violence are content-based laws subject to strict scrutiny under the First Amendment. And although the courts have traditionally permitted greater regulation of broadcasting than of other media, it is far from clear how deferential they would be today to a law regulating violence on broadcast stations,

given that broadcast programs are actually delivered to most consumers in a single package with nonbroadcast cable channels.

A related, long-standing First Amendment principle holds that speech may not be suppressed based on fears that it might inspire recipients to engage in aggressive or undesirable behavior. The exception to that rule, articulated in *Brandenburg v. Ohio* (1969), applies only to speech designed to whip a violent mob into a frenzy. *Brandenburg* cannot be stretched to cover televised entertainment safely viewed by millions.

BOISTEROUS CHILDREN, OH MY

Second, as even the FCC seems to recognize, the scientific justification for regulating violent expression is shaky at best. Based on its review of the research, the FCC report links TV violence only to short-term "aggressive behavior" in children. That's a far cry from violence or some form of long-term harm. (Imagine children watching "Teenage Mutant Ninja Turtles" and then acting out karate moves on the playground.) And even as to that connection, Chairman Kevin Martin, in his separate opinion, acknowledges that "[r]esearch on whether watching violent programming actually causes aggressive behavior in children is inconclusive."

To be sure, the report also makes reference to research (and researchers) that have made more extravagant claims of causal connections. But here again, the experience with attempts to regulate video games is instructive. Two bodies of research featured prominently in the FCC report—the work of psychologist Craig Anderson of Iowa State University and studies involving MRI scans purporting to show the effect of exposure to violence on brain activity—have been rejected by the courts as falling far short of substantial evidence of harm.

Thus, after hearing trial testimony from Anderson in a 2005 case challenging an Illinois video game law, a federal court in Chicago found that his research established only a correlation between playing violent video games and exhibiting aggressive thoughts and behavior. As the court explained, "with these limited findings, it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games." And the same court rejected

the MRI research as providing “barely any evidence at all” of harm from exposure to violent media.

The weakness of the research is critical because courts are unlikely to accept on faith the harmfulness of violent content. As Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit noted in his 2001 landmark opinion about an Indianapolis video arcade ordinance, children have been exposed to violent literature since time immemorial. It follows that intuition or common sense is not enough to allow legislators to determine that this is harmful for constitutional purposes.

IS IT TOO GORY?

Third, even if a court were to agree with the FCC that a law limited to restricting more violent broadcast programs to late-night hours does not require strong scientific support, another critical problem remains: Any such law would have to define the types of violence that could no longer be broadcast during daytime hours.

The experience with video games makes clear how difficult that really is. After all, are “Road Runner” cartoons going to be banned on Saturday mornings? If not, how do you draft a meaningful law that still excludes a show in which a coyote meets violent near-death multiple times in each episode?

One answer might be to limit the ban to “realistic” violence. But news reports from Iraq are realistic, yet few would say they could or should be pushed into the late-night hours. How about sword fights in a movie about Robin Hood or the Three Musketeers? The temptation is to keep adding adjectives—graphic, gory, gratuitous, etc. The absurdity of this is apparent: Lawmakers cannot avoid unconstitutional vagueness by piling on modifiers.

Significantly, the FCC doesn’t even try to solve this problem. As Commissioner Jonathan Adelstein points out in his separate

statement, the FCC is unable to provide a definition of violence “that would cover the majority of violent content that is inappropriate for children, provide fair guidance to programmers, and stand a decent chance of withstanding constitutional scrutiny, in light of judicial precedent.” Instead, it’s passing the buck back to Congress.

WHAT PARENTS DO

Congress should think twice before wielding the blunt instrument of the law to regulate violent content on television. A far preferable approach would be to improve and promote awareness of such technological solutions as the V-chip, which give parents more power to decide what their children will watch.

The FCC has instead given up on parents as part of the solution with regard to broadcast TV, while still seeking to employ parents as central to the solution in the cable realm. That is the import of the proposal to allow consumers to subscribe a la carte to cable stations—i.e., the supposition that parents will make wise choices. But that solution would do virtually no good. Unlike the V-chip, it forces parents to choose between what they as adults might watch and what they want their children to watch. The reality is that many would still subscribe to certain channels, even if those channels have some programming that is inappropriate for children.

Violence on television is a matter of concern to a lot of people, but opting for a politically expedient solution that is both constitutionally and practically unworkable will not make that concern go away.

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