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### Private Broadcasters and the Public Interest: Notes Toward a 'Third Way'

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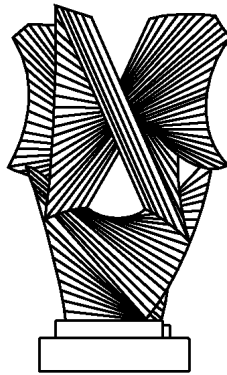
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Private Broadcasters and the Public Interest:  
Notes toward a “Third Way”

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# Private Broadcasters and the Public Interest: Notes toward a “Third Way”

*Cass R. Sunstein\**

## I. Introduction

The so-called communications revolution has been driven by technological change. The rise of cable television, the Internet, satellite television, “direcTV,” and digital television has confounded ordinary understandings of “television.”<sup>1</sup> Before long, digital television may enable viewers to choose among over a thousand programs.<sup>2</sup> The possible combination of television and the Internet—a combination now in its early stages—may prove an equally dramatic development.<sup>3</sup>

Law has responded to these developments in fits and starts, largely by attempting to engraft legal requirements designed for the old environment onto an altogether new communications market. The result is a high degree of anachronism, misfit, and drift, and in the view of many observers, a series of constitutional violations.<sup>4</sup>

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<sup>1</sup> See Bruce Owen, *The Internet Challenge to Television* 311-26 (1999) (discussing this possibility with some skepticism about its feasibility, but also dealing with other dramatic technological developments).

<sup>2</sup> See Lawrie Mifflin, *As Band of Channels Grows, Niche Programs Will Boom*, *N. Y. Times*, Dec. 28, 1998, at A1.

<sup>3</sup> See Owen, *supra* note 1, at 311-26.

<sup>4</sup> See Thomas Krattenmaker and L.A. Powe, *Converging First Amendment Principles for Converging Communications Media*, 104 *Yale L.J.* 1719, 1725

Most of the modern debate involves a vigorous but increasingly tired contest between those defending the old regulatory order<sup>5</sup> and those urging rapid movement toward “simple rules” for government control of television, above all well-defined property rights and freedom of contract.<sup>6</sup>

My aim in this Article is to discuss a small but important part of the intersection between the emerging communications market and law: public interest obligations imposed on television broadcasters. Since the initial rise of broadcasting in the United States, government has treated the license as a kind of “grant” that is legitimately accompanied by duties.<sup>7</sup> Congress and the FCC have required broadcasters to follow a range of requirements—a form of old-style “command-and-control” regulation, growing out of an understanding that there would be three, and only three, private broadcasting stations. Much, though far from all, of this regulation was eliminated in the 1980s.<sup>8</sup> A large question is the extent to which public interest requirements continue to make sense, or even to survive constitutional scrutiny, in an entirely different communications market.

The question was posed starkly with the enactment of the Telecommunications Act of 1996,<sup>9</sup> one of whose central concerns involved the rise of digital television. The Act had to deal with two issues. First, who would have the right to broadcast digital television?

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(1995); Mark Fowler and Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207, 210 (1982); the various contributions to *Rationales and Rationalizations: Regulating the Electronic Media* (Richard Corn-Revere ed. 1997).

<sup>5</sup> This is the general thrust of Lee C. Bollinger, *Images of a Free Press* (1991); Owen M. Fiss, *The Irony of Free Speech* (1996).

<sup>6</sup> See *Rationales and Rationalizations*, *supra* (offering a number of essays challenging any role for government aside from the definition and enforcement of property rights); Richard A. Epstein, *Simple Rules for a Complex World* 275-306 (1996) (discussing environmental protection, and a general account of the role of government, in a way that is easily adapted to the area of communications).

<sup>7</sup> See below.

<sup>8</sup> See below.

<sup>9</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §§ 151-613 and amending the Communications Act of 1934).

Should the licenses be sold, or auctioned, or given outright to existing broadcasters? Second, what public interest obligations—if any—should attach to the ownership of a right to broadcast digital television? The Act squarely answered the first question but was silent on the second.<sup>10</sup> In an extremely controversial step, Congress did not sell or auction the right to broadcast digital television, but basically gave the right to existing broadcasters for free.<sup>11</sup> This has sometimes been described as a “\$70 billion giveaway.”<sup>12</sup> At the same time, Congress refused to eliminate public interest obligations and delegated to the FCC the power to decide whether such obligations should be imposed on digital television broadcasters, and if so in what form.<sup>13</sup> The FCC has not yet made that decision or even commenced formal proceedings.

In this Article I offer two basic claims, one involving ends, the other involving means. The first is that at least in the near term, the nature of the emerging communications market does not provide a sufficient reason to abandon the idea that broadcasters should be required to promote public interest goals. There is a large difference between the public interest and what interests the public. This is especially so in light of the still-distinctive character and consequences of the communications market. One of the central goals of the system of broadcasting, private as well as public, should be to promote the American aspiration to deliberative democracy<sup>14</sup>—a system in which citizens are informed about public

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<sup>10</sup> 47 U.S.C. 336(a).

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Editorial, *What Price Digital Television?*, N.Y. Times, Dec. 26, 1998 at A26 (editorial). See also *See Federal Management of the Radio Spectrum: Advanced Television Services: Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce, 104th Cong. 82 (1996)* (statement of Robert M. Pepper, Chief, Office of Plans and Policy, FCC, stating that an auction would bring between \$11 to \$70 billion in revenue). For general criticism, see Thomas Krattenmaker, *The Telecommunications Act of 1996*, 29 Conn. L. Rev. 123, 163-64 (1996); Matthew Spitzer, *Dean Krattenmacher's Road Not Taken*, 29 Conn. L. Rev. 353 (1996).

<sup>13</sup> 47 U.S.C. 336(d).

<sup>14</sup> See, e.g., Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* 52-94 (1996) (discussing reciprocity); Joshua Cohen, *Democracy and Liberty*, in *Deliberative Democracy* 185-231 (Jon Elster ed. 1998).

issues and able to make judgments on the basis of reasons. Educational programming, and programming that deals with civic questions, can promote that aspiration; reliance on an unregulated market may not. There are also legitimate grounds for encouraging broadcasters to make programming accessible to people with disabilities, above all the deaf. I emphasize in this connection some special characteristics of the broadcasting market, characteristics that make it hazardous to rely on the ideal of “consumer sovereignty” as the exclusive basis for regulatory policy.

My second claim is that in order to promote the relevant goals, government should decreasingly rely on command-and-control regulation,<sup>15</sup> and should turn instead to three less intrusive and more flexible instruments, each of which is well-adapted to a period of rapid technological change. The instruments are (1) mandatory public disclosure of information about public interest broadcasting, unaccompanied by content regulation; (2) economic incentives, above all “play or pay”; and (3) voluntary self-regulation, as through a “code” of appropriate conduct, to be created and operated by the industry itself. These instruments have played an increasing role in regulatory policy in general, especially in the environmental arena.<sup>16</sup> But they have not been discussed in the area of communications, where they have a natural place; and despite its growing importance, the general topic of self-regulation by industry self-regulation has received little academic attention.<sup>17</sup>

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<sup>15</sup> A question not addressed here is the content of any minimal requirements; I emphasize the more flexible alternatives as the instruments of choice, without denying the need for some minima as a “backstop.” In the current system, for example, it may well make sense to require a degree of children’s programming and also free air time for candidates. See Final Report, *supra* note \*. The precise extent of mandatory programming is beyond the scope of the present discussion, though I do refer to mandates at several points below..

<sup>16</sup> See generally Neil Cunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* 422-48 (1999); Anthony Ogus, *Regulation* 121-149, 245-56 (1998); National Academy of Public Administration, *The Environment Goes To Market* 12-55 (1994).

<sup>17</sup> The principal exception can be found in an illuminating symposium issue in an Australian law review, see Symposium, *Industry Self-Regulation*, 19 *Law & Policy* 363 (1997).

Through requiring broadcasters to disclose information about their public interest activities, government may be able to enlist public pressure and social norms so as to create a kind of competition to do more and better. This is the simplest and least intrusive of regulatory instruments. By allowing broadcasters to buy their way out of certain public interest obligations, government should be able to ensure that those with an incentive to produce good programming are actually doing so, and also to produce lowest-cost means of promoting public interest programming. And through encouraging (not mandating) voluntary self-regulation, government can help broadcasters to overcome a kind of prisoner's dilemma faced by participants in a "winner-take-all" market,<sup>18</sup> a prisoner's dilemma that contributes to a range of social problems, often stemming from a kind of "race to the bottom" with respect to programming quality.

It should be clear that this basic approach combines an insistence on the serious limits of unrestrained communications markets in promoting social goals with a plea for rejecting traditional regulation and for enlisting more flexible, market-oriented instruments in the service of those goals. This approach is consistent with some incipient but quite general trends in regulatory law.<sup>19</sup> If the approach is sound, it is ideally suited to the emerging communications market; but it is easily adapted to other areas as well, involving environmental degradation and other social problems. It is much too soon to say whether there is a "third way" between traditional command-and-control regulation and reliance on free trade and well-defined property rights. But if there is indeed a "third way," it is likely to be found in proposals of this kind.

Thus the most general theme of this Article is that disclosure, economic incentives, and voluntary self-regulation might displace government command-and-control in a variety of areas of regulatory law. More specific themes involve the value of requiring producers to

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<sup>18</sup> See Robert H. Frank and Phillip J. Cook, *The Winner-Take-All Society* 189-209 (1995).

<sup>19</sup> See, e.g., Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* 37-92 (1999); National Academy of Public Administration, *The Environment Goes To Market* (1994); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613, 618-33 (1999).

disclose goods and bads, independent of any regulatory requirements; of relaxing the antitrust laws so as to permit cooperation designed to reduce some of problems associated with both “winner-take-all” markets and “races to the bottom”; of distinguishing between market-suppressing and market-supplementing remedies; of building on emerging developments in environmental protection so as to allow far more imaginative “trades” among producers of social goods and bads; and of greatly expanding the repertoire of regulatory tools to be used by officials concerned with market failures (or market successes that disserve social goals). In short, it is time to move beyond the view that market ordering and content regulation are the two possibilities for communications law. There are many alternatives, and real progress can come only from exploring the choice among them.

The Article comes in eight parts. Part II sets the stage, outlining the history of regulation and identifying some relevant puzzles. Part III evaluates, and rejects, the claim that in the emerging television market, there is no longer room for public interest regulation of any kind. I suggest that broadcasting is no ordinary commodity, partly because of the collective benefits of good programming, and partly because viewers are more like products, offered to advertisers, than consumers paying for entertainment on their own. I also trace likely stages of the emerging market, with broadcast programming becoming more and more like general-interest magazines. Part IV deals with disclosure, exploring the possibility that relevant private groups, invoking widespread social norms, can interact to produce improvements in the broadcasting market without compulsory programming of any kind. Part V deals with economic incentives, beginning with the idea of “pay or play,” and then adapting some ideas in the law of tort to the law of broadcasting. Part VI examines whether a code of broadcasting might operate as kind of positional arms control agreement, helping to counteract a situation in which broadcasters compete to the detriment of collective goals. Part VII is a brief summary of regulatory options. Part VIII provides a conclusion.



## II. History, Puzzles, Problems

### *A. A Brief Historical Overview*<sup>20</sup>

Broadcast licenses have never been treated like ordinary property rights, open for sale on the free market. Since the initial enactment of the Communications Act of 1934, the government has awarded licenses to broadcasters in accordance with the “public interest, convenience, and necessity.”<sup>21</sup> The Federal Radio Commission early described the system as one in which broadcasters “must be operated as if owned by the public. . . . It is as if a community should own a station and turn it over to the best man in sight with this injunction: ‘Manage this station in our interest . . . .’”<sup>22</sup> Under this “public trustee” standard, the FCC has imposed a range of obligations on broadcasters.

In its initial set of guidelines, the FCC required stations to meet the “tastes, needs and desires of all substantial groups among the listening public.”<sup>23</sup> This required “a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family, find a place.”<sup>24</sup>

Often this kind of guidance operated as a general plea, with little systematic enforcement. In 1960, however, the FCC went so far as to outline fourteen of the “major elements usually necessary to the public interest.”<sup>25</sup> These included religious programming; program for children; political broadcasts; news programs; sports programs; weather and market services, and development and use of

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<sup>20</sup> This section draws on the first section of the report referred to in note \* supra.

<sup>21</sup> 47 USC 303®.

<sup>22</sup> The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees, 11 Fed. Comm. B.J. 5, 14 (1950) (quoting Schaeffer Radio Co., an unpublished 1930 FRC decision).

<sup>23</sup> Great Lakes Broadcasting Co. v. FRC, 3 FRC Ann. Rep. 32, 34 (1929), modified on other grounds, 37 F.2d 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706 (1930).

<sup>24</sup> Id.

<sup>25</sup> Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2314-15 (1960).

local talent. The FCC eventually specified its general guidelines, which were intended merely as “indicia of the types and areas of” appropriate service. The specifications included minimum amounts for news, public affairs, and other non-entertainment programming, including the controversial “fairness doctrine,” and also access rules for prime-time.<sup>26</sup> Broadcasters were required to limit advertising time, maintain program logs, and ascertain local community needs.<sup>27</sup>

Substantial changes occurred in the 1980s, a period of significant deregulation. The head of the FCC, Mark Fowler, declared that television is “just another appliance,” a “toaster with pictures.”<sup>28</sup> The fairness doctrine was largely eliminated, and many of the more particular public interest requirements were removed.<sup>29</sup> Nonetheless, a number of such requirements remain. For example, the FCC continues to say that if a broadcaster sells airtime to one candidate, it must sell similar time to opposing candidates as well. Congress itself has codified a right of this kind.<sup>30</sup> A longstanding statutory provision requires that if a broadcaster offers to sell time, it must do so at the “lowest unit rate of the station” during the 45 days before a primary election and during the 60 days before a general or special election.<sup>31</sup>

Recent years have seen special attention to children’s programming and to deaf people’s access to television. In 1990,

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<sup>26</sup> See *In re Amendment to Section 0.281 of the Commission’s Rules: Delegations of Authority to the Chief, Broadcast Bureau*, 59 F.C.C.2d 491, 493 (1976); See *Amendment of Part 73 of the Commission’s Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Report and Order, 23 F.C.C.2d 382, 385-7 (1970).

<sup>27</sup> See *id.*

<sup>28</sup> See Bernard Nossiter, *Licenses to Coin Money*, 240 *Nation* 402 (1985).

<sup>29</sup> *In re The Revision of Programming and Commercialization Policies*, 98 F.C.C. 2d 1076 (1984). See also *Revision of Applications for Renewals*, 49 R.R.2d 470 (1981) (postcard renewals); *In re Complaint of Syracuse Peace Council*, 2 F.C.C.R. 5043, 5054-55 (1987) (repealing most of fairness doctrine), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

<sup>30</sup> 47 U.S.C. § 315.

<sup>31</sup> 47 U.S.C. § 315(b).

Congress enacted the Children's Programming Act of 1990,<sup>32</sup> which requires broadcasters to provide three hours of educational programming per week, and which also limits the advertising on children's programming (12 minutes per hour during weekdays and 10/5 minutes per weekends).<sup>33</sup> A statute enacted in 1990 requires new television sets to have special decoder chips, allowing them to display closed captioned television transmissions.<sup>34</sup> The Telecommunications Act of 1996 requires use of "v-chip" technology, designed to facilitate parental control over what enters the home; it also contains ancillary requirements intended to ensure "ratings" of programming content.<sup>35</sup>

*B. Two Puzzles*

Turn now to the present, or at least to the recent past. From 1997 to 1998, a presidential advisory committee met to discuss the public interest obligation of television broadcasters.<sup>36</sup> Several of the broadcasters on the Committee were quite skeptical about governmental mandates, but highly receptive to the idea of adopting some kind of broadcasting "code," akin to the kind approved and administered by the National Association of Broadcasters between 1928 and 1979. The Committee eventually moved toward endorsing the notion of a code, and the idea received considerable attention, mid-deliberations, in the trade press.

In its annual meeting, however, the National Association of Broadcasters signaled its skepticism about the idea and came very close to saying "no" and "never." Very oddly, a large part of the broadcasters' objection was that any "code" would violate the antitrust laws. This is very odd, because in their discussions, members of the NAB treated the possibility of an antitrust violation as extremely good news. It is not often that high-level corporate

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<sup>32</sup> Children's Television Act of 1990, tits. I, II, §§ 103, 203, 47 U.S.C. §§ 303(a)-(b), 394 (1994).

<sup>33</sup> Pub. L. No. 101-437, § 102(b).

<sup>34</sup> Television Decoder Circuitry Act of 1990, 47 U.S.C. § 303(u).

<sup>35</sup> See the general discussion in James Hamilton, *supra* note, at 302-11.

<sup>36</sup> I draw on personal recollections here. See note \* *supra*. Transcripts of the relevant meetings can be found at the website of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters.

officials are smiling when they discuss the possibility that certain action would be found unlawful.

Consider a second puzzle. During the committee's deliberations, some people argued on behalf of a "pay or play" system, in which broadcasters would be relieved of public interest obligations (to "pay") if they agree instead to pay someone else—another broadcaster—to do so. But many of the broadcasters on the committee were quite skeptical of this approach, arguing that public interest obligations were part of the duty of every broadcaster, and that no one should be exempted for a price. This was also very odd. It is not often that high-level corporate officials prefer rigid government mandates to more flexible approaches. What explains these puzzles?

### *C. Identifying the Problem*

To evaluate particular proposals, it is necessary to have a concrete sense of why some people think that even well-functioning television markets are inadequate. Consider the following possibilities, each of which has produced public concern in the last decade<sup>37</sup>:

1. There may be insufficient educational programming for children. The existing fare may be insufficient because there is too little simply in terms of amount, or because children do not watch the stations on which it is available, or because the quality is too low.
2. Some programming may be affirmatively bad for children if, for example, it contains excessive violence, or otherwise encourages behavior that is dangerous to self and others. The result of such programming may be to produce violent or otherwise dangerous behavior in the real world.<sup>38</sup>

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<sup>37</sup> For different angles, see, e.g., Final Report, *supra* note; Hamilton, *supra* note, at 3-50 (discussing violence); Newton Minow and Craig LaMay, *Abandoned in the Wasteland: Children, Television, and the First Amendment* 10-45 (1995) (discussing children) Danny Schechter, *The More You Watch, The Less You Know* (1997) (discussing content of news).

<sup>38</sup> See Hamilton, *supra*, at 20-30, for evidence.

3. Programming may not be sufficiently accessible to people who are deaf or hard of hearing; this may be a particular problem if citizens are unable to find out about emergencies.<sup>39</sup>

4. There may be too little coverage of serious issues, especially during political campaigns. The relevant coverage may involve sensationalism and “sound bites,” or attention to who is ahead (“horserace issues”) rather than who thinks what and why. The result may be an insufficiently informed citizenry.<sup>40</sup>

5. There may be too much violent programming in general, with adverse consequences for adults, not only children.<sup>41</sup> The adverse consequences may include an increase in violence (because of changes in social norms or “copycat” effects<sup>42</sup>), general demoralization and fear, or a misperception of reality.

6. News coverage may be a form of “infotainment,” dealing not with real issues, but with gossip about celebrities and charges of various kinds.<sup>43</sup>

7. At least on the major networks, programming may be too homogenous, in a form of “blind leading the blind” programming. Since a significant percentage of Americans do not receive cable television, and depend on broadcasters, the result may be insufficient variety in programming.<sup>44</sup>

8. There may be too little substantive diversity of view—too little debate among people with genuinely different

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<sup>39</sup> See Final Report, *supra* note \*, at 30-31.

<sup>40</sup> See Kiku Adatto, *Sound-Bite Democracy* (1995), for general discussion.

<sup>41</sup> See Hamilton, *supra* note, at 20-30, for detailed discussion.

<sup>42</sup> For evidence, see Elliott Aronson, *The Social Animal* 62-64, 266-69 (6<sup>th</sup> ed. 1995).

<sup>43</sup> See Schechter, *supra* note.

<sup>44</sup> See below.

perspectives about issues of policy and fact. Here too, the result may be an insufficiently informed citizenry.<sup>45</sup>

9. The problem may be not homogeneity but heterogeneity, which may result in a highly balkanized viewing public, in which many or most people lack shared viewing experiences, or in which people view programming that largely reinforces their own convictions and prejudices.

10. It may be too expensive for candidates to reach the electorate via television. The result may be excessive competition to accumulate funds simply in order to have access to television; this competition may have corrosive effects on the electoral process. Free air time would be a possible response, perhaps qualified by an obligation, on the part of the candidate, to speak for at least 50% of the time, or to refrain from negative campaigning.

To be sure, some of these problems cannot be corrected through regulation that is either feasible or constitutional. Moreover, these various conceptions of the relevant problem point toward diverse solutions, some of which would raise serious first amendment problems, as discussed below.<sup>46</sup> A particular challenge is to develop approaches that would allow a high degree of flexibility, minimize government involvement in programming content, and also do some good.

### III. Preferences and Audiences

It has increasingly been urged that any objections to existing television are elitist or outmoded.<sup>47</sup> On one view, public interest obligations have no place in modern law, particularly in light of the

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<sup>45</sup> See C. Edwin Baker, *The Media That Citizens Need*, 147 U Pa L Rev 317, 383-407 (1999).

<sup>46</sup> See pp. below.

<sup>47</sup> See Fowler and Brennan, *supra* note; Corn-Revere, *supra* note.

decline of the “scarcity” rationale for regulation; it has even been urged that the FCC no longer has any appropriate role.<sup>48</sup>

A conceptual point first: Though many people claim to argue for “deregulation,” that route is not in fact an option, or at least not a reasonable one. What “deregulation” really means is a shift from the status quo to a system of different but emphatically legal regulation, more specifically one of property and contract rights, in which government does not impose specific public interest obligations but instead sets up initial entitlements and then permits trades among owners and producers. This is a regulatory system as much as any other. If it seems close to the current system for newspapers and magazines, it is no less a regulatory system for that; a great deal of law (inevitably) governs the rights and duties of newspapers and magazines. The only real form of deregulation is anarchy, and that is not an option. The issue is thus not whether to “deregulate,” but whether one or another regulatory system is better than imaginable alternatives.

I therefore turn to the general question whether there remains any reason for government to regulate broadcasting in the “public interest.” My concern here is both theoretical and empirical. The question is whether in the current market, broadcasters are likely to provide viewers what they would like to see, and if so whether that point is decisive on the question whether public interest obligations should be imposed.<sup>49</sup> The brief answer is that the idea that broadcasters show “what viewers want” is a quite inadequate response to the argument for public interest obligations.<sup>50</sup> The discussion deals with the technological present and the short-term future; below I introduce complications from emerging technological developments.

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<sup>48</sup> See Yochai Benkler & Lawrence Lessig, *The New Republic*, Dec. 14, 1998 at 15 (arguing that a growing body of research suggests the F.C.C. is unnecessary).

<sup>49</sup> An excellent discussion, on which I draw at several points here, is C. Edwin Baker, *Giving the Audience What It Wants*, 58 *Ohio St. L.J.* 311 (1997).

<sup>50</sup> The following points are directed to the television market at the close of the twentieth century and the opening of the twenty-first; later I discuss how they bear on the market that is likely to emerge thereafter.

*A. Three Market Failures<sup>51</sup>*

A well-functioning television market would promote the ideal of consumer sovereignty. People would be able to choose from a range of options, and suppliers would cater to their tastes. To a considerable extent, of course, the existing system approaches this reality. But there are three serious problems, each suggesting that consumer sovereignty is not served by free markets in programming.

*1. Eyeballs as the commodity*

The first point is the most fundamental. Television is not an ordinary product, for broadcasters do not sell programming to viewers in return for cash. A system of “pay-per-view” would indeed fit the usual commodity model; but “pay per view” continues to be a rare practice. The difference between the existing broadcasting market and pay-per-view is quite important. The key problem here is that viewers do not pay a price, market or otherwise, for television. On the contrary, it is more accurate to say that viewers *are* a commodity, or a product, that broadcasters deliver to the people who actually pay them: advertisers.<sup>52</sup>

This phenomenon introduces some serious distortions, at least if we understand an ideal broadcasting market as one in which viewers receive what they want. From the standpoint of consumer sovereignty, and taking viewers as consumers, the role of advertisers creates market failures. Of course broadcasters seek, other things being equal, to deliver more rather than fewer viewers, because advertisers seek, other things being equal, more rather than fewer viewers. To this extent the broadcasting market may well provide many or most viewers with what they “want.” But advertisers have issues and agendas of their own, and the interests of advertisers can push broadcasters in, or away from, directions that viewers, or substantial numbers of them, would actually like.

This is a substantial difference from the ordinary marketplace. Thus advertisers like certain demographic groups and dislike others, even when the numbers are equal; they pay extra amounts in order to

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<sup>51</sup> These are market failures if it is assumed that the purpose of a well-functioning television market is to ensure that programming is well-matched to viewer preferences.

<sup>52</sup> See C. Edwin Baker, *Advertising and A Democratic Press* 25-87 (1994).



attract groups that are likely to purchase the relevant products, and this affects programming content.<sup>53</sup> Advertisers do not want programming that draws product safety into question, at least not if it is their own products, and sometimes more generally.<sup>54</sup> In addition, advertisers want programming that will put viewers in a receptive purchasing mood, and hence not be too “depressing.”<sup>55</sup> Advertisers also tend to dislike programming that is highly controversial or that is too serious, and hence avoid sponsoring shows that take stands on public issues.<sup>56</sup> In these ways, the fact that broadcasters are delivering viewers to advertisers—this is largely their charge, under existing arrangements—can produce offerings that diverge considerably from what would emerge if viewers were paying directly for programming. To this extent the notion of consumer sovereignty is seriously compromised.

### *2. Informational cascades and broadcaster homogeneity*

A second problem is that it is not clear whether broadcasters are now engaged, in anything like a systematic or scientific way, in catering to public tastes. At first glance it would seem obvious that broadcasters must be engaged in this endeavor (subject to the qualification just stated); if broadcasters are maximizing anything, they must be maximizing viewers. Attracting viewers is their job.<sup>57</sup> But there is reason to question this judgment, at least in its simplest form. Sometimes rational people make decisions not on the basis of a full inspection of the alternatives, but on the basis of an understanding of what other people are doing.<sup>58</sup> Because people obtain information from other people’s actions, individual actions carry with them one or more “informational externalities,” which potentially affect the decisions of others. Thus rational and boundedly rational people, in business as elsewhere, rely on the

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<sup>53</sup> See *id.*, at 30-35.

<sup>54</sup> See *id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See Danny Schechter, *The More You See, The Less You Know* (1998).

<sup>58</sup> Sushil Bikchandani et al., *Learning from the Behavior of Others*, 12 *J. Econ. Persp.* 151, 164 (1998).

signals provided by the words and deeds of others.<sup>59</sup> The result can be to produce cascade effects, as B follows A, and C follows A and B, and D, as a rational agent, follows the collected wisdom embodied in the actions of A, B, and C. Informational cascades can produce unfortunate outcomes, in fact outcomes far worse than those that would result if individuals accumulated information on their own. Sometimes, moreover, people use the “availability” heuristic, by which an event is measured as more probable if an instance of its occurrence can be brought to mind.<sup>60</sup> Using the availability heuristic, broadcasters might reason that if one show or another has attracted substantial viewers in the past, they should copy it. The result would be “fads” and “fashions” in programming.<sup>61</sup>

In theory, then, broadcasters might be building on the programming judgments of other broadcasters, often, perhaps, reacting to the “availability” of salient recent instances in which a particular program was especially popular (dealing, let us suppose, with the O.J. Simpson trial) or especially unpopular (dealing, let us suppose, with South Africa). If this is true, private decisions by broadcasters may produce both mistakes and homogeneity—mistakes in the form of programming unlike what viewers want, and homogeneity in the form of the “blind leading the blind.”<sup>62</sup>

Recent evidence suggests that the theoretical account has considerable truth. A careful study shows that there is a good deal of simple imitation, as networks provide a certain kind of programming simply by imitating whatever other networks are doing.<sup>63</sup> Recently

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<sup>59</sup> In a related vein, see Andrew Caplin and John Leahy, *Miracle on Seventh Avenue: Information Externalities and Search*, 108 *Econ. J.* 60 (1998).

<sup>60</sup> See Timur Kuran and Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *Stan. L. Rev.* 163 (1999).

<sup>61</sup> See note *supra*.

<sup>62</sup> See David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *The New Economics of Human Behavior* 188 (Mariano Tommasi & Kathryn Ierulli eds., 1995).

<sup>63</sup> See Sushil Bikchandani et al., *Learning from the Behavior of Others*, 12 *J. Econ. Persp.* 151, 164 (1998); Robert E. Kennedy, *Strategy Fads and Competitive Convergence: An Empirical Test for Herd Behavior in Prime-Time Television Broadcasting* (Harvard Business School, January 1998).

popular shows tend to create cascade effects. This imitative behavior is not in the interest of viewers. On the contrary, it creates a kind of homogeneity and uniformity in the broadcasting market, and thus makes for problems in terms of providing what viewers “want.”<sup>64</sup> This is not a conventional market failure, but it suggests that existing decisions are unlikely to promote consumer sovereignty.

### *3. Externalities and collective action problems*

Even if broadcasters did provide each viewer with what he or she wanted, a significant problem would remain, and from the economic point of view, this is probably the most serious of all. Information is a public good, and once one person knows something (about, for example, product hazards, asthma, official misconduct, welfare reform, or abuse of power), the benefits of that knowledge will probably accrue to others.<sup>65</sup> Note in this regard Amartya Sen’s remarkable finding that no famine has ever occurred in a democratic party with a free press.<sup>66</sup> This finding is complemented by a series of less dramatic ones, showing the substantial benefits for individual citizens of a media that is willing and able to devote attention to public concerns, including the plight of the disadvantaged.<sup>67</sup> But individual choices by individual viewers may well produce too little public interest programming in light of the fact that the benefits of viewing such programming are not fully “internalized” by individual viewers. Thus individually rational decisions may inflict costs on others at the same time that they fail to confer benefits on others. In this respect, the problem “is not that people choose unwisely as individuals, but that the collective consequences of their choices often turn out to be very different from what they desire or anticipate.”<sup>68</sup>

Most generally, there are multiple external effects in the broadcasting area; some of these are positive, but unlikely to be

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<sup>64</sup> See *id.*

<sup>65</sup> An illuminating and detailed discussion is Baker, *Giving the Audience What It Wants*, *supra* note, at 350-85.

<sup>66</sup> See Amartya Sen and Jean Dreze, *India 76* (1995).

<sup>67</sup> *Id.* at 75-76, 173, 191.

<sup>68</sup> Robert H. Frank and Phillip J. Cook, *The Winner-Take-All Society* 191 (1995). See also Pierre Bourdieu, *On Television* 9-29 (1998).

generated sufficiently by individual choices, while others are negative, and likely to be excessively produced by individual choices. Consider a decision to watch violent programming.<sup>69</sup> In short, the effects of broadcasting depend on social interactions, and broadcasting produces a range of collective goods and collective bads. Many of the resulting problems are connected with democratic ideals. Thus, for example, a culture in which each person sees a high degree of serious programming may well lead to better political judgments; media portrayals of violence can produce harm to others; greater knowledge on the part of one person often leads to more knowledge on the part of others with whom she interacts.<sup>70</sup> Perhaps most important, a degree of serious attention to public issues can lead to improved governance through deterring abuses and encouraging governmental response to serious problems. In these various ways, public interest programming can produce social benefits that will not be adequately captured by the individual choices of individual citizens; the same is true for programming that produces social costs, including increased criminal activity.<sup>71</sup>

*B. Problems on Non-Market Criteria:  
Children, Deliberative Democracy, and Related Issues*

Many people object to purely market approaches to television.<sup>72</sup> Perhaps television is not best understood as an ordinary commodity, subject to the forces of supply and demand. There are several reasons why this might be so. The unifying theme is that the American political tradition is committed to the ideal of deliberative democracy,<sup>73</sup> an ideal that has animated first amendment doctrine and media regulation in general.<sup>74</sup> Even if the media market were well-functioning from the economic point of view, there would be room for measures designed to promote a well-functioning system of

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<sup>69</sup> See Hamilton, *supra*, at 3-49.

<sup>70</sup> Baker, *supra*, at 350-367.

<sup>71</sup> See *id.* at 355-56; see also James P. Hamilton, *Channeling Violence: The Economic Market for Violent Television Programming* 20-30, 285-322 (1998).

<sup>72</sup> See, *eg.*, Baker, *supra*, at 355-65.

<sup>73</sup> See Joseph Bessette, *The Mild Voice of Reason* 6-39 (1995).

<sup>74</sup> See Minow and LaMay, *supra* note, at 15-65; Cass R. Sunstein, *Democracy and the Problem of Free Speech* 53-92 (1993).

democratic deliberation, especially in view of the importance of television to people's judgments about what issues are important, and about what it is reasonable to think.<sup>75</sup>

*1. Children and the hearing-impaired*

A well-functioning market may fail to serve certain categories of viewers. Of these the most obvious is children, who may be poorly served by an absence of educational programming<sup>76</sup> or adversely affected by violent programming.<sup>77</sup> It is possible to treat the resulting problems as "externalities," but the more natural conclusion is that the television market is creating difficulties even in the absence of a market failure. Because television has a significant role as an educational instrument, the failure to serve children is a significant problem.<sup>78</sup> A well-functioning market may also disserve people who are hard of hearing, if they are deprived of access to television by the existing use of technology, a particular problem if they are unable to watch the news or to understand descriptions of emergency conditions. Here too there is potential room for a regulatory response, partly in order to include deaf people in civic activities by informing them of electoral issues and news in general.

*2. Endogenous preferences*

The public's "tastes," with respect to television programming, do not come from nature or from the sky. They are partly a product of current and recent practices by broadcasters and other programmers. They are often generated by the market.<sup>79</sup> What people want, in short, is partly a product of what they are accustomed to seeing. It is also a product of existing social norms, which can change over time, and which are themselves responsive to existing commercial fare. Tastes are formed, not just served, by broadcasters.

The point raises doubts about the idea that government policy should simply take viewers' tastes as given. In an era in which

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<sup>75</sup> See Shanto Iyengar and Donald Kinder, *News That Matters* (1987); Shanto Iyengar, *Is Anyone Responsible? How Television Frames Public Issues* 127-44 (1991).

<sup>76</sup> See Newton Minow and Craig LaMay, *Abandoned in the Wasteland* 10-65 (1995).

<sup>77</sup> See Hamilton, *supra*, at 76-128.

<sup>78</sup> See Minow and LaMay, *supra*, at 100-126.

<sup>79</sup> Baker, *supra* note, at 404-410.

broadcasters are providing a good deal of public interest programming, dealing with serious issues in a serious way, many members of the public will cultivate a taste for that kind of programming. This effect would promote democratic ideals by fostering information and helping to increase deliberation.<sup>80</sup> In an era in which broadcasters are carrying sensationalistic or violent material, members of the public may well cultivate a taste for more of the same. “Free marketeers have little to cheer about if all they can claim is that the market is efficient at filling desires that the market itself generates. . . . Just as culture affects preferences, so also do markets influence culture.”<sup>81</sup> If this is so, the ideal of consumer sovereignty is placed under some pressure; market activities cannot easily be justified by reference to tastes that they themselves generate.

This point should not be overstated. Undoubtedly broadcasters have limited power to push tastes very dramatically in one direction or another. At a minimum, the idea that viewers’ tastes are endogenous to existing fare should be taken as a cautionary note about treating consumption choices as decisive for purposes of policy. Combined with the point to follow, it suggests that there is nothing illegitimate about policies that depart from consumption choices in favor of widely held social aspirations. But there is reason for broader concern about the adverse effects of certain kinds of programming—including a failure to cover serious issues in a serious way—on democratic judgments.<sup>82</sup>

### *3. Citizens, consumers, and precommitment strategies*

There is a difference between what people want in their capacity as viewers (or “consumers of broadcasting”) and what they want in their capacity as *citizens*.<sup>83</sup> Both preferences and values are a function of the setting in which people find themselves; they are emphatically a product of social role. In these circumstances, it would be wrong to

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<sup>80</sup> For evidence that the effects of television on this count are far from fanciful, see Iyengar, *Is Anyone Responsible?*, *supra* note, at 26-116.

<sup>81</sup> Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* 201 (1995).

<sup>82</sup> See Iyengar, *Is Anyone Responsible?*, *supra* note, at 46-68.

<sup>83</sup> A good discussion is Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 *Yale L.J.* 377 (1998).

think that the choices of individual viewers are definitive, or definitional, with respect to the question of individual preference of value. On the contrary, a democratic public, engaged in deliberation about the world of telecommunications, may legitimately seek regulations embodying aspirations that diverge from their consumption choices. Participants in politics may be attempting to promote their meta-preferences, or their preferences about their own preferences; they may be attempting to carry out a precommitment strategy of some kind; they may be more altruistic or other-regarding in their capacity as citizens, perhaps because of the nature of the goods involved; they may be more optimistic about the prospects for change when acting collectively.<sup>84</sup>

When participants in democracy attempt to make things better, and do not simply track their consumption choices, it is not helpful to disparage their efforts as “paternalism” or as “meddling.” Consumers should not be confused with citizens; this is a form of democracy in action.<sup>85</sup> Thus it is entirely appropriate for government to respond to people’s aspirations and commitments as expressed in the public realm. This is especially so when a democratic polity is itself attempting to ensure more in the way of democratic deliberation.

### *C. Principle and Policy*

These points suggest that there is good reason, in principle, for some kind of regulatory response to existing markets in television. But nothing said thus far argues for any particular governmental initiative. There is no simple “match” between the identifiable market and nonmarket failures and public interest requirements in general. For example, it is hard to imagine a legitimate governmental response to the problem of excessive homogeneity on the major networks. Any such response is likely to correct only a piece of the problem, as through, for example, efforts to encourage more serious coverage of political campaigns. We have also seen that existing public interest obligations are extremely varied; each of them must be

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<sup>84</sup> The latter two points are emphasized in *id.* at 399-401; in the particular context of broadcasting, see Baker, *Giving the Audience What It Wants*, *supra*, at 401-04..

<sup>85</sup> See Baker, *Giving the Audience What It Wants*, *supra*, at 401-11.

assessed on its own. At first glance, policies that attempt to promote better programming for children are most securely supported by the arguments made thus far (as a response to what is reasonably classified as a market failure, and also as a way of increasing positive externalities and of promoting social aspirations). Efforts to ensure that deaf people are able to enjoy television, through closed captioning, are justifiable on similar grounds. There is room also for efforts to ensure better coverage of electoral campaigns—perhaps through a requirement of free air time for candidates, perhaps through a private “code” designed to ensure more substantive discussion. Disclosure requirements, allowing the public to have a general sense of broadcaster performance, seem to be justified as a non-intrusive method for allowing civic aspirations to help influence future programming. As a response to possibly unfortunate effects on advertiser pressures, and also as a way of ensuring against a destructive “race to the bottom” with respect to programming content, a general code of broadcaster behavior seems appealing (see Part VII below).

There are pragmatic questions as well. To say that a form of response may be justified in principle is not at all to say that it will succeed in practice. Just as in the environmental area, where command-and-control regulation has produced unintended adverse consequences,<sup>86</sup> many problems have emerged with command-and-control regulation of the kind that has typified FCC regulation for most of its history. Consider, for example, the fairness doctrine, designed to ensure exposure to public issues and to allow diverse voices to have access to the airwaves. A serious problem with the fairness doctrine is that it appears to have discouraged stations from covering controversial issues at all, and to ensure a kind of bland uniformity, thus disserving democratic goals.<sup>87</sup> A uniform set of mandates may also produce waste and poor programming; if a network is especially bad at generating good shows for children, and has a hard time attracting a children’s audience, is it so clear that that network should be faced with the same obligations as everyone else?

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<sup>86</sup> See Cass R. Sunstein, *Free Markets and Social Justice* 245-383 (1997).

<sup>87</sup> See Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect” ? Evidence from the Postderegulation Radio Market*, 26 *J. Legal Stud.* 279 (1997)



In view of the great diversity of the broadcasting market, a “one size fits all” approach may be far more costly, and less effective, than creative alternatives.

It is useful to distinguish here between approaches that suppress markets and approaches that supplement markets.<sup>88</sup> In regulatory policy, market-suppressing approaches include minimum wage and maximum hour laws, or price and wage controls. Market-supplementing approaches include jobs training programs and the earned income tax credit. In telecommunications policy, the fairness doctrine was a market-suppressing remedy; so too with a requirement that broadcasters provide three hours of educational programming per week, or a certain amount of time for candidates for public office. By contrast, the devotion of public funds to the Public Broadcasting System is a market-supplementing approach; so too with a subsidy granted to each of the networks, designed to ensure a certain amount of public interest programming. Of course the line between the two can be thin when the market-supplementing approach ends up displacing material that would otherwise be supplied in accordance with forces of supply and demand.

*D. Communications Past, Present, and Future:  
Planned Obsolescence and Beyond*

The arguments offered thus far have not specifically addressed the new market in communications. An especially important question is whether emerging changes in television technology strengthen the case for satisfaction with market outcomes.

*1. Predicting the future*

The most striking feature of the emerging communications market is a dramatic increase in the number of available stations and programming options. The existing regulatory regime was designed for a system with three private broadcasting networks and the Public Broadcasting System (PBS). In 1999, about 32% of people who have television remain dependent on broadcasters, which means that they

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<sup>88</sup> See Amartya Sen and Jean Dreze, *India 21-24* (1997) (discussing market supplementing strategies).

have access to five or six stations.<sup>89</sup> This means that about two-thirds of viewers have access to between fifty and one hundred stations., including the all-news stations C-Span and CNN, and a range of “soft news” stations such as MSNBC. By itself this is an extremely significant change, and the shift from this situation to one in which most people have access to (say) 500 stations may be only one of degree. More dramatic innovations are coming in the future, with the possible ultimate “convergence” of various television sources, including digital television and the Internet.<sup>90</sup> If a “television set” becomes akin to a computer monitor that provides access to the full range of American magazines, would not the case for public interest regulation be substantially weakened? The foregoing discussion offers an ambivalent answer. Some of the problems with the market status quo would dissipate, but others would remain. Let us explore these questions in more detail.

For purposes of analysis, we might separate the market for television into four rough stages. The first is that of the period between the 1940s and 1960s—the market for which the existing regulatory system was designed; call this *the old regime*. As noted, the old regime included three large networks and also PBS; the four stations provided all of what Americans knew as television. The second market is one of the late 1990s; call this *the transitional state*. Here the most dramatic change in the number of available options. This is a system in which a substantial percentage (about 32%) of the viewing public relies on five broadcasters and PBS, but in which 68% of the public has access to cable television, and thus is able to choose among fifty or more options. Of that 68%, a growing segment is able to see well over 100 stations. But in the transitional state, broadcasters continue to have a special role, both because a substantial number of people do not have access to cable at all, and because even cable viewers watch the major networks disproportionately.

The third stage, likely to begin shortly, is continuous with the transitional state; call this the stage of *multiple options*. This is a market in which broadcasters continue to be seen by more people

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<sup>89</sup> See Statistical Abstract of the United States, No. 888, Utilization of Selected Media: 1970 to 1998 (1998).

<sup>90</sup> See Owen, *supra* note 1.

than other providers, but are decreasingly distinctive in terms of either the size or nature of their audience. More people will have access to cable or other options, and many of those who rely on broadcasting will be able to have more options too. But broadcasters will continue to be seen by a disproportionate number of people, if only because a shrinking but still substantial percentage of viewers will continue to have access only to broadcasters; this significant subgroup is important partly because of its sheer size (unlikely to drop below 20% for at least a decade) and partly because it includes an especially high percentage of people, including children, who are poor and poorly educated. In this stage, broadcasters will in some ways be akin to Newsweek, Time, and US News and World Report, in the sense that they will have a relatively dominant role in terms of sheer numbers. But they will have to compete with other programmers, some general, some specialized, with analogues (most of them now in place) to Sports Illustrated, The Economist, Dog Fancy, National Review, National Geographic, the New Republic, Consumer Reports, Playboy, and many more. This third stage will be marked by the rise of digital television, which is allowing broadcasters to “multiplex,” that is, to provide two, three, four, or even five programs where they could previously provide only one. The result may be to make broadcasters themselves more specialized.<sup>91</sup> It is hard to predict the future here, but the best prediction is that a situation of this kind will prevail for the next decade and more.

The final stage—call it one of *technological convergence*—is one of substantial or possibly even complete shrinkage in the distinctive role of broadcasters.<sup>92</sup> This is a stage in which television programming can be provided via the Internet, over telephone lines, or both; a television may itself be a simple computer monitor, connected to various programming sources from which viewers may make selections. If it is economically feasible for broadcasters to continue as such, they are likely to have little of a special role and will be among a large number of providers. At most, and extending

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<sup>91</sup> See note supra.

<sup>92</sup> This shrinkage may or may not occur as a result of convergence. For discussion, see Owen, supra, at 312 (“Whether convergence is inevitable, or even likely, is still unclear”).

the analogy to Time or Newsweek, they will be have a somewhat larger and more general audience than most of their competitors. Perhaps they will not be distinctive at all. The most extreme version of this final stage would be akin to the market for books, where people make individual choices, not filtered by some intermediary offering packages.<sup>93</sup>

*2. Regulatory options and technological change*

Each of the arguments offered here makes sense for old regime and the transitional state. They also seem to make sense for the emerging third stage of multiple options; recall that even here, a substantial segment of the public will depend on broadcasters only, and people with access to cable and other alternatives continue, statistically speaking, to watch a disproportionate amount of broadcast fare. But arguments for public interest obligations would be less sensible as applied to a market in which broadcasters occupy no special role, partly because some of the relevant problems would be diminished, partly because in such a market, it seems peculiar to impose on broadcasters, and no one else, a special duty to protect public interest goals. In that market, perhaps everyone should be faced with some of the requirements discussed below (in particular the disclosure requirement). But the case for others (such as uniform mandates, a broadcaster-only code, or pay or play) would be weakened, not least since it would seem arbitrary to single out broadcasters for such requirements.

Let us examine, in more detail, the force of the particular arguments as the market changes over time. Even if informational influences produce a degree of homogeneity among broadcasters, and even if broadcasters tend to follow one another, the increasing number of channels means that for most Americans, there is far more heterogeneity now than there was a decade ago, and a great deal more heterogeneity is likely in the near future, perhaps dramatically increasing heterogeneity. At the same time, advertisers are likely to have an increasingly weak role in determining overall programming content. When a few broadcasters exhausted the market, advertiser preferences could have a more substantial effect

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<sup>93</sup> I put to one side the complexities introduced by Amazon.com and various book clubs.

than they now do. Thus two of the arguments made above—involving the market failures from advertiser pressures and from informational cascades—are significantly weakened. Of course these changes should not be overstated. Recall that 32% of American households with televisions do not have cable television, and that a substantial number of Americans are likely to depend on over-the-air programming for the not-too-distant future; hence the increasing heterogeneity is not quite as dramatic as it might seem.

But some of the arguments offered above—especially those focussed on democratic ideals—retain considerable force. Even in the very long term, there will continue to be substantial external benefits from public interest programming, benefits that are not adequately captured by individual viewer choices. And to the extent that citizens seek to push communications policy toward (for example) more and better programming for children, or free air time for candidates, or greater access for the deaf people, changes in the evolving market offers only partial answers. Heterogeneity may be an inadequate solution here. It is reasonable for citizens to believe that there should be very general public exposure to public issues, and hence that it is not sufficient to have one, or two, or three, or even more stations (CNN, C-SPAN, MSNBC) that take such issues seriously. Indeed, citizens may favor a kind of general precommitment strategy—operating against their own particular viewing choices—through which broadcasters, at least, are required to devote some time to educational or civic programming. Thus the presence of news-only stations, especially on cable, is not a sufficient response to those who want broadcasters to do more and better. It is insufficient partly because a significant segment of the population will have no access to cable at all, and partly because in their capacity as citizens, people may favor a precommitment strategy that overcomes certain individual viewing choices.

In the very long run, this argument too will be weakened. As we have seen, the strongest objection would come when broadcasters are not genuinely distinctive; when this is the case, it would seem arbitrary to encourage broadcasters, but not others, to provide certain kinds of programming. In the face of such changes, it will indeed make sense to adapt the proposals discussed below to a dramatically changed market. But it is hard to explore this question in the

abstract; everything turns on the particular regulatory proposal, and instrument, that is at issue. The question of adaptation will arise at several points below. For now let us observe only that in the extreme situation—when broadcasters are not in any sense distinctive—the case for regulation limited to broadcasting would be very weak, and alternative strategies, involving funding of public interest programming, would be better. Thus my emphasis here—on disclosure, economic incentives, and voluntary self-regulation—is designed for a (likely not inconsiderable) period in which broadcasters continue to occupy a special role. To simplify a complex story, the very long-term may call for a combination of public subsidies for high-quality programming and disclosure requirements for general-interest stations. But in the shorter term, there is a great deal more to consider.

#### IV. Disclosure

Consider a simple proposal: *Broadcasters should be required to disclose, in some detail and on a quarterly basis, all of their public service and public interest activities.* The disclosure might include an accounting of any free air time provided to candidates, educational programming, charitable activities, programming designed for traditionally under-served communities, closed captioning for the hearing impaired, local programming, and public service announcements.<sup>94</sup> The hope, vindicated by experience with similar approaches in environmental law,<sup>95</sup> is that a disclosure requirement will by itself trigger improved performance, by creating a kind of competition to do better, and by enlisting various social pressures in the direction of improved performance. A requirement of this sort would be part of a general trend in federal regulation, one with considerable promise.<sup>96</sup>

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<sup>94</sup> Current law requires disclosures of a subset of this material: children's programming and non-entertainment programming responsive to ascertained community needs. See 47 C.F.R. 3526(a)(8)(I), (iii) and 47 C.F.R. 3527(a)(7).

<sup>95</sup> Madhu Khanna et al., Toxic Release Information: A Policy Tool for Environmental Protection, 36 J. Env. Economics and Management 243 (1998).

<sup>96</sup> See Wesley A. Magat and W. Kip Viscusi, Informational Approaches to Regulation (1992); Cass R. Sunstein, Informational Regulation and Informational Standing: Akins and Beyond, 147 U Pa L Rev 613, 618-29 (1999).

*A. Precursors*

Many statutes and regulations now require the disclosure of information. Some of these are designed to assist consumers in making informed choices; such statutes are meant to be market-enhancing. By contrast, others are designed to trigger political rather than market safeguards; such statutes are meant to enhance democratic processes. The most famous of these is NEPA. Enacted in 1972, the principal goal of NEPA is to require government to compile and disclose environmentally-related information before government goes forward with any projects having a major effect on the environment.<sup>97</sup> NEPA does not require government to give environmental effects any particular weight, nor is there judicial review of the substance of agency decisions.<sup>98</sup> The purpose of disclosure is principally to trigger political safeguards, coming from the government's own judgments or from external pressure.<sup>99</sup> Hence any governmental indifference to adverse environmental effects is perfectly acceptable under NEPA: the idea behind the statute is that if the public is not indifferent, the government will have to give some weight to environmental effects.

Probably the most successful experiment in information disclosure is the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>100</sup> Under this statute, firms and individuals must report, to state and local government, the quantities of potentially hazardous chemicals that have been stored or released into the environment. Users of such chemicals must report to their local fire departments about the location, types, and quantities of stored chemicals. They must also give information about potential adverse health effects. On the basis of the relevant results, the EPA publishes pollution data about the releases of over 300 chemical from

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<sup>97</sup> See *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

<sup>98</sup> See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980).

<sup>99</sup> See *id.*

<sup>100</sup> 42 U.S.C. §§ 11,001-11050 (1994)

over 20,000 facilities.<sup>101</sup> This has been an exceptional success story, one that has well exceeded expectations at the time of enactment.<sup>102</sup> A detailed report suggests that EPCRA has had important beneficial effects, spurring innovative, cost-effective programs from the EPA and from state and local government.<sup>103</sup>

Many other statutes involving health, safety, and the environment fall in this general category. The Animal Welfare Act is designed partly to ensure publicity about the treatment of animals; thus covered laboratories are required to file reports with the government about their conduct,<sup>104</sup> with the apparent thought that the reports will deter noncompliance and also allow continuing monitoring. In addition to its various command-and-control provisions, the Clean Air Act requires companies to create and disclose “risk management plans” involving accidental releases of chemicals; the plans must include a worse case scenario.<sup>105</sup> The Safe Drinking Water Act was amended in 1996 to require annual “consumer confidence reports,” to be developed and disseminated by community water suppliers.<sup>106</sup> Statutes governing discrimination and medical care also seem committed partly to the idea that “sunlight is the best of disinfectants”<sup>107</sup>; thus they require covered institutions to compile reports about their conduct and compliance with applicable law. The Federal Election Campaign Act requires political committees to disclose a great deal of information about their activities.

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<sup>101</sup> See James P. Hamilton, Channeling Violence: The Economic Market for Violent Television Programming 302 (1998).

<sup>102</sup> See Madhu Khanna et al., Toxic Release Information: A Policy Tool for Environmental Protection, 36 J. Env. Economics and Management 243 (1998) (discussing success of toxic release inventory and stockholder responses to release of relevant information); Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 612-16 (2d ed. 1996) (discussing informational approaches).

<sup>103</sup> See GAO, Toxic Chemicals, Report to the Congress (1991).

<sup>104</sup> Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1994).

<sup>105</sup> 42 U.S.C. 7412(r).

<sup>106</sup> 42 U.S.C. 300 g-3 (c)(4) (1996).

<sup>107</sup> The phrase comes from Louis D. Brandeis, *Other People's Money* 92 (1914).



Of course there is an overlap between informational regulation designed to assist consumers and informational regulation designed to trigger political checks. A statute that requires companies to place “eco-labels” on their products may produce little in the way of consumer response, but shareholders and participants in the democratic process may attempt to sanction those whose labels reveal environmentally destructive behavior. Companies will know this in advance, with likely behavioral consequences. The risk of sanctions from shareholders and state legislatures may well produce environmental improvement even without regulation.<sup>108</sup>

A great deal of recent attention has been given to informational regulation in the particular context of the communications industry. As an alternative to direct regulation, which raises especially severe first amendment problems, government might attempt to increase information instead. Thus the mandatory “v-chip” is intended to permit parents to block programming that people want to exclude from their homes; the v-chip is supposed to work hand-in-hand with a ratings system.<sup>109</sup> Similarly, a provision of the 1996 Telecommunications Act requires television manufacturers to include technology capable of reading a program rating mechanism; requires the FCC to create a ratings methodology if the industry does not produce an acceptable ratings plan within a year; and requires that broadcasters include a rating in their signals if the relevant program is rated.<sup>110</sup> Spurred by this statute, the networks have generated a system for television ratings, which is now in place.<sup>111</sup> The question is whether disclosure requirements might be enlisted more generally.

### *B. Rationale*

Why has information disclosure become such a popular regulatory tool? There are several answers. For various reasons, a

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<sup>108</sup> Consider the eco-label required by the European Union. see Council Regulation 880/92 of 23 March 1992, On a Community Eco-Level Award Scheme, 1992 O.J. (L 99).

<sup>109</sup> See James P. Hamilton, *Channeling Violence: The Economic Market for Violent Television Programming* 289-92 (1998).

<sup>110</sup> See *id.* at 302 (1998).

<sup>111</sup> See *id.* at 304-11.

market failure may come in the form of an inadequate supply of information.<sup>112</sup> Because information is generally<sup>113</sup> a public good—something that if provided to one is also provided to all or many—workers and consumers may attempt to free ride on the efforts of others, with the result that too little information is provided. For this reason, compulsory disclosure of information can provide the simplest and most direct response to the relevant market failure.

It is increasingly recognized that information is often a far less expensive and more efficient strategy than command-and-control, which consists of rigid mandates about regulatory ends (a certain percentage reduction in sulfur dioxide, for example), regulatory means (a technological mandate, for example, for cars), or both.<sup>114</sup> A chief advantage of informational regulation is its comparative flexibility. If consumers are informed of the salt and sugar content of foods, they can proceed as they wish, trading off various product characteristics however they see fit. If workers are given information about the risks posed by their workplace, they can trade safety against other possible variables (such as salary, investments for children or retirement, and leisure).<sup>115</sup> If viewers know the content of television programs in advance, they can use market methods (by failing to watch) or political methods (by complaining to stations) to induce changes. From the standpoint of efficiency, information remedies can be better than either command-and-control regulation or than reliance on unregulated markets alone.

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<sup>112</sup> See Anthony I. Ogus, *Regulation: Legal Form and Economic Theory* 121-125 (1994).

<sup>113</sup> Of course it is possible to give information more “private good” characteristics, and innovative approaches can be expected in the next decade. Consider, for example, fees for access to information on the Internet, or the subscription-based Consumer Reports; neither of these approaches converts information into a private good but both reduce the range of people who may, without high cost, have access to it. Thus it is possible to imagine a range of approaches that would diminish the cost of access for some or money while increasing it, or holding it constant, for others.

<sup>114</sup> See Anthony I. Ogus, *Regulation: Legal Form and Economic Theory* 121-149 (1994); Stephen Breyer, *Regulation and its Reform* 271-83 (1982).

<sup>115</sup> See Cass R. Sunstein, *Free Markets and Social Justice* 329-30 (1997).

From the democratic point of view, informational regulation also has substantial advantages. A well-functioning system of deliberative democracy requires a certain degree of information, so that citizens can engage in their monitoring and deliberative tasks. Subject as they are to parochial pressures, segments of government may have insufficient incentive to disclose information on their own; consider FOIA or FECA, where the self-interest of government or private groups may press in the direction of too little disclosure. Thus a good way to enable citizens to oversee private or public action, and also to assess the need for less, more, or different regulation, is to inform them of both private and public activity. The very fact that the public will be in a position to engage in general monitoring may well be a spur to desirable outcomes.

EPCRA is the most obvious example here. Sharp, cost-effective, and largely unanticipated reductions in toxic releases have come about without anything in the way of direct regulation.<sup>116</sup> One of the causes appears to be adverse effects on stock prices from repeated disclosure of high levels of toxic releases.<sup>117</sup> In the area of broadcasting, it is possible to hope that disclosure of public interest programming, and the mere need to compile the information each year, can increase educational and public affairs programming without involving government mandates at all. Thus a primary virtue of informational regulation is that it triggers political safeguards and allows citizens a continuing oversight role, one that is, in the best cases, largely self-enforcing.

None of this is to say that informational regulation is always effective or desirable. Under imaginable assumptions such regulation will be inferior to command-and-control regulation and to reliance on markets unaccompanied by disclosure requirements. And there are potential problems with informational strategies, which may be expensive, sometimes costing more than they are worth, and which may be ineffectual or even counterproductive. Whether these are convincing objections depends on the incentives faced by those who disclose, which are likely to differ with context. To know whether

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<sup>116</sup> See Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 611-16 (2d ed. 1996).

<sup>117</sup> See Madhu Khanna et al., *Toxics Release Information: A Policy Tool for Environmental Protection*, 36 *J. Env. Ec. And Management* 243 (1998).

disclosure is an effective alternative to other forms of regulation, it is necessary to have a concrete understanding of the circumstances in which disclosure will fulfill its intended goals. Undoubtedly the most successful cases involve well-organized groups able to impose reputational and financial harm on firms engaged in harmful activity.<sup>118</sup>

### *C. The Minimal Proposal*

We are now in a position to discuss a disclosure requirement for public interest programming in somewhat more detail. On a quarterly basis, every broadcaster should be required to make public the full range of public interest and public service activities in which it engages in every year. The relevant activities might involve free air time for candidates, educational programming, public service announcements, access for disabled viewers (as through closed captioning or video descriptions), charitable activities, emergency warnings and services, and the like. The FCC should require a completion of a relatively simple form to ensure accurate and uniform accounting, and FCC staff should take steps to sanction those stations that have failed to disclose, or that have done so inaccurately. A special advantage of disclosure requirements is that they appear to fit well with the emerging communications market insofar as they allow maximum flexibility and do not impose requirements that may be rapidly outrun by changing technologies. Even in a period in which broadcasters are akin to Time and Newsweek, such requirements would make a good deal of sense as a means of creating some democratic pressure for improvement.<sup>119</sup> Of

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<sup>118</sup> See Gunningham and Grabosky, *supra* note, at 296-300.

<sup>119</sup> An obvious question is whether, if the case for disclosure has been made out, similar requirements ought to be imposed on magazines and even newspapers. Indeed, the same question might be asked about economic incentives and voluntary self-regulation, as discussed below. I do not discuss those questions here. For those who believe that there is increasingly little difference between television and print media, it might seem that if requirements of this sort are not desirable for the latter, they are also undesirable for the former. The best response to this argument is in Bollinger, *supra* note, with the suggestion that the different regulatory regimes for the broadcast and print media are well-suited to two different images of press freedom, one image involving democratic self-government, the other involving a form of economic laissez-faire. Bollinger

course it is reasonable to think that as the market evolves, disclosure requirements should be placed on all programmers, and not limited to broadcasters. The hope would be that such requirements would produce a kind of “race,” at least in some markets, to do more and better.

Is the hope realistic? People did not anticipate that the Toxic Release Inventory (TRI) would by itself spur behavioral changes; the question is whether the same forces might operate here. The answer depends on whether the mechanisms that have produced significant voluntary changes in the environmental arena will also be triggered in this setting. In order for voluntary improvements to occur, the disclosure requirements must be accompanied by political activity and existing norms that might be enlisted on behalf of increased public interest programming. With respect to the TRI, well-organized groups have been able to threaten, or to use, publicity so as to induce companies to undertake voluntary reductions. It appears that environmental groups have mobilized when disclosure shows high levels of toxic emissions; anticipating this, companies have reduced emissions voluntarily.<sup>120</sup> Thus the effect of the TRI has been to draw private and perhaps governmental attention to the most serious polluters, who have an incentive to reduce on their own. Once this process is underway, there has been a kind of competition to produce further reductions, as each polluter seeks to be substantially below the group of most serious polluters.

The question is whether the same might happen here. The answer depends first on the existence of external monitoring and second on the power of the monitors to impose reputational or financial harm on broadcasters whose record is poor.<sup>121</sup> The external

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believes that the existing of two parallel regulatory regimes makes appropriate space for each of these images, and that if one regulatory regime goes wrong (through, for example, excessive regulation of television, or an excessive “race to the bottom” in magazines), the other can serve as a corrective. This Article is in the general spirit of Bollinger’s approach, but it attempts to develop more flexible tools for implementing it, tools that are better adapted to the emerging television market.

<sup>120</sup> See note *supra*.

<sup>121</sup> See Madhu Khanna et al., *Toxics Release Information: A Policy Tool for Environmental Protection*, 36 *J. Env. Ec. And Management* 243 (1998); Gunningham and Grabosky, *supra*, at 296-300.

monitors may include public interest groups seeking to “shame” badly performing broadcasters; they may include rivals, who seek to create a kind of “race to the top.” From the disclosures, it should be clear which broadcasters are doing least to promote the public interest, and perhaps those broadcasters will be specially targeted by private groups and competitors. The ultimate effect cannot be known a priori. Much depends on the possibility of private monitors. If public interest organizations, and viewers who favor certain programming, are able to mobilize, perhaps in concert with certain members of the mass media, substantial behavioral effects might be expected. It is even possible that a disclosure requirement would help create its own monitors. On the other hand, it is possible that toxic releases are such a salient and easily quantified public “bad” that a political response is quite likely; perhaps a failure to provide public interest programming is a far less salient “bad.” It is even possible that diverse conceptions of what counts as a “bad” would lead to inappropriate (but successful) pressures, if (for example) politically controversial programming, or programming that challenges popular convictions, receives public opprobrium.

But in view of the relative unintrusiveness of a disclosure requirement, and the flexibility of any private responses, this approach is certainly worth trying. At worst, little will be lost. At most, much will be gained, probably in the form of better programming, and in any case in the form of greater information about the actual performance of the broadcasting industry—and also about the circumstances in which disclosure requirements will be effective on their own. In light of the aspirations of most viewers, the likely result of disclosure will be to improve the quality and quantity of both educational and civic programming, in a way that promotes the goals of a well-functioning deliberative democracy.

## V. Economic Incentives

In this section I explore the possibility that broadcasters might meet their public interest responsibilities, not through a set of uniform requirements, but through economic incentives. As we will see, the most creative and promising approach, modeled on recent environmental reforms, involves “play or pay,” in which broadcasters are given a choice between complying with public interest

requirements or paying someone else to put public interest programming on the air. I begin with a discussion of “play or pay,” and then move to a more ambitious discussion of the alternatives, growing out of the law of tort and posing a debate between market-suppressing and market-supplementing approaches.

*A. Of Nature and Coase*

Ronald Coase’s work on efficiency, free trades, and transactions costs originated in the area of communications, and in particular in an attack on the FCC; but it has been most influential in the environmental arena.<sup>122</sup> In that area, there has been a great deal of dissatisfaction with rigid governmental commands, and there has also been an unmistakable movement in the direction of more flexible economic instruments, which are likely to be far more efficient.<sup>123</sup> A command might say, for example, that every coal-fired power plant must reduce its sulfur dioxide emissions by 50%, or that it must use technology of a governmentally specified kind. With respect to environmental protection, incentives typically come in two different forms: pollution fees, imposed on those who impose environmental harm, and tradeable pollution rights or “licenses,” given to those who produce pollution. For example, government might say that companies must pay a certain amount per unit of sulfur dioxide emission. Alternatively, government might say that each company is permitted to emit a certain specified amount of sulfur dioxide, but that its permission, or right, can be bought and sold on the free market. On the pollution fee model, it pays to reduce pollution simply in order to reduce the level of the tax. On the tradeable pollution right model, it also pays to reduce pollution, because the reduction can be used to engage in more of the relevant activity or in order to obtain money from another who cannot reduce so cheaply. Fees or tradeable licenses should create good dynamic

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<sup>122</sup> See R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 *Am. Econ. Rev.* 384 (1974), reprinted in R.H. Coase, *Articles on Economics and Economists* 64 (1994); R. H. Coase, *The Federal Communications Commission*, 2 *J. L. & Econ.* 1(1959).

<sup>123</sup> See Gunningham and Grabosky, *supra* note, at 69, 391-421.

incentives for pollution reduction, and also move environmental protection in the direction of greater cost-effectiveness.<sup>124</sup>

There is a complex literature on the choice between pollution fees and tradeable emission rights.<sup>125</sup> The solution depends largely on an inquiry into what government knows and does not know.<sup>126</sup> In general, a fee is better if the government is able to calculate the damage done per unit of pollution, but has difficulty in calculating the appropriate aggregate pollution level. In those circumstances, a fee is better because the government is unlikely to err by setting it, whereas a system of tradeable permits will produce mistakes. By contrast, a tradeable permit is better if the government knows the appropriate aggregate level, but is unable to calculate the damage done per unit of pollution. In either case, government can take advantage of the informational advantage held by private businesses participating in pollution control, so as to allow them to decide on the most effective, least-cost method of achieving any particular pollution reduction. If it is extremely expensive for company A to reduce its current level, it may choose to pay a high tax. Or—if the system is one of tradeable pollution rights—it may simply pay someone else, capable of reducing pollution more cheaply, to produce the relevant reduction instead. For any desired level of reduction, a system of economic incentives should produce the right result at a lower cost, by allocating burdens to those most able to bear them.

*B. Taxes, Public Bads, Hot Potatoes, and Cold Spots*

Although the FCC has experimented with allocating communications rights via auction, little thought has been given to the possibility of using economic incentives to promote public interest goals in the communications market. In principle, however, both the “fees” approach and the license approach may well be preferable to government commands. At least this is so if we think of public interest programming as a “good,” which people should pay

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<sup>124</sup> See William J. Baumol & Wallace E. Oates, *The Theory of Environmental Policy* (2d ed. 1988).

<sup>125</sup> For an overview, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 72-85 (1995).

<sup>126</sup> See Stephen Breyer, *Regulation and its Reform* 271-83 (1982).



for failing to produce, just as pollution is a “bad,” which people should pay for producing. Consider educational programming and free time for presidential elections. Suppose, for example, that ABC is in an especially good position to produce high-quality programming for children, whereas CBS is in an especially good position to promote high-quality programming involving presidential elections. Rather than requiring both ABC and CBS to produce educational programming and programming involving presidential elections, the government might allow each to pay a fee if it is to be relieved of the requirement of providing one or the other. This is the “tax” model of public interest programming. Alternatively, it might adapt the emission fee model, and allow CBS to sell ABC its obligation with respect to educational programming, while permitting ABC to sell CBS its obligation with respect to presidential elections.

A large problem with a tax is that it is very hard to calculate it. Should government use market measures of some kind, or attempt to capture the public loss, or lost public gain, from the broadcasters’ behavior? Either approach would be quite difficult. In these circumstances, the simplest approach would be for government to experiment with “pay or play” approaches, in which broadcasters have a presumptive obligation to provide public service programming but can buy their way out by paying someone to provide that programming instead. Such approaches have also had considerable success in the environmental area, despite a number of familiar reservations.<sup>127</sup> People have objected, for example, that emissions trading will make an unfortunate “statement” about pollution, thus legitimizing it,<sup>128</sup> or that trading will result in the concentration of pollution in dangerous “hot spots,” or that the administrative burdens of a trading of system are overwhelming. Practice has generally shown these objections to be unconvincing.<sup>129</sup> If there is an analogy between environmental protection and broadcasting

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<sup>127</sup> See Stavins, *supra* note.

<sup>128</sup> See Steven Kelman, What Price Incentives?: Economists and the Environment 110-165 (1981).

<sup>129</sup> See Robert Stavins, What Can We Learn From the Grand Policy Experiment? Lessons from SO<sub>2</sub> Allowance Trading, 12 J. Econ. Persp. 69 (1998).

regulation,<sup>130</sup> a system in which those who do not provide public interest programming must pay a kind of “fee” has an important advantage, because it is so much more flexible than one in which the government imposes uniform obligations on everyone. In this respect, a system of “pay or play” seems to be the most cost-effective means of promoting public interest goals, just as emissions trading are the most cost-effective means of reducing pollution. For those who dislike it, a public interest obligation can be treated as a kind of “hot potato”; fortunately, from their point of view, it is one that they can transfer to others, as a gift accompanied by cash.

It is possible to respond, as has been conventionally thought, that public interest responsibilities are a general part of the public trust and not alienable, and hence that broadcasters should not be permitted to “buy their way” out of those obligations. But it is unclear what content to give to this statement; the question is what concrete harm would be created by a right to “pay” rather than play. If the pay or play option had corrosive effects on the norms of the broadcasting industry, by making people take public responsibilities less seriously, that would indeed be a problem; but there is little reason to believe that the option would have this effect. The simple question is this: What if a broadcaster was willing to give \$10 million to PBS in return for every minute, or every thirty seconds, of relief from a public interest responsibility? At first glance, the nation would be better off as a result. Any objection to a system of tradeable rights would have to be more subtle.

A conceivable problem with an economic incentive in this context is that it may undermine the general purpose of public interest programming, by producing a situation in which that programming is confined to a small subset of stations—“cold spots”—in a kind of communications equivalent, or converse, of the “hot spot” problem that has received attention in the environmental area.<sup>131</sup> The “hot spots” problem arises when trades result in a concentration of pollution in a single area, with serious adverse health effects; it is generally agreed that steps must be taken to

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<sup>130</sup> See James Hamilton, *Channeling Violence*, *supra*, at 285-322 for an instructive discussion.

<sup>131</sup> See Stephen Breyer, *Regulation and its Reform* 175-78 (1982).

ensure that this does not happen. In the communications context, the problem will arise if all of the widely viewed broadcasters end up selling their obligations to a single station or set of stations. This is undesirable if it results in a kind of “ghettoization” of public interest programming and if it is believed—as seems quite sensible—that all or most viewers ought to have access to some public interest programming.

A second problem is both conceptual and administrative. When a trade is made, what is being traded? Perhaps it seems simplest, and most sensible, to trade minutes for minutes. But all broadcast minutes are not the same. An “internal” trade could be one in which ABC (for example) trades an hour of prime-time programming for an hour of 3 am programming; an external trade could involve a transfer of one hour of ABC’s highly popular evening hours to (say) Fox’s far less popular shows in the same period. Steps must be taken to ensure that in any trade, there is an equal public interest benefit for public interest loss. Perhaps a test of audience shares—“viewer per viewer” trades—is the best way to start.

An approach of this kind would have the fortunate consequence of helping to handle the “cold spots” problem as well. Part of the problem can be handled by monitoring the sales to make sure that a high-viewer broadcaster is trading to other high-viewer stations. If the “minute for minute” trades were adjusted to take account of the number of viewers, a trade to a low-viewer station would be especially expensive. Demographic considerations could play a role as well. The details are less important than the suggestion that a creative administrative could reduce the relevant problems, just as these have been handled in the environmental arena.

### *C. Economic Incentives and the Constitution*

What is the relationship between economic incentives and the first amendment? A direct tax on undesirable programming, or on the failure to provide desirable programming, would raise very constitutional questions. This is because they would be a regulation of speech on the basis of content. Whether such a regulation would be unconstitutional should turn on many of the questions raised in debates over the legitimacy of the “fairness doctrine,” designed to compel coverage of serious issues and an opportunity to speak for

opposing views.<sup>132</sup> Many people have argued that with decreasing scarcity, the fairness doctrine is no longer legitimate if it ever was.<sup>133</sup> If this objection is correct, an economic incentive in the form of a tax would be questionable too. The advantage of a tax over the fairness doctrine is that the former is far more flexible; hence if the fairness doctrine would be constitutional under current conditions, the same should be true of the proposed tax.

The point raises the question why, if a tax would be constitutionally problematic, a system of “pay or play,” which has similar motivations and consequences, would not be constitutionally problematic as well. The intuition might be that a tax is a direct penalty on a certain programming content, whereas “pay or play” simply provides an alternative (“pay”) to a legitimate mandate. But this seems to be a form of wordplay. If a tax is questionable, “pay or play” should be questionable as well. My suggestion here is that there should be no constitutional objection to the extent that government is acting, in a viewpoint-neutral fashion, to promote educational goals and attention to civic affairs. Current law gives no clear answer to that question.<sup>134</sup> For those who believe that government is prohibited from favoring programming of a particular content, “pay or play” should be unacceptable. The problem with this view is that it seems to convert the first amendment into a species of Herbert Spencer’s Social Statics, in a way that loosens the connection between the free speech principle and underlying democratic goals. If the first amendment is associated with democratic self-government and in particular with deliberative democracy, “pay or play,” of the sort suggested here, would be perfectly consistent with the free speech guarantee.<sup>135</sup>

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<sup>132</sup> See *Syracuse Peace Council v. FCC*, 867 F.2d 543 (DC Cir 1989) for an outline of the issues.

<sup>133</sup> This is the FCC’s current position. See *id.*

<sup>134</sup> See *Turner Broadcasting Systems, Inc. v. FCC*, 520 US 180, 191 (1997) (upholding “must carry” rules as effort to promote widespread dissemination of information from a multiplicity of sources, but emphasizing that the rules are content-neutral. For general discussion, see Cass R. Sunstein, *One Case At A Time* 172-207 (1999).

<sup>135</sup> I discuss the relationship between democratic goals and regulation of speech in Cass R. Sunstein, *Democracy and the Problem of Free Speech* 17-51 (1993).

*D. Expanding the Viewscreen: A Glance at the Cathedral*

Thus far I have been exploring economic incentives by contrasting taxes and tradeable rights with command-and-control regulation. But if we wanted a more complete picture, we would widen the viewscreen a bit. In a classic Article, Guido Calabresi and A. Douglas Melamed proposed four “rules” that courts might adopt for nuisance suits.<sup>136</sup> Two of the rules come from a situation in which either the plaintiff or the defendant is given the relevant entitlement, and it is protected via a “property rule,” in which case the entitlement could be reallocated only through a trade. The other two rules come from a situation in which either is given an entitlement protected by a “liability rule,” in which case the entitlement could be reallocated through a legally forced exchange, at a price determined through the legal system (assumed to be the market price). Calabresi and Melamed also discuss “inalienability rules,” in which no exchanges are permitted, either voluntarily or through the legal system.

There is a great deal of room for exploring, through this lens, the system of public interest regulation. If public interest programming is desirable, and if certain programming is undesirable, it may make sense to think of ways of requiring broadcasters to pay “damages,” or instead to require the taxpaying public to pay for better programming. A serious problem is of course one of valuation. Suppose that certain programming (educational or civic, for example) is a public good, producing positive externalities, and that certain programming (violent material, for example) is a public bad, producing negative externalities. How can government assign monetary values to the desirable and undesirable effects? Is it constitutional for government to do so? These questions are hard enough in the area of torts; they are far harder in the context of broadcasting. I restrict myself here to a comparison of some leading alternatives.

*Rule 1. Government requires all broadcasters to provide public interest programming; no bargaining is allowed.*

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<sup>136</sup> Guido Calabresi and A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

Comment: This is the traditional model, with the debate being about its scope; thus the number of obligations was sharply introduced in the 1980s, but without rethinking the basic model. Under this system, the public's interest in the relevant programming<sup>137</sup> is protected by an inalienable property rule. The entitlement is granted to the government, and it is entitled to mandate broadcaster performance. Thus broadcasters have a kind of "split" property right; they own the right to broadcast as they choose (in general), but the public has a kind of lien on the property, giving it ownership rights over certain areas. Those who like the traditional approach appear to think that it has good social consequences, by ensuring that public interest programming is not relegated to unpopular times and channels, and also that it has desirable "expressive" effects, by affirming the status of broadcasters as public trustees. As we have seen, it also has several possible problems; its rigidity is likely to lead to inefficiency, and it may well produce unintended adverse consequences, as in the case of the fairness doctrine.

*Rule 2a. Government requires broadcasters who do not provide public interest programming to pay a kind of "damage award," to be determined by government and then used to fund public interest programming by others, such as PBS.*

Comment: Under this approach, the public continues to have the relevant entitlement, which is protected by an unusual liability rule. The broadcasters' failure to provide educational programming for children, or free air time for candidates, would count as a kind of social harm for which broadcasters would have to pay. (The same might be said of the provision of violent or sexually explicit programming, though here the first amendment problems would be quite serious.) One problem with this approach is the need to calculate the level of the "damage award." There are no clear market measures for this amount, which will therefore have a level of arbitrariness.

*Rule 2b. Government requires each broadcaster to provide a certain level public interest programming, but permits broadcasters to sell their*

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<sup>137</sup> I am so describing it for convenience, without making any normative judgment.

*obligations (accompanied by money) to others, at a market-determined rate.*

Comment: This is akin to 2a, in the sense that the public has the relevant entitlement, which protected by a kind of liability rule; but here the market, rather than the legal system, determines the value of not playing the public interest programming. Hence one station might sell to another its obligation to provide, say, one hour of educational programming; the selling station would pay the market-determined amount to ensure that the buying station will find it worthwhile to take on the new duty. This kind of market determination could be a substantial advantage in light of limited information on the government's part; government is in an extremely poor position to calculate any such "damage award."

As compared with Rule 1, a potential problem with this approach is that some people may avoid the stations that "play" and may not see the relevant programming at all. On the other hand, the empirical question remains whether under Rule 1, most members of the viewing audience will see and benefit from the mandated programming.

*Rule 2c: Government establishes a minimum total content of public interest broadcasting on broadcast networks each year (for example, six hours of free air time for candidates, 150 hours of educational programming for children), assigns initial, pro rate obligations to each broadcaster, and then permits broadcasters to trade the obligations at market-determined prices.*

Comment: This is very close to 2b; the only difference is that it is a precise analogy to certain initiatives in environmental law, where government establishes a maximum level of pollution in the relevant area, provides pollution permits, and then allows trades among polluters.<sup>138</sup> A disadvantage of this approach, as compared to 2a, is that it may be harder to calculate the total level of appropriate program than to decide on the appropriate for tax for those who do not play. On the other hand, the opposite may be true.<sup>139</sup> An

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<sup>138</sup> This is the acid deposition program under the Clean Air Act, 42 U.S.C. 7651 et seq.

<sup>139</sup> These are brief notes on a complex issue. For details in the environmental context, see Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in the Legal Context*, 108 *Yale LJ* 677, 706-35 (1999).

additional difficulty, as discussed above, is that broadcasting hours are not fungible. An hour of children's programming at 3 am on Monday morning is a lot less valuable than at 9 am on Saturday.

*Rule 3a. Government pays broadcasters (at reasonable but government-determined rates) to provide public interest programming.*

Comment: Under this approach, the broadcasters have the relevant entitlement, which is protected by a liability rule. The broadcaster owns the entitlement, but the government is permitted to obtain a forced exchange, just as it is in the general law of eminent domain. In fact it is possible to see some kind of payment as the constitutionally compelled solution, at least if the right to provide such programming as broadcasters choose is taken to be, by constitutional decree, an entitlement in broadcasters. Thus, for example, government might be able to compel coverage of important issues, or attention to the needs of children, or programming involving emergencies; but the public has to pay.

Interestingly, government appears not to have tried this approach in the United States, at least not as a general rule. An advantage of this approach is that it should not be difficult to calculate the value of the exchange; the market will answer that question. This is an important advantage over Rule 2a. On the other hand, Rule 3a has probably been resisted, as compared with 1, 2a, and 2b, on the ground that because broadcasters are beneficiaries of public largesse, they should not be paid to promote public interest goals. This is of course a distributional concern, and the underlying judgment—that “broadcasters,” rather than “taxpayers,” should pay—is not clearly correct in light of the complexity of the incidence of the burden imposed under 1 and 2a or 2b. The burden under the latter rules does not simply fall on “broadcasters” but more likely on advertisers and hence on consumers—perhaps to the benefit of those who advertise in newspapers and on cable. Rule 3a might be preferable if it is amended as suggested in Rule 5a, which would require broadcasters to buy spectrum rights.

A serious problem with this kind of system is that it may provide broadcasters with an incentive to produce less public interest broadcasting on their own than they otherwise would, or at least to understate the amount that they would voluntarily provide. In an unrestricted market, political and shareholder pressures, conscience,



and advertiser and viewer demand will result in a nontrivial amount of public interest programming.<sup>140</sup> But if government proposes to pay broadcasters for whatever public interest programming they provide, voluntary service may be substantially reduced. This is a pervasive problem with paying people to do good, or not to do bad; the payment may induce less of the good or more of the bad.<sup>141</sup> The question for rule 3 is whether it is possible to generate a “baseline production” level from which any subsidy could be calculated.

*Rule 3b. Government must—and does—buy the right to ensure public interest programming, at market-determined rates*

Comment: This is a variation on 3a in the sense that it transforms the broadcasters’ entitlement into one protected by a property rule. It is akin to a system of markets in broadcasting, but with two qualifications: broadcasters are not required to pay for their entitlement in the first instance, and government stands ready to compete with others who seek to obtain access to viewers. One advantage of 3b over 3a is that it operates on the basis of market-determined prices; no one has to calculate a special government rate. But if one believes that existing fare is unproblematic, the government’s purchases will be wasteful. And those committed to public interest programming may object that government will not purchase enough (unless this is specified in some way in advance); they may also object that so long as licenses are being given for free, other rules, not given a “windfall” to broadcasters, are better.

*Rule 4. Broadcasters provide such public interest broadcasting as they choose, including none at all.*

Comment: On this approach, the broadcasters’ interest is protected by a property rule. Broadcasters own the relevant entitlement. Just as occurs in an ordinary market, people can pay broadcasters to provide public interest programming, at market determined prices. The problem with this approach is that the market price might be too high, for all of the reasons discussed in Part IB of this Article. This approach is similar to Rule 3b, except that government does not stand ready to ensure a certain level of public interesting programming.

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<sup>140</sup> See National Association of Broadcasters, *supra* note.

<sup>141</sup> See Saul Levmore, *Carrots and Torts* (unpublished manuscript 1999).

*Rule 5a. Broadcasters must buy, via auction, the right to broadcast, and once they do that, they can provide such public interest broadcasting as they choose, including none at all.*

Comment: This is a kind of ideal market solution. It does not involve a governmental “giveaway” of a scarce resource, and after the valuable commodity has been purchased, free trades are allowed. It seems to have all the advantages of Rule 4, with the further advantage that the valuable property right is purchased rather than simply conferred. The problems with this approach should be easy to identify from section IB of this Article.

*Rule 5b. Broadcasters must buy, via auction, the right to broadcast, but once they do that, they may be asked or (if for some reason necessary) compelled to provide public interest broadcasting at market-determined prices.*

Comment: This is quite similar to 5a. The difference is that government stands ready to pay for public interest programming on broadcast stations, at market prices; and if broadcasters for some reason refuse, government can force an exchange. Under 5b, part of the entitlement is owned, but protected only by a liability rule. This approach is in one sense a cousin of 2b. The major difference is that here the taxpayers are paying for public interest programming (at the same time that they receive money from the sale of the spectrum), rather than “broadcasters.” The most important difference is therefore distributional. As noted above, that difference is more complex than it seems in light of the fact that when a burden is imposed on “broadcasters,” their advertisers are likely to be paying much of the bill, and the result will be complex effects on consumers, on other communications outlets, and on advertising choices. There is no simple redistribution, in 2b, from “broadcasters” to the “public.”

*Rule 5c. Broadcasters must buy, via auction, the right to broadcast; once they do that, they may be subject to public interest obligations, but they can pay a “damage award,” to be used by some other station to support public interest programming, if they fail to do so.*

Comment: This should also decrease the amount paid for the entitlement, as compared with Rule 5a. This is a pay or play version of Rules 5a and 5b. The problem here lies in determining the level of any such “damage award.” This approach is in one sense a cousin of Rule 2a, as pay or play systems.

A full understanding of these possibilities would much facilitate both conceptual and empirical inquiry. Undoubtedly a choice among the various options should depend partly on the particular public interest obligation involved; a requirement of emergency warnings might take the form of Rule 1, whereas a requirement of free air time for candidates might be some combination of Rules 1, 2b, and 5b. The analysis thus far suggests that Rules 2b and 5b have special advantages over the alternatives. Rule 2b, the basic pay or play system, seems well-suited to the current period, as a kind of interim improvement over the regulatory status quo. In some areas, Rule 5b may well be better in the longer term, as broadcasters come to resemble general-interest magazines. Movement in the direction of selling the spectrum, rather than giving it away to preselected owners, would also be highly desirable.

#### VI. Voluntary Self-Regulation: Aspirations, Trustees, and “Winner-Take-Less” Codes

In this section I discuss the possibility of promoting public interest goals through voluntary self-regulation, as through a “code” of conduct to be issued and enforced by the National Association of Broadcasters (NAB). For many decades, in fact, the NAB did indeed impose a code, partly to promote its economic interests (by raising the price of advertising), partly to fend off regulation (by showing that the industry was engaged in self-regulation), and partly to carry out the moral commitments of broadcasters themselves. A code has a great deal of potential. Above all, it could address a far greater number of problems than an economic incentive (for first amendment reasons), and it appears to have far more potential for producing good, and reducing bad, than a disclosure requirement.

For example, a code could address all public interest obligations thus far, but also attempt to protect against sexually violent material, against subliminal advertising, against sensationalistic treatment of politics, and against a wide range of other problems with television. The question is whether it is possible, in the current era, for broadcasters to overcome some of the unfortunate effects of the marketplace with voluntary measures. An underlying question, likely to be faced in many areas of regulatory policy both domestically and internationally, is whether a code would work as a kind of

undesirable cartelization or instead as protection against an undesirable “race to the bottom.” I suggest that a code might do a great deal of good, partly because of the likely existence of external monitors, partly because of a code’s capacity to help develop a kind of internal morality likely to affect many of its signatories. A general lesson is that the antitrust laws ought not to be invoked too readily to prevent producers from undertaking cooperative action in circumstances in which competition is producing palpable social harms. In such contexts, a “code” can provide some of advantages of government regulation, but do so in a more flexible and better-informed fashion. Thus it is hazardous to invoke the antitrust laws to prevent an industry to provide the kinds of benefits that might be provided, more crudely and expensively, by direct regulation.<sup>142</sup>

*A. The Problem and A Recently Emerging Strategy*

Notwithstanding the qualifications described above, competitive pressures often can do a great deal in providing programming that people would like to see. In an era of cable television, and an increasingly large range of options, competitive pressures will be especially in producing “niche” programming for people who have a particular interest in serious programming. The communications market increasingly resembles the market for magazines; recall the possibility, in a digital market, of over one thousand stations. But those competitive pressures also have a downside. They can lead to sensationalistic, prurient, or violent programming, and to a failure to provide sufficient attention to educational values, or to the kind of programming that is indispensable to a well-functioning democracy.<sup>143</sup> This is so especially in light of the fact that a small relative advantage can led to huge increases in viewers, a fact that presses television in tabloid-like directions. As Robert Frank and Philip Cook have suggested, “[I]ncreasingly impoverished political debate is yet another cost of our current cultural trajectory. Complex modern societies generate complex economic and social problems, and the task of choosing the best course is difficult under the best of

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<sup>142</sup> See Robert Frank and Philip Cook, *The Winner-Take-All Society* 225-27 (1995).

<sup>143</sup> See James P. Hamilton, *Channeling Violence: The Economic Market for Violent Television Programming*, *supra*, at 129-284 (discussing violence)..

circumstances. And yet, as in-depth analysis and commentary give way to sound bites in which rival journalists and politicians mercilessly ravage one another, we become an increasingly ill-informed and ill-tempered electorate.”<sup>144</sup>

It would be possible to respond to the harmful effects of competitive pressures in various ways. Probably the simplest response would take the form of voluntary self-regulation, through some kind of “code” of good programming; this approach is specifically designed to respond to the problems that can be introduced by market pressures. In various nations, including the United States, cooperative action has played a constructive role in situations of this kind.<sup>145</sup> Though it has yet to receive much academic commentary,<sup>146</sup> voluntary self-regulation via industry agreements is emerging as a regulatory strategy of choice, especially in the environmental arena.<sup>147</sup> The EPA, for example, has encouraged companies that produce pesticides to agree on pesticide reduction strategies, and here the fact of broad agreement is crucial.<sup>148</sup> California has attempted to deal with the problem of workplace accidents via a “cooperative compliance program” involving self-enforced safety plans on large construction projects. The result has been to produce significant drops in accident rates.<sup>149</sup> Self-regulating agreements are now in place in Canada’s system for forest management; in the Responsible Care program of the chemical industry, now operating in more than forty countries; in national regulation of nuclear power plants.<sup>150</sup>

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<sup>144</sup> See Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* 203 (1995).

<sup>145</sup> See the discussion of ethical code in Israel in Moshe Negbi, *The Enemy Within* 14 (Joan Shorenstein Center, Harvard University, Discussion paper D-35, November 1998). Note also that many international bodies attempt to certify quality, in a kind of cooperative action designed to reduce adverse effects of market pressures.

<sup>146</sup> An exception is Neil Gunningham and Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 *Law & Policy* 363 (1997).

<sup>147</sup> See Gunningham and Graboski, *supra*, at 50-56, 300-07.

<sup>148</sup> *Id.* at 300.

<sup>149</sup> See Gunningham and Rees, *supra*, at 369.

<sup>150</sup> *Id.* at 51.

What accounts for the increasing popularity of industry self-regulation, as part of the general project of “reinventing government”<sup>151</sup>? From the industry’s standpoint, self-regulation allows far more flexibility than government mandates. From the standpoint of government itself, a special advantage of codes is that they avoid the kind of informational overload that comes from government prescriptions; it is partly for this reason that voluntary agreements among companies have had good effects in the area of occupational safety and health.<sup>152</sup> In a point of special relevance to television, codes also have been found to have the “ability to influence community attitudes,” in a way that tends to contribute to the “development of a custodial ethic.”<sup>153</sup> Thus codes have helped to develop “an effective institutional morality that brings the behavior of industry members within a normative framework.”<sup>154</sup>

Such cooperative action often makes people concerned about antitrust violations and self-interested profit-seeking under a public-spirited guise. This is of course a risk, but the antitrust law can go wrong when it prevents certain cooperative action that overcomes palpably adverse effects of market pressures. Indeed, the International Standards Organization is designed specifically to ensure a form of cooperation designed to overcome those adverse effects<sup>155</sup>; the question is whether that experience has communications analogues.

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<sup>151</sup> See symposium, *Industry Self-Regulation*, 19 *Law and Policy* 300 (1997).

<sup>152</sup> See J.V. Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety and Health* (1988); John Mendenhall, *Regulating Occupational Safety and Health* (1989).

<sup>153</sup> *Id.*

<sup>154</sup> See Gunningham and Rees, *supra*, at 371-72.

<sup>155</sup> See, e.g., *Profit Bows to Ethics*, *Independent* (London), Oct. 26, 1997, Sunday, at 3. (stating “Some of the world’s biggest companies are putting their weight behind a new, verifiable code of conduct intended to answer mounting consumer criticism of the exploitative conditions under which the goods they sell are produced in poor countries. . . . The code, called SA8000 (Social Accountability 8000), is the brainchild of the Council on Economic Priorities, an American public interest group, which tries to improve corporate responsibility. It has been drawn up by companies, non-governmental organisations, trade unions, and other interested groups, and is due to start operating next year. The code covers the basic issues of child labour, forced labour, health and safety, trade

My emphasis here is on allowing programmers and journalists to do what, in an important sense, they would actually prefer to do. It is worth underlining this point. Many journalists in the world of broadcasting would very much like to do better<sup>156</sup>; competitive pressures are the problem, not the solution, and a voluntary code could help them and the public as well.

### *B. History*

The idea of a broadcasting code is nothing new. Consider its development over time:<sup>157</sup>

#### *1. Origins and precursors: The spectrum and Roosevelt*

The idea of a broadcasting “code” has a long history. The NAB was founded in 1923, and it first attempted to produce a degree of self-regulation in 1926, as a response to the “chaos” widely perceived to have been produced by interference and piracy. Some progress was made, but ultimately the agreement broke down; hence legislation was necessary, in the form of the Radio Act of 1927.

The initial NAB code was produced in 1928. It included some content guidance, but it was quite vague and also lacked an enforcement mechanism. Just one year later the NAB adopted a new code, involving ethics and standards of commercial practice. For example, the code banned “fraudulent, deceptive or obscene” material, “false, deceptive, or grossly exaggerated advertising claims, and “offensive” material. But the continuing imprecision of this

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union rights, discrimination, discipline, working hours, and pay. . . . As the name SA8000 suggests, it is the first to be modelled on existing and widely accepted commercial standards such as ISO9000, drawn up by the International Standards Organization in Geneva, which is used to determine whether companies have the management systems to meet required product quality. But the real strength of the new approach is commercial sanctions. A company which adopts the code also agrees to be independently inspected to see whether it is abiding by the conditions laid down. It will be able to attract customers and gain a competitive advantage by advertising the fact that its factories and suppliers meet the standard.”

<sup>156</sup> See Schechter, *supra* note.

<sup>157</sup> I draw here on Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 *Cardozo Arts & Ent. L.J.* 667 (1995).

code, together with the lack of an effective enforcement mechanism, made it something of limited usefulness.

The next major step resulted from President Roosevelt's National Recovery Administrative Codes in 1933. The NAB submitted a code of fair practices to the NRA, and on November 27, 1933, President Roosevelt signed it and gave it the force of law. The result included a seven-person Broadcaster Code Authority, designed to supervise compliance. But the National Recovery Act was struck down in 1935 by the Supreme Court, and the Code Authority was eliminated along with the "law" that President Roosevelt had signed.

### *2. After the New Deal, and increased content control*

Soon thereafter the NAB produced a new voluntary code, which was largely ignored. But in 1938 the NAB produced another, more specific code and also an explicit enforcement authority, the NAB Code Committee. Part of the reason for the new development was the increasing willingness of the FCC to regulate both structure and content—and a specific warning, by the Chairman of the FCC (after the broadcast of War of the Worlds) that without industry self-policing, government involvement was likely.

The 1938 code included a number of important provisions. Among other things, it (a) required broadcasters to allot time fairly for discussion of controversial views; (b) banned the sale of time for the airing of controversial views; (c) asked broadcasters to cooperate with educational groups for the airing of educational programming; (d) required fair and accurate news programs; and (e) regulated commercials by limiting the time and length of advertisements. There were also prohibitions on hard liquor advertising. A code committee would enforce the Code by determining whether a station was in compliance. Notably, the head of the FCC publicly approved the code, and the American Civil Liberties Union described it as "a great step forward in formulating a policy in the public interest."

### *3. Television.*

All of these steps involved radio, but the 1938 code was the unmistakable precursor of the eventual television code. In its first period, television witnessed a pattern that generally characterized the past debates over radio and late twentieth century debates over



television: legislative concern, proposed legislation, steps toward self-regulation, and little or no legislation or regulation.

In 1951, members of Congress proposed a National Citizens Advisory Board for Radio and Television, to oversee programming content. At about the same time the NAB began to draft its first television code in 1952, apparently in direct response to a congressional threat of legislation.<sup>158</sup> The new code had a broad reach, emphasizing in particular educational and cultural programming. It also contained content restrictions on display of violent action and sexual material.

Compliance with the Code was voluntary. (Note also that station operators who were not members of the NAB were eligible to subscribe.) Its enforcement provisions were quite modest. The basic mechanism came in the form of a clearinghouse for complaints. In addition, subscribers could display a code seal (the NAB “Seal of Good Practice”), and permission to display the seal would be withdrawn for “continuing, willful, or gross” violations. Thus the only formal sanction was that the noncomplying station owner could not display the seal. But there were informal pressures too. Stations who sought license renewal were likely to have prompt FCC processing if they adhered to the code. Moreover, some people believe that subscription to the Code was appealing to those who bought advertising time, because the Code contained limits on the length and frequency of commercials, which would enhance the prominence of the announcement. Some stations in the United States did not adhere to the Code, but the vast majority chose to do so.

#### *4. Family viewing*

In 1962, the FCC proposed to make parts of the code into a legal mandate. The industry successfully resisted this step. But there was a continuing pattern of interaction among regulatory proposals, legislative reaction, public concern, and self-regulation. Of these the most important involved 1970s concerns about violence on television. The industry responded through the “family viewing policy,” saying that inappropriate entertainment programming would

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<sup>158</sup> See Daniel L. Brenner, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 *Stan. L. Rev.* 1527, 1529 (1975).

not be shown between 7 pm and 9 pm eastern standard time. This was a distinctive form of self-regulation. But the Writers Guild of America challenged the policy on first amendment grounds (see below), arguing that the policy was not voluntary self-regulation but was in fact a produce of government coercion.

In a controversial decision, the trial court accepted the challenge, and barred the NAB from enforcing the policy.<sup>159</sup> The court of appeals overturned the decision on the ground that the district court was not the right forum to resolve these issues in the first instance.<sup>160</sup> The court of appeals said that the issue should first be resolved by the FCC. Although the decision of the court of appeals was jurisdictional, that court suggested considerable doubt about the district court's judgment: "It simply is not true that the First Amendment bars all limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public."<sup>161</sup>

The FCC ruled in 1983 that there had been no government coercion and that the NAB had adopted the family viewing policy voluntarily. In its key passage the FCC wrote, "[v]oluntary industry action is often preferable to governmental solutions, and an industry frequently addresses a problem in order to forestall regulation by the Government; conversely, it is not unusual for a regulatory body to forego enacting rules when the regulated industry voluntarily adopts standards which deal with a perceived problem."<sup>162</sup> In June 1979, however, the Justice Department filed the antitrust suit described in detail below, resulting in the demise of the television code.

In the 1980s, continuing congressional concern about televised violence led to a new law exempting from the antitrust law networks, broadcasters, cable operators and programmers, and trade association, in order to permit them to generate standards to reduce

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<sup>159</sup> *Writers Guild of Am. West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), vacated sub nom. *Writers Guild of Am., West v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

<sup>160</sup> *Writers Guild of Am., West v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

<sup>161</sup> 609 F.2d at 364.

<sup>162</sup> *NAB Television Code, Report*, 95 F.C.C.2d 700, 710 (1983).

the amount of violence on television.<sup>163</sup> But there was considerable doubt about whether an explicit exemption was necessary; a 1993 opinion from the Department of Justice said that the industry could cooperate to reduce television violence without offense to the law of antitrust.<sup>164</sup>

In June 1990 the NAB issued new, quite tepid “voluntary programming principles” to cover violence, indecency and obscenity, drugs and substance abuse, and violence. The new standards were reaffirmed in June 1991, and in 1992, ABC, NBC, and CBS issued and agreed to adhere to a set of new standards, although without an enforcement mechanism. Thus in the 1990s self-regulation can be found in various places: the advance parental advisory system, joint advisory guidelines issued by the four networks, NAB principles, and an annual public assessment, by the four networks, of television violence.

### *C. A Code: Sample Provisions*

The question is whether it might be possible to adopt a new code for broadcasting, specifically designed for the new communications market. Such a code might update the old NAB code, and help overcome current problems, without having the degree of tepidness of the existing “standards.” A code might even promote some of the goals associated with deliberative democracy.

What provisions might a new code include? An important question involves appropriate specificity; quite clear provisions (“three hours of educational programming per week”) risk excessive rigidity, whereas vague provisions (“reasonable efforts to provide educational programming per children”) risk meaninglessness. Discussions of code-making in general have stressed the need for “the public announcement of the principles and practices that the industry presumptively accepts as a guide to appropriate conduct and also as a basis for evaluating and criticizing performance.”<sup>165</sup> This point argues in favor of a degree of specificity.

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<sup>163</sup> See 47 U.S.C. § 303(c).

<sup>164</sup> See Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Sen. Paul Simon (D-Ill.) (Nov. 29, 1993).

<sup>165</sup> See Gunningham and Rees, *supra*, at 383.

Consider the following possible code provisions,<sup>166</sup> simply for the sake of illustration:

1. Each broadcaster shall provide three hours of free air time for candidates during the two month period preceding the election. In return for free air time, candidates shall discuss substantive issues in a substantive way, and must provide something other than short “soundbites.”
2. Each broadcaster shall provide one hour of educational programming for children each day. Broadcasters shall attempt to ensure that children are not exposed to excessively violent programming or programming that is otherwise harmful to or inappropriate for children. Broadcasters shall avoid programming that encourages criminal or self-destructive behavior; they should also be sensitive in presenting sexual material that children might encounter.
3. News coverage shall be substantive and issue-oriented. It should not emphasize the sensational and the prurient. It should concern itself with claims and disagreements on matters of substance. Consistent with the exercise of legitimate station discretion, stations should not give excessive or undue attention to sensational accusations or to issues of “who is ahead,” at the expense of other issues.
4. Morbid, sensationalistic or alarming details not essential to a factual report, especially in connection with stories of crime or sex, should be avoided. News should be broadcast in such a manner as to avoid panic and unnecessary alarm. News programming should attempt to avoid prurience, sensationalism, and gossip. Stations should make an effort to

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<sup>166</sup> These provisions are adapted but substantially revised from the more detailed Code suggested by the Report of the Advisory Committee, *supra* note. I believe that the provisions described there are too vague and tepid to be useful; for reasons discussed in the text, vague and tepid provisions create a high probability of futility and ineffectiveness.

devote enough time to public issues to permit genuine understanding of problems and disagreements.

5. Violence, psychological but especially physical, should be portrayed responsibly, and not exploitatively. Presentation of violence should avoid the excessive, the gratuitous, the humiliating, and the instructional. The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or sound, should be avoided. Programs involving violence should venture to present the consequences to its victims and perpetrators. Particular care should be exercised where children may see, or are involved in, the depiction of violent behavior.. Programs should not present rape, sexual assault, or sexual violence in an attractive or exploitative light.

6. Broadcasters shall ensure that their programming is responsive to the needs of citizens with disabilities. To this end, broadcasters shall ensure that programming is accessible, through the provision of closed captioning and other means, to the extent that doing so does not impose an undue burden on the broadcaster. Particular efforts should be made to provide full access to news and public affairs programming. Citizens who are deaf and hard of hearing are sometimes at risk of a form of disenfranchisement., or even physical danger, because steps are not taken to ensure that television broadcasting is available to them. Stations should take special steps to ensure that information about disasters and emergencies are fully accessible to those who are deaf and hard of hearing, including in "real time."

*D. A Code: Problems and Prospects*

Such a code would of course raise many questions. The first would involve the problem of enforcement. Without an enforcement mechanism, a code might have no effect at all, indeed it might be a form of public deception.<sup>167</sup>

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<sup>167</sup> See John Braithwaite, *Responsive Business Regulatory Institutions*, in *Business, Ethics, and Law* 91 (C. Cody and C. Sampford eds. 1993).

There are several obvious possibilities. The simplest would be for the NAB to undertake enforcement on its own, just as it did under the old code. It might, for example, give a seal of approval to those who are shown to comply with its provisions, and deny a seal of approval to those who have been shown not to have complied. The NAB might also give special public recognition to those stations that have compiled an excellent public service record in the past year. Such recognition may be awarded for, among other things, meeting the needs of children in a sustained and creative way, offering substantive and extended coverage of elections, including interviews, free air time, and debates, offering substantive and extended coverage of public issues, and providing opportunities for discussion of problems facing the local community. At the time of license renewal, a notation might be given to the FCC that there has been compliance or continuing or egregious noncompliance with the code. If the NAB is unwilling to enforce a code of this kind, perhaps a private group could take the initiative, both promulgating the code and publicizing and in that (modest) sense sanctioning violations.<sup>168</sup> A special problem here is that in light of increasing competition from non-broadcast programming sources, a code would not be in the economic interest of broadcasters even if generally adopted, and this is an unpromising fact for a code's effectiveness.<sup>169</sup> Perhaps supplemental enforcement will come from rivals of those who defect from the agreement and violate the code; this is a reasonable prediction in theory, and something similar has been found in analogous areas.<sup>170</sup>

Any enforcement by the NAB or even a private monitoring group would be most likely to succeed if accompanied by external pressures of one sort or another. As in the case of disclosure requirements, the most promising possibilities include public interest groups able to mobilize relevant social norms and to focus media

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<sup>168</sup> This approach would have special advantages in light of the fact that some stations are not members of the NAB. For NAB stations that must compete with non-member stations, a code creates an obvious competitive risk, and there is a continuing question whether it is possible to design strategies, public or private, to combat this risk.

<sup>169</sup> See Gunningham and Grabosky, *supra* note, at 53-54.

<sup>170</sup> See Gunningham and Rees, *supra* note, at 403.

attention on derelict actors.<sup>171</sup> Perhaps such activity would be accompanied by market pressures of various sorts, as consumer action has had significant effects on code enforcement in related areas.<sup>172</sup> A degree of FCC interest in the existence of code violations would also help.

These points raise a related question: the scope of any such code. Undoubtedly such a code was less painful, and easier to operate, when three broadcasters exhausted the universe of television. Of course broadcasters now find themselves in competition with many other entertainment sources, including cable and the Internet. In these circumstances, broadcasters are not likely to constrain themselves if their competitors are not similarly constrained. The competition for an audience for news is much affected by the existence of “tabloid television,” and a broadcaster who ties himself to the mast may find himself with a significantly reduced audience. The point suggests that in the development of a code, broadcasters should perhaps be joined by the National Association of Cable Television. By itself, however, a code limited to broadcasters should do considerable good, even if some broadcasters are reluctant to subscribe to it. When the market reaches the stage in which broadcasters are merely some of a large number of providers, with no distinctive status, it might make sense to think of a more general code (with suitable adjustments for particular kinds of programmers<sup>173</sup>). It is worth underlining the point that as in the context of disclosure, the likelihood of success will increase with the existence of third-party monitors, both public and private, and also with a threat of more intrusive action should it prove necessary.<sup>174</sup>

*E. Notes on Antitrust Law and the First Amendment*

A code for television broadcasters might be thought to raise issues of both constitutional and antitrust law. The constitutional issues are relatively straightforward; the antitrust issues are a bit more complex. I offer a brief discussion here.

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<sup>171</sup> See Gunningham and Rees, *supra*, at 390-92.

<sup>172</sup> See *id.* at 391 (discussing hostile consumer action).

<sup>173</sup> For example, it is not clear that a station devoted to children should be required to provide free air time for political candidates.

<sup>174</sup> See Gunningham and Grabosky, *supra* note, at 55-56.

There is essentially no risk that a code of the sort suggested here would create serious first amendment problems. By itself, a code is a private set of guidelines, and private guidelines by themselves raise no first amendment issue. If a private group decides to impose restrictions on the speech of its members, and government is not involved, the first amendment is irrelevant. Of course things would be different if government mandated any such code.<sup>175</sup>

Nor would provisions like those described above be likely to violate the antitrust laws. The Department of Justice has so concluded,<sup>176</sup> and in two important cases, aspects of previous codes were upheld against private antitrust attack. A district court refused to issue an injunction against code standards forbidding cigarette advertising, despite a claim that these standards were inconsistent with the antitrust laws.<sup>177</sup> A lower court also upheld the provisions involving standards for advertising for children.<sup>178</sup> In these cases, the

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<sup>175</sup> See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (private contract raises no first amendment issue); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). If a code is a product of government threat, and is effectively required by government, the first amendment comes into play. See *Writers Guild of America*, *supra*. There can be no question that a governmentally *mandated* code, not voluntary but taking the form that we have outlined, would raise legitimate constitutional problems. This does not necessarily mean that the first amendment would be violated; but it does mean that the code would have to be tested for compliance with first amendment principles, including constitutional limits on content regulation.

<sup>176</sup> See note *supra*.

<sup>177</sup> See *American Brands, Inc. v. National Ass'n of Broadcasters*, 308 F. Supp. 1166 (D.D.C. 1969). The court concluded that the plaintiff was not likely to prevail on the merits. The court referred in particular to the dangers posed by cigarette smoking and claimed that the standards and guidelines in the code serve the "public interest." *Id.* at 1169.

<sup>178</sup> See *American Fed'n of Television & Radio Artists v. National Ass'n of Broadcasters*, 407 F. Supp. 900 (S.D.N.Y. 1976). The rule at issue there said that children's program hosts or primary cartoon characters "shall not be utilized to deliver commercial messages within or adjacent to the programs which feature such hosts or cartoon characters." The provision applied as well "to lead-ins to commercials when such lead-ins contain sell copy or imply endorsement of the product by program host or primary cartoon character." The plaintiff attacked the restrictions, claiming that it restricted the ability of hosts and actors to obtain free employment for delivery of commercials. The court said, "There is not the



court basically concluded that the restrictions were reasonable and in the public interest.

As I have noted, the most recent code met its demise as a result of an antitrust action brought by the Justice Department in 1979, based on an allegation that certain provisions of the Code violated the Sherman Act. But the Justice Department's complaint was quite narrow. It involved not the code in general, but three specific kinds of cartel-like advertising restrictions: (1) time standards, limiting the amount of commercial material that could be broadcast in an hour; (2) program interruption standards, which imposed a limit on the maximum number of commercial announcements per program as well as on the number of consecutive announcements per interruption; and (3) multiple product standards, which prohibited the advertising of two or more products or services within a single commercial if the commercial was less than 60 seconds in length. Basically, the court held that the multiple product standards were per se unlawful, but that the time standards and program interruption standards could not be tested without an inquiry into the facts.<sup>179</sup>

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slightest indication of any anti-competitive purpose in the creation of the rule," especially since there was no evidence of a motive "to benefit one class of performers competitively over another class of performers." *Id.* at 902. The court found it relevant that the rule "resulted from a bona fide concern on the part of various groups, and the FCC, regarding fair and ethical methods to be used in television advertising directed to children." *Id.* This was "a reasonable rule of conduct regarding good practice by its members in the public interest and is not in violation of the antitrust laws." *Id.* at 903.

<sup>179</sup>The district court held that the time and product interruption standards were not invalid per se. In the court's view, the distinctive characteristics of the broadcasting industry argued against a per se rule of invalidity. Because broadcast frequencies are scarce, because the whole area is subject to regulation, and because of the fact that there are only sixty minutes in an hour (!), no simple solution would be sensible. On these two issues, the court also denied summary judgment for the government under the rule of reason, concluding that there were material issues of fact. By contrast, the court held that the multiproduct standard *was* per se unlawful. In its view, this rule was akin to a standardization agreement by which food manufacturers set a standard for the ingredients that would be used in their products. This form of standardization was per se illegitimate. Thus the court actually invalidated only one provision of the code, on the theory that it was analytically akin to a system for price-fixing. At the same time, the court denied summary judgment for the NAB. An important question was whether the time standards would have the effect of raising or stabilizing the price of commercial

After the court's ruling, the NAB suspended enforcement of all code provisions.<sup>180</sup> Doubtless the NAB did this partly for reasons of economic self-interest, and not only because it was fearful of a legal challenge. Nonetheless, the district court's narrow decision—untested in any court of appeals—has loomed over the debate about codes. But in its most recent analysis of the problem, the Department of Justice suggested that networks could agree to guidelines and principles to reduce unnecessary violence on television.<sup>181</sup> Indeed, this is not an ordinary form of collusion. It is not as if broadcasters are saying that advertisers must pay a minimum of \$X per advertisement. It is possible that the restrictions under discussion would have little or no adverse effect on competition; they may even have good effects on competition.<sup>182</sup> Even with a code, programmers would compete over a great many things, including the kinds of programming regulated by a code. The code might in a sense be procompetitive, because it would ensure television coverage of materials in which there is a substantial public interest and which might otherwise not be provided. This is so especially in light of the

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time (this was the antitrust problem); it was possible, the court said, that any such effect would be trivial in light of the importance of other factors. If this was true, the code would not violate the Sherman Act. This is because there is no antitrust violation without a significant adverse effect on competition. See, e.g., *United States v. Arnold, Schwinn, & Co.*, 388 U.S. 365, 375 (1967), overruled on other grounds by *Continental T.V., Inc. v. GTE Sylvania, Inc.* 433 U.S. 36 (1977); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

<sup>180</sup> In public it claimed that it would seek an appeal, but a consent judgment was issued, in which the NAB agreed, for ten years, to cease monitoring and enforcement of the three disputed code provisions.

<sup>181</sup> See Letter Of Sheila Anthony, Assistant Attorney General, *supra*. The Department of Justice concluded that “the conduct that was at issue in the NAB case differs significantly from that covered by” an agreement on televised violence. *Id.* at 3. In the NAB case, the problem was raising “the price of time,” to “the detriment of both advertisers and the ultimate consumers of the products promoted on the air.” *Id.* By contrast, an agreement covering violence should “be liked to traditional industry standard-setting efforts that do not necessarily restrain competition and may have significant procompetitive benefits.” *Id.* In the view of the Department of Justice, “efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis.” *Id.* at 4.

<sup>182</sup> Compare *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978).

fact that stations would compete for viewers with respect to the kinds of programming covered by the code.<sup>183</sup>

In light of the distinctive nature of the television market, a code of the sort under discussion would likely survive a “rule of reason” inquiry. Any restrictions, such as they are, could be defended as a means of promoting competition and also various public interest goals, such as education of children, access for the handicapped, and democratic and civic functions.<sup>184</sup>

#### *F. Less Puzzling Puzzles*

We are now in a position to disentangle the two puzzles discussed in Part II. The broadcasters on the Committee favored a code partly because they thought it a good idea in principle and partly because they had little to lose from it. Though generally “winners,” they were selected for the Committee because of their commitment, through both words and deeds, to moderating some of the adverse effects of competition. They were vulnerable to “winner take all” effects insofar as they were reluctant to engage in certain competitive practices. In this way, a code might even help them. But the NAB would not like a code at all. The broadcasting industry as a whole would be hurt by such a code, especially because cable television would not be bound by it. Why should broadcasters, in an intensely competitive market, give a significant edge to cable? Especially if the result would be that cable could take, if not all, a lot more of the viewing audience than it now does? It is not surprising if

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<sup>183</sup> It is not entirely clear that any plaintiff would have an antitrust injury. The self-regulation that we are discussing would allow a wide range of choices and options for consumers and producers. Perhaps some producer of some marginal programming could claim that he was unable to sell his product because of (for example) free air time for candidates; but this would be an extremely speculative injury. Perhaps viewers could argue that they were deprived of certain programming that they would like; but in view of the wide range of options available to viewers, this too is speculative. Perhaps some stations or programmers could contend that a code limited their freedom; but it is not clear that this would count as an antitrust injury, especially in light of the fact that the code is voluntary.

<sup>184</sup> This idea is bolstered by the line of cases analyzing restrictions by trade associations and similar entities. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988).

broadcasters who supply a large degree of public interest programming believe that they would be net winners with a code—and if the broadcasting industry as a whole believes that it would be a net loser. Such an industry, cautious about invoking its own economic interest alone, is all too likely to invoke the antitrust laws (or the first amendment) for purely strategic and self-interested reasons.

This point helps explain the Committee broadcasters' skepticism about "pay or play" alternatives. A set of rigid public interest requirements does not hurt them and may even help them, insofar as it places their competitors under legal duties that they would themselves meet voluntarily (because of their aspirations or because of the particular demands of their audience and their advertisers). A system of "pay or play" would mean that these broadcasters would be undercut by competitors who, unwilling to play, would pay—and capture a large audience share, in a version of "winner-take-most." But this is not a convincing objection to a system of "pay or play." It is true that some of those who "play" will be at a competitive disadvantage with respect to some of those who "pay" others to play instead. But by itself this competitive disadvantage is not worthy of concern, any more than we should be concerned when, in the environmental context, some of those who reduce pollution are at a competitive disadvantage with respect to those who, instead of reducing pollution, pay a substantial fee to third parties who have reduced pollution, or to the treasury. The question is what approach yields the best outcome for the public. If there is too little public interest broadcasting, or too much pollution, the solution is not the simple command to "play," or "reduce," but to increase the price for failing to play or for failing to reduce.<sup>185</sup>

The best defense of a code of the sort I have discussed is that it would produce "winner-take-less" outcomes, in a way that would provide significant benefits for the public by diminishing some of the adverse effects of market competition, and by strengthening broadcaster norms in favor of obligations to children and to democratic values. And if this is so, it provides a general lesson about how voluntary private action might sometimes handle problems

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<sup>185</sup> With the qualification involving hot spots and cold spots, discussed above.

usually dealt with by direct regulation—and a lesson about the reflexive use of the antitrust laws to prevent producer cooperation.

### VII. A Summary

The discussion has ranged over a number of regulatory tools, and it may be helpful, by way of summary, to discuss them all briefly and at once. We have seen that both disclosure and codes have the advantage of ensuring a minimal government role, in a way that reduces constitutional concerns and also allows a high degree of flexibility. The danger is that these remedies will have little effect; here the key question is whether there are good external monitors, able to impose reputational or other costs on those who do poorly. We have also seen that “taxes” on programming that does not serve public interest goals, and subsidies to programming that does serve such goals, can have similar effects. A principal problem with subsidies is that they create an incentive not to provide such programming voluntarily. The table that follows seems to capture the basic territory.

Of course some of these tools could serve as complements rather than as alternatives. Disclosure makes sense with or without additional strategies. It should be the least controversial item on the list; the only real question is what else should accompany it. Disclosure is likely to work especially well in tandem with voluntary self-regulation, indeed the two tools are natural allies. By contrast, mandates and economic incentives are genuine competitors, and in the current context, economic incentives generally seem best, with mandates operating as a “backstop,” probably to be eliminated in the long term.<sup>186</sup>

As I have emphasized, these recommendations are designed for the current stage of telecommunications technology; they are also likely to make sense for the near term. For the next decade, the key question is whether initiatives designed for broadcasters should be applied to cable programmers as well (especially disclosure and compliance with a code).

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<sup>186</sup> For an overlapping discussion, emphasizing the value of “policy mixes” in the context of environmental law, see Gunningham and Grabosky, *supra*, at 422-448.

	Examples	Potential virtues	Potential problems	Most appropriate context and overall evaluation
1. Mandate	Fairness doctrine; mandatory three hours of childrens' educational programming; Clean Air Act and Clean Water Act "technology" approaches	Effectiveness; simplicity	Rigidity; high expense; futility (if viewers fail to watch,), even counter-productive (if producers are able to circumvent the system and to do worse than they would have done)	Three or four broadcasters and no other television sources; generally ill-suited to current situation, except as "backstops" against egregious behavior
2. Disclosure	Toxic Release Inventory; warning labels for foods and drugs; television ratings system	Flexibility, low administrative costs	Futility (if disclosure does no good), a particular problem in the event of market failure	Some external monitoring by private groups; well-suited to the likely future
3. Economic incentive—"tax"	"green taxes"; polluters pay	Efficiency and hence a good programming "mix"; correction of any market failure and serving nonmarket goals	Difficulty of calculating the relevant amount; putting good broadcasters at a competitive disadvantage	Ability to calculate the tax along with market failure or use of nonmarket criteria; well-suited to the short term at least

4. Economic incentive—subsidy	Public Broadcasting System; National Endowment for the Arts; “cash for clunkers” in environmental policy	Same as 3	Difficulty of calculating the subsidy; harmful secondary effects, as in a decrease in voluntary provision of public interest programming (why play when you can be paid?)	Ability to calculate the subsidy along with market failure or use of nonmarket criteria; also well-suited to the short term, in the form of subsidies to PBS
5. Voluntary self-regulation	Old National Association of Broadcasters Code; Current “Responsible Care” program for chemical industry; International Standards Organization	Flexibility, use of industry knowledge, and effectiveness; creation of a kind of “trustee culture”	Lack of enforcement; a charade designed to fend off regulation; an effort by some producers to prevent competition from others	External monitoring and/or industry bona fides and/or threat of mandates if this approach fails; sensible until the distinction crumbles between broadcasters and others
6. Market ordering	Ordinary commodities	Efficiency; consumer sovereignty	Market failure, e.g., externalities, public good problems; use of noneconomic criteria, e.g., democratic ideals	Brave new world (where broadcasters have no special role); perhaps appropriate, probably alongside subsidies and perhaps disclosure, in the very long term

In the very long term, when broadcasters occupy no special role, it may be best to impose disclosure requirements on general-interest stations, and also to subsidize high-quality programming of various sorts. It is too soon to know whether the very long-term will come in the next decade or long thereafter.<sup>187</sup>

### VIII. Conclusion

Dramatic changes in the emerging communications market do not provide a sufficient reason to abandon the traditional goal of ensuring a certain level of public interest programming. To some extent this conclusion depends on conventional market failures. Thus I have emphasized the external benefits that come from public interest programming and also the peculiar characteristics of the broadcasting market, where viewers, or eyeballs, are a commodity provided to advertisers. To some extent this conclusion view turns on a rejection of economic principles as the foundation for communications policy. With respect to public interest programming, viewers' tastes may be a product of an undesirable set of communications options, and in their capacity as citizens, they may well want to make things better rather than worse. Especially in light of the role of the communications media in the production of culture—and hence both preferences and values—it is entirely legitimate for a democratic government to refuse to make “consumption choices” the exclusive basis for policy design. Thus I have emphasized that a public committed to deliberative democracy might support initiatives designed to provide better programming for children and better coverage of public issues. This is so especially in light of the fact that a significant minority of Americans lack cable or other alternatives, and hence continue to depend on broadcasters for television.

These points suggest that for the relevant future,<sup>188</sup> public interest standards deserve to play a large role. For the most part,

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<sup>187</sup> See Owen, *supra*, at 311-26 (predicting that convergence will take a long time, with the suggestion that the Internet may never become an important means of delivering television).

<sup>188</sup> In the long-term, when broadcasters have little or no distinctive role, it may be best to rely on government subsidies for high-quality broadcasting and on disclosure requirements for general-interest programmers. See above.



however, the policy instruments of choice should not involve rigid dictates or commands, which are expensive and potentially counterproductive, and in any case ill-suited to an era of rapidly changing technology. Thus I have suggested a strong preference for the less intrusive options of disclosure, economic incentives, and voluntary self-regulation. Disclosure has been a surprisingly successful, low-cost strategy in other areas of regulatory law. If certain broadcasting is seen as a public good, analogous to clean air, economic incentives may be able to accomplish a good deal, and to do so at relatively low cost. Because competitive pressures are frequently the engine behind poor broadcaster performance, voluntary self-regulation may turn out to be a desirable kind of “cartel,” helping to counteract short-term interests. Through this route it may be possible to develop an intermediate system of controls, responding to the market and non-market failures of current markets, but without introducing the rigidity and inefficiencies of command-and-control regulation.

If measures of this kind have promise in the areas of environmental protection and public interest programming, there is every reason to explore them in other, less familiar contexts as well. In many areas of law, command-and-control regulation has proved a partial or complete failure, and the natural alternative—a system of well-defined property rights and freedom of contract—may produce serious problems of its own. In such circumstances, any “third way,” if it is ultimately to develop for the modern regulatory state, is likely to place heavy reliance on disclosure, economic incentives, and voluntary self-regulation.