

# A “Pay or Play” Experiment to Improve Children’s Educational Television

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## I. INTRODUCTION

The issue of child welfare is again at center stage in electronic media policy discussions both in Congress and at the FCC. The Children’s Television Act of 1990 (CTA) is currently the operative legislation, designed to increase educational programming and reduce commercialization in children’s television.<sup>1</sup> Last summer, the Senate Commerce Committee held a hearing, “Rethinking the Children’s Television Act for a Digital Media Age,”<sup>2</sup> to assess “[h]ow well the [Children’s Television Act] has worked, and how it can be updated to reflect the new digital media market.”<sup>3</sup> Presumably in response to congressional interest, the FCC has opened an ambitious and broad-ranging inquiry into children and the electronic media.<sup>4</sup> This proceeding—capaciously titled *In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape*—is ongoing and focuses, inter alia, on the adequacy of the educational content being offered for children across electronic media platforms.<sup>5</sup>

The FCC has been attempting to encourage broadcasters to air quality children’s educational television for almost fifty years. The modern story began in 1996, when the FCC, concluding that broadcasters had not taken the CTA seriously, adopted a processing guideline under which a broadcast station airing a minimum of three hours per week of core children’s educational or informational (E/I) programming as part of its public interest

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1. Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b (2006)).

2. *Rethinking the Children’s Television Act for a Digital Media Age: Hearing before the S. Comm. on Commerce, Science and Transp.*, 111th Cong. (2009). For the C-SPAN video of the hearing, see *Rethinking Children’s Television- C-SPAN Video Library*, <http://www.c-spanvideo.org/program/287915-1> (last visited Feb. 25, 2010).

3. *Rethinking the Children’s Television Act*, *supra* note 2 (statement of Sen. John D. Rockefeller IV, Chairman, S. Comm. on Commerce, Science and Transp.).

4. *In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, Notice of Inquiry*, 24 F.C.C.R. 13171 (2009) [hereinafter *Empowering Parents NOI*].

5. *Id.* at paras. 25-27.

obligations would receive expedited, staff-level license renewal review.<sup>6</sup> The FCC also defined core children’s E/I programming, for the first time, as regularly scheduled weekly programming of at least thirty minutes in length, aired between 7:00 a.m. and 10:00 p.m., and specifically designed to serve the educational and informational needs of children sixteen years of age and younger.<sup>7</sup>

A decade later, in recognition of the fact that digital transmission would allow each broadcaster to multicast several programming streams, the FCC extended what had come to be known as the “three hour rule” to digital broadcasters—so that stations would air an additional, proportional amount of E/I programming on any free digital content streams they chose to transmit.<sup>8</sup> Throughout, the agency also limited the amount of commercial content that could be aired during children’s programming.

Despite the passing of more than a decade since the adoption of the original children’s television regime, neither the effectiveness of the rules nor their constitutionality has been established. The empirical record, as it stands, is thin.<sup>9</sup> The show *Winx Club* has been claimed to be core

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6. The original 1996 FCC’s Children’s Educational Television Rules permitted stations that aired three hours of core children’s educational television programming per week to receive staff-level review of their license renewal applications. See *Educational and Informational Programming for Children*, 47 C.F.R. § 73.671(d) (2008); see also *Policies and Rules Concerning Children’s Television Programming, Report and Order*, 11 F.C.C.R. 10660 (1996) [hereinafter *1996 Children’s Television Rules*]. See *infra* notes 56-66 and accompanying text. In 2004, the FCC extended the rules to digital content streams under a principle of proportionality. See *Children’s Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rule Making*, 19 F.C.C.R. 22943 (2004) [hereinafter *2004 Children’s DTV Report and Order*]. The 2004 Order required digital broadcasters to increase the amount of core E/I programming broadcast in an amount “roughly proportional” to the amount of additional free video programming offered on multicast channels, adding thirty minutes of core programming for every twenty-eight hour increment of free video programming. *Id.* at para. 19. In 2006, the FCC revised and clarified some aspects of the rules, but the proportionality requirement was retained essentially unchanged. See *Children’s Television Obligations of Digital Television Broadcasters, Second Order on Reconsideration and Second Report and Order*, 21 F.C.C.R. 11065 (2006) [hereinafter *2006 Report and Order*]. See *infra* notes 67-74 and accompanying text.

7. 47 C.F.R. § 73.671(c). To qualify as core E/I programming, a show must have “serving the educational and informational needs of children ages 16 and under as a significant purpose.” *Id.* § 73.671(c)(1).

8. *Id.* § 73.671(e)(2).

9. The last FCC analysis of E/I programming data was published in 1999, and the FCC has not yet released efficacy studies it promised in 2004. *2004 Children’s DTV Report and Order, supra* note 6, at para. 67; Statement of Comm’r Jonathan S. Adelstein Approving in Part & Concurring in Part: FCC Approves Transfer of Univision Communications Inc. (Mar. 27, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-24A4.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-24A4.pdf). See also *FCC Seeks Comment on the Status of Children’s Television Programming, Public Notice*, 22 F.C.C.R. 7267 (2007) (seeking comment on the status of children’s television programming and compliance with the CTA); see *infra* Part IV.D.

educational programming. Legal scholars have not recently attempted to analyze the effectiveness of the FCC's approach in today's radically changed media market.<sup>10</sup> And because all the E/I television rules were adopted through FCC negotiation with broadcasters and children's advocates,<sup>11</sup> the rules were never subjected to judicial review.

This Article takes the opportunity recently offered by Congress and the FCC to assess the current regime and recommend policy changes. With respect to the constitutional question, the FCC's approach would likely pass First Amendment scrutiny. Although it is an important cliché of modern free speech doctrine that the government cannot constitutionally compel speech,<sup>12</sup> broadcast regulation traditionally has been permitted more than the usual constitutional leeway,<sup>13</sup> children have received special protection,<sup>14</sup> and the children's educational television rules have been (and can be) structured to avoid formal compulsion.<sup>15</sup>

That it likely would be found doctrinally acceptable, however, does not resolve the question of whether the FCC's current approach to children's educational television is desirable as a matter of media, social, or educational policy. The articulated regulatory justifications for the rules contain unrecognized and underanalyzed tensions. And questions arise if we frame the rules not as the FCC does—a socially beneficial attempt to improve public education and inculcate a common culture in today's youth,

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10. Of course, in the early years, a scholarly literature developed in support of children's television rules. *See, e.g.*, Dale Kunkel & Julie Canepa, *Broadcasters' License Renewal Claims Regarding Children's Educational Programming*, 38 J. BROAD. & ELEC. MEDIA 4, 397 (1994); Dale Kunkel, *From a Raised Eyebrow to a Turned Back: The FCC and Children's Product-Related Programming*, J. OF COMM., Autumn 1988, at 38, 90-108.

11. *See supra* note 6 and accompanying text.

12. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

13. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”). *See also* Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1 (2004); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

14. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968) (government's interests in the “well-being of its youth” and in supporting “parents’ claim to authority in their own household” justify regulation of broadcast); *Pacifica Foundation*, 438 U.S. at 749 (“broadcasting is uniquely accessible to children”).

15. The Children's Television Act only requires the FCC to “consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.” Children's Television Act of 1990, Pub. L. No. 101-437, § 103(a)(2), 104 Stat. 996 (codified at 47 U.S.C. § 303b(a)(2) (2006)). The FCC's most recent implementation of the Act does not mandate quantitative minima. *See* Educational and Informational Programming for Children, 47 C.F.R. § 73.671(b), (d), (e) (2008).

regardless of the incommensurability of their diverse local educational experiences—but as a virtually hidden federal educational initiative outsourced to a private sector primarily responsive to commercial incentives.

The empirical studies of children's educational television since the adoption of the FCC's rules disclose mixed results.<sup>16</sup> Although most broadcasters appear to be formally complying with the FCC's rules, according to unofficial, non-FCC studies, the evidence shows a noteworthy decline in the amount of children's E/I programming and a consistent shunting of such programming to weekend mornings. Moreover, existing studies question the educational quality of a significant amount of the programming being broadcast over the air.<sup>17</sup>

Three factors can explain these results: broadcasters' economic incentives, administrative limitations triggered by values in tension, and characteristics and preferences of both child audiences and their parents. Changes in the modern marketplace—the expansion of the global marketplace for programming to international outlets, the growing merchandising associated with at least some children's programming, and the transformation of children into a commodity-purchasing demographic for advertisers—have not eliminated the reality that children's educational programming is still largely unprofitable for broadcasters. The commercial, advertising-supported broadcast system will not, on its own, produce notable amounts of high-quality children's educational television programming.<sup>18</sup> Especially in light of the production expenses of high-quality E/I programming and the FCC's limitations on advertising during children's television programming,<sup>19</sup> most E/I programming will not be self-supporting. Moreover, commercial broadcast programming is facing increasing competition from the array of educational offerings on PBS, cable, and the Internet.<sup>20</sup> Particularly as the declining status and profits of over-the-air television stations lead to an increasing concern with the

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16. See *infra* Part IV.D.

17. See, e.g., Barbara J. Wilson, Dale Kunkel & Kristin L. Drogos, *Educationally/Insufficient: An Analysis of the Availability & Educational Quality of Children's E/I Programming*, CHILDREN NOW 2008, executive summary available at [http://www.childrennow.org/uploads/documents/eireport\\_2008.pdf](http://www.childrennow.org/uploads/documents/eireport_2008.pdf); CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT 153 (SANDRA L. CALVERT, AMY B. JORDAN & RODNEY R. COCKING, EDS. 2002).

18. S. REP. NO. 101-227, at 5-9 (making such findings in connection with the passage of the Children's Television Act).

19. The FCC's limits on commercials aired during children's programming, see Commercial Limits in Children's Programs, 47 C.F.R. § 73.670 (2008), were adopted pursuant to the Children's Television Act. See 47 U.S.C. §§ 303a, 303b, 394 (2008).

20. See, e.g., *infra* notes 157, 204, 223 and accompanying text.

bottom line,<sup>21</sup> at least some broadcasters will predictably undermine the FCC's goals by steering too close to the entertainment line in their compliance with the E/I rules. Others will focus on the kinds of educational programming—such as “pro-social” rather than “cognitive” shows—that are more likely to generate greater commercial support.<sup>22</sup> Query whether this is the kind of programming that can best fill the gaps in public education noted by Congress and the FCC in justifying the CTA. These realities suggest that the FCC should rethink its commitment to the Sisyphean task of attempting to squeeze quality children's educational programming from entities whose commercial imperatives push in the opposite direction.<sup>23</sup> Regulating against the pressure of self-interest is unlikely to lead to first-best results. When good results occur, regulation is unlikely to be the principal cause.

The anticompliance pressure likely to be generated by broadcasters' economic incentives will, in turn, increase the FCC's transaction costs of tracking and assessing compliance. More problematically, the FCC's enforcement history in this area already reveals delay and enforcement limits best explained by regulatory ambivalence. Perhaps because of its concerns about trenching on broadcasters' expressive rights, and/or because of differences regarding qualitative programming assessments even by experts, the FCC has not engaged in extensive, intensive, or timely enforcement of its children's programming rules. It has let slide claims that shows like *Saved by the Bell* satisfy E/I requirements, taken a leisurely approach to empirical study, and delayed for years the resolution of still-pending test claims of noncompliance.<sup>24</sup>

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21. See, e.g., Steve Green, *Ad Revenue Decline Puts Pressure on Broadcast Conference, Industry*, LAS VEGAS SUN, Apr. 22, 2009, available at <http://www.lasvegassun.com/news/2009/apr/22/ad-revenue-decline-puts-pressure-broadcast-conference/>. See also Judith C. Aarons, *Cross-Ownership's Last Stand? The Federal Communication FCC's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 344 (2002) (noting decrease in market share of three broadcast networks (ABC, NBC, CBS) from 95% to 61% between 1971 and 1995). See generally Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 F.C.C.R. 542 (2009) (describing to Congress developments in the marketplace for the delivery of video programming).

22. See Comments of Children's Media Policy Coalition, Status of Children's Television Programming, FCC MB Docket No. 00-167 (rel. Sept. 4, 2007) available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6519721521> [hereinafter *Children's Media Policy Coalition Comments*]; Wilson, Kunkel & Drogos, *supra* note 17.

23. See, e.g., Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 3 MICH. ST. L. REV. 911, 914 (2005); Robert Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats and Children's Television Programming*, 45 DUKE L.J. 1193, 1242-43 (1996).

24. *Children's Media Policy Coalition Comments, supra* note 22, at 16-21, n. 67 & 76 (citing the following unresolved petitions: Petitions to Deny Application of Renewal of Broadcast Station Licenses of Paxson Washington License, Inc. WPXW, Manassas, VA:

The final factor in this policy assessment is the preferences and viewing patterns of parents and children—the audience. Studies of audience behavior show that, because children are largely “destination viewers” and because parents’ use of the television as babysitter requires some level of programming predictability, it will be very difficult for broadcasters to compete for children’s attention with the niche children’s programming channels on cable.<sup>25</sup> Moreover, the evidence shows that many parents are not aware of the FCC’s E/I rules and do not understand the E/I notifications provided to guide their viewing choices.<sup>26</sup> This is exacerbated by the reality that most television guides today do not publish the relevant information even if broadcasters provide it.<sup>27</sup>

Airtime programming decisions are a zero-sum game. If all broadcasters in a market have to provide children’s educational programming on all of their free program streams, they will be displacing some other kind of content that might otherwise air. The question then is whether a regulatory policy that creates significant incentives for the airing of such programming—even when the audience for it is already largely wedded to cable and public television—is unduly displacing the development of other, potentially less available, merit good programming on the broadcast medium. For example, serious journalism—and, particularly, investigative journalism—is expensive and increasingly underproduced in today’s media marketplace.<sup>28</sup> I have argued elsewhere that today’s media show a striking need for an expanded commitment to

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File No. BRCT-20040527AGS; Fox Television Stations, Inc. WDC, Washington, D.C.: File No. BRCT- 20040527AKL (filed Sept. 1, 2004); Petition to Deny Application of Renewal of Broadcast Station License of Raycom National, Inc. WUAB, Lorain, OH: File No. BRCT-20050527BIO (filed Aug. 31, 2005); Petition to Deny Application of Renewal of Broadcast Station License of Univision Cleveland LLC, Cleveland, Ohio: File No. BRCT-20050601BER (filed Aug. 31, 2005)). The FCC’s highly publicized \$24 million consent decree with Univision in 2007 over its stations’ failure to air core children’s programming is not to the contrary. See Shareholders of Univision Communications, Inc. (Transferor) and Broadcasting Media Partners, Inc. (Transferee), *Memorandum Opinion and Order*, 22 F.C.C.R. 5842, paras. 40-42, (2007) (resolving, as part of Univision’s transfer of multiple broadcast licenses, petitions to deny grounded on Univision’s asserted failure to comply with children’s educational programming requirements) [hereinafter *Univision Order*].

25. See *infra* Part IV.E.3.

26. *Children’s Media Policy Coalition Comments*, *supra* note 22 at 8; see *infra* Part IV.E.3.

27. *Children’s Media Policy Coalition Comments*, *supra* note 22, at 9.

While FCC rules require broadcasters to provide program guide publishers with core program information, including target ages, we are currently unaware of any program guides that regularly provide such information. The Coalition is also unaware of any cable system operators who provide E/I program information on their digital program guides.

*Id.*

28. See generally Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321 (2007).

serious journalism.<sup>29</sup> Yet media policy discourse has not considered whether, at this point in newspaper history, incentives to serious journalism in electronic media should take precedence over commitments to market-wide children's E/I programming obligations for every commercial broadcast television station—particularly in light of cable offerings on Nickelodeon and the questionable efficacy of the current rules to deliver high-quality children's content.

This skepticism about the FCC's E/I rules in practice does not mean, however, that we should not explore other potentially effective ways of promoting quality children's educational programming. We know that excellent children's educational shows such as *Sesame Street* have been consistently generated by public television.<sup>30</sup> Such offerings would likely be enhanced if public stations were given appropriate additional funding. Yet the traditional approach of appealing to Congress for government funding has been an abject failure with respect to E/I programs, as demonstrated by the short and sad history of the National Endowment for Children's Educational Television.<sup>31</sup>

This Article proposes that the FCC evaluate various possible alternative children's television rules by testing the degree to which they are likely to accomplish five objectives: promoting quality programming, increasing the amount of children's E/I programming in a manner responsive to market needs for various types of such programming, providing sufficient flexibility for broadcasters to enhance innovation over time, ensuring administrability by the FCC, and empowering parents informationally.

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29. See *id.* See also David Lieberman, *Newspaper Closings Raise Fears About Industry*, USA TODAY, Mar. 19, 2009, [http://www.usatoday.com/money/media/2009-03-17-newspapers-downturn\\_N.htm](http://www.usatoday.com/money/media/2009-03-17-newspapers-downturn_N.htm) (describing the closing of numerous daily papers, including Rocky Mountain News, Tucson Citizen, Seattle Post-Intelligencer and a 9.7% drop in advertising revenue for newspapers in 2009).

30. See Press Release, PBS Kids, PBS Kids Is the #1 Educational Media Brand According to National Roper Survey (June 24, 2009), available at [http://www.iptv.org/iptv\\_news\\_detail.cfm?id=4286&type=press\\_release](http://www.iptv.org/iptv_news_detail.cfm?id=4286&type=press_release) (describing GfK Roper survey's conclusion that PBS Kids is the top brand in children's educational programming, beating both cable and commercial offerings). See also Comments of Sesame Workshop at 8-9, Empowering Parents and Protecting Children in an Evolving Media Landscape, FCC MB Docket No. 09-194 (rel. Feb. 25, 2010) [hereinafter *Sesame Workshop Comments*] (describing educational benefits of Sesame Street). See generally PBS Kids, Everything, <http://pbskids.org/everything.html> (last visited Feb. 25, 2010).

31. Congress established a National Endowment for Children's Educational Television in association with the CTA. Children's Television Act of 1990, Pub. L. No. 101-437, § 394, 104 Stat. 996 (codified at 47 U.S.C. § 394 (2006)). The endowment was only funded from 1993-95, and even then for less than \$3 million per year. See 1995 NECET Notice of Availability of Funds, National Endowment for Children's Educational Television, <http://www.ntia.doc.gov/otiahome/necet/necetrfp.html> (last visited Feb. 25, 2010). See *infra* notes 226-28 and accompanying text.



Consideration of those factors suggests that an alternative “pay an E/I fee or play” model for promoting high-quality children’s E/I programming be explored in lieu of the current “three-hour rule” model. The proposal is not a simple “pay or play” system, under which, for example, broadcasters would be given the unconstrained choice of either airing children’s E/I programming, as under the current rules, or funding other stations’ airing of such shows. Nevertheless, the approach is informed by a sense that bounded flexibility for broadcasters could lead to better results than the current regulatory scheme. The alternative approach suggested here would have two prongs. Under the first, broadcasters would be required to contribute a children’s E/I programming fee yearly to an E/I fund. The collected fees would be disbursed, preferably by an independent manager of the E/I fund, to promote high-quality public television E/I programming. The independent manager of the E/I fund would also be responsible for spearheading the kind of media literacy that would enable intelligent viewing choices.

Pursuant to the second prong, broadcasters who wished to reduce or eliminate their fee obligations could instead choose to air their own children’s E/I programming. A sliding-scale model would enhance flexibility. However, in order to justify a fee exemption or reduction, the broadcaster would be precluded from segregating all of its E/I programming to weekend mornings, and its programming would have to be rated highly in comparison to other children’s E/I programming by nationally recognized, independent rating agencies. In turn, the work of those rating agencies would be publicized, *inter alia*, on the FCC’s Web site and funded through a ratings fee contributed to a ratings fund. The broadcaster would receive increasing amounts of credit against its tax obligation in the degree that its own children’s E/I programming met needs otherwise underserved in the local market. In other words, if—as children’s advocates complain—there is too much social (rather than cognitive) educational programming for certain age ranges in a broadcaster’s market,<sup>32</sup> then a broadcaster’s airing of a high-quality cognitive E/I show for an underserved child population could warrant the highest level of exemption from its E/I fee obligations. Of course, it is important that the proposed approach be structured to minimize valuation problems and complexity and to permit appropriate monitoring.

What can we expect if the alternative proposed here is adopted? Some

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32. See *infra* Part IV.D. In addition, it has been argued that the commercial marketplace has significantly underproduced programming for school-age children six to nine. See *Sesame Workshop Comments*, *supra* note 30, at 12 (“Digital media for school-age children is becoming today’s ‘vast wasteland,’ with a scarcity of high-quality, well-designed educational offerings in the market.”).

broadcasters, such as ABC stations, would likely continue to air some good quality E/I programming because ABC's subsidiary relationship with Disney provides them a ready supply of product. They would be excused from their E/I fee if, and to the extent that, their offerings met the quality ratings requirements. Other broadcasters might air children's E/I programming as part of an experiment with niche programming on some of their digital program streams now that the broadcast digital transition has taken place. Indeed, some broadcasters have already partnered to launch the Qubo twenty-four-hour per day children's broadcast television channel.<sup>33</sup> Still other broadcasters—perhaps the majority—would likely opt to fund PBS programming by contributing the E/I fee to the children's educational television fund. If so, there might be sufficient funds for separate public children's channels to germinate.

The FCC is to be commended for its recent initiative requesting comment on sponsorship models and other private/public partnerships.<sup>34</sup> Sponsorship of children's E/I programming—which is permitted under the 1990 CTA<sup>35</sup> and, to some degree, under the FCC's rules—has previously been rejected without any sustained analysis by the FCC. Serious public inquiry moderated by the FCC would be useful in two ways. First, and obviously, it could generate a full exploration of the possible flexible

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33. See *Rethinking the Children's Television Act*, *supra* note 2 (Statement of John Lawson, ION Media Networks). See also Qubo Channel, <http://www.qubo.com/channel/> (last visited Feb. 25, 2010). Qubo is a partnership of NBC, ION Media Networks, Scholastic Media, Classic Media, and Corus Entertainment. Comments of the National Association of Broadcasters at 4-5, Status of Children's Television Programming, FCC MM Docket No. 00-167 (rel. Sept. 4, 2007), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519721436](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519721436) [hereinafter *NAB Comments*]; Comments of ION Media Networks, Inc., Empowering Parents and Protecting Children, FCC MB Docket No. 09-194 (rel. Feb. 25, 2010) [hereinafter *ION Media Comments*]; Comments of the National Association of Broadcasters, Empowering Parents and Protecting Children, FCC MB Docket No. 09-194, at 11-12 (rel. Feb. 24, 2010) [hereinafter *NAB Empowering Parents Comments*].

34. See *Empowering Parents NOI*, *supra* note 4, at para. 27.

We invite comment on what steps the government or industry could take to promote the development and availability of [children's educational] content. Are there any partnerships between commercial entities and public or noncommercial entities that enable the creation of educational content? . . . Should the FCC consider an approach that would permit commercial entities to fund the creation of educational content to be provided by others, such as PBS? How would such a regime be implemented and enforced?

*Id.* See also *id.* at n.39.

35. The CTA provides that during review for license renewal, "the FCC may consider . . . any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children." 47 U.S.C. § 303b(b)(2). The FCC's regulation reflects this. 47 C.F.R. 73.671(b) (stating that supporting other stations' E/I programming "may also contribute to meeting the licensee's obligation"). See also *infra* note 243.

models (including the version proposed here) from all points of view. There are, of course, various ways of designing workable "pay or play" or "tax-and-exemption" regimes. In exploring those possibilities, however, the agency could also create an opportunity for the kind of negotiated media policy that has marked the FCC's approach toward children's educational programming requirements since 1996.

In the final analysis, the current FCC children's television rules are not bad media policy. After all, empirical data reflects that most broadcasters are complying with the letter of the FCC's rules. Evidence from the decline of E/I programming in the 1980s suggests that the rules may have generated some better children's educational programming on commercial over-the-air television than would have been the case otherwise.<sup>36</sup> They might even have displaced some of the low-quality, violent, badly produced, and antisocial children's entertainment programming that would otherwise have aired. But the final assessment requires us to ask both whether the benefits outweigh the costs, and whether alternatives might not better promote at least some of the goals for which the original rules were designed.<sup>37</sup>

Section II of this Article describes the history of children's educational television regulation. Section III addresses the constitutional question, suggesting that despite contrary undercurrents, contemporary First Amendment doctrine would likely support the FCC's discretion to adopt the children's educational television rules as drafted. Section IV then looks at the effectiveness of the FCC's rules, with IV.A, B, and C addressing, respectively, the tensions in the FCC's articulated goals, the implications of the rules as national education policy, and the impact of regulatory scarcity. Section IV.D describes the empirical studies in the area. Having reported the mixed empirical results, Section IV.E then attempts to explicate the outcomes by reference to three characteristics: (1) broadcasters' economic incentives in light of current market conditions, (2) administrative enforcement limitations, and (3) audience factors. The Article concludes, in Section V, that the children's educational television rules do not constitute particularly beneficial media policy. Instead, it suggests that a different approach to the generation of high-quality children's educational programming be taken—one focusing not on programming obligations for private commercial broadcasters, but rather on funding public production of such programming through a children's

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36. See *Children's Media Policy Coalition Comments*, *supra* note 22, at 4 (citing *1996 Children's Television Rules*, *supra* note 6, at para. 121) (comparing today's findings that broadcasters air an average of three hours per week of core educational programming with the NAB's claim in 1996 that they were airing an average of two hours per week prior to passage of the CTA).

37. For one such proposal, see Krotoszynski, *supra* note 23, at 1242-43.

educational programming fund. Such funding could subsidize additional PBS children's E/I programming, but the obligation could also be avoided by broadcasters through their own high-quality E/I efforts, if they choose to make them.<sup>38</sup>

## II. THE HISTORY OF THE FCC'S CHILDREN'S EDUCATIONAL TELEVISION PROGRAMMING RULES

The FCC explicitly began its efforts to promote children's programming in 1960, when it identified children as one of the groups whose programming needs must be met by broadcasters in order to fulfill their public trustee obligations.<sup>39</sup> For much of the time thereafter, however, the FCC focused on commercialization policies for advertising in children's programming and relied on the industry to self-regulate with regard to programming.<sup>40</sup> To prompt such self-regulation, the FCC delivered hortatory statements about the benefits of children's programming, explaining, for example, that broadcasters have a "special obligation" to serve children and suggesting that licensees "make a meaningful effort" to increase the number of programs targeted to children in various age groups.<sup>41</sup>

Despite such exhortations, however, broadcasters of the 1970s and later decades—unlike those of the 1950s—did not air much educational programming for children.<sup>42</sup> Children's advocacy groups responded by

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38. For a discussion of the complexities of reference to "quality" of programming, see *infra* notes 223-24 and accompanying text.

39. FCC *en banc* Programming Inquiry, *Report and Statement of Policy*, 44 F.C.C. 2303 (1960). For the FCC's accounts of the history of children's television regulation, see, e.g., 2004 *Children's DTV Report and Order*, *supra* note 6, at paras. 4-5.

40. For histories of the FCC's approach to children's television, see, e.g., NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* (1995); Angela J. Campbell, *Lessons From Oz: Quantitative Guidelines for Children's Educational Television*, 20 COMM/ENT L.J. 119 (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONSPECTUS 1 (1997).

41. Children's Television Act for Rulemaking, *Report and Policy Statement*, 50 F.C.C.2d 1, at paras. 15, 20, 22 (1974), *aff'd*, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) [hereinafter *1974 Policy Statement*]. The FCC also focused on children's particular vulnerability to commercial messages. *Id.* at para. 34. See also Children's Television Programming, *Notice of Proposed Rulemaking*, 10 F.C.C.R. 6308, para. 3 (1995) (describing the FCC's action).

42. Broadcasters had programmed extensively and diversely for children in the 1950s—principally to promote the purchase of television sets (which were still new and expensive consumer appliances at the time). MINOW & LAMAY, *supra* note 40, at 41-2, 45; Alison Alexander, *Broadcast Networks and the Children's Television Business*, in *HANDBOOK OF CHILDREN AND THE MEDIA* 495, 496 (Dorothy G. Singer & Jerome L. Singer eds., 2001). In the early days of television, children's educational programs "were part of standard commercial offerings. The number of such programs peaked in 1953, dropped precipitously

attempting to convince the FCC to replace exhortations (and broadcaster laissez-faire) with mandatory children's television requirements.<sup>43</sup> After President Carter took office, a Children's Task Force, established by the FCC in 1977, concluded that broadcasters had not adequately complied with the FCC's prior recommendations and urged mandatory programming requirements.<sup>44</sup> Despite these calls from both inside and outside the FCC,<sup>45</sup> the agency thereafter explicitly rejected mandatory children's programming minima during President Reagan's first term.<sup>46</sup> In so doing, the FCC adopted a marketplace-oriented approach to children's television.<sup>47</sup> At this point, in the 1980s, even the agency's hortatory statements about programming for children became less specific and less directive.<sup>48</sup> This occurred just as the development of extensive renewal expectancies

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by 1959, increased some in the 1960s, and steadily declined after that time until the early 1990s." Aletha C. Huston & John C. Wright, *Television and the Informational Needs of Children*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 10 (1998). See also NORMA ODOM PECORA, THE BUSINESS OF CHILDREN'S ENTERTAINMENT 30-32 (1998); ELLEN SEITER, SOLD SEPARATELY: CHILDREN AND PARENTS IN CONSUMER CULTURE 103-4 (1993); Donna Mitroff & Rebecca Herr Stephenson, *The Television Tug-of-War: A Brief History of Children's Television Programming in the United States*, in THE CHILDREN'S TELEVISION COMMUNITY 3-23 (J. Alison Bryant, ed. 2007). When multiple television sets became common, however, broadcasters apparently saw no need to continue that high level of children's programming. They segregated children's programming to Saturday mornings, when stations assumed the adult audience would not be watching. Children's programming consisted largely of cartoons, with few—although notable—educational programs (such as Captain Kangaroo). MINOW & LAMAY, *supra* note 40, at 41, 45.

43. For example, Action for Children's Television submitted a petition proposing that the FCC adopt minimum amounts of age-specific programming for children. See, e.g., Petition of Action for Children's Television, *Notice of Inquiry and Notice of Proposed Rule Making*, 28 F.C.C.2d 368, 368-69 (1971). See also 1974 Policy Statement, *supra* note 41.

44. FCC, TELEVISION PROGRAMMING FOR CHILDREN, A REPORT OF THE CHILDREN'S TASK FORCE (1979). See also Children's Television Programming and Advertising Practices, *Notice of Proposed Rulemaking*, 75 F.C.C.2d 138, at para. 4 (1979) (addressing the possibility of mandated programming requirements).

45. See 1974 Policy Statement, *supra* note 41.

46. See Children's Television Programming and Advertising Practices, *Report and Order*, 96 F.C.C.2d 634 (1984), *aff'd*, Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985) (rejecting the FCC Task Force Report's recommendation) [hereinafter 1984 Report & Order].

47. The FCC's 1984 Report & Order recommended increased public funding of children's television and the creation of additional video outlets so that the market would lead to an appropriate supply of children's educational programming. 1984 Report & Order, *supra* note 46. The FCC also defined the relevant market for children's programming more broadly than broadcasting alone. See *id.* In addition, the FCC during this period also repealed its previous commercialization guidelines limiting commercials during children's educational programming. See Revision of Programming and Commercialization Policies, *Report and Order*, 98 F.C.C.2d 1076 (1984).

48. Indeed, then-Commissioner Rivera took the FCC to task for its 1984 Report & Order, claiming that the FCC's decision to capitulate to the market constituted a "funeral" for children's television. 1984 Report & Order, *supra* note 46, at 16 (Comm'r Rivera, dissenting).

presumably reduced the constraining effect on broadcaster behavior of the fear of license nonrenewal.

Again the children's advocacy community responded, this time by lobbying Congress, which passed the CTA in 1990.<sup>49</sup> The Act imposed two requirements for children's programming. First, it required broadcast licensees and cable operators to limit the amount of commercial matter on children's programs.<sup>50</sup> Second, the Act required the FCC to consider whether broadcasters had served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."<sup>51</sup> The FCC issued a report implementing the Act in 1991.<sup>52</sup> Nevertheless, because the CTA did not contain any specific programming requirements, the FCC initially continued to rely on a self-governance approach, even in response to that directive in the CTA.<sup>53</sup>

At least some broadcasters did not take the FCC's *1991 Report and Order* seriously and claimed that shows like *The Jetsons*, *G.I. Joe*, and *Teenage Mutant Ninja Turtles* satisfied their obligations to air children's

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49. Children's Television Act of 1990, Pub. L. No. 101-437, §§ 102, 103, 394, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a, 303b, 394 (2006)). See Popham, *supra* note 40, at 7 (describing the process). According to an FCC history, the Senate report on the CTA cited the FCC's 1984 decisions as "precipitating factors" in the enactment of the legislation. Children's Television Obligations of Digital Television Broadcasters, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 22946, para. 5 n.15 (2000) [hereinafter *2000 Children's Digital TV NPRM*]. For a history of the adoption of the CTA, see Dale Kunkel, *Policy Battles Over Defining Children's Educational Television*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1998).

50. The Act limited commercials during children's programming to 10.5 minutes per hour during weekends and 12 minutes per hour on weekdays. See 47 U.S.C. §§ 303a-303b. The FCC also counts as a program-length commercial "a program associated with a product, in which commercials for that product are aired." Children's Television Programming, *Report and Order*, 6 F.C.C.R. 2111, para. 44 (1991), *recon. granted in part*, 6 F.C.C.R. 5093 (1991) [hereinafter *1991 Report & Order*]. Host-selling, "the use of program talent to deliver commercials," is also prohibited by the FCC's rules. *Id.* at para. 44 n.147; see also *1974 Policy Statement*, *supra* note 41, at paras. 28, 44-53.

51. 47 U.S.C. § 303b(a)(2). See also *2000 Children's Digital TV NPRM*, *supra* note 49, at para. 5.

52. *1991 Report and Order*, *supra* note 50, at para. 3.

53. *1991 Report and Order*, *supra* note 50. Largely focusing on policies regarding advertising in children's television programming, the *Report* advised broadcasters that the FCC would consider (during the renewal process) whether they had "served the educational and informational needs of children." *Id.* at para. 1. See also Children's Television Obligations of Digital Broadcasters, *Report & Order and Further Notice of Proposed Rulemaking*, 19 F.C.C.R. 22943, para. 9 (2004) (describing the FCC's 1991 rules as follows: "These rules included a flexible definition of educational programming, did not establish quantitative guidelines regarding the amount of educational programming licensees were required to provide, and did not include measures designed to inform the public about educational programming.").

educational programming.<sup>54</sup> Apparently, the market's response to the FCC's reliance on industry self-regulation was to decrease the amount of children's educational programming aired by broadcasters over time and to increase advertising in such programming.<sup>55</sup>

In 1996, concluding that its initial regulations implementing the CTA had not been "fully effective,"<sup>56</sup> the FCC radically shifted its approach away from general calls for voluntary industry attention to children. It chose an approach with three significant new elements: Notably, first, it adopted processing guidelines for renewal applications under which a broadcaster could receive expedited, staff-level approval of the CTA portion of its renewal application by airing at least three hours per week of core educational programming.<sup>57</sup> Nevertheless, even if a broadcaster did not satisfy the "three hour rule," it could still be referred for hearing to the whole FCC and have its license renewed if it convinced the full FCC that it had met its CTA obligation in other ways.<sup>58</sup> It could do so under what might be called a "pay or play" option—pursuant to which it sponsored core children's educational programming on other stations in the market.<sup>59</sup>

Second, in addition to the "three-hour rule," the FCC also, for the first time, provided a definition of "core" children's educational programming

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54. MINOW & LAMAY, *supra* note 40, at 10-11; Popham, *supra* note 40, at 9 (describing Congressman's statement). See also Amy B. Jordan, *The Three-Hour Rule and Educational Television for Children*, POPULAR COMM., 2004, at 103; Kunkel, *supra* note 49, at 44-45 (describing "creative relabeling" of programs); Dale Kunkel & Ursula Goette, *Broadcasters' Response to the Children's Television Act*, 2 COMM. L. & POL'Y 289 (1997).

55. 2000 *Children's Digital TV NPRM*, *supra* note 49, at para. 4.

56. 1996 *Children's Television Rules*, *supra* note 6, at para. 2.

57. *Id.* at paras. 6, 131. Expedited, staff-level review would also be available to broadcasters who, although they provided somewhat less than three hours per week of core programming, aired "a package of programming that demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming." *Id.* at paras. 5, 133. Specifically, the FCC described its processing guideline as consisting of category A, category B, and FCC consideration. *Id.* at paras. 131-35. The broadcaster seeking to secure staff approval under such "category B" review "must show that any reasonable observer would recognize its commitment to educating and informing children to be at least equivalent to the commitment reflected in category A." *Id.* at para. 133. Category B showings might include "specials, regularly scheduled non-weekly programs, short-form programs, and PSAs with a significant purpose of educating and informing children." *Id.* Other relevant factors showing commitments would be airing children's educational programming during prime time or investing a substantial amount of money in developing core programming aired on the broadcaster's channel. *Id.*

58. *Id.* at paras. 5, 135.

59. For example, broadcasters would have a full opportunity to make this demonstration by "relying in part on sponsorship of core educational and informational programs on other stations in the market" (thereby increasing the amount of core educational and informational programming on the station airing the sponsored program) "and/or on special non-broadcast efforts which enhance the value of children's educational and informational television programming." *Id.* at para. 135.

as programming “specifically designed” to educate and inform children—regularly scheduled weekly programming of at least thirty minutes in duration, aired between 7:00 a.m. and 10:00 p.m., that has serving the educational and informational needs of children ages sixteen and under as a significant purpose.<sup>60</sup>

Finally, in attempts to improve public access to information about programming specifically designed for children, it required broadcasters to identify core programming when aired and to publicize such programming.<sup>61</sup> Providing such information would not only help parents direct their children’s television viewing more accurately, but also would “permit[] the Commission to rely more on marketplace forces to achieve the goals of the CTA and facilitate enforcement of the statute by allowing parents, educators, and others to actively monitor a station’s performance.”<sup>62</sup>

How did this turnabout occur? As one commentator has characterized it, the rules were a result of “raw political compromise.”<sup>63</sup> In 1993, after President Clinton’s election, the FCC issued a new Notice of Inquiry (NOI)

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60. 47 C.F.R. § 73.671(c). *See also* 1996 *Children’s Television Rules*, *supra* note 6, at paras. 4, 76, 79-112; 2004 *Children’s DTV Report and Order*, *supra* note 6, at para. 11. The FCC explained that, although “education need not be the only purpose of programming specifically designed to meet the educational and informational needs of children, [it] must be more than an incidental goal.” 1996 *Children’s Television Rules*, *supra* note 6, at para. 81. It did not draw distinctions between educational and informational programming that furthers children’s cognitive and social development. *See* Jordan, *supra* note 54, at 104-45; Kunkel, *supra* note 49 (describing the expansion of the definition to include social as well as cognitive lessons as resulting from broadcaster lobbying). Nor did the FCC require licensees to use educational consultants or advisors to help with the production of core children’s educational programming. 1996 *Children’s Television Rules*, *supra* note 6, at para. 89.

61. 1996 *Children’s Television Rules*, *supra* note 6, at para. 49. *See also* 47 C.F.R. §§ 73.3526(a)(11)(iii), 73.673. Under these informational initiatives, the 1996 rules required commercial broadcasters to identify core programming when aired by displaying an E/I icon, identify such programs to publishers of program guides, and provide improved access to information to the public through standardized reporting and other means. 1996 *Children’s Television Rules*, *supra* note 6, at paras. 49, 65-67. *See also* 47 C.F.R. § 73.673. The information provided should contain identification of core programs and the age group for which the program was intended, in the view of the broadcaster. 1996 *Children’s Television Rules*, *supra* note 6, at para. 57; Children’s Educational Television: FCC Consumer Facts, <http://www.fcc.gov/cgb/consumerfacts/chiltdtv.html> (last visited Feb. 25, 2010).

62. 1996 *Children’s Television Rules*, *supra* note 6, at para. 47. The FCC thought this information initiative would “increase the likelihood that the market will respond with more educational programming” and “help parents and others have an effective dialogue with broadcasters in their community about children’s programming and, where appropriate, to urge programming improvements without resorting to government intervention.” *Id.* at para. 3. *See also* Press Release, FCC, FCC Chairman Reed Hundt Encourages Parents and Activists to Watch, Critique, and Report on New Kids Shows (Sept. 18, 1997), *available at* [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1997/nrmc7068.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7068.html).

63. Popham, *supra* note 40, at 2. *See also* Campbell, *supra* note 40, at 147-49.



on the question of children's television.<sup>64</sup> Congress and the White House pressured the FCC to quantify children's educational programming requirements,<sup>65</sup> but the issue was highly contentious among the Commissioners. The 1996 children's television processing guidelines enforcing the CTA were finally generated as a result of last-minute negotiations between industry leaders and the White House immediately prior to a scheduled White House summit on children's television policy.<sup>66</sup> The guidelines were never subjected to judicial review.

Four years later, the FCC commenced a proceeding to address children's television obligations of digital television broadcasters in light of television's impending digital future.<sup>67</sup> It concluded that digital broadcasters would be subject to all the CTA commercial time limits and educational and information programming requirements previously applied to analog broadcasters.<sup>68</sup> After significant delay, the FCC, in 2004, finally

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64. Policies and Rules Concerning Children's Television Programming, *Notice of Inquiry*, 8 F.C.C.R. 1841, para. 1 (1993). See also Kunkel, *supra* note 49, at 45 (suggesting political basis of FCC's change).

65. Popham, *supra* note 40, at 8-9. See also Kathryn C. Montgomery, *Advocating Children's Television*, in *THE CHILDREN'S TELEVISION COMMUNITY* 229, 236-37 (J. Alison Bryant, ed. 2007).

66. See *1996 Children's Television Rules*, *supra* note 6; Kunkel, *supra* note 49, at 47-48; Montgomery, *supra* note 65, at 236-37. See also Popham, *supra* note 40, at 9-16 (describing the conflicts and stalemates among the Commissioners and the White House-brokered negotiated compromise with the broadcast industry).

67. See *2000 Children's Digital TV NPRM*, *supra* note 49, at para. 15 (requesting comment on application of the three-hour children's E/I guideline to DTV broadcasters). Chairman Kennard, a Clinton appointee, characterized the proceeding as an inquiry into how broadcasters would satisfy their public interest obligations in exchange for the \$70 billion dollar "giveaway" of digital spectrum. William E. Kennard, Chairman, FCC, Remarks at The Museum of Television and Radio: "What Does \$70 Billion Buy You Anyway?" Rethinking Public Interest Requirements at the Dawn of the Digital Age (Oct. 10, 2000), available at <http://www.fcc.gov/Speeches/Kennard/2000/spwek023.html>. See also William E. Kennard, Chairman, FCC, Report to Congress on the Public Interest Obligations of Television Broadcasters as They Transition to Digital Television (Jan. 18, 2001), available at <http://www.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.pdf>. The FCC sought further comment in 2003. See Second Periodic Review of the Comm'n's Rules and Policies Affecting the Conversion to Digital TV, *Notice of Proposed Rulemaking*, 18 F.C.C.R. 1279 (2003). It finally adopted an order extending the rules in September 2004, released in November 2004. See *2004 Children's DTV Report and Order*, *supra* note 6. See also Public Interest Obligations of TV Broadcast Licensees, *Notice of Inquiry*, 14 F.C.C.R. 21633 (1999) [hereinafter *1999 Obligations of TV Broadcast Licensees*] (opening a more general proceeding to determine the public interest obligations of broadcasters in the transition to digital television). This inquiry drew on the work of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (also known as the "Gore Commission Report"). *Id.* at para. 6. See also CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS (1998), available at <http://www.benton.org/sites/benton.org/files/recs.pdf>. [hereinafter GORE FCC REPORT].

68. See, e.g., *2004 Children's DTV Report and Order*, *supra* note 6, at para. 12.

extended its children's educational television rules to broadcasters airing digital programming.<sup>69</sup> It adopted an approach pursuant to which broadcasters choosing to provide additional channels or hours of free video programming in addition to their required free over-the-air video program service would have an "increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide."<sup>70</sup> In 2006, following an additional rulemaking inquiry,<sup>71</sup> the FCC adopted the recommendations of a Joint Proposal (submitted by various broadcast and cable interests and children's advocacy groups)<sup>72</sup> to modify the 2004 rules.<sup>73</sup> Again, as a result of the

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69. See 47 C.F.R. § 73.671(e) (2007). See also *2004 Children's DTV Report and Order*, *supra* note 6. Chairman Kennard was followed, in 2001, by the appointment as Chairman of Republican Michael Powell, who expressed doubt about the rules. *2000 Children's Digital TV NPRM*, *supra* note 49, at 22972 (separate statement of Commissioner Michael Powell). See also *1999 Obligations of TV Broadcast Licensees*, *supra* note 67, at 21658 (Powell, Chairman, concurring) (questioning "why the mere use of a digital medium rather than an analog one justifies *new* public interest obligations"). The FCC explicitly revived its moribund inquiries after only two years, in its periodic review of the rules affecting the conversion to digital television in 2003. *Second Periodic Review of the FCC's Rules and Policies Affecting the Conversion to Digital Television, Notice of Proposed Rule Making*, 18 F.C.C.R. 1279 (2003).

70. *2004 Children's DTV Report and Order*, *supra* note 6, para. 19.

Digital broadcasters will continue to be subject to the existing three hours per week core programming processing guideline on their main program stream. DTV broadcasters that choose to provide additional streams or channels of free video programming will, in addition, have the following guideline applied to the additional programming: 1/2 hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. Thus, digital broadcasters providing between 1 and 28 hours per week of free video programming in addition to their main program stream will have a guideline of 1/2 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 29 and 56 hours per week of free video programming in addition to their main program stream will have a guideline of 1 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 57 and 84 hours per week of free video programming in addition to their main program stream will have a guideline of 1 1/2 hours per week of core programming in addition to the 3 hours per week on the main program stream. The guideline will continue to increase in this manner for additional hours of free video programming.

*Id.* (footnotes omitted).

71. Children's Television Obligations of Digital Television Broadcasters, *Second Further Notice of Proposed Rulemaking*, 21 F.C.C.R. 3642 (2006) [hereinafter *Second Children's Digital TV NPRM*].

72. Proposal of Joint Industry and Advocates Group, Settlement Agreement, FCC MM Docket No. 00-167 (Feb. 28, 2006) [hereinafter Joint Proposal]. See also *Second Children's Digital TV NPRM*, *supra* note 74; FCC Opens Comment Period on Joint Proposal for Changes to Children's Television Rules, *Public Notice* (March 17, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264394A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264394A1.doc).

73. *2006 Report and Order*, *supra* note 6. The FCC adopted the provisions of the Joint Proposal after a public comment period. See *Second Children's Digital TV NPRM*, *supra*

negotiated agreement, the broadcasters withdrew their challenges to the digital children’s television rules.<sup>74</sup>

Despite the theoretical significance of these developments, there have been few FCC findings that stations violated the children’s E/I rules, except as to commercial time limits or violations of record-keeping rules.<sup>75</sup> The most visible enforcement action was the Univision settlement, in which Univision—whose stations had improperly claimed that a Spanish language telenovela satisfied the core E/I programming guideline—agreed to pay \$24 million and abide by a compliance agreement as a condition of FCC approval of its transfer applications in connection with a merger.<sup>76</sup> Advocacy groups have complained about the dearth of FCC action, arguing that the FCC has not been disciplining stations whose E/I programming is inadequate.<sup>77</sup> In 2007, the FCC sought comment on the status of children’s educational programming.<sup>78</sup> FCC Chairman Genachowski recently announced, in his testimony at the Senate Commerce Committee’s recent hearing seeking to update the CTA for the modern media environment, that the FCC would be opening a new proceeding regarding children’s television regulation.<sup>79</sup> The current *Empowering Parents NOI* is the result.<sup>80</sup>

### III. THE CONSTITUTIONALITY OF THE FCC’S CHILDREN’S EDUCATIONAL TELEVISION PROGRAMMING RULES

The issue of the constitutionality of affirmative children’s television

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note 71, at para. 4; *2006 Report and Order*, *supra* note 6, at para. 11. Neither the Joint Proposal nor the FCC’s 2006 decision made significant changes to the multicasting rule that had been adopted in 2004 (except that the FCC “clarif[ied] the way in which repeats of core programs will be counted under the new rule”). *Id.* at para. 3.

74. See Joint Proposal, *supra* note 72 (stand down provision). See also *2006 Report and Order*, *supra* note 6, para. 9 & n.20 (describing the judicial challenges).

75. See, e.g., UPN Television Stations Inc., *Notice of Apparent Liability for Forfeiture*, 20 F.C.C.R. 15807 (2005) (imposing a \$4,000 forfeiture for failure to maintain children’s programming records in station’s public file). See also discussion *infra* Part IV.E.2. The FCC has also denied petitions to deny the license renewal applications of eighteen Chicago television stations on the ground that the petitioners’ claims that the stations had been “systematically negligent in their public interest requirement to air three hours per week” of children’s E/I programming because the petition “contain[ed] statements of opinion as opposed to the specific allegations of fact necessary to make out a *prima facie* case.” Third Coast Press, *Petition to Deny*, 21 F.C.C.R. 14415, 14415-16 (2006).

76. *Univision Order*, *supra* note 24. See also *supra* note 24 and accompanying text; *infra* note 191.

77. See *infra* at Part IV.E.2.

78. See FCC Seeks Comment on the Status of Children’s TV Programming, *Public Notice*, 22 F.C.C.R. 7267 (2007).

79. See *Rethinking the Children’s Television Act*, *supra* note 2, at 3-4 (statement of Julius Genachowski, Chairman, FCC).

80. *Empowering Parents NOI*, *supra* note 4.

programming requirements has not yet been litigated, presumably because of the negotiated, voluntary basis through which both the original analog rules and the subsequent digital rules were ultimately adopted.<sup>81</sup> Initially, as noted above, broadcasters voluntarily agreed not to challenge the constitutionality of the rule in 1996 as part of a political compromise achieved with the involvement of the Clinton White House.<sup>82</sup> The broadcasters' position may well have been influenced by their desire not to derail the government's promised "digital giveaway."<sup>83</sup> Analogously, the final digital children's television rules constituted the adoption of a negotiated compromise between the broadcast interests and public interest children's advocates.<sup>84</sup> The children's television rules have not yet been subject to *as applied* constitutional attacks either.<sup>85</sup>

Were the rules to be challenged under the First Amendment, however, it is likely that they would pass constitutional muster both under the more regulation-tolerant broadcast precedent and under more traditional First Amendment scrutiny as well.<sup>86</sup> Our First Amendment tradition contains

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81. An assessment of those government-industry-public interest group negotiated regulations is beyond the scope of this Article.

82. Campbell, *supra* note 40, at 147-49; Popham, *supra* note 40, at 8-16 (describing events leading up to FCC's decision). See also Comment, Roxana Wizorek, *Children's Television: The FCC's Attempt to Educate America's Children May Force the Supreme Court to Reconsider the Red Lion Rationale*, 47 CATH. U. L. REV. 153, 162-63 (1997) (describing White House summit).

83. Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 938-43 (1997). See also Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 918-19 (1998); Varona, *supra* note 13, at 85; Reed E. Hundt, Chairman, FCC, Remarks to Citizens for a Sound Economy, Spectrum Policy and Auctions: What's Right, What's Left (June 18, 1997), available at <http://www.fcc.gov/Speeches/Hundt/spreh734.html> ("You remember the giveaway of digital TV licenses to today's broadcasters. It was the largest single grant of public property to anyone in the private sector in this century.").

84. See Joint Proposal, *supra* note 72. See also *2006 Report and Order*, *supra* note 6, at paras. 10-12 (congratulating parties on having negotiated a resolution in the DTV context).

85. Although media public interest groups spearheaded license renewal challenges under the FCC's rules contending that broadcasters had not satisfied their children's educational programming requirements, they did not seek judicial review of the FCC's rejections of their claims. There are still several pending license challenges grounded on claims of licensee noncompliance with the children's programming requirements. See John Eggerton, *UCC Challenges Two More TV Licenses*, BROADCASTING & CABLE, Aug. 31, 2005, [http://www.broadcastingcable.com/article/157926-UCC\\_Challenges\\_Two\\_More\\_TV\\_Licenses.php](http://www.broadcastingcable.com/article/157926-UCC_Challenges_Two_More_TV_Licenses.php); John Eggerton, *CDD Challenges DIC Kids Expert*, BROADCASTING & CABLE, Sept. 7, 2004, [http://www.broadcastingcable.com/article/101809-CDD\\_Challenges\\_DIC\\_Kids\\_Expert.php](http://www.broadcastingcable.com/article/101809-CDD_Challenges_DIC_Kids_Expert.php).

86. Professor Krotoszynski has concluded that, although the issue is not clear from doubt, "the government may enact viewpoint-neutral requirements on commercial television broadcasters to meet the educational needs of the nation's children. This result can be reached either by applying *Red Lion* or by rethinking whether commercial children's television programming even constitutes noncommercial speech." Ronald J. Krotoszynski, *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television*

both an autonomy-based strand, historically applied in the print context, and a democracy-reinforcing interpretation that has been deployed since the early twentieth century in the broadcast context.<sup>87</sup> The Supreme Court has historically tolerated a significantly less stringent degree of First Amendment scrutiny for government regulations affecting broadcast speech than it has in connection with newspapers, cable, and the Internet. Having recognized that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them,”<sup>88</sup> the Court has upheld in the broadcast context content regulations akin to those that it has struck down for newspapers.<sup>89</sup>

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*Regulation Must Fail*, 95 MICH. L. REV. 2101, 2124 (1997). Krotoszynski nevertheless concludes that such affirmative obligations are unwise as a matter of policy. *Id.* at 2125-26. See also Krotoszynski, *supra* note 23.

87. See, e.g., Weinberg, *supra* note 13. See generally ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); cf. C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 72-79 (arguing that First Amendment precedents could be read to justify viewpoint-neutral structural regulation of print as well as electronic media) [hereinafter Baker, *Turner Broadcasting*]. For various articulations of the view that the First Amendment is consistent with government intervention to promote democracy via some speech rules, see generally, OWEN M. FISS, LIBERALISM DIVIDED (1996); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Owen M. Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215 (1999); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000) [hereinafter Sunstein, *Television and the Public Interest*]. See also MINOW & LAMAY, *supra* note 40, at 105-37 (the rhetoric of the 1996 Order first adopting the E/I requirements refers extensively to this vision of the First Amendment); C. Edwin Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839, 851-56 (2002) (adopting a broad interpretation of structural regulation) [hereinafter Baker, *Media Concentration*]; Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252-53 (2002) (on the issue of political speech and campaign finance reform).

88. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969). See also *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (“[E]ach medium of expression . . . may present its own problems”) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)); *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 637-38 (1994) (describing adjustment to First Amendment analysis required by the scarcity of broadcast spectrum); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952)).

89. Compare *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down right of reply statute for newspapers), with *Red Lion Broad. Co.* 395 U.S. 367 (upholding the fairness doctrine). Professor Baker has distinguished *Miami Herald* from *Red Lion* because the right-of-reply statute was triggered in *Miami Herald* by the newspaper’s choice of speech; in effect, it was a governmentally imposed punishment for the newspaper’s decision to speak in a particular way. BAKER, *Media Concentration*, *supra* note 87, at 853-54, n.81; Baker, *Turner Broadcasting*, *supra* note 87, at 111-14. However, Professor Baker concludes from that observation not that the First Amendment should preclude content regulation in broadcasting, but rather that government speech interventions designed to promote speech should be acceptable in the print context as well. C. Edwin Baker, *Three Cheers for Red Lion*, 60 ADMIN. L. REV. 861, 862 (2008). See also *McConnell v. FEC*, 540

Despite more than a decade of extended criticism of such broadcast exceptionalism,<sup>90</sup> the Court continues to demonstrate a high degree of tolerance for broadcast regulation, even if its analyses appear to isolate and cabin broadcasting.<sup>91</sup> Thus, it can be argued that the FCC's children's

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U.S. 93, 233-45 (2003) (Breyer, J.) (upholding Title V of the Bipartisan Campaign Reform Act of 2002 (BCRA)); *CBS v. FCC*, 453 U.S. 367 (1981) (upholding reasonable access for federal candidates under Section 312(a)(7) of the Communications Act of 1934); *Pacifica Found.*, 438 U.S. at 758-61 (upholding FCC channeling of indecent programming).

90. Criticisms of the scarcity justification for differential treatment of broadcasting are by now legion. For citations to the central sources, see Varona, *supra* note 13; Yoo, *supra* note 13. The Supreme Court is well aware of the critique of scarcity. *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years.").

91. Even in *FCC v. League of Women Voters*, for example, the Court was "not prepared . . . to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. at 376 n.11. In *Turner I*, the Court distinguished broadcasting from cable:

The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism . . . . In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.

512 U.S. at 637-38 (citations omitted); *accord McConnell*, 540 U.S. at 233-46 (Breyer, J.) (upholding 47 U.S.C. § 315(e), which requires maintenance of political advertising requests by candidates); *Reno v. ACLU*, 521 U.S. at 868-69 (distinguishing Internet transmissions from broadcast on the basis of the scarcity rationale, improbability of "invasive" or accidental reception of indecent material, and the history of "extensive Government regulation" in the broadcast medium). *See also* *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (dictum in Justice Scalia's opinion implying the Court's continued acceptance of broadcast exceptionalism: "Twenty-seven years ago we said that '[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'") (quoting *CBS v. FCC*, 453 U.S. at 395)). The Court has expressed reluctance to undermine long-settled systems and recognized the justificatory power of history in other contexts. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 761 (1996). In addition, the Court may ground broadcast exceptionalism on a recognition of administrative discretion to manage a commons. *See, e.g.*, Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813 (2008). Justice White observed in *Red Lion* that, at the inception of broadcasting, Congress could have required broadcasters to share their frequencies with others, and the fact that it did not choose to do that formally at the time did not mean that the FCC could not constitutionally impose analogies to such spectrum-sharing requirements if it so wished. 395 U.S. at 389. In addition, the precedent upon which *Red Lion* relied to support its conclusion was not a broadcast precedent, but the classic news agency case, *Associated Press v. United States*, 326 U.S. 1 (1945). *Red Lion*, 395 U.S. at 387, 390, 392. *See also* Baker, *Media Concentration*, *supra* note 87, at 861 nn.114-15. One might conclude, then, as does Professor Baker, that *Red Lion* was the Court's way of establishing a rather broad proposition in support of the constitutionality of government attempts to correct for limitations of the market. *See generally id.* To the extent that we read *Red Lion*, then, as a general precedent supporting a governmental role in structuring fairness and access in the communications order, a different question is posed about the Court's continuing adherence to that notion than is posed by simply asking whether the Court's

television rules fit well under the umbrella of the First Amendment broadcasting precedent.<sup>92</sup>

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acceptance of scarcity as a regulatory rationale can still survive the damning criticism to which the idea has been subjected since Ronald Coase suggested that broadcast spectrum be allocated by private property mechanisms. *See, e.g.*, R. H. Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1 (1959). For important critiques, see citations in Varona, *supra* note 13, at n.286. For whatever reason, broadcast regulation still appears to be treated as a First Amendment "special case" by the Court.

92. For example, the FCC, in its children's television orders, relied on broadcast precedents, such as *CBS v. FCC* and *Turner I*, in addition to the *Red Lion* case discussed above. The FCC argued that, like the children's television rules, the statute upheld in *CBS v. FCC* "require[d] broadcasters to air certain types of programming they might not otherwise choose to provide." *1996 Children's Television Rules*, *supra* note 6, at para. 150 (referring to the limited right of access granted by Section 312(a)(7) of the Communications Act to individual candidates running for federal office which was upheld by the Court against First Amendment challenge in *CBS v. FCC*). Indeed, the FCC noted that, by prohibiting broadcasters from having any control over political advertising to be aired by the station pursuant to § 312(a)(7), the compelled speech required by § 312(a)(7) "appears to be significantly more burdensome than the obligation imposed by the CTA." *Id.* Rather than having its editorial discretion effectively eliminated, as under § 312(a)(7), the 1996 children's television requirement allows broadcasters to "retain wide discretion in choosing what programs to provide." *Id.* The FCC also relied on *Turner I*, *see id.*, dealing with the FCC's "must carry" requirement, which compelled local cable operators to carry, upon request and without charge, the signals of local broadcast stations within their service areas. 512 U.S. at 630-32. In *Turner I*, the Court rejected the contention that cable regulations should be reviewed under the limited scrutiny given broadcast regulations, thereby implicitly reaffirming broadcasting's constitutional atypicality, according to the FCC's 1996 Order. *1996 Children's Television Rules*, *supra* note 6, at para. 151. *See also* *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997). If the *Turner* Court could find that indecency regulations and equal time and personal attack rules survived constitutional scrutiny in the broadcast context, then, according to the FCC, "so, *a fortiori*, would the FCC's considerably less intrusive proposal for giving meaningful effect to the Act by defining 'core' educational programming and establishing a procedure that broadcasters can use to assure routine staff processing of the CTA portion of their renewal applications." *1996 Children's Television Rules*, *supra* note 6, at para. 151.

Moreover, the *Turner I* Court found that must-carry rules were content neutral and thus subject only to intermediate, rather than strict, scrutiny. 512 U.S. at 676 (O'Connor J. concurring in part and dissenting in part). Even though Congress's findings had specifically focused on the desirability of diversity of views, local programming, and educational programming, the lead opinion in *Turner I* characterized them as reflecting Congress's acknowledgment that the services provided by broadcast television had some intrinsic value and were worth preserving against the threats posed by cable. *Id.* at 648 (Kennedy, J.). The children's E/I requirements can be characterized similarly. *1996 Children's Television Rules*, *supra* note 6, at para. 152 (concluding that "[o]ur new regulations, like the CTA itself, impose reasonable, viewpoint-neutral conditions on a broadcaster's free use of the public airwaves. They do not censor or foreclose speech of any kind. They do not tell licensees what topics they must address.").

Lower court precedent exists as well. In *Time Warner Entertainment Co. L.P. v. FCC*, the court upheld both the leased access and the public, educational and governmental (PEG) programming provisions of the 1994 Cable Act and a provision of the 1992 Cable Television Consumer Protection and Competition Act which required licensees of direct broadcast satellite (DBS) services to reserve between four and seven percent of their channel capacity "exclusively for noncommercial programming of an educational or

Admittedly, some *Red Lion* critics have seen in more recent Supreme Court cases a distancing from the constitutionally exceptional treatment of broadcasting.<sup>93</sup> Some appellate court opinions addressing structural regulation of the electronic media have dismissed broadcast exceptionalism and required stringent First Amendment scrutiny of FCC regulations.<sup>94</sup> This may be the consequence of an “ideological drift”<sup>95</sup> that has led corporate media interests to appropriate and lead with First Amendment arguments. Moreover, affirmative programming requirements for children arguably extend beyond what even the existing broadcast precedent can justify constitutionally.<sup>96</sup>

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informational nature.” 93 F.3d 957, 973 (D.C. Cir. 1996), *reh’g en banc denied*, 105 F.3d 723 (1997). *See also* Marvin Ammori, *Beyond Content-Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 274 (2009) (arguing that content-promoting rules should receive more First Amendment deference than content-suppressing rules, and that they do so in broadcasting precedent). *See also 2006 Report & Order*, *supra* note 6, at paras. 19, 33.

93. Professor Yoo, for example, has characterized recent Supreme Court cases as reflecting an increasing dissatisfaction with the technology-driven approach to the First Amendment. *See* Yoo, *supra* note 13, at 283-92. More recently, Justice Thomas’s concurring opinion in *FCC v. Fox* articulates doubts about the continuing validity of the foundational precedents for constitutional analysis in broadcasting: “Red Lion and Pacifica were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.” 129 S. Ct. 1800, 1820 (2009). Justice Scalia’s opinion in *FCC v. Fox* does tend in the other direction, however. *See* 129 S. Ct. 1800.

94. *See* Yoo, *supra* note 13, at 292 (characterizing lower court decisions as undermining fundamental regulatory justifications in the broadcast context). *See also* Baker, *Media Concentration*, *supra* note 87, at 851-56 and cases cited therein; Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1037-38 (2004). Some lower courts have treated corporate media entities principally as rights holders, rather than as proxies, trustees, or intermediaries for the public’s expressive interests. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839 (2002). These courts have imposed a significant justificatory burden on the government even for regulations of industry structure. (By contrast, other courts have resisted big media’s appropriation of the First Amendment and upheld FCC structural regulations with less antiregulatory scrutiny. *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).) Media scholars have split on the desirability of these developments. Some have extolled the lower courts as finally recognizing the incoherence of differential broadcast regulation. *See, e.g., Yoo, supra* note 13. Others have decried the purported “Lochnerization” of attempts to regulate media as improperly subjecting mere economic regulation to unduly searching constitutional review. *See* Robinson, *supra* note 83, at 945; Burstein, *supra*, note 94, at 1057-64.

95. Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375-87 (describing “ideological drift” of free speech idea to protect corporate interests). *See also* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 26-29 (2004).

96. For example, the cases on which the FCC has relied for its constitutional analysis can be distinguished from the children’s television rules. In contrast to *CBS v. FCC*, the specific children’s television E/I rules were not statutorily mandated. The Court in *CBS* applied the deferential standard of review of administrative decisions—assessing whether they were arbitrary or capricious. *See* 453 U.S. at 382, 390. The case also concerned an as-



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applied challenge, and the Supreme Court noted the D.C. Circuit's finding that the FCC's statutory interpretation was "a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters." *Id.* at 376 (quoting *CBS v. FCC*, 629 F.2d 1 (D.C. Cir. 1980)). Moreover, the opinion makes much of the fact that the access statute relates to elections. *Id.* at 396. Finally, the majority specifically concludes that the statute did not "impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming." *Id.* at 397. One could question the FCC's notion that § 312(a)(7) of the 1934 Act actually imposes more of a constraint on broadcasters' speech choices than affirmative programming obligations. The reasonable access requirement applies only to political advertising. The constraints on broadcasters approved in *CBS v. FCC* were limited in both duration and access time. And broadcasters' own speech was arguably not compelled—licensees were simply asked to open some room in their schedule for the speech of others.

In the children's television context, government is dictating a particular type of substantive programming that displaces other programming that the broadcaster might prefer to air. Arguably, the children's television rules affect the broadcaster's own speech and editorial decisions more directly than the reasonable access rules for federal candidates. Moreover, although an affirmative access obligation was upheld in *CBS v. FCC*, the Supreme Court also held in *CBS v. Democratic Nat'l Comm.* that the First Amendment did not require CBS to air paid editorials on public issues. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (rejecting group's constitutional right of access claim to air an antiwar commercial on CBS).

As for *Turner I*, the Supreme Court's discussion may be faulted for its analysis of content neutrality. Broadcast regulations were not at issue in *Turner I*, and the Court's remarks about broadcasting were simply dicta. Moreover, the broadcast rules mentioned in *Turner I*, such as the indecency rules that channeled indecent material to late-night hours, differed from the affirmative content obligations involved in the children's rules. And by contrast to the must-carry rules (which provide access for local stations regardless of programming content), the educational television rules create an obligation specifically requiring broadcasters to privilege a particular category of programming. See *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997) (Williams, J., dissenting) (dissenting from denial of rehearing en banc on the ground that *Turner I* was distinguishable from the imposition of quantitative educational television obligations on DBS providers on the grounds discussed above) *denying reh'g* 93 F.3d 957, 973 (D.C. Cir. 1996). Moreover, *Turner I* involved a situation in which Congress was concerned about the effect of cable on the fundamental viability of over-the-air broadcasting. See *Turner I*, 512 U.S. at 633-34 (describing Congressional findings of cable's threat to economic viability of free local broadcast television). See also Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 320-21 ("*Turner I* might be described as holding that some speakers may be restricted in order to enhance the speech of others if the reason is distribution rather than favoritism.>").

Finally, reference to analogous channel set-aside cases decided by the appellate courts does not silence the debate, either. In the DBS context, for example, the *Time Warner* court may have felt compelled to apply existing Supreme Court precedent, regardless of its persuasiveness in the current "post-scarcity" climate. Also, the panel's position could not command a majority of the full D.C. Circuit. A petition for rehearing en banc was denied by a five-to-five vote, with the dissenters arguing that *Red Lion* should not be extended to justify content regulations for DBS providers. See 105 F.3d at 724. The dissenters emphasized that the new DBS technology "already offers more channel capacity than the cable industry, and far more than traditional broadcasting." *Id.* Indeed, those dissenters questioned the continuing viability of *Red Lion* "[e]ven in its heartland application" to broadcasting. *Id.* at 724 n.2. In addition, the court, citing *Turner I*, characterized the set aside as not dictating specific content. *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 977

The next question, therefore, concerns the application of nonbroadcast First Amendment analysis to the children's television rules. The FCC has claimed that the children's E/I programming requirements, when properly construed, should be treated as content-neutral regulations subject to intermediate (rather than strict) constitutional scrutiny.<sup>97</sup> The content neutrality purportedly comes from the fact that the FCC does not attempt to assess programming quality, so long as shows are designed for children and intended to be educational.<sup>98</sup> Arguably, the FCC's children's television obligations are closer to economic regulation than the purposeful and censorious content regulation that is strictly prohibited by the First Amendment. Broadcasters could even be characterized as speech intermediaries rather than traditional First Amendment speakers, especially in the children's television context, because most of them are no longer the content creators at all. While the rules are content-related to the extent that they focus on a particular subject, the reason that they focus on the subject is arguably determined not by administrative preference, but by failures in the structure of the market in electronic media.<sup>99</sup> One could argue, then, that the children's educational programming rules do not pose the dangers

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(D.C. Cir. 1996). With regard to the leased access and PEG channel aspects of the *Time Warner* opinion, the court was addressing a facial challenge to the legislation and explained that, in practice, "were a local authority to require as a franchise condition that a cable operator designate three-quarters of its channels for 'educational' programming, defined in detail by the city council," serious First Amendment concerns would arise. *Id.* at 973. Where the children's educational television rules fit on the court's articulated continuum is unclear.

97. See *1996 Children's Television Rules*, *supra* note 6, at para. 151; *2004 Children's DTV Report and Order*, *supra* note 6, at para. 35. It is beyond the scope of this Article to tackle the theoretical challenges to the attempt to distinguish between content-based and content-neutral government regulation of speech. Both academic and judicial critics have voiced skepticism about the viability of a formal, binary content-based/content-neutral approach to the First Amendment. See, e.g., Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114 (1981). Even for those who think that the distinction is functionally (if not theoretically) workable, drawing the line, in practice, has been judged difficult. See, e.g., *Turner I*, 512 U.S. at 642 (recognizing the difficulty of drawing the line between content-based and content-neutral regulations).

98. See *1996 Children's Television Rules*, *supra* note 6, at para. 152. See also *2006 Report and Order*, *supra* note 6, at para. 19 (arguing that children's television rules in the digital broadcast context do not violate the First Amendment because they merely give "nonmandatory guidance" on how to comply with the CTA and because the CTA itself, which no party to the *2006 Order* has challenged, "reflects a preference for children's educational" television over other content).

99. For a discussion of the market for children's educational television, see *infra* Part IV.E.1.

we associate with content-based rules—at least not to the same degree.<sup>100</sup> The rules arguably inhabit a regulatory reality that lies between traditional content regulation designed to censor particular types of speech and traditional viewpoint regulation. Courts might well apply less searching scrutiny to children’s educational programming requirements if they were convinced that the hybrid character of the rules, with their “pay or play” aspect, truly gave broadcasters a choice not to speak in response to the government’s demand.

Alternatively, even if the content-neutrality argument is found unpersuasive (because it might be argued that the *1996 Rules* specify the governmentally preferred subject matter, seek to define it, and implicitly contain a substantive educational vision), the FCC’s rules may still satisfy more stringent constitutional analysis.<sup>101</sup> The welfare of children has been the most significant trope used, at least in the past decade, by those calling for legal rules to shape socialization norms.<sup>102</sup> The state’s obligation to educate children has been characterized as uncontroversially important.<sup>103</sup>

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100. For example, we might worry that, in imposing content-based rules affecting expression, an administrative agency might in fact be trying to mask viewpoint-based interventions. Or we might fear that content-based rules would force speakers to utter speech with which they disagreed. More generally, we might be concerned that, by allowing government to dictate the content of expression, we would be allowing the state to set the agenda for public discussion and debate. See Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54-57 (1987) (suggesting that content-based laws are more likely to be motivated to restrict speech and to distort public debate). These particular fears are not implicated to a very significant degree by the hybrid regulatory format chosen for children’s educational television.

Admittedly, arguments can be made that the children’s television rules do implicate these concerns. Preferred viewpoints arguably are implicit in the structure of the children’s educational programming policy. Similarly, the requirement that broadcasters air children’s educational programming does affect broadcasters’ expressive agendas. Nevertheless, the FCC’s definition of educational programming does not itself promote any particular viewpoint, regardless of how broadcasters are likely to interpret it. It is also an exaggeration to say that the FCC has hijacked the agenda for public discourse via its children’s E/I rules. Particularly in light of the degree to which the rules preserve broadcaster discretion, the focus on content in the processing guideline is less worrisome than in the traditional content-regulation context. Some have gone further yet, arguing that broadcasters’ expressive choices are commercially motivated and should be treated as commercial speech in any event, subject to more deferential constitutional review. See, e.g., Krotoszynski, *supra* note 23, at 1200.

101. See, e.g., *1996 Children’s Television Rules*, *supra* note 6, at paras. 9, 148-59; *2006 Report and Order*, *supra* note 6, at para. 19 (FCC’s own analysis under purported strict scrutiny).

102. See Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003).

103. See *Television Consumer Protection and Competition Act of 1992* § 2(a)(8)(A), Pub. L. 102-385, 106 Stat. 1460 (1992 Cable Act, which calls the interest in educating children “compelling”). See also *1996 Children’s Television Rules*, *supra* note 6, at para. 153:

The CTA and our regulations directly advance the government’s substantial, and

The Supreme Court's consistent findings about the compelling governmental interest in the protection of children<sup>104</sup> support deference both to Congress's decision to adopt the CTA and to the FCC's decision to promote the improvement of children via regulation. Unsurprisingly, the FCC has claimed that the CTA and its regulations directly advance the government's "substantial, and indeed compelling, interest in the education of America's children."<sup>105</sup> Congress and the FCC have made official findings that television has the power to teach children and is needed to enhance the deteriorating state of public education.<sup>106</sup>

As for the tailoring prong of scrutiny analysis, the discretionary character of the "pay or play" structure should arguably support deference to the FCC. Airing three hours weekly is not the only option provided under the statute (even though it is, in fact, the most convenient option under the current rules applicable in the analog context).<sup>107</sup> Although they

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indeed compelling, interest in the education of America's children. As Congress recognized, "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." In other contexts, the courts and commentators have recognized the government's "compelling" interest in "safeguarding the physical and psychological well being" of minors.

(citations omitted).

104. See, e.g., *United States v. Playboy Entm't Group Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844, 869 (1997); *New York v. Ferber*, 458 U.S. 747 (1982); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968).

105. *1996 Children's Television Rules*, *supra* note 6, at para. 153. See also *2006 Report and Order*, *supra* note 6, at para. 19.

Arguably, this could be the basis for a claim that constitutional deference should be given to broadcast content regulation, not because of the special character of broadcasting, see *supra* text accompanying notes 87-92, but because children's E/I regulation is a regulation about a special, distinct category of speech—speech to children. Maybe, some might say, children are a specially protected group as to whom speech can be regulated, because of the nature of the listener. Since a distinct amount of our First Amendment jurisprudence can be characterized as an attempt to identify categories in which speech will in fact be regulable, it is plausible to make this claim. The problem, however, is that this approach is troublingly expansive and unnecessary for the conclusion that the children's E/I rules should pass constitutional muster.

106. See *1996 Children's Television Rules*, *supra* note 6, at para. 1 (quoting 47 U.S.C. § 303a). See also S. REP. NO. 101-227, at 5-9 (1989); *Education, Competitiveness, and Children's Television: Hearing Before the S. Subcomm. on Comm'n of the Comm. on Commerce, Sci., and Transp.*, 101st Cong. 1-4 (1989).

107. In other words, the very flexibility and imperfection of what some may find unsatisfactory about market-based models in the ecological and environmental contexts may make such models more acceptable when they regulate speech and therefore balance both expressive and other important governmental concerns.

In addition to the First Amendment argument, it is likely that the E/I rules would also satisfy a regulatory takings challenge. Even if the broadcast license today is best thought of in functional terms as a property right, and even though there is a rather stable Supreme Court jurisprudence according to which the government cannot impose disproportionate conditions on property rights, the specifics of the FCC's rules undermine a

do provide a timing benefit in the license renewal process to broadcasters who comply with the suggested programming minima, the rules do not formally mandate or compel a particular amount of children’s programming. The consumer-empowering design of the informational disclosure aspects of the rule is likely to be acceptable as well. The disclosure approach has received judicial and statutory approval in many contexts and has not triggered First Amendment scrutiny.<sup>108</sup> As for the definition of children’s educational programming, it is arguably no more vague and malleable than other statutes that have withstood First Amendment vagueness challenges in the past.<sup>109</sup> Thus, while there are, of

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disproportionate condition argument. For a recent summary of regulatory takings jurisprudence, see, e.g., Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1 (2008).

108. See, e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613, 625 (1999) (describing the benefits of disclosure as a regulatory strategy as “one of the most striking developments in the last generation of American law”). See also Sunstein, *Television and the Public Interest*, *supra* note 87, at 532-33. There has been a move in other regulatory areas to adopt informational regulation strategies (whether to assist consumers, or trigger political checks, or both). For a discussion of the various contexts involving speech in which courts do not see the First Amendment as relevant, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778-80 (2004). For example, despite criticisms of its adequacy, disclosure is the prevailing regulatory strategy in the securities context. See, e.g., Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1 (2003). For detailed discussions of the relationship between securities regulations and the First Amendment, see Antony Page, *Taking Stock of the First Amendment’s Application to Securities Regulation*, 58 S.C. L. REV. 789 (2007); Michael Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006); Symposium, *The First Amendment and Federal Securities Regulation*, 20 CONN. L. REV. 261 (1988). This general trend is based on the notion that disclosure requirements are likely to lead to improved performance. Sunstein, *Television and the Public Interest*, *supra* note 87. Even in the media context, the adoption of the V-chip and its attendant ratings system reflect an assumption that information will empower viewer choice. *Id.* at 533. See also Yoo, *supra* note 13, at 305 (relying on the technological fix provided by the V-chip). Of course, complaints about the ineffectiveness of the V-chip and the ratings system abound. See, e.g., John Eggerton, *Nets Team Up on V-Chip Primer*, BROADCASTING & CABLE, March 30, 2004, available at [http://www.broadcastingcable.com/article/152848-Nets\\_Team\\_Up\\_on\\_V\\_Chip\\_Primer.php?rssid=20105](http://www.broadcastingcable.com/article/152848-Nets_Team_Up_on_V_Chip_Primer.php?rssid=20105); *Empowering Parents NOI*, *supra* note 4, at para. 45 (citing to prior FCC Report discussing various estimates of parental familiarity with the V-chip). See generally Kaiser Family Foundation, V-Chip Studies, <http://www.kff.org/entmedia/vchip.cfm> (last visited Feb. 2, 2010).

109. In the election context, for example, the Supreme Court held that the Bipartisan Campaign Reform Act’s requirement that broadcasters retain records of requests to air messages regarding “political matter of national importance” and “national legislative issue of public importance” was not unconstitutionally vague or overbroad. *McConnell v. FEC*, 540 U.S. 93, 241 (2003). Similarly, the FCC’s post-1987 definition of indecency—defined as “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs”—was found not to be unconstitutionally vague in *Action for Children’s Television v. FCC* (ACT I), 852 F.2d 1332 (D.C. Cir. 1988).

course, counterarguments,<sup>110</sup> this Section concludes that the existing children's educational programming rules likely would be found constitutional.

#### IV. THE EFFECTIVENESS OF THE FCC'S APPROACH

Despite its probable constitutionality under existing law, is the FCC's children's educational television regime effective in application or are there preferable alternatives? The arguments voiced at the recent congressional hearing assumed that the CTA and FCC rules should be both retained and strengthened. But, as Justice Breyer asked in a different context: "Is the game worth the candle?"<sup>111</sup> This Section argues—on the basis both of current<sup>112</sup> empirical data and structural factors—that it is probably not. The FCC has properly insisted on collecting all the available data to inform its analysis and does not appear to have prejudged the result.<sup>113</sup> Ultimately, although the FCC's E/I approach appears to do no harm (and may provide some benefit), it does distract attention from the development of potentially more effective and desirable alternatives.

The regulatory goals articulated by the FCC prior to its current inquiry were underdeveloped and undertheorized. Moreover, its rules have the effect of outsourcing national education policy to commercial entities whose economic imperatives stand in tension with such public obligations. Empirical evidence suggests that the current rules also have not led to an efflorescence of excellent children's educational programming in the over-the-air broadcast context. As evidenced from the extensive briefing on the subject, critics from both sides of the aisle question the rules' effectiveness.<sup>114</sup> There are both economic and structural explanations for

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One of the ways in which the 1996 Children's Television Rules attempted to walk the fine line between governmental regulation and the First Amendment concerns of broadcasters was to define core programming in large part pursuant to "objective" criteria. The only "subjective" element of the definition of core programming is the requirement that the program be significantly designed to have an educational or informational purpose. See *1996 Children's Television Rules*, *supra* note 6. This is still not about quality of result; rather, it is about design and intent, not an assessment of outcome.

110. See, e.g., Reply Comments of Fox Television Holdings, Inc., Status of Children's Television Programming, FCC MB Docket No. 00-167 (rel. Oct. 1, 2007), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6519739005>; Reply Comments of CBS Corp., Matter of Status of Children's Television Programming, FCC MB Docket No. 00-167 (Oct. 1, 2007), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6519739027>. See generally Yoo, *supra* note 13.

111. *Ashcroft v. ACLU*, 542 U.S. 656, 683 (2004) (Breyer, J., dissenting).

112. If, as is likely, the data collected in the pending Empowering Parents proceeding do not differ markedly from what has been available thus far, the record in that proceeding will support this conclusion.

113. *Empowering Parents NOI*, *supra* note 4, at 13179-80.

114. Comments filed in the FCC's rulemaking processes can be found by entering the docket number into its ECFS search tool: [http://fjallfoss.fcc.gov/prod/ecfs/comsreh\\_v2.cgi](http://fjallfoss.fcc.gov/prod/ecfs/comsreh_v2.cgi).

this state of affairs, all of which diminish the possibility that the current approach could ever become very effective.

#### A. *Regulatory Goals in Tension*

With respect to regulatory goals, a review of the CTA and the FCC's approach to children's television since 1996 reveals some degree of tension among multiple goals and uncertainty about the metrics to be used to assess regulatory effectiveness.<sup>115</sup> However, the FCC has neither recognized the differences among these different goals, nor attempted to analyze or

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Filings in the *Empowering Parents NOI* proceeding be found under MB Docket 09-194 and those in the children's educational television proceeding under MB Docket 09-167.

115. The FCC has justified its intervention into children's educational television on a variety of grounds: a statutory obligation; the medium's pervasiveness, influence, and ability to teach; the special needs of children; concern about welfare of television-watching children; the failures of the public educational system; the potential for television to benefit society; the need to protect stations serving the public from more profitable competition; a desire to increase the amount of children's educational programming on television; the correction of predictable market failure in the production of E/I programming; the provision of programming information to parents; and assisting private negotiations by the provision of programming information to media watchdog groups. See *1996 Children's Television Rules*, *supra* note 6, at para. 24 (noting that Congress has required broadcasters to serve the special needs of children); *2006 Report and Order*, *supra* note 6, at para. 4 (noting that television plays a major role in the lives of children and that they watch a significant amount of television before they go to school formally); see also *2004 Children's DTV Report and Order*, *supra* note 6, at para. 3; *1996 Children's Television Rules*, *supra* note 6, at para. 155 (finding that television "has an influence on children in our society rivaled only by family and school," "a pervasive presence in the lives of American children," and that "the government's interest in the intellectual development of our nation's children is at least as significant as its interest in protecting them from exposure to indecent material"); *2006 Report and Order*, *supra* note 6, at para. 5 ("Congress has recognized that television can benefit society by helping educate and inform children."); *1996 Children's Television Rules*, *supra* note 6, at para. 22 (characterizing the goal of the CTA as increasing the amount of children's educational programming on television); *id.* at paras. 1, 29-30 (noting that the rules were adopted in order to correct market failure); *id.* at paras. 6, 125 (explaining rules as a way to create a level playing field for broadcasters to air children's television). For discussions of studies demonstrating the uses and effectiveness of research in the production of children's educational programming, see "G" IS FOR GROWING: THIRTY YEARS OF RESEARCH ON CHILDREN AND *SESAME STREET* (Shalom M. Fisch & Rosemarie T. Truglio eds., 2001). See also AMY B. JORDAN, THE FIRST ANNUAL ANNENBERG PUBLIC POLICY CENTER'S CONFERENCE ON CHILDREN AND TELEVISION: A SUMMARY 19-20 (1996) [hereinafter APPC FIRST ANNUAL CONFERENCE SUMMARY]; Christopher Stern, *FCC's Hundt Takes Children's Television Under His Wing*, BROADCASTING & CABLE, July 24, 1995, at 61 (Chairman Reed Hundt's competitive level playing field explanation for the rules).

With respect to expanding the E/I rules to broadcasters' digital streams, the FCC stated that it had three goals: to create a commensurate increase in children's programming, to give broadcasters flexibility, and to deal with the lack of parental awareness. See *2004 Children's DTV Report and Order*, *supra* note 4, at para. 17. The FCC saw it as "entirely consistent with the First Amendment to ask trustees of the public airwaves to pursue reasonable, viewpoint-neutral measures designed to increase the likelihood that children will grow into adults capable of fully participating in our deliberative democracy." *1996 Children's Television Rules*, *supra* note 6, at para. 154.

mediate between them.<sup>116</sup> If it did, it might have to explore the tensions between some of them, the uncertainties on which many are based, and the fact that they would not all, in operation, lead to the same types of rules.<sup>117</sup>

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116. For example, regulations for the improvement of children implicate different possible interests, such as the following: helping children achieve their roles as citizens and members of society; helping them learn; promoting their intellectual development; helping parents educate their children; redressing the market failure in the commercial, children's television market; providing a counterweight to the influence of commercial television; facilitating the state's obligation to educate children; and promoting diversity of ideas. The language of the *1996 Children's Television Rules* reflects a number of these themes but does not discuss the differences among them.

117. The following are some of the questions raised by this recitation of multiple regulatory goals: For example, it is true that Congress, in 1990, found a need for broadcasters to serve the child audience. But this general congressional finding does not necessarily lead to the specific rules chosen by the FCC in 1996 and extended thereafter. Moreover, even if we agree that over-the-air television stations should serve the special needs of children, how are those needs to be defined? In other contexts, scholars have challenged the notion of the child as "natural" and a precultural category and discussed the social construction of the ideas of childhood and the child. See, e.g., CONSTRUCTING AND RE-CONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James & Alan Prout eds., 1990). Moreover, despite the teaching effectiveness of some television programming, research suggests that children may well be harmed by watching too much television daily, especially in the younger years. See, e.g., Dmitri A. Christakis et al., *Early Television Exposure and Subsequent Attentional Problems in Children*, 113 PEDIATRICS 708 (2004); Amy B. Jordan et al., *Reducing Children's Television-Viewing Time: A Qualitative Study of Parents-Viewing and Their Children*, 118 PEDIATRICS 1303 (2006). But see Daniel R. Anderson, *Educational Television Is Not an Oxymoron*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 26-33 (1998); Huston & Wright, *supra* note 42, at 12-14, 17-21.

To the extent that the FCC's goal is to increase the amount of children's educational television over-the-air, it is not clear that an insufficiency as such has been demonstrated. The market disincentives to produce quality children's E/I programming in wholly advertiser-supported media should not, in themselves, lead to a presumption of insufficiency in light of the extent to which cable television and PBS have virtually appropriated the field of children's programming.

The relationship between "bad" and "good" children's educational programming is also complex. Is it not the best way for broadcasters to serve the special needs of children to forgo airing the bad children's entertainment programming associated with violence and consumption? But is it necessarily the case that requiring good programming will eliminate bad programming? What kind of metric can we use to assess whether this goal is being achieved?

The question of quality and educational success is also fundamentally comparative. See *infra* notes 223-24 and accompanying text. Moreover, child psychology is an evolving science. There is not necessarily a clear consensus on the determinants of effective children's educational programming (especially when we move away from the clearly cognitive, curricular-style lessons of *Sesame Street*). Even as venerable a children's educational program as *Sesame Street* has been questioned with respect to the educational character of some of its format decisions. See SHALOM M. FISCH, CHILDREN'S LEARNING FROM EDUCATIONAL TELEVISION: SESAME STREET AND BEYOND 19-20 (2004). Reliance on expertise is hardly a foolproof standard. Broadcasters that developed content for children in response to the FCC's requirements apparently did so in consultation with outside experts, most from academia—at least in the early years of the rules. Karen Hill-Scott, *Industry Standards and Practices: Compliance with the Children's Television Act*, in HANDBOOK OF



Moreover, when the E/I rules are addressed in light of the broader, overall regulatory scheme, it becomes clear that the commercial advertising time limits of the CTA ironically undercut the ability of broadcasters to generate ever-improving substantive programming for children.

In addition to the complex relationships of these goals inter se, they also stand in tension with the FCC's concern for the preservation of the editorial freedom and expressive interests of broadcasters in this area. Thus, for example, although the FCC adopted its first definition of children's educational programming in its 1996 rules, the definition was

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CHILD. AND THE MEDIA 605, 607 (Dorothy Singer & Jerome Singer eds., 2001). Nevertheless, recent studies complain of the insufficiency of quality E/I programming. See *infra* Part IV.D.

To the extent the rules are designed to promote full participation in deliberative democracy, it is unclear how they will accomplish this given their particular structure. Obviously, this depends on a number of factors: one's vision of deliberative democracy and participation (and whether there is an implicit viewpoint in this goal, contrary to the FCC's claims), as well as how and whether the goal of democratic participation is promoted by television (particularly in light of the discretion given broadcasters with respect to their E/I compliance).

Despite its attempts to find the middle way, critics from all points of view can also find fault with the FCC's definition of core educational programming. The task of crafting a substantive definition of children's educational programming is fraught with difficulties and line-drawing problems. It is unclear why programming containing pro-social lessons cannot—whether designed for adults or older children—achieve the same sorts of educative effects as those implicit in the FCC's definition of children's E/I programming. It also begs the question why we should distinguish between programming designed to educate children and general audience programming that has some educational value.

As for the market argument, with respect to the FCC's claim that the rules create an even playing field among broadcasters, it is not clear whether this is true. For example, consolidation in the media industry can have an impact on licensees that is likely to skew such economic calculations. As a result of Disney's ownership of ABC, for example, ABC presumably has more economical access to children's educational programming. ABC's Disney-based children's E/I programming supports this conclusion. See, e.g., CHRISTY GLAUBKE, ET AL., *BIG MEDIA, LITTLE KIDS 2* (2007) (finding that children's television offerings dropped significantly after FCC relaxed duopoly/triopoly rules).

Moreover, this FCC argument makes a number of untested assumptions about the ways in which broadcasters use competitor comparisons. The data discussed below suggest that a significant percentage of broadcasters are barely complying with the FCC's E/I rules. It is unclear how the other stations in the market assess such programming by their competitors. Moreover, the underlying market failure is not that some broadcasters wish to air children's educational programming but that they will be deterred by their competitors' failure to do so. Rather, as has been found by Congress and the FCC, all broadcasters face the same economic disincentives to air children's educational programming. See James Hamilton, *Private Interests in "Public Interest" Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177 (1996); William Melody, *CHILDREN'S TELEVISION: THE ECONOMICS OF EXPLOITATION* (1973). Thus, a broadcaster that wishes to air high-quality children's E/I programming will lose money regardless of what its competitors do (of course, it could lose more money than its competitors).

To the extent that the E/I rules are designed to serve as an adjunct to public education, they also raise questions about federal education policy. See *infra* Part IV.B.

designed to promote as much licensee freedom as possible.<sup>118</sup> The FCC has made clear that it “will ordinarily rely on the good faith judgments of broadcasters” with respect to children’s educational programming.<sup>119</sup> Ultimately, these multiple sets of tensions undermine the potential effectiveness of the current FCC’s E/I rules.

### B. *National Education Policy?*

To the extent that the CTA and the FCC’s rules focus on the potential of television to act as an adjunct to the public education system, the FCC’s guidelines also constitute a federal experiment with outsourcing educational responsibility to the private sector. While this unintended consequence can be both praised and criticized, it is at least clear that it has been undertheorized. Nor has the FCC coordinated its initiatives with either state or federal departments of education.

In principle, the FCC’s children’s educational programming requirements could lead to an improved national supplement to the variability in the scope and quality of local, decentralized public education. They could inculcate a common learning culture in today’s youth, regardless of the incommensurability of students’ diverse local educational experiences. This could be quite desirable, particularly to the extent that racial and economic inequalities hinder the effectiveness of universally available public education. At a minimum, it does not seem inconsistent with the goals of federalized education policy.

On the other hand, there has been no analysis looking at whether the FCC’s decision to place the educational mission in the hands of private entities with economic incentives to produce inexpensive programming is the best decision for education policy.<sup>120</sup> If we accept the recent

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118. *1996 Children’s Television Rules*, *supra* note 6, at para. 4. For example, the goal of the definition of “core” children’s educational programming was to enhance the quality of children’s educational programming while respecting broadcaster discretion as much as possible through the adoption of “objective” metrics focused on the process of creation and distribution rather than substantive assessments of quality. *Id.*

119. *1996 Children’s Television Rules*, *supra* note 6, at paras. 4, 88. The FCC assured broadcasters that “we are not interested in influencing—or even knowing—the viewpoint of any core programming. The test of whether programming qualifies as core does not depend in any way on its viewpoint, but solely on whether it is ‘specifically designed’ to serve children’s educational and informational needs.” *Id.* at para. 87.

120. It is true that school boards sometimes consult with private entities in the development of school curricula, for example. In those situations, however, the official, public school boards are still the ultimate arbiters and exercise final control over content. That would not be the same in the broadcasting context, particularly in light of the FCC’s explicit expression of the discretion granted broadcasters for the substantive content of their educational offerings. *See* 47 C.F.R. § 73.671, n.1.

Some might argue that the FCC’s promotion of national education policy does not appropriately balance the interest in a national culture with traditional assumptions about the

assessments that find the children's programming characterized by broadcasters as educational to be actually of low quality,<sup>121</sup> we might wonder whether the goal of a high-quality national education is (or realistically can be) met through the half-hearted compliance of commercial broadcast stations with regulatory requirements. Even if it can be, will the national fare be skewed in ways that should be studied because of the advertiser-supported character of the medium?<sup>122</sup> And is it not possible that the FCC's goals could be undermined if the combination of challenging economic circumstances and the purported availability of educational programming on television would lead to funding reductions for some public school programs? Might there be greater advantages to the development of national education policy through the coordinated efforts of the various responsible governmental departments and agencies than through the post-1996 efforts of the FCC?

### C. *Considerations of Regulatory Scarcity*

Media regulation is doubtless subject to regulatory scarcity; regulators must select among numerous plausible policy initiatives. They do so in light of structural, economic, and political factors. The question this raises is how should the benefits of the children's television rules be assessed against the systemic effect of the FCC's media interventions overall.

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local and public character of education policy. Traditionally, the federal, state, and local relationship with respect to education has been characterized by much local autonomy, although the influence of the federal government on state and local education policy has increased significantly in recent years with the passage of the No Child Left Behind Act of 2001. Pub. L. No. 107-110, 115 Stat. 1425. *See also* PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005 (2006) (describing education federalism); MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY (2009). And, although state requirements have enhanced uniformity over local schools at least in some jurisdictions as well, local school boards and school authorities still have significant autonomy in U.S. education. This decentralization has led to significant variation in educational coverage, educational diversity, and educational quality across the country.

121. Recently, a report by the children's advocacy group Children Now concluded that only thirteen percent of shows claimed to satisfy the E/I requirement are highly educational, while twenty-three percent are minimally educational. Wilson, Kunkel & Drogos, *supra* note 17 (also finding that children's educational television relies mostly on social-emotional lessons (sixty-seven percent of all shows) and neglects children's cognitive needs, such as art, nutrition, health, and mathematics). *See also infra* Part IV.D.

122. Analogously, there have been complaints about the commercialism of Channel One, which has been made available to public schools. *See, e.g.,* Lisa Jacobson, *Advertising, Mass Merchandising, and the Creation of Children's Consumer Culture*, in CHILDREN AND CONSUMER CULTURE IN AMERICAN SOCIETY: A HISTORICAL HANDBOOK AND GUIDE 1, 19 (Lisa Jacobson ed., 2008); Christine M. Bachen, *Channel One and the Education of American Youths*, 557 THE ANNALS AM. ACAD. POL. & SOC. SCI. 132 (1998). *See also* ROY F. FOX, HARVESTING MINDS: HOW TV COMMERCIALS CONTROL KIDS 155-61 (1996).

Airtime programming decisions are a zero-sum game. If broadcasters have to provide a significant amount of children's educational programming, they will be displacing some other kinds of content that might otherwise air.<sup>123</sup> The question, then, is whether a regulatory policy that calls for the airing of children's educational programming on commercial stations—without enforceable quality requirements, and even when large percentages of the audience are already wedded to cable and public television—will unduly displace other valuable programming on at least some part of the broadcast medium.

For example, today's media has a striking need for an expanded commitment to serious journalism.<sup>124</sup> With the decline in the fortunes of the daily newspaper, the "if it bleeds, it leads" tunnel vision of local television news, the challenges to the traditional business model of the mainstream media, and the increasing expense of investigative reporting, among a host of other factors, serious journalism is threatened at every turn. This is particularly worrisome in light of the expanded powers of the post-9/11 state and the widespread failure in the private commercial world. Hard-hitting journalism of the kind that has toppled presidencies, no less than coverage of more local significance, is at risk. Without minimizing the potential social value of easily accessible high-quality children's educational programming, it is not irrational to wonder whether society might not be better served by promoting worthy journalism instead of the "so-so" children's E/I profile over broadcast television generated by the existing FCC rules. At least until the current regime is improved, regulatory scarcity counsels more attention to journalism. After all, at least some quality children's E/I television *is* available on cable and public television. Investigative journalism is still looking for its home.

#### *D. The Empirical Evidence So Far—Mixed Outcomes*

Given the complexities associated with mandating children's educational programming, it would be useful to understand empirically the effects of the FCC's rule since its inception in the "real world." Despite the fact that broadcasters are required to file with the FCC (and make publicly available) quarterly forms listing their children's educational

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123. One possibility is that children's educational programming will simply replace the more undesirable children's entertainment programming that the broadcasters would otherwise air. Another possibility is that, while some broadcasters would use children's educational programming to displace children's entertainment programming, others would displace different types of pro-social programming instead.

124. See Levi, *supra* note 28. See also Dan Rather, *The News Americans Need*, WASH. POST, Aug. 9, 2009, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080703183.html>.

programming,<sup>125</sup> and despite FCC promises that FCC Staff will provide empirical studies of the rules' effects every three years,<sup>126</sup> there has been only limited empirical study of the subject.<sup>127</sup>

Specifically, the evidence thus far consists of one FCC Staff study addressing programming until 1999,<sup>128</sup> three annual reports by the Annenberg Public Policy Center of the University of Pennsylvania addressing pre-2000 data,<sup>129</sup> and one recent academic report prepared on behalf of the children's advocacy group Children Now in 2008.<sup>130</sup>

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125. See 47 CFR §§ 73.671, 73.673, 73.3526(e)(11)(iii) (2008).

126. See *2004 Children's DTV Report and Order*, *supra* note 6, at para. 69.

127. Wilson, Kunkel & Drogos, *supra* note 17, at 4 ("Since the completion of the last Annenberg Center study in 2000, no systematic research has been conducted to evaluate how well the broadcast industry is fulfilling its obligation to provide educational and informational television programming for the nation's children."). Dr. Amy Jordan and her colleagues at the Annenberg Public Policy Center (APPC) conducted three annual studies of children's E/I programming after the rules were first adopted. The first study was AMY JORDAN, ANNENBERG PUB. POLICY CTR., *THE STATE OF CHILDREN'S TELEVISION: PROGRAMMING FOR CHILDREN OVER BROADCAST AND CABLE TELEVISION* (1997), available at [http://www.annenbergpublicpolicycenter.org/Downloads/Media\\_and\\_Developing\\_Child/Childrens\\_Programming/19970609\\_State\\_of\\_Children/19970609\\_State\\_of\\_Children\\_report.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/19970609_State_of_Children/19970609_State_of_Children_report.pdf) [hereinafter APPC 1996-97 STUDY]. The next study was KELLY SCHMITT, ANNENBERG PUB. POLICY CTR., *THE THREE HOUR RULE: IS IT LIVING UP TO EXPECTATIONS?* (1999), available at [http://www.annenbergpublicpolicycenter.org/Downloads/Media\\_and\\_Developing\\_Child/Childrens\\_Programming/19990628\\_three\\_hour\\_expectations/19990629\\_three\\_hour\\_expectations\\_report.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/19990628_three_hour_expectations/19990629_three_hour_expectations_report.pdf) [hereinafter APPC 1998-99 STUDY]. Finally, Dr. Jordan published the third study: AMY JORDAN, ANNENBERG PUB. POLICY CTR., *IS THE THREE-HOUR RULE LIVING UP TO ITS POTENTIAL?* (2000) [hereinafter JORDAN, THREE-HOUR RULE].

The FCC did open an inquiry into the status of broadcaster compliance with the children's E/I rules, but while the proceeding is still pending, the FCC has not yet released any studies or conclusions. FCC Seeks Comment on the Status of Children's Television Programming, *Public Notice*, 22 F.C.C.R. 7267 (2007). The FCC has explicitly incorporated the record of that proceeding into the currently pending *Empowering Parents* inquiry. *Empowering Parents NOI*, *supra* note 4, at n. 36. We await the filings in that proceedings for further data.

For a survey of the twentieth century literature on children and television in general, see Norma Pecora, *The Changing Nature of Children's Television: Fifty Years of Research*, in *CHILDREN AND TELEVISION: FIFTY YEARS OF RESEARCH* (Pecora, Murray & Wartella, eds. 2007).

128. Mass Media Bureau Policy and Rules Division, FCC, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines 1997-1999* (2001) [hereinafter FCC Staff Report].

129. See, e.g., Jordan, *supra* note 54; JORDAN, THREE-HOUR RULE, *supra* note 127; APPC 1998-99 STUDY, *supra* note 127, at 26.

130. Wilson, Kunkel & Drogos, *supra* note 17. See also *Empowering Parents NOI*, *supra* note 4, at 13179-80 (noting this Report and requesting further data). In addition, the Children's Media Coalition filed an Appendix of empirical data along with its comments in the FCC's 2007 inquiry into the status of children's television programming. The data, which are limited in its scope, have been collected by a review of forms filed with the FCC. *Children's Media Policy Coalition Comments*, *supra* note 22, at app. I. The Coalition's data appear consistent with those of the *Children Now Report*.

These empirical data reveal mixed results. While almost all broadcast licensees purport to comply with the FCC's three-hour guidelines, few stations significantly exceed that amount of children's educational programming. Moreover, the educational quality of the programming overall has been diminishing in the past decade, broadcast E/I programming is viewed by experts as mixed at best, and most broadcasters air their E/I programming on weekend days rather than during the week.<sup>131</sup>

First, the data on the number of hours of weekly E/I programming support the conclusion that the majority of stations responded to the FCC's 1996 rules by increasing the number of hours of children's educational programming they aired.<sup>132</sup> Numerous stations aired more than the three hour minimum of E/I programming immediately after the rules were adopted.<sup>133</sup> There was a consensus among the researchers at the time that commercial broadcasters would not offer much educational programming for children without the FCC's requirements.<sup>134</sup> Almost a decade later,

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131. Wilson, Kunkel & Drogos, *supra* note 17, at 4-5, 11-23.

132. FCC STAFF REPORT, *supra* note 128. The 1999 FCC Staff Report—the only empirical study thus far released by the FCC—concluded that the majority of stations aired between three and four hours per week of core E/I programming and complied with the rules' informational requirements during the 1997–99 period. *Id.* at para. 27. Thus, the FCC Staff concluded that, with the exception of some program preemption problems, particularly for West Coast affiliates of the three largest networks, the 1996 policy was effective in promoting a floor of core educational programming. *Id.* at paras. 28-31, 48. Studies of pre-2000 data by the APPC confirmed the FCC Staff Report. APPC 1996-97 STUDY, *supra* note 127; *see also* APPC 1998-99 STUDY, *supra* note 127. The number of E/I hours aired was a contrast to the pre-1996 findings. *See, e.g.,* Jordan, *supra* note 54, at 109; JORDAN, THREE-HOUR RULE, *supra* note 127, at 21 (seventy-seven percent of programs moderately or highly educational in Philadelphia market from 1997–2000); Schmitt, APPC 1998–99 STUDY, *supra* note 127, at 26 (eighty percent of programs met FCC's rule requirements). *See also* Kunkel & Canepa, *supra* note 10, at 397, 408-14. The 2000 APPC report observed that local broadcasters had chosen to air between three and four hours per week of educational programming since 1997 in order to qualify for expedited license review. *See* JORDAN, THREE-HOUR RULE, *supra* note 127, at 25.

133. The Annenberg studies thus concluded that children's educational television in the United States was "both expanding and improving." DALE KUNKEL & BRIAN WILCOX, *Children and Media Policy*, in HANDBOOK OF CHILDREN AND THE MEDIA 589, 598 (Dorothy G. Singer & Jerome L. Singer eds., 2001) (characterizing Annenberg findings overall). A study of "industry insiders," including network executives, children's television producers, and consultants, conducted by one of APPC's researchers in the late 1990s indicated that "most respondents felt that the Three-Hour Rule marked a turning point in the quality and availability of children's educational programming." Jordan, *supra* note 54, at 111.

134. Jordan, *supra* note 54, at 112. Some explicitly admitted this in the press. *See, e.g.,* Brian Lowry, *On TV: Where Do the Kids Fit In?*, L.A. TIMES, Dec. 12, 2001, at F1 ("NBC acknowledged last week that the network would have exited the children's business entirely by now were it not for the FCC guidelines."). *See also* Frank Ahrens, *That's All, Folks; Saturday-Morning Tradition Fades as Networks Bow Out on Kids' Shows*, SEATTLE TIMES, Jan. 26, 2002, at A3; Meg James, *TV Networks Find Ways to Stretch Educational Rules*, L.A. TIMES, Feb. 23, 2002, at A1 ("Increasingly, the only thing keeping the major networks in children's programming is the federal requirement that their stations air three hours a

however, the *Children Now Report* was more pessimistic about the effectiveness of the requirements, concluding that "the passage of time since the FCC's last policy ruling on this topic in 1996 may be dampening the broadcast industry's commitment to children's educational programming."<sup>135</sup> The *Children Now Report* asserted that, although stations industry-wide continued to meet the 3-hour standard, averaging 3.32 hours per week of E/I programming, 59 percent aired only the minimum of three hours.<sup>136</sup> Moreover, the study found that market size was negatively correlated with the amount of E/I programming delivered, with major market stations delivering the lowest average amount of children's programming, at slightly over three hours per week.<sup>137</sup> In addition, the *Children Now Report* revealed that seventy-five percent of broadcasters have reverted to presenting children's E/I programming only on Saturdays and Sundays,<sup>138</sup> despite the fact that children watch a significant amount of television during the week and more weekday educational programming had aired in prior years.<sup>139</sup> In addition to limiting E/I programming on weekdays, this meant that more of the shows would be preempted by other programming (such as sports events).<sup>140</sup> Parents still face difficulties becoming aware of E/I programming because newspapers and television guides do not typically provide adequate information.<sup>141</sup>

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week of educational programming."). Television stations certainly did not significantly increase their children's educational offerings in response to the specific exhortation in the CTA to air programming designed for them. See Kunkel & Goette, *supra* note 54, at 306-07; Jordan, *supra* note 54, at 112 and sources cited therein.

135. Wilson, Kunkel & Drogos, *supra* note 17, at 17.

136. *Id.* at 11-12. The 2008 study found that 59% of stations provided only the minimum of three hours per week of children's E/I programming, 37% exceeded that standard (programming between 3.1 and 4.0 hours per week), and 3% exceeded 4 hours per week. *Id.* Although the study strongly implies that the coverage is insufficient, it is currently the case, based on the study data, that less than 3% of the stations overall air less than 3 hours per week of children's E/I programming. *Id.* at 12 tbl.3.

137. *Id.* at 11.

138. *Id.* at 12. "[T]he largest markets had the lowest percentage of stations that aired weekday programming (22%), whereas the smallest markets had the highest percentage (32%)." *Id.* As the study concludes, "the large majority of stations follow a dominant pattern that fails to provide educational children's programming Monday through Friday." *Id.* at 13. See also *Children's Media Policy Coalition Comments*, *supra* note 22, at 5-6 (reporting on results of survey conducted by the Children's Media Policy Coalition in response to the FCC's 2007 inquiry into the status of children's television programming).

139. *Children's Media Policy Coalition Comments*, *supra* note 22, at 6, app. I. For recent data regarding children's media use, see Comments of Pew Research Center's Internet & American Life Project, Empowering Parents and Protecting Children in an Evolving Media Landscape, FCC MB Docket No. 09-194 (rel. Feb. 25, 2010).

140. *Children's Media Policy Coalition Comments*, *supra* note 22, at ii, 6-7.

141. See 2004 *Children's DTV Report & Order*, *supra* note 6, at para. 17; 2000 *Children's Digital TV NPRM*, *supra* note 49, at para. 38; Wilson, Kunkel & Drogos, *supra* note 17, at 5-6; APPC 1998-99 STUDY, *supra* note 127, at 25.

Beyond the question of formal compliance is a more qualitative assessment, looking at the educational effectiveness of the CTA-responsive programming aired by broadcasters.<sup>142</sup> The *Children Now Report* concluded that, while the proportion of shows with minimal educational quality has “held relatively constant over the past decade,” the majority of shows were “moderately educational,” and “high-quality children’s educational programming [was] down dramatically.”<sup>143</sup> The *Children Now Report* found that only thirteen percent of E/I episodes were classified as highly educational in the 2007–08 season, from a high of twenty-nine percent in 1997.<sup>144</sup>

Moreover, there continues to be a distinct skew toward social-emotional rather than cognitive-intellectual programming aired for children by commercial stations since the late 1990s.<sup>145</sup> And although the largest

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142. Unlike the FCC Staff study, which limited itself to quantitative analysis, the recent Children Now study and the APPC reports also contained qualitative aspects. See, e.g., Wilson, Kunkel & Drogos, *supra* note 17, at 4 (articulating goal of “evaluat[ing] the educational quality of the most widely viewed shows”).

143. Wilson, Kunkel & Drogos, *supra* note 17, at 17. “[T]he amount of E/I programs judged to be highly educational has dropped by more than half since the first Annenberg study was conducted.” *Id.* Twenty percent of the children’s E/I programs were judged highly educational by the Annenberg Center scientists in 2000 (a percentage already sharply lower than the findings of prior annual reports). *Id.* (describing diminishing educational quality from twenty-nine percent in 1997–98, to twenty percent in 1999–2000, as found by the Annenberg Public Policy Center team). With regard to educational strength, the APPC Report found that “77 percent of the E/I episodes in the sample were judged to meet the letter (and sometimes the spirit) of the FCC guidelines.” JORDAN, THREE-HOUR RULE, *supra* note 127, at 3. These numbers are consistent with prior findings subsequent to the adoption of the 1996 children’s television guidelines. In earlier findings, social scientists affiliated with the APPC found that 38.8% of the programs in an earlier sample of children’s programming could be considered high quality, with 37% considered low quality in the same market as that studied later in a subsequent APPC study. Amy B. Jordan & Emory H. Woodard, IV, *Growing Pains: Children’s Television in the New Regulatory Environment*, 557 THE ANNALS AM. ACAD. POL. & SOC. SCI. 83, 85 (1998). Twenty-three percent of the studied programs were judged to be “minimally educational.” JORDAN, THREE-HOUR RULE, *supra* note 127, at 4. “Minimally educational” programs are those that “failed to meet the APPC educational benchmarks and were unlikely to provide substantive lessons for the audience.” *Id.* In fact, the report found that “[e]ach year one fifth to one quarter of the programs labeled E/I have little educational value.” *Id.* at 28.

144. Wilson, Kunkel & Drogos, *supra* note 17, at 17. To assess educational quality, the *Children Now Report* used six criteria: clarity, integration, involvement, applicability, importance, and positive reinforcement. *Id.* at 8-9. While the first four criteria were adapted from previous APPC studies evaluating E/I programming, the last two criteria—lesson importance and lesson reinforcement—were new to the *Children Now Report*. *Id.*

It should be noted that the broadcaster community has challenged the findings of the *Children Now Report*. See *NAB Empowering Parents Comments*, *supra* note 33, at 18 (Feb. 24, 2010).

145. Wilson, Kunkel & Drogos, *supra* note 17, at 13-16. In the earlier study, “57 percent of the programs were judged to address the social/emotional or cognitive/intellectual needs of children in some significant way.” JORDAN, THREE-HOUR RULE, *supra* note 127, at 20. The *Children Now Report* shows that seventy-four percent of the episodes studied contained



share of E/I programming (fifty-three percent) was targeted to elementary school children (thirteen percent targeted to preschoolers and thirty-three percent to teenagers),<sup>146</sup> the educational quality of the programming was higher for programs targeted to the teenage/preteenage audience than to that aimed at preschool children.<sup>147</sup> In addition, although the majority of E/I episodes did not contain physical aggression, they did contain social aggression (with twenty-eight percent featuring a substantial amount of aggression).<sup>148</sup>

When comparing the E/I programming on commercial stations to that aired by the PBS network, the *Children Now Report* found that educational quality varied by channel type, with public broadcasting episodes achieving higher educational quality.<sup>149</sup> The type of primary lesson also differed significantly by channel type—with fifty-five percent of the episodes of PBS featuring cognitive-intellectual (rather than social-emotional) lessons.<sup>150</sup> According to the study, commercial broadcasters aired twice as many shows with “high amounts of aggression.”<sup>151</sup>

### E. Explaining the Study Results

A closer look at the broadcaster incentives, internal FCC factors, and factors regarding audience information and access can account for the complex reality of broadcast children’s educational television programming.

#### 1. Broadcaster Incentives and Market Developments

A basic rationale for both the congressional passage of the CTA in 1990 and the three-hour rule adopted by the FCC in the *1996 Children’s Report and Order* rested in large part on perceived market failure.<sup>152</sup> The

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social-emotional lessons. Wilson, Kunkel & Drogos, *supra* note 17, at 13-14. The most common type of social-emotional lesson involved teaching positive interaction with others, followed by lessons about self-esteem and self-restraint. *Id.* Cognitive-intellectual lessons were less frequent, with fewer than half of the episodes (forty-four percent) containing any cognitive-intellectual aspects. *Id.* at 14 & tbl.5. Only three percent of the lessons were about art or cognitive skills, and only one percent were about teaching math. *Id.* Moreover, despite the childhood obesity epidemic frequently featured in the nation’s newspapers, the recent study shows that only ten percent of the programs showed health-related lessons. *Id.* at 15.

146. Wilson, Kunkel & Drogos, *supra* note 17, at 15 & fig. 2.

147. *Id.* at 18 & fig. 3.

148. *Id.* at 18-19.

149. *Id.* at 20 & fig. 5.

150. *Id.* at 20.

151. *Id.* at 21.

152. See S. REP. NO. 101-227, at 5-9 (1989); see also *1996 Children’s Television Rules*, *supra* note 6, at paras. 1, 29-34; *2000 Children’s Digital TV NPRM*, *supra* note 49, at para. 5. Scholarship in this area uniformly assumes the likelihood of market failure with regard to children’s television programming—whether the scholars are of a regulatory or deregulatory

FCC claimed that the market would underproduce children's educational programming because of the advertising-supported character of broadcasting. The literature has identified four continuing barriers to the production and airing of high-quality children's programming: the intense competition for advertisers' dollars, the heavy reliance on ratings, the perceived need to target the largest possible audience, and the narrow margin of profit.<sup>153</sup>

Because the child audience is much smaller than the adult population and therefore a niche market,<sup>154</sup> because children are not well-rounded consumers of the full panoply of advertised products and are therefore less desirable to advertisers,<sup>155</sup> and because many seek educational programming on cable and PBS,<sup>156</sup> analysts conclude that the child

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bent. See, e.g., THOMAS KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 82 (1994); MINOW & LAMAY, *supra* note 40; C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997); Candeub, *supra* note 23; James T. Hamilton, *Private Interests in "Public Interest" Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177, 1180-81 (1996); cf. Robert Corn-Revere, CATO INSTITUTE, *Pol'y Analysis No. 268: Regulation in Newspeak: The FCC's Children's Television Rules* (1997) (arguing that government compulsion can only increase the supply of children's E/I programming, but cannot manufacture the demand).

153. Amy B. Jordan & John L. Sullivan, *Playing by the Rules: Impact and Implementation of Children's Educational Television Regulation Among Local Broadcasters*, 4 COMM. L. & POL'Y 483, 501-05 (1999); see also KEITH S. BROWN & ROBERTO J. CAVAZOS, EMPIRICAL ASPECTS OF ADVERTISER PREFERENCES AND PROGRAM CONTENT OF NETWORK TELEVISION, MEDIA BUREAU STAFF RESEARCH PAPER SERIES 14 (2003) (finding that advertisers discount programs starring or including children by 11%); AMY JORDAN, ANNENBERG PUB. POL'Y CTR., THE THREE HOUR RULE: INSIDERS' REACTIONS 13-17 (1999).

154. There are overall a relatively small number of children from the advertiser's point of view. Some have suggested that "in order for a program to be interesting to national advertisers, it must have at least approximately 75 percent 'clearance' (that is, must reach at least 75% of American TV households)." AMY JORDAN & JOHN SULLIVAN, ANNENBERG PUB. POL'Y CTR., CHILDREN'S EDUCATIONAL TELEVISION REGULATIONS AND THE LOCAL BROADCASTER: IMPACT AND IMPLEMENTATION 10 (1997), available at [http://www.aeforum.org/aeforum.nsf/d27aa4e05753477780256c5100355ea8/ff7906c1ad765a71802567bd00413d98/\\$FILE/auop0043.pdf](http://www.aeforum.org/aeforum.nsf/d27aa4e05753477780256c5100355ea8/ff7906c1ad765a71802567bd00413d98/$FILE/auop0043.pdf).

155. See, e.g., Children's Television Programming and Advertising Practices, *Report & Order*, 96 F.C.C.2d 634, paras. 6, 25 (1984).

156. PBS is associated with the highest quality of children's educational programming, such as *Sesame Street*. See generally ROBERT W. MORROW, *SESAME STREET AND THE REFORM OF CHILDREN'S TELEVISION* (2006); Comments of The Public Broadcasting Service, Empowering Parents and Protecting Children in an Evolving Media Landscape, FCC MB Docket No. 09-194 (rel. Feb. 25, 2010). Nickelodeon is the dominant children's programmer on cable, with children's educational programming also appearing on other cable channels, such as the Disney Channel, among others. See generally SARAH BANET-WEISER, *KIDS RULE! NICKELODEON AND CONSUMER CITIZENSHIP* (2007). Some have said that "a kids marketer should devote 80 percent to 90 percent of ad dollars to cable because that's where the eyeballs are." Daisy Whitney, *Defining Distinct Niches: Building the Brand is the Name of the Game in Kids TV*, TELEVISION WEEK, Mar. 10, 2003, at 10 (quoting Starcom executive). Observers note that, when the CTA was passed, more than half of all

demographic will be underserved by commercial broadcasters. Children today also have less free time and many competitors vying for their attention, leading to a fragmented children's market.<sup>157</sup>

The economics of over-the-air television is also predicted to lead to lower-quality children's educational programming.<sup>158</sup> E/I programming of the cognitive sort must appeal to narrow age ranges in order to be effective.<sup>159</sup> Since age-appropriate, high-quality children's E/I programming is more expensive<sup>160</sup> and difficult to produce,<sup>161</sup> broadcasters will be under significant pressure to comply with the FCC's rules minimally at best. Studies indicate that "high-quality programs draw smaller audiences than low-quality programs among children aged 2-11

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the children watching Saturday morning television were tuned in to ABC, CBS, NBC, and Fox. By 2001, that number had apparently dropped to 26% of the children's audience. James, *supra* note 134 (citing to Nielsen data); *cf.* Alexander, *supra* note 42, at 497 (with a smaller number yet). In 2002, broadcast networks reduced children's programming spot prices because, although annual spending on child-oriented advertising had been increasing, about fifty-five percent had gone to Nickelodeon. Joseph Perreira, *Kid Stuff? Pow! Splat! Voom!*, WALL ST. J., Oct. 18, 2002, at A1. For a current description of Nickelodeon's children's programming, see Comments of Viacom Inc., Empowering Parents and Protecting Children in an Evolving Media Landscape, FCC MB Docket No. 09-194 (rel. Feb. 25, 2010).

157. Alexander, *supra* note 42, at 497; Ivy Brown, *More Venues Divide Kids: Capturing Young Viewers Is Major Challenge*, TELEVISION WEEK, Feb. 23, 2004, at 25; Andrew Grossman, *Primed for Victory: Despite Some Negative Force Fields, Children's Networks Are Optimistic this Upfront*, MULTICHANNEL NEWS, Mar. 7, 2005, at 18; Lauren R. Rublin, *Tuning Out: Who Wins, Who Loses as Kids Spend More Time on PCs and Less Watching TV*, BARRON'S, Nov. 8, 1999 at 37. Even outside of cable competition, broadcasters "worry about competition in an increasingly crowded field." JORDAN & SULLIVAN, *supra* note 154 at 21. See, e.g., Valerie Kuklenski, *Children's Hours; No Longer Relegated to Saturday Morning, Networks Expand Reach for Highly Desirable Kid Viewers*, L.A. DAILY NEWS, Oct. 5, 2002, at U14. *But see* Rublin, *supra* note 158.

158. For example, it has been argued that broadcast networks will underproduce children's educational programming because such programming is unprofitable or less profitable than other kinds of programming. See Ahrens, *supra* note 134.

159. See APPC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 11. It stands to reason that a math program for a four-year old is of no interest to a seven-year old.

160. See, e.g., Karen Goldberg Goff, *Watchful Rules for Television*, WASH. TIMES, April 13, 2003, at D1 (quoting media watcher for proposition that few commercial organizations are willing to invest the resources to produce engaging and beneficial programming for preteens). That is consistent with the observation that an appetite for children's educational television decreases as children age. A recent FCC filing by Viacom indicates that the average cost of a half-hour episode of Dora the Explorer is \$650,000. Comments of Viacom Inc. at 8, Empowering Parents and Protecting Children in an Evolving Media Landscape, FCC MB Docket No. 09-194 (rel. Feb. 25, 2010). Indeed, Viacom explains that "[p]rogramming on other Viacom networks helps support this educational content (especially since . . . there are no commercials on Nick Jr.)." *Id.* at 8-9.

161. See Goff, *supra* note 160. Even though some note that children's programs are less expensive to produce than prime-time programs, the profit on such programs is smaller and depends on the necessarily uncertain factors of merchandising deals and international sales. See JORDAN & SULLIVAN, *supra* note 154, at 507; see also Alexander, *supra* note 42, at 503.

years (the desired audience for advertisers).”<sup>162</sup> Perhaps just as important as the reality is the widespread belief among broadcasters that children reject educational programming (particularly beyond preschool age)<sup>163</sup> and that stations cannot brand themselves by their children’s offerings.<sup>164</sup> Because low audiences mean low ratings, which in turn mean low revenues in the commercial television market, broadcasters express conviction that E/I programming will never be profitable.<sup>165</sup>

If this view of the market still reflects current reality, it serves to explain the mixed results revealed by the empirical studies of the children’s E/I rules. But could the market have changed sufficiently as a result of the increasing empowerment of the child audience,<sup>166</sup> global marketing,<sup>167</sup> and

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162. Jordan & Woodard, *supra* note 143, at 90.

163. James, *supra* note 134 (“Broadcasters and their advertisers see educational programming as the TV equivalent of leafy green vegetables. They’re being force fed a restriction that drains profits. Young viewers are leaving in droves, finding better fare, whenever they want, on their cable menus.”); Jordan, *supra* note 54, at 113-115 (describing the views of industry insiders that (1) the child audience had gone elsewhere; (2) there is a lack of promotion; (3) there is a lack of advertiser interest; and (4) few alternative revenue streams for educational television exist). *See also* Alexander, *supra* note 42; Jordan & Woodard, *supra* note 143, at 91. The commercial broadcasters apparently believe that the most profitable programming is geared to boys, that girls will follow boys’ viewing choices (but not vice versa), and that stations must therefore create programming that will be most likely to attract the largest audience of two- to eleven-year-old boys. *Id.* at 90-91.

164. Jordan & Woodard, *supra* note 143, at 85. Affiliates of the major three networks are more likely to define themselves through their local news programming and their network adult programming. JORDAN & SULLIVAN, *supra* note 154, at 20 (“commercial broadcasters do not build their identity on their children’s programming”). *See also* Whitney, *supra* note 156, at 10.

165. JORDAN & SULLIVAN, *supra* note 154, at 503. This appears to be the generally held view, not only among academics, but in the industry at every level. *See, e.g.*, MINOW & LAMAY, *supra* note 40, at 57 (quoting “Captain Kangaroo”). *See also* AMY B. JORDAN, ANNENBERG PUB. POLICY CTR., THE STATE OF CHILDREN’S TELEVISION: AN EXAMINATION OF QUANTITY, QUALITY, AND INDUSTRY BELIEFS 27-31 (1996). This might lead to a vicious circle: “One consequence of broadcaster reliance on ratings is that programmers are less likely to air high-quality, educational programs and, when they do, are less likely to give them adequate production and promotional budgets” which will then presumably reinforce the low ratings. APPC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 12.

166. It is becoming increasingly evident that children, even at an early age, have the ability to influence their parents’ purchasing patterns. *See, e.g.*, PECORA, *supra* note 42, at 98-99; Patti M. Valkenburg & Joanne Cantor, *The Development of a Child into a Consumer*, in CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT 201 (Sandra L. Calvert, Amy B. Jordan & Rodney R. Cocking eds., 2002); Daren Fonda, *Pitching It to Kids on Sites Like Neopets.com, Brands Are Embedded in the Game*, TIME, June 28, 2004, at 52; Jacobson, *supra* note 122, at 3; Kuklenski, *supra* note 157. Moreover, children themselves have more access to money today than was previously the case. *Id.* *See also* BARRIE GUNTER, CAROLINE OATES & MARK BLADES, ADVERTISING TO CHILDREN ON TV: CONTENT, IMPACT, AND REGULATION 2 (2005) (“[c]hildren have spending power.”); PECORA, *supra* note 42, at 7 (describing “how children came to be defined as consumers”); Martha Irvine, *Chew on that New Juicy Fruit Format, Flavors Aimed at Skippees*, MIAMI HERALD, July 5, 2003, at 8 (defining “Skippees” as a market-research acronym for school

the explosion in value of merchandising?<sup>168</sup> Is the economic picture for over-the-air children's E/I programming bleak merely as a result of mutable factors and choices attributable to broadcasters and ratings agencies?

Proponents of the FCC's rules describe a world in which children have money to spend, significant influence on their parents' purchasing decisions (called "the nag factor"), and rich futures as good consumers. They do not necessarily reject educational programming if it is of sufficiently high quality.<sup>169</sup> Ratings arguably underrepresent the viewership of children's educational television.<sup>170</sup> Children's television advocates

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kids with income and purchasing power). *See also* KATHRYN C. MONTGOMERY, GENERATION DIGITAL: POLITICS, COMMERCE, AND CHILDHOOD IN THE AGE OF THE INTERNET 11-34 (2007) (describing marketing to children on a variety of digital platforms).

167. *See generally* PECORA, *supra* note 42, at 133-51; TIM WESTCOTT, THE BUSINESS OF CHILDREN'S TELEVISION (1999) (providing data on international children's television market); *TV Program Merchandising Potential Overshadowing Content*, COMM. DAILY, Mar. 10, 2003 (noting that international sales and licensing are just as important as domestic revenue in children's programming). Some children's programming has no dialogue, which may be helpful for global distribution. *Cf.* Dominic Schreiber, *Family Values* TELEVISION BUS. INT'L, Sept. 1, 2002.

168. Cable and PBS have shown that merchandising can add a highly lucrative component to children's television programming (as shown by the merchandising associated with *Sesame Street* and *Dora the Explorer*). *See, e.g.*, JORDAN, *supra* note 165, at 30 (describing merchandising and quoting critics); Kuklenski, *supra* note 157; Whitney, *supra* note 156; *TV Program Merchandising Potential Overshadowing Content*, *supra* note 167 (noting the "staggering" revenue generated by licensing, with toys licensed from children's television programs bringing in an estimated \$15 billion in 2003).

169. Some studies conclude that most children are interested in quality and popularity of educational programs and do not reject them out of hand simply because they are labeled as educational. *See* APPC 1998-99 STUDY, *supra* note 127, at 18; JEFFREY D. STANGER, TELEVISION IN THE HOME: THE 1997 SURVEY OF PARENTS AND CHILDREN 21 (1997). *But see* GEORGE COMSTOCK & ERICA SHARRER, MEDIA AND THE AMERICAN CHILD 138-99 (2007) (describing study suggesting that "for some young audiences, particularly those eight years old and male, recognizing that a program is educational may backfire.").

170. Nielsen ratings are particularly problematic for children's programming. So, for example, if a program targets five- to eight-year-olds, it is not serviced by Nielsen ratings which break the child audience down into two- to five- and six- to eleven-year-old children. APPC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 15. Another problem with regard to ratings for children's educational programming may be an undercounting problem because so many children are viewing television outside of their own homes (for example, in day-care and school settings). *Id.* *See also* Catherine Schetting Salfino, *Tyke TV Grows Up*, BROADCASTING & CABLE, Mar. 5, 2001, at 17 (explaining that the Nielsen distinctions between two- to five- and six- to eleven-year-old children are "unsatisfying" because of the range of children's interests and household viewing habits); APPC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 20-21.

Children's advocates also urge that the lower ratings for children's educational programming (by comparison to action adventure cartoons) are attributable to the facts that educational programs are not aired in prime time and are not well-promoted. In fact, the recent *Children Now Report* indicates that the majority of E/I compliant programming is aired during the weekend. Wilson, Kunkel & Drogos, *supra* note 17, at 12-13, 22. Media sociologists conclude that educational shows do not have major marketing campaigns with

argue that if rating agencies tailored their methods more appropriately to the children's market, if advertisers and corporate underwriters were to "see beyond the ratings," and if broadcasters scheduled and promoted children's E/I programming more effectively, broadcasters' traditional assumptions about the lack of profitability of children's educational television might be challenged.<sup>171</sup> Foundation grants for educational programming might be available even for commercial entities.<sup>172</sup> Large media companies could "recapture their costs through multiple plays of the same program within a short period of time" and across platforms.<sup>173</sup> Moreover, with the additional capacity provided by digital transmission, broadcasters could decide to create their own equivalents to Nickelodeon.<sup>174</sup>

Whether the market has changed materially, however, is at best a debatable proposition. The child audience is still a niche market requiring expensive programming appealing to narrow age bands. The reliance of the industry on ratings has not changed, despite the arguments made by children's television advocates. The lack of empirical data makes it difficult for advertisers to ignore the ratings as currently constituted. The

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major fast food chains in the country; they are not put in attractive timeslots, kept there, and promoted on air. APPC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 10. In addition, producers claim that educational programs are given inadequate time to build an audience before they are shuffled around and/or canceled. *Id.* at 20-21. *See also* Alexander, *supra* note 42, at 502-03; Jordan, *supra* note 54, at 113-14; APPC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 21; AMY B. JORDAN, ANNENBERG PUB. POLICY CTR., THE STATE OF CHILDREN'S TELEVISION: AN EXAMINATION OF QUANTITY, QUALITY, AND INDUSTRY BELIEFS 34-35 (1996). Without money to promote educational programs, children and parents may be unaware of the existence of such programs. *See, e.g.*, Jordan & Woodard, *supra* note 143, at 92-93 (stating the importance of promoting educational programming and outreach to parents).

171. Jordan & Woodard, *supra* note 143, at 93. *See also* JORDAN & SULLIVAN, *supra* note 154, at 26-27; APPC 1996-97 STUDY, *supra* note 127, at 29. Reputational benefits to advertisers of being associated with highly praised and promoted children's educational programming—particularly if it is truly entertaining and beloved by children—should not be minimized. *See* Alexander, *supra* note 42, at 502-03 (discussing increasing importance of promotions, public service announcements, and educational outreach for program success).

172. Valerie Crane & Milton Chen, *Content Development of Children's Media*, in THE FACES OF TELEVISUAL MEDIA: TEACHING, VIOLENCE, SELLING TO CHILDREN 68 (2D ED., EDWARD L. PALMER & BRIAN M. YOUNG, EDS. 2003) ("profit-making ventures . . . receive funding or grants from foundations").

173. Crane & Chen, *supra* note 172, at 68. (Children apparently benefit from and do not dislike repeat viewing of the same educational program. *Id.*; FISCH, CHILDREN'S LEARNING, *supra* note 117, at 24-5, 32-3.)

174. Broadcasters could thus choose to aggregate their "core" programming and simultaneously increase access to it by parents and children. STACY M. DAVIS, ANNENBERG PUB. POLICY CTR., THE SECOND ANNUAL ANNENBERG PUBLIC POLICY CENTER'S CONFERENCE ON CHILDREN AND TELEVISION: A SUMMARY 17-18 (2007) (indicating this is a business decision, not something dictated by television structure per se).

children's market may be "particularly volatile and difficult to predict."<sup>175</sup> Studies show that the appeal of television programming created especially for children "drops off decisively" in the teenage years.<sup>176</sup> The possibility of profitable children's educational programming grounded on merchandising and international sales is both limited and controversial.<sup>177</sup> The economics of broadcasting will likely create more incentives for pro-social than for cognitive E/I programming (as current data demonstrates).<sup>178</sup> The need to rely on program repeats and international licensing can also skew the type of programming produced.<sup>179</sup> Finally, if the economic picture were to change for children's E/I programming, broadcasters would presumably have incentives to adapt—regardless of regulatory directives, transaction costs being equal.

Arguments in support of the three-hour floor might be based on the proposition that the requirement might expand the supply of children's programming, which in turn might be expected to lead to increased quality, amount, and diversity of such beneficial programming. However, while the

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175. SEITER, *supra* note 42, at 102.

176. GEORGE COMSTOCK & ERICA SHARRER, *MEDIA AND THE AMERICAN CHILD* 79 (2007).

177. *See, e.g.*, Crane & Chen, *supra* note 172, at 69 (licensing as "high-risk business."). Only the most popular programs have succeeded in developing significant merchandising revenues. Merchandising success is far from guaranteed. Inter alia, it depends on a successful underlying show and/or character. Those are particularly hard to predict for a children's audience. Indeed, some, like Nickelodeon, typically wait up to two years after a show's introduction to engage in merchandising efforts. *See* Sherri Day, *SpongeBob and Pals Provide Licensing Gold for Nickelodeon*, N.Y. TIMES, Jan. 9, 2003, at C1. While it is a truism that hits cannot be predicted even when geared to an adult audience, the child audience apparently presents even greater predictive difficulties. Much about this demographic "remains understudied and/or misunderstood." APCC FIRST ANNUAL CONFERENCE SUMMARY, *supra* note 115, at 5.

Moreover, we may be ambivalent about the merchandising-based subsidy of children's educational programming. It stands to reason that merchandising-based subsidies can have subtle skewing effects on the kind of educational programming that is produced. Merchandising may also raise concerns analogous to those that led to the limitations on advertising in children's television shows imposed by Congress and the FCC under the CTA.

178. *See* Wilson, Kunkel & Drogos, *supra* note 17, at 13-16, 22. *See also* Sandra L. Calvert, et al., *Children's Online Reports About Educational and Informational Television Programs*, in CHILDREN IN THE DIGITAL AGE: INFLUENCES OF ELECTRONIC MEDIA ON DEVELOPMENT 165, 178-180 (Sandra L. Calvert, Amy B. Jordan & Rodney R. Cocking eds., 2002); Jordan & Woodard, *supra* note 143, at 87 ("Nearly all of the network-provided programs [studied in 1997] had prosocial messages as their primary educational goal."); JORDAN, THREE-HOUR RULE, *supra* note 127, at 26.

179. Despite the usefulness of repeat viewing for some kinds of televised education, one can raise questions about the impact on program diversity of a business model that relies on a small number of repeated programs. Similarly, "windowing [distributing the same programming in different venues] can also limit the kind of product developed. . . driv[ing] the development of animation with simple language, plot, and characters in order to permit crossing cultural barriers." Crane & Chen, *supra* note 172, at 70.

effect of the past decade's media consolidation on children's programming apparently has been understudied in both academic and policy circles, the one report published on the subject concluded that consolidation had had a "serious [negative] impact on the availability and diversity of children's programming [in the Los Angeles market]."<sup>180</sup> On the production side, media consolidation has diminished the number of producers of children's programming.<sup>181</sup> The production of such programming is currently dominated by major studios, some international producers and co-production entities, and a few independent production companies.<sup>182</sup> Media analysts characterize "the barriers to program entry into the children's television market [as] enormous."<sup>183</sup>

In addition, the 1990s witnessed an increasing trend toward the vertical integration of program producers and distributors.<sup>184</sup> Vertical integration has the potential to displace independent programmers because major networks that own production studios have the incentive to favor programming from those studios.<sup>185</sup> On the one hand, the expansion of channel capacity can serve as an open invitation for program producers, with more supply lines requiring more content for distribution. On the other hand, if industry behemoths capture the market for distribution, they can determine who survives as a content provider. And if such major players

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180. CHILDREN NOW, BIG MEDIA, LITTLE KIDS: MEDIA CONSOLIDATION & CHILDREN'S TELEVISION PROGRAMMING 1, 2 (2003) [hereinafter CHILDREN NOW CONSOLIDATION STUDY]. It is beyond the scope of this Article to assess the *Children Now Consolidation Study*. The study itself notes that the work is only beginning in this area, and calls for further research. *Id.* at 10. See also *Rethinking the Children's Television Act*, *supra* note 2, at 3 (Statement of Gary E. Knell, President & CEO, Sesame Workshop):

[T]remendous consolidation of children's media in which the top three media companies (Nickelodeon, Disney and Cartoon Network) account for 92% of 6 to 11 year-olds' viewing on the main kids' broadcast and cable networks and control a lion [sic] share of the market on the web . . . has made it quite challenging for independent producers to emerge and prosper.

*Id.*

181. According to the President of Children Now, a children's advocacy group, 20 studios or production companies supplied sixty-eight percent of all prime-time programming in 1970, while, by 2002, only ten such studios programmed eighty-eight percent of prime time. Michael Reisch, *Give Children Diverse Programming*, SEATTLE POST-INTELLIGENCER, Mar. 7, 2003, at B7.

182. See, e.g., Alexander, *supra* note 42, at 500. When independents become successful, they are acquired by larger entities. *Id.*

183. *Id.* Professor Alexander explains that production companies retain ownership of the shows and operate on a "near-term deficit-financing model," relying on future profits from aftermarket sales and merchandising agreements. *Id.* at 501. While networks pay licensing fees to air the programs, licensing fees for children's programming have been decreasing as the fragmentation of the child audience has increased. See *id.*

184. See, e.g., *id.* at 501-02; Who Owns What?, COLUM. JOURNALISM REV., <http://www.cjr.org/resources/> (last visited Feb. 25, 2010).

185. Alexander, *supra* note 42, at 502.



are themselves increasingly vertically integrated, then the fear of discrimination against independent program producers becomes even more acute.<sup>186</sup> In this kind of environment, “[i]ndependent production companies can find it hard to place their programming.”<sup>187</sup> Increasing consolidation and vertical integration may also lead to more repurposing, because that will be cheaper than experimenting with new programming.<sup>188</sup>

## 2. FCC Enforcement Limitations

The anticompliance pressure likely to be generated by broadcasters’ economic incentives will, in turn, increase the costs to the FCC of tracking and assessing compliance. There is a more intractable hurdle yet, however—the apparent agency paralysis triggered by the attempt to mediate values in tension.

The FCC’s approach to rule enforcement in this area already demonstrates significant delay and hesitancy. The FCC’s online records disclose that most of its enforcement efforts have been limited and indirect, focusing on violations of the advertising limitations.<sup>189</sup> With regard to the programming rules, the FCC has acted only in response to pressure from advocacy groups. For example, in only one instance since 1996 has the FCC imposed a significant fine for failure to satisfy the three-hour rule.<sup>190</sup>

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186. One media observer has noted that the FCC’s adoption of the Prime Time Access Rule (that limited network control over prime time) and the Financial Interest and Syndication Rulings (that limited network program production investments) during the 1970s led to an increase in the number of independent stations and of children’s programming for such stations. PECORA, *supra* note 42, at 28, 34, 42. *See also* Alexander, *supra* note 42, at 500. Poorly capitalized, these independent stations became outlets in the 1980s mostly for animated children’s programming tied to toys and other products: “In a market of intense competition, these product-based programs minimized risk both in production costs and ratings. The cost of producing the program could be spread between program producers and product manufacturer or licensor, and recognition of either the product merchandise or the program increases sales and ratings.” PECORA, *supra* note 42, at 34.

187. Alexander, *supra* note 42, at 502. In addition, ION Media, the producer of Qubo, the only all-day free children’s programming channel, has recently claimed in an FCC filing that there are insufficient marketplace incentives to create children’s educational programming content because of “barriers to distribution.” *ION Media Comments*, *supra* note 33, at 9. In other words, ION is not currently carried on Direct Broadcast Satellite or most major cable systems. *Id.*

188. *See* CHILDREN NOW CONSOLIDATION STUDY, *supra* note 180 (describing BIG MEDIA, LITTLE KIDS, the recent Children Now consolidation study). For a discussion of the finding that the children’s television market is moderately concentrated, see Alexander, *supra* note 42, at 503.

189. *See, e.g.*, KEVN, Inc., *Letter*, 8 F.C.C.R. 5077 (1993); Bay Television, Inc., *Memorandum Opinion and Order*, 10 F.C.C.R. 11509 (1995); Dubuque TV Ltd. P’ship, *Memorandum Opinion and Order*, 16 F.C.C.R. 4396 (2001) (enforcing the advertising provisions under 47 C.F.R. § 73.670).

190. Shareholders of Univision Comm., Inc., *Memorandum Opinion and Order*, 22

In addition, instead of addressing substantive arguments of noncompliance, the FCC has imposed fines on broadcasters for violations of their record-keeping and reporting obligations under the children's television rules.<sup>191</sup> Despite these examples, the FCC has been notably slow in other instances, even in response to advocacy group pressure. For example, several license challenges grounded on failure to air children's educational programming have been pending since 2004.<sup>192</sup> The fact that the United Church of Christ's (UCC) license challenges have yet to be resolved after five years suggests some FCC ambivalence about UCC's invitation to assess the substantive quality of the programming at issue.<sup>193</sup>

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F.C.C.R. 5842 (2007). See also *supra* note 24 and accompanying text. The Office of Communication of the United Church of Christ takes credit for that enforcement. United Church of Christ, *Landmark FCC Ruling against Univision Is Result of UCC's Public Advocacy for Children*, UNITED CHURCH OF CHRIST, Feb. 24, 2007, <http://www.ucc.org/news/landmark-fcc-ruling.html>. Admittedly, the Univision consent decree involved both a payment of \$24 million by Univision and a compliance agreement. It might be argued that such a significant fine and behavioral penalty can serve to deter broadcaster noncompliance in one instance, rendering additional enforcement cases unnecessary. Without unduly minimizing the effect of the Univision settlement, however, it should be noted that it took the FCC almost two years to conclude the matter, that many stations were involved in that case, that Univision agreed to the settlement because of its own transfer plans, and that lengthy license terms can dilute the potential threat of a Univision-like penalty.

191. See, e.g., UPN Television Stations Inc. WUPL(TV), *Letter*, 20 F.C.C.R. 15807 (2005).

192. See *supra* note 24. See also Wilson, Kunkel & Drogos, *supra* note 17, at 4; John Eggerton, *Alliance Eyes License Challenges*, BROADCASTING & CABLE, Sept. 20, 2004, [http://www.broadcastingcable.com/article/154645-Alliance\\_Eyes\\_License\\_Challenges.php](http://www.broadcastingcable.com/article/154645-Alliance_Eyes_License_Challenges.php).

193. *Children's Media Policy Coalition Comments*, *supra* note 22, at 19-21. The pending license challenges would require the FCC to second guess the core programming claims made by the broadcasters. The definition of core educational programming focuses on whether the programming at issue was specifically designed for children and had education as a substantial purpose. See *1996 Children's Television Rules*, *supra* note 6. The stations at issue claimed that they had engaged in a process designed to satisfy that standard. Station WPXW(TV) FCC 398 Children's Television Programming Report for the quarter ending September 30, 2002. The challengers argued that the definition of core programming needed to be assessed by reference not to process but to outcome, requiring a conclusion as to the educational character of the episodes viewed. *Petition to Deny the License Renewal of WPXW and WDCA on Behalf of the Office of Communication of the United Church of Christ and the Center for Digital Democracy, Before the FCC*, Washington, DC. FCC File No. BRCT-20040527AGS. Consequently, the challengers included a statement by an education expert expressing his view that the station could not reasonably characterize the challenged children's programming (e.g., *Miracle Pets*) as core educational programming. Dale Kunkel, *Kids' Media Policy Goes Digital: Current Developments in Children's Television Regulation*, in *THE CHILDREN'S TELEVISION COMMUNITY* 3-23 (J. ALISON BRYANT, ED. 2007). It may be that the FCC's delay has been influenced by its desire to avoid intrusive assessments of educational quality.

In addition, FCC action has been forestalled by the sale of noncompliant stations to new owners. See, e.g., UPN Television Stations Inc. WUPL(TV), *Letter*, 20 F.C.C.R. 15807, 15810 (2005) (refusing to consider, in a renewal application context, violations of children's television rules that occurred prior to the date on which the petitioning

The children's advocacy community has responded to the FCC's delays by calling directly for rapid resolution of the challenges brought by interested parties.<sup>194</sup> But this recommendation, while eminently practical, does not address what truly may be motivating the FCC's delays—namely, ambivalence on the agency's part about direct assessment of programming content. Advocates' recommendations that the FCC act more expeditiously are unlikely to solve the problem if the FCC's delays are due not to institutional laziness, but to the agency's hesitation to venture too far into content review.

### 3. Audience Factors

In addition to broadcaster economic incentives and FCC administrative factors, audience factors lead to the difficulties with over-the-air children's educational programming production. Specifically, information access issues, parental understanding, and children's viewership patterns all create hurdles for the children's E/I broadcasting market.

The informational disclosure requirements of the children's E/I rules<sup>195</sup> were designed to accomplish two goals: (1) improve parental viewing choices by informing parents of the availability of E/I choices and (2) provide evidence to help parents and children's advocacy groups pressure broadcasters to air more and better E/I programming.<sup>196</sup> However,

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broadcaster acquired the station). Today's lengthy license terms, along with the fact that compliance with the children's television rules is assessed at license renewal, suggest that there is ample time for noncomplying stations either to mend their ways close to their renewal dates or to be transferred to new owners. Either result diminishes opportunities for significant FCC enforcement of children's E/I rules.

194. *Children's Media Policy Coalition Comments*, *supra* note 22, at iii, 19-21.

195. *See supra* Part II.

196. *See 2004 Children's DTV Report & Order*, *supra* note 6, at para. 45; *1996 Children's Television Rules*, *supra* note 6, at paras. 48, 52. It is beyond the scope of this Article to address the effectiveness and desirability of disclosure systems. Suffice it to say, however, that technology today has solved or reduced many of the collective action problems that might have undermined prior attempts to rely on citizen pressure to trigger regulatory responses. (This seems clear in the context of broadcast indecency, for example. *See* Lili Levi, *The FCC's Regulation of Indecency*, *FIRST REPORTS*, Apr. 2008, at 4, 28-29, available at <http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.final.pdf>.) Even if individual parents are unlikely to have the incentive to engage in dialogue on children's television with broadcasters, and even if those parents who do are likely to be ineffective in obtaining significant results on their own, the information approach is likely to empower already-organized children's advocacy groups and media watchdog groups. In addition, media researchers have concluded that local broadcasters select programming meeting the FCC's "core" educational requirements by, among other things, looking for a "seal of approval" from independent groups. *JORDAN & SULLIVAN*, *supra* note 154, at 16-17. Moreover, the obligation to report information, including explanations for why a particular program should be viewed as educational, may well have some sort of inchoate deterrent effect on truly absurd positions by broadcasters. The information approach can also provide

the disclosure mechanisms in the FCC's rules have faced some practical difficulties. For example, many intermediaries, such as newspapers and television guides, have chosen not to print the details of children's E/I programming information, making access to information difficult for parents.<sup>197</sup> The evidence shows that many parents are not aware of the three-hour processing guideline<sup>198</sup> and cannot decipher information related to children's educational television offerings, inter alia, because of a lack of icon standardization.<sup>199</sup> At a minimum, there is variation in parents' awareness of the requisite information.<sup>200</sup>

In addition to information awareness and access problems, evidence suggests viewing patterns that follow children-branded outlets. Children have been described as largely "destination viewers" of television.<sup>201</sup> When interviewed by social scientists, children respond that they watch channels

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broadcasters and cable operators with information about what their competitors are doing.

197. TV Guide, for example, has apparently stopped indicating the educational nature of children's shows. See JORDAN, THREE-HOUR RULE, *supra* note 127, at 23. See also Extension of the Filing Requirement for Children's Television Programming Reports, *Comments of Center for Media Education et al.*, FCC MM Docket No. 00-44, 7 (rel. June 12, 2000), and sources cited therein.

198. Jordan & Woodard, *supra* note 143, at 89; KELLY L. SCHMITT, ANNENBERG PUB. POLICY CTR., PUBLIC POLICY, FAMILY RULES AND CHILDREN'S MEDIA USE IN THE HOME (2000) (finding that parents were unaware of the existence of E/I programming or children's television rules, and that children often chose what to watch without parental input). See also Implementation of the Child Safe Viewing Act, *Report*, 24 F.C.C.R. 11413 (2009) (report by FCC to Congress regarding the state of the marketplace for advanced blocking technologies and use of parental empowerment tools).

199. The FCC requires that core educational programming be identified by displaying an "E/I" icon throughout the program, denoting that the program is "educational and/or informational." FCC Consumer Facts: Children's Educational Television, <http://www.fcc.gov/cgb/consumerfacts/childev.html> (last visited Feb. 7, 2010); Children's Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rule Making*, 19 F.C.C.R. 22943, para. 48 (2004). KAISER FAMILY FOUNDATION, PARENTS, CHILDREN AND THE MEDIA 27 (2007), available at <http://www.kff.org/entmedia/upload/7638.pdf> (recent study finding that only five percent of young (two- to six-year-old) children's parents knew the meaning of the E/I symbol) the same study has "current data" from 2007 that says eleven percent; the five percent number is from 2004. Accord JORDAN, THREE-HOUR RULE, *supra* note 127, at 23-24; Jordan & Woodard, *supra* note 143, at 89. See also Amy B. Jordan, *Public Policy and Private Practice: Government Regulations and Parental Control of Children's Television Use in the Home*, in HANDBOOK OF CHILDREN & THE MEDIA 651 (Dorothy G. Singer & Jerome L. Singer eds., 2001); Kelly L. Schmitt, ANNENBERG PUB. POLICY CTR., PUBLIC POLICY, FAMILY RULES AND CHILDREN'S MEDIA USE IN THE HOME 10-11 (2000); EMORY H. WOODARD IV WITH NATALIA GRIDINA, ANNENBERG PUB. POLICY CTR., MEDIA IN THE HOME 2000: THE FIFTH ANNUAL SURVEY OF PARENTS AND CHILDREN 32-38 (2000).

200. See Press Release, FCC, FCC Adopts New Children's TV Rules (Aug. 8, 1996), available at [http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/1996/nrmm6021.html](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/1996/nrmm6021.html). See also *Empowering Parents NOI*, *supra* note 4, at 13187-92 (requesting information on parental awareness of parental control technologies, children's programming ratings, and extent of media literacy.).

201. Whitney, *supra* note 156, at 10.

rather than individual programs.<sup>202</sup> This has attracted significant numbers of the child audience to cable, as noted.<sup>203</sup> Parents also may well encourage such cable-viewing patterns once they trust a channel—often as a result of the channel's child-related branding.<sup>204</sup> Given the availability of highly rated children's programming on generally "child-friendly" channels, rational working parents in search of a television babysitter<sup>205</sup> may well abandon over-the-air broadcasting for these purposes.<sup>206</sup>

This does not mean that the practical problems facing parents are insuperable or that children's viewing patterns are monolithic. While the information may not currently be disseminated very effectively in the print medium, it does appear in some print venues. Moreover, current practices may change, and the Internet provides other avenues for access to information.<sup>207</sup> The FCC's children's Web pages will become a very useful

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202. *Id.*

203. See, e.g., Alexander, *supra* note 42, at 497 (claiming that, as of 2001, "children's viewing went from 98% broadcast to 15%," with more than 77% of children's viewing moving to cable and Nickelodeon capturing more than 50% of child viewers).

204. Whitney, *supra* note 156, at 10 (describing Nickelodeon's successful branding strategy); Crane & Chen, *supra* note 172, at 70. By contrast, the commercial broadcast networks and stations have not sought to brand themselves in terms of their children's programming. When starting its network in 1986, FOX did "move[] heavily into children's programming" when it launched as a network, but such material was still a small portion of its programming. See BARBARA J. SELZNICK, *GLOBAL TELEVISION: CO-PRODUCING CULTURE* 111 (2008). By definition, commercial television networks cannot focus singly on children, by contrast to child-focused cable channels. See *supra* note 167.

205. Victoria J. Rideout et al., KAISER FAMILY FOUNDATION, *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers* 4 (2003) (on use of television to occupy children when parents are busy), available at <http://www.kff.org>.

206. Although the Saturday morning children's programming segment was a hallmark of U.S. network television since the 1950s (see, for example, MINOW & LAMAY, *supra* note 40, at 45), the networks responded to the fragmentation and flight of the child audience by leasing their Saturday morning dayparts to other programmers instead of producing their own children's programming. See, e.g., Ahrens, *supra* note 134 ("The television battle for kids is over. Cable has won. The major networks dogged by a decade of rising production costs, low ratings and falling ad revenues have thrown in the towel . . ."); Mitroff & Herr Stephenson, *supra* note 42, at 21; Brian Lowry, *NBC and Fox Hire Sitters for the Kids Television*, L.A. TIMES, Aug. 31, 2002, at F1 (describing NBC and FOX as "absentee landlords"). See also Alexander, *supra* note 42, at 496-97; Huston & Wright, *supra* note 42, at 11; Whitney, *supra* note 156, at 10.

207. For example, the Children's Media Policy Coalition has recommended that the FCC require broadcasters to make their children's educational programming information available on their Web sites, and some already do. *Children's Media Policy Coalition Comments*, *supra* note 22, at 9. See also John Eggerton, *Nets Team Up on V-Chip Primer*, BROAD. & CABLE, Mar. 30, 2004, available at [http://www.broadcastingcable.com/article/152848-Nets\\_Team\\_Up\\_on\\_V\\_Chip\\_Primer.php](http://www.broadcastingcable.com/article/152848-Nets_Team_Up_on_V_Chip_Primer.php); John Eggerton, *Cable To Unveil Family TV Planning*, BROAD. & CABLE, Apr. 1, 2004, available at [http://www.broadcastingcable.com/article/152863-Cable\\_To\\_Unveil\\_TV\\_Family\\_Planning.php](http://www.broadcastingcable.com/article/152863-Cable_To_Unveil_TV_Family_Planning.php). TV Guide and local newspapers could potentially be persuaded to reverse their current practices (particularly if the information is made more standard and reported timely). Print sources of information could be supplemented by Internet sources with

resource once the agency improves the content and accessibility of its site—a task Chairman Genachowski recently announced.<sup>208</sup> Similarly, although children are generally characterized as destination viewers, studies also show that they will follow particular shows,<sup>209</sup> and knowledgeable parents can direct their children’s viewing choices.<sup>210</sup> Nevertheless, the point is that the disclosure-based FCC regime imposes potentially significant transaction costs on all the participants. These, in turn, reduce the effectiveness of the rules as a practical matter.

#### V. “PAY AN E/I FEE OR PLAY”—AN ALTERNATIVE MODEL FOR PROMOTING QUALITY CHILDREN’S EDUCATIONAL PROGRAMS ON TELEVISION

Given these critiques of the current E/I rules, there are two alternatives. One is to retain and enhance the existing rules—a position that has been taken by children’s advocacy groups.<sup>211</sup> FCC Chairman Genachowski’s recent congressional testimony does not disavow such a course,<sup>212</sup> although the FCC’s pending proceeding on the subject appears agnostic. While this is a plausible alternative, particularly if the guidelines were revised as suggested by children’s advocates, the FCC and the reformers would still continue to fight an uphill battle.<sup>213</sup> Alternatively, the

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program ratings. See, e.g., Goff, *supra* note 160 (listing groups that rate children’s programs); C.W. Nevius, *Parents Fear Perils of Media, Poll Shows*, S.F. CHRON., May 22, 2003, at A1. Additional information for parents, including links to stations’ family-friendly programs, is provided by the FCC. See FCC Parents’ Place, <http://www.fcc.gov/parents> (last visited Feb. 7, 2010). The information could also be marketed to families through other venues—such as parenting magazines and other sources—so long as organized children’s advocacy groups mobilize to get the word out.

208. *Rethinking the Children’s Television Act*, *supra* note 2.

209. See Wilson, Kunkel & Drogos, *supra* note 17, at 2.

210. This is obviously less true for viewing choices by teenagers, and the rules define “children” to include ages sixteen and younger. 47 C.F.R. § 73.671(c).

211. In comments before the FCC, for example, the Children’s Media Policy Coalition has recommended that the FCC should retain and strengthen the rules by requiring broadcasters to schedule some E/I programming on weekdays, only counting programming toward the processing guideline if clearly identified as E/I and described on the station’s Web site, requiring broadcasters to air cognitive as well as pro-social E/I programming, acting quickly on complaints and petitions to deny, and clarifying that broadcasters with common ownership in a market are not permitted to double count the same shows for their E/I program obligations. *Children’s Media Policy Coalition Comments*, *supra* note 22, at iii.

212. See *Rethinking the Children’s Television Act*, *supra* note 2.

213. This is inevitable with any kind of programming requirement that fights market forces and is contrary to the stations’ economic incentives. Although the Children’s Media Policy Coalition argues that “[t]he processing guideline seems to be having the intended effect of providing ‘the appropriate counterweight to the market forces identified by Congress,’” *Children’s Media Policy Coalition Comments*, *supra* note 22, at 4, it nevertheless is compelled to acknowledge its concern that few licensees are choosing to air more than the bare minimum of E/I programming. *Id.* at 5. Since broadcasters have not been

FCC could accept the fact that requiring commercial broadcasters to provide excellent children’s television is only a second-best solution and squarely study whether alternative means exist to help children more effectively. This Article suggests one specific alternative, but, because one could conceive of a variety of innovative possibilities, it first proposes a method of evaluation.

#### A. *Five Evaluative Objectives*

As the FCC evaluates updating the children’s E/I obligations, it should seek to encourage five objectives: enhancing programming quality, generating programming directed toward needs and age groups otherwise underserved in broadcasters’ local markets, promoting flexibility for broadcasters in order to boost innovation over time, increasing administrability for the FCC, and empowering parents informationally. The FCC’s prior statements of objectives have been less than pellucid.<sup>214</sup> This Article begins instead with the proposition that the most practically successful rules will be those that provide some sort of benefit to all the participants. Broadcasters would be benefited by flexibility in meeting their children’s obligations. Flexibility would allow them to innovate in response to economic conditions and each station’s needs at any given time. The FCC, in turn, would benefit from rules that would be comparatively easy to administer in order to promote accountability. Parents and children would benefit from easy access to accurate, complete, and reliable information about available E/I programming as well as easily accessible and reliable independent ratings of the quality of programming. Children would be benefited by access to an increased amount of high-quality programming geared to each age band in the community. This Article proposes a two-pronged “pay or play” type of approach that would satisfy all these objectives.

Admittedly, the notion of “high-quality” children’s educational programming is elastic, subjective, and grounded on the viewer’s perception of the goals of such programming.<sup>215</sup> Nevertheless, this does not

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able to develop a successful formula for profitable children’s E/I programming during the last decade—despite the existence of the processing guideline—it is likely that their compliance would continue to be grudging at best. This would, in turn, lead to increased costs of monitoring and, doubtless, legal costs.

214. *See supra* Part IV.A.

215. *See supra* note 123. Educational broadcasters have purportedly developed a set of “principles of quality television” and criteria for assessing educational television programming, which include both procedural and substantive elements. DAFNA LEMISH, CHILDREN AND TELEVISION: A GLOBAL PERSPECTIVE 200-201 (2007). Similarly, the *Children Now Report* articulates six criteria to assess the educational quality of programming:

Clarity—How directly or explicitly is the primary lesson presented?, Integration—How often is the primary lesson repeated or incorporated in the program?,

mean that the notion of quality, with all its limits as a theoretical matter, cannot—as a practical matter—serve as a useful guide. History shows that promoting children’s television on noncommercial stations, which are not subject to the same economic incentives as their commercial counterparts, has led to the kinds of programming whose quality has been generally applauded.

Moreover, the FCC’s “procedural” definition of core children’s E/I programming (which focuses on whether the program was designed to educate children)—whatever its flaws—could indirectly promote programming that is substantively effective if the definition is taken seriously by the FCC. Broadcasters facing the burden of proving that a program was designed to educate children might invest in more professional E/I program production.<sup>216</sup>

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Involvement—How engaging or absorbing is the primary lesson?, Applicability—How connected is the primary lesson to the real world?, Importance—How valuable or useful is the primary lesson to children’s development?, Positive Reinforcement—To what extent is learning, including effort and mastery, rewarded?

Wilson, Kunkel & Drogos, *supra* note 17, at 4. While these metrics as well seem reasonable (and appropriately tied to what psychologists now know about child development), they too are far from predictable in application. For example, what is a clear educational lesson for one reviewer may be hopelessly obscure for another. Just as reasonable adults disagree about the quality and value of Oscar-nominated films, even trained child psychologists are likely to disagree on how involving and valuable to find a children’s E/I program. Generally speaking, both the *Children Now* principles and those identified by Lemish are interpretively porous. The relationships of the various principles to one another are not elaborated. And their ability to provide clear and unambiguous guidance is limited. Moreover, to the extent that we choose to define “quality” in a program on the basis of how well it performs noncommercial, citizenship-enhancing goals, we face a more fundamental problem. Simply put, isn’t there an underlying tension between judging a program by such a noncommercial metric and relying on the market to generate it? For a similar argument regarding the development of Nickelodeon, see BANET-WEISER, *supra* note 156, at 51.

Does this mean that any attempt to reference quality in structuring media policy for commercial stations is misguided by definition? The reality is that we cannot truly avoid judgments about quality. Children’s advocates complain about the three-hour rule precisely because they do not believe that it results in sufficient high-quality programming. The underlying rationale for the rule is to increase the quality of children’s programming by crowding out low-quality entertainment programming. The one thing on which both commercial broadcasters and child psychologists agree is that public television has produced high-quality children’s educational programming by any yard stick of quality.

216. One might ask why that has not already happened under the current rules, as the “procedural” definition is already in place. The answer is that, under the current regime, the issue of whether the broadcaster satisfied the CTA is an assessment made at the end of a lengthy license term. Broadcasters know that even disingenuous arguments about the educational design and effect of a children’s program are likely to pass muster in that context. Under this Article’s proposal, however, broadcasters would have an affirmative obligation to sponsor children’s E/I programming on public television unless they aired equivalently high-rated programming of their own. At least some broadcasters might conclude that the investment in E/I program production seriously designed to meet the needs of the child audience would be preferable to such direct sponsorship payments.



Finally, the subjectivity of the goal of increasing educational quality should not derail us, because elasticity in notions of quality is both natural and beneficial. We should not want rules that would straitjacket creativity. Many different kinds of programs might be effective at teaching children. The advantage of a standard that focuses on the design process, rather than judging the outcome, is that it does not impose a singular notion of what should count as high-quality educational programming. That kind of expressive openness should be encouraged.<sup>217</sup>

*B. The "Pay" Prong: E/I Fees To Fund Public Television's Children's E/I Programming*

Quality of children's E/I programming is much more likely to be enhanced if a successful subsidy program for children's programming on public broadcasting stations were developed.<sup>218</sup> Such an alternative might even lead to an increase in the overall amount of educational programming for children. The question, then, is how to ensure adequate funding of such programming on public, noncommercial stations.<sup>219</sup>

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Moreover, if broadcasters' claims of educational value were to continue to be based on program design, this might prompt more and better use of academic consultants. *See, e.g.,* Horst Stipp, *The Role of Academic Advisors in Creating Children's Television Programs: The NBC Experience*, in *THE CHILDREN'S TELEVISION COMMUNITY* 111, 126-27 (J. Alison Bryant ed. 2007) (describing academic consultants on NBC children's programming during 1980-90 and making recommendations). This is not to say that academic consultants will always agree in their assessments of program quality. *See supra* note 123 and accompanying text.

217. Particularly when, as proposed here, judgments of quality are to be grounded on independent ratings bodies' clear and transparent program ratings, their inherent subjectivity is hopefully less worrisome.

218. Others also have argued that it would be preferable to subsidize good children's E/I programming on PBS or elsewhere. *See, e.g.,* MINOW & LAMAY, *supra* note 40, at 154-61; Henry Geller, *Public Interest Regulation in the Digital Era*, 16 *CARDOZO ARTS & ENT. L.J.* 341, 358 (1998) ("If the broadcaster should 'pay' instead of 'play,' this could contribute significantly to the production and distribution of high quality programming by the public television community."); Thomas W. Hazlett & Matthew L. Spitzer, *Digital Television and the Quid Pro Quo*, 2 *Bus. & Pol.*, Aug. 2000, at 115, 117. (citing to Geller and describing his background as FCC General Counsel); Krotoszynski, *supra* note 23, at 1243-46. *See also* HENRY GELLER & DONNA LAMPERT, *CHARGING FOR SPECTRUM USE 11-17* (1989) (arguing for spectrum fees rather than public trustee model); GORE FCC REPORT, *supra* note 67, at 65. Even the architects of the FCC's deregulatory, market-based policy in the Reagan years recommended that children's programming become a noncommercial broadcaster responsibility, subsidized by a spectrum fee on commercial users. *See* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207, 209-13, 247-55 (1982). For PBS's recent description of its children's programming, see generally Comments of The Public Broadcasting Service, *supra* note 156.

219. There are those, of course, who criticize PBS programming, with some conservatives decrying its allegedly too-liberal programming and some liberals complaining about its taking on characteristics of commercial broadcasters. *See, e.g.,* PECORA, *supra* note 42, at 99-110. For discussions of a trend by public television to capitalize on its "brand" and

A focus on public television, rather than ceding the field to cable, is necessary for at least three reasons. First, not everyone has access to cable television: “an estimated 20% of the 100 Million U.S. households with TVs do not subscribe to cable or satellite service (presumably for reasons of cost).”<sup>220</sup> Second, studies show that public television programming is both more balanced—consisting of both cognitive and pro-social shows—and also of higher quality overall than cable television educational shows.<sup>221</sup> Also, upon closer examination, there are limits to the diversity of children’s educational programming on cable.<sup>222</sup> Third, the future of the cable business model is itself unclear. Currently, cable is sold to subscribers on a tiered basis, with groups of channels bundled into tiers. If that changes and subscribers are instead able to pay “à la carte” (only for the channels or “mini-tiers” that they want), then analogous profitability factors that have plagued broadcasters vis-à-vis children’s educational programming may bedevil cable as well.<sup>223</sup>

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to engage in entrepreneurial enterprises to promote funding, see, for example, Sylvia M. Chan-Olmstead & Youngwook Kim, *The PBS Brand Versus Cable Brands: Assessing the Brand Image of Public Television in a Multichannel Environment*, 46 J. BROAD. & ELEC. MEDIA 300 (2002). For critiques of marketing as the “tail that wags the dog” even in the PBS context, see LAURA BUDDENBERG, WHO’S RAISING YOUR CHILD: BATTLING THE MARKETERS FOR YOUR CHILD’S HEART AND SOUL 32 (2004). See also Sally Beatty, *Elmo Gets E-Mail, and Maybe Ads—Links Between Public TV in US and Underwriters Raise Marketing Concerns*, WALL ST. J. EUR., July 12, 2002, at N4.

220. James, *supra* note 134. In 1994, the Supreme Court in *Turner I*, 512 U.S. 622, 623, referred to the forty percent of Americans without cable as supporting congressional intent to protect free over-the-air television. See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, 19 F.C.C.R. 1606 (2004). Although cable passed 97% of U.S. homes as of June 2003, only 63.7% actually subscribed to cable (from a high of 68% in 1998). *Id.* at para. 22 tbl.1. The reduction in cable subscribership is attributable, in part, to the rise of direct broadcast satellite (DBS). *Id.* at para. 23. With regard to the expense of cable, cable rates have been consistently increasing in the past twenty years; in fact, the increase in cable rates was the impetus for Congress’s adoption of the 1992 Cable Act. See *id.* at para. 1.

221. Wilson, Kunkel & Drogos, *supra* note 17, at 20. The commitment of public television to children’s educational programming is indisputable, with some public stations reputedly airing eleven hours per weekday of children’s E/I programming. *NAB Comments*, *supra* note 33, at 8-9.

222. Although there is a significant amount of children’s programming on cable, Nickelodeon is the only cable network that positions itself as a kids-only network. Whitney, *supra* note 156, at 10. While the Disney Channel is targeted to families, the Cartoon Network reaches for a broader audience. *Id.* (quoting Nickelodeon executive). Moreover, as for the Disney channel, although it is purportedly advertising free, its programming is effectively one long-form advertisement for the universe of Disney programming and products. PECORA, *supra* note 42, at 84-90.

223. See Michael Grebb, *The Political Endurance Test: Offering Channels in “Family Friendly” Tiers—or One by One—Could be the Death Knell for Some*, MULTICHANNEL NEWS, May 17, 2004, at 34 (quoting Discovery Networks spokesman as saying that “the network group would never have been able to launch such family-friendly channels as Discovery Kids or The Science Channel in an a la carte [sic] or mini-tier world.”). Even

History shows that government funding of children's educational programming is not a viable method for promoting public television E/I development. Congressional funding of overall public broadcasting in the United States has been consistently criticized as insufficient and often subject to ideological skirmishes.<sup>224</sup> The specific history of children's educational television is even more telling. In 1990, as part of the CTA legislation, Congress created the National Endowment for Children's Educational Television specifically to support children's educational television programming.<sup>225</sup> Unfortunately, however, Congress did not renew the funding for the Endowment after 1995.<sup>226</sup> History thus gives us reason to expect that Congress would not consistently fund public broadcasting children's E/I programming efforts. In any event, even if the legislature had continued to appropriate funds under the Act, the endowment amounts would have been insufficient to promote significant growth in high-quality programming, which is particularly costly.<sup>227</sup> The fundamental lesson to be learned from the failure of the Endowment is that, despite across-the-aisle rhetoric supportive of children's education, it is unwise to rely on congressional funding of programming in support.

An alternative to government funding is to require broadcasters to contribute a yearly E/I license fee into a public broadcasting fund.<sup>228</sup> This

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Nickelodeon, which began life as a commercial-free network, has so significantly incorporated advertising and merchandising into its structure that it, too, is not insulated from the problems posed for children's programming by advertiser support. Regarding the history of Nickelodeon, see, e.g., PECORA, *supra* note 42, at 84, 91-99.

224. U.S. expenditures on public broadcasting are far lower than English or European funding. See Geller, *supra* note 218, at 364. Public Broadcasting funding in the United States was \$430 million in 2009. Lynn Elber, *PBS Chief Says Public Broadcasting Funding Faring Better Under Obama than Bush*, MINN. STAR TRIB., Aug. 2, 2009. BBC funding in 2009 was approximately £4.4 billion (although Britain's parliament has threatened to reroute £125 million to other networks). Aaron O. Patrick, *BBC Prepares to Protect Funding*, WALL ST. J., July 3, 2009, at B4.

225. See 47 U.S.C. § 394; *supra* note 31 and accompanying text.

226. See *supra* note 31 and accompanying text.

227. See 47 U.S.C. § 394(h) ("There are authorized to be appropriated \$2,000,000 for fiscal year 1991, \$4,000,000 for fiscal year 1992, \$5,000,000 for fiscal year 1993, and \$6,000,000 for fiscal year 1994 to be used by the Secretary to carry out the provisions of this section."). Congress, however, appropriated only \$3 million for NECET up to 1993, Notices, 58 Fed. Reg. 15222, 15222 (Mar. 19, 1993), \$1 million in 1994, Notices, 59 Fed. Reg. 14024, 14025 (Mar. 24, 1994), and \$2.5 million in 1995, Richard E. Wiley & Paul E. Misener, *Whither Goest NTIA? The Fate of a Federal Telecommunications Agency*, 48 FED. COMM. L.J. 219, 230 (1996). There is no evidence of appropriations after 1995.

228. Some, such as former FCC General Counsel Henry Geller, have also suggested a kind of broadcast tax or license fee model. See, e.g., Geller, *supra* note 218, at 362 (proposing a license fee, consisting of a percentage of broadcasters' profits, to be contributed to the public broadcasting service); *id.* and accompanying text. See also Steve Behrens, *Poll: 8 in 10 Say Commercial Broadcasters Should Aid Public TV*, CURRENT ONLINE, Jan. 25, 1999, <http://www.current.org/dtv/dtv901g.html> (reporting poll results that seventy-nine percent of adults would favor requiring commercial broadcasters to pay five

could ameliorate public television's perennial funding problem by having commercial broadcasters help fund children's public programming. The objective of the fund would be to assure a baseline, in addition to existing public television E/I programming for children, of E/I programming to make up for shows that broadcasters opted not to air themselves.

The target amount should be the estimated cost of having public broadcasters air E/I programming at least equivalent to three hours per week for each stream of multicasting by all commercial broadcasters. The E/I fee could be established and allocated per broadcaster according to various plausible methods, the comparative merits of which would most appropriately be explored in a public notice-and-comment context.<sup>229</sup> The E/I fee would be paid into a public-television children's educational programming endowment fund akin to the original 1990 NECET fund. Disbursements from the fund would be made to public, nonprofit producers of high-quality E/I programming, preferably by an independent, nongovernmental management entity.

As described below, broadcasters could then earn credits that would reduce or offset their E/I fees if they decided to air children's E/I programming themselves, based on the quality and effectiveness of the programming they offer, including effectiveness in serving otherwise underserved needs of the children in their markets.<sup>230</sup> Finally, because one of the difficulties facing children's E/I programming is apparently the lack of media literacy on the part of the audience,<sup>231</sup> the independent administrator of the E/I fund could be charged with the goal of increasing public understanding and awareness of the availability and benefits of such programming.

Of course, even proponents of a public interest fund approach recognize the "large obstacles" faced by broadcast tax proposals.<sup>232</sup> In fact,

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percent of revenues into a public broadcasting fund).

229. Some possibilities that come to mind are the following: a percentage of earnings, a percentage of net revenues, a fee based on audience reached, a fee based on comparative ratings of existing children's shows, a fee based on the cost of the stations' best children's educational programming over some period of time, among other possibilities. It is beyond the scope of this Article to analyze all the possible methods of fee assignment. Suffice it to say, however, that such an analysis is necessary. For example, it is important to realize that a fee based on cost of programming creates perverse incentives for broadcasters to spend less on their E/I fare. If such an approach were to be recommended, therefore, it would have to contain counter-weighted elements. Similarly, to the extent that the fee was revenue-related, broadcasters' financial claims would have to be checked for accuracy. The current *Empowering Parents NOI* invites discussion of pay-or-play options. See *Empowering Parents NOI*, *supra* note 4, at 13180 and n. 39.

230. See discussion *infra* Part IV.C.

231. See *Empowering Parents NOI*, *supra* note 4, at 13190-92 (requesting information regarding media literacy programs).

232. Geller, *supra* note 218, at 365 (quoted in Hazlett & Spitzer, *supra* note 218, at 144).

the FCC declined to adopt a "pay or play" system several years ago because of its concerns with pricing-related administrability.<sup>233</sup> And broadcasters have a powerful lobby on the Hill and significant clout with the local legislators whose campaigns they report.<sup>234</sup> This is why it is important to get the broadcasters to "buy in" to the E/I fee system.

One of the major benefits of a serious FCC public study of the subject is that it would begin revealing the parties' comparative preferences among various alternatives. Not only would the advantages and disadvantages of various possibilities be ventilated, but—perhaps even more importantly as a practical matter—the palatability of the approaches to each of the relevant parties could be comparatively established. Depending on the details, and particularly when paired with a "pay or play" exemption, a reasonable E/I fee system might well be more preferable to broadcasters than the current three-hour rule, especially in light of the possibility of strengthened enforcement under new legislation. Thus, an E/I fee system, as proposed here, might turn out to be more politically viable than might be predicted. As a practical matter, the FCC's inquiry into this kind of system might lead to another negotiated compromise akin to the negotiated Joint Proposal that was ultimately adopted by the FCC for the digital television E/I rules in 2006.<sup>235</sup>

### C. *The "Play" Prong: Bounded Discretion*

The proposed E/I fee should be paired with an option that would allow stations to minimize or avoid the fee by airing E/I programming

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For example, broadcast tax models could be criticized for raising valuation and calculation problems, for imposing significant governmental monitoring costs, and for increasing unpredictability in the amount of funding from year to year. They can also be used as an excuse by congressional foes of public broadcasting to eliminate or significantly reduce government funding; why should Congress appropriate funds if at least some part of the public broadcasting service can get adequate private support? Moreover, to the extent that the previously suggested broadcast tax model would funnel funding to an undifferentiated public broadcasting pool, children's television could get lost in the competition for funds by those seeking to produce many different kinds of public-good programming. In addition, the question of who is to decide what is produced becomes increasingly significant in light of accounts of governmental and public attempts to pressure public television. See, e.g., Stephen Labatan, *Republican Chairman Exerts Pressure on PBS, Alleging Bias*, N.Y. TIMES, May 2, 2005, at A18, available at <http://query.nytimes.com/gst/fullpage.html?res=9C04E2DC1F31F931A35756C0A9639C8B63&sec=&spon=&pagewanted=2>.

233. The FCC expressed concern that "the FCC would be required to determine how much broadcasters would have to pay other stations to air educational programming." *2004 Children's DTV Report & Order*, *supra* note 6, at para. 31.

234. Kunkel, *supra* note 49, at 45-46 (citing to characterization of NAB as "one of the nation's most effective industry lobbies").

235. *Joint Proposal*, *supra* note 72. This is a descriptive prediction and not a ringing endorsement of such negotiated policies. That subject is beyond the scope of this Article.

themselves.<sup>236</sup> To ensure that the new regime would lead to an increase in programming quality, the broadcasters' obligations to pay the E/I fee should be reduced only if the stations air programming that is rated highly in comparison to other E/I programming by nationally recognized rating surveys. The broadcasters should also be limited in the degree to which they could aggregate their children's E/I programming to weekend mornings.

The credit applied to the broadcaster should be increased to the extent that the programming it airs meets needs that are otherwise underserved in the broadcasters' local market. This provision is particularly necessary because some types of children's educational programming are not as underprovided as others, and any broadcaster attempts to respond to those disparities should be particularly rewarded.<sup>237</sup>

The E/I programming should be reviewed and rated for educational quality by ratings organizations, which must survey a substantial amount of E/I programming per year and rate programs on a curve (in rank order), rather than considering them singly.<sup>238</sup> Those ratings organizations do not yet exist. The work of rating the child-friendliness of television shows and movies has been done by private advocacy groups and a few social scientists in connection with FCC regulatory reviews. An industry of independent rating institutions could develop, particularly with public funding.<sup>239</sup> It would be important for the ratings to be made publicly available and highlighted on the FCC's redesigned Web site. Broadcasters

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236. For other references to the possible benefits of sponsorship models, see, e.g., Krotoszynski, *supra* note 23, at 1245-46; Sunstein, *Television and the Public Interest*, *supra* note 87, at 538; Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 *COMMLAW CONSPICUOUS* 771, 818 (2009); Aryn Pedowitz, *Protecting the Public from Themselves: The First Amendment, Public Policy, and Our Failure to Protect Dissent*, 44 *SANTA CLARA L. REV.* 269, 300 (2003).

237. One of the witnesses who testified at the recent Senate Commerce Committee hearing on Rethinking the Children's Television Act explained that, while there is an adequate amount of children's E/I programming for preschool aged children, children in the six-to-eleven age group were comparatively underserved. *See supra* note 1. In addition, Children Now has complained that there is a disparity in the amounts of cognitive and social programming aired to satisfy the current three-hour rule. Wilson, Kunkel & Drogos, *supra* note 17, at 5. *See also Empowering Parents NOI*, *supra* note 4, at 13179 (requesting further comment on this issue). If that were the case in a local market, the broadcaster might choose to air cognitive programming if doing so would lead to a greater reduction in its E/I fee obligation.

238. Otherwise, broadcasters could circumvent the system by finding a program rater that would simply say their program was educational.

239. One possibility would be that each E/I title would pay a rating fee to a rating fund. The manager of the rating fund would retain two or more ratings agencies which would survey all E/I titles and rate them on a curve or rank them. A separate ratings fund would not be necessary as such, however. The independent entity charged with retaining ratings agencies could be funded from a small portion of E/I fund fees as well. These are the sorts of details that would be best worked out in the FCC's children's television proceeding.

should be allowed to use the ratings to promote their shows. The rating results could be used to establish credits to offset the participating broadcasters' E/I fees. The development of transparent, nongovernmental ratings of children's E/I programming could be one way of responding to critics skeptical of the usefulness of "quality" as a predictable metric for assessing programming.<sup>240</sup>

The FCC has not yet seriously explored<sup>241</sup> such an alternative. The CTA refers to something of a sponsorship notion, but it has been ineffective because it has not been interpreted in a fashion tailored to broadcasters' incentives.<sup>242</sup> A well-crafted option of the kind proposed here

240. See *supra* note 221; see also *supra* notes 222-23 and accompanying text.

241. The FCC did ask for comments on a "pay or play" option in its 2000 notice of proposed rulemaking, *2000 Children's Digital TV NPRM*, *supra* note 49, at para. 20, but rejected that option in its 2004 digital television proceeding, *2004 Children's DTV Report and Order*, *supra* note 4, at para. 31. Most of the comments submitted in response to the 2000 NPRM did not address the "pay or play" question. The principal discussion was undertaken by the children's advocacy group, Children Now. See Comments of Children Now at 28-30, Public Interest Obligations of Television Broadcast Licensees, FCC Docket No. 00-167 (rel. Dec. 15, 2000). The FCC declined to adopt a "pay or play" approach because of a concern that "the 'pay or play' approach would be difficult to administer . . ." *2004 Children's DTV Report and Order*, *supra* note 6, at para. 31. See also *supra* note 223 and accompanying text. The FCC has specifically flagged "pay or play" as an option for discussion in its most recent inquiry. See *Empowering Parents NOI*, *supra* note 4, at n.39.

242. See 47 C.F.R. § 73.671(d) (2009):

Licensees that do not meet these processing guidelines will be referred to the FCC, where they will have full opportunity to demonstrate compliance with the CTA (e.g., by relying in part on sponsorship of Core educational/informational programs on other stations in the market that increases the amount of Core educational and informational programming on the station airing the sponsored program.

It does not appear that any stations have thus far availed themselves of the "pay or play" option. Little can be concluded from this, however. This option, as defined in the FCC's rules, is not an equally satisfactory alternative to the distribution of programming by the licensees themselves. The sponsorship option in the *1996 Children's Television Rules*, *supra* note 6, at paras. 138-39, is not a realistic alternative to airing children's programming. After all, the "pay or play" option as designed in the Order entails additional costs and risks, in contrast to complying with the processing guideline by simply airing the minimal amount of children's core educational programming. Stations that have not aired the recommended number of hours of children's television cannot get FCC staff-level approval of their renewal applications. Instead, they have to argue their case to the FCC, which imposes both costs (in both time and money) and risks of nonrenewal or limited renewal. If license renewal is at stake every eight years, with no formal advice earlier, one might expect a licensee to do everything possible to get Staff approval rather than having to go before a political body. Moreover, the FCC has made it clear that it "has discretion to determine how much weight to give to a station's sponsorship of core educational and informational programming on other stations in the market when evaluating the station's compliance with the CTA." *2004 Children's DTV Report & Order*, *supra* note 6, at para. 20 n.50. This creates significant uncertainty for broadcasters and creates a disincentive to sponsorship. In addition, the FCC has interpreted the sponsorship option narrowly: "a licensee's sponsorship of programming aired on another station in the market does not relieve the licensee of the obligation to air educational programming, and . . . such efforts may be considered only 'in

enhances flexibility. It replaces bureaucratic FCC judgments with the broadcaster's own decision about its willingness and ability to produce or air quality children's educational programming on its own channels. Broadcasters can realistically and flexibly adjust to market conditions as assessed by the station at the relevant time. It permits the development of expertise (which may lead to higher-quality children's educational programming)<sup>243</sup> and offers broadcasters the possibility of branding some of their digital streams as child-friendly venues. (As noted above, a fledgling experiment in such programming is already occurring with the Qubo service.<sup>244</sup>)

Whatever the details, it is important that a "pay or play" option not turn into a tool for broadcasters to reduce their obligations to serve children. The structure of the proposed regime must account for broadcasters' incentives and be alert to the possibilities of gaming the system.<sup>245</sup> Broadcaster discretion must be grounded: The FCC's rules must be stringent enough not to allow broadcasters to avoid paying their E/I fees by airing the equivalent of *SpongeBob SquarePants* or *The Fairly OddParents* as educational programming. After all, the point of this proposal is to generate the preconditions for a potential improvement in the available children's educational programming and not to give broadcasters a new loophole to reduce their current compliance with the CTA. I am mindful of the warning to "do no harm" in a context in which broadcasters would have plenty of incentives to claim that their programming should be counted as high-quality educational fare. Without strong rules regarding, inter alia, ratings agencies' independence, the transparency of quality metrics used by those agencies, and the connections between high ratings and E/I program fee reductions, the FCC could end up in the position of fighting rear-guard actions against broadcaster positions even more cynical than the pre-1990 claims that *The Jetsons* was educational programming.<sup>246</sup>

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addition to' consideration of the educational programming aired by the licensee itself." 2004 *Children's DTV Report & Order*, *supra* note 6, at para. 31 n.67 (citing 1996 *Children's Programming Report & Order*, *supra* note 6, at para. 138). This kind of requirement would naturally reduce station incentives to subsidize such programming on other stations.

243. Sunstein, *Television and the Public Interest*, *supra* note 87, at 540.

244. *See supra* note 33 and accompanying text.

245. This is why an ordinary "pay or play" system alone is problematic. If the cost charged to subsidize PBS programming, for example, is too high, then the broadcaster will choose to air lower-cost and lower-quality E/I programming instead of paying for the better product. If it is too low, then PBS will not have adequate funds to produce high-quality programming itself. Therefore, a "pay or play" model alone, at the discretion of the broadcaster, is less desirable than an E/I tax with an exemption alternative to achieve the goal of increasing high-quality children's educational programming. For different ways of gaming the rules in the children's television context, *see supra* note 193.

246. Admittedly, trying to test whether a "pay or play" scheme would be more beneficial than what is currently in place poses challenges. I thank Professor Matthew Spitzer for



FCC vigilance could help here.

It must also be remembered that the "pay or play" model proposed here begins by placing on commercial broadcasters an obligation to support additional quality children's programming on public television. The affirmative burden of making reasonable claims of quality in order to reduce or eliminate that obligation sits squarely on the broadcaster. Unless the broadcaster's proposed programming meets the transparent standards of quality articulated by independent ratings organizations, there is no reason to reduce or eliminate the station's obligation to pay its E/I fee. This constrains the worst temptations available to broadcasters.

The timing of this proposed experiment is propitious, as U.S. broadcasters have just switched to an entirely digital system and are presumably still in the midst of determining the business models they will employ for their digital streams. It may be that some broadcasters will choose to air specialized children's programming streams in competition with cable. Qubo presents one model of a broadcast alternative to cable children's channels.<sup>247</sup> As discussed above, changes in the children's

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making me think more about this. I do not claim that we can realistically engage in a robust, controlled experiment that would reveal whether the proposed "pay or play" scheme would lead to the availability of a significantly greater amount of high quality children's E/I programming than would have been aired under the current regime. To try to be rigorous, we might wish to select matched pairs of broadcasters, keep one operating under the current "three hour rule" and permit the other one to "pay or play" as suggested here, in order to observe the results. *See* e-mail from Professor Matthew Spitzer, to Lili Levi (Oct. 6, 2009) (on file with the author). It is highly unrealistic that such an experiment could take place. Moreover, complexities would abound, as we struggled to make sure that individual broadcast markets were comparably served and that strategic game-playing did not undermine the experimental model.

There are two reasons to believe that such an experiment can be tested, however. First, we have the experience of what has been aired under the three-hour rule since 1996. This provides a data set against which we can compare how broadcasters react to the regime proposed here. Putting aside the complexities raised by attempts to make detailed comparisons between future developments and historical data, we can nevertheless get a gross sense of the impact of the proposed change by such a comparison.

Second, one can compare the quality of children's educational programming aired by those broadcasters choosing the play option and the programming produced by public television with the proceeds of the E/I fund. Presumably, broadcasters, when voluntarily choosing the play option, will air programming of quality at least as high as when they were simply complying with the three-hour rule. The real test will then be to evaluate the programming that is made available as a result of the E/I fund. If public television provides better children's educational programming than is provided by the commercial broadcasters under the new voluntary scheme, then we will know that the channeling of these resources from the commercial broadcasters to public television has improved children's content. Even if only a small percentage of broadcasters choose to sponsor public television programming by paying into the E/I fund, but the quality of the programming generated by that fund is better than the quality that the market otherwise generally provides, then one can say that the "pay or play" scheme proposed here has led to an improvement.

247. *See supra* note 33 and accompanying text.

television marketplace have led to greater profits flowing from some children's programming than had previously been the case,<sup>248</sup> and the multiple programming streams enabled by the digital conversion mean that over-the-air broadcasters can more profitably choose to program for niche audiences than ever before. The ownership structures of other broadcasters might give some stations (such as ABC stations) cable E/I programming (such as Disney fare) at favorable rates, thereby leading those stations to play, rather than pay their E/I fees. At the same time, other broadcasters may well decide that paying for other entities to produce and air high-quality E/I programming is more economical for them—even if they are compelled to pay far more than rock-bottom prices—than the confusion occasioned by attempts to find commercially viable E/I programming.<sup>249</sup> The goal of the alternative proposed here is to provide a flexible regulatory regime that will use principles of bounded discretion to promote more and higher-quality children's E/I programming than has been engendered thus far by the FCC's approach.

## VI. CONCLUSION

For more than a decade, the FCC has quietly imposed an obligation on each and every broadcaster to air children's educational programming—meaning programming specifically designed to serve children's educational and informational needs. Even though risk-averse broadcasters have all interpreted the obligation as effectively a rule requiring three hours per week of E/I programming, there has been no official FCC assessment of the efficacy of the rule. The private empirical studies that exist suggest a mixed picture: while most broadcasters do air three hours per week of what they claim is “core” programming, many of the shows can be criticized as insufficiently educational and overly focused on social rather than cognitive lessons. Moreover, children's E/I programming is largely limited to the Saturday morning time block.

The FCC has simultaneously sought to promote both high-quality educational programming and a hands-off attitude toward broadcaster editorial discretion. Similarly, it has sought to protect children from excessive commercialization while simultaneously requiring advertising-supported entities to air expensive, high-quality E/I programming. In light of broadcasters' economic incentives and the structure of the broadcasting industry, these goals have each pulled in different directions, leading to

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248. *See supra* Part IV.E.1.

249. Since the 1996 Order went into effect, broadcasters have changed their children's E/I programming line-ups frequently. (The FCC's Form 398 filings tell the story in detail.) FCC Form 398—Children's Television Programming Report, *available at* [http://media.ksfy.com/documents/childrens\\_prog.pdf](http://media.ksfy.com/documents/childrens_prog.pdf).

unimpressive results for child viewers and paralysis at the FCC.

This Article contends that although the FCC's rules would probably have been deemed constitutionally acceptable under the First Amendment had they ever triggered judicial review, they should nevertheless be revised as a matter of policy. In light of the reality of the children's offerings on television (broadly conceived to include cable and DBS), and in light of the excellent children's programming that is the hallmark of the public broadcasting system, this Article suggests that the FCC's new inquiry focus on the desirability of an experimental shift to a realistic "pay an E/I fee or play" model. On this approach, commercial broadcasters would be obligated to subsidize the production of E/I programming on public stations via a fee contributed to an E/I fund to be administered by an independent entity, but would be afforded the opportunity of reducing or eliminating the E/I fee obligation by airing high-quality programming themselves (as rated pursuant to transparent and clearly articulated standards by independent ratings agencies). Hopefully, the structure of such a regime would simultaneously reduce both game-playing by broadcasters and FCC involvement in expressive decisions.

Instead of retreading old ground, the FCC now faces a perfect opportunity to engage the parties in a negotiated experiment of this kind. To the extent that the majority of broadcasters choose to comply with the CTA by sponsoring children's educational programming on public television, then we have created a more consistent funding stream for the development of quality E/I programming such as *Sesame Street*. As for those broadcasters choosing to air their own children's E/I programming, the constraints on their discretion proposed here could well promote increases in quality. Either way, the FCC could be taking realistic steps toward fostering a new generation in children's E/I programming.

