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REGULATING VIOLENCE ON TELEVISION

Harry T. Edwards*
Mitchell N. Berman**

I. INTRODUCTION

Many people in American society believe that there is a causal link between viewing violence on television and antisocial violent behavior. One recent poll revealed that eighty percent of Americans surveyed agreed that "violence on TV shows is harmful to society."1 This is hardly surprising when one considers some of the truly awful portrayals of violence now shown in gory detail on television and the sheer ubiquity of less graphic presentations. Violence is portrayed as an accepted way of life: weapons are plentiful and people kill each other on a whim, for any reason or no reason at all. Not only is human life not shown to be sacred, the media message is just the opposite: if someone has something you want, take it from him; if he resists, give him a good beating; if he complains or reports you, then destroy his home and family, rape his girlfriend, and "blow him away." This frightens us, because we now know that television is . . . a socializing agent almost comparable in importance to the home, school, and neighborhood in influencing children's development and behavior. The medium is a formidable educator, the effects of which are both pervasive and cumulative. Research findings have long since destroyed any illusion that television is merely innocuous entertainment. . . ."2

Thus, many adults wonder whether even good parental guidance can overcome these vile messages from media sources; and many parents fear that, because the trash coming from the media is so pervasive, their children will succumb to the belief that violence is their heritage. The endless news reports of violent crime, especially among young people, tend to confirm these fears.

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2 David Pearl, Familial, Peer, and Television Influences on Aggressive and Violent Behavior, in CHILDHOOD AGGRESSION AND VIOLENCE 231, 236-37 (David H. Crowell et al. eds., 1987).
People feel justly horrified by the callous disregard for human life—whether seen in the movies, on television, or in the streets—and are weary of media attempts to market violence for a profit. Indeed, some would say that, even if social scientists failed to demonstrate a direct link between media violence and human behavior, it is morally harmful to expose viewers, especially young viewers, to extreme violence. These concerns prompt many calls for action. And in the past two years, the public fervor reawakened congressional concern over the extent and manner of televised portrayals of violence: a slew of bills and resolutions intended to combat television violence floated through the 103rd Congress. Even Hollywood has joined the fray, with the release of *Natural Born Killers*, a 1994 Oliver Stone movie “about two psychopaths on a killing spree and their avaricious exploitation by the news media, which turn them into pop icons.” The movie has been widely touted as “social satire rather than a drama about two killers.”

Congress has devoted close attention to the issue of television violence on several occasions since television’s widespread introduction in the early 1950s. These ventures yielded innumerable hearings and three compendious government reports on the linkage between portrayals of violence in the media and antisocial violent behavior. Until recently, however, Congress has taken no serious legislative actions to combat televised violence. The debate around televised violence seems to have escalated in recent years, in part because of society’s growing impatience with increasing incidents of violent crime. The media is an easy target, especially since it portrays so

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5 Id.


All three reports affirmed some causal connection between television violence and antisocial aggression. However, the 1969 and 1972 reports in particular exhibited the ambivalent and highly qualified texture of most large politicized committees and are therefore difficult to summarize. Indeed, the *New York Times* first read the 1972 report to conclude that television violence was unharmful. See Prettyman & Hook, supra note 6, at 324 n.24.
much violence, and also because increasing reports from social scientists equate portrayals of violence in the media with misanthropic violent conduct. Regulation of the media seems inevitable to some; the many bills recently offered in Congress reflect this view. Although several of the bills only call for further study or are otherwise of limited direct effect, others would materially affect the presentation of violence on television.

The legislative proposals with the most bite fall into four general categories: (1) banning or zoning; (2) balancing; (3) labelling; and (4) user blocking. The first of these proposals would involve either a ban of certain types of violent programming from television entirely or, alternatively, a permissible zone of time during which such programs could be shown out of children’s viewing hours. The second approach would require programmers to provide balanced programming by offsetting violent shows with nonviolent ones. The third proposal would direct programmers to disclose the violent content of individual shows to viewers by means of violence advisories. And the final proposal would require television manufacturers to install circuitry in new sets that would enable viewers to block out violent programs at their individual discretion.


10 Although research has revealed no pending bills that specifically require balanced presentations of violence, the FCC has previously mandated balanced coverage of issues of public importance under the Fairness Doctrine. See infra note 85.


Notwithstanding the moves afoot to curb portrayals of violence in the media, skeptics abound. Some question the validity of the social science studies that purport to show a positive relationship between media portrayals of violence and antisocial conduct. They point out that "[t]he causes of behavior are complex and are determined by multiple factors, and the viewing of televised violence is only one in a constellation of determinants or precipitating factors involved in antisocial or aggressive behavior."13 Others argue that, even if a relationship between media violence and antisocial conduct exists, Congress will never devise a viable way to regulate the media, because offending "violence" defies definition. Finally, constitutional purists contend that, whether or not a relationship exists, regulation of the media to deal with this problem is impermissible under the First Amendment.

This Article examines whether any of the aforementioned forms of regulation14 are consistent with the First Amendment.15 Only a few legal commentators have given this question the serious attention it warrants.16 Krattenmaker and Powe's exhaustive and thoughtful article is particularly noteworthy. However, the expansion of social science data over the past fifteen years significantly undermines their skepticism regarding whether television violence causes antisocial aggression. Additionally, the marked evolution of First Amendment doctrine requires fresh legal analysis.

The age when courts and commentators could debate whether the First Amendment constituted an "absolute" barrier to government regulation of speech17 is long gone. In its place stands a complex set of rules that directs a reviewing court to consider such diverse factors

13 Pearl, supra note 2, at 238.
14 For purposes of constitutional analysis, we do not distinguish between legislative and agency action. If, for example, it would be unconstitutional for Congress directly to ban television violence on Saturday mornings, there is no good reason to believe that the FCC could effect the same result through its licensing procedures. This point is persuasively argued in Thomas G. Krattenmaker & L.A. Powe, Jr., Televised Violence: First Amendment Principles and Social Science Theory, 64 VA. L. REV. 1123, 1261 n.823 (1978).
15 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.
17 For a sample of the "absolutist" - "balancing" debate of the 1960s, see Gerald Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 STAN. L. REV.
as the form and effect of the regulation, the purposes of the regulators, the value of the speech regulated, and the type of media involved. It is no mean task to sort out the law in this area, and in preparing this Article, we often wondered why we had ventured into this constitutional thicket.

The focus of this Article will be regulations relating to portrayals of violence on television. We make no serious effort to deal with portrayals of violence in newspapers, magazines, books, videos, or movies. Although a number of common issues relate to all media forms, television is unique in several important respects: (1) television has long been the focus of attention of regulators and social scientists, so there is more useful data to consider; (2) society has tended to assume that television more likely involves a "captive audience," especially among children, than other forms of media; (3) newspapers and magazines, more often than not, are principally involved in "news reports" of violence; (4) constitutional caselaw has traditionally allowed more regulation of broadcast television than of other media forms; and (5) television has less well-established traditions of "self-regulation" than the movie industry. In short, because these differences pose some analytical problems, the better part of wisdom caused us to limit the focus of this Article to television violence.

The Article is divided into five parts. In Part I we examine whether the level of scrutiny applied to regulations of television violence should be less than would apply generally to other media under the First Amendment. The Supreme Court has long held that those awarded scarce and valuable licenses to broadcast in the electromagnetic spectrum enjoy lesser constitutional protection against government regulation. We question this view, concluding that the justifications offered to distinguish broadcast media from other media—and especially distinguishing broadcast and cable television—do not hold.

Part II invokes the centerpiece of contemporary First Amendment doctrine—the distinction between content-based and content-neutral speech restrictions. Our review of the legal landscape suggests that, although some close questions arise, generally the banning, zoning, balancing, and labelling proposals are content-based regulations; most proposals mandating the installation of lock-out technology, however, can be written to be content-neutral. Part III begins our analysis of the content-based regulations of television violence by observing that much will depend on whether violent television programs constitute high- or low-value speech. We are inclined to think that television violence is high-value (albeit not necessarily high-quality)

1001 (1972); Harry Kalven, Jr., Upon Rereading Mr. Justice Black on the First Amendment, 14 UCLA L. Rev. 428 (1967).
speech, entitled to the full protection of the rules the Supreme Court has crafted to govern content-based speech restrictions.

Part IV explores those rules. We quickly conclude, along with most others who have examined the issue, that Congress may not regulate television violence as a "clear and present danger" under Brandenburg v. Ohio. We explain, however, that, properly understood, the Brandenburg test simply provides the wrong analytical framework. In our view, most regulations of television violence should be scrutinized under a form of strict scrutiny the Court has developed to govern content-based regulations of high-value speech. Part IV sets forth the elements of "exacting scrutiny."

Part V looks with exacting scrutiny at the principal proposals for content-based regulation of television violence. We believe that, even under exacting scrutiny, content-based regulations of televised violence may be premised on the data indicating that exposure to televised violence causes antisocial aggression. The problem that we find is not that the data fail to show a causal link between exposure to televised and antisocial aggression, but rather that the existing social science data do not supply a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior. Because of this, legislators face an insurmountable problem in finding a generic definition of violence that is coherent and not overbroad. We fear that this may not be possible under a standard of exacting scrutiny. We conclude, therefore, that the proposals covering banning, zoning, and balancing cannot meet exacting scrutiny under the First Amendment. We think that most labelling proposals, although content-based, would be found lawful if designed to facilitate parenting. And, finally, we believe that because "V-Chip" and other user-blocking proposals easily can be written to be content-neutral, they will survive any constitutional challenge.

I. IS BROADCAST TELEVISION REALLY UNIQUE?

Legislators' and social scientists' concerns about the effects of media portrayals of violence on society predate the rise of television. Public attention focused on violence in films in the 1920s and shifted toward violent comic books in the 1940s. Ultimately, both the movie and comic book industries forestalled regulation by the federal government by adopting forms of self-censorship—the familiar ratings system of the Motion Pictures Association of America and the Comic Book Code, respectively. If, however, Congress were suddenly to revisit its previous concern about violence in either movies or comics,
or were it to focus on, say, violent videotapes, any resulting regulations would be scrutinized under a single general body of First Amendment doctrine.

The broadcast media are different. In 1943, the Supreme Court first identified a "unique characteristic" of radio and television that justified a special level of First Amendment protection. That unique characteristic was spectrum scarcity. The Court held that Congress could authorize the Federal Communications Commission to regulate broadcasting in the "public interest" because, "[u]nlike other modes of expression, [broadcasting] inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." FCC control over broadcast media meant a corresponding decrease in First Amendment protection.

The Court's "scarcity" rationale is not the only justification that has been offered for the different treatment accorded broadcast media under the First Amendment. Over the years, the Court has propounded two additional theses: Broadcasting is (1) uniquely accessible to children, and (2) uniquely pervasive or intrusive in the home.

A look at how these rationales distinguish this "unique" medium, broadcasting, from its extended family of other media and its not-so-distant cousin, cable, suggests that the Court should not consider broadcast television such a poor relation under the First Amendment.

A. Broadcast Media

In *National Broadcasting Co. v. United States*, the Court justified governmental control of broadcast licenses based on the theory of spectrum scarcity. It was not until its unanimous decision in *Red Lion Broadcasting, Inc. v. FCC*, however, that the Court spun out all of the First Amendment implications of the scarcity theory. The Court limited First Amendment protection for broadcasting with the following reasoning: Electromagnetic spectrum is a physically limited resource. Because more people wish to broadcast than there is broadcast space available, the government must assume control of the spectrum, allocating rights or licenses for its use. Otherwise, competitors might broadcast at the same frequency, causing interference or, worse, drowning each other out. Because the government owns the airwaves—in trust for the public—individual licensees similarly be-

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22 Id.


24 319 U.S. 190 (1943).

come trustees. The government may, accordingly, require its licensees to broadcast in the public interest.\textsuperscript{26} The Court explained, because "[i]t is the right of viewers and listeners, not the right of the broadcasters, which is paramount," Congress may regulate broadcasters' speech under more lenient standards than would apply to regulations of speech of the other media.\textsuperscript{27}

Courts and commentators have argued for years that scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum today nor a "unique characteristic" that should make any difference under the Constitution.\textsuperscript{28} Although the radio spectrum may have appeared limited when the Court decided \textit{Red Lion},\textsuperscript{29} today the nation enjoys a proliferation of broadcast stations. While in most cities, only one or two major newspapers exist, there will be many broadcasters and likely additional broadcast stations available for license. Should the country ever decide that it would like to increase the number of broadcast channels, it merely needs to devote more resources toward developing additional use of the electromagnetic spectrum. Technological scarcity today fails to justify different First Amendment treatment between broadcast and print.\textsuperscript{30}

In \textit{Red Lion}, the Supreme Court not only mentioned technological scarcity, but suggested that there was a demand for the spectrum that could not be satisfied.\textsuperscript{31} Economists respond that all resources are limited and scarce in the sense that people would like to use more than exist. Other commentators concede the Court's point, but argue that because the government gives away a valuable commodity—the rights to use certain airwaves free of charge—the demand will always exceed the supply. The same would be true in other cases of economic generosity. Were the government to give paper away for free, the demand, especially among would-be newspaper publishers, would

\textsuperscript{26} \textit{Id.} at 386-90.

\textsuperscript{27} \textit{Id.} at 390.


\textsuperscript{29} Plaintiffs in \textit{Red Lion} argued otherwise; they contended that technological advances had produced a more efficient radio spectrum than existed in 1934. \textit{Red Lion}, 395 U.S. at 396. The FCC provided statistics which showed that several UHF channels were available at the time. \textit{Id.} at 398.

\textsuperscript{30} Former FCC chairman Mark Fowler claims that advertising dollars restrict broadcast opportunities more than the number of channels. Mark S. Fowler & Daniel L. Brenner, \textit{A Market-place Approach to Broadcast Regulation}, 60 TEX. L. REV. 207 (1982).

\textsuperscript{31} \textit{Red Lion}, 395 U.S. at 388.
exceed the supply.\textsuperscript{32} Again, economic scarcity does not justify the Court's bifurcated First Amendment analysis.

Finally, economists contend that just because something is technologically or economically scarce does not usually justify government regulation.\textsuperscript{33} The government could easily avoid the chaos and discordance that would arise were broadcast frequencies equally and simultaneously available to everyone by treating broadcasting rights as private property. After an initial allocation, ownership and use would be governed by the free market.\textsuperscript{34}

The Supreme Court has faced critiques of its scarcity rationale with ambiguous responses. In 1984, in \textit{FCC v. League of Women Voters},\textsuperscript{35} the Court acknowledged the mounting criticism of "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity," but stated: "We are not prepared, however, to reconsider our 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."\textsuperscript{36} The following year the FCC provided a faint signal\textsuperscript{37} and then, two years later, directly responded to the Supreme Court's veiled inquiry. The FCC held the Fairness Doctrine unconstitutional stating, "the scarcity rationale . . . no longer justifies a different standard of first amendment review for the electronic press."\textsuperscript{38} Nevertheless, the following year, the Court upheld the FCC's minority ownership licensing preferences, invoking the spectrum scarcity rationale without qualification.\textsuperscript{39} And in 1994, in \textit{Turner Broadcasting System, Inc. v. FCC} ("TBS"),\textsuperscript{40} the Court reiterated that a lesser standard of scrutiny for regulations of broadcast media is alive, while hinting that it is potentially unwell.\textsuperscript{41}

\textsuperscript{32} Spitzer, supra note 28, at 1016.

\textsuperscript{33} Some commentators argue that technological scarcity does explain why government licensing of broadcasting is constitutional, but does not explain the Court's disparate treatment. See, e.g., David Shelledy, Note, \textit{Access to the Press: A Teleological Analysis of a Constitutional Double Standard}, 50 Geo. Wash. L. Rev. 430 (1982).

\textsuperscript{34} R.H. Coase, \textit{The Federal Communications Commission}, 2 J.L. & Econ. 1 (1959) (providing an excellent account of how broadcasting could be governed in the free market).


\textsuperscript{36} Id. at 376-77 n.11.

\textsuperscript{37} The FCC initiated hearings on the Fairness Doctrine, which produced a report concluding that the public had access to diverse viewpoints and thus undercut the scarcity rationale. In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

\textsuperscript{38} In re Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5053 (1987).


\textsuperscript{40} Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) ("TBS").

\textsuperscript{41} Id. at 2456 (observing that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, \textit{whatever its validity in the cases elaborating it, does not apply in the context of cable regulation}") (emphasis added); id. (stating that "we have de-
Thus, although the scarcity rationale is now widely discredited by courts and commentators, the Supreme Court continues to use it to justify broadcast's reduced First Amendment protection. In 1978, in FCC v. Pacifica Foundation, the Court offered two additional rationales for granting limited First Amendment protection to broadcasting. Although this case involved indecency as opposed to violence and radio as opposed to television, the reasoning was offered to support lesser First Amendment protection to broadcast generally. First, the Court found that "broadcasting is uniquely accessible to children, even those too young to read." This observation may distinguish print from broadcast, but it fails to draw a line between broadcast and motion pictures. In any event, while the "accessible to children" rationale may help justify regulations that protect children from, say, exposure to obscene materials in the media, in most cases it does so without attacking the media's core First Amendment protection.

The second rationale offered in Pacifica to justify lesser First Amendment protection was the intrusiveness or pervasiveness of broadcasting. The Court stated, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . [The] material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home. . . ." This controversial characterization might prompt Joe Couch Potato to wonder whether the Justices ever noticed the "off" button on their remote controls as an efficient mechanism with which to fend off intrusive and pervasive television. The pervasiveness rationale certainly does not distinguish broadcast from print. We find the onslaught of catalogues and junk mail, and now junk telephone mail, more intrusive than a controllable television set or radio. Again, while intrusiveness along with the accessibility of broadcast to children may describe government interests in regulation of televised violence, the rationales do not justify widely disparate legal treatment between broadcast media and other types of media.

B. Cable

After several years of delicately hedging the question of cable's precise constitutional status, the Supreme Court recently held in

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43 Id. at 749.
44 Id. at 748.
45 See Leathers v. Medlock, 499 U.S. 439, 444 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (noting that the Court had yet to "determine whether the characteristics of cable television make it sufficiently analogous to
TBS that cable television gets the same First Amendment protection as do all the nonbroadcast media.\textsuperscript{46} Cable's status sheds new light on the Supreme Court's rationales. There is no spectrum scarcity in cable television. Thus, cable offers spectrum-based communications media an abundance of alternatives and essentially renders the physical scarcity argument superfluous. And surely cable is as accessible to children as broadcast television and most likely as pervasive or intrusive. Even considering these two rationales together, cable television will doubtless have as great an impact on a child as broadcast television. The Court's \textit{TBS} decision drives home the irrationality of granting broadcast television less First Amendment protection than all other media.

\textbf{C. Our Thinking}

We believe that the justifications distinguishing broadcast from other media such as print, and especially distinguishing broadcast from cable, will not hold. Maintaining the scarcity rationale or the \textit{Pacifica} reasoning, or even formulating new justifications will prove difficult in future cases; we therefore venture to guess that the Court will eventually feel forced to bring broadcast television and radio into the First Amendment fold, and allow broadcasting to enjoy the full protection it deserves. In fact, Zechariah Chafee's historical analysis of the Supreme Court's responses to different media provides insight and counsels patience.

Newspapers, books, pamphlets, and large meetings were for many centuries the only means of public discussion, so that the need for their protection has long been generally realized. On the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern inventions, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture, and the radio.\textsuperscript{47}

For our purposes, regulation of televised violence will likely include both broadcast and cable. Even assuming the most extreme forms of regulatory control, the power to regulate broadcast media can hardly be seen as a solution for those intent on curbing the ill-effects of televised violence. Given the near universal agreement that cable television features more, and more graphic, violence than does another medium to warrant application of an already existing [First Amendment] standard or whether those characteristics require a new analysis\textsuperscript{48}.

\textsuperscript{46} \textit{TBS}, 114 S. Ct. at 2455-56; \textit{id.} at 2476 (O'Connor, J., concurring in part and dissenting in part) (stating that "cable programmers and operators stand in the same position under the First Amendment as do the more traditional media").

\textsuperscript{47} \textit{ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES} 381 (1954).
broadcast television,\textsuperscript{48} it is fanciful at best to think that regulation of broadcast television with no corresponding regulation of cable television will make any serious difference in addressing the perceived problem of linkage between televised violence and antisocial behavior. And most people in American society would find absurd the idea that a single law purporting to regulate televised violence could constitutionally be applied to broadcast television, but not to cable.

In short, we believe that, at the very least, the Court must treat broadcast and cable alike. Because we find the spectrum scarcity rationale to be a useless line of analysis and because we cannot comprehend any meaningful distinctions between portrayals of violence on broadcast and cable television, we think that the Court's judgment in \textit{TBS} must lead to the conclusion that all television operators stand in the same position under the First Amendment as do the more traditional media.

This Article proceeds then on the twin assumptions that the various regulations we consider would be designed to apply to both broadcast and cable television,\textsuperscript{49} and that their constitutionality will be measured by the maze of First Amendment doctrine generally. Having surmised that the Court will eventually bring broadcast television and radio within the protective fold of the First Amendment, we should make it clear that we are not as confident as some that this is inevitable, much less imminent.\textsuperscript{50} We have no divine wisdom on this point.\textsuperscript{51}

We also note that in rejecting any per se rule that would afford different levels of protection to the electronic media relative to the print media, or to broadcast television relative to cable, we do not suggest that the validity of a particular regulation of violence must be the same for all media. For example, a conclusion that mandated disclosure of violent television programming is constitutional does not necessarily mean that a similar regulation could constitutionally be applied either to comic books or to the movies. After all, the same

\begin{footnotesize}
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\item \textsuperscript{49} Although many of the recent congressional hearings focused on the broadcast networks, see, e.g., John J. O'Connor, \textit{Labeling Prime-Time Violence is Still a Band-Aid Solution}, \textit{N.Y. Times}, July 11, 1993, at II.1, the major bills introduced to combat television violence apply to both broadcast and cable television. See supra notes 9-12; see also Ernest F. Hollings, \textit{TV Violence: Survival Vs. Censorship—Save the Children}, \textit{N.Y. Times}, Nov. 23, 1993, at A21 (describing the Senate bill, sponsored by the author, to “ban the broadcast or cable transmission of violent programming during hours when children make up a substantial share of the audience”).
\item \textsuperscript{51} We also recognize that at least one important scholar argues that, notwithstanding the weakness of the spectrum scarcity rationale, different levels of constitutional protection for different media can be justified as the best means to serve the competing First Amendment values of press autonomy and public access to information. See generally Bollinger, supra note 28.
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themes, words, stories, or images do not constitute identical speech when transmitted by different media any more than a printed musical score is "the same thing" as its orchestral performance.\textsuperscript{52} Televised violence and print violence focused on the same theme may have a very different communicative impact. If so, the government might be permitted to regulate one and not the other, a difference in treatment that hinges upon the different features of the instant expression rather than upon any supposed categorical differences between the two media.\textsuperscript{53}

II. CONTENT-BASED AND CONTENT-NEUTRAL REGULATIONS

It is a black-letter rule of First Amendment jurisprudence that courts will apply more rigorous scrutiny to government regulations that abridge expression on the basis of its "content" or "subject matter" than to restrictions that apply equally to a range of speech without regard for its content.\textsuperscript{54} The distinction rests in large part upon the bedrock supposition that the First Amendment guards against governmental attempts to preempt or distort public debate by favoring or disfavoring topics, speakers, or viewpoints.\textsuperscript{55} This relatively straightforward principle is, however, anything but straightforward in operation. As the Court has recently remarked, "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task."\textsuperscript{56} In this Part of the Article, we undertake that task with regard to the various proposals to regulate televised violence.

\textsuperscript{52} Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) ("Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems.").

\textsuperscript{53} This is a central theme of both Matthew L. Spitzer, Seven Dirty Words and Six Other Stories: Controlling the Content of Print and Broadcasting Media (1986), and Lively, supra note 28. Cf. TBS, 114 S. Ct. at 2457 ("This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not. . . . But whatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.").

\textsuperscript{54} See, e.g., City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring) ("[t]he normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."); Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech, § 3.02[1], at 3-11 (1994) ("The distinction between content-based and content-neutral regulations of speech is one of the central tenets of contemporary First Amendment jurisprudence.").

\textsuperscript{55} See, e.g., TBS, 114 S. Ct. at 2459; Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (stating that First Amendment guarantees serve to "foreclose public authority from assuming a guardianship of the public mind"). Accordingly, the fact that content-neutral regulations might actually burden more speech than content-based ones, see, e.g., Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113, 128 (1981), is not entirely germane.

\textsuperscript{56} TBS, 114 S. Ct. at 2459.
A. Banning/Zoning

Any regulation that burdens television programming because it contains portrayals of violence, and does not equally burden nonviolent programming, is "content-based": it regulates expression on the basis of its subject matter. This is so regardless of how the law might define "violence," or whether the regulation affects only some subset of violent programming, excepting, say, news programs and historical dramas. Thus, a regulation that bans television shows that depict violence is content-based. Similarly, a regulation that "zones" such violent shows into (or out of) particular time slots or channels is also content-based.

Some commentators have disputed this conclusion, offering two related arguments for why these seemingly paradigmatic examples of content-based regulation are content-neutral for purposes of the First Amendment. Under one view, a law that prohibits the airing of violent programs at certain times or on certain channels would not be content-based at all. Instead, this view goes, such a regulation would be a content-neutral time, place, or manner restriction and accordingly subject to intermediate scrutiny. Professor Cass Sunstein, for example, has argued that "the notion that the Constitution forbids government from placing time, place and manner restrictions on violence in children's programming seems to me an adventurous argument that goes well beyond the First Amendment." At this point, we are not prepared to confront the bottom-line question whether the Constitution does or does not forbid such restrictions. The more important issue Professor Sunstein raises is whether "restrictions on violence in children's programming"—"[a] regulation to protect children that is directed at Saturday morning programming, for instance"—should be judged under the more lenient standards that apply to time,

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57 For example: "The threat or use of force that results, or is intended to result, in the injury or forcible restraint or intimidation of persons, or the destruction or forcible seizure of property." Viol. & the Media, supra note 7, at 235.

58 Throughout this Part, mention of "violent television programs," or "televised violence," or the like, refers to whatever subset of programs could plausibly be deemed "violent" under a particular regulatory scheme. The difficulty of delineating such a subset consistent with the First Amendment is discussed infra sections III.B.2 and V.A.2.

59 Time, place, and manner regulations must be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). The "narrowly tailored" criterion is considerably less strict in the context of time, place, and manner regulations than it is when applied to content-based regulations. See Ward, 491 U.S. at 798-99 & n.6.


61 Id. at 40.
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place, and manner restrictions rather than under content-based standards.

Professor Sunstein's argument seems sensible at first glance: instead of broadly prohibiting all representations of violence in the media, Congress might choose to prohibit (or otherwise limit) violent programs at a given time (say, Saturday morning, or prime time weekdays), at a given place (on television), in a given manner (violently). In this view, a ban on violent programming between, say, 7 a.m. and 8 p.m. on television, is analytically indistinguishable from a prohibition on noisy picketing between 9 a.m. and 3 p.m. in front of a school. Arguably, both are content-neutral because each applies to a category of expression regardless of what the speech is "about."

The error of this reasoning would appear to lie in the assumption that "violence" describes a manner of presentation rather than its content. It is well established that "[a] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." And, to most observers, the contentlessness of violence would probably need no extended argument. At least intuitively, violence cannot be divorced from content: It seems truly meaningless, for example, to assert that producers of a war movie, or of a dramatic series on mafia crime lords, or of a James Bond-like sitcom could or should have presented the same content or "subject matter" in a nonviolent manner. Violence is part of the story.

Yet, these illustrations might prove too much. Even sound volume, the paradigm of "manner" in time, place, and manner jurisprudence, can sometimes look like content. The notion of a quiet performance of the 1812 Overture, for instance, is no less oxymoronic

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63 See Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance prohibiting noisemaking adjacent to a school while classes are in session).


65 Notably, in their lengthy consideration and rejection of the time, place, and manner argument, Krattenmaker and Powe never question that violence is content. See, e.g., Krattenmaker & Powe, supra note 14, at 1270 ("Thus, although advocates of zoning televised violence undoubtedly will assert that zoning is simply a time limitation not a prohibition and that other times are available to present violent programming, the argument runs afoul of the basic principle of the time, place, and manner cases because it is entirely related to content."); see generally id. at 1267-73.

than that of a nonviolent production of *Lethal Weapon*. We need a more satisfactory way of distinguishing manner from content than mere intuition provides.

The fact is that the analytically distinct concepts "content" and "manner" correspond to a considerably less distinct reality. Like form and substance, the two are intertwined characteristics of a whole. Just as an aspect of expression that usually looks more like manner (e.g., sound level) can at times appear to be content, so too a feature that generally serves a content function can assume the appearance of manner. The distinction between content and manner, then, would appear to be simply a way of differentiating the predominant and peripheral elements of a communication. If (and only if) an aspect of the communication can be regulated while only minimally impacting upon the meaning of the expression (a judgment call, to be sure), call it "manner" rather than "content." For this reason, analysts who insist that violence "just is" content or "just is" manner may be equally wrong: depending upon context and communicative purpose, violence can assume the guise of either. If so, the distinction between content and manner evokes the familiar distinction between "themetic" and "gratuitous" violence. If it can be assumed that gratuitous violence is unnecessary to the message, then it might be argued that a law limited to restricting only gratuitous violence is a "manner" regulation.

At first blush, an approach focused on "gratuitous" violence might seem to be an analytically satisfactory way to distinguish content and manner in a given expressive act. But the fact that gratuitous violence exists in televised programming does not necessarily mean that there exists any reasonably objective way of identifying it. We cannot imagine how a regulator might fix rules designed to ferret out gratuitous violence without running the risk of wholesale censorship of television programming. The grave difficulty in drawing the appropri-

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67 See Cohen v. California, 403 U.S. 15, 26 (1971) (overturning a conviction for the wearing of a jacket bearing the language "Fuck the Draft" under a statute prohibiting "offensive conduct" and rejecting "the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

68 Compare Michael D. Rips, *Children's TV Bill Doesn't Violate Constitution*, N.Y. Times, Dec. 2, 1993, at A26 (letter to the editor) (arguing that prohibition on violence during children's viewing hours is constitutional time, place, and manner restriction because, "[s]ince violence itself carries no inherent message, the regulation of violence is not a restriction of speech based on its content") with Floyd Abrams, *TV Violence and 'Content-Neutral' Legislation*, N.Y. Times, Dec. 9, 1993, at A30 (letter to the editor) ("But such a ban, imposed because of Congressional disapproval of programming containing violence, is precisely what the First Amendment does not permit. It cannot be 'content-neutral' for Congress to prohibit certain programming because of its content."). Abrams's response, in particular, is strikingly tautological.
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ate lines would turn any such inquiry into a jurisprudential quagmire. And perhaps for that reason, the Court has not adopted it. Instead of focusing its inquiry upon the speech at issue, the Court has looked to the regulation and its purpose. Thus, when the government has alleged that a given speech restriction is a time, place, and manner regulation, the Court has insisted that it be "justified without reference to the content of the regulated speech." On its face, this restatement is of little value, for it appears merely to direct that courts should defer to legislative determinations regarding what is "content" and what is "manner." Accordingly, to make sense of this standard, "content" must be viewed as something akin to "communicative impact." Thus, as the Court has noted, law that "suppresses expression out of concern for its likely communicative impact... cannot be 'justified without reference to the content of the regulated speech.'" That is, a law directed at the communicative impact of expression is ipso facto "content-based" for purposes of First Amendment doctrine—notwithstanding that an analysis of some or all of the expression affected can make the regulated element look like manner. Without undertaking at this point a thorough examination of the ways that television violence is supposed to affect its viewers, it is nonetheless clear that would-be regulators are concerned about the ideas, attitudes, and values that television violence communicates to its audience.

69 Consider the contemporary debate over colorization: colorizers argue that black-and-white is merely the manner in which a film was presented; opponents believe that a choice about color (or its lack) is a more fundamental aspect of the whole.


71 See generally Laurence H. Tribe, American Constitutional Law § 12-2, at 789 (2d ed. 1988) (explaining that government abridgment of speech based on "communicative impact" is singled out either "because of the specific message or viewpoint such actions express" or "because of the effects produced by awareness of the information or ideas such actions impart").


73 This point is well illustrated by Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), which involved the application of a statutory ban on public nudity to nude dancing establishments. All four opinions in that case accepted the major premise that content-based scrutiny would apply if the statute was motivated by hostility to the communicative impact of public nudity. They disagreed only over the minor premise. See id. at 571-72 (plurality opinion) (determining that statute is aimed at conduct, not communicative impact, and upholding it under the intermediate scrutiny of United States v. O'Brien, 391 U.S. 367 (1968)); id. at 579-80 (Scalia, J., concurring) (same, but rejecting O'Brien and upholding statute under rational basis review); id. at 586 (Souter, J., concurring) (arguing that statute is aimed to curb such "secondary effects" as "prostitution and sexual assault," and upholding statute under intermediate scrutiny); id. at 595-96 (White, J., dissenting) (determining that statute is aimed at communicative impact of public nudity and invalidating it under content-based scrutiny).

74 For example, in the words of Senator Paul Simon, one of the leading advocates of voluntary and legislative curbs upon television violence, "We're talking about de glamorizing violence,
This conclusion also forecloses resort to the second and closely related argument for why banning or zoning televised violence is content-neutral. This second approach relies upon a variant of the ordinary time, place, and manner doctrine—the "secondary effects" test of *City of Renton v. Playtime Theatres, Inc.*\(^7\) In *Renton* the Court applied intermediate scrutiny to a law that zoned adult theatres. The Court first acknowledged that the statutory classification discriminated against theatres on the basis of the content of the films shown. It determined, however, that the ordinance was not "content-based" for purposes of First Amendment scrutiny because it was "aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community."\(^6\)

Reliance upon *Renton* would eliminate the need to affix the counter-intuitive label "manner" to the violence element in televised communication. The argument here is that such a regulation is not "content-based" for purposes of the First Amendment precisely because the legislation is *not* motivated out of hostility to the communicative impact of television violence. In fact, several commentators have urged that *Renton* would permit time zoning of television violence because the secondary effects test "seems ideally tailored to the media violence context, where concern focuses on the violent aftereffects of viewing."\(^7\)

This argument is dubious. Whenever it acts to restrict freedom of expression, the government acts, in an ultimate sense, out of concern with the effect of that communication.\(^8\) As the Court remarked in *Boos v. Barry*, "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."\(^9\) One may surmise that the Court's decision in *Boos* is intended to limit the reach of *Renton*. According to the Court, if the ordinance in *Renton* had been "justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a con-

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75 475 U.S. 41 (1986).
76 *Id.* at 47. The Court never identified the worrisome secondary effects with any great precision, but rather adverted generally to such interests as "prevent[ing] crime, [and] protect[ing] the city's retail trade, . . . property values, . . . and the quality of urban life." *Id.* at 48 (internal quotation omitted); see also *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion).
77 Prettyman & Hook, *supra* note 6, at 371 n.228; see also Schlegel, *supra* note 62, at 206-07.
78 *See Smolla, supra* note 54, § 3.02[4][a].
79 485 U.S. 312, 321 (1988); see also *id.* ("The emotive impact of speech on its audience is not a 'secondary effect.'"); *id.* at 334 (Brennan, J., concurring); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2403 (1992).
tent-based statute would have been appropriate.”

Thus, Renton applies only when the alleged harm occurs outside of the causal chain linking the communicative meaning and effect of particular expression with its actual or intended audience. Because whatever harms television violence might cause are allegedly a product of its communicative impact, neither ordinary time, place, and manner analysis nor the secondary-effects doctrine would appear to provide an avenue to remove zoning or banning of television violence from content-based scrutiny.

B. Balancing

In simple form, a balancing rule would require programmers who air violent programs to compensate by airing nonviolent programs. Slightly more elaborately, were Congress to focus on the way that programs portray violence, it could require that disfavored presentations of violence be matched with favored presentations. For example, a program that glorifies violence (The Terminator, say) need be matched with one that disparages it (Boyz ’N the Hood, perhaps). Regardless of degree of subtlety, the regulation would be content-based in two ways. First, once invoked, it would require programmers to air programs of a prescribed content. Second, whether it is invoked is likewise determined by a program’s content. This is self-evident. The somewhat more interesting question is whether a balancing rule abridges speech within the meaning of the First Amendment. After all, it could be argued that by requiring programmers to air a wider range of programming, such a regulation would actually further one of the purposes of the First Amendment, the exchange of diverse views.

The Supreme Court has squarely rejected such an argument in the past. In Miami Herald Publishing Co. v. Tornillo, the Court struck down a state “right of reply” statute which obligated newspapers that attack a political candidate to publish such candidate’s printed reply free of charge. The Court held that the statute

80 Boos, 485 U.S. at 321.
81 The case might be otherwise if the harm identified was, say, truancy rather than violence and if the causal chain established that violent television was so hypnotic that children were skipping school in droves to stay at home to watch. In that event, a zoning rule that proscribed television violence during school hours might properly be analyzed under Renton. Of course, whether it would pass scrutiny is a separate question.
82 See infra section V.A.2.
83 See Pacific Gas & Elec. Co. v. Public Util. Comm’n, 475 U.S. 1, 12-14 (1986). For contrast, imagine a balancing rule, provoked perhaps by concern that citizens watch too much television, that would require programmers to balance every two-hour program with four half-hour shows.
85 The Court had previously examined a similar rule applied to broadcasters. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), involved a similar right of reply regulation as well as the FCC’s Fairness Doctrine, which obligated broadcasters to provide balanced coverage of
abridged freedom of the press for two independent reasons. First, "[c]ompelling editors or publishers to publish that which reason tells them should not be published" is inherently anathema to the First Amendment. Second, the Court rejected the idea that forced reply would expand information available to the public. It identified two concerns. The forced speech would displace other material that the newspaper would have preferred to publish. Also, to avoid application of the statute, newspapers might choose to steer clear of controversy. "Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"  

Both reasons apply similarly to establish that a balancing rule applied to television violence would require content-based scrutiny. First, it would force programmers to air programs that, *ex hypothesi*, they otherwise would not. It thus violates the notion that the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." Second, the statute would effectively silence speech either by inducing programmers to shelve violent programs to avoid the imposition of the rule, or by displacing the programs the programmer would have aired in lieu of whatever (types of) programs invocation of the rule would direct. Consequently, the holding as well as the reasoning of *Miami Herald* seem to establish that a balancing rule applied to violent programming must draw content-based scrutiny.

controversial public issues. Relying upon the scarcity of the broadcast spectrum, the Court upheld the rules on the grounds that they advanced the "paramount" First Amendment rights of viewers and listeners. *Id.* at 390.

While the fairness doctrine was still in force, one viewer petitioned the FCC to apply the doctrine to the issue of television violence. *See In re George D. Corey, 37 F.C.C.2d 641 (1972).* Strangely, although the petitioner specifically invoked the fairness doctrine, under that caption he requested only that the FCC require broadcasters to attach health advisories to violent children's programming. *Id.* at 641. He did not ask that the FCC require broadcasters to devote air time to programming that would present views discouraging violence. The FCC rejected his petition principally on the grounds that "[t]he real thrust of [the] complaint would appear to be not fairness... but the elimination of violent TV children's programming because of its effect on children," and that the issue was therefore more appropriately addressed by Congress. *Id.* at 644.

86 *Miami Herald,* 418 U.S. at 256 (internal quotations omitted).
87 *Id.*
88 *Id.* at 257 (quoting New York Times v. Sullivan, 376 U.S. 254, 279 (1964)).
90 Of course, in contrast to the statute at issue in *Miami Herald,* a violence-balancing law might well be enacted precisely in order to discourage violent programming. But that is all the more reason to subject it to heightened scrutiny. *See Bantam Books v. Sullivan,* 372 U.S. 58 (1963).
C. Labelling and Disclosure Rules

Like all of the regulations discussed, a disclosure requirement could take several different forms. One technique is presently in use. Since the fall of 1993, the four major networks, soon followed by fifteen cable channels, have aired parental violence advisories before programs that the particular broadcaster deems to warrant it. The terse warning reads: "Due to some violent content, parental discretion advised." A second method would mimic the familiar movie rating system of the Motion Pictures Association of America. Other methods are readily conceivable. However, were the government to mandate that broadcasters and cable programmers identify particular programs on the basis of the violence that they contain, that would seem to constitute a content-based regulation.

As in the case of compulsory balancing, the real question here is whether such compulsory labelling burdens speech within the meaning of First Amendment jurisprudence. Both rationales advanced in Miami Herald would suggest an affirmative answer. However, Krattenmaker and Powe, two staunch opponents of other forms of television violence regulation, concluded that, "[c]onstitutionally, requiring notice seems unobjectionable.... Little reason exists to believe that one should be free of informational requirements that are ideological neutral just because he distributes a product entitled to protection under the first amendment." In developing this claim, Krattenmaker and Powe appear to respond only to the argument that forced speech is inherently offensive to the First Amendment. In essence, they emphasize the differences between requiring individuals to express an allegiance or affirm an ideological position, and obligating "sellers" to disclose "characteristics objectively . . . ascertainable and demonstrably relevant to informed choice by consumers."

92 See Edmund L. Andrews, Mild Slap at TV Violence, N.Y. Times, July 1, 1993, at A1. Although the networks may have felt pressured to adopt the advisory system by the threat of congressional action, they were not obligated to do so, and they continue to broadcast each advisory at their individual discretion. We believe that the present advisory system is indeed voluntary for constitutional purposes and raises no problems under the First Amendment.
93 True, a disclosure rule might seem less of a burden than a balancing rule, but the Court has repeatedly held that content-based burdens upon speech are subject to the same level of scrutiny as would apply to content-based prohibitions of the same speech. See, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 116 (1991); Healy v. James, 408 U.S. 169, 183 (1972); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). As we will see, the degree of burden is relevant to the question whether a given content-based regulation is "narrowly tailored" to achieve its purpose. See infra subsection IV.B.2.(b). But that is a separate inquiry.
94 Krattenmaker & Powe, supra note 14, at 1276-77.
95 Id. at 1277.
The Krattenmaker and Powe position is appealing, but short-sighted. Assuming arguendo that the imposition of a violence-disclosure requirement against the media is not inherently obnoxious to the First Amendment, Krattenmaker and Powe fail to address the consequentialist concern that this mandated disclosure might offend the First Amendment by resulting in less speech. For example, there is a good possibility that a labelling or advisory rule would in fact directly induce programmers to alter their violent fare. The danger is not simply that broadcasters will cancel their more violent programs. The risk is also that they will edit their less violent programs to avoid the disclosure obligation. Much will depend of course on the precise content of the required disclosure. We need not dwell on this issue, however, for the Supreme Court's opinion in Riley v. National Federation of the Blind offers a third and possibly dispositive reason (one not implicated in the balancing cases) for concluding that the requirement of a violence-advisory requires content-based scrutiny. Riley involved a state law that, inter alia, required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected over the past twelve months that the fundraiser turned over to charity. The Court reasoned that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," and "therefore consider[ed] the Act as a content-based regulation of speech."

The Court's observation that mandated disclosure alters the content of speech can be read trivially: If you say $X$, and the government obligates you to add $Y$, the content of your speech has surely changed; where it had been $X$ alone, it is now $X+Y$. We believe, however, that the Court was advancing a much more important insight: mandating disclosure that a speaker would not otherwise make necessarily alters the content of the speech to which the mandated disclosure would attach. The whole is different from the sum of its parts. Because mandated speech is transformative, not merely additive, the $X$ in $X+Y$ is no longer the same $X$. This elementary hermeneutic truth applies fully to a government regulation that would require programmers to label or otherwise identify programs on the basis of their violent character or content. Viewers' experience of a program will be shaped by the way it is characterized. By requiring programmers to foreground one aspect of a given program—its violence—the government would affect the impact of the program upon its viewers. In a real sense, this changes the meaning of the speech.

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96 Examples of movie producers editing films to escape an "X" or even an "R" rating are legion. See, e.g., Richard P. Salgado, Regulating a Video Revolution, 7 YALE L. & POL'Y REV. 516, 523-25 & nn.52-61 (1989).
98 Id. at 795.
Consider in this regard the effect of a title upon a viewer's or reader's experience of a work as a whole. Like a violence rating, a title serves essentially a labelling function. But titles do more than attract an audience; they subtly—but inevitably—color the way the audience will experience the work. It is for this reason that editors do not feel free to supply titles for Emily Dickinson's poems.

Against Riley and the balancing cases, one Supreme Court opinion appears to provide support for the conclusion that mandatory violence disclosures would not provoke content-based scrutiny. In Meese v. Keene,0 the Court upheld against First Amendment challenge a federal statute that imposes registration and disclosure requirements upon expressive materials designed to influence U.S. foreign policy and disseminated by agents of a foreign power, and that identifies such materials as "political propaganda." In an opinion by Justice Stevens, the Court held that "the Act places no burden on protected expression." The Court emphasized two factors. First, the Court insisted that, as defined by the statute, the term "political propaganda" is not pejorative. Second, it explained that the law does not actually abridge any speech, but rather advances the purposes of the First Amendment:

Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within the materials subject to the Act is fair, truthful, and accurate speech.

The dissenters disputed both claims. First, they argued as a matter of logic and common sense that requiring people to label their speech as political propaganda will negatively affect the reception of that speech, regardless of how the statute defines the term. Second, they insisted on the basis of precedent that if a disclosure requirement will burden or "chill" speech, then the government's allegation that speakers can mitigate the negative effect by adding more speech is constitutionally irrelevant.

It is not easy to square the holdings in Miami Herald and Riley with the judgment in Keene. One commentator has gone so far as to

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99 See Kim, supra note 3, at 1409-13 (presenting Riley and Keene as parallel lines of authority that would yield conflicting results).
101 Id. at 480.
102 Id. at 483-85.
103 Id. at 481. Cf. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16 (1986) (plurality) ("That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.").
104 481 U.S. at 488-90 (Blackmun, J., dissenting).
105 Id. at 490-93 (Blackmun, J., dissenting).
say that the "whole line of argument [in the Keene majority opinion] 
has a deeply fraudulent character." Arguably, Keene turned simply on a 
close reading of the actual label that the statute requires to be 
placed on the materials for public dissemination. The labels do not 
contain the word "propaganda"; they are essentially limited to the 
name and address of the disseminator, and the fact of affiliation with a 
foreign power. Read this way, Keene stands for a narrow proposition: Some 
forced disclosure is so value-neutral and connotatively empty that its de 
minimus effect on the content of speech does not suffice to warrant 
content-based scrutiny. In other words, the regulation, although 
content-based, is not an "abridgement" or a "burden." This 
seems specious, but we need not reach a conclusion on this for 
purposes of the present analysis. Taking Keene at its worst, we think 
the issue is whether a relatively barebones disclosure requirement is 
deemed an abridgement even absent a particularized showing of special 
inhibitory effect. In the face of such a showing, however, the 
propriety of content-based scrutiny is certain.

Insofar as television is concerned, it is surely the case that to isolate 
and foreground one aspect or theme of a program will influence and 
change the viewer's experience. For example, by causing viewers to 
anticipate violence, a violence advisory will undermine the dramatic 
effect of an isolated and unexpected violent scene. In general, that 
familiar visceral response to a movie, play, or book—"That wasn't as — as I had expected!"—amply testifies to the fact that expectation shapes experience.

There are, in sum, several reasons to conclude that mandatory 
violence disclosure is a content-based regulation of speech: (1) it may 
reduce the amount of violent programming; (2) it forces programmers 
to affirm a judgment with which they might disagree; and (3) it will 
directly interfere with and reshape the way that viewers experience 
the labelled programming. Even one of these factors is enough to 
conclude that governmentally required labelling or violence disclosure 
would provoke content-based First Amendment scrutiny.

106 SMOLLA, supra note 54, § 10.03[1], at 10-79.
107 See Keene, 481 U.S. at 471 ("It should be noted that the term 'political propaganda' does not appear on the form."); id. at 479 n.14 ("The statutory term is a neutral one, and in any event, the Department of Justice makes no public announcement that the materials are 'political propaganda.'").
109 A different conclusion might follow if the state (somewhat purposelessly) required only that every programmer provide a brief synopsis or description—of its own devising—before every program.
A very different inquiry is raised by technological approaches designed to facilitate parents' control over the television viewing habits of their children. There are at least three different types of mechanisms, varying widely in degree of technological sophistication. The simplest device, a lockbox, merely permits users to block out particular channels. A second type of system could block the display of particular channels at particular time slots. Just as a viewer can program a VCR to record a particular show, a program-blocking system would enable a viewer to set a television to lock out (or permit in) specified programs. Both systems are already in limited use.

The third system, which would permit the user to block all shows with a common rating, relies upon the fact that a broadcast signal is comprised of 525 horizontal lines but that only 483 are used to transmit the visual image. This leaves 42 lines in the "vertical blanking interval," ("VBI") of which 24 can be used to carry nonvideo data. The FCC recently amended its regulations governing television signals specifically to permit optional transmission of "extended data services" ("EDS")—which could include program identification labels—in a designated field of the VBI. Representative Markey's much-discussed V-Chip Bill requires television manufacturers to equip new sets with a simple and inexpensive computer chip that could be programmed by the user to block out all shows with a common rating so long as such a rating is transmitted as an EDS. For example, while the "V" in "V-Chip" stands for "violence," observers have also envisioned an "S" rating for sex (or an "N" for nudity) and an "L" for language. The V-Chip proposal, like a law to require television manufacturers (or cable operators) to provide channel-blocking or program-blocking mechanisms, is content-neutral on its face.

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112 H.R. 2888, 103d Cong., 1st Sess. 3 (1993). It also requires manufacturers to install circuitry that would enable users to block signals by channel, program, and time slot (i.e., program-blocking technology). Id.

113 Andrews, supra note 110, § 3, at 14.

114 Although the success of a V-Chip clearly depends upon programs being rated, Markey's bill does not mandate it. See H.R. 2888, 103d Cong., 1st Sess. 2 (1993) ("calling upon [television programmers] to protect the parental right to guide the television viewing habits of children by sending any adopted rating or warning system electronically with the program signal"). Markey has added that he would not require programmers to rate their shows. See Andrews, supra note 92, at A14. The assumption is that once the system is in place, public pressure would suffice to make programmers rate their violent programs.
This fact is not dispositive. As discussed, the distinction between content-based and content-neutral is not a fully accurate description of existing First Amendment jurisprudence. As Renton demonstrates, the content-based designation is over-inclusive in that a facially content-based regulation may be subjected to lesser scrutiny if "justified without reference to the content of the regulated speech." More relevant for the instant inquiry, as a demarcation of the realm of regulations subject to most rigorous scrutiny, "content-based" is also underinclusive. In Professor Tribe's words, heightened "content-based" scrutiny applies to "a governmental action neutral on its face... motivated by (i.e., would not have occurred but for) an intent to single out constitutionally protected speech for control or penalty."

The Court's decision last summer in TBS provides the leading guidance in determining whether a facially content-neutral statute should be subjected to content-based scrutiny. TBS involved a challenge to the must-carry provision of the 1992 Cable Act, which requires cable systems to devote a specified portion of their channels to the transmission of local broadcast stations. The Court determined with apparent ease that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." The number of channels a cable operator must set aside for local full-power broadcasters was dependent only upon the operator's channel capacity and could be neither increased nor decreased by considerations related to the content of the operator's programming. As the Court acknowledged, however,

[t]hat the must-carry provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.

116 Tribe, supra note 71, § 12-3, at 794. Of course, an intent to single out a category of speech for control or penalty (or special benefit) need not be inspired by the communicative impact of the speech. A content-based restriction justified simply on the basis that a given subject matter is more (or less) important receives highest scrutiny. See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972) (finding that ban against picketing that excepts labor picketing is content-based). Accordingly, the temptation to conflate the distinction between content-based and content-neutral with Tribe's two tracks should be withstood. See generally Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189 (1983) (elaborating on the differences between content-based and content-neutral regulations).
118 Id. at 2460.
119 Different rules applied to the set-asides for low-power broadcasters. See id. at 2460 n.6. The majority's analysis and our analysis in text refers only to the requirement that cable operators set aside channels for full-power broadcasters.
120 Id. at 2461.
The Court then split 5-4 over whether “Congress’ purpose in enacting [the must-carry rules] was to promote speech of a favored content.”121 The majority held that it was not, finding that the congressional purpose was simply to preserve the economic viability of free broadcast television without regard for the content of programming broadcast television stations would air.122 The dissenters disagreed. Pointing to extensive congressional findings that specifically extolled broadcast television for its commitment to provide local and public-affairs programming, the dissent concluded that Congress’s “preference for broadcasters over cable programmers is justified with reference to content.”123

The fact that a facially content-neutral statute will be deemed content-based if the reviewing court determines that the legislature’s purpose was to favor or disfavor speech of a particular subject matter encourages misdirection. Thus, writing in 1978 about simple channel-blocking systems, Krattenmaker and Powe observed that “[t]he careful draftsman should be expected to emphasize” the government’s “economic” interests in facilitating both energy conservation and “savings in billing costs for pay television subscribers from undesired or inadvertent use of the set.”124 While Krattenmaker and Powe cannot be faulted merely for predicting that legislators will “hedge their bets,” so to speak, any implication that legislators should contrive artificial justifications for legislation in order to avoid constitutional scrutiny would be both troubling and, in this case, unnecessary.

A lockout regulation can be easily justified for a number of legitimate reasons, not just the curbing of viewership of television violence. After all, parents’ concerns about what their children watch are not limited to violence; parents worry too about indecency, children’s advertising, and the generally low quality of much that their children watch. And many are troubled that their kids simply spend too much time in front of the set. A properly designed lockout law—say, one that mandated installation of program-blocking and time-blocking circuitry—would respond to the range of parental concerns. It really

121 Id.
122 Id. (finding that “Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable”).
123 Id. at 2476 (O’Connor, J., concurring in part and dissenting in part). Because Congress incorporated its findings into the statute as enacted, the dissent noted that the “content-based justification appears on the statute’s face.” Id. at 2478 (O’Connor, J., concurring in part and dissenting in part). This fortuity should not distract from the fact that the speech restriction itself was facially content-neutral and that both the majority and dissent were directed by an inquiry into Congress’ purpose in enacting the legislation.
124 Krattenmaker & Powe, supra note 14, at 1276. Although this writing long preceded TBS, an earlier case, United States v. O’Brien, 391 U.S. 367 (1968), also directs judicial inquiry into legislative purpose.
would (in the language of pending legislation \(^{125}\)) "empower" parents to regulate all aspects of their children's viewing, not just whether, when, and how they watch violence.

Under \(TBS\) such legislation could be content-neutral. True, a lockout law could not plausibly be defended on the grounds that Congress had no idea that parents might use the system to reduce their children's viewing of violent programs. But even the \(TBS\) majority appreciated that, in passing the must-carry provisions, Congress was aware of some ways in which the content of benefitted broadcast stations would, in the aggregate, differ from that of programs to be displaced. Hence, the dispositive question, it seems, is not whether Congress enacted the legislation with an awareness or expectation that its effects would be non-content-neutral, but whether such an awareness motivated, or was incidental to, passage of the legislation. If the government could convince a reviewing court that Congress's purpose or "overriding objective" in mandating lockboxes was not to reduce television violence, but to facilitate parental ability to supervise the television-watching habits of their children—whatever each parent's choices might be—then the law is content-neutral. Given Congress's history of responding to a variety of parental concerns about children's television, \(^{126}\) such an argument would be more than plausible. Thus, a parental-empowerment justification for a facially content-neutral lockout regulation could be easily defended.

A still more vexing question is whether a government-imposed ratings-blocking system would be content-neutral. For those who favor government intervention to combat television violence, the appeal of such technology over a program-blocking system is obvious. Because a program-blocking system would require that parents make particularized decisions regarding which shows to block out (or allow in), it is likely to be used only rarely. A V-Chip system promises to curb violence more effectively because it enables a user to block out all disfavored programs (so long as they are rated) en gross. But it is precisely this feature that raises the possibility that a V-Chip regulation might be content-based even while other lockout systems would be content-neutral. A program-blocking system, recall, vests all

\(^{125}\) See supra notes 8 & 12.

choice in the user. A ratings-blocking system does not. While the user still enjoys ultimate control over whether to block a particular rating, somebody else decides what those ratings will be. And if that somebody is the government, then the regulation looks more content-based.

Since the utility of a ratings-blocking system requires both that the broadcaster or cable operator transmits rated programs and that the television set be configured to recognize the particular rating, either the television-programming or television-manufacturing industry could drive the standards. The rub comes if the law that mandates the system also directs what the ratings would be. But this rub is easily avoided if Congress enacts a "Chip" law but does not code it "V," i.e., if Congress requires the adoption of a rating system without specifying an exclusive list of ratings categories or rating gradations within the categories. Thus done, the content of the ratings system ultimately adopted would be impossible to predict. Public pressure (especially the implicit threat of more drastic congressional action) might produce a multifaceted rating system to reflect more than just violence. We could expect such a system to identify a range of content elements (sex, nudity, violence, language, substance abuse, and infomercials, for instance) and distinguish among degrees. The regulation will raise problems only if the government ordains the program characteristics upon which a lockout mechanism could operate, thereby disadvantaging speech by content or subject matter.

The foregoing analysis also suggests that a law which mandates lockout technology but does not single out speech of any particular content or subject matter does not even come within the purview of the First Amendment. In other words, a regulation that imposes technological obligations upon television manufacturers that would enable users better to select among programs—without a government thumb on the scales—cannot be seen to require, proscribe, burden, or significantly affect speech. To be sure, any simple lockout law will affect speech in some manner. Its effect might even be non-content-neutral, as in TBS. That cannot, without more, violate the Constitution.

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127 Cf. Salgado, supra note 96, at 525-26 (discussing the rating system developed by the Independent Video Programmers Association).
128 Whether the pending "V-Chip" Bill, H.R. 2888, the "Television Violence Reduction Through Parental Empowerment Act of 1993," is in fact such a regulation is unclear. The relevant portion of that bill "Require[s] that (1) apparatus designed to receive television signals be equipped with circuitry designed to enable viewers to block the display of channels, programs, and time slots; and (2) such apparatus enable viewers to block display of all programs with a common rating." H.R. 2888, 103d Cong., 1st Sess. § 3 (1993).
III. High- and Low-Value Speech

"Content-based regulations are presumptively invalid." However, not all content-based regulations are treated the same for First Amendment purposes. The Supreme Court has long engaged in a process of "definitional" balancing, affording lesser degrees of scrutiny to a few specified categories of content-based regulations. The locus classicus of the definitional approach is a single passage from *Chaplinsky v. New Hampshire*, a 1942 decision that involved a criminal conviction under a state statute construed to proscribe words that "have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." The Court sustained the conviction. It reasoned:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Over the ensuing half century, *Chaplinsky's* two tiers have seen considerable revision. The Supreme Court has added commercial speech and child pornography to the categories of speech entitled to lesser protection. And it has abandoned the notion that abridgements of these "narrowly limited classes . . . raise [no] Constitutional problem." In place of *Chaplinsky's* in/out dichotomy, the Court has substituted a more complicated hierarchy of speech in which several narrowly circumscribed categories of expression—libel, fighting words, obscenity, child pornography, and commercial speech—have less "value" under the First Amendment and, consequently, enjoy somewhat reduced constitutional protection.

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131 315 U.S. 568 (1942).
132 Id. at 573.
133 Id. at 571-72.
136 The precise levels or contours of the hierarchy cannot be identified with ease, for the Court has crafted a complex of category-specific rules. For example, "obscenity" is deemed to have no constitutional value and may be regulated subject merely to rational basis review. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). Nonmisleading "commercial speech" has intermediate value and is protected by a three-part test: (1) the state's interests must be substantial; (2) the challenged regulation must advance interests in a direct and material way;
Part of the Article explores whether televised violence is high- or low-value expression.

A. Violent Speech and Existing Categories

Violent programming (expression with violent themes and/or images) does not, without more, fall into any of the existing low-value categories. Fighting words are remarks uttered in a face-to-face confrontation that are inherently likely to provoke the listener to immediate violence.137 Libel requires a false statement of fact.138 Child pornography is material depicting sexual performances by children.139 Commercial speech is expression that proposes a commercial transaction.140 And obscenity is limited to a subcategory of sexually explicit material.141


138 See supra note 136 (quoting Gertz).

139 See generally Ferber, 458 U.S. at 749 (examining constitutionality of a New York criminal statute that prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material that depicts such performances).

140 See, e.g., Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993). Consequently, the mere fact that television broadcasters and cable operators are (with few exceptions) commercial entities does not make their programming commercial speech. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (rejecting notion that movies deserve lesser First Amendment protection "because their production, distribution, and exhibition is a large-scale business conducted for private profit"). A different analysis might apply for violent television commercials. Cf. Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975) (holding that a radio station could be held liable in a wrongful death action for damages arising from an automobile accident caused by a promotional broadcast that induced two youths to speed to the site at which the station had announced it would give away prize money).

141 See Miller v. California, 413 U.S. 15, 24 (1973); Cohen v. California, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); Roth v. United States, 354 U.S. 476, 487 (1957).
B. Should There be a New Low-Value Category for Violent Speech?

Because there can be no serious contention that televised violence falls within any existing category of low-value speech, the more interesting question is whether violent expression might constitute a new low-value category of its own. Chaplinsky provides little guidance. From the Court's brief explanation of low-value speech, one may glean three possible justifications for the categories of unprotected speech identified in Chaplinsky: tradition; no perceived value for certain speech; and a distinction between speech and conduct, i.e., certain words that "by their very utterance inflict injury" are more conduct than speech. However, the Court's subsequent addition of commercial speech and child pornography to low-value status undermined Chaplinsky's rationales. Accordingly, the prevailing contemporary understanding is that a category of speech will not lose full protection under the Constitution absent a persuasive demonstration that such expression fails to serve the purposes of the First Amendment.

1. Not All Violent Expression Can Be Low Value.—While it is well beyond the scope of this Article to plumb the historical and theoretical rationales for the constitutional protection of free speech, the Court's precedents make clear beyond cavil that some types of violent programming fulfill the core purposes of the First Amendment and thus warrant full protection. To begin with, the self-governance rationale for the First Amendment—what the Court has termed its "central meaning"—must surely ensure that any programming that bears upon contemporary political and civic affairs is high value regardless of any violent content. In seeming consequence, Senator Paul Simon, one of the leaders in the congressional drive to curb televised violence, has acknowledged that news shows should be exempt from any conceivable regulation. But news is just the tip of the iceberg. Real-life cop shows, for instance, surely must be high

142 For a fuller development of much of the preceding analysis, see Krattenmaker & Powe, supra note 14, at 1178-90.
143 See, e.g., Tribe, supra note 71, at 836; Stone, supra note 116, at 194.
144 New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964); see also, e.g., Burson v. Freeman, 112 S. Ct. 1846, 1850 (1992) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.") (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
value. And even the narrowest conception of "political" expression likely includes much historical and documentary drama, no matter how violent.

Fortunately, we need not enter the debate over the extent to which the First Amendment must protect artistic expression that is nonpolitical on its face in order to serve the political underpinnings of the constitutional free speech guarantee. Even if "central," the self-governance rationale does not constitute the sole meaning of the First Amendment. Whether it has relied upon a broad conception of the "political," a more general "marketplace of ideas" rationale, or the value of free expression for individual self-fulfillment (or any combination of these and other theories justifying freedom of expression), the Court has repeatedly refused to afford lesser First Amendment protection to "mere" entertainment. This is not to suggest that any expression that comes within the category of "entertainment" is fully protected, for some might press to claim such status for obscenity. Rather, it is to say that the mere fact that expression is produced solely for entertainment does not reduce its value.

It deserves emphasis, then, that the Court has not actualized into current doctrine its occasional dicta suggesting that political speech garners the fullest First Amendment protection. Existing jurisprudence does not describe a continuum of First Amendment scrutiny. Rather, all speech—regardless of its content—enjoys complete (though, not absolute) constitutional protection unless it falls into a specific narrowly delineated category.

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146 Cf. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

147 Compare, e.g., Alexander Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Cr. Rev. 245, 255-57 (advancing an expansive view of the types of communication that serve the self-governance rationale of the First Amendment) with Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 26-28 (1971) (limiting the protection of expression under the self-governance rationale to speech that is explicitly political).

148 See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); cf. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") (citing cases); Miller v. California, 413 U.S. 15, 24 (1973) (stating that in finding a work to be obscene, a court must consider whether, "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value") (emphasis added).


150 See, e.g., United States v. United States Dist. Court, 858 F.2d 534, 542 (9th Cir. 1988) (Kozinski, J.) ("Unless and until the Supreme Court speaks otherwise, we are bound to the view that the constitutional wall against government censorship protects this nether region of public discourse [nonobscene sexually explicit material] as fully as the heartland of political, literary and scientific expression and debate.").
The decision in *Winters v. New York* is the closest that the Court has come to holding that entertainment depicting violence is entitled to full First Amendment protection. *Winters* involved the criminal prosecution of a bookseller under a state law that proscribed the sale or distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." The defendant had been convicted of possession of detective magazines with intent to sell, and the New York Court of Appeals had affirmed, construing the statutory prohibition to extend to collections of criminal stories that are "so massed as to become vehicles for inciting violent and depraved crimes against the person." The Supreme Court reversed the conviction. In so doing, it squarely rejected the claim that violent entertainment is outside of the First Amendment:

We do not accede to [the] suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Lower courts have subsequently held that violent entertainment is high-value speech.

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151 333 U.S. 507 (1948).

152 *Id.* at 513 (quoting *People v. Winters*, 63 N.E.2d 98, 100 (N.Y. 1945)).

153 *Id.* at 510. It ought not to be objected that *Winters* establishes only that violent entertainment is within the First Amendment, not that it is high value. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981) (distinguishing the concepts of coverage and protection under the First Amendment). Appreciation of that distinction long postdates *Winters* itself. Additionally, the Court specifically stated that the violent pictures and stories at issue were "as much entitled to the protection of free speech as the best of literature"—a category that the Court, then as now, surely understood to be high value.

154 *See, e.g.*, Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (8th Cir. 1992); Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 204-06 (S.D. Fla. 1979); Sovereign News Co. v. Falke, 448 F. Supp. 306, 394 (N.D. Ohio 1977), *remanded on other grounds*, 610 F.2d 428 (6th Cir. 1979), *cert. denied*, 447 U.S. 923 (1980); *see also* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) ("[V]iolence on television ... is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.") (dicta).
2. Is Some Subset of Televised Violence Low-Value Speech?—

Even if the category of televised violence may not be assigned a position of low value, a proponent of restrictions on violent programming might nonetheless argue that some subset of violent entertainment would be deserving of lesser protection. Some of it, the argument would go, is so worthless, so utterly without value for self-governance, individual self-fulfillment, and the "search for truth," that it does not warrant the First Amendment's full solicitude. That is, even if violent entertainment on television is presumptively high value, the Court could draw lines around some subset thereof, call that low value, and then subject regulations of that speech to lesser scrutiny. As a general matter, this is an easy argument to advance in light of some of the awful material now seen in the movies and on television. Indeed, Winters itself can be read to support the approach. Instead of basing its reversal on the grounds that the expression at issue was constitutionally protected, the Court overturned on due process grounds, holding that the state court's construction of the statute left it too vague to sustain a criminal conviction.

Were the Court to recognize a low-value subcategory of violent expression, obscenity provides the obvious analog. After it first held, in Roth v. United States, that "obscenity is not expression protected by the First Amendment," the Court struggled for sixteen years to identify the material that might constitutionally be regulated or prohibited as obscene. Its 1973 definition from Miller v. California still governs. Material may not be found obscene unless: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts sexual conduct in a way that would be patently offensive to an average member of the community; and (3) the work, taken as a whole, lacks serious literary, artistic, scientific, or political value. Thus, Congress might try to define a low-value category of violence by adapting the Court's three-part test for obscenity to cover violence instead of sex. In fact, at least one state, Missouri, recently took precisely this tack in a statutory ban on the sale or rental of vio-

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156 Winters, 333 U.S. at 518-19.
158 Id. at 492.
159 For a brief and insightful account, see HARRY KALVEN, JR., A WORTHY TRADITION 33-53 (1988).
161 Id. at 24.
lent videotapes to minors. Such an approach, however, faces at least two substantial objections.

First, it is normally understood that the First Amendment was designed to foreclose regulation of speech based on determinations that the expression is offensive or lacks value. Beyond the obscenity context, the Court has announced steadfastly “that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” and has refrained from giving force to community notions regarding the intrinsic worth of particular speech. As Justice Harlan wrote for the Court in Cohen v. California, two years prior to Miller, “it is... often true that one man’s vulgarity is another’s lyric.” The First Amendment may permit the government to abridge speech on the basis of the harm it might cause, but not on the grounds that a majority does not like it or deems it worthless.

Second, any line demarcating low-value violence must avoid the problem of vagueness. It is, of course, a fundamental requirement of constitutional and criminal law that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” Moreover, the vagueness doctrine applies with particular force when First Amendment freedoms are at stake, lest the law chill protected speech. As we have seen, in Win-

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162 See Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992).
165 Id. at 25; see also Winters, 333 U.S. at 510 (“What is one man’s amusement, teaches another’s doctrine.”).
166 The difference between holding a given speech unprotected because it is harmful and because it lacks value is nicely manifested in the several opinions in New York v. Ferber, 458 U.S. 747 (1982). Compare Ferber, 458 U.S. at 756-66 (emphasizing both the harmfulness and lack of value of child pornography) with id. at 774-75 (O'Connor, J., concurring) (suggesting that the harms caused by child pornography might justify a ban on its distribution regardless whether the material has other value) and id. at 776 (Brennan, J., concurring) (arguing that the distribution ban would violate the First Amendment if applied to works of “serious literary, artistic, scientific, or medical value”).

ters the Supreme Court struck down on vagueness grounds a New York statute construed by the state court to prohibit "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes." 169

Similarly, in Interstate Circuit, Inc. v. City of Dallas,170 the Court reviewed a licensing statute that empowered a state film licensing board to classify a movie as "not suitable for young persons" if it describes or portrays "brutality, criminal violence or depravity . . . or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be . . . likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest." 171 The Court invalidated the ordinance, specifically holding the term "sexual promiscuity" to be unconstitutionally vague. 172 The Court continued:

Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children. 173

Following Interstate Circuit, the Eighth Circuit invalidated the Missouri ban on distribution of violent videotapes to minors in part on the grounds that the statutory term "violence" was unconstitutionally vague. 174

In thinking about this issue, there is another point to keep in mind. However we define violence, the need remains not only to avoid vagueness, but to distinguish the low-value violence from the high. It is not clear how that would be done. One might look to the Miller test, and the concepts of "prurient interest," "patently offensive," and "serious value" used to define obscenity. But these concepts have proven difficult to apply in obscenity cases, and they would pose even more problems in cases seeking to distinguish between high- and low-value violence. One problem is that there is nothing even approaching a consensus on low-value violence. Indeed, some who propose to regulate televised violence save their most vitriolic attacks for precisely the types of programs—news, reality-based cop shows, talk shows, and historical docudramas175—whose high value

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169 Winters, 333 U.S. at 518.
171 Id. at 681.
172 Id. at 687-88; see also id. at 683 & n.10 (reviewing other examples of unconstitutionally vague licensing standards).
173 Id. at 689.
174 Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 689-90 (8th Cir. 1992).
175 See, e.g., Kolbert, supra note 91; O'Conner, supra note 49; cf. Prettyman & Hook, supra note 6, at 331 n.55 (noting the prevalence of copycat criminal incidents following news broadcasts of particular crimes).
(within the meaning of First Amendment jurisprudence) is most assured.

Furthermore, given that this nation traditionally has been more hostile to sexually explicit material than to violent matter, we assume that low-value violent material would have to be at least as graphic and beyond the mainstream as sexually explicit material is to be obscene.\textsuperscript{176} Put otherwise, there must be full First Amendment protection for all violent speech short of the violence equivalent of obscenity.\textsuperscript{177} What that equivalent would be is, of course, impossible to say with precision. However, whether the line between high- and low-value violence narrowly tracks the \textit{Miller} obscenity test or is just functionally comparable, the most violent programs in televised media—say \textit{NYPD Blue}\textsuperscript{178} and uncut versions of \textit{The Terminator} or \textit{Die Hard}, or other such movies—arguably fall within the sphere afforded full protection.

There is another side to this argument, however. Any reasonable person must concede that the Court's definition of "obscenity" is a classic example of a vague regulation, yet we tolerate it. And it is tolerated because, as a society, we have tended to believe that certain material is so outrageous as to be beyond the pale of free expression.

\textsuperscript{176} To be sure, there has been no greater consensus in the Supreme Court regarding the proper level of protection to be afforded sexually explicit material short of the obscene than there has been regarding the proper constitutional status of obscenity itself. \textit{See generally} United States v. United States Dist. Court, 858 F.2d 534, 541-42 (9th Cir. 1988) (providing a succinct history of cases). The controversy apparently continues. \textit{Compare}, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.") \textit{with} Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (applying exacting content-based scrutiny to regulation of indecent but not obscene dial-a-porn services). Present doctrine provides full First Amendment protection to nonobscene speech. \textit{But see} R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2564 (1992) (Stevens, J., concurring) (claiming that "nonobscene, sexually explicit speech" is a "sort of second-class expression" on par with commercial speech in the Court's First Amendment hierarchy).

\textsuperscript{177} The fact that, unlike most sexually explicit expression, some televised violence depicts conduct that is itself illegal does not direct a contrary conclusion. Such an argument would suggest that what makes violent speech worse than sexually explicit speech or, say, profane, blasphemous, and plain offensive forms of modern art, is not the harm or offense that the various types of speech cause, but rather the legality or illegality of the conduct depicted or evoked. To be sure, "[t]he First Amendment does not protect violence." \textit{NAACP v. Claiborne Hardware Co.}, 458 U.S. 886, 916 (1982). But representations of violence are not themselves violence. This argument is a classic non sequitur. The map is not the territory. \textit{See American Booksellers Ass'n v. Hudnut}, 771 F.2d 323, 330 (7th Cir. 1985) (stating that "the image of pain is not necessarily pain").

\textsuperscript{178} \textit{NYPD Blue}, a weekly series from the Emmy-winning producer Steven Bochco, is generally considered the most violent program on network television. \textit{See}, e.g., Kim, supra note 3, at 1397 n.56; O'Connor, supra note 49, at II.26. Because the violence in movies far outpaces that which is made for television, the most violent fare on cable are Hollywood feature films when shown uncut. \textit{See id.}
With this in mind, Justice Stewart's "I know it when I see it"\textsuperscript{179} approach to defining obscenity arguably is no less apt in defining gratuitous violence: "we don't know it until we see it" may be a better way of putting it. If the social science studies continue to connect portrayals of violence to violent criminal activity, we may reach the point where society will tolerate a measure of regulatory vagueness to gain a measure of security in our well-being.

IV. CONTENT-BASED REGULATION OF HIGH-VALUE SPEECH: CLEAR AND PRESENT DANGER, AND BEYOND

The widespread absolutist conception holds that the First Amendment proscribes content-based restrictions of high-value speech. In the much-quoted words of one Supreme Court opinion, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."\textsuperscript{180} Surely, however, this is hyperbole. The task is to identify the standards by which television violence might be regulated notwithstanding that it is high-value speech.

For courts and commentators who have analyzed regulations of media violence, the initial, and sometimes sole, move has been to apply the clear and present danger test of \textit{Brandenburg v. Ohio}.\textsuperscript{181} We conclude in subpart A (along with the overwhelming consensus) that television violence cannot be regulated as a clear and present danger. But that, we shall argue, is not the end of the inquiry. Subpart B develops alternative standards that more properly govern the constitutionality of regulations of televised violence.

\textbf{A. Clear and Present Danger: \textit{Brandenburg} and Television Violence}

\textit{Brandenburg} involved the filming of a Ku Klux Klan rally in rural Ohio at which participants spouted the customarily outrageous racist Klan invective. After the film was broadcast, the state of Ohio convicted the local Klan leader, a major speaker at the rally, under a state criminal syndicalism act making it illegal to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."\textsuperscript{182} A unanimous Court reversed the conviction. It announced in a per curiam opinion that the First Amendment does "not permit a

\textsuperscript{179} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
\textsuperscript{180} Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); \textit{see also} Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").
\textsuperscript{182} \textit{Brandenburg}, 395 U.S. at 444-45.
State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. On its face the Brandenburg standard appears to establish four conditions that must be satisfied in order for the government to restrict speech because of its tendency to cause harm. The speech must be: (1) advocacy (2) directed to inciting or producing (3) imminent lawless action and (4) likely to incite or produce such action.

Brandenburg has spawned a vast and rich literature. For purposes of the present inquiry, however, it is unnecessary to parse the test or scrutinize the commentary on the meaning of "clear and present danger." It is apparent that the incitement element of the Brandenburg test, alone, fails to capture government regulation of television violence. Simply put, the violent fare on television does not explicitly urge viewers to commit the evils with which the legislature may be concerned. Nor can such intent reasonably be attributed to television executives and producers. Largely for this reason, courts and commentators have concluded with near unanimity that televised portrayals of violence are not "directed to inciting or producing imminent lawless action." Consequently, Brandenburg does not help would-be regulators.

183 Id. at 447.

We agree with Professor Smolla that the nomenclature is irrelevant so long as the elements of the test are properly understood. See SMOLLA, supra note 54, § 4.02(3)(b)(ii). Unless otherwise noted, we will use the terms "clear and present danger test" and "the Brandenburg test" interchangeably.


186 Of course, our conclusion that Brandenburg does not address governmental regulation of television violence should not be read to suggest that programmers could air material "directed to inciting or producing" violent behavior. The mere fact of its being telecast would not immunize the programming from regulation under Brandenburg.

187 Several courts have visited the issue in tort suits against media entities to recover for harms caused when television programs or other entertainment allegedly induced viewers either to harm themselves or to commit crimes against others. All that have invoked clear and present danger analysis have denied recovery. See Campbell, supra note 14, at 447-53 (discussing cases); Prettyman & Hook, supra note 6, at 378-79 & nn.264-69 (same); see also Hercog v. Hustler Magazine, Inc., 814 F.2d 1017, 1021-23 (5th Cir. 1987). Commentators have likewise concluded that Brandenburg permits neither tort suits for media-related imitative violence, see, e.g., Prettyman & Hook, supra note 6, at 382; Redish, supra note 185, at 1179 n.90; Sims, supra note 14, at 256-62; but see Hilker, supra note 14, at 570-71, nor other forms of governmental regulation of
B. Toward "Most Exacting Scrutiny"

1. Beyond Clear and Present Danger.—The ease and certainty with which most commentators have concluded that television violence is not a "clear and present danger" within the meaning of the Court's case law have led many to question whether Brandenburg is even the appropriate test.\(^1\) The better view, surely, is that it is not. As a matter of historical fact, the Court developed its clear and present danger jurisprudence in the narrow context of restrictions of speech that incite violence and illegal action as a political strategy.\(^1\) Thus, advocacy of political action is not an element of the test but a precondition for its application.\(^1\)

Consequently, regulations of television violence should not (except in the most unusual circumstances not here relevant) be measured by Brandenburg in the first place. As we have noted, the programs with which the public and congressional leaders are concerned might be harmful and might be without much value, but it requires stretching the language farther than the developers of the test intended to conclude that they "advocate" aggression, violence, or law-breaking. The question becomes whether another test might apply or whether clear and present danger is the only basis upon which content-based regulations of high-value speech might constitutionally be justified (in which latter case, a conclusion that the test does not apply is functionally equivalent to a determination that the test applies but is not satisfied).

The notion that Brandenburg does not cover all content-based regulations is not new. At least a decade ago, commentators suggested that the standards governing incitement might prove to be solely one manifestation of a general compelling interest test.\(^1\) And

televised violence. See Krattenmaker & Powe, supra note 145, at 134; Krattenmaker & Powe, supra note 14, at 1191-96.\(^1\) See, e.g., Prettyman & Hook, supra note 6, at 382; Sims, supra note 14, at 262; Weingarten, supra note 14, at 747-49.

\(^1\) See generally Kalven, supra note 159, at 119-236 (emphasizing this theme).

\(^1\) To be sure, the Court has muddied the issue by sending mixed and confusing signals as to whether the clear and present danger test applies outside of political advocacy, as for instance, in the area of press coverage of judicial proceedings and pretrial publicity, see, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-45 (1978); Gentile v. State Bar, 501 U.S. 1030 (1991), and the heckler's veto. See, e.g., Texas v. Johnson, 491 U.S. 397, 409-10 (1989).

\(^1\) See, e.g., Redish, supra note 185, at 1182-83; Schauer, supra note 150, at 305 (suggesting it "possible that Brandenburg is representative rather than exclusive").

An appreciation of this possibility is frustrated if one subscribes to the minority view that the clear and present danger test demarcates a category of low-value speech rather than constituting a test for restriction of high-value speech. See, e.g., Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1020 (5th Cir. 1987); id. at 1026 (Jones, J., concurring in part, dissenting in part); Prettyman & Hook, supra note 6, at 370; Stone, supra note 116, at 194; Kim, supra note 3, at 1406. Of course, whichever view one takes, the result is the same: if the test is satisfied, the speech at issue
the development of the Supreme Court’s First Amendment jurisprudence, especially during the 1980s, has vindicated that view. While the Court has generally refrained from invoking the clear and present danger test when advocacy of lawbreaking is not involved, it has not thereby summarily invalidated regulations of high-value speech. Rather, it has applied “most exacting scrutiny.”

2. Articulating a New Test.—Although the Supreme Court has determined that the First Amendment affords government wider latitude to impose content-based regulations of high-value speech than the incitement test alone provides, it has not precisely identified what the First Amendment requires in any given case or articulated a satisfactory general test. Accordingly, it is crucial to pay close attention to the Court’s numerous explications of what “most exacting scrutiny” entails.

At its simplest, exacting scrutiny appears identical to the familiar strict scrutiny test under the Due Process and Equal Protection Clauses of the Fourteenth Amendment: the challenged regulation must be “narrowly tailored to serve a compelling state interest.” In can be suppressed consistent with the First Amendment. Still, it will much clarify matters once we determine that the test does not apply to have recognized that the paradigmatic speech generally subject to the clear and present danger test is political advocacy and thus unquestionably high value. Hence, Professor Schauer’s insistence that, although “there are numerous doctrinal paths to nonprotection,” we can best come to understand “the increasingly complex nature of the First Amendment” by keeping the paths analytically distinct. Schauer, supra note 150, at 299.


193 Dicta in some opinions suggests that, even within the universe of content-based regulations of high-value speech, the level of scrutiny might be affected by such considerations as whether the speech is in a public forum and the degree to which the speech is on core political matters. See, e.g., Boos, 485 U.S. at 321 (“Our cases indicate that as a content-based restriction on political speech in a public forum, [the instant regulation] must be subjected to the most exacting scrutiny.”) (emphasis in original). Supreme Court case law squarely rejects the implication. The Court has consistently applied most exacting scrutiny to content-based regulations of nonpolitical high-value speech. See, e.g., Simon & Schuster, 502 U.S. 105, 115-21 (1991) (stories about crime); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (dial-a-porn phone services). Indeed, in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545-50 (1992), the Court applied exacting scrutiny to a content-based distinction drawn among types of fighting words, which the Court acknowledged is low-value speech.

Regulating Violence on Television

a slightly more stringent wording, it would require a "precisely drawn means of serving a compelling state interest."195 In another formulation, "exacting scrutiny" demands that the State demonstrate "a subordinating interest which is compelling" and "means 'closely drawn to avoid unnecessary abridgment.' "196 Reworked again: "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."197 Finally, in perhaps the standard's most common phrasing, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."198

The varied articulations indicate that "exacting scrutiny" contains at least two distinct prongs: a "compelling interest" component and a "narrowly tailored" or "precisely drawn" one. For our inquiry into the constitutionality of regulations of television violence we must parse these elements closely.199

(a) "Compelling interest."—In applying the "compelling interest" prong, the state bears the burden to advance the interest(s) that the challenged regulation is purported to serve.200 Whether one or more is "compelling" is simply a value judgment to be made by the

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197 Sable, 492 U.S. at 126.
199 It is worth noting that the Court's approach is not really a balancing test. Under exacting scrutiny, one side of the scale is, at least in theory, assigned a fixed weight. A limited-tier First Amendment jurisprudence that treats all speech outside of a few narrow categories as equally high value, see generally supra Part III, strongly suggests an approach such as the Court has developed. It does not, however, necessitate it. The Court could apply a uniformly strict balancing formula to all regulations of high-value speech, while crafting more lenient rules (of either a categorical or balancing nature) for low-value expression.
200 See, e.g., Bellotti, 435 U.S. at 786 (citing Elrod v. Burns, 427 U.S. 347, 362 (1976)).
If the court deems the interest not to be compelling, the inquiry ends there: the content-based regulation is unconstitutional.\(^\text{202}\)

If the court deems the government's stated interest to be compelling, it must then determine whether the challenged regulation in fact serves the interest. If it fully serves the interest, the compelling interest prong is satisfied, and the reviewing court can turn to the "narrowly tailored" component. If the regulation does not serve the asserted interest at all, it is unconstitutional. In a number of situations, however, a regulation will appear to serve the state's compelling interest, but only partially. This is the place for underinclusiveness review, an analysis that likely would bear significance for any regulation of television violence.

In one sense, "underinclusive" is a way of describing particular regulations that provoke content-based scrutiny because they restrict less speech than they otherwise could.\(^\text{203}\) Once within exacting scrutiny, however, courts also frequently employ an underinclusiveness inquiry to determine whether a given regulation satisfactorily serves the interest that the state purports to advance. If a speech restriction leaves unregulated significant alternative sources of the harm sought to be remedied, a court will reason that the underinclusiveness either belies the state's avowed objective,\(^\text{204}\) or establishes that, in practice,

\(^{201}\) For a flavor of the untethered subjectivism that a judicial inquiry into "compellingness" entails, see *TBS*, 114 S. Ct. at 2478 (O'Connor, J., dissenting in part):

The interest in localism, either in the dissemination of opinions held by the listeners' neighbors or in the reporting of events that have to do with the local community, cannot be described as "compelling" for the purposes of the compelling state interest test. It is a legitimate interest, perhaps even an important one—certainly the government can foster it by, for instance, providing subsidies from the public fisc—but it does not rise to the level necessary to justify content-based speech restrictions. . . .

The interests in public affairs programming and educational programming seem somewhat weightier, though it is a difficult question whether they are compelling enough to justify restricting other sorts of speech.\(^\text{202}\)

Because the requirement of narrow tailoring is so stringent, and so often proves fatal, it is most common for the Court to assume arguendo that the asserted interest is compelling and then to invalidate the regulation as underinclusive (regulation does not satisfactorily advance the interest), overbroad (regulation abridges too much speech), and/or overly burdensome (regulation places too great a restriction on the speech that it regulates).

\(^{203}\) See generally Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29. This is the situation exemplified by a regulation that excludes a certain category of speech from what would otherwise be a permissible time, place, and manner restriction, thereby subjecting the regulation to exacting content-based scrutiny. In *R.A.V.*, for instance, the Court applied exacting scrutiny to a hate-speech ordinance only because the regulation proscribed some, but not all, fighting words. The majority denied that it was engaging in some sort of "underinclusiveness" analysis. 112 S. Ct. at 2545.

the regulation will not adequately serve the state’s putatively compelling interest.\(^\text{205}\)

Underinclusiveness review has thus encouraged a slight recasting of the compelling interest prong: the challenged regulation must \textit{substantially advance} a compelling interest.\(^\text{206}\) Although helpful, this formulation is not precisely correct. The fact that a regulation does not “substantially advance” the state’s proffered interest should not necessarily prove fatal. If the state’s interest is to reduce a given harm, a speech restriction that will reduce the harm by, say, ten percent should probably not be termed “substantial.” However, if the harm is especially grave, a ten percent reduction might well be of considerable social value. This means that in situations where a speech restriction only imperfectly advances government’s stated interest—and we can anticipate that regulations of televised violence are likely to fall into this category—the compelling interest prong of exacting scrutiny rightly requires only that government’s interest in the expected limited realization of its stated objective itself be compelling. Thus, content-based restrictions applied only to a limited set of speakers will not necessarily fall under the view that they “simply cannot be defended on the ground that partial prohibitions may effect partial relief.”\(^\text{207}\) Instead, the regulation must \textit{accomplish}—rather than merely “serve”—a compelling interest.\(^\text{208}\)

\(^{205}\) The Court’s opinions in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), and Florida Star v. B.J.F., 491 U.S. 524 (1989), are illustrative. In \textit{Daily Mail} the Court invalidated a state criminal statute that prohibited newspapers from publishing, without the consent of the juvenile court, the name of any youth charged as a juvenile offender. It reasoned that the application of the ban only against newspapers (and not against, for example, the electronic media) could not serve the state’s arguably compelling interest in protecting the anonymity of juvenile offenders in order to promote their rehabilitation. \textit{See Daily Mail}, 443 U.S. at 104-05; \textit{id.} at 110 (Rehnquist, J., concurring in the judgment).

\(^{206}\) \textit{Florida Star} involved similar facts. A state law barred “instrument[s] of mass communication” from publishing the name of a victim of sexual assault. \textit{Florida Star}, 491 U.S. at 526 (quoting FLA. STAT. ch. 794.03 (1987)). The Court held, \textit{inter alia}, that the statute’s failure to prohibit any disclosure by private individuals prevented the state from “satisfactorily accomplish[ing] its stated purpose” of protecting the privacy of sexual assault victims. \textit{id.} at 541; \textit{see also id.} at 541-42 (Scalia, J., concurring in part) (“[A] law cannot be regarded as protecting an interest ‘of the highest order,’ . . . and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprotected.”) (quoting \textit{Daily Mail}, 443 U.S. at 103). \textit{Cf.} City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993) (engaging in a similar form of analysis under intermediate scrutiny for regulations of commercial speech).

\(^{207}\) \textit{See, e.g.,} supra note 205 (quoting \textit{Florida Star}); \textit{see also} Bellotti, 435 U.S. at 795; NAACP v. Alabama, 357 U.S. 449, 464 (1958).

\(^{208}\) \textit{Florida Star}, 491 U.S. at 540.
"Narrowly tailored."—Second, a regulation must be narrowly tailored to achieve its compelling objective. Although the Court tends to use terms like "narrowly tailored" and "least restrictive means" indiscriminately, case law reveals that this component of exacting First Amendment scrutiny is comprised of two distinct elements. First, the regulation must restrict no more speech than is necessary to achieve its end.\(^{209}\) It must, that is, be "precisely drawn"; put negatively, it may not be overinclusive or overbroad.\(^{210}\) Additionally, it must impose no greater infringement upon the affected speech than is necessary.\(^{211}\) The means chosen must be the "least burdensome" possible. The narrowly tailored prong is thus concerned with both the scope and degree, or breadth and depth, of speech restriction.\(^{212}\)

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209 See, e.g., Simon & Schuster, 502 U.S. at 122 (invalidating law that requires criminals to escrow income from works describing their crimes on the ground that, although it serves compelling interest in ensuring compensation of victims, it is not narrowly tailored because it "clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated"); Frisby v. Schultz, 487 U.S. 474, 485 (1988) (stating that "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"); FCC v. League of Women Voters of Cal., 468 U.S. 364, 392-95 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-09 (1982) (holding that blanket statutory exclusion of press and public from trials of sex offenses involving victims under the age of 18 is not narrowly tailored to serve the compelling state interest in protecting minor victims from further trauma because the effect of press coverage upon the minor victim will presumably vary on a case-by-case basis).

210 Overbreadth is also a term of art to distinguish cases in which parties advance the interests of other persons not before the court from cases in which parties challenge a regulation as applied to them. See, e.g., R.A.V., 112 S. Ct. at 2542 n.3; Board of Trustees v. Fox, 492 U.S. 469, 482-83 (1989). We are not now speaking of rules of third-party standing. For purposes of the narrowly tailored prong of exacting First Amendment scrutiny, a statute is precisely drawn if and only if it does not restrict speech that it need not to achieve its objective.

211 For example, as an alternative ground for its opinion in Daily Mail, the Court held that the regulation was overly burdensome because there was no evidence that the state could not have adequately enforced its publication prohibition through a means short of criminal penalties. Daily Mail, 443 U.S. at 105; see also Consolidated Edison Co. v. Public Serv. Comm’n, 477 U.S. 530, 542 n.11 (1980) (assuming arguendo a compelling state interest in protecting privacy of captive recipients of the monthly bill, a less burdensome means would be to require utility to stop sending inserts to the homes of customers who object).

212 Of course, a given regulation might fail both aspects of the narrowly tailored prong. That is, it might be both overbroad and overly burdensome. For example, in FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), the Court applied strict scrutiny to a statute that, as constructed, prohibited corporations from using general treasury funds for "express advocacy" in any federal election. Id. at 249. The Court found the statute infirm for two reasons. First, assuming arguendo that the ban on the use of general treasury funds by commercial corporations served Congress' compelling interest in preventing corruption of the electoral process, the Court concluded that electoral spending by noncommercial political corporations does not raise the same concerns. Id. at 256-62. Therefore, the application of the ban to noncommercial political corporations such as respondent established that the statute was not narrowly tailored to achieve the government's compelling interest. Id. at 263.

Second, the Court assumed, again arguendo, that Congress had a compelling interest in protecting the interests of contributors to noncommercial corporations who might not want their
That these elements—(1) precisely drawn and (2) least burdensome means—are analytically distinct is clear and does not require extended discussion. As the two prongs are presently conceived, however, one further distinction might be noted. The least burdensome means prong is relative: for a regulation to fail this prong, the court must be able to identify (or conceive of) a different regulation that could accomplish substantially the same objective while imposing less of a burden upon speech. The precisely drawn prong is more absolute: If the regulation restricts harmless speech, the court will usually hold it invalid, even if it believes that no regulatory alternative could restrict less speech and accomplish substantially the same result.²¹³

(c) "Necessary."—A separate and final question involves the requirement that a challenged regulation be "necessary" to achieve the state's compelling interest. As we have observed, the language appears in some statements of the test, but not in others. Indeed, the apparent randomness of its inclusion or exclusion suggests that the "necessary" requirement may be simply a byproduct or recharacterization of the two components of the narrowly tailored prong: a regulation must both (a) restrict no more speech than necessary and (b) burden speech no more heavily than necessary.

The current caselaw gives a mixed message regarding the extent to which a speech restriction must be "necessary" in order to survive exacting scrutiny. In Riley v. National Federation of the Blind,²¹⁴ for example, the Court held that the disclosure requirement imposed upon professional fundraisers failed exacting scrutiny because, inter alia, it was not narrowly tailored to advance the state's asserted interest in informing potential donors how the money they might contribute would be spent. The Court held that the State has "more benign" options like itself publishing detailed financial information about professional fundraisers or more vigorously enforcing its existing anti-contributions to be used for electioneering. Id. at 260. The Court then concluded that such an interest could be advanced through "less burdensome" means than the ban on electoral use of general treasury funds. Id. at 261. Congress could, for example, merely require that noncommercial corporations inform potential contributors that funds might be used for advocacy in federal elections. Id.

The Court concluded that the narrowly tailored criterion of exacting scrutiny demanded that a content-based regulation of speech be both the least burdensome and the least restrictive means available: "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." Id. at 265.

²¹³ The fact that the prong is more absolute does not mean that it requires perfection. Some minimum degree of overbreadth might be permissible. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 661 (1990) (upholding regulation as "not substantially overbroad" and drawing no distinction between overbreadth or "overinclusive[ness]" in facial and as-applied challenges).

The crux of the Court's reasoning seemed to be that "government [may] not dictate the content of speech absent compelling necessity."216

The Court's recent decision in Burson v. Freeman217 presents a very different picture. Burson involved a challenge to a Tennessee statute that barred solicitation of votes and display of campaign materials within 100 feet of the entrance to polling places on election day. A plurality of the Court upheld the statute upon determining that the state's interest in preventing election fraud was compelling. Much of the plurality opinion considered whether campaign-free zones around polling places were necessary to achieve that objective:

To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest. While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.218

Although the plurality opinion in Burson suggests that "necessary" is an independent prong of exacting scrutiny, the standard employed seems highly malleable, and it is far from stringent. In fact, Tennessee had many options short of a solicitation ban available to it—increased police security or rules for crowd control would have made the restriction on speech unnecessary—but the plurality was unimpressed.219 As Justice Stevens pointed out in his dissent, "the plurality declines to take a hard look at whether a state law is in fact 'necessary.'"220 After Burson, it would appear that "necessary" is an

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215 Id. at 800; see also Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 & n.11 (1980) (finding that broad prophylactic ban on canvassing not narrowly tailored because enforcement of existing laws against fraud would sufficiently serve purported governmental objective).

216 Riley, 487 U.S. at 800.


218 Id. at 1852. The Court then undertook a lengthy discussion of the evolution of the secret ballot, both in Australia and the United States. See id. at 1852-55.

219 The plurality concluded that, because "all 50 States, together with numerous other Western democracies" followed a tradition of using "a secret ballot secured in part by a restricted zone around voting compartments," this "wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." Id. at 1855. This notion of "necessary" is far short of "essential."

Justice Scalia concurred on the ground that the law was a reasonable viewpoint-neutral regulation. Justice Thomas did not participate in the decision, and Justice Stevens, who was joined by Justice O'Connor and Justice Souter, dissented. The dissenters argued that, "[u]nder the plurality's analysis, a State need not demonstrate that contemporary demands compel its regulation of protected expression; it need only show that that regulation can be traced to a longstanding tradition." Id. at 1865.

220 Id. at 1865 (Stevens, J., dissenting).
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independent prong of "exacting scrutiny," but of only questionable force.

With the foregoing understanding of the legal landscape as our guide, we are now prepared to submit the content-based proposals for the regulation of televised violence to exacting First Amendment scrutiny.

V. "EXACTING SCRUTINY" IN THE LIGHT OF SOCIAL SCIENCE STUDIES SHOWING A RELATIONSHIP BETWEEN TELEVISED VIOLENCE AND ANTISOCIAL AGGRESSION

In this Part we consider the principal types of content-based regulations: banning or zoning, balancing, and disclosure. For each type of provision, we examine whether it is necessary to achieve a compelling state interest and is precisely drawn in the least burdensome manner. We focus in particular on some of the notable social science data purporting to show a positive relationship between portrayals of violence on television and antisocial behavior. We do not address the regulations covering lock-out technology, because, as we have argued above, these regulations can be written to be content-neutral.

A. Banning/Zoning

1. Prong One: Does the Restriction Accomplish a Compelling Governmental Interest?—Congress would likely assert that a full or partial ban on televised violence will accomplish either of two discrete interests: (1) reducing societal violence; and (2) protecting the psychological and emotional well-being of minor viewers. That both interests are compelling is indubitable. Few if any state interests are more important than protecting the lives and property of its citizens from antisocial violent behavior. Additionally, "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physi-

221 Although commentators routinely note both types of alleged harm, few translate the two into distinct interests requiring different legal analyses.

According to a theory developed by George Gerbner at the University of Pennsylvania's Annenberg School for Communication, television violence harms society in a more insidious way than merely by stimulating discrete individual acts of aggression. Its more profound effect is to cultivate fear, anxiety, and an acceptance of power relations that breeds docility and resistance to change. See Krattenmaker & Powe, supra note 14, at 1157-70; see also Kim, supra note 3, at 1390-91 & nn.30-31. It is hard to tell whether this theory is intended to embrace more than the "psychological well-being" interest. Whatever the merits of this argument, it belongs more to the arena of philosophy and social theory than it does to legal analysis, at least until it can be framed in more concrete terms. Such an amorphous and unevaluable social danger probably cannot constitute a "compelling interest" within the meaning of First Amendment scrutiny. Cf. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943) (holding that clear and present danger test requires concrete harm to individuals and that harm to "national unity" is too nebulous to justify restriction of speech).
cal and psychological well-being of a minor' is 'compelling.' Consequently, whether the first prong of exacting scrutiny is satisfied reduces to whether banning or zoning televised violence would actually accomplish either of the state's asserted compelling interests.

(a) Reducing societal violence: Review of the "Violence Hypothesis."—In considering the interest in reducing societal violence, it is clear that the underinclusiveness problem will be implicated. Even a complete ban on televised violence would not eliminate societal violence. The analysis therefore proceeds in three steps: (1) is televised violence a causal factor for societal violence? (i.e., would a ban on the former even partially serve the state's interest); (2) what is the magnitude of the causal effect? (i.e., how much societal violence could a given regulation of television violence eliminate); and (3) would the state's interest in such a partial reduction of societal violence be a compelling interest?

This first question embraces the "violence" or "causal" hypothesis—"viewing televised violence causes subsequent aggression against individuals or property"—and has generated an extensive body of social scientific research and debate. This subsection summarizes and analyzes that literature. We first present a descriptive overview of the data that underlie the prevailing consensus of opinion in the social scientific community in favor of the violence hypothesis. Next, we discuss the chief criticisms of the majority view. Finally, we assess these objections critically. The sheer mass of the literature—literally hundreds of studies, commentaries, and narrative reviews published over the past three decades—ensures that the following exploration be cur-

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223 Thus, the oft-stated objection that regulation of media violence is unconstitutionally paternalistic misses the mark. See, e.g., Robert S. Peck, The First Amendment and Television Violence 1-2 (Dec. 2, 1993) (draft memorandum for the ACLU) (on file with the authors); Krattenmaker & Powe, supra note 14, at 1157; Kim, supra note 3, at 1430 ("[D]o viewers prefer violence? The answer to this question is critical to the policy debate on this issue. If viewers want violence, then there really isn't much to debate—the public is getting what it wants."). To be sure, the First Amendment forbids the government to prevent adults from receiving information on the grounds that the messages will be harmful to them. See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.31 (1978) (citing cases). But such a flat constitutional ban does not apply when the government's justification is either to prevent harm to persons other than the willing listeners (i.e., to combat externalities) or to protect children in the audience.

224 In sum, the question is whether, and to what extent, televised violence contributes to antisocial violent behavior. That is, absent televised violence (or, more precisely, absent the particular programming that a specific regulation might eliminate) how many violent acts would be prevented?

225 Krattenmaker & Powe, supra note 14, at 1135.
sory. Additionally, because some of the debate centers on methodological disputes, it bears mention that neither of the authors is trained in social psychology or the quantitative social sciences generally. Nonetheless, we are confident that the ensuing discussion will provide sufficient basis for constitutional analysis.

Investigators have employed three types of research to test the violence hypothesis: laboratory experiments, field studies, and correlational surveys. In simplified form, researchers in a laboratory experiment segregate subjects into experimental and control groups and expose the former to televised violence and the latter to nonviolent programming or to no programming at all. The groups are then provided an opportunity to aggress. Studies typically show that subjects exposed to violent programming are more aggressive than subjects in the control group.

Two early studies provide the models from which much subsequent work has developed. In a famous series of experiments dating from the early 1960s, Albert Bandura and his colleagues compared the effects of live and filmed depictions of violent behavior on subsequent aggressive behavior by nursery school children. The children were divided into five groups. The first group was exposed to a live model who verbally and physically abused a Bobo doll, a large inflated plastic figure of a clown. The second group witnessed a film of the same model engaging in the same conduct. The third group viewed the same violent activity, but this time the aggressor was a woman dressed as a cat to evoke television cartoons. The fourth and fifth groups were controls: one viewed a film of the model playing calmly with the Bobo doll; the other was not exposed to the woman or the doll.

After the exposure, the children were mildly frustrated by being led past a full and inviting playroom and then escorted individually to a second room more sparsely furnished with a Bobo doll, a mallet, dart guns, and a few other toys. Experimenters observed the children through a one-way mirror and counted the number of times each child committed an aggressive action such as kicking or shooting the doll. The researchers discovered that, on average, the children in the three experimental groups committed nearly twice as many aggressive acts as did the children in the two controls. Similar results have been obtained with human models instead of Bobo dolls.

In a second experimental paradigm, pioneered by Leonard Berkowitz, investigators measured the effect of violent programming

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227 These experiments are summarized in Albert Bandura, Aggression: A Social Learning Analysis 72-76 (1973).

228 See the discussion in Krattenmaker & Powe, supra note 14, at 1138-39.
on viewers' willingness to administer electric shocks to other individuals. The experiments have been conducted across a range of age groups, with a variety of violent materials, and with or without the subjects being provoked to anger or frustration. The results routinely reveal that those who view the violent programs will deliver longer and more intense shocks.

These and similar experiments have provided strong support for the violence hypothesis. There is near-universal agreement among social scientists that, in the laboratory setting, televised violence is a causal factor for aggressive behavior. It is similarly acknowledged, however, that the generalizability of laboratory studies of behavior is necessarily limited. A necessary cost of the greater control the experimenter can achieve in the laboratory is the artificiality of the situation.

Although a well-designed experiment will minimize the artificiality of conditions, the “external validity” of the research, that is, the degree to which conclusions drawn from laboratory studies hold true in the “real world,” is always subject to some doubt. The force of this doubt varies from case to case, depending upon the extent and manner in which the laboratory conditions depart from conditions obtaining in natural settings. As we will see, adherents and critics of the violence hypothesis differ mightily regarding the external validity of laboratory experiments. Before assessing the merits of this debate, however, we turn to efforts to garner direct information about the effect of televised violence in natural settings—field experiments and correlational surveys.

In field as in laboratory experiments, subjects are randomly assigned to groups, exposed to various types of television or film programming, and then measured for aggressive behavior. Field experiments differ from their laboratory counterparts principally in two facets. The settings are relatively natural, and the experimenters measure actual aggressive behavior engaged in over a longer period of time.

In one of the best-known studies, conducted by Seymour Feshbach and Robert Singer and published over twenty years ago, several hundred adolescent boys living in residential schools and

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229 Examples of such experiments are discussed id. at 1139-42. As in Stanley Milgram's famous experiments about the banality of evil, the subject is told that the press of a button or turn of a dial will deliver an electric shock to another person who is connected to the machine. In fact, the latter individual, an associate of the experimenter, does not actually experience pain or discomfort.

230 As the principal skeptic in the social scientific community has conceded, “[i]t seems clear that . . . viewing violent material on television or film in the laboratory can increase aggressive responses in the laboratory.” Jonathan L. Freedman, Effect of Television Violence on Aggressiveness, 96 PSYCHOL. BULL. 227, 228 (1984).

231 See, e.g., id.
group homes were assigned to either a violent or nonviolent television diet. Over the course of six weeks, adults in the homes and schools monitored the aggressive behavior of all the boys. The results were ambiguous; indeed, in some homes the boys who watched the nonviolent fare aggressed more than did those who watched the violent programs.

Unfortunately, these results reveal little, for most commentators have concluded that the experiment was badly flawed in design and execution. The most substantial failing arose from the fact that the boys who were assigned the nonviolent programming protested over being deprived programs that were in their usual television diet. Consequently, the boys in the nonviolent television group did not function as a control—they were considerably more frustrated and angry than their peers who were permitted to watch violent television. In fact, the boys who were supposed to watch only nonviolent shows objected so strenuously that the researchers capitulated and let them watch *Batman.* So the nonviolent diet was no longer entirely nonviolent.

While there have been other field experiments, some supporting the violence hypothesis, some contradicting it, most too have suffered from methodological failings. Believers and skeptics of the violence hypothesis generally agree that the field experiments are too inconsistent and methodologically faulty to provide any information regarding causation: they neither disprove nor bolster the violence hypothesis. We need not discuss them further.

A second type of field study, and the third of the major investigative designs, is the correlational survey. In the simple survey, a researcher gathers information via interviews and printed questionnaires regarding the viewing habits and aggressiveness of a large number of subjects. The researcher then analyzes the data to determine the degree to which television viewing correlates with aggressive behavior. A detailed discussion of the data is not necessary. Scores of studies, involving thousands of subjects of both sexes ranging in age

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232 This experiment is well summarized in *Spitzer,* supra note 53, at 105-06. Boys in the former group watched such programs as *Bonanza* and *The Rifleman.* Programs for the latter group included *Andy Williams* and *Gomer Pyle.* *Id.*

233 There were further reasons to discredit the study. For example, the boys may have outfoxed the researchers. Having guessed the purpose of the experiment, boys assigned the aggressive diet may have tried to curb their aggression (and boys in the other group may have acted up) to convince the adults that violent programming did not induce aggression and thereby to preserve their preferred television fare. *Id.*


235 See, e.g., *Comstock,* supra note 226, at 232 ("[I]t is widely acknowledged that the several field experiments which have been conducted are uninterpretable as a body of evidence."); Freedman, *supra* note 230, at 234.
from young children to high school and college students in several countries, have clearly established, at the least, "that children and adolescents who watch more violent programs on television or who prefer violent programs tend to be more aggressive."\textsuperscript{236}

It is an essential truth of statistics, however, that correlation does not prove causation. That viewing television violence is positively correlated with aggressive behavior can be explained in three ways: (1) viewing television violence causes aggressive behavior; (2) a disposition to behave aggressively causes a preference for violent television programming; or (3) an independent factor, or set of factors, causes both violent behavior and a preference for violent programming.\textsuperscript{237} Several investigators have attempted to discern which hypothesis is true.

In one of the most important of the surveys, William Belson gathered detailed information about behavior and viewing habits of over 1500 adolescent males in London.\textsuperscript{238} Among his elaborate set of findings, Belson discovered a moderate correlation between high exposure to television violence and violent behavior in general.\textsuperscript{239} Most importantly for the causal question, however, was his analysis of the relationship between television violence and serious violent behavior: (i) heavier viewers of television violence commit a great deal more serious violence than do lighter viewers of television violence who have been closely equated to the heavier viewers in terms of a wide array of empirically derived matching variables; (ii) the reversed form of this hypothesis is not supported by the evidence.\textsuperscript{240}

By undermining both causal alternatives to the violence hypothesis (that independent factors cause aggressive behavior as well as a preference for television violence, and that an aggressive disposition causes a preference for television violence), this important finding went far beyond a demonstration of mere correlation. It tended, Belson claimed, to establish the violence hypothesis.

The other meaningful way to derive causation from correlational data is by means of a longitudinal correlation study. In a longitudinal study, data collectors simply return to their subjects after a significant passage of time to gather the same information. In one such study,\textsuperscript{241} researchers surveyed over 800 third graders and returned ten years later to survey over half of the original participants. They found that viewing television violence correlated positively with aggressive be-

\textsuperscript{236} Freedman, supra note 230, at 236-37.
\textsuperscript{237} See, e.g., id. at 237.
\textsuperscript{238} WILLIAM A. BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY (1978). The study was financed by CBS.
\textsuperscript{239} Id. at 520-21.
\textsuperscript{240} Id. at 15.
behavior at both points in time and that the correlations between viewing television violence in third grade and various measures of aggression ten years later were also statistically significant. The correlation between aggressive behavior in third grade and viewership of television violence ten years later, however, was, at most, at the borderline of statistical significance. Although such findings do not prove the violence hypothesis, they strongly bolster it relative to the reverse causal hypothesis.

Although the foregoing discussion is highly abbreviated and simplified, it presents the skeleton of the empirical social scientific case for the violence hypothesis. Laboratory experiments demonstrate that television violence causes aggressive behavior in controlled settings. Correlational surveys reveal at least that the viewing of televised violence in real life correlates with aggressive behavior, and suggest—but do not establish—causation as well. Partly on the basis of such research findings, the National Institute of Mental Health could report in 1982 that

the consensus among most of the research community is that violence on television does lead to aggressive behavior by children and teenagers who watch the programs. . . . Not all children become aggressive, of course, but the correlations between violence and aggression are positive. In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable that has been measured.242

Despite this growing consensus, skeptics remain, both in the social scientific and legal communities. (Indeed, legal analyses have been, if anything, the more critical of the empirical evidence.243) The dissenters’ objections fall into two distinct categories: they challenge the evidence as both unpersuasive and irrelevant.244

242 TELEVISION & BEHAVIOR, supra note 7, at 6.
243 In the most thorough examination of televised violence in the legal literature to date, Krattenmaker and Powe concluded: “Upon analyzing the methodologies and definitions employed by the researchers, a reasonable person must conclude that no acceptable evidence supports the violence hypothesis.” Krattenmaker & Powe, supra note 14, at 1169-70; see also id. at 1170 (Given “the available evidence concerning the impact of televised violence . . . [no foreseeable regulatory program designed to inhibit or channel violent programming . . . could be supported by any acceptable view of rational policy formulation.”). In a more recent appraisal, the same authors are still critical of the data but less strident. See KRATENMAKER & PowE, supra note 145, at 126-32; see also Spitzer, supra note 53, at 116.
244 Some critics have also questioned the reliability of the published data, alleging that biases and predispositions of journal editors have skewed the published findings in favor of studies that report positive results. See Spitzer, supra note 53, at 116; Jonathan L. Freedman, Television Violence and Aggression: What Psychologists Should Tell the Public, in PSYCHOLOGY AND SOCIAL POLICY 179, 185 (Peter Suedfeld & Philip E. Tetlock eds., 1992); Krattenmaker & Powe, supra note 14, at 1154-55.

While some publication demand effect might exist, it is impossible to determine how to factor such a datum into an overall assessment of the validity of the violence hypothesis. Indeed, the critics do not attempt to quantify this objection and are willing to rely upon speculation and
The critics object, first, that a fair interpretation of the data simply does not support the violence hypothesis. In reaching this conclusion, they identify methodological failings in individual studies and emphasize the lack of uniform results and sometimes weak statistical correlations. Ultimately, however, the bulk of the skeptical objection to the weight and sufficiency of the evidence rests upon the reservations already noted about the explanatory reach of each of the important research techniques. Because the field experiments are, as a body, so uninformative, the violence hypothesis must rest on the lab experiments and the correlational surveys. Accordingly, the critics especially stress the obstacles to the external validity of the laboratory experiments and the inability of the correlational surveys to prove causation.

Dissenters have identified four factors as posing the most formidable challenges to the external validity of the laboratory experiments. They object, first, that the viewing experience is unnatural. The programming to which the subjects are exposed—which is either made specially for the experiment or culled from actual television shows—does not fairly reflect the mixture of violent and nonviolent programs in a natural television diet. Also, normal television viewing tends to be characterized by less concentrated attention to the screen than occurs in the laboratory. Second, critics point to the frequent practice of provoking or frustrating subjects before or after exposure in order to increase the magnitude of effects. Third, critics claim that viewers in natural settings rarely have the opportunity for immediate aggression that the laboratory experiments provide. Fourth and, in the estimation of most critics, most fatally, lab aggression is not subject to the formal and informal sanctions that apply in the real world to discourage antisocial aggression. To the contrary, the critics continue, experimenter demand effects are likely actually to encourage the aggressive behavior that the experimenter hopes to measure.

Where the skeptical case against the laboratory experiments is essentially qualitative, the critics’ reservations about the correlational surveys is quantitative and highly technical. While conceding correlation, the critics offer a host of reasons to doubt that even Belson’s study and the longitudinal surveys permit confident inferences about


See, e.g., Freedman, supra note 244, at 184-87.

See generally id.; SPTZER, supra note 53, ch. 6; Freedman, supra note 230; Krattenmaker & Powe, supra note 14, at 1147-57.

See supra note 236 and accompanying text.
causation. We will explore neither these criticisms\textsuperscript{248} nor the responses they have provoked. Because the debate now centers on such issues as the proper mathematical technique for interpreting longitudinal survey data,\textsuperscript{249} we will not rely in our analysis on the degree to which the correlational survey data alone support the causal hypothesis.

Finally, dissenters object that even if the violence hypothesis is accepted as proven, it is irrelevant to political and constitutional debate because "no one yet has been able to suggest an acceptable operational definition of the very kind of behavior sought to be measured: 'violence.'"\textsuperscript{250} The problem, as the critics see it, is that researchers have tested for whether televised violence causes aggressive behavior, but that aggression codes for a vast range of behaviors, from the normatively neutral to the highly valued and generously rewarded.\textsuperscript{251} Laboratory experiments that measure aggression against a Bobo doll and correlational studies that include verbal aggression within a single measure of aggressive behavior tell us nothing about the effect of televised violence on behavior with which the law is, or should be, concerned. As Krattenmaker and Powe put it, First Amendment scrutiny requires evidence demonstrating that televised violence produces "the purposeful, illegal infliction of pain for personal gain or gratification that is intended to harm the victim and is accomplished in spite of societal sanctions against it."\textsuperscript{252}

How persuasive are these several objections? The first and more fundamental of the skeptical criticisms—that the published data do not adequately support the violence hypothesis—has been aggressively debated in the social science literature. Although a full exploration of this debate—or, put otherwise, an independent assessment of the validity and significance of the data—is far beyond the scope of this Article, the central points in the majority's rebuttal can be summarized.

First, many researchers have argued that the skeptics overstate the obstacles to the external validity of the laboratory experiments. Consider, for example, Krattenmaker and Powe's objection that "[a]ggressive behavior did not occur, or occurred less frequently,

\begin{itemize}
\item \textsuperscript{248} For the skeptical position on the correlational survey data, see Freedman, \textit{supra} note 230, at 237-43. For a more recent, though less elaborate statement, see Freedman, \textit{supra} note 244, at 181-83.
\item \textsuperscript{249} The import of Huesmann et al.'s response to Freedman on the question of correlational surveys is that cross-lagged correlational analysis (which is the method described for illustrative purposes \textit{supra} text accompanying note 241) is less reliable than regression analysis. See Huesmann et al., \textit{supra} note 234, at 197.
\item \textsuperscript{250} Krattenmaker & Powe, \textit{supra} note 14, at 1155.
\item \textsuperscript{251} \textit{Id.;} Spitzer, \textit{supra} note 53, at 114.
\item \textsuperscript{252} Krattenmaker & Powe, \textit{supra} note 14, at 1156; see also Spitzer, \textit{supra} note 53, at 114 (quoting definition approvingly).
\end{itemize}
when the subjects were not frustrated or angered before testing. Given these findings, these test results suggest at most that people angered or frustrated by other experiences in life may be stimulated by televised violence to perform violent acts.  

Surely the majority might emphasize that researchers have obtained statistically significant positive results even without frustrating their subjects. But the crux of the majority response must be that this skeptical criticism, taken for all it's worth, is no impediment to external validity. The fact that viewers who have experienced anger or frustration will be more susceptible to the influence of television violence might speak to the magnitude of the causal hypothesis in real life. However, given that the television audience does include a fair number of persons who suffer frustration or anger comparable to that induced in laboratory subjects, this point does not speak to the naturalizability of laboratory findings.

Proponents of the violence hypothesis also have rebutted the assertion that external validity is threatened by lack of sanctions in the lab and alleged experimenter demand effects. Huesmann et al. have argued that the skeptics' positing of demand effects "runs counter to the empirical evidence" and propose that it is more likely that subjects who discern the experimenter's intent will try to suppress aggressive response. Even more significantly, many researchers have disputed that laboratory experiments with young children differ in any meaningful way from what is a "natural" setting: "Children at [nursery school] age lack the concept of experimentation that would lead them to behave atypically, and the experience of watching television and then playing (when behavior is measured) while under adult supervision is hardly unusual for them." Taken together, these two arguments suggest that older subjects might respond against possible demand effects, while young children will not experience any difference in external pressure ("sanctions") against aggressive behavior in or out of the laboratory setting.

Second, as briefly noted, scientists in the majority camp believe that the correlational surveys reveal more about causation than do the skeptics.

Finally, and most profoundly, the majority insists that the whole thrust or focus of the skeptical attack is misguided. Of course, they concede, laboratory experiments cannot prove their own external validity. And of course correlational surveys can never disprove all factors that might be independent causes of both viewership of television

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253 Krattenmaker & Powe, supra note 14, at 1152 (citation omitted).
254 See Comstock, supra note 226, at 237.
255 Huesmann et al., supra note 234, at 192-93.
256 Comstock, supra note 226, at 228; see also Wood et al., supra note 244, at 374.
Regulating Violence on Television

violence and aggressive behavior. But when it comes to evaluating the full body of research on the violence hypothesis, the whole is considerably greater than the sum of its parts. "What is most impressive about the media violence research is the way in which the laboratory experiments, correlational single-wave field studies, and longitudinal developmental studies all complement each other in linking exposure to media violence with subsequent aggression." This point is confirmed by several projects that have applied meta-analysis—a recently developed technique to arithmetically average the results of studies with nonuniform characteristics—to laboratory, field, and survey data. All have yielded strong support for the causal hypothesis.

It is ultimately significant, we believe, that critics have advanced substantially the same criticisms for well over a decade, yet there remains a strong consensus among social psychologists who have examined the question that television violence does cause aggressive behavior. A reading of the legal literature is skewed toward skepticism (perhaps in part because analysts have imported into the causal debate legitimate reasons to believe that regulation of television violence would be unconstitutional for other reasons) and therefore tends to overstate the objections against the violence hypothesis and to overlook the responses to those objections. We believe that the evidence is persuasive—not conclusive, to be sure—and do not dissent from the prevailing social scientific view. However, a fact highly significant to social psychology—that television violence causes viewers to behave aggressively—might bear little relevance to law and politics, for the state recognizes good, bad, and neutral forms of aggression. This is the second skeptical objection to the violence hypothesis.

Krattenmaker and Powe have written that the lack of an adequate operational definition of violence is the "most damaging" objec-

257 See, e.g., COMSTOCK, supra note 226, at 234-35. We might add that, given Occam's Razor, this fact should provoke little concern.

258 Huesmann et al., supra note 234, at 192; see also COMSTOCK, supra note 226, at 228 (emphasizing that "[t]he many experiments are, on the whole, so consistent in outcome, so complementary and plausible in leading to explanations for the effects of television violence on aggressive and antisocial behavior, and so logically linked to and consistent with the outcome of research on other kinds of media effects and on topics other than media effects").

259 "Meta-analyses are statistical procedures to represent the outcomes of individual studies in a standardized metric. These outcomes can then be aggregated to yield an estimate of effect across a body of literature." Wood et al., supra note 244, at 372.

260 See, e.g., id. (aggregating 23 experimental studies that investigated aggression by children and adolescents in unconstrained social interaction and finding significant support for the causal hypothesis); F. Scott Andison, TV Violence and Viewer Aggression: A Cumulation of Study Results 1956-1976, 41 PUB. OPINION Q. 314 (1977); Susan Hearold, A Synthesis of 1043 Effects of Television on Social Behavior, in 1 GEORGE COMSTOCK, PUBLIC COMMUNICATION AND BEHAVIOR 65 (1986).

261 COMSTOCK, supra note 226, at 198-99; Huesmann et al., supra note 234, at 191.
tion to the violence hypothesis. We believe, however, that an important misunderstanding underlies Krattenmaker and Powe’s deep reliance on their definitional or “irrelevance” objection to the violence hypothesis. This confusion is manifested by the argument that immediately follows their proposed definition of violence: “Whether viewing such behavior simulated on television tends to cause its occurrence in real life seems to be the question about which researchers, regulators, and the public care.” Not quite. The real social and legislative concern is that some identifiable subset of television fare causes antisocial behavior of a sort that the state has a compelling interest in eliminating or reducing. In point of fact, most people who share this concern believe that the identifiable subset itself can somehow be defined by reference to its “violent” content. But that need not be the case. If, for example, research attributed societal violence to the telecast of poignant dramas about a young boy and his dog, that would be a conceivable basis for Congress to ban Lassie.

If the simple point is that the legislature need not cabin its efforts to reduce televised violence to depictions of the very behavior the real-world reduction of which constitutes the state’s compelling interest, the upshot is that the irrelevance objection does not cut as broadly as might at first appear. The fact that researchers have neither uniformly tested the same material nor articulated a narrowly precise definition of the putatively harmful programming does not present a serious challenge to the violence hypothesis. The definitional objection reduces to the single claim that, even if the research evidence establishes that televised violence does cause aggression in natural settings, it does not demonstrate that televised violence causes antisocial aggression. This is certainly not a trivial objection. But it is far from fatal.

The objection invites two responses. It is true, of course, that a causal relationship between televised violence and antisocial violence cannot be logically deduced from data which show only that televised violence causes aggression, broadly defined. But because antisocial aggression is a subset of the aggression that the social science data have primarily recorded, it is reasonable to infer that televised violence will cause some degree of the behavior that Congress can rightly attempt to curb. Moreover, it is false that the research has concerned

262 Krattenmaker & Powe, supra note 14, at 1155.
263 Id. at 1156; see also Krattenmaker & Powe, supra note 145, at 132.
264 For example, many commentators have opined that the telecast of sporting events causes as much violent behavior by its viewers as does any other type of television programming. See, e.g., O’Connor, supra note 49, at II.1 (noting the high incidence of spousal and partner abuse immediately following the Superbowl); Anna Quindlen, Time to Tackle This, N.Y. TIMES, Jan. 17, 1993, at A17 (noting that Super Bowl Sunday may be one of the busiest days of the year at shelters for battered women).
itself only with minor aggressions. While laboratory experiments, of course, have not sought to measure "seriously" aggressive or criminal behavior, several correlational surveys, including Belson's well-regarded London study, did. Researchers have concluded that high exposure to television violence increases the incidence of seriously violent behavior, including the commission of crimes against persons and property.265

The evidence, in sum, supports both the weak version of the violence hypothesis and the stronger claim that viewing television violence is a causal factor for antisocial and criminal aggression. The evidence is not, we reiterate, conclusive. But, especially from the perspective of a court reviewing a regulation of television violence that is itself premised on the legislature's conclusion that television violence causes serious antisocial behavior, it need not be.

To be sure, a court must not simply accept at face value the legislature's claim that a challenged regulation will advance the state's asserted interest. "Mere speculation of harm does not constitute a compelling state interest."266 Furthermore, the Court has stated squarely that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."267 Yet, in its recent decision in Turner Broadcasting System v. FCC,268 the Court stressed that considerable deference is due legislative findings regarding complicated predictive questions:

Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . .

That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. . . . This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to

265 Belson, supra note 238. For a brief summary of Belson's conclusions, see Comstock, supra note 226, at 233-35. See also Brandon S. Centerwall, Reviews and Commentary: Exposure to Television As a Risk Factor for Violence, 129 AM. J. EPIDEMIOLOGY 643, 643-44 (1989) (discussing other studies correlating television violence and criminal behavior). It is thus not the case, as Krattenmaker and Powe have contended, that empirical investigators have not even attempted to measure the effect of television violence on antisocial aggressive behavior. See Krattenmaker & Powe, supra note 145, at 132; Krattenmaker & Powe, supra note 14, at 1156-57.

266 Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980). Even when regulating commercial speech, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993). A fortiori, the State must make at least as strong a showing when regulating high-value speech.


reweigh the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.269

In particular, a court's decision whether to defer to a congressional predictive judgment will likely be colored by two factors. First, as TBS indicates, the court should make sure not to impose an unreasonable evidentiary burden upon Congress with respect to the assessment of empirical data.270 Second, the court should extend deference to reasonable congressional judgments that are intuitive and commonsensical when such judgments do not admit of exact proof.271 Because the violence hypothesis is surely both intuitive272 and impossible to

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269 Id. at 2471. The Court then denied summary judgment for the government, holding that the record did not adequately establish that must-carry legislation was necessary to preserve the viability of local broadcasting. See also id. at 2472 (Blackmun, J., concurring) (emphasizing both "the paramount importance of according substantial deference to the predictive judgments of Congress," and the high standard for summary judgment); id. at 2473 n.1 (Stevens, J., concurring) (agreeing with the test set out by the majority but indicating his judgment that the standard was satisfied).

270 See also Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973): The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claim under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress ... on a constitutional question .... The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Id. at 103.

271 For example, in Globe Newspaper Co. v. Superior Court, the Court refused to accept the State's effort to justify its ban on public and press from certain sex offense trials by reference to its interest in encouraging minor victims to testify:

The Commonwealth has offered no empirical support for the claim that the rule of automatic closure ... will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.

457 U.S. 596, 609-10 (1982). See also First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978) ( remarking that the state's arguments for how the challenged statute would advance its purported interest are neither "supported by record or legislative findings" nor "inherently persuasive").

272 It seems next to impossible to demonstrate that a given claim is intuitively sound to one who is not already convinced. Perhaps this is one question on which opinion polls constitute persuasive evidence. See supra note 1 and accompanying text.

To undermine the intuitive appeal of the violence hypothesis, one would need not merely to question the social science data, but also to suggest a plausible causal theory for why televised violence would not contribute to societal violence. One theory has proposed that televised violence provides a cathartic effect upon viewers, thereby giving them an opportunity for vicarious release of their violent urges. According to the catharsis hypothesis, then, televised violence might actually reduce social violence. Whatever the theory's abstract plausibility or its validity when applied to other phenomena, most social scientists agree that it does not describe the effect of television violence. See infra note 312.
prove, a reviewing court should afford due deference to congressional findings that conclude that television violence does cause aggressive behavior. Even the most steadfast skeptic in the social scientific community has acknowledged that an objective scientist could reasonably approve the violence hypothesis on the basis of all available data. Consequently, a reviewing court faced with the issue would likely conclude that certain regulations properly may be premised on the data indicating that televised violence causes antisocial aggression.

Causation, though, is not enough. To accept the causal hypothesis is only to conclude that regulation of television violence would serve the state’s compelling interest in combatting societal violence. To determine whether the interest the legislation accomplishes is compelling, we need to know how much societal violence the regulation would curb. Thus, for purposes of the compelling interest prong of exacting scrutiny, the issue most likely will not be whether television violence causes societal violence, but how much. Unfortunately, despite the vast number of studies investigating the violence hypothesis, there is scant data on the magnitude of the effect of television violence.

The most prominent report to address this issue was a recent epidemiological study conducted by Brandon Centerwall. The epidemiological methodology is straightforward: in this case it was to compare the incidences of violent behavior in two comparable popula-

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273 See, e.g., Huesmann et al., supra note 234, at 198 (claiming that “definitive proof” of a causal effect “is a logically unreachable conclusion, according to Popper’s . . . falsificationist analysis”); COMSTOCK, supra note 226, at 9. Comstock notes:

[I]t would be foolish to pretend that “research,” given the resources that have been devoted to any particular question, will consistently reply with compelling, definitive answers, or that there are not some questions that are difficult or impossible to confront directly in any sound way by available methods and techniques. We should not be afraid that empirical evidence will mislead us as much as we should be careful that we do not discard what it can tell us by subjecting it to unrealistic or inconsistent standards.

Id. (emphasis added).

274 See Freedman, supra note 244, at 179 (“Some of those who read the available research carefully may conclude that the effect probably exists, others will find that they are unable to make a reasonable guess, and still others will be led to think that watching TV violence probably does not affect aggression.”). Contrast this measured skepticism with Krattenmaker and Powe’s conclusions in their 1978 article. See supra note 243.

275 It would not do, of course, for advocates of television violence regulation to define the government’s objective as the elimination of social violence caused by viewing television violence. By ensuring a closer fit between ends and means, such a move would permit the conclusion that the regulation not merely “serves,” but accomplishes, the state’s interest. Cf. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 120 (1991) (“[T]he Board has taken the effect of the statute and posited that effect as the state’s interest. If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored.”). Still, whether the state’s reformulated interest is “compelling” depends on the amount of societal violence that television violence causes.

276 Centerwall, supra note 265.
tions—one exposed to television violence, the other not exposed. Such a comparison is impossible in the United States, however, given the pervasiveness of television in general and violent programming in particular. Centerwall took advantage of a historical accident—that television was banned in South Africa until 1975—to undertake a cross-national epidemiological study of the United States, Canada, and South Africa.

Television was introduced in both the United States and Canada in the early 1950s. Centerwall found that the white homicide rate in the United States, and the overall homicide rate in Canada, increased by over ninety percent from 1945-1974. Meanwhile, in South Africa, the white homicide rate decreased slightly. Following the introduction of television in 1975, the South African homicide rate increased over fifty percent by 1983. The measured homicide rates in the United States and Canada over those eight years remained stable. On the basis of this study, Centerwall determined that television was etiologically related to nearly half of all homicides and inferred a similar causal relation between television and other forms of interpersonal violence. He concluded “that if, hypothetically, television technology had never been developed, there would today be 10[.]000 fewer homicides each year in the United States, 70[.]000 fewer rapes, and 700[.]000 fewer injurious assaults.”

Given the inherent limitations of cross-national epidemiological data, that conclusion must strike anyone as the roughest of estimates. But even if accurate, it still tells us precious little about the probable effect of a ban on television violence. As Krattenmaker and Powe note (seemingly against interest), some television programming might have beneficial effects that reduce societal violence. Accordingly, a more limited content-based television regulation might yield an even more profound reduction of societal violence. On the other hand, several researchers have suggested that the mere act of viewing television contributes to societal violence, even if the content of the program

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277 Centerwall looked at only white homicide rates in the United States and South Africa because of the greater difference in living conditions of blacks in the two countries. In Canada, which was 97% white when television was introduced, Centerwall examined overall homicide data. Id. at 645.

278 There was a delay of 10-15 years in both countries before the homicide rate began steadily to climb—a lag that would coincide with the maturation to criminal age of the first generation of children raised with television. Id.

279 Id. at 651.

280 Brandon S. Centerwall, Special Communication—Television and Volence: The Scale of the Problem and Where to Go From Here, 267 JAMA 3059, 3061 (1992).

281 Krattenmaker & Powe, supra note 145, at 125 n.115 (“Neither [Centerwall], nor we, have any idea whether the supposed good things television shows might balance out the supposed bad things television shows.”).
watched is neutral. If true, a ban on televised violence would have less of an impact than Centerwell's numbers suggest.

But there is probably little need to parse the numbers too finely. As one government research administrator has noted, "if only one out of a thousand viewers were affected, a given prime-time national program with an audience of 15 million would generate a group of 15,000 viewers who had been influenced." Because there is so much violence in our society, a relatively small proportional reduction might nonetheless constitute a compelling interest. It is hard to conceive that a court might defer to legislative findings that accepted the violence hypothesis, yet nonetheless conclude that the magnitude of the causal effect is too small to make the state's interest "compelling."

(b) Protecting children from harm.—Before reaching the second prong of the inquiry, a brief discussion is warranted regarding whether a full or partial ban on television violence would accomplish the state's admittedly compelling interest in protecting the emotional and psychological well-being of children viewers. Although the First Amendment permits the state to restrict speech in order to protect children from harm, children do retain significant expressive rights. The state must demonstrate that the speech it would restrict in the

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282 See, e.g., Freedman, supra note 230, at 236; Freedman, supra note 244, at 180; Schlegel, supra note 62, at 200 & nn.70-71.

There are two distinct reasons for this hypothesis. One view, emphasizing opportunity costs, speculates that the likely alternatives to watching television tend, in the aggregate, to teach prosocial behavior. The second view is grounded in the notion that all programming that arouses the viewer causes aggressive behavior. On the arousal hypothesis, see infra note 308 and accompanying text.

283 Pearl, supra note 2, at 231, 239-40; see also Wood et al., supra note 244, at 378 ("Exposure to media violence may have a small to moderate impact on a single behavior, but cumulated across multiple exposures and multiple social interactions the impact may be substantial.").

284 The result would surely be otherwise were Congress to impose any form of violence regulation only upon broadcasters, thereby widening the already considerable gap between broadcast and cable fare. Although we cannot conceive that such a rule would pass exacting scrutiny, it is also true that under existing law it would not need to. Presently, content-based regulations of broadcast speech must be narrowly tailored to further a substantial government interest. See, e.g., FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1983). However, the positive effect of a broadcast-only regulation would be so minimal (indeed, to the extent it spurs increased viewership of cable's more violent programming, it would be counter-productive), that we doubt it would serve even a "substantial" government interest.

The foregoing reason why a broadcast-only regulation would be unconstitutional should be distinguished from a possible equal protection violation. A conclusion that gross underinclusiveness prevents the regulation from accomplishing a compelling (or substantial) interest does not depend, as would an equal protection challenge, upon a determination that broadcast and cable television are similarly situated. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666-68 (1990), for a helpful discussion of the use of underinclusiveness in an equal protection challenge to a content-based speech restriction.
interest of minors’ well-being is in fact harmful to them. Unfortunately, there is little data on whether television violence harms children, for the great bulk of academic commentary and social science research regarding television violence has focused on the violence hypothesis. But, although observers have often appeared to assume that the questions whether television violence causes antisocial behavior and whether it threatens the health of its viewers amount to the same thing, the two harms are distinct.

On one hand, television violence might harm viewers in a way that does not manifest in violent and antisocial behavior. On the other, we cannot, as a categorical matter, infer pathology from mere antisocial behavior. So acceptance of the violence hypothesis does not establish that television violence is harmful to children viewers. And there seems to be little direct support for the latter hypothesis when understood as a separate question. Because the government cannot sustain its burden on the basis of available evidence, it is hard to imagine how a court could conclude that elimination of televised violence would serve—at least accomplish—a compelling state interest in promoting the health and well-being of children.

285 See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975) (refusing to uphold ordinance that prohibited drive-in movie theaters whose screens are visible from a public space from showing films containing nudity on grounds of protecting children from harm).

286 See, e.g., Albert, supra note 16, at 1302-03:

In recent years, medical authorities and social scientists increasingly have criticized television for being excessively violent. Their concern grows out of a belief that televised violence presents a special threat to the health of younger viewers. Critics of violent programming and defenders of the television industry have engaged in an intense, emotion-charged debate over whether viewing televised violence actually causes aggressive behavior.

287 Of course, political systems often elude this difficulty by defining antisocial behavior to be pathological. Liberal societies do not.

288 The Supreme Court’s obscenity and indecency cases do not require a contrary conclusion. In Ginsberg v. New York, 390 U.S. 629 (1968), the Court upheld a state law that prohibited the sale to persons under 17 of sexually explicit materials that, while nonobscene as to adults, were defined to be obscene as to minors. The Court held that the statute served the state’s compelling interests both in facilitating parental control over their children’s exposure to such material and in protecting the well-being of society’s youth. In regard to the latter interest, the Court conceded the lack of scientific evidence that viewing sexually explicit materials is injurious to minors. However, it reasoned that, because the proscribed material was obscene (under the now-obsolete “variable obscenity” standard), the Constitution required only “that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.” Id. at 641.

Since Ginsberg, the Court has often assumed that indecency is harmful to children, but its decisions have not relied on this mere supposition. For example, when, in FCC v. Pacifica Found., 438 U.S. 726 (1978), the Court upheld the FCC’s power to regulate an indecent radio broadcast, it cited to both interests identified by the Court in Ginsberg. Pacifica Foundation, 438 U.S. at 749. Most significantly, the Court’s decision could have rested fully on Congress’ interest “in supporting ‘parents’ claim to authority in their own household.” Id. (quoting Ginsberg, 390 U.S. at 639). In Sable Communications v. FCC, 492 U.S. 115 (1989), the Court observed that the state has a compelling interest in protecting minors from the influence of indecent materials, id. at 126, en route to invalidating a ban on dial-a-porn services for being overly burdensome.
2. **Prong Two: Is the Regulation Precisely Drawn?**—Assuming that the substantial elimination of violent television would accomplish a compelling state interest in reducing societal violence, a regulation enacted in furtherance of that objective must be precisely drawn to restrict only that programming which will likely induce antisocial aggression. A content-based ban on high-value speech “can be narrowly tailored... only if each activity within the proscription’s scope is an appropriately targeted evil.” When it comes to television violence, however, separating out the harmless from the harmful will prove a daunting task.

At this stage of the constitutional scrutiny, more so than at the compelling interest prong, existing social science data are inadequate. The many studies employ widely disparate definitions of “violence” as the independent variable (that is, on the antecedent side) in the violence hypothesis. Such definitions include “the use of physical force against persons or animals, or the articulated, explicit threat of physical force to compel particular behavior on the part of that person” and “that which is physically or psychologically injurious to another person or persons whether intended or not, and whether successful or not.” While the diversity of operational definitions might be unfortunate, the task is not simply to agree upon any single one so long as it is not unconstitutionally vague. The heart of the problem is that available research does not supply a basis upon which one could determine with adequate certainty whether a particular “violent” program will cause harmful behavior.

In fact, researchers have identified a large and varied assortment of aspects of the relationship between program and viewer that influ-

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290 In our earlier discussion, see supra notes 262-64 and accompanying text, we have rejected Krattenmaker and Powe’s “definitional” or “irrelevance” objection to the violence hypothesis insofar as it condemned the lack of a precise and legally meaningful definition of “aggression” as the dependent variable in the hypothesis. Quite clearly, Krattenmaker and Powe intended as well to advance the critique now presented in text. But as we explained, Krattenmaker and Powe seemed to conflate these two distinct “definitional” critiques. The latter form of the objection now addressed does not undermine the validity of the claim that television violence does cause antisocial aggressive behavior. In other words, it is the independent legal requirement that a speech restriction not be overbroad that gives the latter objection its force.

291 See Prettyman & Hook, supra note 6, at 330 n.55 for a compilation and critique of several competing definitions.
ence whether and to what extent the program might contribute to aggressive behavior. These include the extents to which the violence is presented as justified, effective, unpunished, socially acceptable, gratuitous, realistic (yet fictional), humorous, and motivated by a specific intent to harm. The effects of a particular presentation will also depend upon the extent to which actual viewers like and associate with the aggressor or the victims. Significantly, it is not the case that all violent programming is harmful, with the above factors relevant only for distinguishing the more harmful from the less.

Some genres of violent programming might not, as a general matter, be harmful. More fundamentally, a program characteristic harmful in the abstract might be neutralized when combined with other features into a single whole. As one prominent adherent of the violence hypothesis put it:

Experimental effects are straightforward. Real life effects are not because the elements so carefully disengaged in the experiments are commingled in real life. What we have, then, is an empirically tested theory, a valid theory, a theory with wide applicability, but nevertheless a theory requiring subtle and thoughtful application that takes into account the portrayal, the real life setting and circumstances, and the state and characteristics of the viewer.

The seemingly insurmountable obstacle is that government lacks the ability to actualize the requisite subtlety into legislation. The problems are two-fold. Broad and indiscriminate application of the operational characteristics already mentioned will sweep too broadly in practice. Additionally, even partial reliance upon such qualitative and unusually fuzzy terms as "gratuitous," "socially acceptable," and "effective" will almost surely prove unconstitutionally vague. For the same reasons, the First Amendment prohibits the government from circumventing the need for narrow and precise lines by delegating discretion to administrative agencies to identify the offending programs on an ad hoc basis under generally worded guidelines.

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292 See, e.g., Belson, supra note 238, at 520-28; Pearl, supra note 2, at 241; see generally Comstock, supra note 226, at 183-96.

293 In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), the Court stated unanimously that courts should defer to legislative line-drawing when the varieties of speech swept within a broad prohibition were all harmful, and differed only in degree. Id. at 263; id. at 268 (Rehnquist, C.J., dissenting).

294 See, e.g., Belson, supra note 238, at 520 (finding "little or no support" for a causal link between television violence presented as part of cartoons, science fiction, slapstick comedy, or most sporting events, and serious violent behavior).

295 Comstock, supra note 226, at 196.

296 Cf. Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ("[W]e are quite sure that the pejorative description 'outrageous' does not supply" a principled or objective standard.).

297 See, e.g., City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1513 n.19 (1993); Grayned v. City of Rockford, 408 U.S. 104, 113 n.22 (1972) (condemning "broadly worded licensing ordinances which grant . . . standardless discretion to public officials") (citing cases).
This is not to insist that the state could craft no standard that would both employ clear and precise terms and bring within its scope only programming actually likely to cause violent behavior. However, any regulation of television violence confronts an inherent tradeoff between precision and effectiveness. The risk is that any restriction in this area that is neither overbroad nor vague will leave unregulated so much violent programming that it will no longer accomplish a compelling interest. Until someone can demonstrate otherwise, we must conclude that a full or partial ban on television violence cannot, in clear and precise terms, simultaneously restrict enough violent programming to be effective and restrict no more programming than is actually harmful.

3. **Prong 3: Is the Regulation the Least Burdensome Means?**—A content-based regulation is the “least burdensome means” unless the court can identify a less burdensome alternative that would comparably accomplish the state’s interest. If we assume that the influence of television violence is significantly greater upon children and adolescents than it is upon adults, a total ban on television violence would almost certainly not be the least burdensome means to reduce societal violence. Because “the government may not reduce the adult population . . . to . . . only what is fit for children,” Congress would be required to tailor its limitations upon violence more closely to the hours when children can be expected in the audience.\(^{298}\)

However, because we do not rely on the “least burdensome means” prong of exacting scrutiny in reaching our ultimate conclusion that any and all prohibitions of television violence are unconstitutional, we need not sort whether, and how significantly, television violence affects adults.\(^{299}\)

\(^{298}\) In fact, although it is generally agreed (among those who accept the violence hypothesis) that children are especially susceptible to the influence of television violence, there is considerable uncertainty over the extent to which adults are also affected. See, e.g., Comstock, supra note 226, at 235; Centerwall, supra note 265, at 3060; Huesmann et al., supra note 234, at 196-97; Pearl, supra note 2, at 241; Wood et al., supra note 244, at 380.

\(^{299}\) Sable Communications v. FCC, 492 U.S. 115, 128 (1989) (internal quotations omitted).
Whether a zoning regulation would be the least burdensome means is a more difficult question. Of course, within the family of all possible time or channel prohibitions, the particular regulation adopted must be the least burdensome—a determination that requires a delicate balancing of the tradeoffs between burden and effectiveness. Assuming that the regulation chosen is the least burdensome of all possible zoning rules, the question is whether a less burdensome type of regulation could achieve the government’s interest with similar success.

This question cannot be answered with confidence absent a record that would provide a basis for predicting the likely consequences of a range of regulatory alternatives upon children’s viewship of violent programming. Most commentators have speculated, however, that the presumably less onerous alternatives of lockboxes, balancing rules, and violence ratings or advisories would have slight overall impact on children’s viewing habits because the parental supervision upon which they rely is often a fiction. For the sake of argument we accept this as true. Consequently, a reasonably drawn violence zoning rule—say, a prohibition upon violent programming during prime time weekdays and on Saturday mornings—would be the least burdensome means to achieve the government’s compelling interest in combatting the societal violence produced by television violence.

4. Prong Four: Is Speech Restriction Necessary?—Assume that an appropriately drawn zoning regulation might be the least burdensome means to achieve a compelling government interest in curbing societal violence. Assume further—and most improbably—that the government could advance a definition of the proscribed fare which is both limited to the violence that is actually harmful and not itself vague. It remains to determine whether such a regulation would be necessary.

301 Whether and how the Court should assess whether the challenged regulation is “least burdensome,” other than via an impressionistic balancing, is uncertain. See Sable, 492 U.S. at 131-32 (Scalia, J., concurring).

302 The burden imposed by a zoning rule depends, of course, upon the hours that it leaves available for violent programming. It is conceivable that a zoning rule which leaves an especially large window open for violent programming could be less burdensome than an especially onerous disclosure rule. For purposes of present analysis we assume otherwise.


304 But see Martin v. Struthers, 319 U.S. 141, 144-47 (1943) (striking down statute restricting door-to-door canvassing on First Amendment grounds and observing that the state’s purported interest in crime reduction could be served by leaving residents with the choice whether to admit the caller).
Broadcasters contend that it would not be. They argue that the government could do a great deal before regulating speech to combat societal violence with equal or greater effectiveness. Opponents of television violence regulations complain that broadcasters are being scapegoated merely because government is unwilling or unable to tackle more serious social problems. At the very least, before Congress regulates television violence, goes a frequent refrain, it should finally enact serious gun control.305

That may be so. But it is beside the point. The final prong of exacting scrutiny does not inquire whether other policies are available that could serve the government's interest as (or more) effectively. It asks whether an alternate policy could render the speech restriction redundant or gratuitous. To be sure, when a speech restriction serves to eradicate a problem in toto, the two questions may amount to the same thing. But where, as here, a content-based regulation of speech makes only a partial contribution to a government interest (and yet that partial contribution is itself compelling), it is not rendered unnecessary by the availability of other mechanisms that would likewise make partial contributions to alleviating the same problem. Government could undertake innumerable policies to reduce societal violence—in addition to gun control, it could, for example, expand jobs programs, drug rehabilitation, and HeadStart—but the mere fact that such programs lie partially or fully unrealized does not make regulation of television violence "unnecessary" within the meaning of First Amendment jurisprudence.

In order to answer the question whether governmental banning or zoning of television violence is necessary to curtail that media's contribution to societal violence, we need to know how television violence influences viewers to behave aggressively. We need, that is, a psychological theory that accounts for the violence hypothesis. Unfortunately, there is more disagreement in the psychological community over how media violence affects viewers than whether it does. Even the catalogue of theories regarding how media violence affects viewers differs from one commentator to the next.306 All in all, though, five distinct theories appear most prominently in the literature: catharsis, arousal, instruction, disinhibition, and social learning.

According to the catharsis hypothesis, persons feeling aggressive impulses can partake vicariously in a portrayal of violent behavior and thereby feel less need to act aggressively themselves.307 The arousal

305 See, e.g., Kolbert, supra note 91, at C18.
306 See, e.g., Belson, supra note 238, at 528-29; Comstock, supra note 226, at 235-36; Spitzer, supra note 53, at 96-97; Prettyman & Hook, supra note 6, at 326-30; Kim, supra note 3, at 1390-93.
307 See generally Violence & the Media, supra note 7, at 453-72 (Appendices III-D & III-E).
theory holds that the viewing of any type of exciting scene (including, but not limited to, episodes involving violence) will provoke a state of physiological arousal, which itself may induce highly energetic behavior (again, including but not limited to aggression). The instructional theory, perhaps the most mundane of the hypotheses, posits that viewers learn and replicate specific behaviors or techniques they see on television. This is the theory relied upon by plaintiffs in most tort suits for media-induced harms: A did X because he saw it on television.

The disinhibition hypothesis assumes that inhibitions against aggressive and violent conduct are largely socially constructed and enforced. Continual viewing of violent behavior by others tends to make viewers, especially children, more comfortable with violence and suffering, thereby counteracting the inhibitory effect of formal and informal social sanctions against violent behavior. Lastly, according to social learning theory, children learn traits and characteristic ways of behavior from their environments. Television violence teaches children that aggression is an effective, satisfactory, and acceptable way to resolve problems.

For the sake of this analysis, we can reject the first three theories, for each is inconsistent with the presupposition that regulation of television violence would yield a sufficiently large diminution in societal violence so as to accomplish a compelling government interest. This is most apparent with regard to the catharsis theory because it predicts that viewing violence would reduce aggressive behavior. Indeed, psychologists have rejected the theory largely because it is contrary to empirical evidence. But it is also true, if less obviously so, for the arousal and instructional hypotheses. Although neither proposes that media violence would reduce violent behavior, neither can account for a large enough causal effect to justify a regulation of television violence in the first place. The arousal theory fails to support the state's interest as compelling for two reasons. First, it suggests that violent programming causes no more aggressive behavior than do other types of existing programming. Second, because states of arousal are short-lived and nonaggregative, the arousal theory does not support the conclusion that television programs (of any sort) would constitute much of a social problem. The instructional theory, for its part, is

308 See, e.g., COMSTOCK, supra note 226, at 191-93.
309 See Campbell, supra note 14, at 438-40 (discussing cases).
310 See, e.g., SPITZER, supra note 53, at 96.
311 See, e.g., COMSTOCK, supra note 226, at 236; Huesmann et al., supra note 234, at 197.
312 See Prettyman & Hook, supra note 6, at 326 n.32.
313 For these reasons, George Comstock concluded that, although the arousal hypothesis “may account almost wholly or play a major role in some short-term effects... [i]t is far from the whole story.” COMSTOCK, supra note 226, at 193.
incompatible with our animating premise because it only explains why a particular crime or violent act is committed. By failing to explain why one would act criminally or violently to begin with, it does not support the central thrust of the violence hypothesis, namely that television violence causes an overall increase in antisocial aggression.

This leaves only the disinhibition and social learning theories. Both are essentially long-term developmental accounts of the way that a steady diet of television violence can encourage children to respond to social problems in an aggressive manner. It is precisely their status as developmental theories which suggests that government need not silence the violent speech. Unlike, say, defamation, the harm supposed to be produced by television violence is not completed upon receipt of the communication. Indeed, studies show that public officials, educators, and parents, together, can counteract the effects of television violence upon children by, among other things, ensuring that children watch less television, reinforcing anti-aggressive prosocial norms, and encouraging children to adopt a more detached and critical appreciation of the ways in which television programs may influence them to feel and behave.314 All of this can be done with government programs short of bans on televised violence.

The question, thus, is whether a theoretical account of the violence hypothesis in terms of developmental learning renders government efforts to prohibit televised violence (in toto or at certain times) unnecessary within the meaning of the First Amendment's exacting scrutiny. The answer depends in large part on how strictly we are to read "necessary." As we have noted, the Supreme Court has relayed mixed signals.

Construed leniently, the "necessary" prong would present no obstacle to government regulation of television violence. Were it possible to distinguish between harmless and harmful violence, we think that most courts would indeed endorse a lenient construction. A court is unlikely to foreclose Congress from curbing the showing of precisely identified media material that was known to cause serious harm, even if the harm were to materialize only over time.

But a different result would likely obtain if the "necessary" prong is to be construed and applied strictly. The social science data indicating that television violence does not cause viewers to behave aggressively via some sort of extraordinary psychological process akin to hypnosis or addiction315 would then become critical. Because televisi-

314 See, e.g., Huesmann et al., supra note 234, at 196; Pearl, supra note 2, at 245.
315 See Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 200 (S.D. Fla. 1979) (rejecting a tort claim against the television networks brought by a young man who alleged that he was "completely subliminally intoxicated" by 10 years of watching television violence to shoot and kill his elderly neighbor); see generally Spreitzer, supra note 53, ch. 4 (critiquing similar theories of television's hypnotic effect).
VIOLENCE APPEARS TO CAUSE AGGRESSIVE ANTISOCIAL BEHAVIOR BY DEVELOPING ATTITUDES AND HABITS OVER AN EXTENDED PERIOD OF TIME, ITS EFFECTS CAN BE COMBATTED THROUGH CONCERTED AND SUSTAINED PUBLIC AND PARENTAL INTERVENTION PROGRAMS THAT AVOID BANS ON TELEVISION PROGRAMMING. THIS IS NOT TO CLAIM NAÏvely THAT SUCH EFFORTS WILL ELIMINATE ALL HARMs THAT TELEVISION VIOLENCE MIGHT CAUSE. IT IS TO SUGGEST, HOWEVER, THAT A STRICT READING OF THE "NECESSARY" PRONG WOULD REQUIRE GOVERNMENT TO ATTEMPT TO ADDRESS TELEVISION VIOLENCE THROUGH OTHER REMEDIAL OPTIONS AVAILABLE TO IT BEFORE IT COULD CURB SPEECH.

OF COURSE, GIVEN THAT PROPOSALS TO BAN OR ZONE VIOLENT PROGRAMMING CANNOT SATISFY THE REQUIREMENT THAT CONTENT-BASED RESTRICTIONS OF SPEECH BE PRECISELY DRAWn, DISPUTES REGARDING THE PROPER CONSTRUCTION OF THE "NECESSARY" PRONG NEED NOT BE RESOLVED FOR PRESENT PURPOSES.

B. BALANCING

UNDER AN ANALOG TO THE FAIRNESS DOCTRINE, CONGRESS COULD DIRECT PROGRAMMERS TO PROVIDE A "BALANCED" PROGRAM SCHEDULE IN ORDER TO COUNTERACT THE DANGEROUS INFLUENCES OF TELEVISION VIOLENCE. FOR EXAMPLE, PROGRAMMERS COULD BE REQUIRED SIMPLY TO AIR AN HOUR OF NONVIOLENT PROGRAMMING FOR EACH HOUR OF VIOLENT PROGRAMMING. THE PRICE OF ONE HOUR OF VIOLENT CARTOONS MIGHT BE TWO EPISODES OF MISTER ROGERS.

IN A MORE NUANCED SCHEME, THE GOVERNMENT COULD REQUIRE THAT PROGRAMS DEPICTING VIOLENCE IN SUCH A WAY AS LIKELY TO CAUSE THEIR VIEWERS TO AGRESS BE MATCHED WITH PROGRAMS THAT, WHILE VIOLENT, PRESENT VIOLENT BEHAVIOR IN A "SOCIALLY RESPONSIBLE" MANNER. THAT IS, FOR EACH PROGRAM THAT PORTRAYS VIOLENCE AS, FOR EXAMPLE, EFFECTIVE, OR SOCIALLY ACCEPTABLE, THE PROGRAMMER WOULD BE OBLIGATED TO PRESENT VIOLENCE AS, RESPECTIVELY, INEFFECTIVE OR MORALLY UNACCEPTABLE.

WHAT THIS UNDERLINES, INCIDENTALLY, IS THAT MOST REGULATIONS OF VIOLENCE—ANY THAT WOULD DISTINGUISH BETWEEN, SAY, TERMINATOR AND BOYZ ‘N THE HOOD (TO USE OUR EARLIER EXAMPLES)—ARE REALLY VIEWPOINT-BASED RESTRICTIONS, NOT CONTENT-BASED. FOR PRESENT PURPOSES, HOWEVER, THIS IS A DISTINCTION WITHOUT A DIFFERENCE.

TO BE SURE, IT IS COMMON WISDOM THAT THE FIRST AMENDMENT PLACES A HEAVIER BURDEN UPON VIEWPOINT-BASED REGULATIONS THAN UPON CONTENT-BASED ONES. SEE GENERALLY SMOLLA, supra note 54, § 3.02[2][c]. INDEED, MUCH LANGUAGE IN SUPREME COURT OPINIONS SUPPORTS THIS CLAIM. SEE, e.g., TURNER BROADCASTING SYS. v. FCC, 114 S. Ct. 2445, 2481 (1994) (Ginsburg, J., dissenting in part) ("THE 'MUST-CARRY' RULES CONGRESS HAS ORDERED DO NOT DIFFERENTIATE ON THE BASIS OF 'VIEWPOINT,' AND THEREFORE DO NOT FALL IN THE CATEGORY OF SPEECH REGULATION THAT GOVERNMENT MUST AVOID MOST ASSIDUOUSLY."); R.A.V. v. CITY OF ST. PAUL, 112 S. Ct. 2538, 2547 (1992) (NOTING THAT "THE ORDINANCE GOES EVEN BEYOND MERE CONTENT DISCRIMINATION, TO ACTUAL VIEWPOINT DISCRIMINATION"); id. at 2568 (STEVENS, J., CONCURRING) ("[W]E HAVE IMPLICITLY DISTINGUISHED BETWEEN RESTRICTIONS ON EXPRESSION BASED ON SUBJECT MATTER AND RESTRICTIONS BASED ON VIEWPOINT, INDICATING THAT THE LATTER ARE PARTICULARLY PERNICIOUS."). (EMPHASIS OMITTED).

IN SOME CONTEXTS, THE DISTINCTION BETWEEN VIEWPOINT-DISCRIMINATION AND CONTENT-DISCRIMINATION MAKES A DOCTRINAL DIFFERENCE. FOR EXAMPLE, CONTENT-BASED REGULATIONS OF GOVERNMENT-RELATED CONDUCT OR PROPERTY, OUTSIDE OF A PUBLIC FORUM, ARE ROUTINE AND ESSENTIAL. BECAUSE, SAY, A PUBLIC SCHOOL OR UNIVERSITY MUST BE ABLE TO LIMIT THE CONTENT OR SUBJECT MATTER OF EXPRESSION IN
Despite a few early appeals for the application of the fairness doctrine to televised violence, there seems to be little enthusiasm for a violence-balancing law in Congress. And for good reason. First, it raises, of course, the same concerns about overbreadth and vagueness as do any governmental proposals to separate the harmful violence from the innocuous. Second, a requirement that programmers present a "balanced" menu of violent and nonviolent offerings simply would not address the problem. Few doubt that there is plenty of wholesome fare on television for those who want it. And variety will only improve in the 500-channel cable universe of the near future. The challenge is to make nonviolent programming more attractive to more viewers. Whether the government can aid producers in that task is a controversial question. But a legislative mandate that programmers simply put more of it on the air will not accomplish a compelling government interest.

C. Labelling and Disclosure Laws

Most commentators, assuming that a violence-disclosure regulation would be designed to serve the state's compelling interest in reducing societal violence, have dismissed such labelling regulations as ineffectual. The problem as these critics see it is that many children who might be most influenced by televised violence (either to commit violent acts or to suffer developmental harm themselves) lack effective parental supervision. As George Gerbner argued, "The notion of parental control is an upper-middle-class conceit."

the classroom, speech restrictions in such situations need be viewpoint-based in order to trigger heightened scrutiny. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985). But the Court usually applies the same doctrinal rules—most exacting scrutiny—both to content-based and viewpoint-based regulations. See, e.g., Boos v. Barry, 485 U.S. 312, 319-21 (1988) (expressly recognizing that a content-based statutory ban on picketing was viewpoint-neutral, yet applying exacting scrutiny to invalidate the law); FCC v. League of Women Voters of Cal., 468 US 364, 383-84 (1984); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic..."). And "[i]t is to the holdings of... cases, rather than their dicta, that we must attend." Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1676 (1994). The principal difference between content-based and viewpoint-based regulations, we propose, is simply that there are so few situations in which a viewpoint-based distinction could serve a compelling government interest.

318 See, e.g., Spitzer, supra note 53, at 118; Krattenmaker & Powe, supra note 14, at 1274.
319 See Information Superhighway, supra note 50, at 1081-82.
320 See, e.g., Kim, supra note 3, at 1429-41 (evaluating a variety of structural proposals aimed at decreasing the influence of advertisers and increasing the influence of both viewers and the "creative" wing of the television industry).
321 Kolbert, supra note 91, at C18.
We accept these criticisms in part: disclosure would serve the state's interests in reducing societal violence and protecting the emotional and psychological well-being of youth too minimally to satisfy the compelling interest prong of exacting First Amendment scrutiny. But, as the analysis of lockout technology in Part II explained, those two objectives do not exhaust the range of potential state interests relating to the nation's television habit. Part II concluded that lockboxes would pass constitutional scrutiny as a means to further the state's interest in facilitating parental supervision over all aspects of their children's television viewing. Congress could mandate violence-disclosure—be it in the form of a "V"-rating or an advisory of the sort the networks recently adopted—in order to serve the similar yet narrower interest in facilitating parental control over their children's viewing of violent programming in particular.

Such a regulation could not be dismissed out of hand as an "upper-middle-class conceit" just because not all parents share the interest or opportunity. Rather, as a content-based regulation, it must be analyzed under the prongs of exacting scrutiny. Because the constitutional analysis would depend so heavily upon the precise details of the regulatory scheme, it is impossible at this point to replicate the detailed examination undertaken in subpart V.A.

The initial question is whether the state has a compelling interest in facilitating parental control over their children's viewing of television violence. One might think this question was already answered, for we have concluded that the social science evidence that television violence harms children is insufficient to justify a full or partial governmental ban on television violence. But these are two very different questions. Indeed, they are in fundamental tension. Were there sufficiently convincing data that television violence harms children, the state most assuredly would not have an interest in facilitating parental decision-making over whether, when, and how often, their children watch violent television. It is only because persuasive evidence that

322 Cf. Krattenmaker & Powe, supra note 145, at 133 (finding no "reason to believe that parental supervision will address the problem as critics have defined it") (emphasis added). This is because critics have defined the problem principally in terms of reducing societal violence; they have failed to consider that facilitating parental supervision can be a valuable end in itself.

323 The fact, if true, that in enacting a labelling scheme the government were to be motivated not to censor violence, but rather to notify parents and viewers, does not change the level of scrutiny. Because the regulation is content-based, it elicits most exacting scrutiny. The fact that government might act with benign intentions is irrelevant. See, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 117 (1991) (citing cases).

324 This is not to say that the state might not choose to rely on parental intervention as a means to accomplish its compelling interest in protecting children from a given harm. Thus, for example, it would not be illogical for Congress to enact some form of lockbox regulation and to justify the enactment in terms of an alleged compelling interest in safeguarding children's emotional well-being. The constitutionality of such a regulation would then depend, inter alia, on
television violence harms children is lacking that the state may reasonably assert an interest in facilitating parental supervisory choice.\textsuperscript{325}

This is not the end of the inquiry, however.

As we have noted,\textsuperscript{326} whether a particular interest is "compelling" is probably the most subjective and least constrained of the inquiries generated under exacting scrutiny. Nonetheless, Supreme Court precedent provides considerable guidance. As the Court wrote in \textit{Ginsberg}, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."\textsuperscript{327}

The fundamental status of parenthood means "that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."\textsuperscript{328} Because many parents reasonably believe that television violence can affect their children adversely, we believe that the state's interest in facilitating parents' ability to control how much violent programming their children watch is compelling. The state's compelling interest lies not in protecting children, but in protecting \textit{parenting}.\textsuperscript{329}

Whether some form of disclosure system would accomplish the state's interest is a separate matter. It is probable that not every possible type of labelling rule would significantly improve parents' super-

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\textsuperscript{325} \textit{Ginsberg} v. New York, 390 U.S. 629 (1968), and \textit{New York} v. \textit{Ferber}, 458 U.S. 747 (1982), well illustrate this point. In \textit{Ginsberg}, the Court upheld a state ban on the sale of certain sexually explicit material to children, relying in part on the state's interest in assisting parents in child-rearing. It noted specifically that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." 390 U.S. at 639. It also acknowledged the lack of scientific support for the conclusion that the regulated material was actually harmful to children. \textit{Id.} at 641.

In \textit{Ferber}, the Court upheld a state prohibition against the distribution of child pornography. This time the Court expressed utter confidence that the material at issue was harmful to minors. 458 U.S. at 758. The opinion makes no mention of any supposed government interest in furthering parental discretion.

\textsuperscript{326} \textit{See supra} subsection IV.B.2.(a).

\textsuperscript{327} \textit{Ginsberg}, 390 U.S. at 639.

\textsuperscript{328} \textit{Id.}

\textsuperscript{329} For this reason the state could not legitimately rationalize a banning or zoning regulation as a means to further the state's interest in facilitating parental control. Absent persuasive evidence that television violence is harmful to children, the state must respect parents' wishes to expose their children to violent programming. \textit{See} \textit{Action for Children's Television} v. FCC, 11 F.3d 170, 183-86 (D.C. Cir. 1993) (Edwards, J., concurring), \textit{vacated, and reh'g en banc granted}, 15 F.3d 186 (D.C. Cir. 1994).

This observation produces a noteworthy asymmetry. Both distribution curbs (banning or zoning) and parental advisories might plausibly advance the state's interest in preventing whatever harm television viewing might cause (either to viewers or to society). But only the latter form of regulation could conceivably further the state's interest in facilitating parents' supervisory responsibilities.
visory ability. But it is as likely that some type of advisory rules, especially if enacted in conjunction with a complementary blocking system, could make a substantial contribution. Assume, then, that a properly drafted disclosure regulation would accomplish the state's compelling interest in substantially improving parents' ability to determine how much violence—and of what sort—their children can watch. That law must still satisfy the remaining prongs of exacting scrutiny.

In this case, the requirement that such a regulation be narrowly tailored should not prove to be an obstacle. Because, as we have noted, there is no way at present to distinguish between harmless and harmful violent programming, any notice requirement purporting to discriminate between the two will fail scrutiny under the First Amendment. But the government's interest in facilitating parental supervision can be achieved without the need to distinguish between harmful and harmless violence. Parents are entitled to know if there is any violent content in programming so that they can assess whether and how to regulate the television watching of their children. It does not matter that some parents might elect to forbid their children from watching a show containing harmless violence, or that some parents may elect to set no rules; that is their right. Indeed, parents may do what the government may not do—adopt an overbroad prophylactic rule banning their children from watching any program with violent content to ensure against any possible harmful effects. The point is that a regulation requiring notice undoubtedly will facilitate parenting, so most such regulations will be narrowly tailored to satisfy a compelling government interest. And we can see no reasonable argument that notice regulations are not "necessary" under exacting scrutiny. Thus, we agree with Krattenmaker and Powe's conclusion that a labeling requirement seems unobjectionable under the First Amendment.330 We are on riskier ground than they, however, because we reject their view that such a requirement is content-neutral.

VI. Conclusion

Regulation of televised violence, if it is to be done, should address programming by broadcasters and cable operators alike. Although regulation of broadcast television alone could perhaps be sustained under present doctrine that treats regulations of the broadcast media with greater solicitude, such an approach would hardly address the problems that proponents of regulation identify. Indeed, the positive effect of a broadcast-only law would probably be so slight that it might well prove unconstitutional for failing to serve even a "sub-

330 Krattenmaker & Powe, supra note 14, at 1276-77.
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substantial" government interest (especially if, as seems likely, it would spur increased viewership of cable's more violent program fare).

In assessing the current legislative proposals designed to address televised violence, we think that the banning, zoning, balancing, and labelling regulations are content-based. We recognize that there are legal commentators who have argued that a governmental ban on violent programs during narrowly identified children's viewing hours would be a content-neutral restriction and would pass intermediate scrutiny. We think that this claim fails under probing inquiry. The important question, then, is whether the various content-based regulations can withstand the exacting scrutiny necessary to pass muster under the First Amendment. We have some doubts about regulations that would require labelling, but we think the answer is otherwise clear.

Solid social science data indicate a causal connection between antisocial violent conduct and exposure to portrayals of violence on television. We think that Congress can act on these data, and that a court would accept the data as adequate to support even content-based regulations. The problem we see, however, is that the existing data do not supply a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior, and exacting scrutiny requires that any content-based regulation be precisely drawn to restrict only that programming that will likely induce antisocial aggression. When it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data.

In short, assuming that we are correct in our assessment of what is content-based, and assuming that broadcast media and cable media are treated alike, we think that the banning, zoning, and balancing proposals cannot survive scrutiny under the First Amendment. At bottom, the point here is that "violence on television . . . is protected speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." 331 As Judge Kozinski has noted in a related context, "[u]nless and until the Supreme Court speaks otherwise, we are bound to the view that the constitutional wall against government censorship protects this nether region of public discourse as fully as the heartland of political, literary and scientific expression and debate." 332

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332 United States v. United States Dist. Court, 858 F.2d 534, 542 (9th Cir. 1988).
For the proponents of regulation, the best hope would appear to be “V-Chip” and similar proposals that would require manufacturers to equip television sets with both program-blocking and ratings-blocking capabilities so that viewers could block shows either program-by-program or by ratings category. We think that legislation of this type easily can be written to be content-neutral and, thus, avoid the requirements of exacting scrutiny under the First Amendment. The safest course for Congress, obviously, will be to enact a regulation that neither requires “transmission” of ratings nor imposes any specific ratings categories. Even with these limitations, however, a “V-Chip” bill, especially one with some labelling requirement, should go a long way toward facilitating parental guidance of television-watching by minors. It is doubtful that broadcasters and cable operators could ignore viewer demands for the creation and transmission of a ratings system. The ultimate effect of any such system on antisocial violence remains to be seen.

VII. Postscript by Judge Edwards

As a constitutional scholar, long-time law teacher, and fervent advocate of the First Amendment, I am not surprised by the conclusions that I have reached. But, as a father and step-father of four children, the husband of a trial judge in Washington, D.C. who works with the perpetrators and victims of juvenile violence every day, and an Afro-American who has watched the younger generation of his race slaughtered by the blight of violence and drugs in the inner-cities of America, I am disappointed that more regulation of violence is not possible. Like many parents of my vintage, I believe, in my gut, that there is no doubt that the trash that our children see as “entertainment” adversely affects their future, either because they mimic what they see or become the potential victims in a society littered with immorality and too much callous disregard for human life. It is no answer for a parent like me to know that I can (and will) regulate the behavior of my children, because I know that there are so many other children in society who do not have the benefit of the nurturing home that I provide. If I could play God, I would give content to the notion of “gratuitous” violence, and then I would ban it from the earth. I am not God, however, so I do not know how to reach gratuitous violence without doing violence to our Constitution.