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## THE HOLLINGS BILL: UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

*Arthur Eisenberg\**

As Mr. Windhausen suggested,<sup>1</sup> there are a variety of legislative proposals that have surfaced with respect to the issue of television and violence. Two of the proposals, the Hollings Bill<sup>2</sup> and the Bryant Bill<sup>3</sup> would call upon the Federal Communications Commission ("FCC") directly to regulate the content of programming. Three bills, the Schumer Bill,<sup>4</sup> the Kennedy Bill,<sup>5</sup> and the Dorgan-Durbin Bill<sup>6</sup> would, in a variety of ways, call upon government agencies to collect information and to publicize information about violent programming. Two other pieces of legislation, the Durenberger Bill<sup>7</sup> and the Slattery-Kassebaum Resolution<sup>8</sup> would compel television licensees to engage in the labeling of television programming. And, one bill, the Markey Bill,<sup>9</sup> is directed at the television manufacturers and seeks to compel them to build television sets equipped with television blocking

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1. See John Windhausen, *Congressional Interest in the Problem of Television and Violence*, 22 HOFSTRA L. REV. 783 (1994).

2. S. 1383, 103d Cong., 1st Sess. (1993).

3. H.R. 2837, 103d Cong., 1st Sess. (1993).

4. H.R. 2609, 103d Cong., 1st Sess. (1993).

5. H.R. 2756, 103d Cong., 1st Sess. (1993).

6. S. 973, 103d Cong., 1st Sess. (1993); H.R. 2159, 103d Cong., 1st Sess. (1993).

7. S. 943, 103d Cong., 1st Sess. (1993).

8. S. Res. 122, 103d Cong., 1st Sess. (1993); H. Res. 202, 103d Cong., 1st Sess. (1993).

9. H.R. 2888, 103d Cong., 1st Sess. (1993). The Markey Bill would require manufacturers to equip television sets with two forms of blocking devices. First, manufacturers would be required to build television sets with the capacity to block out a particular channel so that a parent could simply trigger the blocking device and thereby prevent children from viewing channels that in the parents' opinion contain programming that is inappropriate to children.

Second, the Markey Bill would also require manufacturers to build televisions with a chip that would recognize and block or scramble a particular signal. If such a requirement were implemented, an "enlightened" television program producer, upon acknowledging that his or her television show contains violence, could include on the videotape of the program, a particular signal which could then be identified by the chip and the program could be scrambled or blocked.

devices.

But, because the Hollings Bill represents, in many respects, perhaps the most aggressive effort by Congress to control the content of television programming, let me focus first on that bill and explain why I believe it is unconstitutional.<sup>10</sup> Indeed, I believe it is unconsti-

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10. The text of the Hollings Bill is as follows:

**SECTION 1 SHORT TITLE**

This act may be cited as the "Children's Protection from Violent Programming Act of 1993."

**SECTION 2 FINDINGS**

The Congress Makes the following findings:

(1) Television influences children's perception of the values and behavior that are common and acceptable in society.

(2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming—

(A) has established a uniquely pervasive presence in the lives of all Americans; and

(B) is readily accessible to children.

(3) Violent video programming influences children, as does indecent programming.

(4) There is empirical evidence that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than those children not so exposed. Children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior and therefore to imitate such behavior.

(5) There is a compelling governmental interest in limiting the negative influences of violent video programming on children.

(6) There is a compelling governmental interest in channeling programming with violent content to periods of the day when children are not likely to comprise a substantial portion of the television audience.

(7) Restricting the hours when violent video programming is shown is the least restrictive and most narrowly tailored means to achieve that compelling governmental interest.

(8) Warning labels about the violent content of video programming will not in themselves prevent children from watching violent video programming.

**SECTION 3 UNLAWFUL DISTRIBUTION OF VIOLENT PROGRAMMING**

Title VII of the Communications Act of 1934 (47 U.S.C. § 601 et seq.) is amended by adding at the end the following new section:

**SEC. 714 UNLAWFUL DISTRIBUTION OF VIOLENT PROGRAMMING**

(a) UNLAWFUL DISTRIBUTION—It shall be unlawful for any person to—

(1) distribute to the public any violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience; or

(2) knowingly produce or provide material for such distribution.

(b) RULEMAKING PROCEEDING—The Commission shall conduct a rulemaking proceeding to implement the provisions of this section and shall promulgate final regulations pursuant to that proceeding not later than nine months

tutional under two discrete First Amendment doctrines. First, the Hollings Bill violates First Amendment vagueness principles. Where First Amendment rights are at stake, government is required to regulate with narrow specificity.<sup>11</sup> Precise regulation is important for two basic reasons. First there is the underlying due process notice principle that generally requires government to regulate in a way that informs individuals as to what kind of conduct is prohibited and what kind of conduct is not prohibited. But, where free speech is at stake, we require an even greater degree of regulatory precision. We do so because we do not want citizens to err on the side of self-censorship.

The second reason for requiring precision of regulation is that

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after the date of enactment of this section. As part of that proceeding, the Commission—

(1) may exempt from the prohibition under subsection (a) programming (including news programs, documentaries, educational programs, and sporting events) whose distribution does not conflict with objective of protecting children from the negative influences of violent video programming, as that objective is reflected in section 2 of the Children's Protection from Violent Programming Act of 1993;

(2) shall define the term "hours when children are reasonably likely to comprise a substantial portion of the audience" and the term "violent video programming."

(c) REPEAT VIOLATIONS—If a person repeatedly violates this section or any regulation promulgated under this section, the Commission shall, after notice and opportunity for hearing, immediately repeal any license issued to that person under this Act.

(d) CONSIDERATION OF VIOLATIONS IN LICENSE RENEWALS—The Commission shall consider, among the elements in its review of an application for renewal of a license under this Act, whether the licensee has complied with this section and the regulations promulgated under this section.

(e) DEFINITION—As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast or cablecast, including by wire, microwave or satellite.

#### SECTION 4 EFFECTIVE DATE

The prohibition contained in § 714 of the Communications Act of 1934 (as added by section 3 of this Act) and the regulations promulgated thereunder shall be effective on the date that is one year after the date of enactment of this Act.

*Id.*

11. The Supreme Court has repeatedly observed that "[p]recision of regulation must be the touchstone" whenever First Amendment rights are involved. *NAACP v. Button*, 371 U.S. 415, 438 (1963). Basic due process principles dictate that citizens must be given fair warning of what is and is not prohibited by our criminal laws. Nevertheless, some uncertainty inevitably remains and citizens are left to calculate whether their behavior violates the law. Where First Amendment activity is involved, we seek to alter the calculus somewhat because we do not want citizens to engage in self-censorship out of fear that their expressive activity will run afoul of the law. Accordingly, we insist on even greater specificity with respect to laws that regulate expressive activity than we do with regard to general criminal enactments. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958).

imprecise laws confer excessive discretion on public officials who are charged with enforcing the law. Such discretion provides regulators with the capacity to favor some speakers over others based upon the content of their expression, thus violating one of the most basic principles of the First Amendment: the principle that requires government neutrality with respect to the speechmaking activity of its citizens and that prohibits content-based discrimination by government officials.<sup>12</sup>

I think the Hollings Bill fails ultimately to satisfy the First Amendment requirement of precise regulation. By its terms, the Hollings Bill seeks to regulate "violent video programming."<sup>13</sup> But the statute, at least, does not define this term. It presumably leaves to the FCC the authority to engage in that definitional effort. But that definitional effort, I suspect, will ultimately be unsuccessful. It does not seem at all likely that a satisfactory definition can be developed.

How, indeed, is violent television programming to be defined? Would *Tom and Jerry* cartoons qualify as violent? A survey of television violence conducted at Concordia College in Minnesota<sup>14</sup> found that seventy-three acts of violence on a *Tom and Jerry* cartoon took place in one hour; in *Bugs Bunny* they found fifty-eight acts of violence in a one-hour program. Nineteen acts of violence were found in *The Little Mermaid*. Would these cartoons be defined as violent video programming?

The same Concordia College study found twenty-one acts of violence in a documentary on the Civil War. Twelve acts of violence were found by the survey in the Hitchcock film, *North by Northwest*. Are these shows so violent as to be relegated to some distant hour, late at night? Are children not to be permitted to watch TV documentaries?

Now, I understand the Hollings Bill allows that the FCC might, in its discretion, choose to exclude documentaries from the reach of its provisions. Nevertheless, I raise these matters simply to demonstrate the difficulty that I think the FCC will inevitably encounter in attempting to define the sort of violence that would fall within the proscriptive reach of its regulatory authority.

What about news? Is the federal government's invasion of the Branch Davidian complex so violent that it should not be shown to children? What about football games? Should football games not be

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12. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

13. S. 1383, 103d Cong., 1st Sess. (1993).

14. TELEVISION VIOLENCE DEMONSTRATION PROJECT (Concordia College 1993).

shown on Sunday afternoons because—applying the statutory standard—a substantial number of children might be watching? Again, the legislation allows that sporting events and news might be excluded in the discretion of the FCC, but again, the statute makes no effort to define what violence would be covered.

Thus, violence remains a highly subjective matter and it is unlikely in the extreme, that any satisfactory definition can be employed which will give broadcasters fair and sufficient notice as to what is and what is not proscribed in a way that will satisfy the First Amendment requirement of precise regulatory enactments. Indeed, there is a case almost directly on point.<sup>15</sup> In 1991, the State of Missouri enacted a law prohibiting the sale or rental of videocassettes to minors if they depicted violence. The Eighth Circuit found the statute to be hopelessly vague and therefore unconstitutional.<sup>16</sup> Under the reasoning of the Eighth Circuit, the Hollings Bill would be similarly unconstitutional.

The Hollings Bill also violates the First Amendment prohibition against content-based regulation. As Justice Marshall observed in *Police Department of Chicago v. Mosley*,<sup>17</sup> “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.”<sup>18</sup> Accordingly, the First Amendment requires that any content-based regulation must be shown to be narrowly tailored in the pursuit of a compelling governmental interest.

Now, I would concede that the prevention of violent acts by children is a compelling governmental interest, but the fact remains that the Hollings Bill is not narrowly tailored in the pursuit of that interest. The case law suggests that an unsubstantiated fear of violence or similar bad behavior cannot serve as a basis for suppressing speech.<sup>19</sup> Consequently, in *Brandenburg v. Ohio*,<sup>20</sup> the Supreme

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15. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

16. *Id.* at 689.

17. 408 U.S. 92 (1972).

18. *Id.* at 95.

19. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

20. 395 U.S. 444 (1969). In *Brandenburg*, the Court was engaged in its taxonomic jurisprudence of categorizing certain speech as falling outside the protection of the First Amendment while other speech remained fully protected. In this regard, the Court had previously held that obscenity and fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and defamatory remarks, *see Roth v. United States*, 354 U.S. 476 (1957) (*quoting Beauharnais v. Illinois*, 343 U.S. 250 (1952)), remained unprotected by the First Amendment.

The Court's doctrine respecting these matters has evolved. In *New York Times Co. v.*

Court announced that speech promoting violence would become unprotected under the First Amendment only if it is "directed [at] . . . producing imminent lawless action and is likely to . . . produce such [lawless] action."<sup>21</sup>

The sort of tight fit between means and ends is not present here. Television violence cannot be shown to produce a likelihood of "imminent lawless action" in any particular individual. Thus, under our system of free expression, the government's response to such expression cannot involve coerced silence of the sort envisioned by the Hollings Bill. Rather, in a self-corrective marketplace of ideas, the appropriate response must involve more speech to explain why the original speech was offensive.

In this regard it does not matter, in First Amendment terms, whether television violence has a general and inchoate adverse impact upon children as well as adults. I would concede that there is too much violence in our society. There may well be too much violence on television. But the fact is that much expression is offensive. Much expression has the capacity to provoke, in a general way, undesirable consequences. Speeches about Communism in the 1930s or 1950s might have provoked some disloyalty among some members of the American population. Some religious speech has the capacity to exacerbate religious differences and to heighten national differences. Louis

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Sullivan, 376 U.S. 254 (1964), the Court "constitutionalized" the law of defamation. Under a taxonomic approach toward the First Amendment, defamation might continue to be regarded as unprotected by the First Amendment, but the Court's definition as to what would constitute actionable defamation—at least with respect to public officials—was significantly modified. Similarly, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court found commercial speech to be protected by the First Amendment, notwithstanding earlier suggestions to the contrary. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942). However even then, commercial speech remained subject to different First Amendment standards. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

In *Schenck v. United States*, 249 U.S. 47 (1919), the Court first introduced the "clear and present danger" test in deciding whether certain forms of political advocacy were or were not entitled to First Amendment protection. The *Brandenburg* standard is simply a modern formulation of that approach. So understood, *Brandenburg* is a tool for deciding whether expression is or is not protected by the First Amendment. It is not a case in which the Court was applying a requirement of "narrowly tailoring" under what has come to be described as "strict judicial scrutiny." See Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Nevertheless, the *Brandenburg* opinion provides a powerful example of the Court's hostility to laws that would suppress expression on the basis of a loose nexus between the expression and undesirable yet anticipated consequences.

21. *Brandenburg*, 395 U.S. at 447.

Farrakhan's speeches may well provoke racial tensions and promote anti-Semitism.

These examples only demonstrate the power of expression. And those of us who believe in the importance of the First Amendment and believe in free speech cannot deny that speech is a powerful medium. But, if the capacity of speech to influence people in unspecific yet undesired ways becomes the basis for censorship, then we might as well abandon the First Amendment and allow government to decide what speech is good for us and what speech is not.

In the end, the First Amendment was intended to prohibit government from doing just that. And at bottom, the Hollings Bill invites two questions as a matter of constitutional doctrine as well as a matter of common sense. First, what is violent speech? And, second, who does Senator Hollings trust to make that decision? Senator Hollings can provide no constitutionally acceptable answer to these questions.

