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THE FCC'S AFFIRMATIVE SPEECH OBLIGATIONS PROMOTING CHILD WELFARE†

*Lili Levi**

Child welfare has been the most commonly articulated rationale justifying regulation and legislation regarding electronic media in the past twenty years. The most visible and controversial initiatives that the Federal Communications Commission (“FCC”) has taken to promote that goal—such as the prohibition of indecency on broadcast television during the daytime¹—have entailed suppressing speech to protect children from harm. But prohibiting speech is not the only tack the FCC has taken to promote the welfare of children. It has also adopted regulations designed to use television to educate and improve the young. Specifically, the FCC’s children’s educational television rules—adopted under the authority of the Children’s Television Act of 1990 (“CTA”)²—have sought to induce broadcasters to air a minimum of three hours per week of core educational programming for children.³ The remainder of this Essay focuses on that affirmative speech obligation.

† This speech is adapted for publication and was originally presented at a panel discussion as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies Media and Law Symposium at Regent University School of Law, October 9–10, 2009.

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¹ FCC Broadcast Radio Services, 47 C.F.R. § 73.3999 (2009); *see also* 18 U.S.C. § 1464 (2006) (making it a federal criminal offense to broadcast obscene, indecent, and profane material). The FCC has defined indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.” Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8000 (2001) (quoting Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n.10 (1993)). Since 2003, the FCC has expanded the scope and enforcement of its indecency rules. *See* Lili Levi, *The FCC’s Regulation of Indecency*, FIRST REP., Apr. 2008, at 2–3, 14, <http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.final.pdf>; *see also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009) (upholding, against Administrative Procedure Act challenge, the FCC’s expansion of its indecency prohibitions to the broadcast of fleeting expletives); FCC v. Pacifica Found., 438 U.S. 726, 758–61 (1978) (upholding, against First Amendment challenge, the agency’s right to channel indecency).

² Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996–1000 (codified as amended in 47 U.S.C. §§ 303(a), 303(b), 394, 397 (2006)).

³ 47 C.F.R. § 73.671(d) (2009); *see also* Policies & Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,660, 10,718 (1996) (authorizing the Mass Media Bureau “to approve the Children’s Television Act portions of a broadcaster’s renewal application where the broadcaster has aired three hours per week . . . of educational and informational programming”).

Children in America watch an average of over three hours of television daily.⁴ While many complain about children's entertainment programming on commercial television, social scientists have demonstrated the medium's ability to be an effective teacher.⁵ In contrast, public discourse highlights failures—in money, competence, outcomes—in public education systems all around the country.⁶ It is understandable, then, that children's advocates, the FCC, and Congress have all expressed interest in affirmatively enlisting commercial broadcasters to enhance public education.

This issue is now very much in the public eye. Over the summer, the Senate Commerce Committee held a hearing entitled *Rethinking the Children's Television Act for a Digital Media Age*.⁷ Julius Genachowski, the then-recently appointed FCC Chairman, responded to the Senate inquiry by announcing the commencement of a new FCC investigation into the children's educational television rules and their application in the digital media age.⁸ Shortly thereafter, the FCC released a Notice of Inquiry entitled *Empowering Parents and Protecting Children in an Evolving Media Landscape*; therein, it invited comment, *inter alia*, on "what steps the government or industry could take to promote the development and availability [of children's educational content]," and "whether the [FCC's] rules implementing the CTA have been effective in

⁴ Empowering Parents & Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13,171, 13,175 (2009) (citing DONALD F. ROBERTS ET AL., KAISER FAMILY FOUND., GENERATION M: MEDIA IN THE LIVES OF 8–18 YEAR-OLDS 23–24 (2005)).

⁵ E.g., *id.* at 13,176 (citing Heather L. Kirkorian et al., *Media and Young Children's Learning*, FUTURE OF CHILDREN, Spring 2008, at 39, 47; Barbara J. Wilson, *Media and Children's Aggression, Fear, and Altruism*, FUTURE OF CHILDREN, Spring 2008, at 87, 107–08).

⁶ See, e.g., Sam Dillon, *16 Finalists are Named for School Grant Program*, N.Y. TIMES, Mar. 5, 2010, at A15 (describing state contest for federal education funds under Race To The Top initiative); Bob Herbert, Op-Ed., *Stacking the Deck Against Kids*, N.Y. TIMES, Nov. 28, 2009, at A19 (noting that the current recession is curtailing American children's educational opportunities). See generally *Fixing D.C.'s Schools: A Washington Post Investigation*, WASH. POST ONLINE, <http://www.washingtonpost.com/wp-srv/metro/interactives/dcschools/#fullseries> (detailing the plight of Washington, D.C. schools) (last visited Apr. 19, 2010).

⁷ Julius Genachowski, Chairman, Fed. Comm'ns Comm'n, Statement Before the United States Senate Committee on Commerce, Science, & Transportation: Hearing on "Rethinking the Children's Television Act for a Digital Media Age" 3–4 (July 22, 2009) [hereinafter Genachowski Statement], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292170A1.pdf. For the C-SPAN video of the hearing, see C-SPAN Video Library, Senate Commerce Hearing on Children's Television, <http://www.c-spanvideo.org/program/287915-1> (last visited Apr. 19, 2010).

⁸ Genachowski Statement, *supra* note 7, at 2; see also John Eggerton, *FCC to Revisit Kids TV Rules*, BROADCASTING & CABLE, July 22, 2009, http://www.broadcastingcable.com/article/316123-FCC_To_Revisit_Kids_TV_Rules.php?nid=2228&source=title&rid=6104711 (reporting the FCC inquiry into children's television rules in the current media age).

promoting the availability of educational content for children on broadcast television.”⁹

This renewed focus on children’s television provides an opportunity to think about whether the FCC’s rules are effective or should be fundamentally revised. In my view, the history of children’s television regulation is one of limited success. Where you come out on this depends on whether you emphasize the “limited” or the “success,” and that is why this issue will likely be controversial.

Although the FCC has encouraged broadcasters to air quality children’s educational television for almost fifty years, it rejected mandatory requirements during much of that period.¹⁰ Despite FCC exhortations, broadcasters of the 1970s and later decades did not air much educational programming for children.¹¹ Even after Congress passed the CTA in 1990, requiring programming service to the child audience, at least some broadcasters continued to claim that shows like *The Jetsons*, *GI Joe*, and *Teenage Mutant Ninja Turtles* satisfied their obligations to program appropriately for the child audience.¹² If you have children and have seen these programs, you’re probably amused at the broadcasters’ temerity.¹³

Ultimately, in 1996, the FCC decided to incentivize broadcasters to air more educational programming for children. So the agency adopted what it called a “processing guideline” under which a broadcast station airing a minimum of three hours per week of core children’s educational

⁹ *Empowering Parents*, 24 F.C.C.R. at 13,179.

¹⁰ *See, e.g.*, Comm’n en banc Programming Inquiry, 44 F.C.C. 2303, 2303, 2314 (1960) (recognizing children as a group whose interests must be met by broadcasters seeking to fulfill their public interest obligations). For the FCC’s account of the history of children’s television regulation, see, for example, *Children’s Television Obligations of Digital Television Broadcasters*, 19 F.C.C.R. 22,943, 22,945–49 (2004). For scholarly histories of the FCC’s approach to children’s television, see, for example, NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 9, 21 (1995); Angela J. Campbell, *Lessons From Oz: Quantitative Guidelines for Children’s Educational Television*, 20 HASTINGS COMM. & ENT. L.J. 119, 137 (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children’s Television Programming*, 5 COMM.LAW CONSPICUOUS 1, 2–8 (1997).

¹¹ *See* MINOW & LAMAY, *supra* note 10, at 47–57.

¹² *Id.* at 10–11; Amy B. Jordan, *The Three-Hour Rule and Educational Television for Children*, 2 POPULAR COMM. 103, 104 (2004); Dale Kunkel, *Policy Battles Over Defining Children’s Educational Television*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 44 (1998); Dale Kunkel & Ursula Goette, *Broadcasters’ Response to the Children’s Television Act*, 2 COMM. L. & POL’Y 289, 293 (1997); Popham, *supra* note 10, at 9 (citing 142 CONG. REC. 7220 (1996) (statement of Rep. Markey)).

¹³ Throughout this period, the FCC also limited the amount of commercial content that could be aired on children’s programming. *See* 47 C.F.R. § 73.670 (2009). It is this part of the children’s television rules that has been most effective, when the FCC has actively enforced it.

or informational (“E/I”) programming as part of its public interest obligations would receive expedited, staff-level review when it came to license renewal.¹⁴ The FCC also defined core children’s educational programming as specifically designed to serve the “educational and informational needs of children [sixteen] years of age and under.”¹⁵ Finally, the rules had an informational component that required identification of educational programming.¹⁶

Subsequently, in 2004 and 2006, in order to translate the “three hour rule” to the digital broadcast environment, the FCC explained that digital broadcasters transmitting any free digital content streams in addition to their main channels would be required to air an additional, proportional amount of E/I programming on their additional content streams if they were seeking expedited staff-level license renewal review.¹⁷

None of these children’s educational television rules was subjected to judicial review. Broadcasters voluntarily agreed not to challenge the constitutionality of the rules in a 1996 compromise brokered by the White House in connection with a children’s television summit convened by President Clinton.¹⁸ They also dropped their constitutional challenges to the digital extension of the children’s educational television rules after reaching a negotiated compromise with children’s advocacy groups.¹⁹

¹⁴ Policies & Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,660, 10,662–63 (1996).

¹⁵ 47 C.F.R. § 73.671(c) (2009).

¹⁶ *Policies & Rules Concerning Children’s Television Programming*, 11 F.C.C.R. at 10,683–84; see also 47 C.F.R. §§ 73.3526(e)(11)(iii), 73.673 (2009) (requiring broadcasters to report educational programming efforts).

¹⁷ Children’s Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943, 22,950 (2004). The 2004 order required digital broadcasters to increase the amount of core programming broadcast “roughly proportional” to the amount of additional free video programming (for example, data-casting and subscription video services are not included) offered on multicast channels. *Id.* The increase is tied to increments of twenty-eight hours; therefore, a broadcaster who offered up to twenty-eight hours of free video programming would be required to show an additional thirty minutes of core programming; twenty-nine to fifty-six hours would entail an additional sixty minutes of programming, and so on in increments of twenty-eight hours. *Id.* at 22,950–51; see also Children’s Television Obligations of Digital Television Broadcasters, 21 F.C.C.R. 11,065, 11,066–68, 11,070, 11,072 (2006) (revising and clarifying some aspects of the rules while retaining the proportionality requirement).

¹⁸ Popham, *supra* note 10, at 15 n.176; Kunkel, *supra* note 12, at 47–49.

¹⁹ Joint Proposal of Industry and Advocates on Reconsideration of Children’s Television Rules, Children’s Television Obligations of Digital Television Broadcasters, No. 00-167 (F.C.C. Feb. 9, 2006), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6518324672>; Press Release, Fed. Comm’n’s Comm’n, FCC Opens Comment Period on Joint Proposal for Changes to Children’s Television Rules (Mar. 17, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264394A1.pdf.

That compromise was subsequently accepted by the FCC.²⁰ Because of these agreements, few parties are left with the incentive to commence a judicial challenge to the rules.

The welfare of children naturally has nonpartisan appeal. Nevertheless, regulatory experiments should be subject to periodic study, particularly when they are: 1) the result of negotiated agreements where it is not clear that everyone is sitting at the table; 2) promoting government-preferred speech of a particular kind; and 3) leaving few stakeholders with incentives to question the rules.

An assessment of the rules should begin with the constitutional question. Are the children's educational television rules an example of compelled speech that is unconstitutional under the First Amendment? Or are they a minimally-intrusive *quid pro quo* for the benefit broadcasters receive of using the public airwaves? The FCC's approach would be likely to survive First Amendment scrutiny because of the constitutionally special status of children,²¹ and because of the constitutionally exceptional jurisprudence of broadcast regulation.²² The "broadcast First Amendment" leads to more deferential review of the FCC's regulatory decisions,²³ and the welfare of children is a heavy weight on the scale regardless of medium. Moreover, the FCC's rules promoting children's educational television were drafted so as to avoid

²⁰ *Children's Television Obligations of Digital Television Broadcasters*, 21 F.C.C.R. at 11,065, 11,070.

²¹ See, e.g., *Ginsburg v. New York*, 390 U.S. 629, 640 (1968) (recognizing that the government has an "interest in the well-being of its youth").

²² See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); see also Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1 (2004) (describing exceptionalism of broadcast regulation); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1008–09 (1993) (identifying dual First Amendment traditions for broadcasting and print); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 263 (2003) (noting the limited First Amendment protection enjoyed by broadcasters (citing *Pacifica*, 438 U.S. at 748–50)). More generally, Justice Scalia's opinion for the majority in *FCC v. Fox Television Stations, Inc.*, provides a tantalizing glimpse of a condition-based rationale for broadcast regulation. See 129 S. Ct. 1800, 1805–1819 (2009). Spectrum scarcity, the traditional justification for broadcast regulation, has been widely criticized. See, e.g., Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221–26 (1982)); see also *Fox*, 129 S. Ct. at 1820–21 (Thomas, J., concurring) (describing and criticizing scarcity-based broadcast regulation). But instead of leading to a reversal of the constitutionally exceptional status of broadcasting, Justice Scalia's reasoning suggests an alternative rationale to ground regulation. See *Fox*, 129 S. Ct. at 1819 (asserting that "[t]he [FCC] could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children").

²³ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386–87 (1969).

formal compulsion.²⁴ They provide incentives—rather than mandating requirements—to air three hours per week of core children’s educational programming.²⁵ Broadcasters still have the option of airing less than three hours of core educational programming and having their CTA compliance assessed by the full FCC.²⁶ The only consequence of a failure to comply is that rubber-stamp review by the FCC staff will be unavailable.²⁷ If these rules are seen as little more than a reasonable choice offered the broadcaster, they are likely to pass even more stringent First Amendment scrutiny than that usually accorded to broadcast regulation.

But the constitutional issue should not be the end of the inquiry. In its recent *Empowering Parents* Notice of Inquiry, the FCC asked for comment on the effectiveness of its current children’s television rules and specifically inquired whether it should “consider an approach that would permit commercial entities to fund the creation of educational content to be provided by others, such as [Public Broadcasting Service (“PBS”)].”²⁸ In a forthcoming article in the *Federal Communications Law Journal*, I argue that while the agency’s current approach has likely led to some broadcasters airing better children’s programming than they might otherwise have done, it is still fraught with challenges.²⁹ I argue that there are structural impediments to commercial broadcasters filling the need for high quality children’s educational programming. First, broadcasters’ economic incentives will push them toward as minimal compliance as possible. Children’s educational programming is still largely unprofitable for broadcasters, and is therefore likely to be under-produced by commercial licensees.³⁰ This reality is reinforced by the fact that the FCC imposes limits on advertising during children’s television

²⁴ See 47 C.F.R. § 73.671(d) (2009).

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Empowering Parents & Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13,171, 13,180 (2009).

²⁹ See generally Lili Levi, A “Pay or Play” Experiment to Improve Children’s Educational Television, 62 FED. COMM. L.J. (forthcoming Apr. 2010) [hereinafter Levi, A “Pay or Play” Experiment].

³⁰ S. REP. NO. 101-227, at 5–9 (1989) (making such findings in connection with the passage of the Children’s Television Act); see also Adam Candeub, *Creating A More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911, 925–28 (explaining the two-sidedness of media markets and arguing for efficiency of disclosure regulations allowing viewers to communicate with advertisers); Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children’s Television Programming*, 45 DUKE L.J. 1193, 1242 (1996) (detailing the difficulty of producing educational programming (citing Joint Comments of the Association of America’s Public Television Stations & the Public Broadcasting Service at 5–10, Policies & Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,660 (1996) (No. 93-48))).

programming.³¹ Recent evidence, such as a claim by some stations that *Winx Club* is core educational programming, bolsters this prediction.³² (The theme song to the series is: “We’ve got the style! And we’ve got the flair! Look all you want! Just don’t touch the hair!”³³ One might wonder precisely what education is being conveyed.)

While strict enforcement might be a counter-weight to minimalist compliance in theory, in actuality the FCC’s concerns about free speech will continue to make the agency hesitate to enforce the rules stringently. The FCC is institutionally ambivalent—simultaneously committed both to protecting children and to broadcaster expressive freedom.³⁴ It is also sensitive to the political context Professor Candeub described, and the ways in which it will signal its commitments.³⁵ When we add in the fact that parents say they don’t understand the children’s television ratings that have been required by the FCC,³⁶ and that high quality children’s educational programming is available on public television, cable, the Internet, and interactive computer programs, we can understandably begin to doubt the current system as a matter of policy.

³¹ See 47 C.F.R. § 73.670 (2009) (limiting, *inter alia*, the amount of commercial material broadcasters can air during children’s programming). These limits were adopted pursuant to the Children’s Television Act. See Children’s Television Act of 1990, Pub. L. No. 101-437, tits. I–II, §§ 102(a)–(b), 203(a), 104 Stat. 996–98 (codified as amended at 47 U.S.C. §§ 303a(a)–(b), 394 (2006)).

³² For example, a Washington, D.C. channel, WTTG, filed an FCC Form 398—the FCC’s children’s programming report form, FED. COMM’NS COMM’N, INSTRUCTIONS FOR FCC 398: CHILDREN’S TELEVISION PROGRAMMING REPORT 1 (2006), available at <http://www.fcc.gov/Forms/Form398/398.pdf>—for the fourth quarter of 2008, identifying *Winx Club* as core educational programming. WTTG, FCC 398: CHILDREN’S TELEVISION PROGRAMMING REPORT 2 (2008), available at <http://media.myfoxdc.com/FCC/ChildrensTV63008.pdf>.

³³ Lyricsmode.com, We Are the Winx! (Winx Club Theme Song) Lyrics, http://www.lyricsmode.com/lyrics/t/television/we_are_the_winx_winx_club_theme_song.html (last visited Apr. 19, 2010).

³⁴ For example, the FCC has made clear that it “will ordinarily rely on the good faith judgments of broadcasters” with respect to children’s educational programming. *Policies & Rules Concerning Children’s Television Programming*, 11 F.C.C.R. at 10,662, 10,701.

³⁵ Adam Candeub, *Shall Those Who Live by FCC Indecency Complaints Die by FCC Indecency Complaints?*, 22 REGENT U. L. REV. 307, 309 (2010).

³⁶ Comments of Children’s Media Policy Coalition at 8, Children’s Television Obligations of Digital Television Broadcasters, No. 00-167 (F.C.C. Sept. 4, 2004), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6519721521> (citing KELLY L. SCHMITT, ANNENBERG PUB. POL’Y CTR. OF THE UNIV. OF PA., REPORT SER. NO. 30, THE THREE-HOUR RULE: IS IT LIVING UP TO EXPECTATIONS? 25 (1999), available at http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/19990628_three_hour_expectations/19990628_three_hour_reaction/19990628_three_hour_reactions_report.pdf).

Empirical studies of children's educational programming since the 1996 adoption of the FCC's rules reveal mixed results. As recent studies confirm, most broadcasters appear to be formally complying with the FCC's rules.³⁷ Yet the advocacy group Children Now released a 2008 study—noted in the FCC's new children's programming docket—showing a noteworthy decline in the amount and quality of children's E/I programming.³⁸ While the majority of shows were “moderately educational,” according to Children Now, high quality children's educational programming was “down dramatically.”³⁹ Of course, people can say that these are very subjective judgments. What is high quality to me may be terrible quality to you, and vice versa. But at a minimum the current studies raise questions about whether commercial broadcasters really can save the day for children's educational television.

I suggest in my article that the FCC should explore an alternative “pay or play” approach to the promotion of high quality children's educational television programming on broadcast stations.⁴⁰ While I will refer to that article for the details, I will just mention my bottom-line suggestion here. The proposal would place commercial broadcasters under an obligation to contribute a children's educational programming fee yearly to a fund for public stations to generate high-quality public television educational programming for children. As *Sesame Street* attests, few would quarrel with the ability of public television to do this. But those who wished to reduce or eliminate these fee obligations could air their own children's educational programming instead. What this approach would do, then, would be to give broadcasters the flexibility to decide whether, in the particular markets and economic circumstances in which they find themselves, it would make sense for them to commit to high quality children's programming. Of course, we would like this rule to make us better off than we are today under the “mixed success” story of the current rules. To do so, the programs proposed by broadcasters to offset their E/I fee obligations would have to be highly rated in order to pass muster. Workable “pay or play” systems are tricky to design, but if the FCC opened up this possibility to serious public consideration, two benefits could result. First, the full range of possible “pay or play” structure—with their pros and cons—could be ventilated

³⁷ *E.g.*, BARBARA J. WILSON ET AL., CHILDREN NOW, EDUCATIONALLY/INSUFFICIENT?: AN ANALYSIS OF THE AVAILABILITY & EDUCATIONAL QUALITY OF CHILDREN'S E/I PROGRAMMING 22 (2008), available at http://www.childrennow.org/uploads/documents/eireport_2008.pdf.

³⁸ Comments of Children's Media Policy Coalition, *supra* note 36, at 15 (citing WILSON ET AL., *supra* note 37, at 8, 11, 14).

³⁹ WILSON ET AL., *supra* note 37, at 17.

⁴⁰ See generally Levi, A “Pay or Play” Experiment, *supra* note 29.

through a serious public proceeding. Second, the process might again open the door to negotiated alternatives.

What are the benefits of “pay or play” approaches? If they work, they can provide a win-win alternative to command-and-control regulation. For broadcasters, a “pay or play” approach could promise flexibility while evening the playing field. On the public side, if they are structured properly, they ensure either that high quality programming will be aired commercially or that PBS—which knows how to make excellent children’s programming—has lots of additional resources to continue producing and airing such programming. Maybe there would be enough money to create a public children’s channel to compete with Nickelodeon. At the same time, a “pay or play” rule with disclosure obligations could enhance broadcaster accountability.

This kind of proposal is not antithetical either to the FCC’s approach or to the CTA. The Act itself contains language that permits broadcasters to satisfy their children’s television obligations by sponsoring core children’s educational programming on other stations in the market.⁴¹ In theory, then, the CTA provides for a novel use of marketplace forces to advance regulatory goals. As such, it is a quiet experiment in the media policy context with a kind of “third way” model much discussed in the past decade in other administrative contexts.⁴² That kind of approach is an attempt to create a workable regulatory stance between command-and-control regulation and virtual surrender to the market by adopting market-inclusive regulatory approaches melding some traditional governmental regulation with market-based elements.

The problem is that the FCC has, in the past, interpreted the statutory sponsorship provision in an extremely restrictive way. For example, although the agency has not spoken often to this issue, those few statements it has made have suggested that broadcasters who sponsor children’s programming on other stations cannot sponsor away

⁴¹ The Children’s Television Act provides that during review for license renewal, “the [FCC] may consider . . . any special efforts by the licensee to produce or support programming broadcast by another station in the licensee’s marketplace which is specifically designed to serve the educational and informational needs of children.” Children’s Television Act of 1990, Pub. L. No. 101-437, tit. I, § 103(b), 104 Stat. 996, 997 (codified as amended at 47 U.S.C. §§ 303b(b) & (b)(2) (2006)). The FCC’s regulation reflects this. See 47 C.F.R. § 73.671(b) (2009) (stating that supporting other stations’ E/I programming “may also contribute to meeting the licensee’s obligation”).

⁴² Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1342 n.74 (2007) [hereinafter Levi, *Regulatory Equilibrium*] (citing Reed E. Hundt, Keynote Address, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 539–47 (1996); Reed Hundt & Karen Kornbluh, Commentary, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children’s Educational Television*, 9 HARV. J.L. & TECH. 11, 17, 22–23 (1996)).

their entire obligation, and must air at least three hours of children's educational programming per week.⁴³ So it is not surprising that, to my knowledge, no broadcaster has availed itself of the sponsorship option allowed under the CTA. In taking this interpretation, I would argue that the FCC has given short shrift to a potential experiment in a media "third way." What this means is not that "pay or play" approaches will not work, but that the FCC has not made its current "third way" approach sufficiently realistic and attractive as an alternative. The FCC's recent request for comment on the desirability of sponsorship models for the provision of children's educational programming suggests that the agency may be open to rethinking its approach.⁴⁴

In the final analysis, the current FCC children's television rules are not bad media policy. After all, such empirical data as we have reflects that most broadcasters are complying with the letter of the FCC's rules. The question is whether a more flexible system might better promote both the goals of the original rules and other social policy goals. Children's television is not the only beneficial programming we should wish to generate. Yet mandatory children's programming rules are likely to reduce broadcaster willingness to air other kinds of socially desirable but equally unprofitable programming. If the audience is wedded to cable and public television, then won't the broadcast requirement have the undesirable result of essentially duplicating programming available elsewhere at the expense of other important programming?

The other important programming I am thinking about is serious journalism. This kind of enterprise—particularly investigative journalism—is expensive and increasingly under-produced in today's media marketplace.⁴⁵ We face a daily barrage of obituaries for

⁴³ The FCC has interpreted the sponsorship option narrowly, stating that "a licensee's sponsorship of programming aired on another station in the market does not relieve the licensee of the obligation to air educational programming, and [] such efforts may be considered only 'in addition to' consideration of the educational programming aired by the licensee itself." Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943, 22,955 n.67 (2004) (quoting Policies & Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,725 (1996)); see also 47 C.F.R. § 73.671(d) (2009) ("Licensees that do not meet these processing guidelines will be referred to the [FCC], where they will have full opportunity to demonstrate compliance with the CTA (e.g., by relying *in part* on sponsorship of core educational/informational programs on other stations in the market that increases the amount of core educational and informational programming on the station airing the sponsored program . . .)." (emphasis added)).

⁴⁴ See Empowering Parents & Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13,171, 13,180 (2009) (citing Children's Television Obligations of Digital Television Broadcasters, 15 F.C.C.R. 22,946, 22,954–55 (2000)). Footnote 39 of the *Empowering Parents* Notice of Inquiry cites to the sponsorship provision and 47 C.F.R. § 73.671(e)(1) (2009) without reference to the limiting language noted in footnote 38. Admittedly, however, it is unwise to read too much into what is missing from a footnote.

⁴⁵ See Levi, *Regulatory Equilibrium*, *supra* note 42, at 1326.

newspapers and searching inquiries into the future of journalism.⁴⁶ Maybe at this point in newspaper history, media policy should focus on generating incentives to serious journalism in electronic media. To the extent that we face a scarcity of regulatory attention and political feasibility, I would argue that promoting journalism should take precedence over market-wide children's educational programming obligations for every commercial broadcast television station.

I realize that the first rule of policy proposals should be "do no harm." Perhaps the fact that most broadcasters are at least minimally complying with the FCC's current children's television rules should counsel against fiddling with the status quo. But the reality is that commercial broadcasters, owned by publicly-traded corporations whose shareholders invest to make money, are not in the business of altruism. Their economic incentives will push toward barely minimal compliance so long as the mandated programming isn't profitable for them. A well-designed "pay or play" model leaves the decision of what makes the most economic sense to those closest to the issue. A "pay or play" model might well lead to an improvement in the quality of children's educational programming in each broadcast market overall, so long as the FCC adopts strong rules that do not permit stations to classify programming akin to *Sponge Bob Square Pants* as "play." We should at least engage in a serious exploration of such an option.

⁴⁶ See generally Free Press, Welcome to SaveTheNews.org, <http://www.savethe-news.org/welcome> (last visited Apr. 19, 2010) (promoting "a new, broad-based campaign to develop policies that address the journalism crisis; to renew, reshape and re-imagine our nation's newsroom; and to involve the American people in the process").