University of Michigan Journal of Law Reform

Volume 39

2005

Sailing Toward Safe Harbor Hours: The Constitutionality of Regulating Television Violence

Eric C. Chaffee
Jones Day

SAILING TOWARD SAFE HARBOR HOURS: THE CONSTITUTIONALITY OF REGULATING TELEVISION VIOLENCE

Eric C. Chaffee*

Because of the recent focus on television violence, it is more a question of "when," rather than "if," Congress will take action on this issue. "Safe harbor" regulation, or restricting violent programming to certain hours of the day, is one form of regulation that is recurrently suggested as a means for dealing with the potential ills created by television violence. The possibility of such regulation implicates numerous constitutional issues. This Article addresses whether "safe harbor" regulation of television violence is feasible without violating the First Amendment and other provisions of the Constitution.

I. INTRODUCTION

[R]ecent tragedies . . . show that changing the culture of violence won't be easy. It will require assumption of new responsibilities by parents, schools, churches, and law enforcement as well as the media. And assuming these new responsibilities will require us to face up to current problems unblinkingly, and address them realistically.

—Senator John McCain[1]

* Associate, Jones Day, Cleveland, Ohio. J.D., University of Pennsylvania, 2002; B.A., Ohio State University, 1999. I would like to thank my family for their constant support in all of my endeavors. I would also like to express my deepest gratitude to Christine Gall for her critical comments and encouragement while I was drafting this Article. The views set forth in this Article are completely my own and do not necessarily reflect the views of any employer or client either past or present.

1. *Television Violence: Hearing on S. 876 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science and Transportation*, 106th Cong. 1 (1999) [hereinafter *Hearing*] (prepared statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Science, and Transportation) (discussing the difficulties of regulating television violence).

Television, compact discs, and video games bring violence into the open windows of our homes. By the time kids reach the age of eighteen, they have witnessed as many as 26,000 murders on television. But not all those murders are the same. Some make a child pause at the consequences of violence, while others pile up in an empty litany of bashing, stabbing, and shooting that creates a numbness which in turn requires even crueler or gorier violence to induce a flutter of shock.

—Bill Bradley[2]

The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly . . . . If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles.

—Justice Anthony Kennedy[3]

In recent years, the onslaught of media violence directed toward and available to children and adolescents has drawn intensifying criticism.[4] Television violence in particular has drawn strong political condemnation, and both Democrats and Republicans have shown resolve to address this issue.[5] One proposed solution is the regulation of television violence on broadcast channels to certain times during the night.[6] This is because these "safe harbor"

2. Bill Bradley, *Violence in America*, 10 ST. JOHN'S J. LEGAL COMMENT. 43, 47–48 (1994) (explaining the results of exposing children to depictions of violence).

3. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826–27 (2000) (speaking for a majority that included Justice Stevens, Justice Souter, Justice Thomas, and Justice Ginsberg regarding the ability of the government to regulate speech that is potentially harmful to children).

4. *See* Alexandra Marks, *Washington Turns Up the Debate on TV Violence*, CHRISTIAN SCI. MONITOR, July 14, 1995, at 1 (discussing increased political interest in the regulation of television violence); *Youth and Violence*, BUFFALO NEWS, July 29, 2000, at C2 (reporting on growing social concerns about the relationship between media violence and youth violence).

5. *See* Jane Hall, *Four Senators Assail TV Broadcasters in FCC Letter*, L.A. TIMES, May 25, 2000, at A1 (showing political commitment to ending the alleged problems created by television violence); *infra* notes 30–32 and accompanying text (demonstrating Congressional commitment to explore and cure the possible ills created by television violence).

6. *See infra* notes 37–42 and accompanying text (discussing recent legislation to regulate television violence to certain hours of the day).

hours[7] are presumably when children and adolescents are least likely to be watching. The possibility of such regulation implicates numerous constitutional issues. This Article addresses whether "safe harbor" regulation of television violence is feasible without violating the First Amendment and other provisions of the Constitution.

The remainder of this Part contains general statements about the scope and timeliness of this Article. Part II provides a survey of previous attempts to regulate violence in the media. Part III provides an analysis of the Supreme Court's stance on the constitutionality of regulating broadcast materials. Part IV and Part V analyze respectively the compelling interests for regulating television violence and the constitutional obstacles to such regulation. Finally, Part VI discusses the application of Supreme Court precedent to "safe harbor" regulation and the implications of this precedent.

This Article ultimately concludes that it is unlikely that television violence can be regulated to "safe harbor" hours in any meaningful way. Any regulation of television violence will be closely scrutinized by the Supreme Court because of the potential chilling effect on free speech. Even though compelling interests probably exist justifying the regulation of television violence, less restrictive means are likely available, and because of the difficulty in defining violence, any regulation will probably suffer from constitutionally impermissible vagueness and overbreadth.

The scope of this Article focuses on violence on broadcast television, rather than cable, because the Supreme Court has consistently shown a greater willingness to allow content-based regulation of subject matter on broadcast channels.[8] Because of this greater latitude, "safe harbor" regulation is much more viable on broadcast television, rather than cable.[9]

In this Article, the analysis of whether "safe harbor" regulation of television violence on broadcast channels violates the First Amendment is timely because of the lack of Supreme Court guidance on the topic, the failure of previous scholarship to fully

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7. The term "safe harbor" is the name given to the hours that a regulated form of broadcast can be aired. This term is commonly used in relation to indecent materials and generally denotes the hours between 10:00 P.M. and 6:00 A.M. *See Playboy*, 529 U.S. at 807–08, 812 (discussing regulation of indecency to "safe harbor" hours).

8. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1997) (showing the Court's application of the First Amendment to regulation of cable); FCC v. Pacifica Found., 438 U.S. 726 (1978) (showing the Court's application of the First Amendment to content-based regulation of broadcast media).

9. *See infra* Part III.B.3.

explore "safe harbor" regulation, and the political resolve to face this issue. The Supreme Court has never spoken on whether the First Amendment allows television violence on broadcast channels to be regulated to certain hours of the day.[10] The issue remains open whether "safe harbor" regulation of television violence is a per se violation of the Constitution, or whether it might be acceptable under certain conditions.[11]

Although law review articles and comments exist that discuss this topic, no previous scholarship provides as comprehensive and expansive review of the constitutionality of "safe harbor" regulation as this Article.[12] This is especially true because most of the existing scholarship was drafted before the Supreme Court's decision in *United States v. Playboy Entertainment Group, Inc.*[13] In that case, the Court declared § 505 of the Communications Decency Act of 1996 (CDA) unconstitutional for requiring cable operators to ensure that indecent or sexually explicit programming on channels pri-

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10. *See Hearing, supra* note 1, at 6–8. (prepared testimony of Robert Corn-Revere, Adjunct Professor, Institute of Communications Law, Columbus School of Law) (discussing the lack of precedent from the Supreme Court regarding the regulation of television violence to "safe harbor" hours).

11. *But see* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (stating that sexually indecent material could not be regulated on the grounds that it contains violence against women because media violence is protected speech no matter how insidious).

12. A handful of articles and comments discuss "safe harbor" regulation briefly. *See, e.g.*, Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397, 405–08 (1994) (discussing "safe harbor" regulation of television violence generally without undertaking a thorough constitutional analysis); Ian Matheson Ballard, Jr., Note, *See No Evil, Hear No Evil: Television Violence and the First Amendment*, 81 VA. L. REV. 175, 213–14 (1995) (mentioning "zoning" of television violence to "safe harbor" hours and suggesting that it might be more constitutionally viable than an across-the-board reduction of violence); Benjamin P. Deutsch, Note, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101, 1162–70 (1994) (discussing the difficulties in drafting "safe harbor" regulation of television violence that is narrowly tailored and not unconstitutionally vague); Forouzan M. Khalili, Comment, *Television Violence: Legislation to Combat the National Epidemic*, 18 WHITTIER L. REV. 219, 252 (1996) (endorsing "safe harbor" regulation without specific analysis of its constitutionality); Laura B. Schneider, Comment, *Warning: Television Violence May Be Harmful to Children; But the First Amendment May Foil Congressional Attempts to Legislate Against It*, 49 U. MIAMI L. REV. 477, 507–10 (1994) (analyzing "safe harbor" regulation of television violence briefly and suggesting that it will be treated the same as "safe harbor" regulation of television indecency).

A number of articles and comments deal with other issues relating to the regulation of television violence. *See, e.g.*, Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187 (1995); David V. Scott, *The V-Chip Debate: Blocking Television Sex, Violence, and the First Amendment*, 16 LOY. L.A. ENT. L. REV. 741 (1996); Stephen J. Kim, Comment, *"Viewer Discretion Is Advised": A Structural Approach to the Issue of Television Violence*, 142 U. PA. L. REV. 1383 (1994).

13. 529 U.S. 803 (2000) (exploring the constitutional implications of "safe harbor" regulation of cable television).

marily dedicated to sexually-oriented material was either fully scrambled or played between the hours of 10:00 P.M. and 6:00 A.M.[14] *Playboy* does not resolve the issue that this Article addresses, however, because *Playboy* focused solely on sexual content, rather than violence, and cable, rather than network television, but the possibilities for comparison are strong.

This Article also differs from previous scholarship because it focuses solely on the regulation of television violence on broadcast networks, e.g., ABC, CBS, FOX, and NBC. Most of the other scholarship fails to give a sufficiently detailed explanation of how and why the Supreme Court has treated different media differently.[15]

This Article is important because acts of juvenile violence within the past decade have created political resolve to find a solution to the problems that television violence may cause.[16] A political fervor has developed to find a response to the steady diet of violent messages fed to the nation's youth each day.[17] At this particular point in time, new technologies, such as the V-chip, have emerged that may answer the concerns of the American public.[18] Questions remain, however, as to the feasibility of technological solutions to regulate the viewing of television violence.[19]

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14. *Id.* at 806, 827.

15. *See id.* at 880–81 (examining the differences between cable and broadcast media); *see also supra* note 12 (providing a survey of previous scholarship examining "safe harbor" regulation). *But see* Kevin Saunders, *Regulating the Access of Children to Televised Violence*, 2002 L. REV. M.S.U.-D.C.L. 813, 819–21 (examining whether violent material can be regulated to "safe harbor" hours and discussing the Supreme Court's differing treatment of broadcast versus cable television).

16. *See* DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW 9–10 (2000) (discussing increases in juvenile crime); Clay Calvert, *Violence, Video Games, and A Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 21–24 (2002) (examining the recent rash of school shootings, including the Columbine massacre in Littleton, Colorado, which is the deadliest school shooting spree in the nation's history); Timothy Egan, *Santee Is Latest Blow to Myth Of Suburbia's Safer Schools*, N.Y. TIMES, Mar. 9, 2001, at A1 (reporting on the recent rash of school shootings).

17. *See infra* notes 37–44 and accompanying text (discussing recent Congressional efforts to examine and regulate television violence).

18. *See* Brett Ferenchak, Comment, *Regulating Indecent Broadcasting: Setting Sail from Safe Harbors or Sunk by the V-Chip?*, 30 U. RICH. L. REV. 831 (1996) (describing the V-chip and how it functions).

19. *See generally* TELEVISION VIOLENCE AND PUBLIC POLICY (James T. Hamilton ed., 1998) (containing a detailed analysis of the V-chip).

II. PREVIOUS ATTEMPTS TO REGULATE VIOLENCE IN THE MEDIA

Attempts to regulate depictions of violence in the public realm have been numerous and constant in the history of the United States. Although a complete recounting of each of these attempts is beyond the limits of this Article, the constant nature of the crusade against violence as entertainment and a few proposed measures to regulate television violence should be examined.

A. The Crusade Against Violence as Entertainment

Violence has been viewed as a source of entertainment since ancient times.[20] Despite this long history, individuals have often spoken out against violence as entertainment and its effects on society.[21]

In the past century, outcry against violence in the media has been a constant in the United States. After World War I, concerns mounted regarding the effects of the growing movie industry.[22] In the 1940s, public outcry focused on the print media[23] and led to the Supreme Court invalidating a prohibition on the sale of magazines primarily dedicated to "bloodshed, lust or crime."[24] In the past fifty years, as television has become an increasing force in society, broadcasters have often been accused of ignoring their responsibility to society by airing violence to increase ratings and profits.[25] In fact, a 1993 study found teachers, parents, and princi-

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20. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) ("Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low."); Schneider, *supra* note 12, at 478 ("Throughout the ages, violence has played a significant role in literary works. Writers as far back as the ancient Greek playwrights incorporated violence in their stories. Since then, violence has been prevalent in esteemed literature, throughout history from the works of Shakespeare to those of Tennessee Williams.").

21. *See* Corn-Revere, *supra* note 12, at 189 (discussing the history of the campaign against media violence).

22. *Id.*

23. *Id.*

24. Winters v. New York, 333 U.S. 507, 511 (1948).

25. *See, e.g.*, Khalili, *supra* note 12, at 219 ("[I]t is imperative that our children are properly educated and given appropriate guidance. Unfortunately, the media all too often undermines this important goal by broadcasting violence-ridden programs . . . ."); Sam Brownback, *Broadcasters Go Too Far*, USA TODAY, Oct. 20, 2004, at A10 ("Due to strong competition, many broadcasters are neglecting their public-interest responsibilities and pushing

pals cited rap music and television as the most frequent cause of violence other than family dysfunction.[26] In the past few decades, rock and hip hop music have been recurrently cited as reasons for juvenile delinquency and youth violence.[27] Most recently, critics of media violence have taken aim at the video game industry.[28]

The crusade against television violence has been a frequent source of Congressional debate. First Amendment scholar Robert Corn-Revere describes the past fifty years of Congressional activity relating to television violence:

> In this long history of censorship, perennial campaigns against television violence have appeared with the regularity of the thirteen-year locust. Senate Judiciary Committee hearings on juvenile delinquency in the mid-1950s and early 1960s examined the effects of television on young people; in the mid-1970s, both Congress and the FCC again expressed concerns about depictions of violence on TV. This culminated in the creation of the "family viewing policy" in which the networks and the National Association of Broadcasters (NAB) agreed to move violent and sexually-oriented programming to the later evening hours.[29]

In recent years, Congress consistently has made statements against television violence.[30] In 1999, the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation even conducted hearings on the issue of television violence.[31] In 2004, thirty-nine members of Congress requested that

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the envelope toward more and more questionable content. Increasing numbers of indecency complaints at the FCC demonstrate the public's rising concern.").

26. *See Survey of Schools Finds "Epidemic of Violence,"* WASH. POST, Jan. 6, 1994, at A6 (stating the results of a recent survey regarding youth violence); *see also* Wald, *supra* note 12, at 402–03 (discussing the implications of the survey).

27. Corn-Revere, *supra* note 12, at 189 (providing a review of complaints about media violence).

28. *See* Calvert, *supra* note 16 (discussing recent attempts to regulate violent video games); Kevin Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. M.S.U.-D.C.L. 51 (same). Although several attempts have been made to regulate the distribution of violent video games, courts have invalidated all of the regulations. *See, e.g.*, Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1183 (W.D. Wash. 2004) (stating that no regulation preventing "the dissemination of violent video games to children . . . has passed constitutional muster").

29. Corn-Revere, *supra* note 12, at 189–90.

30. *See, e.g.*, Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 437 (2000) (discussing statements made by Senator Robert Byrd against television violence).

31. *Hearing*, *supra* note 1.

the FCC explore the potential regulation of television violence.[32] Though these undertakings have not produced any meaningful legislation, Congressional interest exists to address this issue.

Intensifying acts of juvenile violence have fueled the crusade to regulate violence in the media. With the rash of school shootings that continues to occur with surprising regularity, the public has become greatly concerned with the danger that youth violence poses.[33]

B. Measures Proposed to Regulate Television Violence

Because of the constant crusade against media violence, attempts to regulate the entertainment industry are numerous, and a complete recounting is impossible. However, a general statement of attempts to regulate violence and discussion of two recent Congressional attempts to regulate television violence will provide a context for the issues relating to regulating television violence.

Legislative attempts to regulate television violence generally come in several different forms: 1) a complete ban on the broadcast of violent materials; 2) regulation of violence to certain hours of the day; 3) labeling, rating, and outside monitoring requirements designed so that adults can easily recognize offensive speech; and 4) technological devices that block the offending signals from being received.[34] Moreover, politicians have been willing to use the threat of legislation as a means of obtaining self-regulation from the industry.[35] Self-regulation measures often include the following: 1) limiting violent programs to certain hours of the day; 2) adopting labels, ratings, and outside monitoring;

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32. *See* Robert Corn-Revere, *Regulating TV Violence: The FCC's National Rorschach Test*, COMM. LAW., Fall 2004, at 1 (discussing the Congressional mandate that the FCC explore the issue of television violence). Ultimately, the FCC sought comment from a wide variety of individuals on issues such as the effects of viewing violent programming, the role of the V-chip, and possible regulatory solutions. *See* Violent Television Programming and Its Impact on Children, 19 F.C.C.R. 14394 (July 28, 2004) (notice of inquiry).

33. *See, e.g.*, Tom Weber, *Youth Killers Warned Us; We Didn't Act*, BANGOR DAILY NEWS, Mar. 24, 2005, at B1 ("Now a place called Red Lake[, Minn.] is added to that tragically long list of infamous American school-massacre sites that includes West Paducah, Ky.; Pearl, Miss.; Springfield, Ore.; Jonesboro, Ark.; and Littleton, Colo., where Eric Harris and Dylan Klebold killed 13 people and themselves six years ago at Columbine High School."); *supra* note 4 and accompanying text.

34. *See* Corn-Revere, *supra* note 12, at 193–94 (listing various means of regulating television violence); Schneider, *supra* note 12, at 502–18 (discussing and analyzing various methods of regulating television violence).

35. Corn-Revere, *supra* note 12, at 193–94 (discussing lawmakers' threat of legislation as a method for obtaining self-regulation of violence by the television industry).

3) conducting viewer education programs; and 4) presenting programs to address violence in society.[36]

Recent efforts to regulate the broadcast media include the Telecommunications Act of 1996.[37] This Act represents one of the most broadly sweeping regulations of the broadcast media to date. It includes provisions requiring the adoption of a rating system for television shows and requiring that new television sets be equipped with technology, known as the "V-chip," to allow parents to block certain unwanted television programs.[38] The success of these provisions in blocking unwanted programming has been hotly debated,[39] but the implications this Act may have on the constitutionality of the "safe harbor" regulation of television violence are numerous.[40]

Also of particular interest in the regulation of television violence is a bill recently presented by Senator Ernest Hollings of South Carolina that would have actually instituted "safe harbor" regulation for television violence.[41] Prior to his recent retirement, Senator Hollings had been a consistent proponent of this type of regulation and had previously presented similar legislation.[42] The Senate held hearings regarding the bill,[43] but Congress never held a vote to enact the proposed legislation.[44] However, the fact that this legislation has been seriously discussed demonstrates that Congress is amenable to and may pass "safe harbor" regulation at some point in the future.

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36. *See id.* (reporting on the self-regulation that the cable industry has undertaken).

37. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C., 15 U.S.C., 18 U.S.C.).

38. *Id.*, § 551(b)(1), 110 Stat. at 139 (codified as amended at 47 U.S.C. § 303(w)–(x) (2000)).

39. *See generally* Ferenchak, supra note 18 (discussing the implications of the V-chip provision).

40. *See infra* Part V.A.

41. *See* Children's Protection from Violent Programming Act, S. 161, 108th Cong. (2003) (containing legislation to regulate television violence to certain hours of the day).

42. *See* Children's Protection from Violent Programming Act, S. 341, 107th Cong. (2001) (containing legislation to regulate television violence to certain hours of the day); Children's Protection from Violent Programming Act, S. 876, 106th Cong. (1999) (same); Tom Long, *Sex and Violence in Entertainment: Can Parents Win?*, DETROIT NEWS, Sept. 28, 2000, at B1 (reporting on the attempts of Senator Hollings to legislate "safe harbor" regulation of television violence).

43. *See Hearing, supra* note 1, at 5–6 (prepared testimony of Robert Corn-Revere, Adjunct Professor, Institute of Communications Law, Columbus School of Law) (examining the "safe harbor" regulation of television violence).

44. The legislation ultimately was incorporated into the Broadcast Decency Enforcement Act of 2004, S. 2056, 108th Cong. (2004).

Although multiple ways exist to regulate television violence,[45] "safe harbor" regulation proves particularly interesting from a First Amendment standpoint. First, "safe harbor" regulation does not constitute a complete prohibition of television violence.[46] Although the Supreme Court has been wary of validating time, place, and manner restrictions for content-based regulation of speech,[47] the Court has been most permissive of allowing these restrictions in the broadcast context.[48] Second, "safe harbor" regulation of television violence mirrors the same type of regulation that the Supreme Court has already validated in cases regarding indecent material.[49] Because "safe harbor" regulation has been used to balance the interests of the state and broadcasters in the past, the Court might be agreeable to this type of regulation of television violence.[50]

III. ANALYSIS OF THE SUPREME COURT'S STANCE ON THE CONSTITUTIONALITY OF REGULATING BROADCAST MATERIALS

Although First Amendment law entails a complex and vast web of opinions that in many cases represent five-to-four divisions of the Court, the majority of significant First Amendment litigation has occurred only within the past one hundred years.[51] Prior to the twentieth century, many believed that the First Amendment applied solely to prior restraints on speech, and that once the speech

45. *See* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 743–55 (1999) (considering self-regulation as a means for addressing the issue of television violence); Corn-Revere, *supra* note 12, at 190–94 (reporting on a variety of methods for controlling television violence); Schneider, *supra* note 12, at 502–18 (discussing advisories, ratings, parental lock out devices, and a variety of other measures to control television violence).

46. *See* Ballard, *supra* note 12, at 213–14 (examining "zoning" in comparison to an "across-the-board" restrictions on television violence).

47. *See* Ward v. Rock Against Racism, 491 U.S. 781, 790–91 (1989) (discussing Supreme Court precedent regarding time, place, and manner restrictions).

48. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (validating a time, place, and manner restriction for indecent materials in broadcast media).

49. *See, e.g., id.*

50. *But see Hearing*, *supra* note 1, at 6–10 (prepared testimony of Robert Corn-Revere, Adjunct Professor, Institute of Communications Law, Columbus School of Law) (discussing the constitutional difficulties that arise from regulating television violence on broadcast channels to "safe harbor" hours).

51. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1022 (13th ed. 1997) (recounting the development of First Amendment doctrine).

was articulated in public it could still be punished without violating the Constitution.[52]

It was not until 1919, in the landmark case of *Schenck v. United States*,[53] that Justice Holmes—speaking for a unanimous Court—conceded that "[i]t may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . ."[54] It was only after this statement that the Court began to expand and explore the intricacies of the First Amendment. In fact, the Court did not decide the seminal case in First Amendment regulation of the broadcast media, *FCC v. Pacifica Foundation*, until 1978.[55]

This section will analyze the contours of constitutionally permissible regulation of broadcast media. This analysis will proceed through an examination of the criteria used for assessing the constitutionality of content-based regulation and an examination of the standard of review used in applying these criteria.

A. Criteria for Assessing the Constitutionality of Regulating Speech

The First Amendment declares, "Congress shall make no law . . . abridging the freedom of speech . . . ."[56] Although this statement appears to be a per se rule against any sort of regulation of speech, Supreme Court precedent demonstrates that regulation of speech is permissible in a variety of circumstances. Historically, for example, bribery, perjury, and counseling to murder have been considered so clearly unprotected by the First Amendment that prohibitions of these types of speech have gone unlitigated.[57] In terms of litigated restraints, speech interfering with rights

52. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (demonstrating the Supreme Court's initial position that the First Amendment protected against only prior restraints on speech).

53. 249 U.S. 47 (1919).

54. *Id.* at 51–52 (discussing the Court's current opinions on the applicability of the First Amendment to the regulation of speech).

55. 438 U.S. 726 (1978).

56. U.S. CONST. amend. I; *see also* Gitlow v. New York, 268 U.S. 652, 666 (1975) (holding that the First Amendment is applicable to the states via the Due Process Clause of the Fourteenth Amendment).

57. *See* GUNTHER & SULLIVAN, *supra* note 51, at 1022.

guaranteed in the Constitution[58] and speech with little to no substantive value[59] have been barred in a variety of situations.

The general criteria for proving the constitutionality of content-based regulation of speech consist of demonstrating that a compelling state interest in regulating the speech outweighs the interest in protecting the right to express it,[60] showing that the regulation of speech is narrowly tailored to meet the compelling state interest,[61] and showing that no viable, less restrictive alternative for achieving the state's interest exists.[62] Subsequent sections will analyze each of these issues in the context of the constitutionality of regulating television violence on broadcast channels. Before that occurs, however, it is important to consider what standard of review the Court will use in determining the constitutionality of any attempt to regulate television violence.

B. Standard of Review for a First Amendment Claim

Although Supreme Court precedent has made clear that the First Amendment prohibition on restriction of speech is not absolute, the Supreme Court has almost consistently held that content-based regulations will be subject to strict scrutiny.[63] In many cases, this means that regulations, even if they may be justified in some manner, will still not pass constitutional muster after being "strictly scrutinized" by the Court.[64] When the Court does employ strict scrutiny in a First Amendment case, the government can still prevail if it can show that compelling interests for the regulation exist and that the regulation is the only possible means of achieving the interests.[65]

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58. *See infra* Part IV (discussing instances in which free speech was trumped by constitutionally protected rights, i.e., parental authority over the upbringing of one's children and privacy in one's home).

59. *See infra* Part III.B.2 (examining speech that is not protected by the First Amendment because it has little value in the free exchange of ideas).

60. *See infra* Part III.A.

61. *See infra* Part V.B.

62. *See infra* Part V.A.

63. *See* R.A.V. v. City of St. Paul, 505 U.S 377, 395–96 (1992) (providing analysis of the Court's application of strict scrutiny to content-based regulations of speech); *see also* Ross, *supra* note 30, at 432 (explaining that strict scrutiny is generally applied in First Amendment cases).

64. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (discussing the level of scrutiny employed by the Court when First Amendment rights are challenged).

65. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (discussing the criteria for assessing a First Amendment claim).

In this subsection, the factors contributing to the level of scrutiny that the Court will apply in assessing the constitutionality of any regulation of violence on broadcast television will be examined through a review of the Court's treatment of content-based versus content-neutral regulation, protected versus unprotected speech, and regulation of the broadcast medium. Although content-based regulations are usually "strictly scrutinized" by the Supreme Court, the level of scrutiny may be reduced if television violence is not a form of speech that receives full First Amendment protection or if television violence in the broadcast media receives less First Amendment protection than speech in other media.

1. Content-Based Versus Content-Neutral Regulation—The Supreme Court has consistently recognized a greater danger in de jure, content-based regulation of speech rather than de facto, content-neutral regulation. In cases of content-based regulation, the Court reviews the regulation with strict scrutiny to validate intentional abridgment of the freedom to convey the content of speech because of concerns about irrevocable damage to liberty and the democratic spirit.[66] If the regulation is content-neutral, however, the Court will likely review the regulation with only intermediate scrutiny.[67]

The test for delineating between content-based and content-neutral regulation consists of whether the regulation is aimed at the communicative impact of the speech, i.e., content-based, or is incidental and ancillary to some other non-communicative regulation by the state, i.e., content-neutral. Determining whether a regulation by the state is content-based or content-neutral is often a complicated task. For example, in *Cohen v. California*,[68] Cohen was charged with violating a statute that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct" for wearing a coat bearing the words "fuck the draft."[69] Although at first glance the statute might

66. *See* GUNTHER & SULLIVAN, *supra* note 51, at 1025–29 (explaining the philosophic justifications for the protection of free speech).

67. *See* Frisby v. Schultz, 487 U.S. 474, 481–82 (1988) (upholding an ordinance prohibiting picketing on a sidewalk in front of any individual's residence or dwelling because the ordinance was content-neutral and passed intermediate scrutiny). To survive intermediate scrutiny, the state must demonstrate that the regulation is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. *Id.*; *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (applying intermediate scrutiny to a content-neutral regulation requiring cable broadcasters to devote a specified portion of their channels to the transmission of local commercial and public broadcast stations).

68. 403 U.S. 15 (1971).

69. *Id.* at 16.

seem to have the content-neutral goal of protecting the peace, the Court held that the regulation was applied in a content-based manner because Cohen's conviction under the statute rested upon the communicative impact of the words he used to convey his message, rather than any separately identifiable conduct.[70] Obviously, the difficulty in determining the content-based or content-neutral status of a regulation can be substantial.

Strict scrutiny, however, is not always fatal to content-based regulations. For example, in *Burson v. Freeman*,[71] a plurality of four Justices upheld a statute that made it illegal to solicit votes or display campaign materials within one hundred feet of a place of voting. Even though the regulation was content-based, the plurality held that the state had a compelling interest to protect citizens' right to vote freely for issues or candidates of their choice, and that the ban was narrowly tailored to achieve this interest.[72]

Considering that the Bill of Rights was initially drafted as a response to citizens' fears of encroachment of liberty,[73] the Court's strict scrutiny of content-based regulations seems logical. In fact, courts closely scrutinize even content-neutral regulations. For instance, in *Schneider v. State*,[74] city ordinances forbidding the distribution of leaflets to reduce litter were struck down on First Amendment grounds because although the prohibitions were content-neutral in their aims, less restrictive means existed of achieving the same goals, such as punishing only those who litter.[75]

In terms of the regulation of violence on broadcast television, the Court will most likely view any regulation as content-based in spite of any phraseology in the actual legislation. In cases involving the regulation of speech, the government is likely to claim that a regulation is content-neutral to try to avoid the more exacting level of strict scrutiny that is employed for content-based regulations. In *United*

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70. *See id.* at 24–26. "The only conduct which the state sought to punish was the fact of communication." *Id.* at 18.

71. 504 U.S. 191 (1992).

72. *Id.* at 200 ("While we readily acknowledge that a law rarely survives [strict] 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.").

73. *See* GUNTHER & SULLIVAN, *supra* note 51, at 418 (stating that the amendments composing the Bill of Rights were introduced during the first session of Congress in response to a "widespread demand for constitutional protection of individual . . . rights"); *see also* THE FEDERALIST No. 84 (Alexander Hamilton) (attempting to address concerns that the Constitution did not contain a bill of rights).

74. 308 U.S. 147 (1938).

75. *Id.* at 162 (holding that freedom of speech and press should not be burdened because obvious methods for preventing litter exist, such as punishing those who actually throw paper on the ground).

States v. Playboy Entertainment Group, Inc.,[76] however, the Court ruled that a regulation was content-based that required cable operators to ensure that indecent or sexually explicit programming on channels primarily dedicated to sexually-oriented material be either fully scrambled or played between the hours of 10:00 P.M. and 6:00 A.M.[77] The Court reached this holding because the provision singled out particular programming content and particular programmers.[78] Although *Playboy* focused on "safe harbor" regulation of indecency on cable television, the fact that the Court found the regulation to be content-based and subject to strict scrutiny means that regulating television violence to "safe harbor" hours will likely be subject to the same high level of scrutiny because any regulation of television violence would focus on particular programming content. Whether the "safe harbor" regulation deals with indecency or violence, the focus of the regulation is the same, i.e., the content of the speech.

2. Protected Versus Unprotected Speech—Based on the criteria for assessing the constitutionality of regulating speech, the Court has held that certain categories of speech do not merit the same First Amendment protection as other forms of speech,[79] and thus, deserve a lower degree of scrutiny by the Court. An analysis must be undertaken to determine whether television violence fits into one of these categories of unprotected speech or whether television violence should receive the "strictly scrutinized" balancing afforded to other forms of protected speech.

The types of speech that receive the least First Amendment protection[80] are obscenity,[81] advocacy of imminent lawless

76. 529 U.S. 803 (2000).

77. *Id.* at 811–12.

78. *Id.*

79. A recurrent issue in First Amendment scholarship is whether the protection of speech should be analyzed in terms of categorization or balancing. *See* GUNTHER & SULLIVAN, *supra* note 51, at 1032–33 (explaining the debate between the categorization of speech or balancing of interests in First Amendment claims). Categorization seeks to establish "bright line" rules about which forms of speech are protected and which are not, while balancing evaluates the interests involved and the merits of the proposed regulation. *Id.* A full analysis of the issue is beyond the scope of this text. Therefore, it is assumed for present purposes that balancing is the correct interpretation of Supreme Court precedent, and that balancing interests, in fact, yields categories of unprotected speech.

80. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (limiting unprotected speech to categories such as obscenity, advocacy of imminent lawless behavior, fighting words, defamation, and fraudulent misrepresentation).

81. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not protected by the First Amendment). In *Miller v. California*, the Supreme Court held that the test for obscenity requires inquiry into:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b)

behavior,[82] fighting words,[83] defamation,[84] and fraudulent misrepresentation.[85] The main test for delineating between protected and unprotected speech consists of whether the speech can be valued in the context of social dialogue.[86] Speech that lacks such value in the free exchange of ideas is deemed unprotected.[87] For example, in *Chaplinsky v. New Hampshire*,[88] the Supreme Court held that the defendant could be convicted under a broadly worded statute[89] for calling a city marshal a "damned racketeer" and "damned fascist" because the speech had "slight social value as a step to truth."[90]

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whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. 15, 24 (1973) (citations omitted); *see also* Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (applying the *Miller* test). Child pornography may be regulated even without satisfying the *Miller* test because of the state's compelling interest in protecting children. *See, e.g.*, New York v. Ferber 458 U.S. 747, 756–64 (1982) (holding that the state has great leeway in regulating child pornography).

82. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that incitement to "imminent lawless action" is not protected speech). The state cannot forbid advocating violation of the law unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

83. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (stating that "fighting words" are not protected speech). The Supreme Court has defined the term "fighting words" as "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574. Regulations aimed at fighting words are often held to be unconstitutional for overbreadth and/or vagueness. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (invalidating a New Orleans ordinance on grounds of overbreadth and vagueness for making it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in actual performance of his duty"); Gooding v. Wilson, 405 U.S. 518, 519 (1972) (invalidating a Georgia statue on grounds of overbreadth and vagueness for making it a misdemeanor to "use to or of another, . . . opprobrious words or abusive language, tending to cause a breach of the peace").

84. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact.").

85. *Id.*

86. *See Chaplinsky*, 315 U.S. at 572 (holding that no constitutional protection exists for "utterances [that] are no[t an] essential part of any exposition of ideas, and are of such slight 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").

87. *See* Miller v. California, 413 U.S. 15, 23–24 (1973) (discussing the unprotected status of speech deemed to lack value in the free exchange of ideas).

88. *Chaplinsky*, 315 U.S. at 569.

89. The statute read:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id.

90. *Id.* at 572.

Of course, it would be difficult to claim that delineating between protected and unprotected speech based on whether the speech has "social value as a step to truth" provides a "bright line" rule for the determining the status of speech. Therefore, analyzing how the Court may approach a particular regulation of speech can be difficult.

Although it was once viewed that unprotected speech receives only "mere rationality" review, rather than strict scrutiny, the Supreme Court seems to have abandoned this position and defaulted to strict scrutiny in cases of unprotected speech. In *R.A.V. v. City of St. Paul*, for example, the Court employed strict scrutiny and invalidated a city ordinance that made it a misdemeanor to "place[] on public or private property . . . a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[91] The Court felt that the city should not have differentiated between racially based "fighting words" and other categories of "fighting words."[92] However, obscenity, advocacy of imminent lawless behavior, fighting words, defamation, and fraudulent misrepresentation all pose obvious dangers to society. Thus, even if the Court imposes strict scrutiny in the context of the unprotected categories of speech, it would not be per se fatal.

It is unlikely that television violence falls into one of the unprotected categories of speech.[93] In *Winters v. New York*,[94] although not speaking specifically on the regulation of television violence, the Court invalidated a state law designed to prohibit the production, distribution, and sale of publications primarily dedicated to stories of bloodshed and crime. In that case, the Court penned the oft-quoted language, "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."[95] Although

91. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).

92. *Id.*

93. *See* Corn-Revere, *supra* note 32, at 27–28 (suggesting that violent images should not receive the more limited First Amendment protection afforded to obscene or indecent materials).

94. 333 U.S. 507 (1948).

95. *Id.* at 510 (demonstrating a commitment by the Court to protect depictions of violence in the media); *see also* Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1199 (9th Cir. 1989) (refusing to create a new category of unprotected speech for non-obscene pornography because of its alleged violent content); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004) ("[D]epictions [of violence] have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protection of the First Amendment or subject to government regulation.").

this case is from the 1940s and may not reflect the current state of the law, it stands as one of the few Supreme Court cases to address the issue of regulating depictions of violence.

More recently, in *American Booksellers Association v. Hudnut*,[96] the Seventh Circuit, affirmed in memorandum by the Supreme Court, held that indecent sexually oriented material could not be regulated on the ground that it depicted violence against women because "violence on television . . . is protected as speech, however insidious."[97] Although the Seventh Circuit's holding might have some limits if broadcasters began televising extreme acts of violence, *Hudnut* stands for proposition that the type of television violence currently televised is protected speech under the First Amendment.

Even if a regulation is held to involve protected speech, strict scrutiny will not necessarily be fatal to regulating television violence for the following two reasons. First, even when speech is protected, the regulation may still be valid if the government can demonstrate a compelling state interest in regulating the speech that outweighs the interest in protecting the right to free speech.[98] And the government can show that the regulation is narrowly tailored to meet the compelling state interests[99] with no viable less restrictive alternatives for achieving these interests.[100] Second, the Court has afforded the government leniency in regulating broadcast speech because of the pervasive nature of the medium.[101]

3. Regulation of the Broadcast Medium—Although the drafters of any regulation of television violence will likely receive some leniency from the Court, it is probable that any regulation will still be "strictly scrutinized." In instances of content-based regulation by the state, the Court has generally held that the state may not claim in defense of the regulation that the speaker can articulate the message in some other place, some other time, or some other

96. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

97. *Id.* at 330 (speaking in dicta of the First Amendment protection of violence on television); *see also* James v. Meow Media, Inc., 300 F.3d 683, 695–99 (6th Cir. 2002) (stating in dicta that the First Amendment prevents tort liability based on distribution of violent media because communication with violent content is protected speech); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 178–82 (D. Conn. 2002) (holding that the First Amendment protected a producer of a violent video game for wrongful death allegedly caused by the game); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279–81 (D. Colo. 2002) (dismissing an action based on alleged liability for distributing violent video games and movies because the expressive content of games and movies is protected speech).

98. *See supra* Part III.A.

99. *See infra* Part V.B.

100. *See infra* Part V.A.

101. *See infra* Part III.B.3.

manner.[102] In essence, once the state is seen as objecting to speech via a time, place, or manner regulation, this is considered significant enough to invalidate the regulation on First Amendment grounds.

Under this analysis, it might appear that "safe harbor" regulation of television violence on broadcast channels is a per se violation of the First Amendment because the regulation would be a time, place, and manner restriction and, as stated earlier, a content-based regulation.[103] In broadcast cases, however, the Supreme Court has created a special exception to its general prohibition on time, place, and manner restrictions for content-based regulations.[104] In fact, the Court is more lenient with legislators in the broadcast context.[105]

In *FCC v. Pacifica Foundation*, the seminal case examining regulation of broadcast media, the Supreme Court examined the rationales for granting leniency to the government in regulating broadcast speech.[106] In *Pacifica*, the Court affirmed that a twelve-minute broadcast containing filthy words played on a radio station during daytime hours was not protected by the First Amendment based on three distinct rationales: the ease of exposure, the inadequacy of content warnings, and extremely detrimental nature of the initial exposure.[107]

In granting some leniency in regulating broadcast speech, the Court was especially concerned with the ease of exposure to harmful materials. Unlike internet[108] and indecent phone services[109] ("dial-a-porn") cases in which the Court has not granted as much deference to the government in regulating speech, broadcast speech affords viewers and listeners easy access to harmful material with just an accidental touch of a button.[110] It requires neither the

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102. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 879 (2000) (invalidating a "safe harbor" regulation in the context of cable television in part because it constituted a time, place, and manner restriction).

103. *See supra* Part III.B.1.

104. *See Playboy*, 529 U.S. at 879; FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978).

105. *See, e.g.*, *Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

106. *See id.* at 748–49.

107. *See id.* (stating the rationales for a lower degree of scrutiny in cases regarding the regulation of broadcast speech); *see also* Reno v. ACLU, 521 U.S. 844, 867 (1997) (applying the Pacifica analysis).

108. *See* Reno v. ACLU, 521 U.S. at 867 (holding that the internet receives full First Amendment protection unlike the broadcast media).

109. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127–28 (1989) (holding that unlike indecent phone services, the broadcast media has unique characteristics that warrant lesser First Amendment protection).

110. *See* Reno v. ACLU, 521 U.S. at 844; Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n, 896 F.2d 780, 784 (3d Cir. 1990).

sophistication nor the level of purposefulness that other media, e.g., internet or dial-a-porn, demand to gain access. As Justice Stevens put it in *Pacifica,*

> Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children .... The ease with which children may obtain access to broadcast material ... amply justif[ies] special treatment of indecent broadcasting.[111]

The Court also stated that the inadequacy of content warnings justified granting leniency to the government in the regulation of broadcast speech. The Court understood that with the flip of a dial exposure to harmful material might occur with broadcast media. As Justice Stevens wrote,

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.[112]

Thus, the Court has held that no level of warning can protect a viewer and/or listener from the initial exposure to offending material.

Finally, in granting a leniency in regulation of broadcast speech, the Court understood that it is the initial exposure that can be the most detrimental because the loss of innocence of a listener or viewer is instantaneous.[113] As the Court wrote in *Pacifica,* "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[114]

As held in *Pacifica,* a lower level of scrutiny is used in evaluating the regulation of indecency on broadcast television.[115] The Supreme Court acknowledged that different media have different degrees of accessibility, and that the free speech interests in allowing indecent materials to be broadcast twenty-four hours a day,

111. *Pacifica,* 438 U.S. at 749.
112. *Id.* at 748–49.
113. *See id.* at 749.
114. *Id.*
115. *Id.* at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

seven days a week do not overcome the compelling government interests to protect children, retain parental control over the home, and protect the right to privacy from unwanted intrusion in the home, because with the flip of a switch, the damage of broadcasted indecent materials is done.[116]

The Court has been reluctant to state the specific level of review in regulating indecency in broadcast speech. In broadcast cases, the Court has applied relaxed scrutiny, which falls well below the demands of strict scrutiny.[117] In *United States v. Playboy Entertainment Group, Inc.*,[118] however, Justice Kennedy, speaking for a majority that included Justices Stevens, Souter, Thomas, and Ginsberg, seemed to turn away from this relaxed scrutiny in any context and stated that content-based speech restrictions will always be subject to strict scrutiny.[119] It is unclear whether Justice Kennedy was speaking specifically about the level of scrutiny for cable television or was making a general statement regarding both cable and broadcast speech.[120] In any event, no matter what level of scrutiny is applied, it is likely that the drafters of any regulation of television violence would receive some leniency from the Court because of the nature of the broadcast medium.

Of course, the amount of leniency is uncertain. Although arguments can be made for and against violence being treated in the same manner as indecency in the broadcast context, it is likely that any regulation of television violence would be subject to strict scrutiny. Regulating television violence would create a fundamental change in society,[121] and defining harmful violence for purposes of regulation would be extremely difficult.[122] The arguments for and against applying the same reduced scrutiny in the broadcast context for regulation of violence and regulation of sexually explicit material are examined below.

a. The Case for Applying Reduced Scrutiny to Regulation of Broadcast Violence—The case for applying the same reduced scrutiny to regulation of violence and sexually explicit material is based upon

116. *See id.* at 748–49.

117. *See* FCC v. League of Women Voters, 468 U.S. 364 (1984).

118. 529 U.S. 803 (2000).

119. *Id.* at 813.

120. *Id.* A few lines later, Justice Kennedy grouped both cable and broadcast speech together stating: "Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts." *Id.* (citations omitted).

121. *See infra* text accompanying notes 135–137 (discussing how regulation of television violence could represent a fundamental change in the entertainment and information available to the people of the United States).

122. *See infra* text accompanying notes 138–141.

concerns about the pervasiveness of broadcasting, comparable compelling interests regarding the effects of television violence and sexually explicit material, and apprehension about increased violence in the United States.

Broadcast media is pervasive in nature. Regardless of the subject matter in question, regulators must contend with the ease of exposure, the inadequacy of content warnings, and extremely detrimental nature of initial exposure. *Pacifica* can be viewed as a statement on how the Court will treat the broadcast media in general, rather than a specific statement about how the Court will treat indecency. In fact, the Court's rationales for reduced scrutiny are equally compelling for any type of speech transmitted via the broadcast media. The argument can be made that the level of scrutiny for the broadcast media should not be altered simply because the type of speech changes. The pervasiveness of broadcast media is constant no matter the content of the speech.

The same level of scrutiny is arguably warranted for broadcast media regulation of violence and sexually explicit material because the compelling interests are the same in both instances. As the next section will discuss, the Court has cited the protection of children, the preservation of parental authority over the home, and the protection of privacy in the home, as compelling government interests that can outweigh the interest in protecting the right to free speech in the context of indecent material.[123] If these interests can be shown to exist in the broadcasting of violent material, the Court may use a commensurate level of reduced scrutiny.

The case for the regulation of violence and sexually explicit material being given comparable reduced scrutiny can also be based on increased youth violence in American society. As school shootings within the past decade have shown, violence among adolescents and juveniles is now taking on ever more alarming forms.[124] With the increased ease of communication throughout the world, greater concern must be given to the types of messages to which individuals—especially children—are being exposed.[125] Although indecent sexual materials may pose threats, such as increased pregnancy and continued spread of sexually transmitted diseases, the horrific acts of violence committed by juveniles in the past decade may prove to be an equally substantial danger to society.[126] The Supreme Court could give the regulation of violence

123. *See infra* Part IV.A–C.

124. *See supra* note 16.

125. *See id.*

126. *See* Kim, *supra* note 12, at 1390–91 (containing an analysis of "safe harbor" regulation of indecent broadcasting).

and sexually explicit material comparable reduced scrutiny because each type of speech poses a substantial harm to society.

b. The Case Against Applying Reduced Scrutiny to Regulation of Broadcast Violence—However, the case against comparable scrutiny for broadcast media regulation of violence and sexually explicit material is likely more compelling. Regulation of violence is likely to be treated differently than regulation of indecent materials because of the probable narrowness of the *Pacifica* holding, the greater historical acceptance of violence as entertainment, and the difficulty in defining violence. *Pacifica* likely will be interpreted narrowly as holding that leniency to the government applies only in regulating indecent broadcasting.[127] In fact, the case law seems to support the contention that indecent and violent programs are not treated the same. In *Winters v. New York*,[128] for example, the Court held that magazines primarily depicting acts of violence were "as much entitled to the protection of free speech as the best of literature."[129] This statement suggests that the Court will be adverse to granting broadcast regulation of violence the same reduced scrutiny as broadcast regulation of sexually explicit materials.

On the other hand, the argument can be made that the Court should not be viewed as speaking to any level of scrutiny for regulation of broadcast media because *Winters* dealt only with the print media and did not consider broadcast television.[130] More recent circuit court cases, however, have suggested that depictions of violence receive greater protection under the First Amendment than indecent speech. As mentioned previously,[131] in *American Booksellers Association, Inc. v. Hudnut*,[132] the Seventh Circuit held that indecent sexually oriented material could not be regulated on the grounds that it depicted violence against women because "violence on television . . . is protected as speech, however insidious."[133] Under the Seventh Circuit's analysis, regulation of television violence would not get the same decreased level of strict scrutiny that the regulation of sexually indecent material receives.[134]

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127. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (containing an analysis of indecent broadcasting).

128. 333 U.S. 507 (1948).

129. *Id.* at 510.

130. *Id.* at 507.

131. *See supra* notes 96–97 and accompanying text.

132. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

133. *Id.* at 330.

134. *See supra* text accompanying notes 94–97 (discussing cases where communication with violent content was protected speech under the First Amendment).

Moreover, regulation of television violence likely will not get the same level of reduced scrutiny as regulation of television indecency because historically, violence has been a much more accepted form of entertainment. Cartoons, news, sports, and a variety of other regularly broadcast programming all contain some level of violence.[135] In *Pacifica*, the case turned on whether a few words and acts, which had already been taboo to broadcast, could be prevented from being broadcast.[136] In the case of regulating violence on television to certain "safe harbor" hours of the day, this would represent a fundamental change in the entertainment and information available to the people of the United States.[137] Thus, the regulation of violence on television likely will be treated differently than the regulation of sexually explicit materials because *Pacifica* defended the status quo of not allowing indecent materials on broadcast television, while the regulation of violence on broadcast television would substantially alter American culture. Although this does not mean that the regulation of violence on broadcast television to "safe harbor" hours will be considered per se unconstitutional, it does suggest that the Court may use a much more exacting form of scrutiny because it represents such a fundamental change in society.

Furthermore, the Court would likely not give the regulation of violence on television the same reduced degree of scrutiny because of the difficulty in defining the types of violence to be regulated.[138] Because cartoons, news, sports, and a variety of other regularly broadcast programming all contain some level of violence, the choices made in deciding which types of violence should be regulated will undoubtedly be tremendously difficult and controversial.[139] In fact, it is not even clear that the Court will accept that television violence poses a threat to society. For instance, in *Eclipse Enterprises v.*

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135. *Cf.* Bradley, *supra* note 2, at 47–48 (stating that some television violence may cause children to pause to contemplate the consequences of their actions); Deutsch, *supra* note 12, at 1101–06 (claiming that many types of violence on television are not harmful to children); David Foldenflik, *Can TV Violence Be Good for You?*, L.A. TIMES, July 29, 2000, at F15 (reporting the possibility that certain lessons learned from television violence may be beneficial).

136. FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

137. *See Wald*, *supra* note 12, at 419 ("[T]he vast array of programs containing some violence also contain history, literature, documentary, sports, news or even good storytelling."); *supra* Part II.A. (discussing the constant presence of violence as entertainment throughout history).

138. *See infra* note 189 and accompanying text.

139. *See* Wald, *supra* note 12, at 420 ("The thorniest problem in any control system [to regulate television violence]—by whomever administered—is deciding what violence is to be screened out. . . . [S]o many aspects of our life and society do involve violence that it inevitably must be reflected in our art and forms of entertainment.").

Gullotta,[140] the Second Circuit ruled that a ban on trading cards depicting violent acts was unconstitutional because it was neither narrowly tailored to meet a compelling state interest, nor was it possible to prove the link between the trading cards and increases in crime.[141] That case highlights the difficulty in defining violence narrowly enough to encompass only violence that will be viewed as detrimental.

In sum, the Court likely will "strictly scrutinize" any regulation of television violence because it would be a content-based regulation of protected speech and would constitute a fundamental change to the information and entertainment available to the American public. The Court likely will grant some leniency to the drafters of any regulation of television violence in determining its constitutionality. However, it is unlikely that the regulation of violence will receive as low a level of scrutiny as regulation of indecency on broadcast television because of the probable narrowness of the *Pacifica* holding, the greater historical acceptance of violence as entertainment, and the difficulty in defining violence.

IV. POSSIBLE COMPELLING STATE INTERESTS FOR REGULATING TELEVISION VIOLENCE

As stated previously, the general criteria for proving the constitutionality of a regulation of speech consists of demonstrating that a compelling state interest for the regulation outweighs the interest in protecting the speech. Then, the state must show that no viable less restrictive alternatives for achieving the compelling interest exist and demonstrate that the regulation of speech is narrowly tailored to meet the interest.[142]

This section will explore a number of the state's possible compelling interests for regulating television violence. Based on a review of Supreme Court precedent, it is likely that the government will claim a compelling interest in protecting children, preserving parental liberty in the upbringing of children, and protecting privacy in the home. These possible compelling interests are examined below.

140. 134 F.3d 63 (2d Cir. 1997).
141. *Id.* at 71 (Griesa, J., concurring).
142. *See supra* Part III.A.

A. The Compelling Interest in Protecting Children

In *Sable Communications of California, Inc. v. FCC*,[143] the Supreme Court held that there is "a compelling interest in protecting the physical and psychological well-being of minors."[144] *Sable* provides only one of many examples of the Court's dedication to protecting children.[145] In *Sable*, the Court was firm in its conviction that children must be protected from easily obtainable indecent materials, and held that a "blanket restriction" requiring access codes to receive indecent messages ("dial-a-porn") was unconstitutional only because of the numerous and complicated steps that had to occur to obtain these phone messages.[146] *Sable* differs significantly from the regulation of violence on broadcast television because *Sable* regarded only "dial-a-porn," rather than broadcast regulation. The availability and access to these two types of speech is considerably different, but *Sable* demonstrates that the Court allows the protection of children to be a compelling justification that can outweigh the interest in protecting the right to free speech.

In the case of violence on broadcast television, arguments for the protection of children[147] are often based on the correlation between violent broadcasts and violent behavior, the desensitization to violence caused by these broadcasts, and the degradation in morality that exposure to violence can yield.[148] The existence of a correlation between violent broadcasts and violent behavior is a

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143. 492 U.S. 115 (1989).

144. *See id.* at 126 (containing the Court's analysis of why protecting children is a compelling justification).

145. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1997) (discussing the protection of children from indecent programming on cable television); FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (discussing protecting children from indecent speech in broadcast media).

146. *See Sable*, 492 U.S. at 127–28 (1989) (finding that different degrees of accessibility of media yield differing degrees of scrutiny by the Court).

147. Although the analysis in this section may be equally applicable to the protection of society in general, it is highly unlikely that the Court would validate a prohibition of content-based speech in the broadcast media on the grounds that the state is protecting adults by regulating the speech. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on materials available to youths than on those available to adults."); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 (1968) ("[B]ecause of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, materials objectionable, as to them, but which a State could not regulate as to adults."). Thus, although the analysis is applicable to adults, the focus of this subsection will be solely on the protection of children because this represents a more viable argument for the regulation of violence on broadcast television to "safe harbor" hours.

148. *See* Kim, *supra* note 12, at 1383 (1994) (exploring various justifications that a court might use in determining the merits of regulating television violence).

point of severe division among experts who study the effects of broadcast television on children.[149] At one end of the spectrum are experts who claim an undeniable link between television violence and violent behavior,[150] and at the other are experts who claim the exact opposite.[151] Whether "safe harbor" regulation of television violence will pass constitutional muster may turn on which experts the Court believes.

Even if there is not causation between television violence and violent behavior, one can still argue that the desensitization to violence caused by these broadcasts yields a culture that is more accepting and more susceptible to violence. The best evidence for the desensitizing effects of violence in the media may be the intensifying acts of violence committed by children and adolescents.[152] Although this does not prove a direct correlation between desensitization to violence and the media, it may convince the Court that there is a need for prophylactic measures to prevent the continuation of a culture of violence. The Court may view itself as protecting children by not allowing them to develop the destructive tendencies caused by desensitization to violence.[153]

In fact, members of the Court may adopt the view that violence in the media yields a general degradation in morality. Some have argued that exposure to television violence in fact causes psychological and emotional damage to children that may yield a lack of concern for others in the world around them.[154] This concern has often been expressed by a fear for the general degradation of the morality in society, and may be of some concern to the Court in

149. *See* Corn-Revere, *supra* note 32, at 24 (discussing the wide spectrum of opinions regarding the correlation or lack of correlation between viewing violent television and undertaking violent behavior).

150. *See* Khalili, *supra* note 12, at 225 ("The studies and research clearly demonstrate that excessive violence on televisions detrimentally affects children of all ages, and contributes to the rising level of violence in this country."); Jane Gallagher, *TV: A Force for Good or Evil*, DAILY POST (Liverpool), Mar. 14, 2005, at 10 ("A long-term study carried out in the 1980s found that the amount of television violence watched at a young age predicted the level of aggressiveness in later life."); Curtis Ivery, *Television and Youth Violence*, MICH. CHRON., July 6, 2004, at 6 ("Studies confirm that young people who watch more than an hour a day are four times more likely to be violent as young adults than those who watch less.").

151. *See supra* note 135.

152. *See supra* note 33 and accompanying text. *But see* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001) (finding that the harm caused by violent video games is "implausible, at best wildly speculative").

153. *See* Khalili, *supra* note 12, at 219–22 (explaining the widespread effects of violent programming in society).

154. *See, e.g.*, Schneider, *supra* note 12, at 486 ("A[n] . . . effect of television violence, known as the *bystander effect* or the *desensitization effect*, describes the viewer's increased callousness toward violence directed at others.").

deciding whether a compelling interest to protect children is present to justify regulating television violence.[155]

If legislators wish to justify a regulation of television violence based on protecting children, then they will need to make specific findings of fact. Legislators must prove causation between violent broadcast and violent behavior, that violent programming causes desensitization to violence, or that violent program leads to a degradation of morality.

B. The Compelling Interest in Preserving Parental Liberty over the Upbringing of Children

Preserving parental authority over the upbringing of children may be a second compelling justification for "safe harbor" regulation of television violence. In the landmark cases of *Meyer v. Nebraska*[156] and *Pierce v. Society of Sisters*,[157] the Supreme Court held that the right of dominion over the household and the upbringing of one's own children is a fundamental liberty in the United States based on the Due Process clause of the Fourteenth Amendment.[158]

Consistently, the Court has been willing to balance this liberty with other fundamental rights to maintain parental authority. For example, in *Hodgson v. Minnesota*,[159] the Supreme Court affirmed a waiting period before a minor could exercise her right to an abortion in the interest of allowing parental guidance and discussion of the implications of the abortion.[160] This demonstrates that the Court is willing to balance fundamental rights, such as the right to obtain an abortion, against the liberty of parents.

The rationales for protecting this liberty via the regulation of broadcast media are based on the same reasons that the broadcast media is treated differently than other forms of media, i.e., the ease of exposure, the inadequacy of content warnings, and the ex-

155. *Id.*

156. 262 U.S. 390 (1923).

157. 268 U.S. 510 (1925).

158. *See Pierce*, 268 U.S. at 534–35 (holding that parents have a liberty interest in choosing how their children are educated); *Meyer*, 262 U.S. at 399 (establishing the fundamental right to create a home and bring up children).

159. 497 U.S. 417, 448–49 (1990).

160. *See id.* at 449 ("The 48-hour delay [after parental notification of a minor's intention to obtain an abortion] imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy.").

tremely detrimental nature of the initial exposure.[161] In cases such as *Ginsberg v. New York*, the Court has recognized that indecent materials pose a threat to a parent's liberty in controlling how a child is raised because indecent materials affect psychological and emotional development.[162] In *Ginsberg*, the Court upheld a restriction against selling indecent magazines to minors based in part on the notion that it would violate parents' liberty in choosing how their children are raised.[163]

With the ease of exposure, the inadequacy of content warnings, and extremely detrimental nature of the initial exposure to the broadcast media, the Court has been willing to balance other fundamental rights with the compelling interest in preserving parental authority. As discussed previously, in *Pacifica*, when a parent heard a twelve-minute filthy-word broadcast while driving with his child in the middle of the afternoon, the Court acknowledged that the initial impact on a child hearing these words made the difference, not reiterations after the damage had been done.[164] In cases of indecency, the compelling governmental and societal interest is substantial because exposure to indecent materials may not allow parents to retain the liberty to raise their children as they see fit.

In regards to regulation of television violence to certain hours during the day, the liberty of parents to raise their children without external interference may serve as a compelling justification for such regulation. As with all forms of broadcast, the power to "enlarge a child's vocabulary in an instant" and to have substantial effects on moral, psychological, emotional, religious, social, and sexual development cannot be understated.[165] However, the decision of the Court as to whether television violence is actually interfering with the fundamental liberty of parents in the upbringing of children will turn on the issues discussed in the previous subsection regarding the correlation between violent broadcasts and violent behavior, the desensitization to violence that may be caused by these broadcasts, and the degradation in morality that

161. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (stating the rationales for a lower degree of scrutiny in cases regarding the regulation of broadcast speech); *see also* Reno v. ACLU, 521 U.S. 844, 867 (1997) (applying the *Pacifica* analysis).

162. 390 U.S. 629, 640–42 (1968) (stating concerns about the effects of indecent material).

163. *Id.* at 639 (holding that the liberty of parents in choosing the upbringing of children justifies limiting the availability of sexually explicit materials to minors).

164. *See Pacifica*, 438 U.S. at 749 (demonstrating the Court's concern about the effects that certain broadcasts may have on children).

165. *See id.* (examining the effects of exposure to indecent materials, including the harm of first exposure).

exposure to violence may yield.[166] Without an answer to these initial questions, it is impossible to determine whether the Court will find a compelling justification to allow the regulation of television violence based on preserving parental authority.[167]

C. The Compelling Interest of Protecting Privacy in the Home

A third justification for limitations placed on the broadcast media may be based on the liberty of an individual to be left alone in his or her own home. In broadcasting cases, precedent affirms that the liberty of an individual to be left alone provides a compelling government interest that may allow for the regulation of speech.[168] As held in *Pacifica*, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[169] The Court's treatment of regulating indecency on broadcast television is similar to the tort of nuisance, because when indecent material is broadcast, it encroaches on individual property rights. In indecency cases, precedent confirms that a balance is struck within broadcast media between the "safe harbor" hours in which indecent material may be aired and the daytime hours when a homeowner and his or her children should be protected.[170]

Because the available precedent examines only indecency, it is unclear whether the liberty of the individual to be left alone at home will prove to be applicable to the regulation of violence on broadcast television. Again, much will turn on the Court's findings of fact regarding the existence and severity of the problem created by television violence. Without understanding the problems created by television violence, it is impossible to say whether the Court will treat indecency and violence comparably. Thus, drafters of any

166. *See* discussion *supra* Part IV.A.

167. Even if a correlation between violent television and violent behavior is found, the Court may still invalidate the regulation of violence on broadcast television on other grounds, such as the availability of less restrictive means to solve the problem and the inability to narrowly define "violence" for purposes of regulation. *See infra* Part V.

168. *Pacifica*, 438 U.S. at 749–50 (evaluating the right of the individual to be left alone in his or her own home); *see also* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736–38 (1970) (discussing the individual's right to privacy in the home).

169. *See Pacifica*, 438 U.S. at 748 (examining the right to privacy in one's own home from the encroachment of indecent material).

170. *See* Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (holding that a reduction of "safe harbor" hours from 10:00 P.M. until 6:00 A.M. to 12:00 midnight until 6:00 A.M. for private broadcasters is unconstitutional).

regulation of television violence must make specific finding of fact that television violence is offensive and/or unwanted by a substantial number of Americans.

V. CONSTITUTIONAL OBSTACLES TO THE "SAFE HARBOR" REGULATION OF VIOLENCE

Tailoring a "safe harbor" regulation of television violence that is not overly broad or vague will be nearly impossible. Although it is arguable that no less restrictive means for regulating television violence exist, defining harmful violence for purposes of regulation will be extremely difficult.

A. The Availability of Less Restrictive Alternatives to the Regulation of Television Violence to "Safe Harbor" Hours

A major issue that arises in assessing whether the First Amendment allows depictions of violence on broadcast channels to be regulated to certain hours of the day is the availability of less restrictive means of regulating television violence. The government can defend a regulation of speech against someone asserting First Amendment rights if it can show that a compelling interest exists, and that the regulation is the only viable means of achieving that interest. For the state to pass legislation to regulate the broadcasting of television violence, it must show that no alternative means of achieving the same ends exist.[171]

In the debate over the regulation of television violence, the potential less restrictive means that are most often cited are the V-chip,[172] digital cable locks,[173] and voluntary self-regulation.[174] To validate the regulation of television violence to certain hours of the day, the government will have to prove that none of these options,

171. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 881 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

172. *See generally* Ferenchak, *supra* note 18 (describing the V-chip and how it functions).

173. *See Broadcasters Get Word Out How to Block Racy Shows*, USA TODAY, June 3, 2005, at 2B (discussing technological means for parents to block unwanted programming).

174. *See* Campbell, *supra* note 45, at 753–55 (1999); Corn-Revere, *supra* note 12, at 190–94.

nor any other option, can effectively achieve a compelling state interest to regulate violent broadcasts.

In terms of the V-chip, The Telecommunications Act of 1996[175] includes a requirement that signal-blocking technology, the so called "V-chip," be included in all new television sets.[176] It might appear that V-chip technology provides a less restrictive alternative to "safe harbor" regulation. This assumes, however, that the V-chip can operate effectively to regulate television violence.[177] It also assumes that there is a V-chip in every television set.[178]

In addition to the V-Chip, individuals with digital cable have the option via an on-screen menu and their remote control to block channels or programs based on television ratings.[179] Similar to the V-chip, the ability of digital cable locks to block unwanted depictions of violence depends on how many homes are actually equipped with this technology and whether this technology can be used effectively to regulate television violence.

The Supreme Court's response to V-chip and other signal blocking technologies is unclear. In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court invalidated § 505 of the Telecommunications Act of 1996 because a less restrictive provision of the Act, § 504, allowed the indecent transmissions at issue to be fully scrambled at the request of a viewer.[180] This suggests that the Court will be willing to entertain the idea that the V-chip and digital cable locks are viable alternatives to the regulation of television violence, but if this issue becomes determinative, the Court will be forced to rely on the trial courts, as finders of fact, to establish the viability of the V-chip and other signal blocking technologies.

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175. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C., 15 U.S.C., 18 U.S.C.).

176. *Id.*, § 551(b)(1), 110 Stat. at 139 (codified as amended at 47 U.S.C. § 303(w)–(x) (2000)).

177. *See generally* THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET (Monroe E. Price ed., 1998) (providing an in-depth discussion of the merits and shortcomings of the V-chip); Saunders, *supra* note 15, at 814 (suggesting that the V-chip is having only "limited success").

178. *See* Scott, *supra* note 12, at 757 ("[T]he V-Chip will not be completely effective unless it is installed in every television accessible to children."); Jennifer C. Kerr, *Government Takes Closer Look at Violence on Television*, PITTSBURGH POST-GAZETTE, July 29, 2004, at A5, *available at* 2004 WLNR 4984575 (Westlaw) ("A 2001 study by the Kaiser Family Foundation found that 40 percent of American families own a television set with a V-chip, but only 17 percent of those families use the device.").

179. *An Indecent Proposal; Content Regulation*, ECONOMIST, July 23, 2005, at 14, 14 ("Digital cable set-top boxes are particularly precise, and allow parents to block individual programmes at the touch of a button on their remote control.").

180. 529 U.S. 803, 807 (2000). This case is the most recent example of the Supreme Court exploring the constitutional implications of "safe harbor" regulation of television.

Voluntary self-regulation is probably not a feasible less restrictive alternative because the entertainment industry has claimed to have made numerous attempts to reform its programming habits.[181] If legislation is passed, it is unlikely that a court will view an already failing system of voluntary self-regulation as a viable alternative to "safe harbor" regulation of television violence.[182]

B. Overbreadth and Vagueness

To pass constitutional muster, a regulation of speech must not be overly broad or vague. The doctrine of overbreadth demands that a restriction of speech may not regulate speech beyond the speech that can be legitimately restricted.[183] A regulation of speech may not sweep unnecessarily broadly and invade areas of protected speech.[184] Although vagueness is similar to overbreadth, it differs in that vagueness simply relates to a restriction of speech being unclear in its scope.[185] A regulation of speech will be considered unconstitutionally vague if individuals of common intelligence must guess at its meaning.[186] If a restriction of speech that

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181. Corn-Revere, *supra* note 12, at 193–94 (discussing a variety of forms of self-regulation that cable companies have attempted).

182. This once again assumes that the Court will find a compelling interest for the regulation of television violence.

183. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) (stating that overbreadth occurs when a restriction of speech entails a substantial amount of protected speech); *see also* Ballard, *supra* note 12, at 217 (discussing overbreadth and the regulation of television violence).

184. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding that legislation must be "reasonably restricted to the evil with which it is said to deal"); *see also* Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987) (invalidating an airport authority rule as substantially overbroad because no justification exists for an absolute ban of "all 'First Amendment activities'" in the central terminal of Los Angeles International Airport); City of Houston v. Hill, 482 U.S. 451, 461 (1987) (invalidating a Houston ordinance as substantially overbroad for making it unlawful "to . . . in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty").

185. Smith v. Goguen, 415 U.S. 566, 573, 578 (1974) (finding a Massachusetts statute unconstitutionally vague for making it a crime to "treat[] contemptuously the flag of the United States" due to the "absence of any ascertainable standard" for defining "treat[] contemptuously").

186. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914); Collins v. Kentucky, 234 U.S. 634, 638 (1914)) (stating the standard for determining if a statute or regulation is unconstitutionally vague); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly.").

otherwise would be legitimate suffers from either overbreadth or vagueness, it will be invalidated on First Amendment grounds.[187]

In regards to the regulation of television violence, structuring a restriction on speech that does not suffer from overbreadth or vagueness will likely be impossible. Judge Patricia Wald of the D.C. Circuit examines the problem: "Do we really want our children protected from true depictions of our country's violent history: lynchings, assassinations of Presidents, wars fought in the name of justice and freedom, the Rodney King tapes?"[188] In essence, defining violence that merits regulation is a daunting task.[189]

The Supreme Court has already noted the difficulty of crafting legislation that is narrowly tailored to regulate harmful depictions of violence. Returning to *Winters v. New York*,[190] the invalidated New York statute attempted to prohibit the production, distribution, and sale of publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[191] Although the Court recognized the importance of the state's power to minimize the incentives for crime and stimulation of juvenile delinquency, the Court held that the statute was invalid because it was too vague to be meaningfully interpreted, and included prohibitions against constitutionally protected speech.[192] The Court noted that invalidation of this statute did not mean that the state could not punish objectionable publications.[193] However, *Winters* highlights how difficult it will be to define harmful violence without impinging on constitutionally protected speech.[194]

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187. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (invalidating a New Orleans ordinance on grounds of overbreadth and vagueness for making it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in actual performance of his duty"); Gooding v. Wilson, 405 U.S. 518, 519 (1972) (invalidating a Georgia statue on grounds of overbreadth and vagueness for making it a misdemeanor to "use to or of another . . . opprobrious words or abusive language tending to cause a breach of the peace").

188. Wald, *supra* note 12, at 417 (discussing the implications of shielding children from violent content in television programming).

189. *See* Corn-Revere, *supra* note 32, at 23–24, 28–30 (discussing that no well-established definition of "violence" or "violent programming" exists for purposes of regulating television violence); Ross, *supra* note 30, at 456–57 (discussing the problems of defining "violence" for purposes of regulation).

190. 333 U.S. 507 (1948).

191. *Id.* at 508.

192. *Id.* at 510–20.

193. *Id.* at 520.

194. The difficulty is that the more narrowly "violence" is defined, the less effective any regulation will become. As Judge Patricia Wald noted:

To regulate television violence, the state must give a defined standard for determining what type of violence will be restricted to certain hours. A regulation cannot give officials broad discretion in determining what speech is objectionable.[195] If arbitrary and discriminatory enforcement is to be avoided, regulations of speech must provide explicit standards for those who apply them.[196] Under these conditions, any definition of violence that the state might adopt in attempting to regulate television violence will almost certainly be constitutionally invalid from overbreadth or vagueness.[197]

The only regulation that is likely to pass constitutional muster is a regulation that provides a specific work or list of works that can just be shown during "safe harbor" hours. Any other regulation will almost certainly be too overbroad or vague to be constitutional because harmful violence is too difficult to define.

Canada, our neighbor to the North, has just adopted a violence code, written by the television broadcasters but formally approved by the Canadian equivalent of our FCC, and intended to be used in licensing decisions. During hours exclusive of 9:00 p.m. to 6:00 a.m. the broadcasters will not show any program that "sanctions, promotes, or glamorizes" violence, or contains "gratuitous violence in any form," and they are classifying programs according to their violence content. But the only casualty in its early days has been *Teenage Mutant Ninja Turtles*, which some said would have been dropped anyway because of low ratings.

Wald, *supra* note 12, at 414.

195. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (holding that a regulation of speech may not grant overly broad discretion to a government official); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (holding that a regulation unconstitutionally inhibits speech if discretion is left to the uncontrolled will of an official); Saia v. New York, 334 U.S. 558, 562 (1948) ("When a city allows an official to ban [speech] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas.").

196. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

197. *Cf.* Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688–90 (8th Cir. 1992) (invalidating for overbreadth and vagueness a Missouri state statute prohibiting the rental or sale to minors of videos depicting violence and requiring dealers to display or maintain such videos in separate areas within their stores); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1189–91 (W.D. Wash. 2004) (holding a statue unconstitutionally vague for regulating "video or computer games that contain realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer").

VI. CONCLUSION

The government will have to demonstrate compelling interests[198] for the Court to hold regulation of television violence to "safe harbor" hours constitutional. Even if the government can demonstrate these compelling interests, it is unlikely that any regulation will pass constitutional muster because the regulation will almost certainly be subject to strict scrutiny.[199] Particularly damaging to the government's regulation of television violence is the V-chip and other signal blocking technologies that are being made available to greater and greater numbers of individuals.[200] Unlike regulating indecent materials, the "safe harbor" regulation of television violence would spark a fundamental change in American society because violence is such an integral part of news and entertainment in the United States.[201] Defining violence so as to justify regulation is extremely difficult, and any regulation is likely to be fatally flawed from overbreadth and vagueness.[202]

198. *See supra* Part IV.

199. *See* Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 531–32 (Tenn. 1993) (stating that courts have invalidated all attempts to regulate material based solely on violent content).

200. *See supra* Part V.A.

201. *See supra* text accompanying notes 135–137.

202. *See supra* Part V.B.