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Draft Op-Ed on Regulations of Television Violence  
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This week, Congress turns once again to the question of how to respond to the perceived threat of television violence to the development and behavior of children. Under our Constitution, the proper response is plain, even though it is not simple: give parents more power to control what their children see. But Congress's attention at this time seems instead to signal an intent to involve the Federal Government more deeply in what we are allowed to see on our television sets. The FCC, for instance, has suggested that Congress "time channel" certain shows to late night time slots or implement a government-run ratings system. Such attempts to restrict free speech would be grave mistakes – and ones that the courts are unlikely to tolerate.

It's worth remembering that depictions of violence have long played an important and respected role in all media of expression. That a television program includes violent content does not – and cannot – automatically trump its positive value to society, or the inestimable value of resisting government censorship. The Old Testament and the Koran are often violent; so are *Hamlet* and *The Call of the Wild*; and so are many of our most beloved and acclaimed television shows, from "Mission Impossible" to "Law and Order" to broadcast and cable news networks' coverage of terrorist attacks and the Iraq war. Depictions of violence and its consequences can contribute powerfully to a show's portrayal of our often violent world and its equally violent history, and the use of violence – however disquieting – adds meaning that is nearly impossible to achieve otherwise.

Even the staunchest critics of television violence must concede that only certain types of depicted violence cause real concern. But letting the government decide *which* depictions threaten children's welfare and should be so labeled or otherwise restricted is both unconstitutional and unwise. For one thing, any definition of "impermissibly" or "gratuitously" violent television programming will be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" – a violation of "the first essential of due process of law," as the Supreme Court held more than eighty years ago. What possible criteria could determine whether the strenuous physical interrogation of a suspect on "24" is "patently offensive," or whether a gruesome depiction of the storming of Normandy is "excessive," to test just two proposed definitions?

Vague laws on any subject are unconstitutional, but such regulations are particularly troubling when directed at speech. The inevitable consequence of such vagueness is that valuable expression will be "chilled" as individuals and institutions try to avoid any speech that puts them at risk of being penalized for violating the law – even if that speech is not, in fact, illegal. And, on the other side of the enforcement coin, vague laws give regulators and prosecutors so much leeway that they can easily restrict speech "to pursue their own personal predilections" or to bow to political pressure rather than to implement faithfully the intent of Congress. The U.S. Court of Appeals for the Second Circuit recently raised just these concerns while striking down the FCC's attempts to fine broadcasters for "fleeting expletives" uttered on their shows.

The dangers of boundless discretion are exacerbated by the fact that regulation of televised violence invariably responds less to the violent content itself than to what

particular depictions *say* about the use of violence or what *attitudes toward violence* these depictions convey. But the First Amendment clearly prohibits government regulation based on the viewpoint expressed by speech. Congress cannot, for instance, restrict only speech that criticizes the government, while permitting pro-government speech. Similarly, Congress has no power to target speech that expresses a disapproved message about or attitude toward violence (such as a show that admiringly portrays a mobster's violent rise through the ranks) while leaving untouched "approved" speech on the same subject (such as a show condemning a drug dealer's violent retaliations).

Lawmakers may be tempted to relax these standards when the speech is restricted with the welfare of children in mind, but doing so would turn the First Amendment on its head. If anything, the degree to which children are especially impressionable cuts *against* letting the central government control what our children see or learn. Why else fight so hard over the teaching of evolution or the inclusion of "one Nation under God" in the pledge schoolchildren recite? And, even if the purpose of regulating television violence would be to protect young children, any such regulation would necessarily deprive adults and older children of unhindered access to uncensored speech. Time channeling, for instance, would prevent *everybody* from watching televised violence except during specified times – even in the large majority of television households without any young children. The First Amendment forbids limiting adults to speech that would be suitable for youngsters.

Finally, even assuming that the proponents of government control are right about how television violence affects young children, regulations addressing those effects would be too ineffectual to pass constitutional muster. The Supreme Court has held that

a regulation of speech must “advance[] its asserted interests in [a] direct and material way.” But the proponents’ asserted interests are too at odds with one another to meet this requirement. The stated interest in protecting children from frightening material, for example, would suggest that any depiction of violence should be cartoonish and sanitized; but this would undercut the asserted interests in making children understand the consequences of violence and in avoiding material that the proponents of control fear children might imitate. And even the strongest of those proponents are likely to tolerate violence on such television programming as news and sports, even though these exceptions seem just as likely – or more likely, given their real-world nature – to cause the same effects as would the depictions of violence that some seek to prohibit.

In raising these First Amendment concerns, I do not mean to deny the legitimate concerns of parents about what their children see on television. As a father and a grandfather, I share those concerns. But it is also in my role as a parent and grandparent – even more than as a constitutional scholar -- that I address them here. As parents, we should resist, not embrace, moves by government to control the upbringing of our children. We should insist on measures intended solely to facilitate *parental* control. The Supreme Court has repeatedly recognized that such measures are more narrowly tailored and less restrictive of speech, and case after case has obligated Congress to resort to such measures even when centralized government regulation would arguably have been more effective.

Fortunately, parents today have more options than ever before to control what their children see on television, from the V-Chip to time-shifting technologies to voluntary ratings systems. To the extent that Congress worries about the effectiveness of

these alternatives, the right response is to improve their distribution through publicity campaigns or government aid, not to bypass them on the easy path to censorship.

As with most policy questions that concern our children, the issue of whether and how to respond to television violence is difficult. It may seem easiest simply to delegate these decisions to the government. But the First Amendment demands that we as parents take responsibility for controlling what our children see or hear. Only by undertaking that duty can we protect our children – not just from inappropriate speech, but from a system of government that treads too readily on their constitutional rights.