COMMUNICATIONS

Cashing Out Children's Television

Instead of providing children's television, should broadcasters simply be required to pay for it?

BY DOUGLAS LICHTMAN

Thirty years ago, Congress enacted aspirational legislation requiring that television broadcasters serve the educational and instructional needs of children. The statute articulated few details, vaguely instructing the Federal Communications Commission to consider, during license renewal, the extent to which a broadcaster has "served the educational and informational needs of children" through either its general programming or "programming specifically designed to serve such needs."

One detail, however, stands out. The statute empowered the FCC to look beyond a licensee's direct offerings and consider not only "any special non-broadcast efforts by the licensee which enhance the educational and informational value" of their own programming, but also "any special efforts by the licensee to produce or support programming broadcast *by another station* … which is specifically designed to serve the educational and informational needs of children."

This portion of the statute has lain dormant for 30 years, in large part because the FCC early on promulgated rules that, as a practical matter, eliminated any incentive for broadcasters to experiment with non-broadcast initiatives. Specifically, in 1996 the FCC adopted a "processing guideline" under which a broadcaster's compliance would be given rubber-stamp, staff-level approval so long as the broadcaster had, during the prior licensing period, aired an average of three hours of programming each week where that programming was regularly scheduled, lasted at least 30 minutes in length, was broadcast between 7 a.m. and 10 p.m., and was identified by the broadcaster as having "as a significant purpose" the goal of educating and informing children. Renewal applications that fell short of those requirements would be considered by the full commission in a hearing where the broadcaster would, in the FCC's own ironic words, "have the full opportunity to demonstrate compliance" in other ways. But the risk associated with substantive review had its predictable effect, and thus the availability of a rubber-stamp approach in practice meant that nearly every broadcaster chose to meet the objective standards.

However, the FCC has recently changed course. In July 2018, a then-pending Notice of Proposed Rulemaking called for comments on a possible "framework that will make the use of special sponsorship efforts and special non-broadcast efforts a more viable option for broadcasters in fulfilling their children's programming obligations." The FCC repeated that call one year later in a Further Notice of Rulemaking, officially extending the pending proceeding in an effort "to create a more robust record and to solicit industry proposals for a detailed framework for evaluating special sponsorship efforts."

I write here to offer such a proposal. Specifically, I propose that the FCC eliminate the existing and well-worn presumption that broadcasting three hours of regularly scheduled, self-described "educational programming" is sufficient to meet federal standards. I suggest replacing it with a presumption that a broadcaster's obligation has been met if the broadcaster donates, in cash, to a qualifying educational nonprofit the aggregate economic value of three weekly hours of television airtime.

This would address a glaring inconsistency that has undermined the efficacy of the FCC's approach since its inception: The FCC intervened in this market on the theory that unfettered market forces will not by themselves create an adequate incentive for broadcasters to provide worthwhile children's programming. But the FCC then structured its intervention so as to rely on

DOUGLAS LICHTMAN is professor of law at the University of California, Los Angeles School of Law. This essay is adapted from an article bearing the same name that will appear in volume 27 of the *UCLA Entertainment Law Review*.

SKYNESHER/GETTY IMAGES

market forces as the primary check on program quality. My proposal tolerates no such incongruity. Instead, it strips unmotivated broadcasters of creative control, cashes them out, and moves the resulting financial resources to motivated nonprofits like the Sesame Street Workshop and the Corporation for Public Broadcasting. The burden placed on broadcasters under my proposal would be the same as it is today; either way, the real cost to them is the lost opportunity to earn revenue on three hours of profitable programming. But the value created could be substantially more. Broadcasters, in short, would no longer be told to provide educational television; they would simply be told to pay for it.

USING A PRESUMPTION

My use of a presumption is perhaps the first detail worth explaining. As noted above, up until now, federal law in theory has allowed broadcasters to meet their obligations in cash rather than in kind. But broadcasters have never been motivated to do this because there has been no rubber-stamp process by which to prove that a given set of financial commitments was sufficient to meet regulatory requirements. A broadcaster that aired its own educational programming, by contrast, could trigger rubber-stamp review simply by airing the right number of hours of content, at the right times, in the right format, even if the programming itself was of embarrassingly low quality.

Indeed, over the years the FCC has been explicit that rubber-stamp review relies on the "good faith judgments of broadcasters" and that the commission will evaluate substance "only as a last resort." But a broadcaster that opted instead to deploy financial resources was not eligible for rubber-stamp review and thus had no choice but to take the risk of justifying its expenditures before the full commission. I propose to solve this problem by replacing the existing, objective, rubber-stamp path based on direct broadcast efforts with a new, comparably objective rubber-stamp path based on financial contributions. Broadcasters would opt into the new program for the very same reasons they have historically opted to meet the three-hour guideline: compliance would be the safest path toward renewal.

This ties to my bigger thematic point, the idea of recasting each broadcaster's "public trustee" obligation as an obligation to *pay for* educational fare rather than to *provide it.* This is intentional. Over the long run, payments like these will help make plain exactly how much money is being spent on educational television, and that information in turn will allow for a more meaningful conversation about whether that number is inappropriately low or inappropriately high, and whether those dollars might be better spent on textbooks, teacher salaries, or other educational inputs.

It might well turn out, for example, that upon seeing exactly how much money is flowing in this part of the educational ecosystem, voters will decide that this implicit tax should be expanded to apply to cable providers and Netflix. It might turn out that voters will decide that these monies should instead be folded into local school budgets. Voters might even decide that this money is well spent as-is because, once created, a high-quality television program can be viewed again and again by a large number of geographically dispersed children, thereby generating tremendous value per dollar invested. Regardless, by articulating the requirement as an obligation to pay, the FCC can finally make explicit a set of numbers that have long been hidden from the public's view.

Reframing the public trustee obligation as an obligation to pay, rather than an obligation to provide, has a more immediate consequence as well: it opens the door to possible concentration of resources. In other settings, the FCC justifiably demands that broadcasters each air some specific programming of interest. During election years, for example, the commission has historically pressured ABC, NBC, CBS, and FOX to each redundantly and simultaneously air the presidential debates. The idea is that, by forcing every broadcaster to simultaneously air these events, the FCC eliminates what might otherwise be attractive competing options and thus increases viewership for the debates themselves. Similarly, for many years, when a broadcaster attacked "the honesty, character, integrity or like personal qualities of an identified person or group," that broadcaster was required to offer the attacked person or group "a reasonable opportunity to respond over the licensee's facilities." The idea this time was that the most likely way to reach the viewers of the original content was to air a response on the same channel.

No plausible story along these lines has even been invoked to explain children's television, however. The FCC has never forced broadcasters to air their children's programs simultaneously, for example, although it might have been an interesting experiment to declare (say) Tuesday nights to be "education night" and simply not allow broadcasters to air dramas, comedies, or indeed anything other than educational television on that one evening each week. Similarly, the FCC never took the position that viewers need to watch educational programs on particular channels. Quite the opposite, the commission has long facilitated the hunt for appropriate programs across the dial, specifically by requiring broadcasters to label their educational programs on screen, identify their educational programs to firms that publish television guides, and list their educational programs on various public documents. Besides, if each broadcaster is offering only three hours of educational programming each week, and if each specific hour will plausibly target one age range but not another, no single channel can plausibly be all things to all viewers anyway. Families that rely on broadcast for educational fare have no choice but to consider multiple broadcasters' offerings.

Note that competition does not explain the FCC's long-standing assumption that every broadcaster must participate. Remember, advertisers have little incentive to fund even first-rate educational programs because age-appropriate educational programming by definition will never attract large crowds, let alone crowds of economic significance. Competition thus cannot be harnessed as a way to encourage quality. Make a better program and you still will end up with almost no advertising revenue. Competition only works when there is some payoff over which to compete.

How does all this relate to the concentration of resources? Up until now, even though there was never a policy justification for it, every broadcaster was nevertheless pressured to fund and air its own programs. That meant that production budgets were spread thin. But more importantly it meant that most of the money invested in children's television was actually spent to functionally purchase airtime. Think of it this way: the real cost felt by broadcasters as they comply with the existing rules is likely the opportunity cost associated with airing children's television rather than more profitable fare. Thus, by requiring every broadcaster to air its own shows, the existing rules in essence take the pot of money that broadcasters are required to allocate toward educational television and spend most of it on time rather than content. Remove the obligation to directly air educational programs, however, and suddenly spending can be intentionally rebalanced. Some nonprofits might decide that the best approach is indeed to spend most of the money to purchase minutes of airtime. But others might decide to reallocate scarce resources, buying less time and investing correspondingly more in development and production. My proposal opens the door to these possible tradeoffs.

CHANGING THE DECISION-MAKER

My proposed approach offers yet another substantial advantage, and it is frankly the advantage I find most enticing: it would allow broadcasters to hand over key pedagogical and content decisions to parties with the knowledge and commitment to actually make the most of whatever resources society chooses to devote to children's educational television.

The regulatory regime historically has been built on an irreconcilable inconsistency: on the one hand, the FCC recognizes that broadcasters lack a financial incentive to invest in high-quality educational fare and hence must be pressured to offer these programs; on the other hand, the FCC has steadfastly refused to impose on broadcasters any rules about quality, pedagogy, or substance, maintaining that the market will provide proper incentives. The fox, in short, has been forced to guard the educational hen house, but the details have been graciously left to the fox's "good faith" judgments.

The historical evidence is already enough to definitively reject this approach. Broadcasters have been "complying" with the FCC's children's television rules since 1996, yet the industry has not in all that time developed anything remotely resembling a comprehensive plan for creating and evaluating educational programming. Contrast that with the thoughtful approach adopted by the nonprofit Sesame Street Workshop, where content, teaching styles, and format are constantly being studied, evaluated, and changed.

My proposal thus shifts control away from half-hearted broadcasters and toward motivated educators, and it does so without asking the FCC to itself become the Department of Education. This is why I propose that rubber-stamp approval be awarded in any instance where a broadcaster has made the appropriate financial grants rather than proposing that each broadcaster contribute money to some federal fund that would then evaluate and fund proposals. The idea of creating a federal fund would not be crazy. The real Department of Education, for example, from time to time makes grants to support the creation of educational television. And, separately, since 1967 Congress has empowered the Corporation for Public Broadcasting to allocate hundreds of millions of dollars every year to support the production and distribution of programming that "addresses the needs of underserved audiences, especially children and minorities." But my proposal takes seriously the FCC's long-articulated reluctance to intervene too directly in what it describes as a "sensitive First Amendment area." Thus, under my proposal, educational decision-making would remain as decentralized as ever. Instead of picking programs, broadcasters would pick grant recipients, and thus the FCC's rubber-stamp rule could continue to be a purely objective checklist.

HOW MUCH, SPENT HOW?

As to the size of the check that each broadcaster would need to write, much depends on whether the FCC is willing to eliminate the existing rubber-stamp review. If not, no broadcaster will be willing to pay in cash any more than what that specific broadcaster would otherwise have to pay to satisfy the FCC's existing rule. Financial obligations as a result would need to be tailored to each station's unique economics. The key factors would be the costs that the particular station would otherwise incur to produce or purchase qualifying educational content, and the opportunity cost the station suffers when it devotes an hour to low-revenue educational material rather than to its specific, presumably higher-revenue, next-best options.

These numbers would obviously be difficult for the FCC to calculate and errors in the calculations would be exploited by broadcasters. If the commission inadvertently understates costs, the relevant broadcaster will opt for the non-broadcast option. If the FCC inadvertently overstates costs, the broadcaster will instead air its own programs.

I therefore favor removing the existing rubber-stamp pathway entirely, thereby making room for imperfect calculations. A broadcaster's average profitability per hour could be combined with reasonable estimates as to the costs of producing content to create a plausible, but not perfect, estimate. Broadcasters would then typically opt to pay that imperfect measure anyway, because the alternative (offering their own content and having it reviewed on the merits by the full commission) would be significantly more risky. Removing the existing "processing guideline" thus makes it easier for the FCC to implement the non-broadcast approach. And leaving broadcasters with an option to directly air programming in this scenario serves as a safety net in case the default economic analysis is wildly inappropriate for some specific broadcaster.

Another issue that needs to be addressed is whether all the funds transferred under my proposed mechanism would need to be used to support educational television as opposed to supporting other educational efforts. From a public policy perspective, strong arguments can be made in favor of at least considering redirecting some of the money toward textbooks and teachers' salaries. But, on this, I favor the more conservative course. After all, existing federal law references only expenditures that are tightly tied to broadcast, with the relevant statute specifically pointing to expenditures that "support programming broadcast by another station" and expenditures that "enhance the educational and informational value" of a broadcaster's own programming. This leaves room for some non-television efforts, but it does not plausibly authorize a completely freewheeling program of educational investments. I thus opt for an approach that can be implemented right away, without further congressional action. A more aggressive implementation might someday be attractive, but there is no reason to allow the perfect to delay the implementation of the potentially very good.

A harder question is whether monies spent on broadcast should be strictly limited such that every penny from a given broadcaster must ultimately benefit viewers within that broadcaster's geographic area. Historically, a broadcaster's educational programming has, by definition, been made available to that broadcaster's own geographic audience. But, because different programs serve different demographics, the benefits have not necessarily been distributed evenly within that group. A broadcaster that focused on preschool programming benefited the youngest members of its community while ignoring teens, whereas a broadcaster that focused on afterschool specials benefited local teens while ignoring toddlers.

Emulating these outcomes would be the safest approach for a financial program, although there is no slam-dunk policy rationale favoring it. Indeed, if the goal is to maximize educational impact, a better approach would be to focus resources where they are needed most, moving money away from affluent communities where broadcast is already comparatively unimportant and toward communities that lag in terms of their access to cable, satellite, high-speed internet, and the like.

That said, the more my proposal mirrors existing patterns and practices, the more likely it is to be deemed palatable by the FCC and by relevant stakeholders. For now, I therefore favor a rule that directs monies back into the broadcaster's own community, recognizing that nonprofits will still have flexibility to focus on serving the subsets of each community that need the programs most, and that programs produced for one community can easily be shared with other communities and also made available over the internet, on DVD, and in public libraries.

Relatedly, the rules implementing my proposed approach should include provisions that forbid advertising during timeslots that are purchased using these monies. Broadcasters today have an incentive to account for advertising revenue when deciding what types of educational programs to air. For instance, because there is no obligation to serve all youngsters in the community, a broadcaster can favor programs that at the margin are more attractive to advertisers, even if those programs are not the educational programs that the community most needs. This is especially problematic in light of the evidence suggesting that low-income families in particular rely on educational broadcast content. Low-income households will often be unattractive advertising targets, which means that broadcasters under the existing rules have an incentive to ignore the very families that need the broadcasts most.

Banning advertisements during children's television would have solved this problem years ago, but the FCC never took that step, presumably for fear that the lost revenue would reduce program quality. Here, because the financial approach promises greater funding and because programming decisions would be made by more motivated providers, a ban on advertising can work. Broadcasters should not be allowed to undermine the educational purpose of these rules by offering cheaper airtime to nonprofits that are willing to produce advertiser-friendly content or target advertiser-friendly constituencies.

Finally, the FCC has tentatively concluded that broadcasters must air at least some educational programming even if they also participate generously in non-broadcast efforts. The commission reached this conclusion because federal law today states that the FCC may consider non-broadcast efforts "in addition to" the licensee's own programming. But requiring that the FCC consider a broadcaster's own programming is not the same as requiring that there actually be such programming. A basketball coach might consider a recruit's shooting range, defensive intuition, and experience, and yet, consistent with that, in the end pick a player who has no experience but compensates with a particularly great jump shot. Here, too, consideration does not seem to imply necessity. And, if I am right that special sponsorship efforts offer a wide range of advantages over the traditional broadcast approach, there is no reason to squander resources by forcing broadcasters to keep one foot in the regulatory grave.

CONCLUSION

My argument here is a specific application of what I submit is a broader principle. Many regulations are perceived by the relevant regulated party as tantamount to a tax and hence many regulations could be reformulated as explicit taxes without increasing the regulated party's burden. For me, that raises the question of what other regulations similarly should be reframed in cash rather than in kind, allowing regulated parties to fund socially desirable activity rather than themselves directly participating in it.

Educational television obligations might be a particularly easy example through which to champion this idea. Congress already empowered the FCC to make a change like this. The move to cash is particularly attractive here given how much easier it is to define an amount of money as opposed to a quality of programming. And the entire experiment presents low risk given how little the regulations have achieved to date.

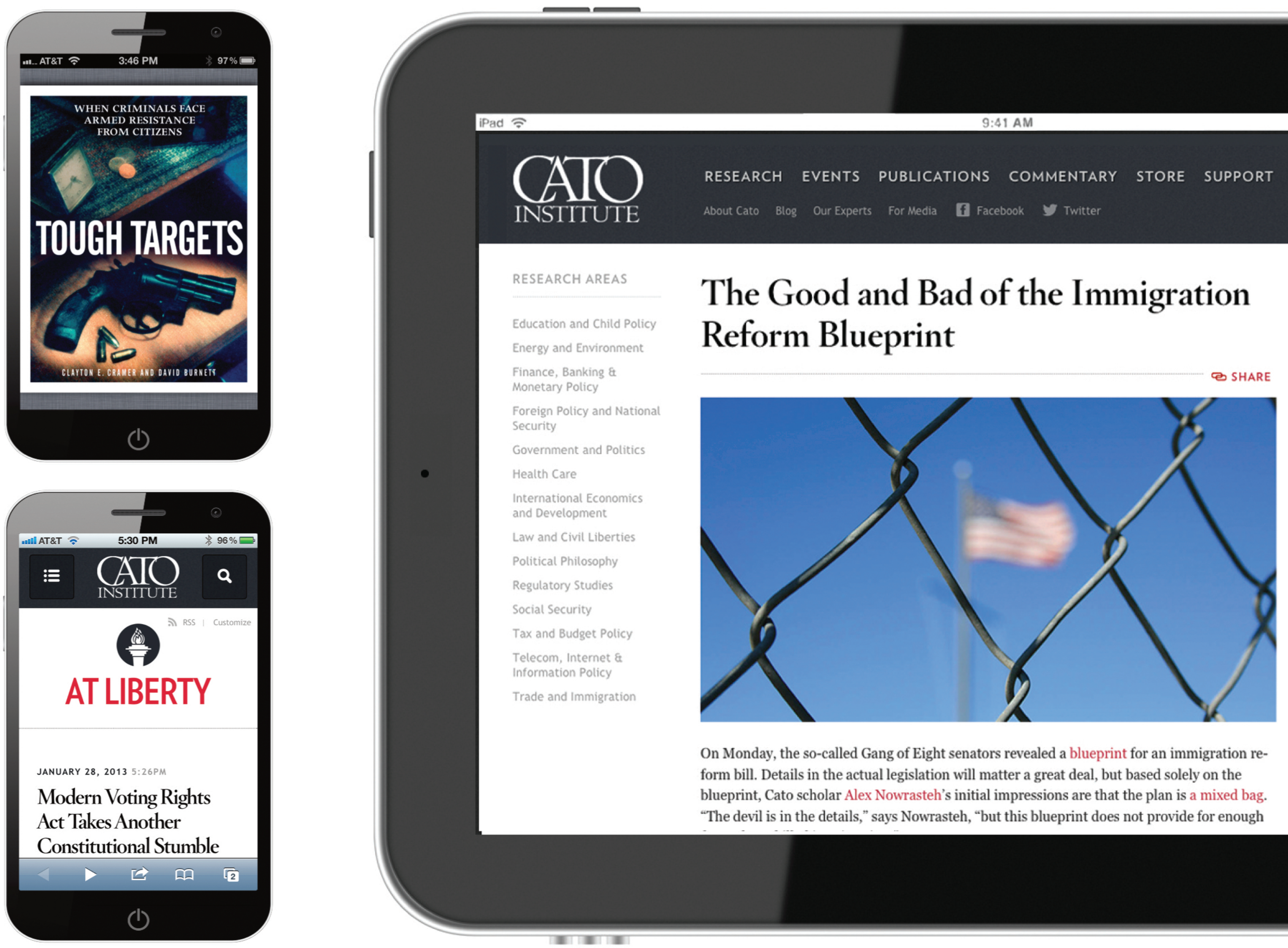
But the bigger question warrants further attention. Where a regulated party is today being asked to provide a service directly despite market incentives to the contrary, is it at least worth considering whether, instead, the law ought to cash that party out and use the resulting monies to purchase the service from a more motivated provider? R

READINGS

- "It's Time to Reexamine the FCC's Kid Vid Requirements," by Commissioner Michael O'Rielly. Federal Comminications Commission blog, January 26, 2018.
- Notice of Proposed Rulemaking: In the Matter of Children's Television Programming Rules, Modernization of Media Regulation Initiative, 33 FCC Rcd 7041. Federal Communications Commission, July 13, 2018.
- Report and Order and Further Notice of Proposed Rulemaking: In the Matter of Children's Television Programming Rules, Modernization of Media Regulation Initiative, 2019 FCC Lexis 1878. Federal Communications Commission, July 12, 2019.

Cato at your Fingertips

The Cato Institute's acclaimed research on current and emerging public policy issues–and the innovative insights of its *Cato@Liberty* blog–now have a new home: Cato's newly designed, mobile-friendly website. With over 2.2 million downloads annually of its respected Policy Analysis reports, White Papers, journals, and more–and it's all free–the quality of Cato's work is now only matched by its immediate accessibility.



Visit today at Cato.org and at Cato.org/blog.

CATO INSTITUTE