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Broadcast in the Past?: The Dangers of Deregulating Children’s Broadcast Television

I. Introduction

In January 2019, economists Phillip B. Devine and Melissa S. Kearney found that, in its fifty-year tenure, PBS’s Sesame Street markedly improved children’s school performance.¹ Remarkably, those with access to the children’s television show experienced improved educational and employment outcomes over those without access.² Sesame Street’s creation and success were a direct result of the 1960s push for better children’s television. Only with the help of outspoken activists, like Peggy Charron, who championed children’s rights to educational television programming, would the Federal Communications Commission (FCC) have taken the steps necessary to ensure children received mentally enriching content and were protected from greedy toy companies employing unfair advertising practices.

In an age of new technology, unsettled in its benefits and risks, grassroots efforts combined with the power of the FCC brought about change that would positively affect future generations. Yet, in 2019, as technology and media further emerged as foundations of the future, the FCC misstepped. The FCC concluded the emergence of this new technology was but a sign that the death of broadcast was nigh and accordingly lowered broadcasters’ standard of accountability.

This article will begin by providing an overview of the Federal Communications Commission’s role in regulating broadcast television. In Section II, this article will explain in depth how the FCC has placed limitations on the type of content and circumstances under which

¹ Melissa S. Kearney & Phillip B. Levine, *Early Childhood Education by Television: Lessons from Sesame Street*, 11 AM. ECON. J.: APPLIED ECON. 318 (Jan. 2019), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/app.20170300>.

² *Id.*

television stations can broadcast content. This discussion will lead into the Children’s Television Act (CTA) of 1990 and the regulation of children’s television—also known as the KidVid Rules. After providing some background on the creation of the CTA and its effectiveness up to recent times, Section III will dive deeper into the 2019 CTA modifications. Then this article will examine the contents of the 2019 Notice of Proposed Rulemaking, analyzing the changes made in addition to the attached commissioners’ statements. The article will analyze the FCC’s proposed alternatives to broadcast children’s television: public children’s educational television and other sources of children’s educational programming named in the order, including cable television, online sites/programming, and Over the Top (OTT) streaming platforms. Lastly, the article will explain how these proposed options are untenable substitutes for historically effective KidVid Rules.

II. History of the FCC

In 1934, Congress enacted the Communications Act, which “combined and organized federal regulation of telephone, telegraph, and radio communications.”³ The Act also created the FCC to oversee this newly united regulatory scheme.⁴ The Act mandates that the FCC “make available . . . without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio

³ *The Communications Act of 1934*, BUREAU OF JUST. ASSISTANCE U.S. DEP’T OF JUST., <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288#:~:text=The%20Communications%20Act%20of%201934%20combine%20and%20organized%20federal%20regulation,oversee%20and%20regulate%20these%20industries> (last visited Oct. 20, 2022).

⁴ *Id.*

communications service” and base its “broadcast licensing decisions on whether those actions will serve the public interest, convenience, and necessity.”⁵

The FCC’s rule adoption process begins with publishing a Notice of Proposed Rule Making (NPRM).⁶ The notice describes the proposed rule(s) and the public is invited to read and comment on it.⁷ After the public comment deadline, the FCC can either “[a]dopt some or all of the proposed rules,” “[a]dopt a modified version of some or all of the proposed rules,” “[a]sk for public comment on additional issues,” or “[e]nd the rulemaking proceeding without adopting any rules at all.”⁸ The FCC may also initiate proceedings to create new rules and policies when Congress enacts a new law affecting telecommunications.⁹ In addition to rulemaking, the FCC also establishes policy through individual cases.¹⁰ These may “involv[e] license renewals, station sales, and complaints about violations of Commission rules.”¹¹

Five individuals sit at the head of the FCC; the President appoints, and the Senate confirms, five Commissioners for five-year terms, with one Commission Chairperson.¹² At any time, only

⁵ *The Public and Broadcasting*, FED. COMM’N COMM’N, <https://www.fcc.gov/media/radio/public-and-broadcasting#FCC> (last visited Sep. 18, 2022).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Proceedings & Actions*, FED. COMM’N COMM’N, <https://www.fcc.gov/proceedings-actions> (last visited Oct. 20, 2022).

¹⁰ *The Public and Broadcasting*, *supra* note 5.

¹¹ *Id.*

¹² *Id.*; *see also The FCC and You!!*, FED. COMM’N COMM’N, <https://transition.fcc.gov/cgb/kidszone/teachersguide/aboutfcc.pdf> (last visited Oct. 9, 2023).

three of the five Commissioners may be of the same political party, and no Commissioner may have financial interests in any business related to the commission.¹³ Beneath the Commissioners are seven bureaus and eleven offices.¹⁴ They “process applications for licenses, . . . manage nonfederal spectrum, analyze complaints, conduct investigations, develop and implement regulatory programs, and participate in hearings, among other things.”¹⁵

Underlying the FCC’s purpose is a public interest standard.¹⁶ In the early 20th century, radios began to rapidly rise in popularity.¹⁷ In an attempt to balance the subsequent “competitive commercial pressures of broadcasting with the needs of a democracy,” Congress passed the Radio Act of 1927 and then the Communications Act of 1934.¹⁸ In addition to prohibiting a common carriage system—whereby any and all broadcasters would have the right to buy radio airtime—Congress required “broadcast licensees operate in the ‘public interest, convenience and necessity.’”¹⁹ In doing so, Congress created spectrum scarcity where only proper “[g]overnment-sanctioned licensees would . . . have free speech rights in broadcasting.”²⁰ From these new

¹³ PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., R45699, FED. COMM’N COMM’N: STRUCTURE, OPERATIONS, AND BUDGET 5 (2022), <https://sgp.fas.org/crs/misc/R45699.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ THE BENTON FOUNDATION, CHARTING THE DIGITAL BROADCASTING FUTURE 1, 2 (Dec. 18, 1998), <https://www.ntia.doc.gov/files/ntia/publications/piacreport-orig.pdf>.

¹⁸ *Id.*

¹⁹ *Id.* at 18–19.

²⁰ *Id.* at 19.

regulations, the public trustee model was born.²¹ In addition to limiting access to the airwaves, Congress and the Federal Radio Commission established licensees as “public fiduciaries” where each station is allowed its right of free speech but must keep in mind its duty as actors of the public interest.²² After establishing the public interest standard without much explanation, the FCC outlined the “major elements usually necessary to meet the public interest.”²³ This included children’s, religious, educational, news, sport, and entertainment programs, along with service to minority groups and weather and market reports.²⁴

Despite this apparent violation of broadcasters’ First Amendment rights, the Supreme Court ruled the standard constitutional. Notably, in *Red Lion Broadcasting Co. v. F.C.C.*, the Supreme Court upheld the FCC’s public trustee model,²⁵ finding that the FCC’s regulation of broadcasting was necessary due to spectrum scarcity.²⁶ The Court also emphasized that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”²⁷

²¹ *Id.*

²² *Id.*

²³ Network Programming Inquiry, Report and Statement of Policy, 25 FED. REG. 7291, 7295 (1960).

²⁴ *Id.*

²⁵ *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 389 (1969).

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. *Id.*

²⁶ *Id.* at 390.

²⁷ *Id.*

However, under FCC Chairman Mark Fowler and the Reagan Administration's direction, the FCC began to reinterpret the public interest standard under a "Marketplace Approach."²⁸ Following this approach, the Commission regulates "only when the marketplace clearly fails to protect the public interest," not where the marketplace presents a "potential for failure."²⁹ In 1981, by these guidelines, the FCC deregulated radio by eliminating "commercial time limitations" and "non-entertainment programming requirements."³⁰ Then, in 1984, the FCC similarly deregulated commercial and non-commercial television broadcasting.³¹ Where the Commission had previously been staunchly committed to policies accused of infringing upon free speech rights, under Chairman Fowler, the FCC reexamined its objective, expressing new concern for broadcasters' First Amendment rights.³² This era of general deregulation was additionally upheld by the courts where they found the FCC's policymaking abilities largely up to its discretion.³³

III. How the FCC Regulates Television

As noted, the FCC derives its power to regulate television from the Communications Act of 1934.³⁴ When assigning broadcast stations to the broadcast spectrum, the Commission considers

²⁸ Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L. J. 606, 616 (1998).

²⁹ *Id.*

³⁰ *Id.* at 617.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 618.

³⁴ THE BENTON FOUNDATION, *supra* note 17.

the best way to avoid interference among stations and examines a particular community's need for additional broadcast outlets.³⁵ Ultimately, the Commission must decide whether a potential licensee meets the public interest standard by which the FCC must make all regulatory decisions.³⁶ Because broadcasters independently determine the aired content, the Commission must determine that the broadcaster, or licensee, will serve its community's needs.³⁷ In other words, the FCC "expect[s] station licensees to be aware of the important problems and issues facing their local communities and to foster public understanding by presenting programming that relates to those local issues."³⁸

The FCC characterizes stations as either commercial or noncommercial educational (NCE).³⁹ The distinction between the two lie in their fundings sources: commercial stations rely on advertising revenue, while NCE stations secure funding through public contributions and government support.⁴⁰ To receive a license, NCE stations must show they "will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service."⁴¹ Once the Commission grants them a license, NCE stations encounter further funding restrictions.⁴² NCE

³⁵ *The Public and Broadcasting, supra* note 5.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 47 CFR § 73.621(a).

⁴² *The Public and Broadcasting, supra* note 5.

stations may receive funding from for-profit entities and may in turn air acknowledgements of contribution naming and describing the donor, but they may not air any promotional material on behalf of donating for-profit entities.⁴³ Furthermore, if a station suspends regular programming to fundraise for a third-party non-profit, it must publicly file the fundraiser details.⁴⁴

Once a station obtains licensee status, it is subject to license regulation by the Commission.⁴⁵ Licensees are permitted to operate under their initial license for up to eight years.⁴⁶ Before the license expires, a station must undergo the license renewal process.⁴⁷ Renewal depends on whether the Commission deems the station to have “served the public interest, . . . not committed any serious violations of the Communications Act or the FCC’S rules” and refrained from committing “violations which, taken together, would constitute a pattern of abuse.”⁴⁸ The Commission evaluates a licensee’s renewal status based on several elements—an interesting few being whether foreign entities hold interests in a station, a court has found adverse action against a station or its owners, a station’s “advertising sales agreements discriminate on the basis of race or ethnicity,” and whether a station has complied with commercial limitations broadcasted during children’s programming.⁴⁹ Additionally, the FCC invites the public to participate in the

⁴³ *Id.*; 47 CFR § 73.621(e).

⁴⁴ *The Public and Broadcasting*, *supra* note 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

licensing process.⁵⁰ Anyone may submit either protests against a station’s license renewal or a more informal objection which the Commission will consider when issuing renewals.⁵¹ Viewers may also file petitions to deny when there are new station applications, when licensees are “assigned” (sold), when licensees undergo a “transfer of control” (a transfer of stock or other ownership), or when a station makes “major facility changes.”⁵² These provisions emphasize the importance of public participation in the television broadcasting regulatory scheme, which is consistent with the Commission’s public interest mandate.

A. Limitations on Broadcasting

First Amendment freedom of speech rights pervade almost all legal conflicts, and the arena of broadcast television is no different. Section 326 of the Communications Act makes clear that “[n]othing in this Act shall be understood or construed to give the Commission the power of censorship . . . and no regulation or condition shall be promulgated or fixed . . . which shall interfere with the right of free speech.”⁵³ Examined under its public interest standard, the FCC has reemphasized that “the public interest is best served by permitting free expression of views.”⁵⁴ Thus, stations have the right to dictate their programs’ structure and content, as well as their advertising.⁵⁵ However, this may also mean that the First Amendment protects

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 47 U.S.C.S. § 326.

⁵⁴ *The FCC and Freedom of Speech*, FED. COMM’N COMM. 1, (Dec. 30, 2019), https://www.fcc.gov/sites/default/files/the_fcc_and_freedom_of_speech.pdf.

⁵⁵ *The Public and Broadcasting*, *supra* note 5.

“programming that stereotypes or . . . otherwise offend[s] people with regard to their religion, race, national background, gender, or other characteristics.”⁵⁶

Though allowing freedom of expression is obviously paramount, the FCC has some responsibility to limit certain broadcast material. As explained, licensees must foremostly meet the needs of the communities they serve in order to obtain a license and also demonstrate compliance with this objective in periodic filings submitted to the Commission.⁵⁷ The Commission also has discretion to affirmatively restrict objectionable programming.⁵⁸ Where the FCC may not restrict or prohibit indecent or profane material, it can restrict programming labeled as such toto times when children may be watching.⁵⁹ However, the FCC may prevent broadcasters from airing obscene material because it is an unprotected form of speech.⁶⁰ In evaluating content’s obscenity, the FCC applies the three-prong test set out in *Miller v. California* 413 U.S. 15 (1973).⁶¹ The content “must [1] appeal to an average person's prurient interest; [2] depict or describe sexual conduct in a ‘patently offensive’ way; and, [3] taken as a whole, lack serious literary, artistic, political or scientific value.”⁶²

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *The FCC and Freedom of Speech*, *supra* note 54.

⁶⁰ *Id.*

⁶¹ *Obscene, Indecent, and Profane Broadcasts*, FED. COMM’N COMM. (Jan. 13, 2021), <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts>.<https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts>.

⁶² *Id.*

The Commission similarly restricts certain programming likely to negatively impact children.⁶³ The regulation of indecent, profane, and obscene material obviously falls under this umbrella, but policy more specifically targeted at the protection of children is the restriction of violent programming.⁶⁴ In 1996, Congress passed a law requiring television sets be equipped with a “V-chip” device allowing parents to filter programming by rating.⁶⁵ However, this effort empowering parents to limit their children’s programming proved insufficient and, in 2007, several House representatives requested the Commission conduct a report on the impact of television violence on children.⁶⁶ The findings reported that the V-chip and ratings system were not effective and exposure to violent television programming could increase children’s aggressive behavior.⁶⁷ It suggested Congress “implement a time channeling solution” or “mandate some other form of consumer choice in obtaining video programming.”⁶⁸ From these efforts, it is abundantly clear that the Commission and Congress find the wellbeing of children especially vulnerable. They have shown that they have and can exercise their discretion to act.

IV. The Children’s Television Act of 1990

This section will provide a history of the Children’s Television Act (CTA). The section will then explain the CTA’s evolution and how it came to be what it is today. Finally, arriving in the

⁶³ *The Public and Broadcasting*, *supra* note 5.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Violent Television Programming And Its Impact On Children, 22 F.C.C. Rcd. 7929 (2007).

⁶⁷ *Id.*

⁶⁸ *Id.*

present day, the article will go over the FCC’s 2019 revision of the Act, and show how the public received this change.

A. History of the CTA

Congress passed the Children’s Television Act in 1990 largely due to the efforts of activist Peggy Charren.⁶⁹ After raising two children on children’s television primarily focused on airing toy commercials, Charren founded Action for Children’s Television (ACT).⁷⁰ With the goals of limiting advertising during children’s programming and increasing accessibility to diverse, high-quality children’s programming, Charren and ACT used the FCC’s public interest standard to lobby the FCC to improve the regulation of television.⁷¹ The first iteration of the CTA limited advertising during children’s programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays, directed the FCC to consider stations’ compliance with the CTA in the license renewal process, and established a National Endowment for the creation of children’s television “specifically directed toward the development of fundamental intellectual skills.”⁷²

Despite Peggy Charren’s determined efforts, the Act had little effect on broadcasters. Although some broadcasters took the mandate seriously—resulting in the creation of the beloved

⁶⁹ Bruce Weber, *Peggy Charren, Children’s TV Crusader, Dies at 86*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/arts/peggy-charren-childrens-tv-crusader-is-dead-at-86.html>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. § 303 (1988 & Supp. IV 1992)).

show, Bill Nye the Science Guy⁷³—several broadcasters argued the Act was purposely vague and that cartoons like G.I. Joe and Super Mario Brothers sufficiently satisfied children’s educational needs.⁷⁴ And in turn, the FCC took little action enforcing the law, claiming that the law “intended to give broadcasters leeway,” and was inevitably unclear.⁷⁵

After facing criticism and pressure from parents and other interested parties, the Commission in 1996 issued an order revising policy concerning the enforcement of the CTA.⁷⁶ The order reported that market forces insufficiently ensured the availability of children’s educational programming.⁷⁷ Broadcasters had little economic incentive to air improved children’s programming because its audience was smaller, and thus it was harder to appeal to child audiences across all ages, resulting in less revenue through the sale of advertising.⁷⁸ In response to broadcasters’ comments that the FCC should look at the “overall availability of educational programming in the video marketplace” in light of the increased availability of children’s programming across other video platforms, the Commission still found that broadcast licensees should remain the focus.⁷⁹ Most notably, the Commission defined programming

⁷³ Gary E. Knell, *The Children’s Television Act: Encouraging Positive Television For Our Children*, 17 HASTINGS COMM/ENT L.J. 699, 701 (1995).

⁷⁴ Edmund L. Andrews, *Broadcasters, to Satisfy Law, Define Cartoons as Education*, N.Y. TIMES (Sept. 30, 1992), <https://www.nytimes.com/1992/09/30/us/broadcasters-to-satisfy-law-define-cartoons-as-education.html>.

⁷⁵ *Id.*

⁷⁶ Policies and Rules Concerning Children’s Television Programming, 11 FC.C. Rcd. 10660 (1996).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (“While noting an increase in the number of nonbroadcast outlets available for children to receive video programming, the House Report states that ‘the new marketplace for video programming does not

specifically designed to educate and inform children.⁸⁰ By this definition, the Commission requires broadcasters to air a “regularly scheduled, weekly program of at least 30 minutes, and aired between 7:00 a.m. and 10:00 p.m.”⁸¹ The Commission also implemented a stricter enforcement policy which would require broadcasters to air at least three hours of “core programming” in addition to adopting a processing guideline ensuring broadcasters’ compliance with the CTA revisions.⁸²

Preemptively responding to criticism citing First Amendment violations, the Commission again pointed to the public interest standard as empowering the FCC to carry out the provisions of the CTA.⁸³ It emphasized the agreement made between licensed broadcasters and the government (on behalf of the public) where “a licensed broadcaster is ‘granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise is burdened by enforceable public obligations.’”⁸⁴ Evaluated under any level of scrutiny, the FCC claimed, the expanded regulations were “no more burdensome than necessary.”⁸⁵ The FCC thought that, if anything, the new processing guidelines were made in the interest of

obviate the public interest responsibility of individual broadcast licensees to serve the child audience.”
Id.)

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (quoting *CBS, Inc. v. FCC*, 453 U.S. 367 (1981)).

⁸⁵ Policies and Rules Concerning Children’s Television Programming, *supra* note 76.

broadcasters; the Commission sought to help the license renewal process along, and broadcasters would have an easier time of reporting compliance.⁸⁶

As the broadcasting landscape progressed—and the one channel per broadcaster model no longer applied to digital broadcasters that could stream multiple channels with both better picture and sound quality⁸⁷—the Commission found a need to update the children’s broadcasting regulations accordingly.⁸⁸ In 2004, the Commission proposed new changes to digital television broadcasting.⁸⁹ Significantly, they required digital broadcasters (that now had content running across several channels) to stream an additional hour per week of designated core programming, label their core programming content with the symbol “E/I” to notify audiences that the program officially met the guidelines of core programming, and limit the display of links to commercial websites.⁹⁰ In 2006, the Commission issued an order clarifying some of the 2004 rules,⁹¹ marking the last significant update to children’s broadcasting until just recently.

B. 2019 Deregulation—The FCC’s Efforts to “Modernize” Media

As part of the FCC’s new Media Modernization Initiative, in 2019, by a 3–2 vote, the Commission ordered new updates to children’s broadcasting regulations for the first time in

⁸⁶ *Id.*

⁸⁷ Digital Television, FED. COMM’N COMM’N, (Aug. 9, 2016), <https://www.fcc.gov/general/digital-television>.

⁸⁸ Children’s Television Obligations of Digital Television Broadcasters, 19 F.C.C. Rcd. 22943 (2004).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Children’s Television Obligations of Digital Television Broadcasters, 21 FCC Rcd. 11065 (2006).

thirteen years.⁹² Citing a drastically changed media landscape, a decline in broadcast television viewership, and an increase in availability of other sources of children’s media, the report updated practically all major aspects of children’s broadcast regulations from core programming length requirements to reporting requirements.⁹³ Importantly, the 7:00 a.m. to 10:00 p.m. time frame during which core programming was required to be aired was extended to 6:00 a.m.; the definition of core programming was expanded to include short form programming “including public service announcements (PSAs) and interstitials (i.e., programming of brief duration that is used as a bridge between two longer programs)”; compliance requirements were relaxed—allowing stations to air either three hours per week or 156 hours of core programming annually; the requirement that stations identify core programming with the “E/I” symbol was eliminated; and stations were now required to report on an annual basis rather than quarterly.⁹⁴ The report identified these changes as “a continuation of the Commission’s efforts to modernize its media regulations and reduce outdated requirements that can impede competition and innovation in the media marketplace.”⁹⁵

⁹² Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 34 FCC Rcd. 5822 (2019).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

C. Reactions to the Change Were Mixed

Supporters of the new decision included broadcasters and Republicans. Broadcasters responded extremely positively to these changes.⁹⁶ They were concerned that “[t]he obligation to carry low-rated children’s programming [would] ha[ve] economic consequences at a time when stations are already dealing with shrinking profit margins.”⁹⁷ The Commission’s 2019 decision echoed these concerns.⁹⁸ Providing broadcasters with greater flexibility and with the means for easier compliance was one of the often referenced reasons for much of the change enacted.⁹⁹ Republican Commissioner O’Rielly, who led the charge in the changes, referenced in a statement that there was an “underlying market principle . . . driv[ing] television content.”¹⁰⁰ This principle, he said, is that “TV stations are always looking to increase viewership because this is how they generate revenue to survive.”¹⁰¹ While, true, an important motivation to consider, it is not the *necessary* motivation to consider. As it cites in its Order, the FCC derives its authority

⁹⁶ Cynthia Littleton, *FCC Revises Children’s Programming Rules for Broadcasters*, VARIETY, (July 10, 2019), <https://variety.com/2019/biz/news/childrens-programming-act-fcc-revise-rules-1203264076/>. Unsurprisingly though, considering the initiation of the 2018 Notice of Proposed Rulemaking proposing the new children’s programming rules was at the urging of many broadcasters and other broadcast industry organizations. Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92.

⁹⁷ Littleton, *supra* note 96.

⁹⁸ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92.

⁹⁹ *Id.*

¹⁰⁰ Statement of Commissioner Michael O’Rielly, Children’s Television Programming Rules; Modernization of Media Regulation Initiative, FCC 34 F.C.C. Rec. 5822 (2019).

¹⁰¹ *Id.*

from the public interest standard, meaning the FCC’s duty is to the general public and not market forces or industry wants and needs.

Protesters of the decision criticized it as taking a step back.¹⁰² Notably, the founder and CEO of Common Sense Media, a nonprofit organization dedicated to reviewing and rating media’s suitability for children, remarked that the decision reflected the FCC’s lack of “interest in improving the lives of kids and families” and also expressed concerns about low-income families’ access to educational children’s content.¹⁰³ Commissioners Geoffrey Starks and Jessica Rosenworcel expressed similar concerns in their dissenting opinions.¹⁰⁴ Commissioner Starks noted that under the new time requirement guidelines “broadcasters could theoretically reduce the amount of 30-minute, regularly scheduled programming airing on the primary stream to zero.”¹⁰⁵ Despite this decision appearing to address access concerns, both Commissioners Starks and Rosenworcel expressed concern over the lack of access to quality educational content for low-income families of color who may not have access to other sources of children’s media besides what is provided through broadcast television.¹⁰⁶

¹⁰² Dade Hays, *FCC’s Vote To Ease “Kid Vid” Rules Draws Pushback And Democrats’ Dissent*, DEADLINE, (Jul. 10, 2019), <https://deadline.com/2019/07/fcc-vote-to-ease-kid-vid-rules-draws-pushback-and-democrats-dissent-1202644411/https://deadline.com/2019/07/fcc-vote-to-ease-kid-vid-rules-draws-pushback-and-democrats-dissent-1202644411/>.

¹⁰³ *Id.*

¹⁰⁴ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92; Children’s Television Programming Rules; Modernization of Media Regulation Initiative, Statement of Commissioner Geoffrey Starks, Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 34 F.C.C. Rcd. 5822 (2019).

¹⁰⁵ Hays, *supra* note 102.

¹⁰⁶ Statement of Commissioner Jessica Rosenworcel, Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 34 F.C.C. Rcd. 5822 (2019).

V. PBS and Public Television as the Primary Source for Children’s Educational Programming

The Media Modernization Initiative and its supporters consistently identify one primary reason for the necessity of modernization—viewers who wish to consume quality educational children’s content will look to PBS and other noncommercial educational stations that are solely dedicated to educational content and not the commercial broadcast channels that require regulation.¹⁰⁷ The Commission’s 2019 Order rolling back restrictions on commercial broadcasters identifies PBS, specifically, as a primary source of educational television, especially for underserved children.¹⁰⁸ It notes that PBS’s viewership continues to rise due to its expansion of viewership through digital media and overall continued commitment to educating children.¹⁰⁹ Though the Commission is correct to emphasize the importance of public television like PBS, it appears to depend overly on a resource that (1) has a distinct purpose of its own that is not addressed by other forms of media, and (2) has faced historically consistent calls for defunding and budget cuts.¹¹⁰ Furthermore, the idea that PBS is merely available as a dependable resource does not obviate the need to properly regulate commercial children’s programming—that kids will surely still be watching.

¹⁰⁷ See Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See e.g., Brian Stelter, *PBS and NPR are ready to fight budget cuts—again*, CNN, (Mar. 6, 2017), <https://money.cnn.com/2017/03/16/media/public-media-pbs-npr-budget-cuts/index.html>; Melissa Kearney & Phillip Levine, *Disadvantaged kids to miss out on educational TV under Trump budget*, THE HILL, (Mar. 19, 2017), <https://thehill.com/blogs/pundits-blog/education/324705-low-income-kids-to-miss-educational-tv-under-trump-budget/>.

A. The CPB and PBS: Funding and Functions

The Corporation for Public Broadcasting (CPB) is a nonprofit corporation created by the Public Broadcasting Act of 1967.¹¹¹ It is the largest single source of funding for public television and distributes federal government funds to public telecommunication services.¹¹² It uses grants to “encourage[] the development of content that addresses the needs of underserved audiences, especially children and minorities.”¹¹³ Additionally, it funds digital platforms used by media producers and production companies.¹¹⁴ Through Community Service Grants, the CPB provides federal funding to public, local media (radio and television) stations.¹¹⁵ The law provides that 95% of funds going through the CPB must be distributed to local radio and television stations.¹¹⁶ Though the CPB provides the funding for programming, public stations retain sole authority in the selection of programs they air.¹¹⁷ Such programming may be selected from sources like the Public Broadcasting Service (PBS).¹¹⁸

¹¹¹ *About CPB*, CORP. FOR PUB. BROAD., <https://www.cpb.org/aboutcpb>. (last visited Sept. 26, 2022).

¹¹² 47 U.S.C. §396

¹¹³ *About CPB*, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *About Public Media*, CORP. FOR PUB. BROAD., (last visited Sept. 26, 2022), <https://www.cpb.org/aboutpb/what-public-mediahttps://www.cpb.org/aboutpb/what-public-media>.

¹¹⁶ Madhulika Sikka, *How Do Federal \$\$\$ Get to Your Local Station?* PUB. BROAD. SERV., (Feb. 22, 2018), <https://www.pbs.org/publiceditor/blogs/pbs-public-editor/how-do-federal-get-to-your-local-station/>.

¹¹⁷ *About Public Media*, *supra* note 115.

¹¹⁸ *Id.*

The CPB created PBS in 1969 to offer public media aimed at children’s educational needs.¹¹⁹ PBS provides programming for its members—local television stations that may opt in to become a PBS member station through membership dues.¹²⁰ Since 1970, PBS has been responsible for the creation of some of America’s most renowned and beloved children’s television like Sesame Street, Mr. Rogers’ Neighborhood, and Arthur.¹²¹ One way it receives funding is through the CPB but PBS, including its local member stations, heavily depends on other forms of funding.¹²² In fact, federal and CPB funding only make up about 14% of PBS’s revenue streams.¹²³ What’s more, those federally appropriated funds are not dedicated entirely towards programming.¹²⁴ Government dollars also go towards publicly necessitated services like “vital telecommunications technology, emergency signaling services assisting first responders, and digital access.”¹²⁵ The largest sources of funding come from membership at 29%, distribution at 27%, and underwriting at 20%.¹²⁶

Taken together, a large percentage of funding is subject to influence as PBS is composed of either individuals or entities operating at the behest of the public. At the most obvious level,

¹¹⁹ *Mission and Values*, PUB. BROAD. STATION, (last visited Sept. 26, 2022), <https://www.pbs.org/about/about-pbs/mission-values/https://www.pbs.org/about/about-pbs/mission-values/>.

¹²⁰ Sikka, *supra* note 116.

¹²¹ *History Timeline*, CORP. FOR PUB. BROAD., (last visited Sept. 26, 2022), <https://www.cpb.org/aboutcpb/history-timelinehttps://www.cpb.org/aboutcpb/history-timeline>.

¹²² Sikka, *supra* note 116.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

one major source of funding for PBS is public viewer donations. It likely would not be an overstatement to say that most individuals who grew up with a television at home are familiar with some variation of the cheery phrase, “made possible by viewers like you.” This thanks was no exaggeration. In 2008, around 60% of public broadcasting funding was from private sources.¹²⁷ “Individual donors comprise[d] the largest single source, accounting for nearly \$750 million, or 26.3 percent of revenue.”¹²⁸ Furthermore, businesses made up about 18% of revenue, or \$508 million, and foundations comprised 8% of revenue, or \$508 million.¹²⁹ While the strong relationship between viewer and broadcaster has been built over decades, their positions as funder and funded, respectively, remain precarious. People are highly subject to influence and when viewers and businesses adopt anti-public television rhetoric, support (i.e. money) is withdrawn.

Additionally, viewers and lawmakers fail to properly account for the CPB’s “specific mission of bringing a distinct brand of educational and cultural programming—free of commercial trappings—to a broad swath of the American public.”¹³⁰ In other words, public television’s purpose is to provide free first-rate broadcast television and radio to underserved,

¹²⁷ Steven Waldman, *The Information Needs of Communities*, FED. COMM’N COMM. 1, 152, (July 2011), <https://www.fcc.gov/sites/default/files/the-information-needs-of-communities-report-july-2011.pdf>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Suevon Lee, *Big Bird Debate: How Much Does Federal Funding Matter to Public Broadcasting?*, PROPUBLICA, (Oct. 11, 2012), <https://www.propublica.org/article/big-bird-debate-how-much-does-federal-funding-matter-to-public-broadcasting>.

rural populations whose one and only available public television program service is that which is provided by the CPB.¹³¹

B. Consistent Calls for Defunding PBS

For four consecutive years, former President Trump’s fiscal budget proposed cuts to funding for public broadcasting.¹³² While his 2021 budget suggested a staggering decrease in Congressional funding from \$445 million to \$30 million, this was a marked improvement from Trump’s prior proposed budgets wherein the CPB was entirely eliminated.¹³³ Luckily, these plans went unapproved and the CPB maintained its \$445 million in Congressional funding.¹³⁴ Although these calls for funding seemed extreme, in actuality, the CPB and PBS have endured several similar calls in the past.

In 1979, the Nixon administration sought to “reorganize” the CPB, causing public television to be less “anti-Administration.”¹³⁵ Overall, the CPB appeared to pose some threat to the Nixon

¹³¹ *Alternative Sources of Funding for Public Broadcasting Stations*, CORP. FOR PUBLIC BROADCASTING, (June 20, 2012), <https://s3.documentcloud.org/documents/461077/cpb-june-2012-report.pdf>. In a June 2012 report, the CPB reported that of fifty-four television stations at high risk of being shut down due to insufficient funding, thirty-one “serve[d] predominantly rural areas, and [nineteen] provide[d] the only public television service available to viewers in their service area.” The eradication of these stations would have meant that “more than [twelve] million Americans would lose access to the only public television program service currently available to them over the air.” *Id.* at 3.

¹³² *The Chilling Effect of Public Broadcasting Funding Cuts*, FIRST AMENDMENT WATCH, (last visited Mar. 21, 2023), <https://firstamendmentwatch.org/deep-dive/the-chilling-effect-of-public-broadcasting-funding-cuts/>.

¹³³ *Id.*

¹³⁴ *Federal Appropriation*, CORP. FOR PUBLIC BROADCASTING, <https://www.cpb.org/appropriation/history> (last visited Mar. 21, 2023).

¹³⁵ Les Brown, *Files of Nixon White House Show Bid to Control Public Broadcasting*, N.Y. TIMES, (Feb. 24, 1979), <https://www.nytimes.com/1979/02/24/archives/files-of-nixon-white-house-show-bid-to-control-public-broadcasting.html>.

administration.¹³⁶ Concerned with “public broadcasting’s liberal political tilt,” Nixon’s two solutions were to either (1) “kill it” or (2) “shape its future organization and direction.”¹³⁷ The following years brought more critical takes on PBS with lawmakers and other public figures publicly denouncing PBS in the nineties and aughts for its supposed left-leaning bias.¹³⁸ This culminated in a failed attempt by the House to eliminate the CPB’s entire funding, which fell short in the Senate.¹³⁹ Prior to Trump’s longstanding feud with PBS, federal funding of public television became a hot topic during the 2012 election.¹⁴⁰ In the debate between incumbent President Obama and Republican candidate Mitt Romney, Romney promised to “stop the subsidy to PBS,” sparking a conversation about the importance of PBS and, in particular, Big Bird, who Romney took aim at in the process.¹⁴¹

In more recent years, PBS’s programming continues to bear the brunt of public criticism. In 2019, an episode of the long-running children’s show, *Arthur*, made headlines over a plotline featuring a same-sex marriage.¹⁴² Alabama took a stance when one of its PBS affiliates, Alabama

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Meredith Blake, *Battle of ‘Sesame Street’: Political Fight over PBS Has Long History*, L.A. TIMES, (Oct. 4, 2012), <https://www.latimes.com/entertainment/tv/la-xpm-2012-oct-04-la-et-st-history-political-fight-over-pbs-20121004-story.html>.

¹³⁹ *Id.*

¹⁴⁰ Brian Stelter and Elizabeth Jensen, *Romney’s Pledge Puts Focus on Public TV*, N.Y. TIMES, (Oct. 11, 2012), <https://www.nytimes.com/2012/10/12/us/politics/romneys-pledge-puts-public-television-in-spotlight.html>.

¹⁴¹ Barbara Goldberg, *Feathers Fly over Romney’s ‘Big Bird’ Debate Comments*, REUTERS, (Oct. 5, 2012), <https://www.reuters.com/article/usa-campaign-bigbird-idINDEE8930G320121005>.

¹⁴² See Sandra E. Garcia, *‘Arthur’ Opens Season with a Same-Sex Wedding and a Cake*, N.Y. TIMES, (May 14, 2019), <https://www.nytimes.com/2019/05/14/arts/television/ratburn-arthur.html>.

Public Television (APT), chose not to air the episode.¹⁴³ Commenters both applauded and denounced the episode’s airing.¹⁴⁴ One commenter expressed that although the episode featured an accepted reality to some, it portrayed an objectionable offense to others, and therefore, a taxpayer-funded public network’s decision to release this episode was “both imprudent and improper.”¹⁴⁵ The episode also led to Republican Representative Doug Lamborn introducing two congressional bills eliminating PBS’s federal funding.¹⁴⁶ In addition to calling the federal funding of PBS a “violati[on] [of] the conscience rights of many conservative and religious Americans,” he also argued it was “unconstitutional.”¹⁴⁷ Comments like these from the nation’s lawmakers are what inundate voters’ and viewers’ newsfeeds, to attach negative sentiments to PBS’s name and reputation.

VI. Alternative Sources of Children’s Educational Programming—Cable Television, Online Sites/Programming, and OTT Streaming Platforms

The Commission proposes that the media landscape’s modernization in recent years—with the proliferation of online, digital, and over-the-top (OTT) streaming services, like Netflix and

¹⁴³ Declan Leary, *Gay Marriage in Arthur Pushes the Limits of Social Realism in Children’s TV*, NAT’L REV., (May 22, 2019), <https://www.nationalreview.com/2019/05/arthur-gay-marriage-pushes-limits-social-realism-childrens-television/>.

¹⁴⁴ *See id.*; Ashley Fetters and Natalie Escobar, *How a Gay Character on Arthur Reflects Changing Norms in the U.S.*, THE ATLANTIC, (May 14, 2019), <https://www.theatlantic.com/family/archive/2019/05/mr-ratburns-gay-wedding-on-arthur-was-quietly-profound/589462/>.

¹⁴⁵ Leary, *supra* note 143.

¹⁴⁶ Rhuaridh Marr, *A Republican Congressman Wants to Defund PBS Because of Same-Sex Marriage*, METRO WEEKLY, (June 27, 2019), <https://www.metroweekly.com/2019/06/a-republican-congressman-wants-to-defund-pbs-because-arthur-had-a-gay-wedding/>.

¹⁴⁷ *Id.*

Hulu—necessitate a change in regulating children’s broadcast television.¹⁴⁸ Children’s widespread use of these new services, they say, is reflected in broadcast television’s decline in public viewership of educational and informational programming.¹⁴⁹ They argue that the availability of resources like cable television (which has the same unchecked regulations that control broadcast stations), online sites like YouTube, and previously broadcasted children’s programs available through streaming platforms are sufficient replacements for the children’s broadcast television that used to be the primary source of children’s educational programming.¹⁵⁰ However, this argument runs into trouble where these resources’ “modern” status also attaches an unregulated status.¹⁵¹ The Commission noted that in the 2017-2018 season, children’s educational and informational programming across hundreds of NBC and CBS stations “averaged *only* 57,000 viewers between the ages of two and 17”¹⁵² but as the 1996 overhaul of the CTA emphasized:

[B]roadcasting rating services basically register only one "vote" per viewer . . . [b]ut the signal that matters to the broadcaster is the dollar amount of advertising revenues. Small audiences with little buying power, such as children's educational television audiences, are unlikely to be able to signal the intensity of their demand for such programming in the broadcasting market.¹⁵³

¹⁴⁸ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Michael O’Rielly, *FCC Regulatory Free Arena*, FED. COMM’N. COMM’N, (June 1, 2018), <https://www.fcc.gov/news-events/blog/2018/06/01/fcc-regulatory-free-arena>.

¹⁵² Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92. (emphasis added).

¹⁵³ Policies and Rules Concerning Children’s Television Programming, *supra* note 76.

A. Cable Television

The FCC first suggests that there exists a “wide array of full-time children’s cable channels that air educational programming.”¹⁵⁴ Channels like Disney, Nickelodeon, and Baby First TV Network provide plenty of sufficiently educational programming for all viewers.¹⁵⁵ That these cable channels serve entertainment purposes rather than educational and they may not be “age-appropriate” does not eliminate them as a possible source of suitable children’s programming, as the Commission appears to suggest the onus lies with the parent to decide whether the cable programming available is suitable for their child.¹⁵⁶ This reasoning works directly against the motivation behind the bulk of the CTA and subsequent regulation of children’s broadcast programming.¹⁵⁷

However, if we were to say that the duty does lie with the parent to decide what media their child consumes, we are still left to contend with cable broadcasters’ resistance against commercial limitations.¹⁵⁸ Though cable broadcasters do not have the same requirements as

¹⁵⁴ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*; Children’s Television Obligations of Digital Television Broadcasters, *supra* note 88. For example, in the 1996 revisions to the KidVid Rules, the Commission expressly recognized that parents were inadequately informed on the availability of children’s educational programming (i.e., ensuring that broadcasters aired core programming meant nothing if parents did not know where to find it and how to differentiate it from non-core-programming). Policies and Rules Concerning Children’s Television Programming, *supra* note 76.

¹⁵⁸ *See* Ted Johnson, *FCC Proposes \$3.4 Million In Fines To Stations For Violating Children’s Ad Limits With Hot Wheels Commercials*, DEADLINE, (Sept. 21, 2022), <https://deadline.com/2022/09/fcc-sinclair-hot-wheels-childrens-television-act-1235124032/>.

children's broadcast, such as core programming, etc., they are still limited by commercial matter regulations.¹⁵⁹ They may not air more than 10.5 minutes of commercials on weekends and may air no more than 12 minutes of advertising on weekdays during programming produced for children 12 and under.¹⁶⁰ While these limitations present far less of an imposition, cable broadcasters still resist—as evidenced by the recent \$3.4 million fine imposed upon a broadcaster airing Hot Wheels commercials embedded in “Team Hot Wheels” programming.¹⁶¹

B. The Internet: An Unsuitable Alternative

The Commission’s 2019 Report and Order next suggests that children may seek appropriately educational content through various online sites and programming.¹⁶² It suggests a “myriad” of online sites like “PBS Kids, YouTube, and YouTube Kids” which offer free or subscription-based educational or informational content.¹⁶³ Thus, the report states that the vast availability of non-broadcast sites like these make the drop in broadcast viewership unsurprising.¹⁶⁴

The Commission defends its position against two main objections: that available non-broadcast children’s media is far more for entertainment purposes than educational and that

¹⁵⁹ *Cable Television*, FED. COMM’N. COMM’N (last visited Sept. 30, 2022), <https://www.fcc.gov/media/engineering/cable-television><https://www.fcc.gov/media/engineering/cable-television>.

¹⁶⁰ *Id.*

¹⁶¹ Johnson, *supra* note 158.

¹⁶² Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92 at 5832.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

online sources are not subject to regulation of indecent material, advertising limits, and privacy concerns.¹⁶⁵ First, it argues that much of broadcast television is not suited for children at all, never mind “specifically designed to serve the[ir] educational and informational needs.”¹⁶⁶ Furthermore, there are several non-broadcast sources of educational programming recommended by trusted sources like Common Sense Media.¹⁶⁷ In particular, the Order directs audiences to online sites like YouTube that have a catalog of previously aired educational broadcast programming like those aired by PBS.¹⁶⁸ Second, the Order only briefly notes that any potential risks that come with consuming unregulated online media are no reason to disregard the abundance of content out there.¹⁶⁹ It is again the parent’s responsibility to monitor and safeguard their children from actualizing those risks.¹⁷⁰

Inaccessibility is a glaring problem when considering online sites as broadcast alternatives. The Commission itself notes that, “particularly children in minority and low-income households [do not] have access to the wealth of children’s educational programming available on non-

¹⁶⁵ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92 at 5834.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* Common Sense Media is an independent, nonprofit organization devoting itself to reviewing and recommending the suitability of media for children and families. *About Us*, COMMON SENSE MEDIA (last visited Feb. 18, 2023), <https://www.commonsensemedia.org/about-us/our-mission>.

¹⁶⁸ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92 at 5834.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

broadcast platforms.”¹⁷¹ It cites the 2023 Nielsen Local Watch Report¹⁷² as well as its own finding that as of 2018, over 14% (16 million) of American households were over-the-air (OTA) households and did not subscribe to cable or satellite television.¹⁷³ Of these 16 million households, 41% also did not subscribe to any streaming services.¹⁷⁴ Since then, the April 2022 Nielsen Watch Report noted an uptick of OTA households, increasing from 14% to 15%.¹⁷⁵ Additionally, that OTA households are “more likely to be minority households”¹⁷⁶ has not changed in the four years since the Commission’s Order.¹⁷⁷ Twenty-one percent of Hispanic households and twenty percent of Black households are OTA households without any subscription video on-demand (SVOD) services.¹⁷⁸ This is in comparison to the 24% and 14% of Hispanic and Black households that are OTA households with SVOD and the 12% and 18% of Hispanic and Black households that are OTA households with both SVOD and virtual multichannel video programming (vMVPD) services (i.e., internet providers that offer live

¹⁷¹ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92, at 5836.

¹⁷² Nielsen is a market research company conducting research into audiences of media across all platforms. Katelyn Peters, *What Is Nielsen Company? Definition, History, and How Data Works*, Posted in Company Profiles: Communication Companies, INVESTOPEDIA, (Jan. 28, 2023), <https://www.investopedia.com/terms/a/acnielsen.asp>; see also *About Nielsen*, NIELSON, <https://www.nielsen.com/about-us> (last visited Feb. 18, 2023).

¹⁷³ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92, at 5836.

¹⁷⁴ *Id.*

¹⁷⁵ *The Over-the-Air Evolution*, NIELSON 1, 3 (Apr. 2022), <https://image.nielsen-email.com/lib/fe3311727164047d7c1272/m/2/88566418-c127-43d9-a92e-570c7286de75.pdf>.

¹⁷⁶ Children’s Television Programming Rules; Modernization of Media Regulation Initiative, *supra* note 92, at 5834.

¹⁷⁷ *The Over-the-Air Evolution*, *supra* note 175, at 6.

¹⁷⁸ *Id.*

television like Hulu Live or YouTube TV).¹⁷⁹ Furthermore, the Nielson Watch Report found that the median income of only OTA households was \$22,800—a stark difference in income from the \$49,000 and \$77,200 median incomes of OTA with SVOD households and OTA with both SVOD and vMVPD households, respectively.¹⁸⁰

Despite many American households being primarily OTA households and the internet’s near ubiquity today, many people have either no or limited access to internet service.¹⁸¹ Lack of internet access persists today; as of a 2020 UNICEF study, two-thirds of the world’s school-age children (1.3 billion children, ages three to seventeen years old) did not have internet access in their homes.¹⁸² And while in the United States—across factors like age, race, gender, income, education, and community—percentages of households with internet access remain in the high

¹⁷⁹ *The Over-the-Air Evolution*, *supra* note 175, at 5–6.

¹⁸⁰ *Id.* at 6.

¹⁸¹ See *Internet/Broadband Fact Sheet*, PEW RSCH. CTR., (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#panel-480dace1-fd73-4f03-ad88-eae66e1f4217>.

¹⁸² Two Thirds of the World’s School-Age Children Have No Internet Access at Home, New UNICEF-ITU Report Says, Press Release, UNICEF, (Dec. 1, 2020), <https://www.unicef.org/press-releases/two-thirds-worlds-school-age-children-have-no-internet-access-home-new-unicef-itu>.

eighties to nineties,¹⁸³ a digital divide still exists among low-income households¹⁸⁴ and Black and Latino households.¹⁸⁵

Among children especially, most concerning is what current FCC Chairperson Jessica Rosenworcel calls “the homework gap.”¹⁸⁶ The term explains the phenomenon of unequal access to internet services, rendering many children of low-income backgrounds unable to complete homework.¹⁸⁷ This issue became particularly apparent during the COVID-19 pandemic, when the mass-closing of schools forced children across America to adopt online learning.¹⁸⁸ As a result, many children who had little to no reliable internet access at home were forced to complete their schooling in public spaces offering free Wi-Fi.¹⁸⁹

¹⁸³ *Internet/Broadband Fact Sheet*, *supra* note 181.

¹⁸⁴ Emily A. Vogels, Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption, Posting in Technology Policy Issues: Digital Divide, PEW RSCH. CTR., (June 22, 2021), <https://pewresearch-org-preprod.go-vip.co/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>; see Kendall Swanson & Robin Ghertner, *People in Low-Income Households Have Less Access to Internet Services*, U.S. DEP’T OF HEALTH AND HUM. SERVS.: OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION, (Apr. 2020), https://aspe.hhs.gov/sites/default/files/private/pdf/263601/Internet_Access_Among_Low_Income.pdf.

¹⁸⁵ Sarah Atske & Andrew Perrin, Home Broadband Adoption, Computer Ownership Vary By Race, Ethnicity in the U.S., Posting in Technology Policy Issues: Digital Divide, PEW RSCH. CTR., (July 16, 2021), <https://pewresearch-org-preprod.go-vip.co/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/>.

¹⁸⁶ Tanya Basu, Why the “Homework Gap” is Key to America’s Digital Divide, Posting in Humans and Technology, MIT TECH. REV., (Oct. 13, 2020), <https://www.technologyreview.com/2020/10/13/1010243/jessica-rozenworcel-homework-gap-key-to-americas-digital-divide/>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

The next most pressing concern which the Commission addresses—but does so inadequately—is the unregulated nature of online sites. The FCC has the power to regulate broadcast television because it is a form of interstate or international communication by way of television,¹⁹⁰ but because the communication of online content is not by radio, television, satellite, wire, or cable, online content is out of the FCC’s jurisdiction.¹⁹¹ There have been recent calls for the Commission to regulate online content as it begins to directly compete with telecommunications like radio and television,¹⁹² but the Commission’s power remains limited to the more broad ability to make internet services accessible to all.¹⁹³

Without delving too far into the weeds of internet law, a birds-eye look at internet content regulation identifies a few main themes: potential government censorship of free speech, the

¹⁹⁰ *What We Do*, FED. COMM’N COMM., <https://www.fcc.gov/about-fcc/what-we-do#:~:text=The%20FCC's%20rules%20and%20regulations,web%20in%20a%20searchable%20format>, (last visited Feb. 18, 2023).

¹⁹¹ *Id.*

¹⁹² David Oxenford, *Does the FCC Regulate Internet Content and Companies?*, Broadcast Law Blog, (May 12, 2020), <https://www.broadcastlawblog.com/2022/05/articles/does-the-fcc-regulate-internet-content-and-companies/>. The FCC has most recently tasked itself with ending net neutrality. Klint Finley, *The WIRED Guide to Net Neutrality*, Posted in *Business*, Wired, (May 5, 2020, 7:00 AM), <https://www.wired.com/story/guide-net-neutrality/>. In 2017, the FCC, under President Trump, voted to eliminate network neutrality—the principle that all internet service providers must offer their services equally. *Id.* The lack of net neutrality regulation would allow broadband providers to monitor and then potentially block or slow some content and fast-track other content based on market motivators. *Id.* The repeal of net neutrality could further increase the digital divide, making internet access even less accessible to those who cannot afford “priority treatment.” *Id.*

¹⁹³ Motivated by the COVID-19 pandemic’s impact on internet accessibility, Senators Edward J. Markey (D-Mass.) and Ron Wyden (D-Ore.) and Representative Doris Matsui (CA-06) introduced the Net Neutrality and Broadband Act. *Senators Markey, Wyden and Rep. Matsui Introduce Legislation to Reinstate Net Neutrality, Reverse Damaging Trump-Era Deregulation*, Posted in News/Press, ED MARKEY, (July 8, 2022), <https://www.markey.senate.gov/news/press-releases/senators-markey-wyden-and-rep-matsui-introduce-legislation-to-reinstate-net-neutrality-reverse-damaging-trump-era-deregulation>. The Act would give the FCC the authority to reinstate net neutrality, “classify[ing] broadband internet access as a telecommunications service under Title II of the Communications Act.” *Id.* As of early 2023, no sources suggest the Act has been or is close to being passed. *Id.*

international nature of the internet, the internet as largely user-controlled space, and the massive scale on which the internet exists.¹⁹⁴ These considerations have meant that the internet remains a largely unregulated landscape.¹⁹⁵ Internet content regulation dates all the way back to the internet’s early years and is still hotly litigated.¹⁹⁶ Section 230 of the 1996 Communications Decency Act (CDA) granted “legal immunity to Internet platforms for content posted by users.”¹⁹⁷ Section 230 poses some obvious concerns—such as potential inability to hold internet platforms liable for content they not only host but promote and profit from. This concern continues to manifest today in the form of two pending cases before the Supreme Court, *Twitter v. Taamneh* and *Gonzalez v. Google*.¹⁹⁸ Both cases involve holding platforms (here, Twitter and Google) liable for content that they not merely passively hosted but actively promoted using targeted content and algorithms.¹⁹⁹ Where possible concerns of suppressing free speech arise, commenters like Stanford Law professor Daphne Keller, suggest that only illegal or harmful

¹⁹⁴ See Roger J. Cochetti, *Taking a Long View of Internet Content Regulation: How Did We Get Here?*, THE HILL, (Oct. 22, 2022, 5:00 PM), <https://thehill.com/opinion/technology/3699719-taking-a-long-view-of-internet-content-regulation-how-did-we-get-here/>; see also Arno R. Lodder et al., *Internet Law: A Brief Introduction*, SAGE ENCYCLOPEDIA OF THE INTERNET 2–4, (June 2018), <https://deliverypdf.ssrn.com/delivery.php?ID=637013125091127107112005007098093101049046040041043039068118065110070126000086125110037057053027056034097000085071121081030080042044003061022010064093102073118031050038023106099093087119075098124114071065023095003077113123067080100028096070019118018&EXT=pdf&INDEX=TRUE>.

¹⁹⁵ *Id.*

¹⁹⁶ See Isaac Chotiner, *Two Supreme Court Cases That Could Break The Internet*, THE NEW YORKER (Jan. 25, 2023), <https://www.newyorker.com/news/q-and-a/two-supreme-court-cases-that-could-break-the-internet>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

content would be targeted.²⁰⁰ However, an unintended consequence would be internet platforms preemptively or gratuitously deleting content to escape or prevent liability.²⁰¹

Depending on how the Supreme Court decides cases like *Twitter v. Taamneh* and *Gonzalez v. Google*, a new judicially created legal landscape for internet content regulation may emerge, but perhaps this is a job better suited for Congress. In 2020, the Department of Justice reviewed Section 230 of the CDA and recommended Congress make changes.²⁰² The Department proposed four main areas for reformation: (1) “incentivizing platforms to address the growing amount of illicit content online, while preserving . . . immunity for defamation,” (2) “increase[ing] the ability of the government to protect citizens from harmful and illicit conduct,” (3) “promoting competition,” and (4) “promot[ing] free and open discourse online and encourage[ing] greater transparency between platforms and users.”²⁰³ This recommendation highlights many of the same points Daphne Keller addresses and the imminent decisions in

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996*, DEP’T OF JUSTICE, <https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996> (last visited Oct. 9, 2023). <https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996>. The *Gonzalez* case involved plaintiffs seeking to find Google, Twitter, and Facebook directly and secondarily liable for allowing terrorist group ISIS to post content “further[ing] its mission.” *Gonzalez v. Google*, 2 F.4th 871, 880 (9th Cir. 2021). Plaintiffs claimed that Google “placed paid advertisements in proximity to ISIS-created content” and “shared the resulting revenue with ISIS.” *Id.* at 880. Pursuant to Section 230 of the Communications Decency Act, the Court deemed the internet platforms immunized. *Id. Taamneh* similarly sought to find Twitter, Google, and Facebook liable for “provid[ing] material support [to ISIS] . . . in violation of the Antiterrorism Act.” *Taamneh v. Twitter*, 343 F. Supp. 3d 904, 906 (N.D. Cal. 2018). After hosting ISIS-created content on their platforms, Twitter, Google, and Facebook allegedly inadequately reviewed this content and after blocking some of it failed to “make substantial or sustained efforts” to prevent ISIS from creating new accounts. *Id.*

²⁰³ *Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 202.

Taamneh and Gonzalez,²⁰⁴ namely that online platforms should not be immune from liability when they “purposefully facilitate[] or solicit[] third-party content . . . violat[ing] federal criminal law,” and that several vague terms within Section 230 should be replaced with more narrowly defined terms so content potentially harmful to children would be rightfully removed and platforms would not as easily and arbitrarily remove content.²⁰⁵

Taking a more focused approach, one primary concern, often unbeknownst to consumers, online sites collect and share consumers’ personal information.²⁰⁶ “[F]requent breaches, cyberattacks and unauthorized online sharing of personal information,” has understandably motivated legislatures to enact online privacy legislation.²⁰⁷ However, currently, there is no “single, comprehensive federal [consumer data privacy] law.”²⁰⁸ Existing federal privacy laws protect only certain information in specific circumstances.²⁰⁹ For example, the Health Insurance Portability and Accountability Act (HIPAA) only makes private communication between patients and healthcare professionals/businesses; the Family Educational Rights and Privacy Act (FERPA) gives students the right to keep their student education records private; the Electronic Communications Privacy Act (ECPA) prevents the

²⁰⁴ Chotiner, *supra* note 196.

²⁰⁵ *Department of Justice’s Review of Section 230 of the Communications Decency Act of 1996*, *supra* note 202.

²⁰⁶ Pam Greenberg, *2021 Consumer Data Privacy Legislation*, NAT’L CONF. OF STATE LEGISLATURES, (Dec. 27, 2021), <https://www.ncsl.org/technology-and-communication/2021-consumer-data-privacy-legislation#:~:text=Creates%20the%20Consumer%20Privacy%20Act,or%20before%20the%20point%20of.>

²⁰⁷ *Id.*

²⁰⁸ Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES, (Sep. 6, 2021), <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/>.

²⁰⁹ *Id.*

government from wiretapping phone calls and provides “how employers can monitor employee communications.”²¹⁰

California has made substantial efforts to pass comprehensive privacy legislation.²¹¹ California has enacted comprehensive laws like the California Consumer Privacy Act (CCPA) in 2018 and the California Privacy Rights and Enforcement Act (CPRA) in 2020.²¹² The CCPA and CPRA give consumers the right to know what personal information has been collected, delete that collected information, and opt in or out of the sale of personal information. The acts also call for non-discriminatory treatment and allow consumers to initiate a private cause of action for data breaches, correct inaccurate personal information, and limit the use and disclosure of sensitive personal information.²¹³ These acts initially provided the strongest privacy laws in the nation; but following their enactment, Colorado and Virginia passed similarly comprehensive legislation.²¹⁴ The rest of the nation has also found data privacy laws to be of special concern, with more states passing legislation,²¹⁵ but this legislation has addressed different sectors of data in disparate manners.²¹⁶

²¹⁰ *Id.* However, the ECPA is now widely considered outdated as it was passed in 1986, “well before the modern internet.” *Id.* It fails to address “data stored on servers, in cloud storage documents, and in search queries.” *Id.*

²¹¹ Greenberg, *supra* note 206.

²¹² *Id.*

²¹³ Bloomberg Law, *Comparing CCPA vs. CPRA – What’s the Difference?*, YOUTUBE (July 27, 2022), https://www.youtube.com/watch?v=dK_NfVlcR64&t=15s. <https://pro.bloomberglaw.com/brief/the-far-reaching-implications-of-the-california-consumer-privacy-act-ccpa/#ccpa-cpra>

²¹⁴ Greenberg, *supra* note 206.

²¹⁵ *Id.*

²¹⁶ Klosowski, *supra* note 208.

The Children’s Online Privacy Protection Rule (COPPA), enforced by the Federal Trade Commission (FTC) is most relevant here.²¹⁷ Passed in 1998, COPPA generally imposes five requirements on online sites directed at children (individuals under the age of thirteen) or sites that know they collect or maintain children’s personal information.²¹⁸ (1) Sites must provide notice of how they collect, use, and disclose any information collected; (2) they must obtain parental consent before collecting, using, or disclosing children’s personal information; (3) they must, upon request, allow parents the ability to review personal information collection and to refuse “the information’s further use or maintenance”; (4) they must only collect information reasonably necessary to “facilitat[e] a child’s online participation in a game, prize offer, or other activity”; and (5) they must “[e]stablish and maintain reasonable procedures to protect the confidentiality, security, and integrity of the personal information collected.”²¹⁹

The FTC recently displayed interest in how social media and video streaming sites monitor and collect information with regard to children and teenagers.²²⁰ In 2019, the FTC sent orders to Amazon, ByteDance (the operator of TikTok), Discord, Facebook, Reddit, Snapchat, Twitter, WhatsApp, and YouTube.²²¹ It sought information on how these services collect

²¹⁷ 15 U.S.C. §§ 6501–08.

²¹⁸ *Children’s Online Privacy Protection Act*, FED. RSRV, 1 (Jan. 2006), <https://www.federalreserve.gov/boarddocs/supmanual/cch/coppa.pdf>.

²¹⁹ *Id.*

²²⁰ Lisa M. Thomas, *FTC Focuses on Privacy Practices of Social Media and Video Streaming Companies*, NAT’L L. REV. (Jan. 6, 2021), <https://www.natlawreview.com/article/ftc-focuses-privacy-practices-social-media-and-video-streaming-companies>.

²²¹ *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information*, FED’L TRADE COMM’N (Dec. 14, 2020), <https://www.ftc.gov/news-events/news/press-releases//12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use>.<https://www.ftc.gov/news->

personal and demographic information, how ads and content are displayed, whether algorithms are applied to personal information, and the impact of these practices on children and teens.²²² And more recently, in August 2022, the FTC sought public comment on “harmful commercial surveillance and lax data security.”²²³ It expressed concern that the FTC had difficulty deterring unlawful data collection and expressed interest in introducing rules “establish[ing] clear privacy and data security requirements across the board,” which would “incentivize all companies to invest more consistently in compliant practices.”²²⁴

The recent interest in data privacy should be no concern considering the FTC’s recent large-scale investigation into YouTube’s data collection practices.²²⁵ Following complaints received going back to 2015, the FTC investigated YouTube for suspected violations of COPPA.²²⁶ Considering YouTube’s popularity among children,²²⁷ any improper tracking of children’s personal information is notably urgent.

[events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use](https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use)

²²² *Id.*

²²³ *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, FED. TRADE COMM’N (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices>.

²²⁴ *Id.*

²²⁵ Tony Room & Elizabeth Dwoskin & Craig Timberg, *YouTube Under Federal Investigation Over Allegations It Violates Children’s Privacy*, WASH. POST (June 19, 2019, 8:41 PM), <https://www.washingtonpost.com/technology/2019/06/19/facing-federal-investigation-youtube-is-considering-broad-changes-childrens-content/>.

²²⁶ *Id.*

²²⁷ *See* Aaron Smith & Skye Toor & Patrick Van Kessel, *Many Turn to YouTube for Children’s Content, News, Hot-To Lessons*, PEW RSCH. CTR. (Nov. 7, 2018), <https://www.pewresearch.org/internet/7,2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/>.), A 2018 Pew Research

Additionally, children have become increasingly more vulnerable to misleading content disguised as suitable for children but containing material that may adversely affect children's brains.²²⁸ Several creators have posted content using characters from children's media like "Peppa Pig, Nickelodeon's PAW Patrol and Disney's Frozen and Mickey Mouse" and manipulated the storylines to involve themes inappropriate for children.²²⁹ Children who stumble upon these videos may experience "stressful and/or fearful emotions [that] may underdevelop . . . parts of the brain responsible for executive functions."²³⁰

Other children's content on YouTube features seemingly harmless, entertaining, and educational material, but scientists and commenters have expressed concern over adverse effects from extensive viewership.²³¹ Children's online media production companies like ChuChu TV realized they could achieve exceeding viewership numbers by producing content for toddlers with "[b]right lights, extraneous elements, and faster pacing."²³² To put these numbers in perspective, on YouTube, Sesame Street (one widely available trusted educational children's show the FCC cited as a non-broadcast alternative) boasted over five billion views; however,

study found that 81% of all parents with children aged eleven or younger allow their children to use YouTube and 34% of parents admitted their children regularly watch content on YouTube. *Id.*

²²⁸ See Josephine Bila, *YouTube's Dark Side Could Be Affecting Your Child's Mental Health*, CNBC, (Feb. 13, 2018), <https://www.cnbc.com/2018/02/13/youtube-is-causing-stress-and-sexualization-in-young-children.html>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See e.g., Alexis C. Madrigal, *Raised by YouTube*, ATLANTIC (Nov. 2018), <https://www.theatlantic.com/magazine/archive/2018/11/raised-by-youtube/570838/>.

²³² *Id.*

their numbers pale in comparison to ChuChu’s more than 19 billion views.²³³ Revealed in this microcosm is the problem with children’s media at large.²³⁴

Because quality is hard to measure, the numbers that exist are the ones that describe attention, not effect: views, watch time, completion rate, subscribers. YouTube uses those metrics, ostensibly objectively, when it recommends videos. But as Theodore Porter, the great historian of science and technology put it . . . ‘Quantification is a way of making decisions without seeming to decide.’²³⁵

That broadcast viewership numbers have begun to drop and that non-broadcast children’s media content has gained extreme popularity is no reliable indication that the Commission should feel comfortable trending away from broadcast content that has been shown to improve the lives of children.

Any potential educational value gained from shows like those featured on the ChuChu TV channel is eliminated by its attention-grabbing tactics.²³⁶ What’s more, videos like these not only have zero educational value but are actively detrimental to children.²³⁷ “If kids get used to all the crazy, distracting, superfluous visual movement, then they may start requiring that to hold their attention,” making “other educational videos less effective and compelling,” the co-director of UCLA’s Center for Scholars and Storytellers, Colleen Russo Johnson, remarked.²³⁸

²³³ *Id.* Madrigal also notes that while some newer ChuChu-produced videos feature more educational content than they have previously, they are not the most viewed. *Id.* The older videos implementing the most toddler-engaging characteristics still have the most views; therefore, they rise to the top of the search results, continuing to gain popularity. *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *See e.g., id.*

²³⁸ *Id.*

The extreme complexity of internet content makes it nearly impossible to actively and sufficiently regulate internet platforms. For almost thirty years, Congress, the judiciary, and most importantly, everyday people, have struggled to strike a balance between the freedom of information and the limitation of illegal or harmful content. Therefore, it is too much to ask broadcast viewers (parents and children alike) to be satisfied with decreasing the availability of trustworthy children's media.

VII. Conclusion

The public has charged the FCC and similar government regulatory bodies with acting in the public's best interest. This necessarily means that every decision, and every Report and Order passed, fully considers the scope of effects on the public. Here, the Commission's 2019 Order deregulating children's broadcast television failed to prioritize the public's best interests.

Modernization of media is not going to be accomplished so quickly, and for the Commission to believe the opposite lets down a whole generation of children and parents who can no longer reasonably rely on the quality of children's broadcast television. The FCC's belief that the vast availability of non-broadcast alternatives supersedes any risk they present is misguided. The online realm is not yet at a place that is reliably safe for children. And regulatory bodies currently lack the authority and resources to make it dependably secure for children to roam freely. For these reasons, the FCC's 2019 decision lacks foundation.