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Winner-Take-Less Codes: The Case of Private Broadcasting Interdisciplinary Program Series

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Winner-Take-Less Codes: The Case of Private Broadcasting

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From 1997 to 1998, the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters debated various possible reform proposals. Aware of the "winner-take-all" characteristics of the media market, several of the broadcasters on the Committee were quite skeptical about governmental mandates, but highly receptive to the idea of reviving some kind of broadcasting "code," akin to the kind approved and administered by the National Association of Broadcasters ("NAB") between 1928 and 1979. The idea of a code received considerable attention, mid-deliberation, in the trade press. In its annual meeting, however, the National Association of Broadcasters signalled its skepticism about the idea and came very close to saying, "no" and "never."

Very oddly, a large part of the broadcasters' objection was that any "code" would violate the antitrust laws. This is very odd, because in private discussions, members of the NAB treated the possibility of an antitrust violation as extremely good news. It is not often that high-level corporate officials are smiling when they discuss the possibility that certain action would be found unlawful.

It seems clear that a code is unlikely to be accepted by the NAB, and that if it has any prospects at all, it would be to fend off more aggressive and direct regulation. Part of the purpose of this Essay is to understand the dynamic just described—the enthusiasm of many distinguished broadcasters for such a Code and the simultaneous resistance of the NAB. Part of the purpose is also to understand a second and related puzzle: pervasive broadcaster skepticism about a

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seemingly flexible and highly attractive "pay or play" system, in which broadcasters can be relieved of public interest obligations (to "pay") if they agree instead to pay someone else—another broadcaster—to do so. As we will see, the solution to the two puzzles helps illuminate the nature of television markets, and also the potential virtues and vices in both market and non-market solutions.

Television markets have important "winner-take-all" characteristics.[1] Intense competition among stations can lead to extraordinary success for some programs and total disaster for others. For many people, the relative quality of the program (Is this the best local news show? The best program on at 7:30?) matters as much as its absolute quality. And for many people, what matters is what other people are watching; hence a decision to watch, or not to watch, the evening news on CBS, or Ally McBeal, or Star Trek, or Seinfeld can have external consequences.

Participants in media markets are entirely well-aware of this fact. A bad decision for one week may produce a crisis the next week; a good decision for one week may make a year and conceivably a decade. The result can be a kind of homogeneity in programming and also a more than occasional "race to the bottom" in terms of sheer quality, as the effort to grab viewer attention has corrosive effects on programming. Many broadcasters and journalists are quite vocal about this phenomenon, lamenting the adverse effects of competition, which lead them to produce shows different from and inferior to what they would, in a sense, like to offer.

Apart from the concerns of participants, are winner-take-all television markets a basis for legitimate public concern? I believe that they are, above all because of the adverse cultural and democratic consequences of sensationalistic, violent, or prurient programming.[2] It is reasonable to think that competitive forces have an array of harmful effects, ranging from inadequate programming for children, to substance-free and scandal-pervaded treatment of political issues, to news as "infotainment," and most generally to bad consequences for social norms, preferences, and culture as a whole.[3]

Government has often responded to this problem through direct regulation. The most celebrated example is the "fairness doctrine," now largely defunct, which required a certain amount of public interest programming and emphasized the importance of presenting divergent views. Regulation of this kind is often defended as a way of overcoming competitive pressures. The problem with such regulation is that it may be futile or counterproductive. It may also raise serious constitutional problems.

In this essay I discuss another way of promoting public interest goals. The basic idea is a system of voluntary self-regulation, through a "code" of conduct to be issued and enforced by the National Association of Broadcasters (NAB), and if not by the NAB, by some kind of external "watchdog" group. For many dec-

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1. See Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society*, 189-210 (Penguin 1995).

2. I attempt to defend this proposition in Sunstein, *Private Broadcasters and the Public Interest* (cited in note †).

3. A good general discussion is provided by C. Edwin Baker, *Giving the Audience What It Wants*, 58 Ohio St L J 311 (1997).

ades, in fact, the NAB did indeed issue and enforce such a code, partly to promote its own economic interests (by raising the price of advertising), partly to fend off regulation (by showing that the industry was engaged in self-regulation), and partly to carry out the moral commitments of broadcasters themselves. A new code, building on the old, could contain various public interest obligations designed to protect children and to encourage substantive attention to public issues, and such a code could also attempt to protect against (for example) sexually and gratuitously violent material, subliminal advertising, sensationalistic treatment of politics, and a wide range of other problems with television. Such a code might promote some of the desirable effects of government regulation without creating the familiar accompanying problems of rigidity and coercion.

The question is whether it is possible, in the current era, for broadcasters to overcome some of the unfortunate effects of the winner-take-all, or winner-take-most, marketplace with voluntary measures designed to ensure something on the order of winner-take-less. An underlying question, likely to be faced in many areas of regulatory policy both domestically and internationally, is whether a code would work as a kind of undesirable cartelization or instead as protection against an undesirable "race to the bottom"—and whether such a code might be immunized from attack under the antitrust laws.

I suggest that a code might do a great deal of good. A general lesson is that at least with respect to television, competition is producing an array of social harms, and the antitrust laws ought not to be invoked too readily to prevent producers from undertaking cooperative action in circumstances in which competition is producing serious harms. Government regulation is often the response to market failure, but a code might be better, especially because of its comparative flexibility and because of the informational advantages of private enforcers. Thus it is hazardous to invoke the antitrust laws; direct regulation may lead the industry to provide benefits more crudely and expensively than if a code were in place.[4]

I. THE PROBLEM

Competitive pressures often do a great deal in providing programming that people would like to see. In an era of cable, satellite, digital television, and an astonishingly large range of options, competitive pressures will be instrumental in producing "niche" programming for people who have a particular interest in certain programming, even serious programming. The communications market increasingly resembles the market for magazines; there may even be a possibility, in a digital market, of over one thousand stations.[5] But as I have noted, those competitive pressures also have a downside. They can lead to a failure to provide sufficient attention to educational values, or the kind of programming that is

4. See Frank and Cook, *The Winner-Take-All Society* at 225-27 (cited in note 1).

5. This is discussed in more detail in Sunstein, *Private Broadcasters and the Public Interest* (cited in note †).

indispensable to a well-functioning democracy.[6] This is so especially in light of the fact that a small relative advantage can lead to huge increases in viewers, a fact that presses television in tabloid-like directions. As Robert Frank and Philip Cook have suggested, "[i]ncreasingly impoverished political debate is yet another cost of our current cultural trajectory. Complex modern societies generate complex economic and social problems, and the task of choosing the best course is difficult under the best of circumstances. And yet, as in-depth analysis and commentary give way to sound bites in which rival journalists and politicians mercilessly ravage one another, we become an increasingly ill-informed and ill-tempered electorate."[7]

It would be possible to respond to the sometimes harmful effects of competitive pressures in various ways. Direct legal requirements and prohibitions are of course a possibility. But the most obvious and simplest response would take the form of voluntary self-regulation, through some kind of "code" of good programming. Such an approach would be specifically designed to respond to the problems that can be introduced by market pressures. In other nations, cooperative action has played a constructive role in situations of this kind.[8] Such cooperative action often makes people concerned about antitrust violations. But the antitrust law can go quite wrong when it prevents certain cooperative action that overcomes palpably adverse effects of market pressures.[9] Indeed, the International Standards Organization is designed specifically to ensure a form of cooperation designed to overcome those adverse effects[10]; the question is whether that experience has domestic analogues.

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6. See James T. Hamilton, Channeling Violence: The Economic Market for Violent Television Programming (Princeton 1998).

7. See Frank and Cook, *The Winner-Take-All Society* at 203 (cited in note 1).

8. For a discussion of the ethical code in Israel, see Moshe Negbi, *The Enemy Within: The Effect of "Private Censorship" on Press Freedom and How to Confront It- An Israeli Perspective*, Discussion Paper D-35, 14 (Harvard University 1998). Note also that many international bodies attempt to certify quality, in a kind of cooperative action designed to reduce adverse effects of market pressures.

9. See Frank and Cook, *The Winner-Take-All Society* at 225-27 (cited in note 1).

10. See, for example, Michael Prest, *Profit Bows to Ethics*, The Independent (London), 3 (Oct 26, 1997) (stating "Some of the world's biggest companies are putting their weight behind a new, verifiable code of conduct intended to answer mounting consumer criticism of the exploitative conditions under which the goods they sell are produced in poor countries. . . . The code, called SA8000 (Social Accountability 8000), is the brainchild of the Council on Economic Priorities, an American public interest group, which tries to improve corporate responsibility. It has been drawn up by companies, non-governmental organisations, trade unions, and other interested groups, and is due to start operating next year.

The code covers the basic issues of child labour, forced labour, health and safety, trade union rights, discrimination, discipline, working hours, and pay. . . . As the name SA8000 suggests, it is the first to be modeled on existing and widely accepted commercial standards such as IS09000, drawn up by the International Standards Organisation in Geneva, which is used to determine whether companies have the management systems to meet required product quality.

But the real strength of the new approach is commercial sanctions. A company which adopts the code also agrees to be independently inspected to see whether it is abiding by the conditions laid down. It will be able to attract customers and gain a competitive advantage by advertising the fact that its factories and suppliers meet the standard.").

My emphasis here is on allowing programmers and journalists to do what, in an important sense, they would actually prefer to do. It is worth underlining this point. Many journalists in the world of broadcasting would very much like to do better; competitive pressures are the problem, not the solution, and a voluntary code could help them and the public as well.

II. HISTORY

The idea of a broadcasting code has a long and illuminating history.[11] A central goal was to increase revenues by jacking up the price of advertising. Another goal was to fend off federal regulation. Yet another goal was to embody the public-regarding aspirations of many members of the industry (and to prevent competitive responses by those who had only profits on their mind). Intriguingly, the invalidation of part of the code, on antitrust grounds, was received with enthusiasm by the NAB, a phenomenon that casts light on the puzzle with which I began.

A. ORIGINS AND PRECURSORS: THE SPECTRUM AND ROOSEVELT.

The NAB was founded in 1923, and it first attempted to produce a degree of self-regulation in 1926, as a response to the "chaos" widely perceived to have been produced by interference and piracy. Some progress was made, but ultimately the agreement broke down; hence legislation was necessary, in the form of the Radio Act of 1927.

The initial NAB code, produced in 1928, included some content guidance, but it was quite vague and also lacked an enforcement mechanism. Just one year later the NAB adopted a new code, involving ethics and standards of commercial practice. For example, the code banned "fraudulent, deceptive or obscene" material, "false, deceptive, or grossly exaggerated advertising claims, and "offensive" material. But the continuing imprecision of this code, together with the continuing lack of an effective enforcement mechanism, made it something of limited usefulness.

The next major step resulted from President Roosevelt's National Recovery Administrative Codes in 1933. The NAB submitted a code of fair practices to the NRA, and on November 27, 1933, President Roosevelt signed it and gave it the force of law. The result included a seven-person Broadcaster Code Authority, designed to supervise compliance. But the National Recovery Act was struck down in 1935 by the Supreme Court,[12] and the Code Authority was eliminated along with the "law" that President Roosevelt had signed.

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11. I draw here on a variety of sources, including independent research and Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 Cardozo Arts & Ent L J 667 (1995).

12. See *Schechter Poultry Corp v United States*, 295 US 495 (1935).

B. AFTER THE NEW DEAL: INCREASED CONTENT CONTROL.

Soon thereafter the NAB produced a new voluntary code, which was largely ignored. But in 1938 the NAB came up with another, far more specific code and also an explicit enforcement authority, the NAB Code Committee. Part of the reason for the new development was the increasing willingness of the Federal Communications Commission (FCC) to regulate both structure and content—and a specific warning, by the Chairman of the FCC (after the broadcast of War of the Worlds) that without industry self-policing, government involvement was likely.

The 1938 Code included a number of important provisions. Among other things, it (a) required broadcasters to allot time fairly for discussion of controversial views; (b) banned the sale of time for the airing of controversial views; (c) asked broadcasters to cooperate with educational groups for the airing of educational programming; (d) required fair and accurate news programs; and (e) regulated commercials by limiting the time and length of advertisements. There were also prohibitions on hard liquor advertising. A Code committee would enforce the Code by determining whether a station was in compliance. Notably, the head of the FCC publicly approved the Code, and the American Civil Liberties Union described it as "a great step forward in formulating a policy in the public interest."[13]

C. TELEVISION.

All of these steps involved radio, but the 1938 Code was the unmistakable precursor of the eventual television Code. In its first period, television witnessed a pattern that generally characterized the past debates over radio and late twentieth century debates over television: legislative concern, proposed legislation, steps toward self-regulation, and little or no legislation or regulation.

In 1951, members of Congress proposed a National Citizens Advisory Board for Radio and Television, to oversee programming content. At about the same time the NAB began to draft its first television code in 1952, apparently in direct response to a congressional threat of legislation.[14] The new code had a broad reach, emphasizing in particular educational and cultural programming. It also contained content restrictions on display of violent action and sexual material.

Compliance with the Code was voluntary. (Note also that station operators who were not members of the NAB were eligible to subscribe.) Its enforcement provisions were quite modest. The basic mechanism came in the form of a clearinghouse for complaints. In addition, subscribers could display a code seal (the NAB "Seal of Good Practice"), and permission to display the seal would be withdrawn for "continuing, willful, or gross" violations. Thus the only formal sanction was that the non-complying station owner could not display the seal.

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13. See MacCarthy, *Broadcast Self-Regulation* at 673 (cited in note 11).

14. See Daniel L. Brenner, The Limits of Broadcast Self-Regulation Under the First Amendment, 27 Stan L Rev 1527, 1529 (1975).

But there were informal pressures, too. Stations who sought license renewal were likely to have prompt FCC processing if they adhered to the Code. Moreover, some people believe that subscription to the Code was appealing to those who bought advertising time, because the Code contained limits on the length and frequency of commercials, which would enhance the prominence of the announcement. Some stations in the United States did not adhere to the Code, but the vast majority chose to do so.

D. THE DEMISE OF THE CODE.

The most recent code met its demise as a result of an antitrust action brought by the Justice Department in 1979, based on an allegation that certain provisions of the Code violated the Sherman Act.[15] But the Justice Department's complaint was quite narrow. It involved not the code in general, but three specific kinds of cartel-like advertising restrictions: (1) time standards, which limited the amount of commercial material that could be broadcast in an hour; (2) program interruption standards, which imposed a limit on the maximum number of commercial announcements per program as well as on the number of consecutive announcements per interruption; and (3) multiple product standards, which prohibited the advertising of two or more products or services within a single commercial if the commercial was less than 60 seconds in length.

The court did not invalidate the code in general, nor did it accept the Justice Department's argument in its entirety. It held that the multiple product standards were per se unlawful, but that the time standards and program interruption could not be tested without an inquiry into the facts.[16] The NAB took this ruling as an opportunity to eliminate the Code altogether. From all reports, the NAB was pleased to take a narrow judgment as the basis for a complete rejection of the

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15. *United States v National Association of Broadcasters*, 536 F Supp 149 (D D C 1982).

16. *United States v National Association of Broadcasters*, 536 F Supp at 156-63. The district court held that the time and product interruption standards were *not* invalid per se. In the court's view, the distinctive characteristics of the broadcasting industry argued against a per se rule of invalidity. Because broadcast frequencies are scarce, because the whole area is subject to regulation, and because of the fact that there are only sixty minutes in an hour (!), no simple solution would be sensible. On these two issues, the court also denied summary judgment for the government under the rule of reason, concluding that there were material issues of fact. By contrast, the court held that the multiproduct standard *was* per se unlawful. In its view, this rule was akin to a standardization agreement by which food manufacturers set a standard for the ingredients that would be used in their products. This form of standardization was per se illegitimate. Thus the court actually invalidated only one provision of the code, on the theory that it was analytically akin to a system for price-fixing. At the same time, the court denied summary judgment for the NAB. An important question was whether the time standards would have the effect of raising or stabilizing the price of commercial time (this was the antitrust problem); it was possible, the court said, that any such effect would be trivial in light of the importance of other factors. If this was true, the code would not violate the Sherman Act. Id. This is because there is no antitrust violation without a significant adverse effect on competition. See, for example, *United States v Arnold, Schwinn, & Co*, 388 US 365, 375 (1967), overruled on other grounds by *Continental T V, Inc v GTE Sylvania, Inc*, 433 US 36 (1977); *Neeld v National Hockey League*, 594 F2d 1297, 1298 (9th Cir 1979).

Code approach, perhaps because of the emerging threat from cable television (see below).

In the 1980s, continuing congressional concern about televised violence led to a new law exempting from the antitrust law networks, broadcasters, cable operators and programmers, and trade associations, in order to permit them to generate standards to reduce the amount of violence on television.[17] But there was considerable doubt about whether an explicit exemption was necessary; a 1993 opinion from the Department of Justice said that the industry could cooperate to reduce television violence without offense to the law of antitrust.[18]

E. FAMILY VIEWING.

In 1962, the FCC proposed to make parts of the code into a legal mandate. The industry successfully resisted this step. But there was a continuing pattern of interaction among regulatory proposals, legislative reaction, public concern, and self-regulation. Of these the most important involved 1970s concerns about violence on television. The industry responded through the "family viewing policy," saying that inappropriate entertainment programming would not be shown between 7 pm and 9 pm eastern standard time. This was a distinctive form of self-regulation. But the Writers Guild of America challenged the policy on first amendment grounds, arguing that the policy was not voluntary self-regulation but was in fact a product of government coercion.

In a controversial decision, the trial court accepted the challenge, and barred the NAB from enforcing the policy.[19] The court of appeals overturned the decision on the ground that the district court was not the right forum to resolve these issues in the first instance.[20] The court of appeals said that the issue should first be resolved by the FCC. Although the decision of the court of appeals was jurisdictional, that court suggested considerable doubt about the district court's judgment: "It simply is not true that the First Amendment bars All limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public."[21]

The FCC ruled in 1983 that there had been no government coercion and that the NAB had adopted the family viewing policy voluntarily. In its key passage the FCC wrote, "[v]oluntary industry action is often preferable to governmental solutions, and an industry frequently addresses a problem in order to forestall regulation by the Government; conversely, it is not unusual for a regulatory body

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17. See 47 USC § 303c(c).

18. See Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Sen. Paul Simon (D-Ill.) (Nov 29, 1993) in Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future*, Appendix B (Dec 18, 1998).

19. *Writers Guild of America, West v FCC*, 423 F Supp 1064 (C D Cal 1976), vacated sub nom. *Writers Guild of America, West v American Broadcasting Co*, 609 F2d 355 (9th Cir 1979).

20. *Writers Guild of America, West v American Broadcasting Co*, 609 F2d 355 (9th Cir 1979).

21. Id at 364.

to forego enacting rules when the regulated industry voluntarily adopts standards which deal with a perceived problem."[22]

In June 1990 the NAB responded to public pressure by issuing new, exceptionally tepid "voluntary programming principles" to cover violence, indecency and obscenity, drugs and substance abuse, and violence. The new standards were reaffirmed in June 1991, and in 1992, ABC, NBC, and CBS issued and agreed to adhere to a set of new standards, although without an enforcement mechanism. Thus in the 1990s self-regulation can be found in various places: the advance parental advisory system, joint advisory guidelines issued by the four networks, NAB principles, and an annual public assessment, by the four networks, of television violence.

III. A CODE: SAMPLE PROVISIONS

From what I have said thus far, the case for a new code is quite straightforward. Such a code might well counteract some of the harmful effects of "race to the bottom" competition, and they might ensure that winner-take-all markets look more like winner-take-most markets, in such a way as to promote (for example) more and better programming for children and greater attention to public issues. The question then becomes whether it might be possible to adopt a new code for broadcasting, specifically designed for the new communications market. Such a code might update the old NAB code, and reduce current problems, without having the degree of tepidness of the existing "standards." Obviously a new code could create certain problems, especially in an era in which broadcasters must compete with other television sources. But for the moment, let us put that point to one side.

What provisions might a new code include? Consider the following possible code provisions,[23] simply for the sake of illustration:

> 1. Each broadcaster shall provide three hours of free air time for candidates during the two month period preceding the election. It is preferable to ensure that candidates provide substantive arguments and that they avoid sloganeering and short "soundbites."
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> 2. Broadcasters shall provide one hour of educational programming for children each day. They shall also attempt to ensure that children are not exposed to excessively violent programming or programming that is otherwise harmful to or inappropriate for children. Broadcasters should

22. Federal Communications Commission, Report: In the Matter of Primary Jurisdiction Referral of Claims Against Government Defendant Arising from the Inclusion in the NAB Television Code of the 'Family Viewing Policy,' 95 FCC2d 700, 1983 WL 182969 (1983).

23. These provisions are adapted and revised from the more detailed Code suggested by the Model Voluntary Code of Conduct for Digital Television Broadcasters, in Final Report on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future*, Appendix B (Dec 18, 1998).

avoid programming that encourages criminal or self-destructive behavior; they should also be sensitive in presenting sexual material that children might encounter.

3. News coverage shall be substantive and issue-oriented. It should not emphasize the sensational and the prurient. It should concern itself with claims and disagreements on matters of substance. Stations should endeavor not to give excessive or undue attention to sensational accusations or to issues of "who is ahead," at the expense of other issues.

4. Morbid, sensationalistic or alarming details not essential to a factual report, especially in connection with stories of crime or sex, should be avoided. News should be broadcast in such a manner as to avoid panic and unnecessary alarm. News programming should attempt to avoid prurience, sensationalism, and gossip. Stations should make an effort to devote enough time to public issues to permit genuine understanding of problems and disagreements.

5. Violence, psychological but especially physical, should be portrayed responsibly, and not exploitatively. Presentation of violence should avoid the excessive, the gratuitous, the humiliating, and the instructional. The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or sound, should be avoided. Programs involving violence should venture to present the consequences to its victims and perpetrators. Particular care should be exercised where children may see, or are involved in, the depiction of violent behavior. Programs should not present rape, sexual assault, or sexual violence in an attractive or exploitative light.

6. Broadcasters should ensure that their programming is responsive to the needs of citizens with disabilities. To this end, broadcasters should ensure that programming is accessible, through the provision of closed captioning and other means, to the extent that doing so does not impose an undue burden on the broadcaster. Particular efforts should be made to provide full access to news and public affairs programming. Citizens who are deaf and hard of hearing are sometimes at risk of a form of disenfranchisement, or even physical danger, because steps are not taken to ensure that television broadcasting is available to them. Stations should take special steps to ensure that information about disasters and emergencies are fully accessible to those who are deaf and hard of hearing, including in "real time."

IV. PROBLEMS AND PROSPECTS

Such a code would of course raise many questions. The first would involve the problem of enforcement. Without an enforcement mechanism, a code might have no effect at all.

There are two obvious possibilities. The simplest would be for the NAB to undertake enforcement on its own, just as it did under the old code. Enforcement might be both symbolic and material. The NAB might, for example, give a seal of approval to those who are shown to comply with its provisions, and deny a seal of approval to those who have been shown not to have complied. It might also give special public recognition to those stations that have compiled an excellent public service record in the past year. Such recognition may be awarded for, among other things, meeting the needs of children in a sustained and creative way, offering substantive and extended coverage of elections, including interviews, free air time, and debates, offering substantive and extended coverage of public issues, and providing opportunities for discussion of problems facing the local community. At the time of license renewal, a notation might be given to the FCC that there has been compliance or continuing or egregious noncompliance with the code.

If the NAB is unwilling to enforce a code of this kind, perhaps a private "watchdog" group could take the initiative, both promulgating the code and publicizing and in that (modest) sense sanctioning violations. In the environmental context, information disclosure has itself accomplished considerable good, by activating relevant groups and social norms.[24] Perhaps the same would be true here.

There is another question: the scope of any such code. Undoubtedly such a code was less painful, and easier to operate, when three broadcasters exhausted the universe of television. Of course broadcasters now find themselves in competition with many other entertainment sources, including cable and the Internet. In these circumstances, broadcasters are not likely to constrain themselves if their competitors are not similarly constrained. The competition for an audience for news is much affected by the existence of "tabloid television," and a broadcaster who ties himself to the mast may find himself with a significantly reduced audience. The point suggests that in the development of a code, broadcasters should perhaps be joined by the National Association of Cable Television.

By itself, however, a code limited to broadcasters would probably do considerable good, even if some broadcasters are reluctant to subscribe to it. When the market reaches the stage in which broadcasters are merely some of a large number of providers, with no distinctive status, it might make sense to think of a more general code (with suitable adjustments for particular kinds of programmers[25]).

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24. See Hamilton, *Channeling Violence* at 311 (discussing advances made in public acceptance of recycling through the application of social norms) (cited in note 6).

25. For example, it is not clear that a station devoted to children should be required to provide free air time for political candidates.

V. NOTES ON ANTITRUST LAW

Provisions like those described should not, and in all likelihood would not, be taken to violate the antitrust laws. The Department of Justice has so concluded,[26] and in two important cases, aspects of previous codes were upheld against private antitrust attack. A district court refused to issue an injunction against code standards forbidding cigarette advertising, despite a claim that these standards were inconsistent with the antitrust laws.[27] A lower court also upheld the provisions involving standards for advertising directed to children.[28] In these cases, the court basically concluded that the restrictions were reasonable and in the public interest.

As I have noted, the most recent code met its demise as a result of an antitrust action brought by the Justice Department in 1979, based on an allegation that certain provisions of the Code violated the Sherman Act. After the court's ruling, the NAB suspended enforcement of all code provisions.[29] Doubtless the NAB did this partly for reasons of economic self-interest, and not only because it was fearful of a legal challenge. Nonetheless, the district court's narrow decision—untested in any court of appeals—has loomed over the debate about codes. But in its most recent analysis of the problem, the Department of Justice suggested that networks could agree to guidelines and principles to reduce unnecessary violence on television.[30] Indeed, this is not an ordinary form of collusion. It is

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26. See Letter from Sheila Anthony (cited in note 18).

27. See *American Brands, Inc v National Association of Broadcasters*, 308 F Supp 1166 (D D C 1969). The court concluded that the plaintiff was not likely to prevail on the merits. The court referred in particular to the dangers posed by cigarette smoking and claimed that the standards and guidelines in the code serve the "public interest." Id at 1169.

28. See *American Federation of Television and Radio Artists, AFL-CIO v National Association of Broadcasters*, 407 F Supp 900 (S D N Y 1976). The rule at issue there said that children's program hosts or primary cartoon characters "shall not be utilized to deliver commercial messages within or adjacent to the programs which feature such hosts or cartoon characters." The provision applied as well "to lead-ins to commercials when such lead-ins contain sell copy or imply endorsement of the product by program host or primary cartoon character." Id at 902. The plaintiff attacked the restrictions, claiming that it restricted the ability of hosts and actors to obtain free employment for delivery of commercials. The court said, "There is not the slightest indication of any anti-competitive purpose in the creation of the rule," especially since there was no evidence of a motive "to benefit one class of performers competitively over another class of performers." Id. The court found it relevant that the rule "resulted from a bona fide concern on the part of various groups, and the FCC, regarding fair and ethical methods to be used in television advertising directed to children." Id. This was "a reasonable rule of conduct regarding good practice by its members in the public interest and is not a violation of the antitrust laws." Id at 903.

29. In public it claimed that it would seek an appeal, but a consent judgment was issued, in which the NAB agreed, for ten years, to cease monitoring and enforcement of the three disputed code provisions.

30. See Letter from Sheila Anthony (cited in note 18). The Department of Justice concluded that "the conduct that was at issue in the NAB case differs significantly from that covered by" an agreement on televised violence. Id at 3. In the NAB case, the problem was raising "the price of time," to "the detriment of both advertisers and the ultimate consumers of the products promoted on the air." Id. By contrast, an agreement covering violence should "be liked to tradi-

not as if broadcasters are saying that advertisers must pay a minimum of $X per advertisement. It is possible that the restrictions under discussion would have little or no adverse effect on competition; they may even have good effects on competition.[31] Even with a code, programmers would compete over a great many things, including the kinds of programming regulated by a code. The code might in a sense be pro-competitive, because it would ensure television coverage of materials in which there is a substantial public interest and which might otherwise not be provided. This is so especially in light of the fact that stations would compete for viewers with respect to the kinds of programming covered by the code.[32]

In light of the distinctive nature of the television market, a code of the sort under discussion would likely survive a "rule of reason" inquiry. Any restrictions, such as they are, could be defended as a means of promoting competition and also various public interest goals, such as education of children, access for the handicapped, and democratic and civic functions.[33]

We are now in a position to understand the two puzzles with which I began. The broadcasters on the Committee favored a code partly because they thought it a good idea in principle and partly because they had little to lose from it. Though frequently "winners," they were selected for the Committee because of their commitment, through both words and deeds, to moderating some of the adverse effects of market competition in television. They were also vulnerable to "winner-take-all" effects from their competitors insofar as they were reluctant to engage in certain practices that might attract viewers. In this way, a code would not hurt and might even help them.

Compare the position of the NAB. The broadcasting industry as a whole could not be helped and might well be hurt by such a code, especially because cable television would not be bound by it. Why should broadcasters, in an intensely competitive market, give a significant edge to cable television? Why should they do this if the result would be that cable could take, if not all, a lot

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tional industry standard-setting efforts that do not necessarily restrict competition and may have significant pro-competitive benefits." Id. In the view of the Department of Justice, "efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis." Id at 4.

31. Compare *Smith v Pro Football, Inc*, 593 F2d 1173, 1183 (D C Cir 1978).

32. It is not entirely clear that any plaintiff would have an antitrust injury. The self-regulation that we are discussing would allow a wide range of choices and options for consumers and producers. Perhaps some producer of some marginal programming could claim that he was unable to sell his product because of (for example) free air time for candidates; but this would be an extremely speculative injury. Perhaps viewers could argue that they were deprived of certain programming that they would like; but in view of the wide range of options available to viewers, this too is speculative. Perhaps some stations or programmers could contend that a code limited their freedom; but it is not clear that this would count as an antitrust injury, especially in light of the fact that the code is voluntary.

33. This idea is bolstered by the line of cases analyzing restrictions by trade associations and similar entities. See, for example, *NCAA v Board of Regents*, 468 US 85 (1984); *Allied Tube & Conduit Corp v Indian Head*, 486 US 492 (1988).

more of the existing audience than it now does? In short, a code limited to the broadcasting industry would not be good for the broadcasting industry, simply because in a market with winner-take-all features, the existence of the code might mean that cable would take all, or most, or at least more. Of course the likely result is that cable would take more rather than most. And this is why a code limited to broadcasting would probably be, on balance, good for the public, and good for good broadcasters, even though bad for broadcasters as a whole.

And this point helps explain a related but perhaps deeper puzzle: the Committee broadcasters' skepticism about "pay or play" alternatives. A set of rigid public interest requirements does not hurt public-interested broadcasters and may even help them, insofar as it places their competitors under legal duties that they would themselves meet voluntarily (because of their aspirations or because of the particular demands of their audience and their advertisers). The substitution of a new system of "pay or play" would mean that these broadcasters would be undercut by competitors who, unwilling to play, would pay—and capture a large audience share, in a version of "winner-take-most." No wonder certain broadcasters would much prefer "play" to "play or pay," even if the latter would, for the industry as a whole, create far more flexibility.

The best defense of a code of the sort I have discussed is that it would counteract the adverse consequences of competitive pressures, producing winner-take-less outcomes, in a way that would provide significant benefits for the public by strengthening broadcaster behavior and norms in favor of obligations to children and to democratic values. And if this is so, the area of television regulation provides a quite general lesson about how voluntary private action might sometimes handle problems usually dealt with by direct government controls—and a lesson about the reflexive use of the antitrust laws to prevent public-spirited producer cooperation. We might even conclude with the suggestion that such cooperation might, in winner-take-all contexts, provide a kind of "third way" between unlimited competition on the one hand and rigid governmental mandates on the other.