

**HEAR AN [EXPLETIVE], THERE AN [EXPLETIVE],  
BUT[T] . . . THE FEDERAL COMMUNICATIONS  
COMMISSION WILL NOT LET YOU SAY  
AN [EXPLETIVE]**

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I. AN OVERVIEW

Broadcast television and broadcast radio<sup>2</sup> are integral parts of American society. So integral, in fact, that often these mediums are taken for granted. To many Americans, broadcast television and broadcast radio are one of the few free things left in life. Anyone who owns a ten dollar radio or a fifty dollar television can watch their favorite new episode of *Grey's Anatomy*, *Sixty Minutes*, or *Lost* and listen to their favorite songs or commentary on KNRK, Z100, or NPR. Because broadcast television and broadcast radio are typically taken for granted, hardly anyone questions the conditions that a regulatory governmental agency places upon the organizations that

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\* J.D. Willamette University College of Law, May 2008; B.S. University of Miami, May 2005. I would like to thank those who not only have helped me with this article, but also those who have helped me reach this point in my life—a point at which my thoughts are of a publishable quality. I thank you all most kindly.

From the University of Miami I want to thank Professors S.L. Harrison and Robert Stahr Hosmon, who initially cultivated any writing talent I may have. Also from Miami, I would like to thank Professors Cynthia Cordes and Danny Paskin, who have unabashedly encouraged me over years. From Willamette University College of Law I want to thank Professor Ed Harri and Rachael Rogers, again for helping me learn how to write, think, and analyze. More specifically, thank you Rachael for always being my default editor, no matter the subject. Also from Willamette, I would like to thank Professor Steven Green, who allowed me to initially pursue the topic of this article in his First Amendment seminar.

Finally, I want to thank my family: Dad, Aylene, and Brittany. Thank you for supporting me all throughout law school, and beyond. But most of all, I thank you for being there, no matter where *there* was.

2. "Broadcast," with regard to broadcast television and broadcast radio, refers to the "transmit[ing] or mak[ing] public by means of radio or television." MERRIAM-WEBSTER'S ONLINE DICTIONARY "broadcast," available at <http://www.merriam-webster.com/dictionary/broadcast> (last visited Nov. 25, 2008). In this regard, programming is transmitted, or broadcasted, over the public airwaves and received by televisions and radios equipped to pick up the signal.

broadcast content over the public airwaves. Too many Americans have forgotten the maxim reminding people that free things usually come at a price.

Although many broadcast television viewers, broadcast radio listeners, and broadcast organizations may not directly perceive the price associated with “free” broadcasting, the indirect effects of a governmental agency’s adoption of numerous rules and regulations have most definitely affected broadcast television’s and radio’s content.<sup>3</sup> This affect has resulted in many individuals and broadcasters alike questioning whether the regulatory practices implemented by a certain governmental agency have effectively—although indirectly—resulted in the censorship, if not the self-censorship, of broadcast television and broadcast radio programming. However, referring back to the U.S. Constitution, the U.S. government is not allowed to outright censor broadcast television’s and broadcast radio’s content.<sup>4</sup>

Thus, the ultimate price that both broadcasters and broadcast audiences alike pay for the use of the public airwaves is that of having to enjoy government filtered broadcast programming. But the ultimate follow up question is why? What is so special about broadcast television and broadcast radio that allows a governmental body to control what would seemingly qualify as First Amendment speech? The answer is the electromagnetic spectrum. It is over this spectrum that broadcast signals are transmitted and ultimately received by radios and antennae televisions across the United States. It is also because of this electromagnetic spectrum that Congress established the Federal Communications Commission (“FCC” or “Commission”),<sup>5</sup> providing the government with a means to protect the spectrum and monitor the content transmitted over its airwaves.

Simply put, it is part of the everyday American lifestyle to listen to broadcast radio and watch broadcast television. These two modes of communication have been around since the turn of the last century, resulting in almost everyone now taking them for granted; everyone, that is, except the United States government and the FCC. And perhaps it is because these two modes of communication are so

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3. Milagros Rivera-Sanchez, *Broadcast Regulation*, in COMMUNICATION LAW WRITERS GROUP, COMMUNICATION AND THE LAW 181, 193 (W. Wat Hopkins ed., 2001) [hereinafter Rivera-Sanchez].

4. *Id.*

5. 47 U.S.C. § 151 (2000).

present in everyday American society that everyday American society has, as a result, unknowingly automatically conferred constitutionally protected First Amendment status to the speech that is transmitted over the electromagnetic spectrum. However, the FCC has made it clear to broadcast licensees—the holders of FCC licenses, with which broadcasters are allowed to use the public airwaves for broadcasting purposes—that broadcasting television and radio programs over the (public) electromagnetic spectrum is a privilege, not a right.<sup>6</sup> Like driving, with this privilege comes certain obligations and responsibilities, namely complying with the FCC or facing the risk of paying hundreds of thousands of dollars in fines and the revocation of one's broadcasting license.<sup>7</sup>

Today, broadcasting networks such as the American Broadcasting Company ("ABC"), the network formerly known as the Columbia Broadcasting System ("CBS"), the National Broadcasting Company ("NBC"), the Fox Broadcasting Company ("FOX"), and the Public Broadcasting Service ("PBS") live in constant fear that they will be assessed a Forfeiture Penalty, a monetary fine imposed by the FCC for failing to meet the Commission's broadcasting standards.<sup>8</sup> And these broadcasters' fears are real because recently the Commission has been overturning FCC precedent and more aggressively assessing Forfeiture Penalties and issuing Notices of Apparent Liability ("NAL") against broadcasters.

In early 2004, the Commission found that NBC's airing of the 2003 Golden Globe Awards Program violated the FCC's indecency standards.<sup>9</sup> During the show, the Foreign Press Association presented the band U2 with the Golden Globe award for "Best Popular Song."<sup>10</sup> Bono accepted the award and said, "This is really, really fucking brilliant."<sup>11</sup> Although the Commission concluded that NBC violated FCC's indecency standards, it did not assess a Forfeiture Penalty against NBC because it also found that NBC lacked sufficient notice

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6. See *Red Lion Broad. v. FCC*, 395 U.S. 367, 377 n.5 (1969).

7. See 47 C.F.R. § 1.80 (2007) (imposing forfeiture penalties for failing to comply with the Communications Act of 1934).

8. See discussion *infra* Part IV (detailing specific accounts of broadcasters engaging in self-censorship to avoid potential FCC penalties).

9. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4975 (2004) [hereinafter *Golden Globes II*].

10. *Id.* at 4976.

11. *Id.* at 4976 n.4.

of the FCC's new "fleeting expletive" policy.<sup>12</sup> Shortly after the Golden Globes incident, the FCC issued a \$550,000 NAL against Viacom, Inc., the owner of CBS and MTV,<sup>13</sup> for its airing of the 2004 Super Bowl Halftime Show in which Janet Jackson's bare breast was revealed for a fraction of a second—to be specific, 19/32 of a second.<sup>14</sup>

Additionally, a few months later, the Commission found that FOX's April 2003 airing of the *Married by America* program violated the FCC's indecency standards and subsequently imposed a \$1,183,000 NAL against FOX.<sup>15</sup> *Married by America* was FOX's latest reality television show, through which the public selected potential spouses for the show's contestants.<sup>16</sup> As part of the program,<sup>17</sup> FOX gave the final two contestant couples bachelor and bachelorette parties,<sup>18</sup> which included strippers attempting to "lure participants into sexual activities."<sup>19</sup> Aware that the display of the strippers' sexual organs would violate FCC obscenity standards, FOX used pixilation to blur out images of the strippers' exposed breasts

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12. *Id.* at 4982. See also Lindsay LaVine, *The Lion, the Witch (Hunt), and the Wardrobe Malfunction: Congress's Crackdown on Television Indecency*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 385, 388 (2005) (finding that the network received little more than "a slap on the wrist" because the Commission in the end did not levy fines against the network). The Commission's fleeting expletive policy derives itself from Justice Powell's concurrence in the *Pacifica* case. There he stated that the *Pacifica* holding did not "speak to cases involving the isolated use of a potentially offensive word during the course of a radio broadcast," as compared to Carlin's monologue, which included the continued and extended use of various expletives over its twelve-minute broadcast. Justice's Powell's concurrence distinguished "verbal shock treatment" from the isolated—or fleeting—use of expletives during a broadcast. This differentiation established which protected, but otherwise indecent, speech the Commission could regulate and which it could not. See *Fox Television Stations v. FCC*, 489 F.3d 444, 447 (2d Cir. 2007) (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

13. Press Release, Fed. Comm'n's Comm'n, FCC Proposes Statutory Maximum Fine of \$550,000 Against Viacom-Owned CBS Affiliates for Apparent Violation of Indecency Rules During Broadcast of Super Bowl Halftime Show, 2004 FCC LEXIS 5428, at \*1 (Sept. 22, 2004).

14. *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230, 19235 (2004) [hereinafter *Super Bowl*].

15. *In re* Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on April 7, 2003, 19 F.C.C.R. 20191, 20191 (2004) [hereinafter *Married by America*].

16. *Id.* at 20192.

17. The *Married by America* program showed the contestants' bachelor and bachelorette parties for approximately six minutes out of the entire one hundred and twenty minute broadcast. *Id.* at 20195.

18. *Id.* at 20191.

19. *Id.* at 20194.

and genitals.<sup>20</sup> However, the Commission found that such actions did not take away from the suggestive nature of the program, which it found rose to the level of indecency.<sup>21</sup> The Commission concluded:

[P]ixilation does little to obscure the overtly sexual and gratuitous nature of the bachelor/bachelorette party scenes. These scenes show, for example, partially clothed strippers, such as a topless woman with her breasts pixilated, straddling a man in a sexually suggestive manner; two partially clothed female strippers kissing each other above a male; two partially clothed strippers rubbing a man's stomach; a male stripper about to put a women's hand down the front of his pants; and a man in his underwear on all fours being spanked by two topless strippers. The scenes also show one of the bachelorettes straddling and touching a topless female stripper and then licking whipped cream off the stripper's stomach and bare chest while the stripper holds her own breasts. Although the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown.<sup>22</sup>

More recently, during the September 2007 airing of the 59th Primetime Emmy Awards, FOX "aired [sic] on the side of caution . . . when it came to the questionable language of presenters and winners alike."<sup>23</sup> Because FOX thought that "some language during the live broadcast may have been considered inappropriate by some viewers. . . . [FOX]'s broadcast-standards executives determined it appropriate to drop sound during those portions of the show."<sup>24</sup> To protect sensitive viewers, FOX also cut away to an image of a "Disco Censor-Ball" hovering high above the stage whenever presenters or winners ventured into questionable statements.<sup>25</sup>

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20. *Id.*

21. *Id.*

22. *Id.* Pixilation has been used in the past to protect broadcasters from FCC obscenity and indecency violations, so the question becomes, why now? What was so different about this particular broadcast and its use of pixilation that made it rise to the level of a FCC indecency violation? See discussion *infra* Part III.B.2.

23. Cristina Kinon, *Fox's Censor Sensibility: Curses Foiled Again at Emmys*, N.Y. DAILY NEWS, Sept. 18, 2007, available at [http://www.nydailynews.com/entertainment/tv/2007/09/18/2007-09-18\\_foxs\\_censor\\_sensibility\\_curses\\_foiled\\_ag.html](http://www.nydailynews.com/entertainment/tv/2007/09/18/2007-09-18_foxs_censor_sensibility_curses_foiled_ag.html).

24. *Id.* Note that here the sensitivities of the few dictated the content of what the many were able to watch. See discussion *infra* Part III.B.2.

25. *Id.*; Lisa de Moraes, *Emmy Awards: The Stars Showed Up. The Viewers Didn't.*, WASH. POST, Sept. 18, 2007, at C07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/17/AR2007091701806.html> (last visited Nov. 25, 2008).

Specifically, FOX muted the sound and cut away to the “Disco Censor-Ball” when Ray Romano recalled how television had changed since he had last been on the air, specifically noting that “Frasier is screwing my wife?”<sup>26</sup> Although the joke brought laughs to the live Shrine Auditorium audience, the television viewers only heard “Frasier is—.”<sup>27</sup> When Katherine Heigl accepted her award for “Outstanding Supporting Actress in a Drama Series,” she only mouthed an expletive, yet FOX once again muted its audio and cut away to its pre-recorded shot of the “Disco Censor-Ball.”<sup>28</sup> One of FOX’s final acts of (self) censorship occurred during Sally Field’s acceptance speech for “Outstanding Lead Actress in a Drama Series.”<sup>29</sup> Before Sally Field finished her speech, which was a partial tribute to her award-winning character on *Brothers & Sisters*, the audience applauded, causing her to lose her train of thought.<sup>30</sup> When Sally Field regained her composure she concluded her speech by saying, “If mothers ruled the world, there would be no goddamn wars in the first place.”<sup>31</sup> FOX cut away to the “Disco Censor-Ball” as Sally Field began to say “goddamn.”<sup>32</sup> After Sally Field’s speech, FOX implemented a four-second delay for the remainder of its U.S.

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26. Kinon, *supra* note 23; de Moraes, *supra* note 25. Mr. Romano’s comment makes reference to the character he had played the CBS show *Everybody Loves Raymond*, in which Mr. Romano plays Ray Barone, husband to Debra Barone, played by actress Patricia Heaton. Ms. Heaton also happened to play the character Kelly Carr on FOX’s *Back to You*, who was the ex-lover of character Chuck Darling, played by Kelsey Grammer, who also played the character of Dr. Frasier Crane on television shows *Frasier* and *Cheers*. FOX Broadcasting Company, Back to you, <http://www.fox.com/backtoyou/showinfo/> (last visited Dec. 2, 2008); CBS, Everybody Loves Raymond, [http://www.cbs.com/primetime/everybody\\_loves\\_raymond/about.shtml](http://www.cbs.com/primetime/everybody_loves_raymond/about.shtml) (last visited Dec. 2, 2008).

27. See Kinon, *supra* note 23; See also de Moraes, *supra* note 25; *59th Primetime Emmy Awards*, WIKIPEDIA, [http://en.wikipedia.org/wiki/59th\\_Primetime\\_Emy\\_Awards](http://en.wikipedia.org/wiki/59th_Primetime_Emy_Awards) (last visited Nov. 25, 2008) (“This [disco censor-ball cut away] lasted approximately 10 seconds before FOX returned to Romano.”). Although FOX’s acts of protective self-censorship during the 59th Primetime Emmy Awards was reported by many more reputable sources than Wikipedia, some details, which were apparent to those who watched the live broadcast, were not included by these more reputable sources. It is for this reason that the author cites Wikipedia’s article on the 59th Primetime Emmy Awards, to provide the reader with a more complete understanding of the self-imposed censorship that took place during the Awards show.

28. Kinon, *supra* note 23; de Moraes, *supra* note 25.

29. Kinon, *supra* note 23; de Moraes, *supra* note 25.

30. Kinon, *supra* note 23; *59th Primetime Emmy Awards*, *supra* note 27.

31. Kinon, *supra* note 23.

32. *59th Primetime Emmy Awards*, *supra* note 27.

broadcast—leaving the entirety of Canadian and international simulcasts uncensored and without time delays.<sup>33</sup>

With the Commission taking such aggressive actions against broadcasters, resulting in broadcasters self-censoring to avoid possible FCC sanctions, the question becomes whether the FCC has overstepped its authority and, perhaps, gone too far? To evaluate whether the FCC has exceeded its authority, one must first understand the history of broadcast television, broadcast radio, and the electromagnetic spectrum. Then one must attempt to understand from where the FCC derives its regulatory authority. Finally, one must look at the FCC's regulations and regulatory decisions. Only by looking at both the Commission's regulatory authority and the manner through which the Commission imposes its authority upon broadcasters is one able to answer the question of whether the FCC's regulations no longer promote the public interest, due mainly to the Commission currently holding too much discretionary administrative agency authority. With an unmistakable affirmative response, one must also conclude that because the Commission has been engaging in improper content-based regulation of broadcasted speech, broadcasters have been compelled to engage in the self-censorship of their programming so as to avoid potential FCC penalties.

To address the question of whether the Federal Communications Commission has overstepped its regulatory authority, Part II of this article will present a quick history of broadcast media, starting with the first radio signals, continuing on to the creation of the television and television networks, and concluding with the creation of the Federal Communications Commission. With this historical background in place, the reader should be able to more easily understand the climate in which the Commission was established, the Commission's purpose, and the source of the Commission's power to regulate the electromagnetic spectrum and broadcast media. In Part III, the article will examine the Commission by looking at its regulatory authority, regulations, and regulatory enforcement practices. Then, in Part IV, the article will attempt to establish

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33. *Id.* At the Creative Arts Awards ceremony, which took place a week prior to the 59th Primetime Emmy Awards, Kathy Griffin's acceptance speech included some off-color religious jokes, i.e., she said, "Suck it, Jesus! This award is my God now!" *Id.* As a result, The Catholic League condemned her comments and successfully convinced E!—the cable channel over which the Creative Arts Awards ceremony was broadcast—to censor Kathy Griffin's speech during its broadcast of the Creative Arts Awards ceremony the following week. *Id.*

whether the Federal Communications Commission has overstepped its regulatory authority and, in laymen's terms, determine whether the Federal Communications Commission continues to make sense.

## II. A QUICK GLIMPSE AT THE HISTORY OF BROADCAST MEDIA

In the late nineteenth century, a man by the name of Guglielmo Marconi began experimenting with electromagnetic waves.<sup>34</sup> His experimentation eventually led to the first wireless radio signal transmission, which was sent across the Atlantic Ocean on December 12, 1901.<sup>35</sup> After Marconi's radio signal, many inventors and engineers became inspired to invent voice radio.<sup>36</sup> On December 24, 1906, Reginald Fessenden achieved this momentous accomplishment and transmitted his voice to wireless operators off the coast of New England.<sup>37</sup> The following year Lee de Forest invented the *Audion*, a radio tube that soon became the standard radio equipment of the day.<sup>38</sup> Other inventors gradually improved upon de Forest's original radio tube concept, leading to an increase in radio's clarity and transmitting power.<sup>39</sup> Over the next fifteen years, radio would become the purview of engineers and hobbyists; however, the average American would still believe radio, though amusing, was truly not a practical means of communication.<sup>40</sup> It was not until The Great War—World War I—that the average American became technologically savvy enough and began demanding ready-made radio machines.<sup>41</sup>

By 1920, the leading radio manufacturer, Westinghouse, came up with an idea to sell more radios—programming.<sup>42</sup> Together with

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34. See generally *A Science Odyssey: People and Discoveries—Marconi Receives Radio Signal over Atlantic*, PUB. BROAD. SERV., <http://www.pbs.org/wgbh/aso/databank/entries/dt01ma.html> (last visited Nov. 25, 2008).

35. *Id.*

36. See generally *A Science Odyssey: People and Discoveries—KDKA Begins to Broadcast*, PUB. BROAD. SERV., <http://www.pbs.org/wgbh/aso/databank/entries/dt20ra.html> (last visited Nov. 25, 2008) [hereinafter *KDKA Begins to Broadcast*].

37. *Id.* Mr. Fessenden wished wireless operators off the coast of New England a merry Christmas and read them the Christmas story with a violin playing "Silent Night" in the background. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* Prior to The Great War, radio operators required a technical prowess that the average American, at the time, did not possess. See *id.*

42. *Id.*

Dr. Frank Conrad, Westinghouse established a regularly transmitting radio station—KDKA.<sup>43</sup> On November 2, 1920, KDKA achieved the nation's first commercial "broadcast."<sup>44</sup> Soon after this broadcast KDKA became a huge hit and within four years, over six hundred commercial radio stations were transmitting programming across the United States.<sup>45</sup> Shortly after individual radio stations adopted programming, broadcast networks—consisting of local stations—began to develop shared radio programming.<sup>46</sup> In 1926, the Radio Corporation of America ("RCA") formed the first national, as opposed to regional, network—the National Broadcasting Company.<sup>47</sup> The National Broadcasting Company's first nationwide, transcontinental broadcast was the 1927 Rose Bowl football game between Stanford and Alabama.<sup>48</sup> Due to radio's new-found audience reach and revenue potential, it was quickly recognized as a significant, influential, and highly profitable business.<sup>49</sup>

However, this burgeoning nationwide radio industry quickly became too popular. The spectrum over which radio signals were broadcasted was simply not large enough to accommodate everyone who wanted to use it because there was a "fixed natural limitation

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43. *Id.*

44. *Id.* Coincidentally, not only did Dr. Conrad help create the nation's first commercial broadcast, but he also coined the term "broadcast" itself. *Id.* The nation's first commercial broadcast took place on election day and was used to prove the power of radio, in that people could hear KDKA's results of the Harding-Cox presidential race before they could read the results in the newspaper. *Id.*; KDKA Newsradio 1020, KDKA History, <http://www.kdkaradio.com/pages/15486.php> (last visited Oct. 14, 2008).

45. *KDKA Begins to Broadcast*, *supra* note 36.

46. *Id.*

47. *Id.*

48. *Id.* Both teams entered the 1927 Rose Bowl game with undefeated seasons, and both teams left the same way—with the final score Stanford 7-Alabama 7, a tie game. *60,000 SEE ALABAMA TIE STANFORD, 7 TO 7; Touchdown With Two Minutes to Play Gives Southerners Deadlock at Pasadena. BLOCKED KICK PAVES WAY Costs Westerners Ball on Own 14-Yard Line and Score by Johnson Follows. COAST TEAM GETS JUMP Tallies in First Period on Bogue's Pass to Walker—Warm Weather Prevails. 53,000 SEE ALABAMA TIE STANFORD, 7 TO 7*, N.Y. TIMES, Jan. 2, 1927, at S1, available at <http://www.nytimes.com/> (search articles for "60,000 See Alabama Tie Standford"); Keith Peters, *The Rose Bowl*, PALO ALTO WKLY., Dec. 29, 1999, available at [http://www.paloaltoonline.com/weekly/morgue/cover/1999\\_Dec\\_29.ROSELEAD.html](http://www.paloaltoonline.com/weekly/morgue/cover/1999_Dec_29.ROSELEAD.html) (last visited Sept. 21, 2008); *Past Game Scores—Tournament of Roses*, PASADENA TOURNAMENT OF ROSES, <http://www.tournamentofroses.com/history/gamescores.asp> (last visited Sept. 21, 2008).

49. See generally *KDKA Begins to Broadcast*, *supra* note 36. For example, in August 1922, New York City aired the first radio advertisement and used revenue from the advertisement sales to improve its broadcasting equipment, which in turn led to New York City's radio stations being able to reach larger audiences, and potential consumers. *Id.*

upon the number of stations [which could] operate without interfering with one another.”<sup>50</sup> The world of radio, which was once silent and barren, was becoming a chaotic cacophony full of confusion.<sup>51</sup> Initially, stations could broadcast over any frequency they so chose, regardless of the interference it caused other broadcasting stations.<sup>52</sup> To overcome this resulting interference, the adversely affected stations would increase the power to their own broadcast frequencies, thereby overpowering the original interfering radio station’s signal.<sup>53</sup> This situation became so bad that “nobody [on the air] could be heard.”<sup>54</sup> To combat the chaos, Congress passed the Radio Act of 1927.<sup>55</sup> The Radio Act of 1927 created the Federal Radio Commission, which was composed of five members who had wide regulatory powers and distributed broadcasting licenses.<sup>56</sup>

But as soon as radio became popular, it also became mundane, inspiring scientists to move on to the next new mode of communication and electromagnetic spectrum utilizing technology—television. In 1923, a man by the name of Vladimir Zworykin, nicknamed the “father of television,” applied for a television-esque patent; specifically, Zworykin applied for a patent for a television camera that could convert optical images into electrical pulses.<sup>57</sup> By 1930, Zworykin had developed a receiver for his television camera and demonstrated his system to RCA.<sup>58</sup>

By the 1930s electronic television broadcasts were occurring all over the world. In 1932, the British Broadcasting Company (“BBC”) created the first regularly broadcasted television programs.<sup>59</sup> In 1935, while Germany built the first special-purpose television station in preparation for the 1936 Berlin Olympic Games, NBC experimented

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50. Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 299 (1998) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 213 (1943)).

51. *See id.* at 298–99 (citing *Nat’l Broad. Co.*, 319 U.S. at 212).

52. *Nat’l Broad. Co.*, 319 U.S. at 212.

53. *Id.*

54. *Id.*

55. 47 U.S.C. § 81 (2000), *repealed by* 47 U.S.C. § 151 (2000).

56. *Nat’l Broad. Co.*, 319 U.S. at 213.

57. *See generally* *A Science Odyssey: People and Discoveries—Television Is Developed*, PUB. BROAD. SERV., <http://www.pbs.org/wgbh/aso/databank/entries/dt26tv.html> (last visited Nov. 25, 2008).

58. *Id.*

59. *Id.*

with electronic broadcasts from atop the Empire State Building.<sup>60</sup> Additionally, in 1937, BBC broadcasted the first live journalistic event covered by television—the coronation of King George VI.<sup>61</sup> It was also in the 1930s that America first experienced the influence television could have over society, through the emergence of mass media and a unified mass culture.<sup>62</sup> As a result of broadcast television’s initial development and rapid growth, the U.S. government eventually stepped in, and by passing the Communications Act of 1934, it expanded the Radio Act of 1927 to encompass the new and emerging television technology.<sup>63</sup>

Both the Communications Act of 1934 and the Radio Act of 1927 shared a common legislative purpose, “to protect the national interest involved in the new and far-reaching science of broadcasting, [and to formulate] a unified and comprehensive regulatory system for the industry.”<sup>64</sup> To better protect the nation’s new broadcasting interest, the Communications Act included language that established the Federal Communications Commission,<sup>65</sup> whose charge of regulating the electromagnetic spectrum included the divvying up of

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60. *Id.*

61. *Id.*

62. *Red Lion Broad. v. FCC*, 395 U.S. 367, 386 n.15 (1969) (“[M]ass media as a prime source of national cohesion.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans.”). The term “mass media” refers to mediums of “communication (as newspapers, radio, or television) that [are] designed to reach the mass of the people.” MERRIAM-WEBSTER’S ONLINE DICTIONARY “mass media,” available at <http://www.merriam-webster.com/dictionary/massmedia> (last visited Nov. 25, 2008). Just as Franklin Delano Roosevelt’s fireside chats during World War II helped keep the American populace uniformly informed about the war effort and imbedded journalists during the Vietnam War helped to uniformly expose the American populace to the war’s true consequences, since its inception, mass media has played a vital role in informing and socializing the entirety of America’s population. An exemplar documentation of this socializing and culture-inducing affect is the political process, i.e., the 1960 Presidential Debates between John F. Kennedy and Richard Nixon, with the August 1960 debate being the first televised presidential debate. See *The Great Debate & Beyond: The History of Televised Presidential Debates*, THE MUSEUM OF BROAD. COMM’NS, [http://www.museum.tv/debateweb/html/equalizer/essay\\_polyprocesstv.htm](http://www.museum.tv/debateweb/html/equalizer/essay_polyprocesstv.htm) (last visited Sept. 27, 2008); *Kennedy-Nixon Presidential Debates, 1960*, THE MUSEUM OF BROAD. COMM’NS, <http://www.museum.tv/archives/etv/K/htmlK/kennedy-nixon/kennedy-nixon.htm> (last visited Sept. 27, 2008) [hereinafter *Kennedy-Nixon Debates*]. For the August 1960 debate, although the candidates were substantively evenly matched, those who heard the debate over the radio pronounced Nixon the winner, whereas those who watched the debate on the television pronounced Kennedy the winner. *Kennedy-Nixon Debates*, *supra*.

63. 47 U.S.C. § 151 (2000).

64. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

65. 47 U.S.C. § 151.

the spectrum, i.e., it was within the Commission's power to allocate different frequency bands to different types of broadcasts, including military, commercial, and personal use broadcasts, and the assigning of different frequencies to specific broadcasters, such as FM and AM frequencies to radio broadcasters and UHF and VHF frequencies to television broadcasters.<sup>66</sup>

### III. THE FEDERAL COMMUNICATIONS COMMISSION: ITS REGULATORY AUTHORITY AND REGULATORY ENFORCEMENT PRACTICES

After years of attempting to regulate radio, Congress eventually decided that it did not possess the requisite knowledge or experience to effectively distribute broadcast licenses and regulate the broadcast media; this realization was pivotal to the creation of the Federal Communications Commission.<sup>67</sup> From its inception, Congress authorized the Commission to take certain measures to regulate broadcast media,<sup>68</sup> and over the years, the United States Supreme Court found reasons to support the Commission's regulatory authority over broadcast media.<sup>69</sup> With regard to the enforcement of the Commission's regulations, the Supreme Court has generally deferred to the Commission's regulatory authority over broadcast media and upheld the Commission's (content-based) regulations.<sup>70</sup> Congress has also supported the Commission's regulations and enforcement practices, as most recently demonstrated by the fact that Congress increased the maximum monetary amount the Commission is able to assess in Forfeiture Penalties against broadcasters.<sup>71</sup>

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66. See NAT'L TELECOMMS AND INFO. ADMIN., U.S. DEP'T OF COMMERCE, MANUAL OF REGULATIONS AND PROCEDURES FOR FEDERAL RADIO FREQUENCY MANAGEMENT ch. 4 (Jan. 2008), available at <http://www.ntia.doc.gov/osmhome/redbook/4a.pdf>; OFFICE OF SPECTRUM MGMT., U.S. DEP'T OF COMMERCE, UNITED STATES FREQUENCY ALLOCATIONS: THE RADIO SPECTRUM (2003), available at <http://www.ntia.doc.gov/osmhome/allochrt.pdf>.

67. See generally *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210-14 (1943); Rivera-Sanchez, *supra* note 3, at 181-83.

68. 47 U.S.C. § 303(r) (2000).

69. See, e.g., *Pottsville*, 309 U.S. 134; *Nat'l Broad. Co.*, 319 U.S. 190; *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

70. See, e.g., *Pottsville*, 309 U.S. 134; *Nat'l Broad. Co.*, 319 U.S. 190; *Red Lion Broad.*, 395 U.S. 367; *Pacifica Found.*, 438 U.S. 726.

71. H.R. 310, 109th Cong., 1st Sess. (2005) (passing this bill would increase the maximum amount of Forfeiture Penalties the Commission could assess against a broadcaster); Broadcast Decency Enforcement Act of 2005, Publ. L. No. 109-235, 120 Stat. 491 (2006) (codified at 47 U.S.C. § 503(b)(2) (Supp. 2008)) (amending section 503(b)(2) of the Communications Act of 1934 to increase the Forfeiture Penalty assessed against broadcasters who have broadcast obscene, indecent, or profane language to "not exceed \$325,000 for each

In Section A of Part III the article examines the Commission's regulatory authority. More importantly, this section will present and critique the two main arguments supporting the Commission's power to regulate broadcast media and the electromagnetic spectrum: (1) the Commission's power to regulate broadcasters' use of the electromagnetic spectrum due to the scarcity of the electromagnetic spectrum; and (2) the Commission's congressional grant of power requiring broadcasters, as a condition of holding a broadcasting license, to operate in the public interest. Section B of Part III introduces the reader to the Commission's actual regulations and then presents case studies describing how the Commission has enforced its regulations in various situations. While presenting the Commission's regulations and enforcement practices, the article also offers a critique of the Commission's regulations and enforcement practices. Finally, Section C of Part III discusses *Fox Television Stations v. FCC*, a 2007 Second Circuit case—and before the United States Supreme Court at time of publication—where a group of broadcasters, including FOX, ABC, CBS, and local affiliates, challenged the FCC's recent take on its longstanding “fleeting expletive” policy.

#### A. *The Federal Communications Commission's Regulatory Authority*

From the time Guglielmo Marconi first discovered the electromagnetic spectrum and for what it could be used, a conflict has been present: too many people have wanted to use the spectrum, which in turn has allowed no one to use the spectrum.<sup>72</sup> And whenever problems arise with U.S. natural resources, the U.S. government typically steps in and attempts to remedy the situation, with regulation.<sup>73</sup>

The U.S. government first stepped in and regulated radio—and the electromagnetic spectrum—when it began requiring large ships to carry wireless equipment, under the guise of trying to save lives on seafaring vessels.<sup>74</sup> The U.S. government continued its regulation of the electromagnetic spectrum with the passage of the Radio Act of

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violation or day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.”).

72. See Rivera-Sanchez, *supra* note 3, at 181–82.

73. See *id.* at 181–82.

74. *Id.* at 181. The U.S. government first regulated the electromagnetic spectrum with the passage of the Wireless Ship Act of 1910; however, after the tragic sinking of the *Titanic*, Congress adopted the Radio Act of 1912 to close some of the loopholes found in the Wireless Ship Act of 1910. *Id.* at 181–82.

1912, which gave the U.S. Secretary of Commerce the authority to award broadcasting licenses and assign spectrum frequencies to licensees.<sup>75</sup> U.S. governmental regulation over the electromagnetic spectrum expanded with the adoption of the Radio Act of 1927, in which Congress recognized the importance of radio and realized the need to control the use of the electromagnetic spectrum—control that the Radio Act of 1912 did not allow.<sup>76</sup> The Radio Act of 1927 also led to the creation of the Federal Radio Commission (“Radio Commission”) and transferred the power to regulate the electromagnetic spectrum from the U.S. Secretary of Commerce to the Radio Commission.<sup>77</sup> U.S. governmental regulation over the electromagnetic spectrum peaked with the passage of the forward-thinking Communications Act of 1934.<sup>78</sup> In the Communications Act, Congress transferred the power to regulate the electromagnetic spectrum and broadcast media from the Radio Commission to the Federal Communications Commission.<sup>79</sup>

History shows that the U.S. government has attempted to regulate the electromagnetic spectrum since the turn of the twentieth century.<sup>80</sup> However, the regulatory authority Congress has granted to the Federal Communications Commission remains decidedly ambiguous.<sup>81</sup> Attempting to combat this ambiguity, Congress and the United States Supreme Court have, over the years, struggled to provide rationale and reasoning for the Commission’s content-based regulation of broadcast media transmissions.<sup>82</sup> Thus far, Congress and the courts have used a combination of two arguments to establish the Commission’s authority to regulate the electromagnetic spectrum and broadcast media: the limited spectrum argument and the public interest argument.<sup>83</sup> In the first subsection, the article presents these two arguments and how they support the FCC’s regulatory authority

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75. *Id.* at 182.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* at 181.

81. *See id.* at 181–83.

82. *See* 47 U.S.C. § 151 (2000); *see, e.g.,* *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969); *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943).

83. Rivera-Sanchez, *supra* note 3, at 183–85 (citing *Red Lion Broad.*, 395 U.S. 367; *Nat’l Broad. Co.*, 319 U.S. 190).

over broadcast media. In the second subsection, the article will discuss criticisms of these two arguments.

*1. Regulatory Authority Arising from the Scarce Nature of the Electromagnetic Spectrum and an Obligation to Serve the Public Interest—Ergo the Federal Communications Commission*

When Congress established the Federal Communications Commission, it intended the FCC to supersede the Federal Radio Commission.<sup>84</sup> With this in mind, Congress included objectives that the Radio Act of 1927 established for the Radio Commission in its passage of the Communications Act of 1934 and creation of the Federal Communications Commission.<sup>85</sup> These adopted objectives included the protection of broadcasting and the formulation of a comprehensive system to unify the broadcast industry.<sup>86</sup> In addition to grandfathering in the Radio Commission's objectives, Congress established new objectives for the Federal Communications Commission, including:

[The] regulat[ion of] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy.<sup>87</sup>

To meet its stated objectives, Congress granted the Commission the power to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act].”<sup>88</sup> More importantly, Congress authorized the Commission to create and enforce these self-made regulations “from time to time, as public convenience, interest, or necessity require[d].”<sup>89</sup>

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84. See *Nat'l Broad. Co.*, 319 U.S. at 214 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940)).

85. *Id.*

86. *Id.*

87. 47 U.S.C. § 151 (2000).

88. 47 U.S.C. § 303(r) (2000).

89. 47 U.S.C. § 303.

Although the Communications Act established the Commission's authority to regulate broadcast media, broadcasters have continually challenged the scope of this authority.<sup>90</sup> However, the Supreme Court has found these challenges to be without merit and has continued to uphold the Commission's authority to regulate the broadcast media.<sup>91</sup>

In *Red Lion Broadcasting v. FCC*, the Supreme Court recognized that Congress' public interest mandate, which required the Commission "to assure that broadcasters operate[d] in the public interest[,] [wa]s a broad one"; meaning that, under the public interest mandate, Congress did not assign the Commission its authority to regulate the broadcast media "niggardly," but instead gave the Commission "expansive" authority under the guise of serving the public interest.<sup>92</sup> In addition, the Court reasoned that because "broadcast frequencies [were] limited, . . . they ha[d] been considered a public trust," which the Commission licensed to broadcasters and whose use was regulated by the Commission.<sup>93</sup> As such, the Court concluded that "every licensee who [wa]s fortunate in obtaining a license [wa]s mandated to operate in the public interest," and essentially, to submit to the Commission's authority in determining which broadcasts served the public interest.<sup>94</sup> In this regard, the Court further reasoned that "although broadcasting [wa]s clearly a medium affected by a First Amendment interest,<sup>95</sup> . . . differences in the characteristics of [broadcasting] justif[ied] differences in the First Amendment standards applied to [this new medium]."<sup>96</sup>

In *National Broadcasting Company v. United States*, the Court recognized that the public interest authority, through which Congress conferred the power to regulate broadcast media to the Commission, could not be interpreted to set up standards so indefinite that it would confer an unlimited power to the Commission.<sup>97</sup> However, the Court

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90. See, e.g., *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969) (broadcasters challenging the Commission's fairness doctrine regulation); *Nat'l Broad. Co.*, 319 U.S. 190 (broadcasters challenging the Commission's chain broadcasting regulations).

91. See, e.g., *Red Lion Broad.*, 395 U.S. 367; *Nat'l Broad. Co.*, 319 U.S. 190.

92. *Red Lion Broad.*, 395 U.S. at 379–80 (citing *Nat'l Broad. Co.*, 319 U.S. at 219).

93. *Id.* at 383.

94. See *id.*

95. *Id.* at 386 (citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948)).

96. *Id.* (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

97. *Nat'l Broad. Co.*, 319 U.S. at 216.

went on to concede substantial deference to the Commission's public interest mandate—effectively giving the Commission unrestrained power—when it stated that the Court's “duty [wa]s at an end when [the Court found] that [the Commission's actions were] based upon findings supported by evidence, and [were] made pursuant to authority granted by Congress,” i.e., made pursuant to the public interest mandate.<sup>98</sup> The Court concluded by stating that “it [wa]s not for [the Court] to say that the ‘public interest’ [would] be furthered or retarded by [the Commission's regulations],” even though it was and is only because of this public interest mandate that the Commission is able to subject the broadcast media to its regulation in the first place.<sup>99</sup>

Additionally, the Court in *National Broadcasting* further developed the definition of “public interest” by stating that the public interest served under the Communications Act was the interest of the listening audience to have a larger and more effective radio usage.<sup>100</sup> The Court reasoned that because the number of radio frequencies was limited by natural factors, public interest demanded that those broadcasters who were entrusted with frequencies make the fullest and most effective use of those frequencies.<sup>101</sup> The Court further reasoned that if these licensed broadcasters took actions that did not amount to the best use of their frequencies, the Commission could conclude that the broadcasters were not serving the public interest.<sup>102</sup> Here, it becomes apparent that by placing the determination of whether a broadcaster is serving the public interest solely within the Commission's discretion, the Court has not only submitted to the Commission's authority, but has removed itself entirely from potential review of the Commission's public interest mandate.<sup>103</sup> However, the Court did not abandon FCC review entirely because it recognized that the purpose and scope of the Communications Act required the Commission to utilize a standard higher than just “a mere

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98. *See id.* at 224.

99. *See id.* Reviewing this conclusion, it appears as though the Court has entirely removed its ability to review FCC regulations, meaning that the Court would not be able to determine for itself whether or not the FCC's regulations promoted or deterred the public interest, i.e., complied with the Commission's own enabling legislation and congressional mandate.

100. *Id.* at 216 (citing 47 U.S.C. § 303 (2000)).

101. *Id.* at 218 (quoting FCC, REPORT ON CHAIN BROADCASTING 81–82 (1941))

102. *See id.*

103. *See id.* at 225.

general reference to public welfare” when making its determinations as to whether a broadcaster was serving the public interest.<sup>104</sup>

The Supreme Court gave life to the Commission’s regulatory authority over broadcast media through a combination of the Communication Act’s public interest mandate and the notion that the electromagnetic spectrum is a limited and scarce public resource. Therefore, because radio frequencies are scarce, the U.S. government is permitted to regulate broadcasters so as to ensure that broadcasters’ use of the frequencies serve the public interest.<sup>105</sup> In *National Broadcasting*, the Court attempted to explain its rationale for supporting the content-based regulation of the broadcast media when it declared, “Freedom of utterance is abridged to many who wish to use the limited facilities of [broadcast].”<sup>106</sup> The Court continued, “Unlike other modes of expression, [broadcast] inherently is not available to all.”<sup>107</sup> Recognizing this “unique characteristic,” the Court explained, “[T]hat is why, unlike other modes of expression, [broadcast] is subject to governmental regulation.”<sup>108</sup> Coalescing all of its arguments, the Court concluded by holding that because broadcast cannot be used by all, the Commission is empowered to regulate those who do use the electromagnetic spectrum through leased radio frequencies, so long as the Commission’s regulations fall within the “statutory criterion of ‘public interest.’”<sup>109</sup>

After *Red Lion* and *National Broadcasting* laid down the foundation for the Commission’s authority to regulate broadcast

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104. *Id.* at 226 (quoting *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)); see discussion *infra* Part III.B (discussing the Commission’s enforcement practices and how these practices comply with the Commission’s public interest mandate). Note that although the Court has recognized that the Commission should apply a higher standard when promulgating and enforcing its regulations, the Court has not dictated the nature or scope of this higher standard, leaving the Commission without direction for how it is suppose to incorporate the higher standard into its public interest content-based regulations over the broadcast media.

105. See *Red Lion Broad. v. FCC*, 395 U.S. 367, 389–90 (1969). The Court has also used a “sound truck” analogy for upholding the Commission’s regulation of the broadcast media, stating that “[j]ust as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast” because broadcast could overwhelm the free speech of others, resulting in a cacophony of noise. *Id.* at 387–88.

106. *Nat’l Broad. Co.*, 319 U.S. at 226.

107. *Id.*

108. *Id.*

109. *Id.* at 226–27.

media, the Court took up *FCC v. Pacifica Foundation*.<sup>110</sup> In *Pacifica*, the Court yet again faced challenges to the Commission's authority to subject broadcast media to content-based regulation.<sup>111</sup> The Court responded to these challenges by recognizing that "each medium of expression present[ed] special First Amendment problems" and that although the reasons for these distinctions were complex, the end result was that broadcasting received the most limited First Amendment protection.<sup>112</sup> Taking into account this limited First Amendment protection, the Court further explained its support for the FCC's (content-based) regulation over broadcast media:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. . . . We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.<sup>113</sup>

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110. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

111. *See id.* at 729–34.

112. *Id.* at 748.

113. *Id.* at 748–50 (internal citations omitted). The Court also recognized that: [B]roadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a

By applying the aforementioned rationales, the Court concluded that “the FCC could, consistent with the First Amendment, regulate indecent material like the Carlin monologue.”<sup>114</sup> However, the *Pacifica* Court emphasized that its holding was narrow: “We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the

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scarcity of spectrum space, the use of which the government must therefore license in the public interest.

*Id.* at 731 n.2 (internal citations omitted). Although the Court’s concerns over the ease with which children could obtain access to potentially indecent broadcast material were found to be compelling in 1978, in 2008, children not only have relatively easy access to potentially indecent programs aired on broadcast television and radio, but also those aired on cable and satellite television and found on the Internet, whose mediums are not regulated by the FCC. See Adam Liptak, *Must It Always Be About Sex?*, N.Y. TIMES, Nov. 2, 2008, at WK4.

114. *Fox Television Stations v. FCC*, 489 F.3d 444, 448 (2d Cir. 2007) (explaining, concisely, the *Pacifica* holding). A partial transcript of comedian George Carlin’s infamous monologue is as follows:

Okay, I was thinking one night about the words you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever, . . . and it came down to seven but the list is open to amendment, . . . The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. . . Then you have the four letter words from the old Angle-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it’s not really okay. It’s still a rude, dirty, old kind of gushy word. (laughter) They don’t like that, but they say it, like, they say it like, a lady now in a middle-class home, you’ll hear most of the time she says it as an expletive, you know, it’s out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. . . Shit! (laughter) . . . At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don’t want to see that shit anymore. . . I’ve had that shit up to here. I think you’re full of shit myself. . . Hot shit, holy shit, tough shit, eat shit. (laughter) shit-eating grin. . . (laughter) Shit on a stick. (laughter) Shit in a handbag. I always like that. He ain’t worth shit in a handbag. (laughter) . . . Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) . . . Anyway, enough of that shit. (laughter) . . .

*Pacifica*, 438 U.S. at 751–55. A full transcript of Carlin’s monologue can be found in the appendix of the *Pacifica* Court’s written opinion. See also DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, *FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEAS* 339 (Suzanne Phelps Weir ed., 1997). In an interview recorded shortly before his June 22, 2008 death, Mr. Carlin recalled that it may not only be the actual words spoken, but who speaks them, which make some words immoral and others not. In this regard, Mr. Carlin thought his critics had overestimated the power of words in and of themselves:

I used to point out that when I was a little boy in the ‘40s, I was told to look up to and admire soldiers and sailors, policemen, firemen, and athletes. . . [They] were objects of childhood hero worship. We all know how they talk. So apparently those words don’t corrupt morally.

John Gibeaut, *Fines, Fox, FCC ... and Other F-Words*, A.B.A. J., Nov. 2008, at 28, 29.

pig is obscene.”<sup>115</sup> Further narrowing its holding, Justice Powell’s concurrence emphasized the fact that the expletive language at issue in *Pacifica*’s broadcast of Carlin’s speech had been “repeated over and over as a sort of verbal shock treatment” and that this “verbal shock treatment” was distinguishable from “the isolated use of a potentially offensive word in the course of a . . . broadcast.”<sup>116</sup>

When forced to confront the potential negative side effects associated with regulating speech based upon its content, i.e., the possible “chilling effect of broadcasters’ exercise of their rights” resulting from the FCC’s “indecent”<sup>117</sup> definition being too vague,<sup>118</sup> the Court quickly dismissed the idea, mostly because it felt that any chilling effect would be “tempered by the Commission’s restrained enforcement policy.”<sup>119</sup> The Court, perhaps naively, reasoned:

It is true that the Commission’s order may lead some broadcasters to censor themselves. At most, however, the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. . . . The danger dismissed so summarily in *Red Lion*, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is “strong medicine” to be applied “sparingly and only as a last resort.”<sup>120</sup>

By refusing to acknowledge the possibility of broadcasters’ self-censorship directly resulting from the potentially vague and discretionary enforcement of the FCC’s indecency regulations, the Court failed to foresee the problems that could arise when, and if, the FCC no longer maintained its prescribed “restrained enforcement policy.”<sup>121</sup>

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115. *Pacifica*, 438 U.S. at 750–51.

116. *Id.* at 757–61 (Powell, J., concurring).

117. *Id.* at 761 n.4; see discussion *infra* Part III.B (defining “indecent,” providing examples of the Commission’s enforcement practices with regard to its indecency policy, and offering critiques of the Commission’s indecency enforcement practices).

118. *Pacifica*, 438 U.S. at 761 n.4.

119. *Fox Television Stations*, 489 F.3d at 450 (quoting *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (citing *Pacifica*, 438 U.S. at 761 (Powell, J., concurring)), *superseded in part by* *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1988)).

120. *Pacifica*, 438 U.S. at 743 (majority opinion) (internal citations omitted).

121. *Fox Television Stations*, 489 F.3d at 450 (quoting *Action for Children’s Television*, 852 F.2d at 1340 n.14 (citing *Pacifica*, 438 U.S. at 761 (Powell, J., concurring)); see

## 2. *A Few Criticisms Concerning the Federal Communication Commission's Regulatory Authority*

The Supreme Court has, at times, questioned the authority that the scarcity of the spectrum argument provides the Commission<sup>122</sup> and, at others, has questioned the Commission's attempt to regulate broadcast media outside of its public interest mandate.<sup>123</sup> However, the Supreme Court has continued to uphold the authority that the scarcity of the spectrum and public interest arguments, in combination, provide the Commission.<sup>124</sup> Furthermore, the Supreme Court has continued to find this authority to be "good law."<sup>125</sup> The pertinent question, though, is whether the Court's decision to continue to uphold the scarcity of the spectrum and the public interest arguments truly does remain "good law."

By February 17, 2009, the FCC will require all television stations serving United States markets to cease broadcasting on their analog channels and instead broadcast digital television programming.<sup>126</sup> This switch to digital television will enable the FCC to reclaim analog channels—or frequencies—and the spectrum space they take up.<sup>127</sup> Subsequently, because broadcasters will use digital frequencies instead of analog frequencies, the FCC will be able to use

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discussion *infra* Part IV (discussing self-censorship occurring in broadcast media as a result of FCC regulatory enforcement practices).

122. See, e.g., *Red Lion Broad. v. FCC*, 395 U.S. 367, 396–97 (1969) ("Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace."); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984) ("[The Court is] not prepared, however, to reconsider [its] long standing approach[, that the prevailing rationale for broadcasting regulation is based on spectrum scarcity,] without some signal from Congress or the FCC [requiring] some revision of the system of broadcast regulation.").

123. See generally *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 158 (2006).

124. See Josephine Soriano, Note, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion's Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341, 343 (2006) (citing *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (applying the scarce spectrum rationale)); *League of Women Voters*, 468 U.S. at 374–81; *Nat'l Broad. Co.*, 319 U.S. 190.

125. Soriano, *supra* note 124, at 343.

126. Consumer & Gov't Affairs Bureau, Fed. Commc'ns Comm'n, "DTV" Is Coming (and Sooner than You Think!)—FCC Consumer Facts, [http://www.fcc.gov/cgb/consumer\\_facts/digitaltv.html](http://www.fcc.gov/cgb/consumer_facts/digitaltv.html) (last visited Nov. 25, 2008).

127. *Id.*

these old analog frequencies for other purposes.<sup>128</sup> In addition to opening up analog frequencies, broadcasters using digital television will gain increased transmitting capabilities over analog frequency broadcasters, as digital television will allow broadcasters to transmit either one high definition channel or multiple simultaneous standard definition channels over a single digital frequency.<sup>129</sup> With the combination of analog frequency reclamation and the augmented broadcasting potential through the use of digital frequencies, the limited and scarce nature of the electromagnetic spectrum will arguably become nonexistent.<sup>130</sup>

Because of the advent of digital television, broadcasters will use significantly less of the electromagnetic spectrum, all the while gaining more broadcasting capabilities.<sup>131</sup> As a result, the scarcity of the spectrum argument, to which the Court has continually referred in upholding the Commission's regulation of the broadcast media, will be significantly weakened, if not eliminated.<sup>132</sup> The scarcity of the spectrum argument will be partially weakened because digital television will give broadcasters the ability to transmit programs over a different (digital) medium.<sup>133</sup> But more importantly, the argument will be weakened because digital television will allow broadcasters to broadcast more programs at the same time, effectively giving them more frequencies over which to broadcast.<sup>134</sup> Finally, the argument is weakened due to the fact that individual broadcasters who were once restricted from broadcasting because of the limited nature of the electromagnetic spectrum, now will be able to broadcast over the old—once occupied— analog broadcasting frequencies.<sup>135</sup> As such, even though broadcasting capacities will still be stunted, as digitizing broadcasts will not enable an infinite number of network commercial broadcasters to transmit programming and analog reclamation will not permit an infinite number of non-network private broadcasters to utilize the electromagnetic spectrum, the once naturally limited nature of the electromagnetic spectrum will become a thing of the past.

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128. *Id.*

129. *Id.*

130. *See id.*

131. *See id.*

132. *Id.*

133. *See id.*

134. *See id.*

135. *See id.*

Moving on to the public interest argument, when determining whether a broadcast qualifies as indecent, the Commission asks whether “in context, [the material] depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>136</sup> The Commission defines “contemporary community standards” as the standards “of an average broadcast viewer or listener and not the sensibilities of any individual complainant.”<sup>137</sup> However, it is the through the individual complainant—or single public interest group—that the Commission commences its obscenity, indecency, and profanity inquiries.<sup>138</sup> Initially, members of the general public submit complaints about broadcast material they find offensive, then FCC staffers review the complaints to see if a violation of FCC regulations has taken place.<sup>139</sup> The problem with this complainant initiated process is that at no point in time are the sensibilities of the average broadcast viewer or listener ascertained or applied.<sup>140</sup> Instead, “contemporary community standards” become solely what organized interest groups, FCC staffers, and FCC Commissioners find patently offensive.<sup>141</sup> As a result, the FCC appears to have created a system that effectively disregards the average broadcast viewer’s or listener’s opinion of what it would consider to be obscene, indecent, or profane.<sup>142</sup> By doing this, the FCC has distanced itself from its public interest mandate and authorization to regulate the broadcast media.

Although the Court has recognized that the arguments supporting the Commission’s authority to regulate the broadcast media have been problematic, the Court has been unwilling to abandon or weaken the public interest and scarcity of the spectrum arguments that, in combination, give life to the FCC’s content-based regulation of the broadcast media. The reason for this unwillingness most likely arises from the fact that without either of these two arguments, the Court

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136. FCC v. Pacifica Found., 438 U.S. 726, 731–32 (1978); Kurt Hunt, Note, *The FCC Complaint Process and “Increasing Public Unease”: Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. & TECH. L. REV. 223, 236–37 (2007).

137. Hunt, *supra* note 136, at 237.

138. *Id.* at 236 (citing 47 U.S.C. § 208 (2000); 47 C.F.R. §§ 1.701–1.736 (2005)).

139. *Id.* (citing Fed. Comm’n Comm’n, *Complaint Process*, <http://www.fcc.gov/eb/oip/process.html> (last visited Feb. 29, 2008) [hereinafter *Complaint Process*]).

140. *See generally id.* at 236–41.

141. *See* discussion *infra* Part III.B (discussing the influence public interest groups have over the FCC and its regulatory enforcement practices).

142. *Id.*

would be unable to support the Commission's authority to regulate the broadcast media; and without this authority, the Commission's content-based regulations over broadcasters' speech would be in violation of the First Amendment.

While challenging both the Court's and Congress' limited spectrum rationale is an important step in determining whether the Federal Communications Commission continues to make sense, a more noteworthy challenge to the FCC and its content-based regulation of the broadcast media is through questioning whether the Commission's regulations truly comply with the Commission's public interest mandate. Upon a closer inspection of the Commission's regulations and enforcement practices, one may observe that it is the select public interest groups, and rarely the general public, who truly benefit from the FCC's regulations over broadcast media.

#### *B. The Federal Communications Commission's Regulatory Enforcement Practices*

Congress established the Federal Communications Commission to "make such rules and regulations and prescribe such regulations and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act]."<sup>143</sup> The only caveat in this grant of authority was that the Commission's regulations were required to serve the public interest.<sup>144</sup> In this regard, the Supreme Court has given great deference to the regulations that the Commission uses to regulate the broadcast media.<sup>145</sup>

Over the years, the Commission has created many regulations;<sup>146</sup> however, this article will not discuss each and every one. Instead, the focus of this article is to question the legitimacy of the Commission's obscenity, indecency, and profanity regulations—specifically, regulations highlighted in *FCC v. Pacifica Foundation* and recent Commission rulings, i.e., those associated with the *Golden Globes* and *Married by America* broadcasts. In the first subsection, this

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143. 47 U.S.C. § 303(r) (2000).

144. 47 U.S.C. § 303.

145. See discussion *supra* Part III.A (discussing the Commission's authority to regulate the broadcast media); see, e.g., *Fox Television Stations v. FCC*, 489 F.3d 444, 454–62 (2d Cir. 2007).

146. See, e.g., *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969) (the Commission's fairness doctrine regulation); *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190 (1943) (the Commission's chain broadcasting regulations).

article will present the Commission's obscenity, indecency, and profanity regulations. Then, in the second subsection, the article will present and discuss case studies detailing the Commission's enforcement practices related to its obscenity, indecency, and profanity regulations. Specifically, the second subsection will examine the subjectiveness of the Commission's obscenity, indecency, and profanity regulations when compared to other, more objective, obscenity tests, i.e., *Miller v. California*,<sup>147</sup> the influenceability of the Commission with regard to its issuance of Notices of Apparent Liability, and how the Commission's complaint process has, to some extent, become a heckler's veto, which the Supreme Court has held in other contexts to be a violation of the First Amendment.<sup>148</sup>

*1. Obscenity, Indecency, and Profanity Regulations Adopted by the Federal Communications Commission*

The Federal Communications Commission has found that it has the authority to regulate obscene, indecent, and profane speech broadcasted over the airwaves through two different statutes.<sup>149</sup> Specifically, through 47 U.S.C. § 303(g), in combination with 47 U.S.C. § 303(r) and 18 U.S.C. § 1464, the Commission may regulate obscene, indecent, and profane broadcastings. Section 303(g) and 303(r) provide:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall— . . . (g) . . . [G]enerally encourage the larger and more effective use of radio in the public interest; . . . (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry

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147. *Miller v. California*, 413 U.S. 15, 24 (1973) This decision issued a new obscenity test for the Court to follow:

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.*

148. *See generally* *Feiner v. New York*, 340 U.S. 315 (1951); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

149. *FCC v. Pacifica Found.*, 438 U.S. 726, 731 (1978).

out the provision of this chapter.<sup>150</sup>

Section 1464 provides: “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”<sup>151</sup> Combining these statutes, the Commission has found that it is a “violation of federal law to air obscene programming at any time.”<sup>152</sup> In addition, the Commission has found that it is a “violation of federal law to air indecent programming or profane language during certain hours.”<sup>153</sup> Although many broadcasters have challenged the Commission’s definition of obscene, indecent, and profane language, claiming that the definitions are overly broad,<sup>154</sup> the Court has continued to uphold the Commission’s obscenity, indecency, and profanity regulations.<sup>155</sup> A more detailed review of the Commission’s obscenity, indecency, and profanity regulations is as follows.

Because the First Amendment does not protect obscene speech, broadcasters are prohibited from airing obscene programming at any time.<sup>156</sup> The Commission uses the *Miller* test to determine what material qualifies as obscene.<sup>157</sup> Therefore, in order for material to be obscene:

- (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest (i.e., material having a tendency to excite lustful thoughts);
- (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and
- (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.<sup>158</sup>

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150. 47 U.S.C. § 303(g), (r) (2000).

151. 18 U.S.C. § 1464 (2000); *see generally* Fed. Commc’ns Comm’n, How the FCC Resolves Obscenity/Indecency/Profanity Complaints, <http://www.fcc.gov/eb/oip/flow.pdf> (last visited Nov. 25, 2008).

152. Consumer & Gov’t Affairs Bureau, Fed. Commc’ns Comm’n, *Obscene, Indecent, and Profane Broadcasts—FCC Consumer Facts*, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Nov. 25, 2008) [hereinafter *OIP Consumer Facts*].

153. *Id.*

154. *See, e.g., Pacifica*, 438 U.S. at 742.

155. *See, e.g., id.* at 726, 742; *Action for Children’s Television v. FCC*, 58 F.3d 654, 657–68 (D.C. Cir. 1988) (discussing a review of the Commission’s obscenity, indecency, and profanity regulations and courts’ subsequent reactions).

156. Enforcement Bureau, Fed. Commc’ns Comm’n, *Obscenity, Indecency, and Profanity—Frequently Asked Questions*, <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw> (last visited Nov. 25, 2008) [hereinafter *OIP FAQ*].

157. *Id.*

158. *Id.* (applying the obscenity test developed in *Miller v. California*, 413 U.S. 15, 24

The Commission recognizes that this test is “designed to cover hard-core pornography.”<sup>159</sup>

When it comes to indecency, the Commission recognizes that indecent material falls under First Amendment protection, therefore, before the Commission is allowed to regulate broadcast indecent speech, “the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest.”<sup>160</sup> *Pacifica* provided the Commission with this compelling interest when the Court held that the regulation of broadcast media’s content was a legitimate and compelling government interest, when done to protect youthful radio listeners.<sup>161</sup> Applying *Pacifica*’s compelling government interest to protect children’s welfare, the Supreme Court has held that “indecent material [may be] restricted to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience.”<sup>162</sup> As such, the Commission implements something similar to a time, place, and manner content-based restriction and prohibits the broadcast of indecent material from 6 a.m. to 10 p.m.<sup>163</sup>

The Commission defines indecent material as “contain[ing] sexual or excretory material that does not rise to the level of obscenity.”<sup>164</sup> Expanding this definition, the Commission states that “material is indecent if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured

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(1973)).

159. *Id.*

160. *Fox Television Stations v. FCC*, 489 F.3d 444, 451 (2d Cir. 2007) (quoting Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, at paras. 1 & 30 n. 23 (2001)).

161. Matthew S. Schneider, Note, *Silenced: The Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves is Monopolization*, 29 CARDOZO L. REV. 891, 901–02 (2007). As a side note, reviewing recent FCC rulings and the FCC’s own indecency factors, the compelling interest in “protecting youthful audience members,” through which the Commission is able to regulate the broadcast media based upon its content, appears to be lacking, mainly due to the pervasiveness of other mediums: cable television, satellite television, and the Internet. See discussion *infra* Part III.B.2 and Part III.C.

162. *OIP FAQ*, *supra* note 156 (applying *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

163. *Id.* Although the 6 a.m. to 10 p.m. time, place, and manner restriction could be considered a least restrictive means of regulating broadcast media’s content, the manner in which the Commission has been enforcing its regulations during this limited time frame does not appear to be the least restrictive means of regulating, as the Commission’s current regulations find that each fleeting expletive violates the FCC’s indecency and profanity regulations is more restrictive than the FCC’s prior fleeting expletive exception policy and Justice Powell’s notion that fleeting expletives fell outside of the FCC’s regulatory purview.

164. *Id.*

by contemporary community standards for the broadcast medium.”<sup>165</sup> The Supreme Court has supported the Commission’s indecency definition, agreeing that indecent speech includes patently offensive language, though not necessarily obscene language, which violates the contemporary community standards for the broadcast medium with regard to excretory and sexual organs and activities.<sup>166</sup> The Commission determines whether broadcasted material qualifies as indecent on a case-by-case basis.<sup>167</sup>

In order to determine whether material is “patently offensive,” the Commission looks at three primary factors:

(1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock. No single factor is determinative. The FCC weighs and balances these factors because each case presents its own mix of these, and possibly other, factors.<sup>168</sup>

Another take on the Commission’s indecency test is as follows:

The first prong the FCC considers is whether the material falls within the scope of the FCC definition for indecency . . . . To be within the scope of the FCC definitions, the broadcast must describe or depict sexual or excretory organs or activities. . . . The second prong of the FCC test looks at whether the broadcast was patently offensive as measured by contemporary community standards for the broadcast medium. Here, the FCC considers several factors: (a) the explicitness or graphic nature of the description; (b) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities, and (c) whether the material appears to pander to or is used to titillate and shock.<sup>169</sup>

Yet another explanation of how the Commission regulates indecency comes from the lips of a FCC employee. Speaking at a 2005 Fordham Intellectual Property, Media, and Entertainment Law Journal Symposium, Mr. William Davenport, the Chief of the Investigations and Hearings Division of the Federal Communications

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165. *Id.*

166. *Pacifica*, 438 U.S. at 731–32.

167. *OIP FAQ*, *supra* note 154.

168. *Id.*

169. Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 209-10 (2006).

Commission's Enforcement Bureau, explained how the Commission examines an indecency complaint once it has been determined that the program in question was aired neither on cable or satellite, nor during the safe harbor period of 10:00 p.m. to 6:00 a.m.:

The first thing we look at is: does the broadcast involve "sexual or excretory organs or activities?" This is what we call, essentially, the subject matter scope of our indecency analysis. Usually, before we even get started we pretty much know that without even going into it.

But the second part is really the heart of the indecency analysis, and that is: was the broadcast "patently offensive based on contemporary community standards?" This is an area where I think much of the debate about whether broadcasts are indecent or not actually occurs.

The "patently offensive" analysis is really broken up into three parts. It is a balancing test. Three factors: first, was the broadcast explicit and graphic; second, did the material at issue dwell on the apparently indecent material, or potentially indecent material, or was that material simply fleeting; and then third, was the material presented in a way that was pandering or titillating or simply just for shock value?

Like I said, this is a balancing test, so the existence or lack of existence of one or more of these factors really doesn't control the outcome. The key is to try and figure out, based on a combination of all the factors, is this bad enough to be indecent?<sup>170</sup>

Although profanity has been within the purview of the FCC's regulatory power, it has not been until recently that the Commission took measures to enforce its profanity regulations.<sup>171</sup> The Commission defines profane language to "include those words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amounts to a 'nuisance.'"<sup>172</sup> The breadth of this definition is unclear, although the Commission appears to have used a profanity analysis to support its *Golden Globes II* decision, and through this single application also revived the

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170. Symposium, *Panel III: Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087, 1090-91 (2005). Mr. Davenport failed to mention how the FCC applied the "contemporary community standards for the broadcast medium" criterion to its patently offensive three-factor analysis.

171. See, e.g., *Golden Globes II*, *supra* note 9, at 4975.

172. *Id.*

Commission's profanity regulation.<sup>173</sup> Like indecency, the Commission's regulations prohibit the broadcast of profane material from 6 a.m. to 10 p.m.<sup>174</sup>

2. *Enforcement of the Federal Communications Commission's Obscenity, Indecency, and Profanity Regulations—A Look at the Golden Globes and Married by America Federal Communications Commission Rulings*

Because the Commission is not constitutionally permitted to censor broadcasts,<sup>175</sup> the Commission may only determine whether a broadcast has violated FCC obscenity, indecency, or profanity regulations through the public complaint process.<sup>176</sup> The public complaint process allows individuals to notify the FCC when they believe obscene, indecent, or profane materials have been broadcast.<sup>177</sup> When filing public complaints, the FCC asks complainants to provide certain information, including: "information regarding the detail of what was actually said or depicted during the broadcast," "the date and time of the broadcast," and "the call sign, channel, or frequency of the station involved."<sup>178</sup> Once the FCC receives a complaint, FCC staff "review each complaint to determine whether it contains sufficient information to suggest that there has been a violation of the obscenity, indecency, or profanity laws."<sup>179</sup> If the FCC determines that a violation may have occurred, the FCC will start an investigation, including sending a Letter of Inquiry to the broadcast station.<sup>180</sup> In this letter, the FCC may request that the broadcast station "confirm or deny the allegations in the complaint and provide copies of any tapes or transcripts of the program at issue."<sup>181</sup> When, and if, the FCC determines that the complained-of-material was obscene, indecent, or profane, the FCC may issue a

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173. *See id.* In *Golden Globes II*, the Commission found that fleeting expletives now, all of a sudden, violated its regulations against indecent speech. *See generally id.*

174. *OIP FAQ*, *supra* note 154.

175. 47 U.S.C. § 326 (2000).

176. B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 203–04 (2006).

177. *Id.*

178. *OIP Consumer Facts*, *supra* note 152.

179. *Id.*

180. *Id.*; *Complaint Process*, *supra* note 139.

181. *OIP Consumer Facts*, *supra* note 152; *Complaint Process*, *supra* note 139.

Notice of Apparent Liability (“NAL”) to the broadcast station.<sup>182</sup> A NAL is a preliminary finding that “the law or the FCC’s rules have been violated.”<sup>183</sup> After the NAL has been confirmed, reduced, or rescinded, the FCC issues a Forfeiture Order—a preliminary finding on the matter.<sup>184</sup>

On January 19, 2003, NBC aired the 60th Annual Golden Globes Awards.<sup>185</sup> During the show, the band U2 won the award for “Best Original Song.”<sup>186</sup> When Bono went up to accept the award, he uttered the phrase, “This is really, really, fucking brilliant. Really, really great.”<sup>187</sup> After the broadcast, the FCC received 234 complaints.<sup>188</sup> Of those, 217 were from individuals associated with the Parents Television Council (“PTC”).<sup>189</sup> The viewing audience for the 60th Annual Golden Globes Awards program was approximately 20,100,000.<sup>190</sup> Upon receipt of the complaints, the FCC Enforcement Bureau found that “the material aired during the ‘Golden Globes Awards’ program [did] not describe or depict sexual and excretory activities and organs.”<sup>191</sup> In addition, the Enforcement Bureau “found that [the] offensive language . . . [wa]s not within the scope of the Commission’s prohibition of indecent program content.”<sup>192</sup> The Enforcement Bureau also concluded that the “material broadcast during the ‘Golden Globes Awards’ program was not obscene.”<sup>193</sup>

Congress did not approve of the Enforcement Bureau’s decision and urged the five FCC Commissioners to review and reverse the Enforcement Bureau’s *Golden Globes I* ruling.<sup>194</sup> In addition to

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182. *OIP Consumer Facts*, *supra* note 152.

183. *Id.*

184. *Id.*

185. Brian J. Rooder, Note, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”: Has the FCC Grown Too Big for Its Britches?*, 74 *FORDHAM L. REV.* 871, 885 (2005).

186. *Golden Globes II*, *supra* note 9, at 4976.

187. *Id.* at 4976 n.4.

188. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globes Awards” Program*, 18 F.C.C.R. 19859, 19859 n.1 (2003) [hereinafter *Golden Globes I*].

189. *Id.*

190. trivialTV, <http://trivialtv.blogspot.com/> (last visited Nov. 25, 2008) (search “01/19/2003” in the “Find TV Schedule” box, which will lead to a schedule showing the Nielson ratings for the 60th Annual Golden Globes Award show).

191. *Golden Globes I*, *supra* note 188, at 19861.

192. *Id.*

193. *Id.*

194. Rooder, *supra* note 185, at 885.

Congressional pressure, the PTC, which had originally filed over ninety percent of the public complaints, filed an Application for Review, seeking the reversal of the Enforcement Bureau's *Golden Globes I* decision.<sup>195</sup> When the FCC Commissioners reviewed the *Golden Globes I* decision, they found that the word "fuck" did fall within the Commission's indecency definition because—in their humble and irregardless of contemporary community standards for the broadcast medium opinion—"fuck" in any context had an inherently sexual connotation and therefore the word "fuck" had to describe sexual activities.<sup>196</sup> The Commissioners went on to say that the word "fuck" was also patently offensive, as it was "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."<sup>197</sup> With this decision, the Commissioners overturned nearly thirty years of precedent that had said the "fleeting use of a single expletive was not indecent."<sup>198</sup> The Commissioners' reason for their departure from precedent was simple; they had merely decided that prior interpretation, under which the single use of the word "fuck" was outside the scope of the Commission's regulatory authority, was "no longer good law."<sup>199</sup> In addition to finding Bono's use of "fuck" indecent, the Commissioners revived the Commission's profanity regulation and held that "fuck" was also profane, in the sense that the word was "vulgar, irreverent, or coarse language."<sup>200</sup>

On April 7, 2003, FOX transmitted a reality-based television program that highlighted single adults who agreed to be engaged to each other and potentially marry one another on a reality television show; the caveat was that none of the single contestants would have

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195. *Golden Globes II*, *supra* note 9, at 4975.

196. *Id.* at 4978.

197. *Id.* at 4979.

198. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1094; *see* *Orion Comm. Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1997) (concluding that the FCC can depart from clear precedent if it provides an explanation for doing so). In 1978, Justice Powell stated that the FCC could regulate indecent speech that had been repeated over and over again for the purpose of "verbal shock treatment," but that the constitutionally permissible content-based regulation of broadcast media did not apply to the "isolated use of a potentially offensive word" uttered during the course of a broadcast. *FCC v. Pacifica Found.*, 438 U.S. 726, 755–62 (1978) (Powell, J., concurring).

199. *Golden Globes II*, *supra* note 9, at 4980.

200. *Id.* at 4981. The Commission has acknowledged that "prior decisions interpreting 'profane' ha[ve] defined that term solely as blasphemy." *Fox Television Stations v. FCC*, 489 F.3d 444, 452 (2d Cir. 2007). However, the Commission has also conceded that the definition of profanity is limited to the words whose mere utterance rises to the level of a legal nuisance. *See, e.g., Golden Globes II*, *supra* note 9, at 4975.

ever met before.<sup>201</sup> The April 7th broadcast focused on the two remaining couples' bachelor and bachelorette parties in Las Vegas, Nevada.<sup>202</sup> During this episode, FOX showed scenes of partially clothed strippers, with pixilated breasts, and a bachelorette straddling and touching a topless female stripper, while licking whipped cream off the stripper's stomach and bare chest, all while the stripper was holding her own breasts.<sup>203</sup> When *Married by America* aired, it had a viewing audience of approximately 7,500,000 viewers.<sup>204</sup> Out of the more than seven million viewers, the FCC received only 159 public complaints claiming the broadcast showed indecent material.<sup>205</sup>

Upon review, the Commission found that even though FOX pixilated exposed sexual organs, the pixilation did little to "obscure the overtly sexual and gratuitous nature" of the scenes.<sup>206</sup> In the end, the Commission concluded that although the "nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown."<sup>207</sup> This decision—the finding that pixilated nudity could still violate FCC indecency regulations if the sexual meaning was inescapable—was the first time the Commission had found the pixilation of nudity indecent.<sup>208</sup> Because the Commission found the sexual nature of the broadcast inescapable, it disregarded the fact that the bachelor and bachelorette scenes comprised only six minutes of a one hundred and twenty minute long broadcast and concluded that the "material plainly dwell[ed] on matters of a sexual nature," and therefore, the broadcast was "intended to pander to and titillate the audience."<sup>209</sup> Considering all factors of the Commission's indecency test, the Commission found

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201. *Married by America*, *supra* note 15, at 20191.

202. *Id.*

203. *Id.* at 20194.

204. trivialTV, <http://trivialtv.blogspot.com/> (last visited Nov. 25, 2008) (search "04/07/2003" in the "Find TV Schedule" box, which will lead to a schedule showing the Nielson ratings for *Married by America*).

205. *Married by America*, *supra* note 15, at 20191.

206. *Id.* at 20194.

207. *Id.* The more pertinent question, though, is when bare breasts are pixilated, does anyone, at any time, believe that the woman is not topless? A slightly more interesting question is whether pixilated bare breasts are truly any different from barely-there string bikini covered breasts? Applying FCC logic, barely covered breasts must not have an inescapable sexual nature because these types of breasts do not appear to violate the FCC's indecency regulations, whereas pixilated bare breasts do violate the FCC's indecency regulations, because of their inescapable sexual nature.

208. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1094.

209. *Married by America*, *supra* note 15, at 20191.

the broadcast to be “patently offensive as measured by contemporary community standards for the broadcast medium, and [wa]s therefore indecent.”<sup>210</sup> In the Commission’s Notice of Apparent Liability, the Commission proposed a \$7,000 Forfeiture Penalty against each FOX station and each FOX Affiliate station; the total proposed Forfeiture Penalty assessed against FOX was \$1,183,000.<sup>211</sup> The decision to penalize affiliate stations was also a departure from prior rulings, in that it was the first time the Commission held affiliates responsible for the programming they aired.<sup>212</sup>

From the above case studies, one is able recognize how the FCC has enforced its obscenity, indecency, and profanity regulations and reasonably conclude that the FCC no longer follows a “restrained enforcement policy,” whose application is limited to repeated language used as verbal shock treatment and not the isolated use of a potentially offensive word uttered during the course of a broadcast.<sup>213</sup> In addition, the above case studies illustrate the subjective and “ever changing without objective reasoning” nature of the Commission’s regulations and the extent to which the Commission is influenced. This can be observed through the Commission’s regular commencement of NALs and assessment of Forfeiture Penalties against broadcast networks, such as NBC and FOX, not from numerous individual complainants, but in reality from a single entity, namely the PTC, who has sponsored and encouraged individuals to file obscenity, indecency, and profanity complaints against broadcasters.

To illustrate, with *Golden Globes I*, the Commission went through its normal routines for investigating received complaints. The Commission evaluated the complaints based upon known precedent and determined that Bono’s utterance of the word “fuck” did not constitute indecency or profanity. However, when the PTC objected to this finding, the FCC Commissioners decided to also object to their own Enforcement Bureau’s findings. Instead, the Commissioners bent to the whim of the few, reversed the Enforcement Bureau’s findings, and uprooted nearly thirty years of

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210. *Id.* Although the Commission alluded to the “contemporary community standards for the broadcast medium” criterion of its indecency analysis, it failed to mention what these standards were and how it applied them to determine that the broadcast in question was patently offensive.

211. *Id.* at 20191, 20196.

212. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1094.

213. *Fox Television Stations v. FCC*, 489 F.3d 444, 450 (2d Cir. 2007).

precedent when the Commissioners held that the single utterance of the word “fuck” constituted indecency.<sup>214</sup> Moreover, the Commissioners resurrected the FCC’s profanity regulations and concluded—without determining the opinions of average Americans so as to accurately apply contemporary community standards for the broadcast medium—that the single use of the word “fuck” was in-and-of-itself profane.<sup>215</sup>

A similar result occurred with the *Married by America* decision. For years, broadcasters had eliminated their indecency liability by utilizing pixilation to blur out images of sexual organs and genitals, in essence, nudity. However, in *Married by America*, the Commission bent to whim of the few (again) and departed from precedent (again) to hold that the pixilation of nudity could still be considered indecent, when the sexual meaning of the overall material (not necessarily the overall program) was inescapable.<sup>216</sup>

Although it is generally understood that the notion of obscenity, indecency, and profanity will evolve over the years, one would generally think that such an evolution would move towards the more tolerant, or in this case, the less prude. However, it appears as though the Commission’s—and not necessarily the average American broadcast viewer’s or listener’s—obscenity, indecency, and profanity standards have moved closer and closer toward the more prude, which include the prudish standards specifically adopted and subjectively applied by the PTC and five FCC Commissioners. The irony of the Commission’s recent rulings arises when one considers that when FCC Chairman Michael Powell first took office<sup>217</sup> he specifically stated that he did not want to overly regulate the broadcast media. However, after five years as FCC Chairman, Mr. Powell made a 180-degree change of opinion when, in 2004, the then-FCC Chairman

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214. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1094.

215. *Golden Globes II*, *supra* note 9, at 4981.

216. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1094. The obvious question then becomes, when does nudity—pixilated or not pixilated—not have some inherent sexual meaning that, by its very nature, becomes inescapable?

217. Mr. Powell was the FCC Chairman during the time the Commission made its *Golden Globes I* and *II* and *Super Bowl* rulings. See generally *Golden Globes I*, *supra* note 188, at 19859; *Golden Globes II*, *supra* note 8, at 4975; *Super Bowl*, *supra* note 13, at 19230. Mr. Martin was the FCC Chairman during the Commission’s *Married by America* ruling. See generally *Married by America*, *supra* note 15, at 20191.

Michael Powell “told Congress the agency was about to embark on an aggressive enforcement campaign.”<sup>218</sup>

In addition to the Commission’s departure from precedent and lack of objective tests to determine when material rises to the level of indecency, the Commission’s decisions illustrate how its enforcement practices have been influenced by the sensibilities of individual complainants instead of the sensibilities of the contemporary community.<sup>219</sup> More specifically, the Commission has allowed the Parents Television Council to influence its indecency decisions instead of applying its obligatory higher standard of review<sup>220</sup> that requires the Commission to employ contemporary community standards for the broadcast medium when making indecency findings.<sup>221</sup> Furthermore, these standards are to be comprised of the average broadcast viewer or listener, not of five Federal Communications Commission Commissioners, nor members of the Parents Television Council.

In *Married by America*, even though the FCC received 159 complaints, all but four of the complaints were identical, i.e., generated from the same web site, and only one complainant had professed to have actually watched the program.<sup>222</sup> In fact, the Commission was able to confirm that twenty-three people, from thirteen states, filed ninety of the total 159 complaints.<sup>223</sup> FOX eventually discovered that the Parents Television Council had posted

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218. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1116. *See also* Gibeaut, *supra* note 114, at 29.

219. *See* discussion *supra* Part III.A.2 (discussing the complaint process and the way in which public interest groups’ interests have influenced the Commission’s public interest mandate and rulings).

220. In *Nat’l Broad. Co. v. United States*, the Court noted that the Communications Act requires the Commission to utilize and apply a higher standard, above a “mere general reference to public welfare without any standard to guide determinations,” when making indecency findings. 319 U.S. 190, 226 (1943). In *Pacifica*, the Court required the Commission to apply contemporary community standards for the broadcast medium, as measured by the average broadcast viewer or listener. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 731–32 (1978); *see also* Hunt, *supra* note 136, at 236–37 (discussing the contemporary community standards requirement imposed upon the FCC and how it has been enforced, specifically discussing how the Commission has ignorantly concluded that an increase in public complaints inherently demonstrates an increase in the public’s concern with what is being broadcast over the public airwaves).

221. *See Pacifica*, 438 U.S. at 731–32.

222. Clay Calvert, *The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325, 332–33 (2005).

223. *Id.*

directions on its web site that instructed members how to send complaints about the *Married by America* episode to the FCC.<sup>224</sup> Also, in *Golden Globes I*, over ninety percent of the public complaints received by the FCC were from individuals associated with the PTC.<sup>225</sup>

What the Parents Television Council appears to have been able to do is to use a heckler's—or hostile audience—veto tactic to shut down otherwise FCC protected speech. In this regard, undisputable evidence shows that it takes only a few complaints, from only a couple of organized complainants, to rock the Commission's precedent boat. Administrative agencies should be better insulated so as not to allow an agency with as much power as the FCC has to regulate the content of nationwide broadcasts to be influenced by the sensibilities of so few upset, and non-representative, broadcast viewers and listeners.

Although it is generally accepted that broadcast media does not receive the same First Amendment protection as street speakers and newspaper writers,<sup>226</sup> just because the Commission has the authority to regulate indecent or profane speech, does not allow it to run away with this authority. In fact, although the United States Supreme Court has supported the Commission's expansive content-based regulatory authority, it supports the Commission's authority based upon the notion that the Commission would apply a restrained enforcement policy.<sup>227</sup> However, from the *Golden Globes II* ruling, it has become obvious that the Commission has switched tactics and no longer relies on years of precedent, including Supreme Court precedent that requires the Commission to observe a restrained enforcement policy, i.e., not regulating fleeting expletives. Instead of reasoned precedent, the Commission relies on the biased complaints of the tens, out of the millions of average viewers, to determine what it should find obscene, indecent, and profane. In this regard, the Commission has turned away from its seemingly objective indecency test and has revealed the Commission's inherent subjective and influenceable nature. Perhaps more important is the fact that by listening to so few complainants and no longer applying the contemporary community standards for the broadcast medium, the Commission has distanced itself from its

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224. *Id.*

225. *Golden Globes I*, *supra* note 188, at 19859 n.1.

226. *See Pacifica*, 438 U.S. at 748.

227. *Id.* at 750–51.

original congressional public interest mandate, and by consequence, the Commission has also single-handedly weakened the support for its regulatory authority over the electromagnetic spectrum and broadcast media.

In 1973, the Supreme Court adopted the *Miller* test to determine whether speech was obscene.<sup>228</sup> In this test, the Court included both subjective and objective elements.<sup>229</sup> The Court selected both elements to help eliminate the ability of one small and isolated group's opinions from overriding another's right to engage in protected free speech, and in effect, invoke a heckler's veto. However, with *Golden Globes* and *Married by America*, the Commission reveals that its indecency test no longer takes into account the objective nationwide contemporary community standards for the broadcast medium. Instead, when determining whether the word "fuck" qualifies as indecent, the Commission applies the subjective contemporary broadcast medium standards of (1) the few individuals who send in multiple public complaints and (2) the five FCC Commissioners.

### C. A *Précis* of Fox Television Stations v. Federal Communications Commission

*Fox Television Stations v. FCC* is a case involving multiple television networks and local affiliates challenging the FCC's departure from its fleeting expletive exception policy.<sup>230</sup> The main complaint arises from two distinct broadcast occurrences. The first is NBC's January 19, 2003 live broadcast of the Golden Globe Awards where musician Bono stated in his acceptance speech, "[T]his is really, really, fucking brilliant. Really, really, great."<sup>231</sup> The second arises from a FCC order issued on February 21, 2006, concerning various television broadcasts, including:

- *2002 Billboard Music Awards*: In her acceptance speech, Cher said, "People have been telling me I'm on the way out every year, right? So fuck 'em."
- *2003 Billboard Music Awards*: Nicole Richie, an award show presenter, said, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

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228. *Miller v. California*, 413 U.S. 15, 24 (1973).

229. *Id.*

230. *See Fox Television Stations v. FCC*, 489 F.3d 444, 444, 454 (2d Cir. 2007).

231. *Id.* at 451.

- *NYPD Blue*: In various episodes, character Detective Andy Sipowitz and others used certain expletives, including: “bullshit,” “dick,” and “dickhead.”
- *The Early Show*: During a live interview of a contestant on CBS’s reality show *Survivor: Vanuatu*, the interviewee referred to a fellow contestant as a “bullshitter.”<sup>232</sup>

In reaching decisions on the above-mentioned broadcasts, the Commission overturned years of precedent and found that the single use of the words “fuck” and “shit” were now presumptively indecent and profane; thus, programs that contained these words, even once, automatically became “patently offensive.”<sup>233</sup> In this regard, the Commission “dismissed the fact that the expletives were fleeting and isolated and held that repeated use [was] not necessary for a finding of indecency.”<sup>234</sup>

FOX and CBS subsequently filed petitions for review; later, ABC and NBC joined in the appeal.<sup>235</sup> Eventually the appeal was taken up by the Second Circuit, before which the Networks (collectively FOX, CBS, and NBC) raised various arguments, including:

- (1) the Remand Order [was] arbitrary and capricious because the Commission’s regulation of “fleeting expletives” represent[ed] a dramatic change in agency policy without adequate explanation;
- (2) the FCC’s “community standards” analysis [was] arbitrary and meaningless;
- (3) the FCC’s indecency findings [were] invalid because the Commission made no finding of scienter;
- (4) the FCC’s definition of “profane” is contrary to law;
- (5) the FCC’s indecency regime is unconstitutionally vague;
- (6) the FCC’s indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and
- (7) the FCC’s indecency regime is an impermissible content-based regulation of speech that violates the First Amendment.<sup>236</sup>

Before reaching the merits of the case, the court first established the proper scope of its review of Commission decisions.<sup>237</sup> The court announced that its review was not “narrowly confined to the specific

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232. *Id.* at 452.

233. *Id.* at 452–53.

234. *Id.* at 453.

235. *Id.* at 453–54.

236. *Id.* at 454.

237. *Id.*

question of whether the two [FOX] broadcasts of the Billboard Music Awards were indecent and/or profane,” but that its review also applied to the policy announced in the *Golden Globes II* decision.<sup>238</sup> The court reasoned that if “that policy is invalid, then we cannot sustain the indecency findings against” the Networks and concluded that the matter was “properly before [the court] on this petition for review.”<sup>239</sup>

Moving to the merits of the appeal, the court indicated its standard of review: “Courts will set aside agency decisions found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”<sup>240</sup> This level of review was narrow and did not permit a court to “substitute its judgment for that of the agency.”<sup>241</sup> Furthermore, courts reviewing agency decisions “[could] not supply a reasoned basis for the agency’s action that the agency itself [had] not given.”<sup>242</sup> The Second Circuit reasoned that if a reviewing court could find a rational connection between the choice the agency made and the data then-available to the agency, so long as the agency articulated a satisfactory explanation, the agency’s action would not be considered arbitrary and capricious, and thus could not be overturned.<sup>243</sup> To determine if an agency’s action qualified as arbitrary or capricious, courts consider whether:

The agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>244</sup>

In the instant matter, the court found that there was no question as to whether the FCC changed its policy.<sup>245</sup> History showed that prior to the *Golden Globes II* decision, the FCC had taken the view that “isolate, non-literal, fleeting” expletives did not run afoul with the Commission’s indecency rules.<sup>246</sup> However, with the issuance of

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238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 455.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

the *Golden Globes II* decision, the Commission had changed its policy:

While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the “F-Word” such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law. . . . The staff has since found that the isolated or fleeting use of the “F-Word” is not indecent in situations arguably similar to that here. We now depart from this portion of the Commission’s 1978 [sic] *Pacifica* decision as well as all of the cases cited . . . and any similar cases holding that isolated or fleeting use of the “F-Word” or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent.<sup>247</sup>

Although the court recognized that agencies were free to revise their rules and policies, it also recalled that if an agency changed its course, it must give “sound reasons for the change” and show “that the [new] rule is consistent with the law that gives the agency its authority to act.”<sup>248</sup> These requirements do not mandate a “heightened standard of scrutiny,” instead the agency is only required to “explain why the original reasons for adopting the rule or policy are no longer dispositive.”<sup>249</sup>

Relying on the FCC’s own reasons for the policy change, the “first blow” theory,<sup>250</sup> the court found that the Commission did not

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247. *Id.* at 455–56.

248. *Id.* at 456.

249. *Id.*

250. *Id.* at 457–58. The *Fox Television Stations* court described the “first blow” theory established by the *Pacifica* Court:

The primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called ‘first blow’ theory described in the Supreme Court’s *Pacifica* decision. In *Pacifica*, the Supreme Court justified the FCC’s regulation of the broadcast media in part on the basis that indecent material on the airwaves enters into the privacy of the home uninvited and without warning. The *Pacifica* Court rejected the argument that the audience could simply tune-out: “To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.” Relying on this statement in *Pacifica*, the Commission attempts to justify its stance on fleeting expletives on the basis that “granting an automatic exemption for ‘isolated or fleeting’ expletives unfairly forces viewers (including children) to take ‘the first blow.’”

*Id.* (internal citations omitted). However, the *Pacifica* Court, through Justice Powell’s concurrence, found that the isolated use of potentially offensive terms was outside the purview of the “first blow” theory and also, therefore, outside the purview of the FCC’s content-based

provide a reasonable explanation as to why the Commission all of a sudden changed its perceptions concerning fleeting expletives.<sup>251</sup> The court questioned why for nearly thirty years the Commission did not find that fleeting expletives were harmful “first blows,” yet now, all of a sudden, it did.<sup>252</sup> The court further found no rational connection between the Commission’s “first blow” theory and the Commission’s actual policy regarding fleeting expletives.<sup>253</sup> The court concluded that “the record simply does not support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to this language on the airwaves.”<sup>254</sup> The court continued to say that:

For decades broadcasters relied on the FCC’s restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent. The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes [II]* decision, it had never banned fleeting expletives. While the FCC is free to change its previously settled view on this issue, it must provide a reasoned basis for that change. The FCC’s decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.<sup>255</sup>

With regard to the Commission’s approach to profanity—another method the Commission used to attack fleeting expletives—the court found that the Commission had not set forth any “independent reasons that would justify its newly-expanded definition of ‘profane’ speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition.”<sup>256</sup> The court continued to reprimand the FCC and stated that “the Commission fail[ed] to provide any explanation for why this separate ban on profanity [was] even necessary.”<sup>257</sup> Again, relying on the Commission’s own words and reasoning, the court recognized that prior to 2004, the Commission had never attempted to regulate

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regulation of the broadcast media. See *FCC v. Pacifica Found.*, 438 U.S. 726, 755–62 (1978) (Powell, J., concurring).

251. *Fox Television Stations*, 489 F.3d at 458.

252. *Id.*

253. *Id.*

254. *Id.* at 459.

255. *Id.* at 461 (internal citations omitted).

256. *Id.*

257. *Id.*

“profane” speech and that the Commission had even taken the view that a “separate ban on profane speech was unconstitutional.”<sup>258</sup> The court then found that the Commission failed to provide a “reasoned analysis of why it [had] undertaken this separate regulation of speech.”<sup>259</sup>

After reviewing the Commission’s rationale for its policy change, the court concluded that “the FCC’s new policy regarding ‘fleeting expletives’ fail[ed] to provide a reasoned analysis justifying its departure from the agency’s established practice.”<sup>260</sup> As such, the court granted the Networks’ petition for review, vacated the FCC’s findings, and because the court found that the FCC’s new indecency “regime” was invalid under the Administrative Procedure Act, the court granted a stay of enforcement of the FCC’s earlier findings.<sup>261</sup>

The court then proceeded to review the constitutionality of the Commission’s “fleeting expletive regime” and overall regulatory authority, although this discussion amounted to dicta because the court never reached the First Amendment issue on the merits.<sup>262</sup> The court concluded this discussion by stating that it was “doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission could adequately respond to the constitutional and statutory challenges raised by the Networks.”<sup>263</sup>

On November 1, 2007, the Federal Communications Commission filed a petition for a writ of certiorari and on March 17, 2008, the United States Supreme Court granted it.<sup>264</sup> During the November 4, 2008 oral arguments, the United States Supreme Court will determine “whether the court of appeals erred in striking down the Federal Communications Commission’s determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of ‘any obscene, indecent, or profane language’ . . . when

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258. *Id.*

259. *Id.*

260. *Id.* at 462.

261. *Id.*

262. *Id.*

263. *Id.* at 467.

264. *Fox Television Stations*, 489 F.3d 444, *cert. granted*, 128 S.Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-582); United States Supreme Court, Docket for 07-582, <http://origin.www.supremecourt.gov/docket/07-582.htm> (last visited Nov. 25, 2008).

the expletives are not repeated,”<sup>265</sup> or in other words, “whether the [C]ommission had given a sound reason for changing its approach to the treatment of isolated, as opposed to repeated, swearing.”<sup>266</sup>

On November 4, 2008 at 10:05 a.m., while the rest of nation was voting for the next President of the United States of America, nine U.S. Supreme Court Justices heard Solicitor General Gregory G. Garre, representing the Commission, and Mr. Carter G. Phillips, representing the Networks, discuss the Federal Communications Commission, its authority to regulate the broadcast media, the F- and S-words, and expletives’ proper usage on the public airwaves.<sup>267</sup> Although it was nearly impossible to determine from the Justices’ questions what outcome they were leaning towards, some, more than others, appeared to enjoy the subject matter of the morning’s oral arguments.<sup>268</sup> Specifically, the gallery erupted into a mild laughter when Justice Breyer recognized that certain cross-sections of humanity are more apt to swearing than others and also when Justices Stevens and Scalia pondered whether a particular remark, which includes potentially indecent language, could still be considered indecent if it was “really hilarious, very, very funny,” meaning that “bawdy jokes are okay if they are really good.”<sup>269</sup>

Moving to the parties’ arguments, the Solicitor General petitioned that the Commission’s “enforcement action may be appropriate in the case of indecent language that is isolated as well as repeated.”<sup>270</sup> To support this claim, Mr. Garre claimed that the Commission’s policy change was not arbitrary and capricious—an Administrative Procedures Act (“APA”) requirement discussed in detail by the Second Court—as the Commission’s decision was based upon three factors: (1) the Commission had directly acknowledged its change in position, i.e., its departure from the Commission’s prior fleeting expletive exception policy, (2) the Commission had provided a concrete and rational explanation for its policy change, i.e., the Commission now believed that the F-word and S-word were clearly

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265. United States Supreme Court, Questions Presented, <http://origin.www.supremecourtus.gov/qp/07-00582qp.pdf> (last visited Nov. 25, 2008).

266. Adam Liptak, *Justices Ponder TV’s ‘Fleeting Expletives’*, N.Y. TIMES, NOV. 5, 2008, at A26.

267. Transcript of Oral Argument at 1, *Fox Television Stations v. FCC*, No. 07-582 (U.S. Nov. 4, 2008) [hereinafter Oral Argument].

268. See Liptak, *Justices Ponder TV’s ‘Fleeting Expletives’*, supra note 266; see generally Oral Argument, supra note 267.

269. Oral Argument, supra note 267, at 18–19, 24–25.

270. *Id.* at 3.

patently offensive, because, for example, the F-word “is one of the most graphic, explicit, and vulgar words in the English language,” and (3) the Commission’s concrete explanation was “at a minimum plausible and consistent with the Commission’s statutory mandate.”<sup>271</sup>

However, neither the Justices, nor the Networks, found the Commission’s three-factored justification to be without contention. Immediately upon Mr. Garre’s proffering of the Commission’s concrete and rational policy, Justice Ginsburg noted inconsistencies with regard the Commission’s implementation of its “rational policy:”

[T]here seems to be no rhyme or reason for some of the decisions that the Commission has made. I mean, the “Saving Private Ryan” case was filled with expletives, and yet the film about jazz history, the words were considered a violation of the Commission’s policies. So that there seems to be very little rhyme or reason to when the Commission says that one of these words is okay and when it says it isn’t.<sup>272</sup>

Additionally, although Chief Justice Roberts and Justice Scalia agreed with Mr. Garre’s second factor, finding the F- and S-words to have an inherent shock value because of these words’ “associate[ion] with sexual or excretory activity,” Mr. Phillips countered, reminding the Justices that there was nothing on the record that remotely suggested this conclusion.<sup>273</sup> Also questioning Chief Justice Roberts’ and Justice Scalia’s from the gut conclusions is Mr. Jesse Sheidlower, editor-at-large of the Oxford English Dictionary.<sup>274</sup> Mr. Sheidlower found, while revising the Dictionary’s entry on the word “fuck,” that the word’s power to shock was in the decline, largely because the word’s core meaning had been blurred throughout its 600 year history.<sup>275</sup> Mr. Sheidlower further indicated that as far as inherent offensiveness went, “fuck” was not even the most offensive word around; historically, society had found blasphemous words and words suggesting questionable parentage to be more offensive than the word “fuck.”<sup>276</sup> Finally, Mr. Sheidlower contended that even though the word “fuck” could get a laugh from a comedian’s audience or a broadcast network a FCC Forfeiture Penalty, today, racial slurs could get people fired.<sup>277</sup>

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271. *Id.* at 8, 11, 61.

272. *Id.* at 8.

273. *Id.* at 34–36.

274. Liptak, *Justices Ponder TV’s ‘Fleeting Expletives’*, supra note 266.

275. *Id.*

276. *Id.*

277. *Id.*

Another topic the Justices and Mr. Phillips quickly broached was the notion of contemporary community standards for the broadcast medium and whether a heckler's veto existed due to the Commission's use of the complaints it receives—from a small and potentially non-representative fraction of society—to satisfy the average American viewer element of its contemporary community standard for the broadcast medium patently offensive analysis.<sup>278</sup> In oral argument, the Commission indicated that only broadcasts found to be “patently offensive as measured by contemporary community standards for the broadcast medium” were indecent.<sup>279</sup> In attempting to discover the Commission's process for determining the contemporary community standards for the broadcast medium, the standard by which the FCC judges material to be patently offensive, Justice Ginsburg asked, “How are the contemporary community standards determined in this context? Does the FCC survey any particular audience to find out what their standards are?”<sup>280</sup> Mr. Garre responded by informing Justice Ginsburg that the Commission looked to contemporary community standards of the average listener “to ensure that material [was] judged neither on the basis of a decision-maker's personal opinion nor by its effect on a particularly sensitive or insensitive person or group.”<sup>281</sup> However, Mr. Garre's reponse sidestepped Justice Ginsburg's question; he never informed the Court of how the FCC determined these standards, except by stating that the Commission applied a “collective experience,” compiled from statements of lawmakers, courts, broadcasters, public interest groups, and citizens, “to determine what is consistent with community standards.”<sup>282</sup> Although, determining what is consistent with a presumed standard is not the same as first, defining an unclear standard, and then second, determining whether or not questionable material violates the now fully defined and vetted standard.

Finally, although the question before the Court did not include First Amendment challenges to the Commission's regulation of broadcast media, both Justice Ginsburg and Mr. Phillips inquired as to whether the Court could truly reach a decision without taking into consideration the “elephant in the room” and apply, at least, a limited

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278. Oral Argument, *supra* note 267, at 14, 47–51.

279. Joint Appendix at 32–33, *Fox Television Stations v. FCC*, No. 07-582 (U.S. June 2, 2008) [hereinafter Joint Appendix].

280. Oral Argument, *supra* note 267, at 14; Joint Appendix, *supra* note 279, at 33 n.13.

281. Oral Argument, *supra* note 267, at 14; Joint Appendix, *supra* note 279, at 33 n.13.

282. Oral Argument, *supra* note 267, at 14.

First Amendment analysis.<sup>283</sup> In this regard, Mr. Powell argued that the Commission should not be bound by the APA's arbitrary and capricious change in administrative policy standard, but instead the Court should impose upon the Commission a higher standard, mainly due to the Commission's unique ability to impose content-based regulations against the broadcast media.<sup>284</sup> Along similar lines, Mr. Powell also argued that the Commission did not have the authority to decide the definition of indecency.<sup>285</sup> Mr. Powell reasoned that because the Commission's authority to impose sanctions against broadcasters who uttered indecent language originated from a federal criminal statute, the Commission could only use 18 U.S.C. § 1464's definition of indecent that, by its nature of being a criminal statute, included the rule of lenity, which requires the Court, when two interpretations of an action are possible, to adopt the interpretation most favorable to the defendant—in this case, non-indecent interpretations.<sup>286</sup>

#### IV. A SYNOPSIS: HAS THE FEDERAL COMMUNICATIONS COMMISSION OVERSTEPPED ITS AUTHORITY? DOES IT CONTINUE TO MAKE SENSE?

The United States Supreme Court has recognized that the First Amendment's free speech protection prohibits the government from regulating speech based upon the speech's content.<sup>287</sup> However, the Supreme Court has permitted the Federal Communications Commission to sidestep this prohibition and regulate the content of broadcast media on a daily basis.<sup>288</sup> The source of this regulatory authority stems from the Commission's obligation to ensure that

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283. *Id.* at 27–28, 37–41.

284. *Id.*

285. *Id.* at 42–47, 52, 55–59.

286. *Id.*

287. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (“Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content.”); 16A Am. Jur. 2d Constitutional Law § 460 (2007) (“Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment. . . . Regulations which permit the government to discriminate on the basis of the content of a speaker’s message ordinarily cannot be tolerated under the First Amendment.”) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

288. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

broadcasters serve the public interest<sup>289</sup> because of the scarce nature of the electromagnetic spectrum.<sup>290</sup> But, when one considers the Commission's recent trend of decisions—those resulting in more restrictive content-based regulations being enforced against the broadcast media<sup>291</sup>—one must ask whether the public interest and scarcity of the spectrum arguments are good enough reasons to allow the government to regulate speech that, in another medium, would be protected.

In answering this question, one must concede that the Federal Communications Commission may have at one time been a valuable administrative agency that ardently protected the public from obscene, indecent, and profane broadcasts; unfortunately, the FCC is no longer that same agency. Subjective opinions of what is considered obscene, indecent, and profane have percolated into the Commission's regulations, and through even a minimal analysis of recent FCC decisions, one is able to observe how the Commission has been influenced—if not controlled—by a relatively limited number of “public” complainants. As a result, the Commission appears no longer to be capable of carrying out its congressional mandate to “regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”<sup>292</sup> in good faith. Until the Federal Communications Commission is able to return to its past, when it honestly attempted to promulgate rules and regulations for the purpose of serving the public convenience, interest, or necessity,<sup>293</sup> and before it started to arduously regulate broadcast media's content and impose severe and subjective penalties resulting in broadcast networks being forced to self-censor, the Federal Communications Commission does not make sense. When the Commission appears to no longer follow its congressional mandate or judicial guidelines, how can the agency itself and the regulations it promulgates be upheld?

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289. See 47 U.S.C. § 303 (2000).

290. See, e.g., *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

291. See, e.g., *Golden Globes II*, *supra* note 9, at 4875; *Super Bowl*, *supra* note 13, at 19230; *Married by America*, *supra* note 14, at 20191.

292. 47 U.S.C. § 151 (2000).

293. 47 U.S.C. § 303 (2000).

Allowing the Commission to overturn well established precedent because it received 159 complaints about a program that aired potentially indecent material when the viewing audience was comprised of 7,500,000 viewers is worse than allowing a crowd to shut down a single speaker because the speaker's words upset—yet did not incite—the crowd. Such action is tantamount to a heckler's veto, an act that the Supreme Court has found in other mediums to unconstitutionally infringe on a speaker's First Amendment rights.<sup>294</sup> As such, allowing the Commission to enforce decisions analogous to hecklers' vetoes not only infringes on the First Amendment rights of the broadcast speakers, but also on the rights of the broadcast viewer and broadcast listener.<sup>295</sup> Beyond broadcast viewers' and listeners' rights, Congress has forbidden the Commission from engaging in regulations that would censor broadcasters and interfere with their (limited) First Amendment rights.<sup>296</sup> Regardless of this prohibition, because of the vagueness of the Commission's indecency regulations and because of the Commission's new enforcement practices, which depart from Supreme Court supported FCC regulation of indecent speech, broadcast networks have ever increasingly been engaging in the self-censorship for fear of FCC penalties.<sup>297</sup> The following table details some of the self-censorship measures taken by broadcast networks in recent years.

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294. See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

295. See *Schneider*, *supra* note 161, at 893–94.

296. 47 U.S.C. § 326 (2000) (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”); see *Fox Television Stations v. FCC*, 489 F.3d 444, 450 (2d Cir. 2007) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring)); *Pacifica*, 438 U.S. at 743; see also, Fed. Comm’n Comm’n, *The FCC and Freedom of Speech—FCC Consumer Facts*, <http://www.fcc.gov/cgb/consumerfacts/freespeech.html> (last visited Nov. 25, 2008) (“The Communications Act prohibits the FCC from censoring broadcast material, in most cases, and from making any regulation that would interfere with freedom of speech. . . . For example, the Courts have said that *indecent material* is protected by the First Amendment to the Constitution and cannot be banned entirely. It may be restricted, however, in order to avoid its broadcast when there is a reasonable risk that children may be in the audience.”) (emphasis in original).

297. See *Fox Television Stations*, 489 F.3d at 462–63; *Hunt*, *supra* note 136, at 231 & nn.54 & 56; *Schneider*, *supra* note 161, at 892–93, 892 n.6, 893 n.10, 894 n.22.

Table 1. *A Sampling of Broadcast Network Self-Censorship*<sup>298</sup>*Saving Private Ryan*: refusal of affiliates to rebroadcast (ABC)—

“In 2004, dozens of ABC affiliates refused to air Steven Spielberg’s classic World War II film, *Saving Private Ryan*, due to the uncertainty of indecency and profanity standards. Yet just two years earlier, prior to 2004’s explosion of indecency violations, the movie had aired without incident.”

“Although even the PTC believed the context of ‘*Saving Private Ryan*’ made the questionable content not indecent, some affiliates decided they could not risk the FCC’s unpredictability.”

*9/11—A Documentary*: refusal of affiliates to rebroadcast (CBS)—

“[T]he chill in the airwaves is unmistakable, and the viewing public is the biggest loser. The most recent example involves dozens of CBS affiliates who refused to rebroadcast the documentary ‘9/11’ for fear they would be fined for the coarse words uttered by rescuers. This is one of many instances of broadcast licensees altering or canceling worthwhile programming out of concern about finding themselves in the Federal Communications Commission’s crosshairs.”

*The Blues: Godfathers and Sons*: subsequent self-censorship (PBS)—

“PBS recently began instructing its producers to self-censor all of its shows, including news programming, after one of its affiliates was slapped with a fine against Martin Scorsese’s documentary on the blues.”

“A PBS station forfeited \$15,000 after the FCC found the airing of Martin Scorsese’s documentary ‘*The Blues: Godfathers and Sons*’ to be indecent because of ‘numerous ‘obscenities,’ including the ‘F-Word,’ the ‘S-Word’ and various derivatives of those words.’”

298. See *Fox Television Stations*, 489 F.3d at 462–63; Hunt, *supra* note 136, at 231 & nn.54 & 56; Schneider, *supra* note 161, at 892–93, 892 n.6, 893 n.10, 894 n.22.

*The War*: preemptory self-censorship (PBS)—

“In 2007, PBS was forced to release an edited version of a World War II documentary—removing four expletives used by ex-soldiers in interviews—in order to ease the fears of public television stations that the FCC would find the unedited version to be indecent.”

*Politically Incorrect with Bill Maher*: cancelled (ABC)—

“ABC cancelled the show when the host made anti-military comments after 9/11, not because ratings decreased, but because advertisers pulled out as a result of conservative advocacy group pressure.”

The *Fox Television Stations* court perhaps summarized it best in dicta:

We can understand why the Networks argue that the FCC’s “patently offensive as measured by contemporary community standards” test coupled with its “artistic necessity” exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to “steer far wider of the unlawful zone.”<sup>299</sup>

If the Federal Communications Commission’s stated purpose is to regulate broadcast media for the public interest, it seems unreasonable to believe that the Commission is able to dutifully serve the public’s interest when its regulations are of a non-representative, biased, subjective, and content-based nature—influenced not by the concerns of average Americans, but by the concerns of a particular public interest group, chiefly the Parents Television Counsel, and five overly opinionated FCC Commissioners. Because of all the aforementioned reasons, the author can only conclude that the Federal Communications Commission no longer makes sense. Most notably, the questioning of the Commission’s continued existence arises from its egregious overstepping of the its congressional mandate, which instructs the Commission to only regulate the broadcast media so as to serve the public interest because the electromagnetic spectrum, at one point in time, was of a most limited nature. Due to the FCC’s

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299. *Fox Television Stations*, 489 F.3d at 463.

improper broadcast media regulation, the artful medium that was once broadcast media no longer exists; and though this is perhaps crudely stated, right now, the Federal Communications Commission is kicking broadcast media's ass.<sup>300</sup>

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300. Schneider, *supra* note 161, at 891, 891 n.1 (citing *Studio 60 on the Sunset Strip: Pilot* (NBC television broadcast Sept. 18, 2006)); *see generally* Tad Friend, *Backstage Angst*, THE NEW YORKER, Sept. 25, 2006, at On Television. Mr. Schneider is referring to a portion of character Wes Mendell's opening monologue performed during *Studio 60 on the Sunset Strip*'s pilot episode. A partial transcript of the monologue is as follows:

This isn't gonna be a very good show tonight and I think you [should] change the channel/. . . This show used to be cutting edge political and social satire, but it's gotten lobotomized by a candy-ass broadcast network hell-bent on doing *nothing* that might challenge [its] audience. . . . We're all being lobotomized by the country's most influential industry which has thrown in the towel to any endeavor that does not include the courting of 12-year-old boys. . . . So change the channel, turn off the TV. Do it right now/. . . and there's always been a struggle between art and commerce, but now I'm telling you art is getting [its] ass kicked, and it's making us mean, and it's making us bitchy, and it's making us *cheap punks* and that's not who we are/. . . . [T]he two things that make the networks scared gutless are the FCC and every psycho-religious cult that gets positively horny at the very mention of a boycott./ *These* are the people they're afraid of, this prissy feckless, off-the-charts greed-filled whorehouse of a network you're watching. . . .

*Studio 60 on the Sunset Strip Monologue*, SCRIBD, <http://www.scribd.com/doc/7953/Studio-60-on-the-Sunset-Strip-Monologue> (last visited Oct. 31, 2008); *Studio 60 on the Sunset Strip*, <http://www.geocities.com/seekergurl/studio60.html> (last visited Oct. 31, 2008).

