To *Infinity* and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age

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I. INTRODUCTION

"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 . . . "[1] This remark by the late George Carlin began his infamous "Filthy Words" monologue—a monologue that was broadcast over the

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[1] Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 751 (1978).

"public airwaves" and which became central to famous litigation that is debated to this day. *In re Pacifica* ("*Pacifica*") marked the first instance in which the Federal Communications Commission ("FCC") sanctioned a broadcaster for using indecent language on the air.[2] In the years following *Pacifica*, the FCC heeded Supreme Court guidance and exercised its narrowly tailored power to prohibit Carlin's seven "Filthy Words" from being broadcast on the air. However, during the past decade, the policies of the FCC have dramatically changed and the agency now advises broadcasters to refrain from more speech than ever before. These rules may not, when examined closely, survive constitutional challenge.

The reasoning given in *Pacifica*, which has been relied on in FCC rulings regarding indecent speech to this day,[3] is outdated, outmoded, and overly intrusive to broadcasters. The rise of modern technology renders obsolete the notion that broadcasting is as "uniquely pervasive"[4] and as "uniquely accessible to children"[5] as it may have been at the time of the *Pacifica* ruling. Filtering technology enabling parents to more accurately limit unsupervised television viewing coupled with a *laissez-faire* market-oriented approach allowing networks to police themselves may better serve the legitimate purpose of maintaining a communications medium for education or entertainment that is free from "indecent" language. Further, analysis of FCC investigation policies will show that while the FCC claims to look towards "contemporary community standards for the broadcast medium"[6] to determine indecency, it may actually be serving the interests of only a small minority of broadcast viewers when determining whether speech is indecent.[7]

This comment begins by charting the statutory history of broadcast indecency regulation, beginning with the Radio Act of 1927 ("Radio

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[2] *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C. 2d 94 (1975). [hereinafter *In re Pacifica*].

[3] *See generally* Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S.Ct. 1800 (2009).

[4] *Pacifica Found.*, 438 U.S. at 748.

[5] *Id.* at 749.

[6] *Id.* at 732. The FCC has used this constant test for determining indecent speech since the Supreme Court decided *Pacifica*.

[7] *See In re Pacifica*, *supra* note 2, at 98. "[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.*

Act"),[8] and moving forward to the Communications Act of 1934 ("Communications Act").[9] A few major cases will be discussed, paying special attention to the reasoning the Supreme Court gives for allowing regulation of indecent speech in *FCC v. Pacifica Foundation*.[10] Next, the FCC's marked change of course in *In re Infinity Broadcasting Corporation of Pennsylvania* (hereinafter, "*Infinity*")[11] merits discussion. In *Infinity*, the FCC determined the *Pacifica* enforcement standard to be "unduly narrow"[12] and began sanctioning broadcasters for airing words other than those explicitly uttered in Carlin's "Filthy Words" monologue.[13] Additionally, the investigative scheme of the FCC will be examined, questioning whether the policies for determining indecency are still in the "public interest."[14] Further, I will engage in a discussion of the validity of *Pacifica*'s reasoning in light of new and improved filtering technology. Lastly, this comment concludes by analyzing whether simple market powers and "branding"[15] techniques may be more effective at achieving the twin goals of curtailing indecent speech and avoiding excessive intrusiveness on broadcasters' First Amendment rights.

As a threshold matter, it should be conceded that each type of communications medium lends itself to some type of governmental regulation and some degree of limitation on speech.[16] This comment will not argue that *all* regulation on speech should be abolished, nor will it argue that the "channeling" approach used by both network broadcasters and cable companies is ineffective to meet its legitimate goal of shielding children from indecent speech.[17] This comment will argue, however, that the reasoning for speech regulation given in *Pacifica* and used by the FCC today is no longer viable given that many variables in broadcast media have changed since the 1970s.

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[8] Radio Act of 1927, 47 U.S.C. §§ 81-83 (repealed 1934).

[9] Communications Act of 1934, 47 U.S.C. §§ 151-615 (2006).

[10] Fed. Commc'n Comm'n v. Pacifica Found, 438 U.S. 726 (1978).

[11] *In re* Infinity Broad. Corp. of Pa., 3 F.C.C. Rcd. 930 (1987) [hereinafter *Infinity*].

[12] *Id.* at 930.

[13] The seven words included "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Pacifica Found*, 438 U.S. at 751.

[14] FCC holds regulatory power "from time to time, as public interest, convenience, or necessity requires." 47 U.S.C.A. § 303 (West 2010).

[15] "Branding" refers to the practice of creating a brand-name and a brand identity.

[16] For example, no matter the medium of communication, obscene speech is prohibited. *See generally* Miller v. California, 413 U.S. 15 (1973).

[17] "Channeling" refers to the current FCC policy of allowing indecent language to be broadcast (to a point) during the "safe harbor" of 10:00 p.m. to 6:00 a.m. It was determined that during these times children were not likely to be in the audience.

Professors, at least one Supreme Court Justice, and the commentariat believe similarly, and this comment aims to supplement the ideas advanced by those writers.

II. HISTORY OF THE FCC AND MAJOR CASES INTERPRETING ITS REGULATORY POWER

Congress granted the FCC and the Federal Radio Commission ("FRC"), which preceded the FCC, power to regulate the finite resources of the electromagnetic spectrum—the "airwaves."[18] Before the creation of regulatory bodies to control the use of the radio waves, multiple amateur and professional users would broadcast on top of each other by using the same frequencies, creating a "cacophony of competing voices"[19] and effectively silencing each other through the confusion. Broadcasters realized that under the "traditional broadcast model, the electromagnetic spectrum was considered to be a scarce physical resource that could support only a limited number of users at one time."[20] However, broadcasters also realized early on that radio technology was uniquely effective as a method of quickly and easily disseminating information to a wide audience. As such, Congress stepped in and adopted the Radio Act, which created the FRC.[21]

The FRC held broadly defined powers, mainly regulating the radio airwaves for the public. Its responsibilities consisted of assigning professional and amateur radio broadcasters specific frequencies on which to transmit a signal, assigning each broadcaster a specific call name, and developing rules on what broadcasters could broadcast and when.[22] However, FRC rules were somewhat vague and were challenged sporadically. As radio broadcasting grew in popularity, so did the major companies that attempted to make radio broadcasting a big business. For example, the major three broadcasters that exist

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[18] *See* Radio Act of 1927, 47 U.S.C. §§ 81-83 (repealed 1934).

[19] Red Lion Broad. Co. v. Fed. Commc'n Comm'n, 395 U.S. 367, 376 (1969).

[20] Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373, 377 (2009).

[21] Radio Act of 1927, 47 U.S.C. §§ 81-83 (repealed 1934). For an extensive and well-researched history on the beginnings of radio technology and radio broadcasting in its infancy, *see* Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t] . . . the Federal Communications Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 216 (2008).

[22] Radio Act of 1927, 47 U.S.C. §§ 81-83 (repealed 1934).

today (NBC, ABC, and CBS) had their humble beginnings in radio.[23]

Almost as soon as radio broadcasting became popular, innovators began experimenting with television broadcasting and its capabilities. The Communications Act expanded the Radio Act to encompass television technology, which logically grew out of advancements from radio.[24] The Communications Act established the FCC, which regulated the electromagnetic spectrum and controlled receipt of licenses to broadcast both radio and television programs.[25] The FCC was given broad power to regulate broadcasting due to the "uniquely pervasive presence"[26] of broadcasting in the American home and the possibility of using mass media as "a prime source of national cohesion."[27] The FCC was given a statutory call to regulate broadcasters "from time to time, as public convenience, interest, or necessity require[d]."[28] Understandably, legislators were anxious to effectively regulate the public airwaves in order to ensure their utilization as a valuable communications medium.[29] However, as evidenced by trends in the litigation discussed below, private businesses in the broadcasting industry began to argue that moving in the direction of regulating to serve the public interest would result in overly broad restrictions.

A. *Regulation in Its Infancy*

In 1943, *National Broadcasting Corporation v. U.S.* held that FCC regulation "in the public interest" consisted of an overly broad delegation of powers.[30] The Communications Act itself defined public interest as being "the interest of the listening public in 'the larger and more effective use of radio.'"[31] NBC worried, quite prophetically, that regulation in the public interest could yield inconsistent and unpredictable broadcast standards that would stretch the limits of

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[23] American Broadcasting Company ("ABC"), Columbia Broadcasting System ("CBS"), and National Broadcasting Company ("NBC"). *See CBS VS. NBC VS. ABC*, RECOMPARISON, http://recomparison.com/comparisons/100525/cbs-vs-nbc-vs-abc/ (last visited Mar. 18, 2011) ("All these American broadcasting channels (CBS, NBC, and ABC) are made available worldwide and they were all former radio broadcasting networks."). *Id.*

[24] *See generally* 47 U.S.C.A. § 151 (West 2011).

[25] *See* 47 U.S.C. § 303 (2010).

[26] Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978).

[27] Red Lion Broad. Co. v. Fed. Commc'n Comm'n, 395 U.S. 367, 386 n.15 (1969).

[28] 47 U.S.C.A. § 303 (West 2010).

[29] *See supra* note 25 and accompanying text.

[30] Nat'l Broad. Corp. v. United States, 319 U.S. 190 (1943).

[31] *Id.* at 216 (quoting 47 U.S.C. § 303(g)).

power that Congress intended the FCC to have.[32] The FCC argued in response that it was not given ultimate power to regulate, but rather that its power was confined to the "public interest, convenience, or necessity."[33] The Court agreed with the FCC, stating that the public interest was "a criterion . . . as concrete as the complicated factors for judgment in such a field of delegated authority permit."[34]

The Court further held that a broadcaster was not serving the "public interest" if the broadcaster took actions that did not amount to the best use of its frequencies.[35] The FCC argued:

> With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect (of the practices disclosed by the investigation) has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging "the larger and more effective use of radio in the public interest" if we were to grant licenses to persons who persist in these practices.[36]

The Court concluded "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 the public interest.'"[37]

Twenty-five years later, the Court was asked again to rule on the FCC's definition of "public interest." In 1969, the Supreme Court decided *Red Lion Broadcasting v. FCC*,[38] and discussed the "Fairness Doctrine," in which a broadcaster must give a public figure or political campaign a chance to respond to public criticism, regardless of whether the speaker would be able to pay for the broadcast time, was challenged.[39] The policy behind the rule rests on a broadcaster's obligation to cover important issues fairly and avoid a monopolization

[32] *See infra* Part II.A.

[33] *Nat'l Broad. Corp.*, 319 U.S. at 216.

[34] *Id.* (quoting Fed. Commc'n Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)).

[35] *Id.* at 218.

[36] *Id.* at 218 (internal citation omitted).

[37] Quale, *supra* note 21, at 224.

[38] Red Lion Broad. Co. v. Fed. Commc'n Comm'n, 395 U.S. 367 (1969).

[39] For a brief discussion of the "Fairness Doctrine," *see Id.* at 369.

of ideas presented to the public. To the Court, "[e]very licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias."[40] However, from the perspective of the broadcaster, the "Fairness Doctrine" imposes content that any broadcast editor may, through the exercise of freedom of expression, choose to leave out.

The Court took a different view, however, and stated that a broadcaster is "a fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[41] It seems clear that the government worried about a few major broadcasters controlling the flow of information to the vast majority of the public. Monopolization of ideas would easily leave out minority viewpoints or viewpoints contrary to those adopted by broadcasters.

At this point, the Court emphasized that broadcasters are not necessarily the "speakers" of what they broadcast. Rather, they are the carriers of others' constitutionally protected speech; "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[42] Further, the Court justified its reasoning on the still-prevalent basis of scarcity of resources and decided in favor of regulating broadcasters and thus controlling access to a limited, but desired, medium. The holding explains that in light of "the Government's role in allocating those [broadcast] frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional."[43]

B. Pacifica *and the Unwilling Constitutional Scholar*

While nothing in the Communications Act specifically allows the FCC to sanction or punish indecent speech, the legislation required the FCC to enforce all federal laws within the scope of its regulation.[44] Congress promulgated 18 U.S.C. § 1464 to criminalize obscene or indecent speech, stating that "[w]hoever utters any obscene, indecent,

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[40] *Id.* at 383.
[41] *Id.* at 389.
[42] *Id.* at 390.
[43] *Id.* at 400-01.
[44] The FCC mandate to uphold all federal laws may be found in 47 U.S.C.A § 303 (West 2010).

or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[45] Thus, if a broadcaster aired indecent speech the FCC could choose to refuse renewal of that broadcaster's license or fine them.

Though it held such power, the FCC declined to enforce it during the first few decades of its existence. Rather than sanctioning or punishing those who aired questionable speech, the FCC only rendered a few advisory opinions on what would be deemed "indecent speech" should they happened to hear it.[46] For example, *In re WUHY-FM* involved the broadcast of Jerry Garcia's (front man for the famous jam-rock band The Grateful Dead) adjectival use of "shit" and "fuck," using them to emphasize certain parts of common speech during an interview.[47] In declining to sanction the radio station for airing the segment, the FCC reasoned that "in sensitive areas like this, the Commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor."[48] Perhaps part of the reason that the FCC trudged softly when First Amendment concerns arose was the fact that the agency had been given very little guidance from the courts on what qualifies as indecent speech. George Carlin presented the federal judiciary with a perfect opportunity to do so.

George Carlin, a prolific stand-up comic of considerable renown, specialized in clever puns and comical word play. He had especially shown an interest "in society's use, overuse, or misuse of [words] and in society's reaction to them."[49] Even the FCC had respect for his talent, comparing him with other renowned authors of the past. "As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate."[50] A particularly illuminating excerpt from one of his stand-up routines is reprinted here, to show how the words he chooses are central to his message. The following is from *Airline Announcements: Part One*,[51] where he critiques the modern

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[45] 18 U.S.C. § 1464 (2006).

[46] *See generally In re* Sonderling Broad. Corp. 41 F.C.C.2d 777 (1973).

[47] *In re* WUHY-FM, E. Educ. Radio, 4548 Market St., Philadelphia, Pa., 24 F.C.C.2d 408, 409 (1970).

[48] *Id.* at 412.

[49] Christine A. Corcos, *George Carlin, Constitutional Law Scholar*, 37 STETSON L. REV. 899, 907 (2008).

[50] *In re Pacifica*, *supra* note 2, at 95.

[51] GEORGE CARLIN, NAPALM & SILLY PUTTY 12-13 (Hyperion 2001).

parlance of boarding an airplane:

> It starts at the gate: "We'd like to begin the **boarding process**." Extra word. "Process." Not necessary. Boarding is sufficient. "We'd like to begin the boarding." Simple. Tells the story. People add extra words when they want things to sound more important than they really are. "Boarding process" sounds important. It isn't. It's just a group of people getting on an airplane.
>
> To begin the boarding process, the airline announces they will **preboard** certain passengers. And I wonder, How can that be? How can people board before they board? This I gotta see. But before anything interesting can happen I'm told to get on the plane. "Sir, you can get on the plane now." And I think for a moment. "*On* the plane? No, my friends, not me. I'm not getting *on* the plane; I'm getting *in* the plane! Let Evel Knievel get *on* the plane, I'll be sitting inside in one of those little chairs. It seems less windy in there."
>
> Then they mention that it's a **nonstop flight**. Well, I must say I don't care for that sort of thing. Call me old-fashioned, but I insist that my flight stop. Preferably at an airport. Somehow those sudden cornfield stops interfere with the flow of my day. And just about at this point, they tell me the flight has been delayed because of a **change of equipment**. And deep down I'm thinking, "broken plane!"
>
> Speaking of potential mishaps, here's a phrase that apparently the airlines simply made up: **near miss**. They say that if two planes almost collide it's a near miss. Bullshit, my friend. It's a near hit! A **collision** is a near miss.[52]

As Carlin proceeded to examine the speech patterns of America, he was troubled by the fact that of the hundreds of thousands of words in the English language, only a select few were prohibited from the "airwaves." To bring that fact to light, he authored a monologue entitled "Filthy Words." That monologue was broadcast at around 2:00 p.m. on a talk show radio program that was known for some of its racy tendencies: Paul Gorman's "Lunchpail."[53] The show frequently "discussed and analyzed society's attitude toward the use of language."[54]

The monologue itself, which dwelled upon and repeated (arguably to fully explain their uses) the words shit, piss, fuck, cunt, cocksucker, motherfucker and tits, naturally merited an FCC complaint regarding Carlin's use of indecent language.[55] After imposing sanctions on the

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[52] *Id.* (emphasis in original).

[53] *In re Pacifica*, *supra* note 2, at 95.

[54] *Id.; see also* Corcos, *supra* note 49, at 909.

[55] A complete transcript of the Carlin monologue was included as an Appendix to the Supreme Court decision in *Pacifica*. An edited version appears below:

> I was thinking about the curse words and the swear words … that you're not supposed to say all the time, 'cause words or people into words want to hear your words … A guy who used to be in Washington knew that his phone was tapped,

Pacifica Corporation, the company that owned the broadcasting radio station that produced "Lunchpail," the decision was appealed to the D.C. Circuit Court and eventually to the Supreme Court.

FCC v. Pacifica Foundation[56] presented the first opportunity for the Supreme Court to determine whether the FCC had the power to regulate radio broadcasts that were considered indecent, but not obscene. In the complaint, the FCC stated that it found the language used to be "patently offensive," though not offensive enough to rise to the level of obscenity.[57] The FCC argued for indecent speech to be classified as language "patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of day when there is a reasonable risk that children may be in the audience."[58] Protecting children was central to the FCC's determination that the program was indecent. It reasoned that children likely heard the broadcast and that

> used to answer, Fuck Hoover, yes, go ahead … 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, 'cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well … Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't … and it came down to seven but the list is open to amendment, and in fact, has been changed … The original seven words were shit, piss, fuck, cunt, cocksucker, mother-fucker, and tits. Those are the ones that will curve your spine … and maybe, even bring us, God help us, peace without honor … um, and a bourbon. And now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. You want to be a purist it … can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh the cock—three times. It's in the Bible, cock in the Bible. And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? It's chickens, you know. Then you have the four letter words from the old Anglo-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. Shit! I won the Grammy, man, for the comedy album. Isn't that groovy? That's true. Thank you. Thank you man … I got my Grammy. I can let my hair hang down now, shit. Ha!

Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 751-52 (1978).

[56] *Id.* at 726.

[57] *In re Pacifica*, *supra* note 2, at 97 ("There is authority for the proposition that the term "indecent" . . . is *not* subsumed by the concept of obscenity – that the two terms refer to two different things.").

[58] *Id.* at 98.

the language, replete with offensive words repeated numerous times, was indecent.[59] However, rather than ban the speech completely from the airwaves, the FCC wanted to channel it to an appropriate time of day.

Pacifica argued in response that the FCC was only allowed to sanction and restrict obscene speech as defined in *Miller v. California*.[60] The Court disagreed, observing that the language of 18 U.S.C. § 1461, concerning radio and television broadcasting, prohibiting obscene speech was written in the disjunctive; as such, the statute was intended to cover more than obscene speech.[61] The Court further concluded that allowing the FCC to sanction certain types of speech "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. While some of these references may be protected, they surely lie at the periphery of First Amendment concern."[62]

What brings speech in from the "periphery," then, is the context in which it is used. Indecent speech is inextricably tied to its context, making both content and context of speech critical to First Amendment analysis.[63] The Court conceded that in many settings the speech used by George Carlin would be constitutionally protected. For example, in a theater in front of a live audience, no government regulation could prohibit his indecent speech. However, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . "[64]

The Court concluded that the FCC had the power to prohibit the broadcast of indecent speech on television and radio. Justice Stevens,

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[59] *Id.* at 99.

[60] Miller v. California, 413 U.S. 15, 24-25 (1973). The *Miller* test determines obscenity by balancing:

> 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 of 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. (internal citations omitted). The test does not apply to determine indecent speech, however, and has been limited to curtailing the dissemination of pornography.

[61] *See* 18 U.S.C. § 1461 (2006). "The words 'obscene, indecent, or profane' [in the statute] are written in the disjunctive, implying that each has a separate meaning." Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 739-740 (1978).

[62] *Pacifica Found.*, 438 U.S. at 743.

[63] *See* Schenck v. U.S., 249 U.S. 47, 52 (1919).

[64] *Id.*

writing for the majority, explained that "[w]e have long recognized that each medium of expression presents special First Amendment problems"[65] and "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[66] The Court considered heightened regulation of indecent speech persuasive due to broadcasting's "uniquely pervasive presence in the lives of all Americans"[67] and the fact that broadcasting was "uniquely accessible to children, even those too young to read."[68]

In allowing regulation of indecent speech, the Court emphasized the narrowness of its holding. The Court stated that it had "not decided that an *occasional* expletive . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution."[69] Due to the fact that George Carlin's monologue involved such a specific use of a specific number of words, the FCC was well aware of what sort of speech *Pacifica* allowed it to sanction. However, the question remained whether, in practice, such sanctions would have a chilling effect on the wrong types of speech—maybe even speech with artistic or intellectual value.

The majority opinion in *Pacifica* observed that the chilling of indecent speech would have its primary effect on the "form, rather than the content, of *serious* communication."[70] Specifically, the Court mentioned that an Elizabethan comedy would not be considered indecent because of its context.[71] Thus, the difference between such works and the Carlin monologue could only rest on the subjective views of the FCC commissioners themselves and whether *they* thought that "the play and its author are more worthy of family-hour broadcast, on context as well as on language itself."[72] Perhaps an argument exists that *this speech*, performed by Carlin who is regarded as a great satirist of the modern English language, was a form of appropriate art that should not have been labeled indecent. Satirists like Carlin rely on both form and content to deliver their message. If the Court limits First Amendment protection of the content, it also seriously limits the

[65] *Pacifica Found.*, 438 U.S. at 748.
[66] *Id.*
[67] *Id.* at 749.
[68] *Id.*
[69] *Id.* at 750.
[70] *Id.* at 743 n.18; *see also* Corcos, *supra* note 49, at 924.
[71] *Pacifica Found.*, 438 U.S. at 750.
[72] Corcos, *supra* note 49, at 925.

message. If it also limits the protection of the form [for example, through channeling], it cripples that message even more severely."[73] For artists like Carlin, who chose to convey certain content in a form that some deemed inappropriate, the possibility remained of facing an unfair roadblock to reach a willing end-user. Therefore, "[i]n Carlin's case, ironically, the Court may have anointed him a more prescient First Amendment scholar than anyone could have predicted."[74]

Pacifica represented, maybe for the first time, a main-stream celebrity being restricted by the government from airing speech that many of the general public viewed as protected by the First Amendment. One author noted:

> Most people with any first amendment bones in their bodies are troubled by the *Pacifica* case . . . [The] case produces heat precisely because Carlin's speech is considered by many to be precisely what the first amendment [*sic*] is *supposed* to protect. Carlin is attacking conventions; assaulting the prescribed orthodoxy; mocking the stuffed shirts; Carlin *is* the prototypical dissenter.[75]

C. Infinity *and a New Standard*

In the years following *Pacifica,* the FCC observed the Court's very narrow rule and restricted its sanctions to broadcasts that used the seven words uttered in George Carlin's monologue.[76] The FCC considered the "host of variables" that determined the context of the speech used, including the time of day, program content, and transmission medium. By focusing on the context of speech that borders on indecency, the FCC operated on the unstated assumption that "only material that closely resembled the George Carlin monologue would satisfy the indecency [standard]."[77] Therefore, the Court's decision in *Pacifica* was constrained and most speech was free from FCC sanction.

Without Court approval or Congressional urging the FCC began a more stringent enforcement policy regarding indecency, perhaps at the request of "lobbying groups, dissatisfied with the Reagan

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[73] *Id.*

[74] *Id.*

[75] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 80 (Harvard Univ. Press 1990).

[76] *See In re* WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, Boston, Mass., 69 F.C.C.2d 1250, 1254-55 (1978); *In re* Pacifica Foundation for Renewal of License for Noncommercial Station WPFW(FM), Washington, D.C., 95 F.C.C.2d 750 (1983).

[77] *Infinity*, *supra* note 11, at 939.

administration's agenda as it pertained to indecency."[78] The FCC stated:

> [o]n close analysis, we found that the highly restricted enforcement standard employed after the 1975 *Pacifica* decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464. Essentially, we concluded that, although enforcement was clearly easier under the former standard, it could lead to anomalous results that could not be justified . . . That approach, in essence ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency.[79]

The FCC further advised broadcasters that the "safe harbor" that developed to channel indecent speech to broadcasts between the hours of 10:00 p.m. and 6:00 a.m. would be replaced with a reasonableness standard.[80] The new restrictions provided that indecent broadcasts would be "actionable, if broadcast when there is a reasonable risk that children may be in the audience, a determination that was to be based on ratings data on a market-by-market basis."[81] Therefore, the new policy based actionable decisions on whether there was a "reasonable risk" that children may be present, veering away from the strict hours-based approach. This invoked a necessarily subjective analysis of what comprised a "reasonable risk." Such determinations may lack supporting data, and rely solely upon the veracity of the complaints the Commission receives. *Infinity* represents the broadcast networks' challenge to the FCC's revised regulations. The incidents at issue in *Infinity* involved the broadcast of a critically acclaimed play, excerpts from Howard Stern's radio show, and a sexually explicit song played on the radio. Upon review of the material aired and the time of broadcast, the FCC found all to be patently offensive according to contemporary standards for the broadcast medium. To clarify its position on how contemporary standards were determined and applied, the FCC explained that the system "ensure[s] that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. Rather, decisionmakers are to draw on their views of the average persons in the community."[82] Thus, rather than having the definition of indecency be adjudicated by the FCC, indecency should be analyzed

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[78] Corcos, *supra* note 49, at 930.

[79] *Infinity*, *supra* note 11, at 930.

[80] *Id.* at 930-31.

[81] *Id.* at 931.

[82] *Id.*

objectively from the point of view of the average broadcast viewer or listener.

Infinity was eventually overturned after a flurry of litigation pled for the return of the 10:00 p.m. to 6:00 a.m. safe harbor for indecent speech.[83] In *Action for Children's Television*, the D.C. Circuit was persuaded by an argument that private broadcasters (such as NBC, CBS, and ABC) were not allowed to air indecent speech until 12:00 a.m. while public broadcasters (who went off the air at 12:00 a.m.) could air indecent speech beginning at 10:00 p.m. "After noting there was no compelling interest for advancing such a distinction, the Court found the Act was unconstitutional to the extent it prohibited the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight."[84]

D. *Indecency Regulation in the New Millennium*

Since *Action for Children's Television* mandated the return of the traditional safe harbor, FCC rules have remained consistent, though the FCC's interpretation of the rules has changed over time. The latest case to squarely tackle FCC enforcement of indecent speech involved three separate utterances by three major celebrities.[85] The litigation that followed, while ultimately supporting the FCC, cast serious doubt on the constitutionality of the agency's enforcement regime.

Fox Television Studios, Inc. v. FCC involved the unlikely constitutional characters of Bono (famous lead vocalist from the musical group U2), Cher (infamous singer and songwriter), and Nicole Richie (actress/heiress and star of the hit television show *The Simple Life*). After winning an award for musical talent, Bono exclaimed that the award was "really, really fucking brilliant."[86] Cher lambasted her critics by saying "fuck them" after winning a similar award.[87] Lastly, Nicole Richie rhetorically asked if the audience had "ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[88] The FCC

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[83] *See* Action for Children's Television v. Fed. Commc'n Comm'n, 58 F.3d 654 (D.C. Cir. 1995).

[84] Corcos, *supra* note 49, at 932; *see generally Action for Children's Television*, 58 F.3d at 667-670 (holding a Congressional mandate to extend the "safe harbor" from 6:00 a.m. until 12:00 a.m. unconstitutional).

[85] *See* Fox Television Stations, Inc. v. Fed. Commc'n Comm'n, 489 F.3d 444, 451-452 (2d Cir. 2007).

[86] *Id.* at 451.

[87] *Id.* at 452.

[88] *Id.* (Richie, in saying that it's "not so fucking simple," was making a pun towards her show, "The Simple Life."); *The Simple Life* (Fox).

stated that the speech was indecent and actionable, despite being non-repetitive expletives, because each of the broadcasts was patently offensive due to the speech being "explicit, shocking, and gratuitous."[89]

Fox Television Studios, along with a host of interpleader broadcast companies, sought judicial review by the Second Circuit Court of Appeals arguing that the FCC change its policy away from the *Pacifica* standard, which only found indecent speech actionable if it was dwelled upon and repeated, arguing that it was arbitrary and capricious.[90] The Second Circuit agreed with the broadcasters, holding that since the FCC could produce no data to show that fleeting expletives caused harm to those listening, its actions were in fact arbitrary and capricious and violated the Administrative Procedure Act.[91]

The Second Circuit avoided the major issue in the case, however, by not justifying any of its holding on constitutional First Amendment grounds. The opinion does include extensive dicta regarding the constitutional issues involved, explaining that the court was not convinced the FCC policies would "pass constitutional muster."[92] Broadcasters still had hope for a ruling on constitutional grounds because the FCC managed to gain *certiorari* from the United States Supreme Court.

Disappointingly, Justice Scalia (writing for the majority) punted the First Amendment issue and rested his opinion entirely on administrative law grounds.[93] In terms of administrative law the opinion is consistent with precedent and empowers other agencies to continue to act in ways that they find appropriate. The Court found that the FCC received guidance through recent legislation to enforce indecent language policies differently than it had in the past.[94] Due to legislative instruction, the decision to punish fleeting expletives as indecent was not arbitrary and capricious. As the extensive history of

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[89] *Id.* at 453.

[90] *Id.* at 444.

[91] *Id.* at 462. The Adminstrative Procedures Act applies to the large number of federal agencies in existence. Since the FCC falls under the ambit of a federal agency, it must abide by APA rules. Judicial review of agency decisions is governed by 5 U.S.C. § 706, and agency determinations may be overturned by a federal court if "agency action, findings, and conclusions [are] found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law…" 5 U.S.C. § 706.

[92] *Id.*

[93] Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S.Ct. 1800 (2009).

[94] *See* Broadcast Decency Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

the case law suggests, broadcasters and constitutional law scholars expected the Court to take the opportunity to squarely approach the First Amendment issue. Not only did Justice Scalia refuse to take up the constitutional issue in the case, he neglected to even acknowledge the legitimate constitutional concerns raised by Justice Thomas' concurring opinion and Justice Ginsburg's dissenting thoughts.[95]

Justice Thomas expressed especially deep concern over the constitutional issues present in *Fox* and dismay at the majority's decision not to consider them given the chance. He joined the majority's opinion "which, as a matter of administrative law, correctly upholds the Federal Communications Commission's ("FCC") policy with respect to indecent broadcast speech under the Administrative Procedure Act."[96] To him, the precedent that the Court and the FCC relied upon, mainly *Red Lion* and *Pacifica*,[97] "were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity."[98] Since the text of the First Amendment does not facially discriminate based on the type of media used to disseminate speech that should be protected, the distinctions that the Court articulated have carved "a legal rule that lacks any textual basis in the Constitution."[99] Justice Thomas therefore concluded that the broadcast medium should have the same First Amendment protections as communication over the phone,[100] communication over the internet,[101] speech presented through cable television,[102] and print media.[103] He opined that the content of the speech and not its form or context affords it First Amendment protection.

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[95] *See* Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S.Ct. at 1819 (Thomas, J., concurring); Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S.Ct. at 1828 (Ginsburg, J., dissenting).

[96] *Id.* at 1819 (Thomas, J., concurring).

[97] Red Lion Broad. Co. v. Fed. Commc'n Comm'n, 395 U.S. 367 (1969); Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

[98] Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S.Ct. at 1820 (Thomas, J., concurring).

[99] *Id.* at 1821.

[100] *See* Sable Commc'n of California, Inc. v. Fed. Commc'n Comm'n, 492 U.S. 115 (1989) (finding restrictions against "Dial-a-Porn" services to be an unconstitutional abridgement of speech).

[101] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (holding that content-based restrictions on the internet are unconstitutional because they would limit expression that was not obscene).

[102] Cable is considered an "invited guest" and as such enjoys full First Amendment protection. Cmty. Television of Utah, Inc. v. Wilkinson, 611 F.Supp. 1099, 1113 (D. Utah 1985), *aff'd sub nom* Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986).

[103] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

Technological improvements and advances in communication further support Justice Thomas' opinion that the reasoning of *Red Lion* and *Pacifica* should be abandoned. In his opinion, Thomas found that broadcast television and radio in the twenty-first Century "are no longer the uniquely pervasive" media forms they once were.[104] Further, pursuant to the "digital transition" which occurred between 2009 and 2010, the electromagnetic spectrum is no longer as scarce as it once was. Digital transmission of broadcast signals gives the FCC the ability to "stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less . . . of [the electromagnetic] spectrum the analog system absorbs today."[105] Due to these factors Justice Thomas felt a "departure from precedent under the prevailing approach to *stare decisis*" was warranted.[106]

Justice Ginsburg wrote separately "only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done."[107] She stated in her opinion that "words are often chosen as much for their emotive as their cognitive force."[108] Further, Justice Ginsburg cautioned against the labeling of certain types of speech as indecent or inappropriate, urging the Court to be aware "that words unpalatable to some may be 'commonplace' for others, 'the stuff of everyday conversations.'"[109]

Though the Supreme Court reversed the Second Circuit's decision on administrative law grounds, it remanded back to the Court of Appeals to hear further arguments on the constitutional issues present in the case, seeing no need to "rush to judgment without a lower court opinion."[110] Squarely considering the First Amendment as it applies to the case, the Second Circuit noted that while broadcasters have always received limited First Amendment protection (due to broadcast's uniquely pervasive presence), "[t]he past thirty years [since *Pacifica*] has seen an explosion of media sources, and broadcast television has

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[104] Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1822 (2009) (Thomas, J., concurring).

[105] *Id.* at 1821 (quoting Consumer Elec. Ass'n. v. Fed. Commc'n Comm'n, 347 F.3d 291, 294 (D.C. Cir. 2003)).

[106] *Id.* at 1822.

[107] *Id.* at 1828 (Ginsburg, J., dissenting).

[108] *Id.* at 1829 (quoting Cohen v. California, 403 U.S. 15, 26 (1971)).

[109] *Id.* (quoting Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 776 (1978) (Brennan, J., dissenting)).

[110] *Id.* at 1819 (2009).

become only one voice in the chorus."[111] The court further explained that "technological changes have given parents the ability to decide which programs they will permit their children to watch. . . In short, there now exists a way to block programs [through V-Chip technology][112] that contain indecent speech that was not possible in 1978."[113] Based on that rationale, the Second Circuit found no reason to give broadcast networks a different level of protection than cable television networks.[114] To the court, "the existence of technology that allowed for household-by-household blocking of 'unwanted' cable channels was one of the principle distinctions between cable television and broadcast media drawn by the Supreme Court in *Playboy*."[115]

Dealing with the First Amendment issue, the Second Circuit struck down the FCC policy regulating indecent speech on the grounds that it was void for vagueness.[116] In terms of due process, "[i]t is a basic principle . . . that an enactment is void for vagueness if its prohibitions are not clearly defined,"[117] and vague regulations "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[118] Fox Television, for one, has experienced such a problem. It decided not to air an episode of *That 70s Show* that dealt with masturbation for fear of an FCC sanction, "even though it neither depicted the act [nor] discussed it in specific terms. The episode subsequently won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue."[119] Using that as a powerful example, the Second Circuit held that:

> [T]he absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some the most important and universal themes in art and literature . . . To place any discussion of the vast topics [of sex and sexual attraction] at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be

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[111] Fox Television Stations, Inc. v. Fed. Commc'n Comm'n, 613 F.3d 317, 326 (2d Cir. 2010).

[112] For further discussion on V-Chip technology, as well as other channel-blocking technologies available on the market today, *see infra* note 6 and accompanying text.

[113] Fox Television Stations, Inc. v. Fed. Commc'n Comm'n, 613 F.3d at 326.

[114] *Id.* at 327 ("We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available." Though the Second Circuit would like to apply a different standard, it was bound by precedent to follow *Pacifica*.).

[115] *Id.* at 326, (citing U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

[116] *Id.* at 327.

[117] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[118] *Id.* at 109.

[119] Fox Television Stations, Inc. v. Fed. Commc'n Comm'n, 613 F.3d at 335.

completely protected under the First Amendment.[120]

While a majority of the Court agreed that the FCC change of policy was not arbitrary and capricious under the Administrative Procedure Act, if the Court granted *cert* to a case similar to *Fox* on First Amendment grounds, at least Justices Thomas and Ginsburg would be open to declaring the enforcement regime unconstitutional as applied. In the event the Court tackles the constitutional concerns presented in the case, perhaps it would find the following arguments persuasive.

III. ARGUMENTS AGAINST THE FCC'S CURRENT ENFORCEMENT REGIME

In the orders that prompted litigation in *Fox*, the FCC relied yet again on the unique pervasiveness and accessibility of broadcast television and radio.[121] However, that reasoning is no longer in touch with modern technology. Broadcasting cannot reasonably be considered "uniquely pervasive" and "uniquely accessible" when cable and satellite technologies (not to mention the internet and accessibility of the world-wide-web) are so widely used today. Statistics show that 86% of American households have cable,[122] yet cable's status as an "invited guest" make it somewhat impervious to FCC regulation.[123] Further, examining the freedom of information over the internet further weakens the FCC's argument of unique pervasiveness. The *vast* amount of unregulated information on the internet, both good and bad, and the broad ability to access it arguably makes the world-wide-web the most pervasive medium of communication.

Why, then, has the FCC continued to rely on antiquated policies? Shouldn't FCC policies reflect the "public interest" in its regulation?[124] What the general public regards as indecent is subject to change over time, and the public perception of indecent language surely has changed since the 1970s and *Pacifica*. An examination of FCC investigative procedures reveals a systematic disconnect between FCC sanctions on indecent speech and the "public" majority.

A. *Investigative Flaws May Counteract the "Public Interest"*

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[120] *Id.*

[121] *See In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4982 (2004).

[122] Fox Television Stations, Inc. v. Fed. Commc'n Comm'n, 489 F.3d at 465.

[123] *See supra* note 102.

[124] "Public interest" refers to the FCC mandate to regulate as "public interest, convenience, and necessity require." 47 U.S.C.A. § 303 (West 2010).

Rationale and the Objective Determination Test in Favor of "Public Interest" Groups

The FCC does not possess a general police power. As an enforcement group, it does not actively monitor everything that is broadcast. Rather, it investigates material based on complaints. In turn, "the FCC [has] only issued forfeitures to [broadcast] stations who were actually the subject of complaints."[125] Therefore, it is possible that a person who lodges a complaint with the FCC may be particularly sensitive to certain types of speech or content and not necessarily representative of the relevant community.

Furthermore, it is possible that if a particularly sensitive group of individuals were to organize, they could effectively lodge many complaints with the FCC against certain types of speech to the detriment of other viewers. One such group, the Parents Television Council ("PTC"), uses its numbers in an attempt to influence FCC rule-making. Coupled with commissioners who listen to and agree with their value judgments, certain interest groups like the PTC may disproportionately drive communications policy. Therefore, the majority of complaints most likely do not represent the "community" as it is understood and used in the FCC's objective test for indecency. If a disproportionately small number of people are offended by certain speech, they limit access of a majority of Americans not likely to be offended, and the FCC fails to fulfill its requirement of regulating in the "public interest." Rather, the FCC holds the majority of consenting viewers/listeners to the standard of a much more fragile minority—effectively "burning the house to roast the pig."[126]

As mentioned previously, the FCC determines whether speech is indecent by utilizing a test that involves "contemporary community standards" for the broadcast medium.[127] In *Infinity,* the FCC maintained that the contemporary community standard is "judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[128] However, the FCC also utilizes its "collective experience and knowledge, developed through constant interaction with lawmakers,

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[125] Paige Connor Worsham, *So Easily Offended? A First Amendment Analysis of the FCC's Evolving Regulation of Broadcast Indecency and Standards for Our Contemporary Community*, 6 FIRST AMENDMENT L. REV. 378, 394 (2008).

[126] Sable Commc'n of California, Inc. v. Fed. Commc'n Comm'n, 492 U.S. 115, 127 (1989) (quoting Butler v. Mich., 352 U.S. 380, 383 (1957) (Frankfurter, J.)).

[127] *See generally* Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

[128] *Infinity*, *supra* note 11, at 933.

courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[129] In order to determine the relevant community standard, then, "[t]he decision process simultaneously removes the 'average person' from the central role of decisionmaker, while allowing subjective judgments to replace a general standard."[130]

Not only do commissioners likely inject their own subjective beliefs when examining the merit of speech, but the FCC responds "to complaints filed disproportionately by *one* advocacy group [the PTC], asserting a single viewpoint," so "the representation is not an accurate portrayal of community standards."[131] The PTC accounts for an overwhelming majority of complaints filed to the FCC. For example, 99.8% of complaints filed in 2003, and 99.9% in 2004, were filed by members of the PTC.[132] The PTC itself encouraged members to file complaints over programs they had not seen, perhaps shows not even in their viewing area. Each complainant may file multiple times, need not have watched the program to file a complaint about it, and each complaint is counted individually. "The complaint process does not provide the opinion of contemporary community in America, and may allow a heckler's veto where community standards would not find the speech patently offensive."[133] In effect, the FCC's complaint process is not particularly effective at gauging any individual community's broadcast standards. As a result of the disproportionate complaining of a few (not to mention the possible subjectivity of the FCC commissioners), "FCC orders imposing fines or license revocation for indecent speech are made in an inconsistent manner, implicating First Amendment concerns."[134]

Perhaps the most blatant example of regulation inconsistency is shown by the FCC decision not to find a full, unedited broadcast of the R-rated film SAVING PRIVATE RYAN patently offensive or indecent as broadcast.[135] The award-winning film was broadcast on Veterans Day

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[129] *In re* Infinity Radio License, Inc., Licensee of Station WLLD(FM), Holmes Beach, Fla., 19 F.C.C.R. 5022, 5026 (2004).

[130] Worsham, *supra* note 125, at 392.

[131] *Id.* at 395.

[132] *Id.* at 396.

[133] *Id.* at 397.

[134] *Id.* at 392.

[135] The broadcast was complained of, however. *See In re* Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005)

and endorsed by United States Senator John McCain, a veteran of the Vietnam War. He stated that "the R-rated language and graphic content [of the film] is for mature audiences and not appropriate for children."[136] Also, the show had a rating of "TV-MA LV" and gave a disclaimer of its content after every commercial break.[137]

The FCC explained in its order that material is indecent "only if it is patently offensive based on an examination of the material's explicit or graphic nature, whether it is dwelled upon or repeated, and whether it appears to pander or is intended to titillate or shock the audience."[138] The FCC agreed that the film was patently offensive, fulfilling prong one of its indecency test. Further, it found that the offensive material was dwelled upon and repeated, satisfying prong two of the test. However, the FCC was persuaded that the offensive material was not used to pander, and so found the broadcast *not* indecent. By finding the material patently offensive and repeated, yet lacking pandering quality and not indecent, the FCC implicitly stated that the artistic merit of the work (as determined by the commissioners and not the general community) may shield certain speech from being deemed indecent. How then, can the FCC distinguish the speech in SAVING PRIVATE RYAN from the fleeting expletives uttered by Bono or Cher?

The FCC attempted to do so, stating that the profanity used by Bono and Cher was "'shocking and gratuitous' and had no claim of 'any political, scientific or other independent value.' The FCC decided the vulgar language in SAVING PRIVATE RYAN, on the other hand, held artistic merit and was integral to the message of the film."[139] However, compare the speech at issue in both cases. The isolated and fleeting uses of profanity during the Golden Globes, while perhaps used to pander to the audience or (in Cher's case) to shock, were not nearly as patently offensive as the depictions of gruesome war violence and consistent profane language, including the words "motherfucker" and "shit," heard in SAVING PRIVATE RYAN. It would appear that either the FCC values mainstream artistic work having subjective merit, or its actual test for indecency rests purely on the last factor of analysis, that

[hereinafter *Saving Private Ryan*].

[136] *Id.* at 4508.

[137] *Id.* This rating denotes a "Mature" rating due to adult language and violent situations. For further explanation of the television rating system, *see infra* note 144 and accompanying text.

[138] *Id.* at 4512.

[139] Lindsay Weiss, *S!*t, P*@s, C*^t, C*@!s*&!er, M*!#$*@!*#^r, T*!s – The FCC's Crackdown on Indecency*, 28 JOURNAL OF THE NAT'L ASS'N OF ADMIN. LAW JUDICIARY 577, 596 (2008).

is, whether the speech is used to "pander titillate or shock." [140] If that is indeed the case, the FCC should admit it, rather than pay lip-service to parts one and two of its so-called rule.

The FCC should not only consider revising its interpretation of the rule, but also pay heed to the legitimate and varied ways for the end-user to control the content he or she allows into his or her home. Technological advances allowing the blocking of certain programming should be considered effective ways to prevent children and unwilling adults from viewing material that they might subjectively find indecent. This approach allows broadcasters to air programming they find to be within the "community standards for the broadcast medium" while not being restricted by complaints from those who have other avenues of controlling their media-exposure.

B. *Technological Advances Make* Pacifica *Obsolete*

Prohibition of indecency over the broadcast airwaves stems in significant part from the FCC's attempts to limit children's access to indecent material. However, given technological advancements in the past two decades, parents are now better able to make enforceable determinations on what their children can and cannot view in their own household.[141] Further, it should be noted, "[t]he market for these parental empowerment tools and technological controls is broad and growing."[142] Perhaps the most available technology to limit content on television is the V-Chip, a blocking tool that "gives households the ability to screen televised content by ratings that are affixed to almost all programs."[143] The V-Chip allows a household member to block all content that carries with it a certain rating. The ratings for particular television shows are usually found at the beginning of programs and are shown when a program returns from a commercial break. The following describes the different ratings available for each program:

"TV-Y" – All Children

"TV-Y7" – Directed to Children Age 7 and Older

"TV-Y7 (FV)" – Directed to Older Children Due to Fantasy Violence

"TV-G" – General Audience

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[140] *See Saving Private Ryan, supra* note 135, at 4512.

[141] Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMMLAW CONSPECTUS 431, 470 (2007).

[142] *Id.* at 471.

[143] *Id.*

> "TV-PG" – Parental Guidance Suggested
>
> "TV-14" – Parents Strongly Cautioned
>
> "TV-MA" – Mature Audience Only
>
> The TV ratings system also uses several specific content descriptors to better inform parents and all viewers about the nature of the content they will be experiencing. These labels include:
>
> "D" – Suggestive Dialogue
>
> "L" – Course Language
>
> "S" – Sexual Situations
>
> "V" – Violence
>
> "FV" – Fantasy Violence.[144]

With the ability to effectively impose limits on the types of speech entering the home, parents concerned about whether their children are encountering indecent language can simply restrict programs with questionable ratings.Thus, V-Chip technology limits the persuasiveness of the argument that broadcasting is as "uniquely accessible" as it once was.[145]

Additionally, some cable and satellite television providers offer more effective methods of limiting access to programming. "[T]he tools that these video providers offer to subscribers are a vital part of the parental controls mix today."[146] Some providers offer parents the ability to not only limit programming based on rating (which may at times be misleading)[147] but also completely block certain channels or program titles.[148] If an especially determined parent still desires further protection for young ears, some companies offer after-market devices that work with your television to limit the speech that makes it past the blocking technique. One such device is the "TVGuardian," which is advertised as "The Foul Language Filter."

> TVGuardian's set-top boxes filter out profanity "by monitoring the closed-caption [signal embedded in the broadcast video signal] and comparing each word against a dictionary of more than 150 offensive words and phrases." If the device finds a profanity in this broadcast, it temporarily mutes the audio signal and displays a less controversial rewording of the dialog in a closed-

[144] *Id.* at 472, n.187.

[145] Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 749 (1978).

[146] Thierer, *supra* note 141, at 473.

[147] The Golden Globes program in question in *Fox Television* contained a TV-PG rating. Since ratings are so general, the viewer may not be able to accurately predict program content.

[148] Thierer, *supra* note 141, at 473. *See also Parental Controls*, COMCAST, http://www.comcast.com/Corporate/Customers/ParentalControls.html/?lid=9CustomersParentalControls&pos=Nav (last visited Jan. 19, 2010).

captioned box at the bottom of the screen.[149]

The V-Chip and TVGuardian are not the only tools available to curtail indecent speech on television. In fact, an often overlooked option is the ability of parents to more closely monitor what their children are viewing on television and then make a decision for themselves as to whether the program is appropriate for their children.

Ultimately, of course, it is up to the parents to allow or forbid their children's access to media if exposure to indecent material presents an especially important concern. One commentator, Adam Thierer, believes that "[p]arents who allow their children to lock themselves in their rooms with media technologies have surrendered their first line of defense for protecting them from potentially objectionable content."[150] He suggests, then, that parents take more of an active role in monitoring what children are exposed to through television programming. Options abound as to how to accomplish this goal, though many are as simple as "limit[ing] viewing to a single TV in a room where a parent can always have an eye on the screen or listen to the dialogue."[151] Lastly, parents should be encouraged to sit down with their children and watch television together. In the event that indecent material is broadcast, the parent could then discuss with the child what was shown and spin the content in whatever manner they deem appropriate. This is not a job for the federal government, however, and the Supreme Court has stated that "[b]ecause it is impossible to generalize about the needs of diverse families and parenting choices they make, the government should not impose a one-size-fits-all solution."[152]

In the event that parents are unwilling or unable to control their children's access to indecent material directly, and are unaware of the control mechanisms readily available to them from the marketplace, perhaps market forces themselves will keep broadcasters from being overrun with indecent speech. At the very least, market branding of broadcast stations will curtail the "shock" of indecent material if unwillingly encountered.

C. *Station "Branding" and Market Forces May Effectively Limit*

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[149] Thierer, *supra* note 141, at 474 (quoting TV GUARDIAN.COM, http:www.tvguardian.com/gshell.php. (last visited Jan. 19, 2010)).

[150] *Id.* at 475-476, n.212.

[151] *Id.* at 475.

[152] *Id.* at 476.

Indecent Speech Without Regulation

The Supreme Court noted in *Pacifica* that the element of surprise was crucial in its decision to allow broadcasters less First Amendment protection than it gives other types of communications venues.[153] The Court stated that "[t]he idea was that viewers flip through channels frequently and could never be warned properly of the indecency to come, warranting curtailed First Amendment freedom for the broadcaster that was intruding upon their home."[154] Perhaps the *Pacifica* rationale that broadcasts are "uniquely pervasive" can be more easily understood by dissecting it into three distinct parts: popularity, intruder, and surprise.[155]

The popularity rationale concerns the widespread use and novelty of broadcast television and radio. However, broadcast television is no longer a novelty since cable television and satellite radio are at least as popular as traditional broadcast, if not more so.

The intruder rationale, describing broadcasting as an intruder into the privacy of the home, has come under fierce criticism as well. The Court's characterization of broadcasters as intruders into the privacy of the home "might prompt Joe Couch Potato to wonder whether the Justices ever noticed the 'off' button on their remote controls as an efficient mechanism with which to fend off intrusive and pervasive television."[156] Therefore, only the surprise rationale remains viable.

Most importantly, "[u]ndercutting *Pacifica*'s 'surprise' rationale through branding undermines the basis for the lowered First Amendment protection that allows the FCC to regulate broadcast content as much as it does."[157] By increasing brand name recognition and their own brand identity, broadcasters may be able to inform viewers of the types of content that will be shown on their stations before the viewer turns on their television. Some cable television stations have branded themselves effectively by grabbing a niche audience that tunes in to see just the type of programming that the station consistently offers. Conversely, a station's brand informs those looking for certain types of programming to stay away.

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[153] Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978).

[154] Kristin L. Rakowski, *Branding as an Antidote to Indecency Regulation*, 16 UCLA ENT. L. REV. 2, 3 (2009).

[155] *Id.* at 7.

[156] Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1496 (1995).

[157] Rakowski, *supra* note 154, at 4.

"Cable networks started the branding trend"[158] as soon as they entered the market, perhaps to differentiate themselves from their major broadcast counterparts. However, "the economic structure of the television industry is shifting toward the cable model, which suggests that branding practices will only become more important" for broadcasters to implement.[159] Part of any effective brand is selling it to the public, so that the general audience can differentiate between brands. For instance, "Disney is wholesome but Fox is 'edgy;' Playboy is sexy-but-classy whereas Spice is 'hot.'"[160]

At television's inception and initial growth in popularity, only three major networks existed: NBC, ABC, and CBS.[161] All three networks attempted to gain the widest market share they could, which could only be accomplished by refusing to air anything that would offend anyone. "When so few options existed for viewers, there was little incentive for a network to risk alienating some to become more appealing to others;" as such, Kristin Rakowski argues that broadcast networks were slow to brand.[162] However, with cable and satellite television options, viewers may now access literally hundreds of channels, many that cater to a purely niche following.[163] Rakowski reasons that "[m]ore channels meant stiffer competition, and competition drives branding."[164] The trend towards "niche-casting" gained popularity as an attempt to "target a specific demographic in hopes of obtaining a small but devoted audience and its accompanying advertiser revenue."[165] Three cable stations that have enjoyed considerable branding success are Playboy, Disney, and Music Television (MTV).

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[158] *Id.*

[159] *Id.* at 27.

[160] *Id.* at 4.

[161] *See supra* note 23 and accompanying text.

[162] Rakowski, *supra* note 154, at 28.

[163] Consider the Golf Channel (*History of the Golf Channel*, GOLFCHANNEL, http://www.thegolfchannel.com/company-history (last visited Mar. 18, 2011)), the Tennis Channel (*About Us*, TENNISCHANNEL, http://www.tennischannel.com/aboutus) (last visited Mar. 18, 2011)), and Versus (*Versus*, NBCSPORTS, http://www.versus.com/info/versus-social-media-page (last visited Mar. 18, 2011)). Those channels garner towards a specific type of person, mainly one who enjoys the particular sport or group of sports that the channel specializes in. Also consider stations such as Women's Entertainment (*Who We Are*, WETV, http://www.wetv.com/about-we-tv.html (last visited Mar. 18, 2011)) which caters almost exclusively to women's interest, and Logo (*About Logo*, LOGOONLINE, http://www.logoonline.com/about (last visited Mar. 18, 2011)), a new station devoted to the interests of the gay, lesbian, bisexual, and transgender community.

[164] Rakowski, *supra* note 154, at 29.

[165] *Id.*

Playboy represents an internationally known brand that "developed its reputation as a lifestyle brand centered on 'the good life.'"[166] However, Playboy markets itself as distinct from other magazines in the adult genre, and is more sophisticated and "couples-friendly" than similar products.[167] For example, Playboy is a purveyor of "soft-core" pornography that "features pinups, not sex."[168] In stark contrast to Playboy's image is Spice, a channel that is now within the Playboy network yet markets more explicit material. "Spice's reputation is for hard-core adult entertainment, but Playboy 'is careful to differentiate [Spice] from Playboy's soft-focus, rather kitsch positioning.'"[169] Due to the differences in the brand and marketing tailored to its content, a viewer may tune in to either Playboy or Spice and predict what type of material they will encounter.

The Disney channel has employed a similar technique to differentiate between its dynamic classes of viewers. Holistically, "Disney is so thoroughly known as the place for 'wholesome family entertainment' that it is hardly necessary to belabor the point."[170] Disney found itself in a strange position recently, trying to retain its core viewership of nine to fourteen-year-old viewers, when that specific demographic began watching Nickelodeon instead of the standard animation-based programming that Disney traditionally offered.[171] As a result, Disney "revamped" itself with "newer, hipper characters [to] dominate the after-school block for tweens" and scheduled programming that was more "emotionally stimulating."[172]

If broadcasting networks could more effectively market their brands, the general public would be put on notice to shows that conform to their brand identity. If a network effectively brands itself as one allowing edgy material, it might downplay any sort of "shock" that an individual viewer claimed they faced in hearing indecent speech on one of its stations. Conversely, if a network wanted to maintain a "family-friendly" persona, it could brand itself as such and attract the market-share that desired that type of programming. "Broadcast

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[166] *Id.* at 30.

[167] *Id.* at 31.

[168] *Id.* at 30-31.

[169] *Id.* at 31 (quoting MARK TUNGATE, MEDIA MONOLITHS 183 (2004)).

[170] Rakowski, *supra* note 154, at 32.

[171] *See* Jacques Steinberg, *Rivals Unafraid to Borrow, or Steal, From Each Other*, NEW YORK TIMES (Feb. 24, 2009), http://www.nytimes.com/2009/02/24/arts/television/24nick.html?pagewanted=1&_r=1.

[172] *Id.*

brands are not as deeply defined as cable brands"[173] yet some are beginning to realize how useful the practice could be for their business. Fox "has long positioned itself as the provider of 'edgy' and 'irreverent' fare, and viewers recognize that image."[174] To the contrary, "ABC has become 'the Lifetime Television of broadcast TV' by focusing on 'light, female-targeted dramas.'"[175] Television viewers, at least those who view a significant amount of television, will recognize and be able to differentiate between the two stations and choose their entertainment accordingly. Therefore, if a fleeting expletive is heard while watching *Family Guy* on Fox, the viewer will not be caught unawares since the majority of Fox shows position themselves on the racy side of general television content. If broadcasters desire to utilize branding to the fullest extent, "only a consistent brand identity will provide enough notice to be valuable to consumers and thus valuable to companies,"[176] making dedication to the brand extremely important.

No one can deny the fact that television is big business. Third-party companies utilize broadcast television to advertise a vast array of products, from shaving cream to cars, and from paper products to vacation destinations. Rakowski notes that "[a]dvertisers will pay a premium for advertising space that reaches their desired niche audience."[177] She argues further that "[a]dvertisers control their brand image by choosing appropriate programming during which to advertise. An advertiser wants to know who watches the program to ensure that the people most likely to purchase its product see the ad."[178] If an advertiser has a vested interest in appealing to a certain type of audience (or a wide range of audiences), it will be prompted to refrain from advertising in certain markets so as to avoid confusing the consumer.

As such, an advertiser who wishes to maintain a family-friendly image will choose not to advertise during racy television programs or on stations that have a niche audience distinct from its target demographic. Advertisers have organized coalitions that refrain from advertising during programs that they deem inappropriate for families.

[173] Rakowski, *supra* note 154 at 35.

[174] *Id.* at 36.

[175] *Id.* at 37.

[176] *Id.* at 18.

[177] *Id.* at 24.

[178] *Id.* at 25.

One such coalition has named itself the Family Friendly Programming Forum and is a subsection of the Association of National Advertisers.[179] Major companies like Coca-Cola, Pepsi, Kellogg, Proctor & Gamble, and Verizon have joined the Family Friendly Programming Forum and effectively steer certain station's programming by withholding advertising dollars from shows that air indecent content.[180] "Such efforts have been effective at changing corporate behavior"[181] at the broadcaster level and, in effect, have limited the amount of indecent material aired. Pressure from advertisers may be an effective alternative to government regulation, preventing a "race to the bottom, pushing the decency envelope to distinguish themselves in the increasingly crowded entertainment field."[182]

IV. CONCLUSION

Until the Supreme Court so mandates, it is not likely that the FCC will independently alter its policies regarding indecent speech. The Court was presented with an opportunity to change the FCC's regulatory power, yet refused to decide *Fox Television Studios, Inc. v. FCC* on constitutional grounds. Regardless of how the Court rules in the future regarding a broadcaster's ability to air indecent speech, current FCC policies must change to keep up with modern technology and the business of broadcast.

Most importantly, the FCC still relies on the outdated, outmoded, and out of touch reasoning given in *Pacifica* to sanction indecent material. Broadcasting is no longer as "uniquely pervasive" or as "uniquely accessible" as it was in the late 1970s when *Pacifica* was decided. With the rise of parental control tools parents can rest assured that accessible and effective means of limiting broadcasting exist. Further, internet technology and the vast stores of information now available at anyone's fingertips prove that the world-wide-web, and not broadcasting, is now the most pervasive and accessible form of communication and expression.

FCC investigative policies require further change to ensure that no

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[179] *See Id.* at 26, n.157. *See also Family Friendly Programming Forum: About FFPF*, ASSOCIATION OF NATIONAL ADVERTISERS, http://www.ana.net/ffpf/content/aboutffpf (last visited Jan. 19, 2010).

[180] Rakowski, *supra* note 154, at 26 n.157. ("Members of the Forum include Coca-Cola, Pepsi, McDonalds, Kellogg, Johnson & Johnson, Proctor & Gamble, and Verizon, and together its members control thirty percent of all money spent on advertising in the United States.") *Id.*

[181] Thierer, *supra* note 141, at 477.

[182] Fed. Commc'n Comm'n v. Fox Television Stations, 129 S. Ct. 1800, 1816 n.4 (2009).

one particular group or point of view drives communications policy limiting indecent speech. Some of the more recent sanctions handed down by the FCC do not represent the general public's perception of what is "patently offensive," but rather represent a minority viewpoint from one group attempting to limit the adult expression available to a consenting public. When certain types of speech are treated differently than others, such as finding an un-cut, unedited showing of SAVING PRIVATE RYAN not to be indecent because of its artistic merit but sanctioning an unscripted fleeting expletive from an awards show, First Amendment concerns arise. By only investigating complaints that are submitted to the FCC, the commissioners are likely only to hear from a uniquely sensitive minority of television viewers.

Lastly, modern market forces and broadcaster branding increase notice that certain types of content are likely to appear on certain stations. If broadcasters take it upon themselves to create a strong brand identity with their followers, similar to the model employed by cable networks, their devoted viewership is likely to increase and those who desire to watch different types of programming can choose to watch other stations. This practice would severely limit the shock that indecent speech might have on the unwilling listener.

Extensive tracking of the beginnings of broadcast regulation and close examination of the important cases interpreting FCC powers have shown the FCC enforcement regime to be severely flawed. The rationale for broadcaster sanctions refuses to take technological advances into account, fails to realize that broadcasting is no longer the most popular mode of communication, and declines to allow broadcasters to police themselves by airing material that appeals to their target audience. While each communications medium lends itself to some type of government regulation, current FCC policies unduly limit broadcast speech, implicating serious First Amendment concerns that have yet to be addressed by the modern Supreme Court.