

THE FCC IN 2010: SEVENTY-SIX YEARS OF OBSCENITY, INDECENCY, AND INCONSISTENCY

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I. INTRODUCTION

Janet Jackson and Justin Timberlake know it well.¹ Howard Stern likely knows it better.² Surely, CBS, NBC, ABC, and Fox secretly hate it.³ Cable and satellite operators hope to remain free from its regulations.⁴ They all can thank George Carlin for introducing it to the world.⁵ Yes, “it” is the Federal Communications Commission (FCC or Commission)—the enemy to all broadcasters that tend to push the limits through the broadcast media of what Americans consider indecent material.⁶ To the layperson, the FCC is the big, bad federal agency that bullies television networks and radio stations whenever the “F-Word” (or certain parts of the human anatomy) slip out.⁷ However, the FCC is not as big as many would expect. Its influence on what Americans see and hear, though, is enormous.⁸

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¹ See *CBS Corp. v. FCC*, 535 F.3d 167, 171–73 (3d Cir. 2008).

² See, e.g., *Sagittarius Broad. Corp. v. Evergreen Media Corp.*, 641 N.Y.S.2d 267, 268 (N.Y. App. Div. 1996) (describing how the FCC planned “to pursue an unprecedented escalation of fines and other regulatory actions against” stations that broadcasted the Howard Stern show); Seth T. Goldsamt, “*Crucified by the FCC*”? *Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 203–05 (1995).

³ See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1807–10 (2009); *CBS Corp.*, 535 F.3d at 171–73.

⁴ See generally Bill Kenworthy, *Timeline: Broadcast Decency*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/about.aspx?id=17491> (last visited Jan. 29, 2011) (showing that cable and satellites operators are not held to the same indecency standard as broadcast operators).

⁵ See *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1977).

⁶ See Kenworthy, *supra* note 4.

⁷ See *CBS Corp.*, 535 F.3d at 172; *Pacifica*, 438 U.S. at 751–52.

⁸ See *History of Communications*, FCC, <http://www.fcc.gov/omd/history/> (last visited Jan. 29, 2011).

On February 1, 2004, approximately 90 million Americans saw Janet Jackson's breast on live broadcast television.⁹ Exposure was brief, a mere half-second, but the fallout lasted much longer.¹⁰ Jackson, the victim of a "wardrobe malfunction,"¹¹ was exposed during the halftime show of Super Bowl XXXVIII, which was aired by CBS.¹² Jackson and Justin Timberlake were performing one of Timberlake's songs when at the end of the song Timberlake tore off part of Jackson's wardrobe, creating the exposure.¹³ A bra was supposed to cover Jackson's breast once Timberlake tore off the top cover, but something went awry and all material covering Jackson's breast was removed.¹⁴ That mere half-second of exposure set off a firestorm of controversy in America,¹⁵ leading to FCC involvement, court cases, debate, and even some questioning the morality of America.¹⁶

That half-second of exposure, dubbed Nipplegate,¹⁷ altered the American landscape in 2004. Senator Zell Miller questioned America's decency following the incident.¹⁸ One person wrote that "[t]he radical Muslims who criticize our culture as degraded and demoralizing now have new proof for their charges."¹⁹ *New York Times* columnist Frank Rich, writing one year after the incident, described the fallout by stating that "[t]he ensuing Washington indecency crusade has unleashed a wave of self-censorship on American television unrivaled since the McCarthy era, with everyone from the dying D-Day heroes in 'Saving Private Ryan' to

⁹ *CBS Corp.*, 535 F.3d at 171.

¹⁰ *Id.* at 172.

¹¹ *Apologetic Jackson Says 'Costume Reveal' Went Awry*, CNN (Feb. 3, 2004, 7:58 AM), <http://www.cnn.com/2004/US/02/02/superbowl.jackson/>.

¹² *CBS Corp.*, 535 F.3d at 172.

¹³ *Apologetic Jackson*, *supra* note 11.

¹⁴ Julie Hilden, *How the Janet Jackson 'Nipplegate' Scandal Illustrates the Danger of Chilling Free Speech*, FINDLAW (Feb. 17, 2004), <http://writ.news.findlaw.com/hilden/20040217.html>.

¹⁵ *See id.*; *CBS Corp.*, 535 F.3d at 172 n.2.

¹⁶ *See* discussion *infra* Part III.

¹⁷ *Jackson Still a Bearable Icon*, NEWSDAY, Aug. 8, 2006, at A12 ("[T]he incident—variously referred to as 'Nipplegate' and 'bra-ha-ha'—is history.").

¹⁸ *'A Deficit of Decency.'* SALON.COM (Feb. 13, 2004), <http://dir.salon.com/story/opinion/feature/2004/02/13/zell/index.html>.

¹⁹ Phyllis Schlafly, *Another CBS Travesty*, EAGLE FORUM (Feb. 11, 2004), <http://www.eagleforum.org/column/2004/feb04/04-02-11.html>.

cuddly animated animals on daytime television getting the ax.”²⁰ Some have even gone so far as to suggest that the incident helped President George W. Bush get reelected in 2004.²¹

The FCC quickly became involved upon receiving an unprecedented 542,000 complaints regarding the incident.²² The Commission found the halftime show to be indecent²³ and issued to Viacom, parent company of CBS, fines totaling \$550,000 or \$27,500 for each of Viacom’s twenty stations that aired the program.²⁴ CBS took the FCC to court over the fines, and in 2008, the Third Circuit ruled in favor of CBS, vacating the fines.²⁵ However, the matter is still not settled because the Supreme Court of the United States vacated the ruling in 2009 and remanded it to the Third Circuit Court of Appeals to reconsider²⁶ in light of the 2009 Supreme Court ruling in *FCC v. Fox Television Stations, Inc.*²⁷ Private citizens even became involved, as one Utah man sued Viacom for false advertising because he claimed that he was led to believe by pre-game advertising that the halftime show would be family-oriented and patriotic.²⁸ The case was dismissed because the man filed the complaint in the wrong venue.²⁹

The now famous wardrobe malfunction brought the FCC to the forefront of American culture. In April 2004, Jackson even spoofed the incident on Saturday Night Live where, playing U.S. Secretary of State Condoleezza Rice addressing the September 11 Commission Hearings, she flashed a heavily blurred breast to distract from her testimony.³⁰ Satirical

²⁰ Frank Rich, *The Year of Living Indecently*, N.Y. TIMES, Feb. 6, 2005, § 2, at 1, available at <http://www.nytimes.com/2005/02/06/arts/06rich.html>.

²¹ *See id.*

²² *In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd. 19230, 19231 n.6 (FCC 2004).

²³ *Id.* at 19236.

²⁴ *Id.* at 19230.

²⁵ *CBS Corp. v. FCC*, 535 F.3d 167, 171 (3d Cir. 2008).

²⁶ *FCC v. CBS Corp.*, 129 S. Ct. 2176, 2176 (2009).

²⁷ 129 S. Ct. 1800 (2009).

²⁸ *See Judge Rules Against Super Bowl Viewer*, YAHOO! MUSIC (May 27, 2004, 2:03 PM), <http://new.music.yahoo.com/janet-jackson/news/judge-rules-against-super-bowl-viewer--12176746>.

²⁹ *Id.*

³⁰ *Janet Jackson Spoofs Wardrobe Malfunction*, YAHOO! MUSIC (Apr. 11, 2004, 7:09 PM), <http://new.music.yahoo.com/janet-jackson/news/janet-jackson-spoofs-wardrobe-malfunction--12176334>.

newspaper *The Onion* mocked the public reaction and the demand to crack down on indecency in an article titled “U.S. Children Still Traumatized One Year After Seeing Partially Exposed Breast on TV.”³¹ Yet, at the center of all the debate was the FCC, and the 2004 Super Bowl Halftime show only served as a jumping off point for tighter regulation of indecency and increased fines.³² However, the FCC had the authority to regulate indecency in broadcast television and radio long before this incident; so the question is: How did we get to this point?

This article explores the FCC’s authority and growth. It also explores the evolution of the terms “indecent” and “obscene.” Finally, this article discusses the future of the FCC and its drive to regulate subscriptions services such as cable and satellite television and radio.

II. HISTORICAL BACKGROUND: WHERE DID IT COME FROM AND WHAT DOES IT DO?

A. 1927–1934: Pre-FCC

The Radio Act of 1927 created the Federal Radio Commission.³³ Its responsibilities were, among others, to classify radio stations, assign bands of frequencies and wavelengths to various classes of stations, regulate the equipment used by stations, and make regulations to prevent interference between stations.³⁴ The Federal Radio Commission only lasted seven years though, because Congress repealed the Radio Act of 1927 in 1934.³⁵

B. 1934–1969: Creation of the FCC

The Communications Act of 1934 created the Federal Communications Commission (FCC).³⁶ The Commission was responsible for:

regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide, and world-

³¹ *U.S. Children Still Traumatized One Year After Seeing Partially Exposed Breast on TV*, THE ONION (Jan. 26, 2005), <http://www.theonion.com/articles/us-children-still-traumatized-one-year-after-seein,1285/>.

³² Frank Ahrens, *The Price for On-Air Indecency Goes Up*, WASH. POST, June 8, 2006, at D1.

³³ 47 U.S.C. § 83 (1927) (repealed 1934).

³⁴ *Id.* § 84.

³⁵ *Id.* §§ 81–85.

³⁶ *Id.* § 151 (2006).

wide wire and radio communication service . . . for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.³⁷

The FCC is an independent U.S government agency that is directed by five Commissioners.³⁸ The President appoints and the Senate confirms the Commissioners to serve five-year terms.³⁹ Only three of the five Commissioners may be members of the same political party, and none may have any financial interest in FCC-related business.⁴⁰ One of the five Commissioners serves as Chairman (as decided by the President).⁴¹

The FCC is organized into seven bureaus and ten staff offices.⁴² The bureaus are responsible for “processing applications for licenses and other filings; analyzing complaints; conducting investigations; developing and implementing regulatory programs; and taking part in hearings.”⁴³ The staff offices provide support services to the bureaus.⁴⁴ Thus, the FCC is responsible for much more than simply regulating indecency on broadcast TV and radio. In fact, it was not determined what power the FCC had to regulate such material until the 1970s.

C. *The 1970s: Red Lion and Pacifica*

*Red Lion Broadcasting Co. v. FCC*⁴⁵ and *FCC v. Pacifica Foundation*⁴⁶ are two of the most well-known Supreme Court cases involving the FCC.⁴⁷ They were essentially the first of what would become many court cases involving the FCC and its regulation of the broadcast medium.⁴⁸

³⁷ *Id.*

³⁸ *About the FCC*, FCC, <http://fcc.gov/aboutus.html> (last visited Feb. 2, 2011).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 395 U.S. 367 (1969).

⁴⁶ 438 U.S. 726 (1978).

⁴⁷ See Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 947 (1998).

⁴⁸ See, e.g., *FCC v. Fox Television Stations*, 129 S. Ct. 1800 (2009); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

In *Red Lion*, the Supreme Court decided the constitutionality of what was known as the “fairness doctrine.”⁴⁹ This doctrine provided that “discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.”⁵⁰ The FCC licensed the Red Lion Broadcast Company to operate a radio station in Pennsylvania.⁵¹ In November 1964, the station aired a broadcast where the Reverend Billy James Hargis attacked a book authored by Fred J. Cook.⁵² Hargis stated that Cook was previously fired by a newspaper, worked for a Communist-affiliated publication, and wrote the book to attack Barry Goldwater.⁵³ Cook demanded that the station give him a chance to defend himself, a request which was denied.⁵⁴ The FCC declared that the station’s refusal violated the fairness doctrine and ordered that Cook be given time to rebut Hargis’ statements whether Cook paid for the time or not.⁵⁵

The Court held that the fairness doctrine, as promulgated and enforced by the FCC, was constitutional.⁵⁶ In doing so, it rejected the broadcaster’s argument that “the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency.”⁵⁷ The Court recognized that the First Amendment affects the broadcast medium but stated that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁵⁸ The right of free speech cannot be used to “snuff out the free speech of

⁴⁹ *Red Lion*, 395 U.S. at 369–70.

⁵⁰ *Id.* at 369.

⁵¹ *Id.* at 371.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 371–72.

⁵⁵ *Id.* at 372.

⁵⁶ *Id.* at 385. Specifically, the Court held:

In light of the fact that the “public interest” in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly . . . we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. *Id.*

⁵⁷ *Id.* at 386.

⁵⁸ *Id.*

others.”⁵⁹ Thus, the FCC did not step outside the bounds of its authority by invoking the fairness doctrine because the license granted required the station to operate for the public interest.⁶⁰ This case is important because it established that television and radio broadcasters are First Amendment speakers, and that the government may not regulate them absent compelling reasons. At the same time, it allowed more regulation.

In *Pacifica*, the Supreme Court defined the power that the FCC has over “indecent” material.⁶¹ The issue was whether the FCC had the power “to regulate a radio broadcast that [was] indecent but not obscene.”⁶² Comedian George Carlin recorded a twelve-minute monologue delivered to a live audience entitled “Filthy Words,” which was about the seven words one cannot say in public.⁶³ A New York radio station, owned by Pacifica, aired the curse-word-laced monologue at two o’clock in the afternoon.⁶⁴ The Commission ruled that Pacifica could be subject to sanctions but did not actually impose any sanctions.⁶⁵ Rather, the Commission stated that the order would go into the station’s file and could be the basis for action if further complaints were received.⁶⁶ The Commission characterized the words as “patently offensive” but not obscene.⁶⁷ However, the monologue was characterized as “indecent.”⁶⁸ The Commission particularly noted the time of day of the broadcast—a time that children were likely to be part of the radio audience.⁶⁹

The Supreme Court agreed, stating that “[t]he words ‘obscene, indecent, or profane’” have separate meanings.⁷⁰ “Prurient appeal is an element of the obscene” whereas “indecent” refers to “nonconformance with accepted standards of morality.”⁷¹ “Obscenity may be wholly

⁵⁹ *Id.* at 387 (citing *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945)).

⁶⁰ *Id.* at 380.

⁶¹ See *FCC v. Pacifica Found.*, 438 U.S. 726, 729, 738 (1978).

⁶² *Id.* at 729.

⁶³ *Id.* The seven words are “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.”
Id. at 751.

⁶⁴ *Id.* at 729–30.

⁶⁵ *Id.* at 730.

⁶⁶ *Id.*

⁶⁷ *Id.* at 731.

⁶⁸ *Id.* at 731–32.

⁶⁹ *Id.* at 732.

⁷⁰ *Id.* at 739–40.

⁷¹ *Id.* at 740.

constitutionally prohibited.”⁷² Indecency on the other hand may not be wholly prohibited.⁷³

The Court rejected *Pacifica*’s First Amendment arguments, finding compelling the government’s interest in shielding children from offensive material.⁷⁴ Also compelling was the interest in protecting privacy in the home—a right that “outweighs the First Amendment rights of an intruder.”⁷⁵

Red Lion and *Pacifica* are significant because they established that broadcasters are subject to limited First Amendment exceptions and the level of deference that the Supreme Court gives to the FCC. *Pacifica* is particularly relevant because it gave the Commission broad leeway in determining what constitutes indecency and obscenity in different contexts. However, *Pacifica*’s holding was quite narrow,⁷⁶ and for a long time, the FCC only sanctioned the broadcast of the seven words at issue in *Pacifica*.⁷⁷ It would take thirty years for the Supreme Court to rule on another case involving foul language.

D. *Post-Pacifica*—1987: *CBS, Inc. v. FCC*

Three years after *Pacifica*, the Supreme Court upheld an FCC order requiring broadcast stations to provide access to a presidential campaign seeking airtime.⁷⁸ In December 1979, the Carter-Mondale Campaign asked each of the three major television networks (ABC, CBS, and NBC) for time to air a thirty-minute program; whereby, the campaign would

⁷² *Id.* at 745 (citing *Miller v. California*, 413 U.S. 15, 23 (1973)).

⁷³ *Id.* at 745–46.

⁷⁴ *See id.* at 749–50.

⁷⁵ *Id.* at 748.

⁷⁶ *Id.* at 750. In addressing the narrowness of its holding, the Court stated:

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission’s decision rested entirely on a nuisance rationale under which context is all-important.
Id.

⁷⁷ *See In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (FCC 1987).

⁷⁸ *CBS, Inc. v. FCC*, 453 U.S. 367, 392–94 (1981).

announce Carter's candidacy for President and outline his plan.⁷⁹ All three networks declined the request: CBS, because of the number of candidates and concern about interrupting regular programming; ABC, because it had not yet decided when it would begin selling political time; and NBC, because it was not prepared to sell political time.⁸⁰ The campaign filed a complaint with the Commission charging the networks with a violation of the Communications Act of 1934.⁸¹ The statute provides that the Commission may revoke a station license "for willful or repeated failure to allow reasonable access or to permit purchase of reasonable amounts of time . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy."⁸²

In upholding the order, the Court stated that the FCC is an "experienced administrative agency long entrusted by Congress with the regulation of broadcasting" and so will be "entitled to judicial deference 'unless there are compelling indications that it is wrong.'"⁸³ "[T]he Commission must be allowed to 'remain in a posture of flexibility to chart a workable "middle course" in its quest to preserve a balance between the essential public accountability and the desired private control of the media.'"⁸⁴ Even though the Court practically admitted that it would not have ruled the same way as the Commission, it nevertheless upheld the order.⁸⁵ The Court will not substitute its judgment because Congress "confided" the responsibility to the Commission.⁸⁶ Clearly then, the Court announced that it will defer to FCC action unless there are compelling reasons not to.

⁷⁹ *Id.* at 371–72.

⁸⁰ *Id.* at 372–73.

⁸¹ *Id.* at 373–74.

⁸² 47 U.S.C. § 312(a)(7) (2006).

⁸³ *CBS, Inc.*, 453 U.S. at 390 (citing *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 381 (1969)).

⁸⁴ *Id.* (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973)).

⁸⁵ *Id.* at 394 ("[C]ourts should not overrule an administrative decision merely because they disagree with its wisdom." (quoting *Radio Corp. of Am. v. United States*, 341 U.S. 412, 420 (1951))).

⁸⁶ *Id.*

III. THE EVOLUTION OF REGULATION OF THE “OBSCENE” AND “INDECENT”

A. *The Obscene*

Under federal law, anyone who utters any obscene, indecent, or profane language by means of radio communication can be fined, imprisoned for a maximum of two years, or both.⁸⁷ However, no statute defines just what constitutes obscene, indecent, or profane.⁸⁸

In 1973, the Supreme Court defined “obscene.”⁸⁹ The standard is: “[1] whether the average person, applying contemporary standards, would find the work, taken as a whole, appeals to the prurient interest; [2] whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by applicable state law; and [3] whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.”⁹⁰ Federal law bans obscene material from broadcast at all hours of the day.⁹¹

B. *The Indecent*

In 1987, the Commission readdressed the indecency standard established in *Pacifica*,⁹² which held that indecent speech involves the description of sexual or excretory activities or organs in a “patently offensive manner as measured by contemporary community standards.”⁹³ What is indecent is “largely a function of context [and] cannot adequately be judged in the abstract.”⁹⁴ However, the FCC decided not to confine itself to the narrowness of *Pacifica*.⁹⁵ The Commission believed “that the definition of indecent broadcast material set forth in *Pacifica* appropriately

⁸⁷ 18 U.S.C. § 1464 (2006).

⁸⁸ See, e.g., *id.* (failing to provide definitions for obscene, indecent, or profane); *Obscenity, Indecency & Profanity – Frequently Asked Questions*, FCC, <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw> (last visited Feb. 2, 2011) (providing definitions for obscene, indecent, and profane without reference to a statutory section).

⁸⁹ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁹⁰ *Id.*

⁹¹ *Regulation of Obscenity, Indecency and Profanity*, FCC, <http://www.fcc.gov/eb/oip/Welcome.html> (last visited Feb. 2, 2011).

⁹² *In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2698 (FCC 1987).

⁹³ *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978).

⁹⁴ *Id.* at 742.

⁹⁵ *In re Pacifica*, 2 FCC Rcd. at 2699 (“[W]e will not apply the *Pacifica* standard so narrowly in the future.”).

includes a broader range of material.”⁹⁶ Carlin’s seven words were no longer the only words that were indecent: “Those particular words are more correctly treated as examples of, rather than a definite list of, the kind of words that . . . constitute indecency.”⁹⁷

The Commission held that indecent speech must involve more than isolated uses of offensive words.⁹⁸ However, repetitive use of specific language is not an absolute requirement for a finding of indecency.⁹⁹ When a complaint focuses solely upon expletives, deliberate and repetitive use is a requisite of an indecency finding.¹⁰⁰ If a complaint to the Commission goes beyond the use of expletives, “repetition of specific words or phrases is not necessarily an element critical to a determination of indecency.”¹⁰¹ Nevertheless, the Commission did continue to apply the “meat” of *Pacifica* by holding that speech describing or depicting “sexual or excretory functions must be examined in context to determine whether,” under contemporary community standards, it is patently offensive.¹⁰² The fact that specific words or phrases are not repeated does not mean that material, which is otherwise patently offensive, is not indecent.¹⁰³

The above definition of indecent is still the definition applied today: Indecent material contains descriptions of excretory or sexual functions that do not rise to the level of obscenity.¹⁰⁴ The determination the Commission must make is whether material fits into the category of indecent, and if so, whether such material is “patently offensive.”¹⁰⁵ With context being the critical factor, the FCC looks at three additional factors in analyzing broadcast material: “(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.”¹⁰⁶

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Frequently Asked Question, supra* note 88.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Other than context, none of these three factors are critical. Rather, the Commission “weighs and balances” the factors.¹⁰⁷

C. *The Profane*

“Profane language” includes those words which are so highly offensive “that their mere utterance in the context presented may . . . amount to a ‘nuisance.’”¹⁰⁸ The definition the FCC employs is “vulgar, irreverent, or coarse language.”¹⁰⁹ Because something is indecent does not necessarily mean that it cannot also be profane.¹¹⁰ In a 2004 order, the Commission held that musician Bono’s use of the “F-Word” on national television was not only indecent but profane as well.¹¹¹ Because of its context and the time of day of the utterance, the “F-Word” amounted to profanity, not just indecency.¹¹² Historically, speech that was found to be profane was focused in the context of blasphemy.¹¹³ The 2004 Order put broadcasters on notice that profane speech will not be confined to the blasphemous, but rather that the “F-Word” and other words as highly offensive as that word will be considered, depending on context, profane.¹¹⁴ Despite different meanings, nothing that is indecent or profane may be broadcast between the hours of 6:00 a.m. and 10:00 p.m.¹¹⁵ However, it took years of court cases before that time frame was finally decided.¹¹⁶

D. *The Struggle to Implement a “Safe Harbor”*

The government may impose reasonable time, place, and manner restrictions on speech, as long as they are narrowly tailored to further a

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (*Golden Globes Order*), 19 FCC Rcd. 4975, 4981 (FCC 2004).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 4982. The complaints varied in their description of what exactly Bono said. His statement was either “this is really, really fucking brilliant” or “this is fucking great.” *Id.* at 4976 n.4.

¹¹² *Id.* at 4981. “[W]e believe that, given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.” *Id.* at 4978.

¹¹³ *See id.* at 4981.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See* discussion *infra* Part III.D.

significant government interest.¹¹⁷ The Commission, therefore, restricted indecent radio and television programming “to a time during which there is not a reasonable risk” that children are listening or watching.¹¹⁸ The Commission previously had in place a safe harbor where indecent material may be aired between the hours of 6:00 a.m. and 10:00 p.m. if such material was preceded by a warning.¹¹⁹ However, through the 1987 *In re Pacifica* Order, the Commission reversed its position and warned broadcasters that 10:00 p.m. was no longer a time where it may be assumed that indecent material may be safely aired.¹²⁰

Later that same year, the Commission clarified and upheld its rulings from *In re Pacifica*.¹²¹ Under 18 U.S.C. § 1464, the Commission may only do what is necessary to restrict children’s access to indecent material.¹²² It may not go further to preclude exposure to adults who are interested in such material.¹²³ The Commission also declined to define precisely what is “patently offensive.”¹²⁴ The phrase must “be construed with reference to specific facts.”¹²⁵ “Patently offensive” is also used in an obscenity context.¹²⁶ When judging whether certain material is indecent, broadcasters must exercise the same judgment in determining whether something is obscene.¹²⁷ Broadcasters “must apply a generic definition with reference to the guidance provided by existing case law on the matter.”¹²⁸ However, the context in which the material is used is still a crucial inquiry.¹²⁹ The Commission also held that midnight is a more reasonable time to air indecent material because the risk that children may be in the audience is lower than if the material had aired at 10:00 p.m.¹³⁰

¹¹⁷ *In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (FCC 1987) (citing *Renton v. Playtime Theatres*, 475 U.S. 41 (1986)).

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *Id.* at 2699–2700.

¹²¹ *In re Infinity Broad. Corp.*, 3 FCC Rcd. 930, 931 (FCC 1987).

¹²² *Id.* at 931.

¹²³ *Id.*

¹²⁴ *Id.* at 931–32.

¹²⁵ *Id.* at 931.

¹²⁶ *See id.* at 932.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 937.

In 1988, the petitioners in *Action for Children's Television v. FCC* (ACT I)¹³¹ challenged these findings. Petitioners argued that the FCC's new, broader definition of indecency was unconstitutionally vague and overbroad.¹³² The court held "that the FCC had adequately explained why it decided to change its enforcement standard."¹³³ According to the court, the FCC had "left no doubt that it has stated a standard it expects to apply generally."¹³⁴ Furthermore, the court agreed with the FCC's ruling that its former "deliberately-repeated-use-of-dirty-words" policy was "unduly narrow . . . and inconsistent."¹³⁵ That approach permitted the unregulated broadcast of any indecent material that did not contain any of the words in Carlin's monologue.¹³⁶

According to the FCC, it made no sense to allow material that described sexual or excretory functions simply because the broadcast avoided using certain words.¹³⁷ However, in response to the Commission's new policy of allowing indecent material to be broadcast between the hours of midnight and 6:00 a.m., the court stated that "in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn."¹³⁸ A "securely grounded channeling rule" would balance the government's interest in protecting children from indecent material while allowing mature listeners to access such material should they so choose.¹³⁹ Therefore, the FCC had not reasonably implemented its authority to "channel such material."¹⁴⁰

Before the Commission could respond to the court's ruling, Congress intervened.¹⁴¹ Two months after ACT I was decided, Congress passed an appropriations bill requiring the FCC to "promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis."¹⁴² Consequently,

¹³¹ 852 F.2d 1332 (D.C. Cir. 1988).

¹³² *Id.* at 1334.

¹³³ *Id.* at 1335.

¹³⁴ *Id.* at 1337.

¹³⁵ *Id.* at 1338.

¹³⁶ *Id.*

¹³⁷ *Id.* (citation omitted).

¹³⁸ *Id.* at 1341.

¹³⁹ *Id.* at 1344.

¹⁴⁰ *Id.*

¹⁴¹ See Act of Oct. 1, 1988, Pub. L. No. 100-459, § 608, 102 Stat 2186, 2228 (1988).

¹⁴² *Id.*

the Commission issued an order banning all indecent broadcasts at all times of the day because there was a risk that children may be in the audience no matter what time such material aired.¹⁴³ The broadcast industry responded in *Action for Children's Television v. FCC (ACT II)*,¹⁴⁴ arguing that a total ban was unconstitutional.¹⁴⁵ The court agreed: "Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."¹⁴⁶ Unless the Commission can pass a reasonable safe harbor rule, there can be no constitutional balance between the interest of shielding children from indecent material, and allowing for the interests of broadcasters and willing audiences seeking access to such material.¹⁴⁷ On remand, the court once again ordered the Commission to adopt a constitutionally permissible safe harbor rule.¹⁴⁸

Following ACT II, Congress passed the Public Telecommunications Act of 1992.¹⁴⁹ This required the FCC to enact new regulations allowing the broadcast of indecent material between the hours of midnight and 6:00 a.m., unless a station goes off the air at or before midnight, in which case the station may broadcast such material after 10:00 p.m.¹⁵⁰ The FCC responded by promulgating the safe harbor times established by Congress.¹⁵¹ Broadcasting obscene material continued to be banned at all times of day.¹⁵²

The broadcast industry again responded in *Action for Children's Television v. FCC (ACT III)*,¹⁵³ arguing that § 16(a) of the Telecommunications Act was unconstitutional as well the FCC's

¹⁴³ *In re Enforcement of Prohibitions Against Broad. Obscenity & Indecency*, 4 FCC Rcd. 457, 457 (FCC 1988).

¹⁴⁴ 932 F.2d 1504 (D.C. Cir. 1991).

¹⁴⁵ *Id.* at 1507.

¹⁴⁶ *Id.* at 1508 (quoting *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1344 (D.C. Cir. 1988)).

¹⁴⁷ *Id.* at 1509 (citing *ACT I*, 852 F.2d at 1343 n.18).

¹⁴⁸ *Id.* at 1510.

¹⁴⁹ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992).

¹⁵⁰ *Id.* § 16(a)(1)–(2).

¹⁵¹ *In re Enforcement of Prohibitions Against Broad. Indecency*, 8 FCC Rcd. 704, 704 (FCC 1993).

¹⁵² *Id.*

¹⁵³ 11 F.3d 170 (D.C. Cir. 1993).

implementation order.¹⁵⁴ The Commission stated three goals justifying its order: (1) ensuring that parents have control over what their children listen to and view; (2) ensuring the well-being of minors, regardless of the level of parental supervision; and (3) protecting all members of the public from unwanted indecent material in their own homes.¹⁵⁵ The court found the first two interests compelling but rejected the third.¹⁵⁶ Notably, the court found that the Commission failed to tailor “its protection of children narrowly to avoid unnecessary infringement on First Amendment rights of adult listeners and viewers.”¹⁵⁷ Consequently, the court vacated FCC’s implementation order and found § 16(a) of the Telecommunications Act of 1992 unconstitutional.¹⁵⁸ The Commission found itself in the same position after ACT I because the court in ACT III ordered the FCC to once again implement a safe harbor that passes constitutional muster.¹⁵⁹ For the FCC to enact a constitutionally acceptable safe harbor, it must create one that is sufficiently narrowly tailored to protect the First Amendment rights of broadcasters and listeners.¹⁶⁰

In 1994, the D.C. Circuit Court of Appeals vacated ACT III and granted a rehearing.¹⁶¹ On rehearing, the court finally allowed an acceptable safe harbor.¹⁶² On reconsideration, the court found the government interest in shielding persons under the age of eighteen from indecent material compelling.¹⁶³ The court also found that, *standing alone*, the “channeling” of indecent material between the hours of midnight and 6:00 a.m. does not “unduly burden the First Amendment.”¹⁶⁴ However, the Telecommunications Act of 1992 draws a distinction between two classes

¹⁵⁴ *Id.* at 171.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 181 (“[T]he 6 a.m.-to-midnight ban ‘stretch[es] to all but the hours most listeners [and viewers-young and old alike-] are asleep,’ thus reducing the adult population to seeing and hearing only material that is fit for children.” (quoting *Action for Children’s Television v. FCC (ACT I)*, 853 F.2d 1332, 1335 (D.C. Cir. 1988))).

¹⁵⁸ *Id.* at 183.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 182.

¹⁶¹ *Action for Children’s Television v. FCC*, 15 F.3d 186 (D.C. Cir. 1994) (granting a rehearing and vacating a prior decision).

¹⁶² *Action for Children’s Television v. FCC (ACT IV)*, 58 F.3d 654, 667 (D.C. Cir. 1995).

¹⁶³ *Id.* at 656.

¹⁶⁴ *Id.*

of broadcasters (those who air material after midnight and those who go off air before midnight) without any apparent relationship to the compelling government interest.¹⁶⁵ Therefore, the court found § 16(a) of the Act unconstitutional.¹⁶⁶ Consequently, the court ordered the Commission to revise its regulations to allow the broadcast of indecent material between the hours of 10:00 p.m. and 6:00 a.m.¹⁶⁷ Because the government failed to show why a disparity between the categories of broadcasters served to shield minors from indecent material, the court set aside the more restrictive of the two time periods.¹⁶⁸ The Commission conformed to the ruling, and finally a constitutionally acceptable safe harbor was put in place.¹⁶⁹

E. What About Cable and Satellite Television and Radio?

The Commission does not have the authority to regulate indecency and profanity on cable television.¹⁷⁰ However, the Cable Television Consumer Protection and Competition Act 1992 (1992 Cable Act) did at one time give the FCC the authority to indirectly regulate such programming.¹⁷¹ The 1992 Cable Act directed the FCC to require cable broadcasters to place indecent, profane, and obscene material on a separate channel and block the programming until the subscriber (cable television consumer) requested in writing that the material be unblocked.¹⁷² It also directed the FCC to enact regulations that would allow the cable provider to prohibit channels from carrying “obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.”¹⁷³ The Supreme Court found these portions of the Act unconstitutional.¹⁷⁴ However, cable

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 669.

¹⁶⁹ See *In re Enforcement of Prohibitions Against Broad. Indecency*, 10 FCC Rcd. 10558, 10558 (FCC 1995).

¹⁷⁰ *Frequently Asked Questions*, *supra* note 88.

¹⁷¹ Cable Television Consumer Protection and Competition Act 1992, Pub. L. No. 102-385, § 10(b)–(c), 106 Stat. 1460, 1486 (1992).

¹⁷² *Id.* § 10(b).

¹⁷³ *Id.* § 10(c).

¹⁷⁴ See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 768 (1996).

providers can refuse to broadcast indecent, profane, or obscene material if they so choose.¹⁷⁵

In 2007, however, the FCC made a push to be able to regulate cable more closely, though the tighter control sought was not limited to offensive material.¹⁷⁶ Chairman Kevin Martin criticized the cable industry over steeply increasing rates and offensive programming, and he believed that subscribers should be able to choose channels *a la carte*.¹⁷⁷ The Commission's rationale for tighter regulation was the popularity of cable television. Martin believed that cable television was accessible to 85% of the population.¹⁷⁸ The Commission relied on the obscure "70/70 rule," which was part of the Cable Communications Act of 1984.¹⁷⁹ Under this rule, if the Commission finds that cable service is available to 70% of U.S. households and 70% of those homes actually subscribe to cable services, then the FCC can "promulgate any additional rule necessary to provide diversity of information services."¹⁸⁰ Chairman Martin believed that both of those requirements had been achieved, which would give the Commission the authority to regulate indecency and profanity on cable television.¹⁸¹ However, Martin's push failed because, currently, the FCC still remains without authority to regulate such material on cable television.¹⁸² The same holds true for satellite radio and television

¹⁷⁵ 47 U.S.C. § 532(h) (1996).

Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority or the cable operator is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent. *Id.*

¹⁷⁶ See Peter Kaplan, *Cable TV Faces Possible New FCC Regulations*, REUTERS (Nov. 13, 2007, 4:16 AM), <http://www.reuters.com/article/televisionNews/idUSN1250570520071113>.

¹⁷⁷ *Id.*

¹⁷⁸ See Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, PROGRESS ON POINT 12.8, May 2005, at 2, available at <http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf>.

¹⁷⁹ Adam Thierer, *FCC's 70% Cable Proposal Is 100% Unwarranted*, PROGRESS SNAPSHOT 3.16, Nov. 2007, at 1, available at <http://www.pff.org/issues-pubs/ps/2007/ps3.16FCCcableproposal.pdf>.

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *Frequently Asked Questions*, *supra* note 88.

services.¹⁸³ However, the ban on obscenity still applies to “subscription programming services” at all times.¹⁸⁴

F. The Enforcement Process

Contrary to common belief, the FCC does not actively monitor broadcasts,¹⁸⁵ though a federal statute permits such monitoring if the FCC so chooses.¹⁸⁶ Rather, the process begins by the filing of a complaint with the Commission.¹⁸⁷ When the Commission receives a complaint from a viewer or listener, it reviews the complaint to determine whether the material in question might fall within the obscenity-indecency-profanity spectrum.¹⁸⁸ If a complaint does not warrant an investigation, the Commission will dismiss it.¹⁸⁹ However, if the Commission does decide to investigate based upon a complaint, it will send a Letter of Inquiry (LOI) to the broadcaster.¹⁹⁰ The LOI informs the broadcaster that a complaint has been filed and requests additional information regarding the broadcast.¹⁹¹ If, after receiving a response from the broadcaster, the Commission determines that a violation has occurred, it sends a Notice of Apparent Liability (NAL) to the broadcaster.¹⁹² The broadcaster can either pay a forfeiture or submit an opposition to the NAL arguing why a forfeiture

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Goldsamt, *supra* note 2, at 208–09.

¹⁸⁶ 47 U.S.C. § 403 (1988).

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. *Id.*

¹⁸⁷ See *Action for Children’s Television v. FCC*, 827 F. Supp. 4, 6 (D. D.C. 1993); see also Goldsamt, *supra* note 2, at 208.

¹⁸⁸ *Action for Children’s Television*, 827 F. Supp. at 6.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 6–7.

should not be imposed or should be reduced.¹⁹³ In most cases, the broadcaster simply pays the forfeiture.¹⁹⁴

IV. RECENT DEVELOPMENTS

A. *The Struggle to Define Indecency Continues in the Twenty-First Century*

Even in 2001, there was still confusion about the Commission's enforcement policies regarding indecent broadcasting.¹⁹⁵ To clear up some of the confusion, the Commission issued a policy statement explaining the indecency standard, judicial history, and the test used by the Commission in making its findings.¹⁹⁶ Furthermore, the statement explained that mere "double entendre or innuendo" may still warrant a finding of indecency if "the sexual or excretory import is unmistakable."¹⁹⁷ The policy statement also provided many examples of what was deemed actionably indecent and examples of what was not.¹⁹⁸ The Commission put the examples into three categories: "Explicitness/Graphic Description Versus Indirectness/Implication"¹⁹⁹; "Dwelling/ Repetition Versus Fleeting Reference"²⁰⁰; and material "Presented in a Pandering or Titillating Manner or for Shock Value."²⁰¹

Under the Explicitness/Graphic Description Versus Indirectness/Implication category, a song that aired on a San Diego station that contained no "bad" words was found to be actionably indecent because "the language used in each passage was understandable and clearly capable of a specific sexual meaning and, because of the context, the sexual import was inescapable."²⁰² On the other hand, a broadcast that

¹⁹³ *Id.* at 7.

¹⁹⁴ *Id.*

¹⁹⁵ See *In re Indus. Guidance on the Comm'n Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 7999 (FCC 2001).

¹⁹⁶ *Id.* at 7999–8003.

¹⁹⁷ *Id.* at 8003–04.

¹⁹⁸ *Id.* at 8003–15 (providing excerpts from various radio programs, including the Howard Stern Show).

¹⁹⁹ *Id.* at 8003–04.

²⁰⁰ *Id.* at 8008.

²⁰¹ *Id.* at 8010.

²⁰² *Id.* at 8006 ("I whipped out my Whopper and whispered, Hey Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy.").

said, “So you talk to Dick Nixon, man you get him on the phone and Dick suggests maybe getting like a mega-Dick to help out, but you know, you remember the time the King ate mega-Dick under the table at a 095 picnic,” was found to be not indecent because the “surrounding contexts do not appear to provide a background against which a sexual import is inescapable.”²⁰³

Under the Dwelling/Repetition Versus Fleeting Reference category, a broadcast where the radio announcer repeatedly referenced his gaseousness was found to be indecent because it dwelled upon excretory activities.²⁰⁴ However, when a radio host said, “The hell I did, I drove mother-f***er, oh. Oh” during a morning radio show, the Commission found it not to be indecent because the broadcast contained only a “fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction.”²⁰⁵ But even “fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness,” such as “references to sexual activities with children.”²⁰⁶

If the purpose of the material presented is to pander or titillate, an indecency finding may be warranted despite the absence of expletives.²⁰⁷ For example, a radio broadcast where the announcer asked a caller to rub the phone on her genitals, directing her to rub harder and to “[b]e a naughty girl,” was found to be indecent.²⁰⁸ However, even if a broadcast is pandering or titillating, the context may render the material not indecent.²⁰⁹ For example, an episode of the Oprah Winfrey Show where the topic was making romantic relations with your mate better contained the following: “You need to at least know how to get your body satisfied by yourself. Because if you don’t know how to do it, how is he going to figure it out? He doesn’t have your body parts, he doesn’t know.”²¹⁰ The material was preceded by a warning and a pause for parents to remove children from the room, and the statement was made by a psychologist.²¹¹ The Commission did not deem the material indecent because “[s]ubject matter alone does

²⁰³ *Id.* at 8007 (citation omitted).

²⁰⁴ *Id.* at 8008.

²⁰⁵ *Id.* at 8009 (citation omitted).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 8010.

²⁰⁸ *Id.* at 8011.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 8011–12.

²¹¹ *Id.* at 8011.

not render material indecent.”²¹² Though the material may have been offensive to some, because of the context, it was not actionably indecent.²¹³ The Commission applied the same reasoning when they found that the uncensored and uncut airing of the film *Schindler’s List* on network television was not indecent, even though the film contained full frontal nudity.²¹⁴

B. The 2004 Golden Globes Order

Even though 18 U.S.C. § 1464 bans the use of “profanity,”²¹⁵ the Commission had never applied that section before 2004.²¹⁶ In 2004, the Commission released an order regarding the 2003 Golden Globe Awards, where musician Bono said, “This is really, really f[***]ing brilliant.”²¹⁷ The Commission initially held that the material was not actionably indecent and found that no licensees that aired the material violated the law.²¹⁸ However, on application by the Parents Television Council, the Commission reviewed that order.²¹⁹ It held that the “F-Word” falls within its indecency definition because it “depict[s] or describe[s] sexual activities.”²²⁰ Rejecting NBC’s argument that Bono used the word “as an intensifier,” the Commission stated that “any use of that word or a variation, in any context, inherently has a sexual connotation.”²²¹ However, this alone does not make the “F-Word” indecent—it must also be patently offensive.²²² Because, according to the Commission, the “F-Word” is among the most “vulgar, graphic and explicit descriptions of sexual activity” and its use “invokes a coarse sexual image,” the

²¹² *Id.* at 8012.

²¹³ *See id.*

²¹⁴ *Id.* at 8012–13.

²¹⁵ 18 U.S.C. § 1464 (2006) (“Whoever utters any . . . profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

²¹⁶ *See In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Golden Globes Order)*, 19 FCC Rcd. 4975, 4988 (FCC 2004).

²¹⁷ *Id.* at 4976 n.4.

²¹⁸ *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Bureau Order)*, 18 FCC Rcd. 19859, 19861 (FCC 2003).

²¹⁹ *Golden Globes Order*, 19 FCC Rcd. at 4975.

²²⁰ *Id.* at 4978.

²²¹ *Id.* (citation omitted).

²²² *Id.* at 4979.

Commission found its use patently offensive, and therefore, indecent.²²³ By so holding, the Commission rapidly backpedaled from its prior rulings that an isolated or fleeting use of expletives is not indecent.²²⁴ It explicitly acknowledged this by stating that it was departing from all prior cases, which held that a fleeting or isolated use of the “F-Word” in situations such as here were not indecent.²²⁵

The Commission also held that the “F-Word” constitutes profane language under 18 U.S.C. § 1464.²²⁶ The Commission historically only focused on what was profane in the context of blasphemy, but because nothing in that limited history constrained the definition of profanity to such context, use of the “F-Word” became actionable as profane.²²⁷ However, prior FCC policy would have found the broadcasts not indecent, and so, because of this “new approach to profanity,” no penalty was imposed against the licensees.²²⁸

C. FCC v. Fox

In 2009, the Supreme Court reviewed the adequacy of the Commission’s holdings in the *Golden Globes Order* in *FCC v. Fox Television Stations, Inc.*²²⁹ The case concerned utterances in two live broadcasts aired by Fox prior to the issuance of the *Golden Globes Order*.²³⁰ The first happened during the 2002 Billboard Music Awards where singer Cher said, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** ‘em.”²³¹ The second occurred during the 2003 Billboard Music Awards when Nicole Richie and Paris Hilton, stars of the Fox series *The Simple Life*, were presenting an

²²³ *Id.*

²²⁴ *See, e.g., In re Indus. Guidance on the Comm’n Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8009 (FCC 2001). A news announcer said, “Oops, f***ed that one up.” *Id.* The Commission found the material not indecent because the news announcer’s use of the single expletive does not warrant further consideration due to the “isolated and accidental nature of the broadcast.” *Id.*

²²⁵ *Golden Globes Order*, 19 FCC Rcd. at 4980.

²²⁶ *Id.* at 4981.

²²⁷ *Id.*

²²⁸ *Id.* at 4981–82.

²²⁹ 129 S. Ct. 1800 (2009).

²³⁰ *Id.* at 1808.

²³¹ *Id.*

award.²³² Hilton told Richie to “watch the bad language,” but Richie proceeded to say, “Why do they even call it ‘The Simple Life’? Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.”²³³ The Commission deemed the broadcasts actionably indecent.²³⁴ Both broadcasts fell within the scope of the indecency test because the 2003 broadcast involved a literal description of excrement, and both broadcasts involved the “F-Word.”²³⁵ The order also found both broadcasts to be patently offensive.²³⁶ The order held that both broadcasts would have been actionably indecent under staff rulings and dicta prior to the *Golden Globes Order*.²³⁷ The order made clear that the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent.²³⁸ The order did not, however, impose any forfeiture or any other sanctions.²³⁹

Under the Administrative Procedure Act, the Supreme Court can only set aside agency action that is “arbitrary” or “capricious.”²⁴⁰ The Court stated that it is “not to substitute its judgment for that of the agency”²⁴¹ and should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”²⁴² The agency must show that there are “good reasons for the new policy” but need not show to the Court’s satisfaction that the reasons for the new policy are better than the reasons for the old policy.²⁴³ It is enough that the new policy is “permissible under the statute, that there are good reasons for [the change], and that the agency believes it to be better.”²⁴⁴

²³² *Id.*

²³³ *Id.*

²³⁴ *In re* Complaints Regarding Various Television Broad. Between Feb. 2, 2002 & March 8, 2005, 21 FCC Rcd. 2664, 2690–94 (FCC 2006).

²³⁵ *Id.* at 2691, 2693.

²³⁶ *Id.* at 2691.

²³⁷ *Id.* at 2692, 2695.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) (citation omitted).

²⁴¹ *Id.*

²⁴² *Id.* (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

²⁴³ *Id.* at 1811.

²⁴⁴ *Id.* (emphasis in original).

The Court concluded that the Commission's action was neither arbitrary nor capricious.²⁴⁵ The Court found convincing that the Commission knew it was making a policy change, even though the explanation of why the Cher broadcast would have violated earlier policy was not convincing.²⁴⁶ Furthermore, the Court believed that the reasons for the policy change were "entirely rational."²⁴⁷ It was reasonable to decide that "it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent."²⁴⁸ The fact that "technological advances have made it easier to bleep out offensive words" further supported the Commissioner's new policy.²⁴⁹ The Court concluded that the Commission was not arbitrarily imposing punishment without notice because it did not impose any sanctions or forfeitures.²⁵⁰

In reversing the Second Circuit Court of Appeal's ruling, the Supreme Court found the Second Circuit's three reasons for finding the Commission's action arbitrary and capricious unconvincing.²⁵¹ First, the Second Circuit found that the Commission failed to explain "why it had not previously banned fleeting expletives as 'harmful "first blow[s]."'"²⁵² For the Second Circuit, "without 'evidence that a fleeting expletive [was] harmful and . . . serious enough to warrant government regulation,' the agency could not regulate more broadly."²⁵³ The Supreme Court took the opposite view, however, stating that just because the Commission "had a prior stance does not alone prevent it from changing its view."²⁵⁴

The Second Circuit's next reason for finding the Commission's actions arbitrary and capricious was that "the agency's 'first blow' theory of harm would require a categorical ban upon *all* broadcasts of expletives," and because the Commission failed "to go to this extreme," it undermined its own rationale.²⁵⁵ The Supreme Court answered by holding that the

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1812.

²⁴⁹ *Id.* at 1813.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1813–14.

²⁵² *Id.* at 1813 (quoting *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007)).

²⁵³ *Id.* (citing *Fox*, 489 F.3d at 461).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1814 (emphasis in original) (citing *Fox*, 489 F.3d at 458–59).

decision by the Commission “to retain some discretion” does not make its regulation of offensive language arbitrary or capricious, especially regulation of award shows that draw millions of viewers, such as the shows at issue here.²⁵⁶

Finally, the Second Circuit rejected the argument that exempting “fleeting expletives would lead to an increased use of expletives.”²⁵⁷ The Supreme Court, however, stated that the agency’s judgment made “entire sense.”²⁵⁸ Even though the Commission’s prior policy did not cause broadcasters to “barrag[e] the airwaves with expletives,” there were more uses of expletives than the FCC deemed acceptable under the statute.²⁵⁹

Perhaps unfortunately, the Court declined to address the constitutionality of the Commission’s recent orders.²⁶⁰ But at the same time, the Court left open the possibility that the FCC’s recent actions are unconstitutional. The Court said that “[i]t is conceivable that the Commission’s orders may cause some broadcasters to avoid certain language that is beyond the Commission’s reach under the Constitution.”²⁶¹ The Court said that the constitutional question will be answered “soon enough,” but for now, “any chilled references to excretory and sexual material ‘surely lie at the periphery of First Amendment concern.’”²⁶²

D. 2010: Fox Television Stations, Inc. v. FCC

Though the Supreme Court declined to address the First Amendment issues regarding FCC policy, the Second Circuit in 2010 did rule on the constitutionality of the policies.²⁶³ The broadcast networks argued that the FCC’s policies are “unconstitutionally vague,” providing “no clear guidelines as to what is covered and thus forces broadcasters to ‘steer far wider of the unlawful zone,’ rather than risk massive fines.”²⁶⁴ “A law or regulation is impermissibly vague if it does not ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’”²⁶⁵ The issue, thus, turned to whether the FCC’s indecency

²⁵⁶ *Id.*

²⁵⁷ *Id.* (citing *Fox*, 489 F.3d at 460).

²⁵⁸ *Id.*

²⁵⁹ *Id.* (quoting *Fox*, 489 F.3d at 460).

²⁶⁰ *Id.* at 1819.

²⁶¹ *Id.*

²⁶² *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S.726, 743 (1978)).

²⁶³ *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010).

²⁶⁴ *Id.* at 328.

²⁶⁵ *Id.* at 327 (quoting *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006)).

policy provided a “discernible standard by which broadcasters can accurately predict what speech is prohibited.”²⁶⁶ The court held that the FCC’s policy was “unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here.”²⁶⁷ The problem here was that it was too difficult to determine what words the FCC would find indecent. For example, the court noted that the Commission found the use of the word “bullshit” on the show *NYPD Blue* indecent but found that the words “dick” and “dickhead” were not patently offensive.²⁶⁸ “The Commission argu[ed] that its three-factor ‘patently offensive’ test [gave] broadcasters fair notice of what it [would] find indecent.”²⁶⁹ However, “the Commission’s reasoning consisted of repetition of . . . the factors without any discussion of how it applied them.”²⁷⁰ The word “bullshit” was found to be indecent because it is “vulgar, graphic and explicit” whereas the word “dickhead” was not indecent because it was “not sufficiently vulgar, explicit, or graphic”; and so, the court found that this does not give broadcasters sufficient notice of how the FCC will apply its factors in the future.²⁷¹

The Commission next argued that because it “cannot anticipate how broadcasters will attempt to circumvent the prohibition on indecent speech, [it] needs the maximum amount of flexibility to be able to decide what is indecent.”²⁷² The court was unsympathetic though, stating:

The observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC’s crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so.²⁷³

The court also addressed the vagueness issues connected with the presumption that the words “f***” and “shit” are indecent and profane.²⁷⁴

²⁶⁶ *Id.* at 330.

²⁶⁷ *Id.* at 319.

²⁶⁸ *Id.* at 330.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 331.

²⁷³ *Id.*

²⁷⁴ *Id.*

The FCC had found the use of these words in the film *Saving Private Ryan* not indecent but found the same words indecent when used during the Golden Globe Awards.²⁷⁵ The reason for the disparate treatment of the same words is that the FCC had carved out exceptions to the presumed-indecent standard: the bona-fide news exception and the artistic necessity exception.²⁷⁶ The use of those words during *Saving Private Ryan* was found not indecent, only because the film was deemed to have sufficient artistic value.²⁷⁷ On another occasion, the word “bullshitter” was deemed not indecent merely because its use occurred during an interview on CBS’ *The Early Show*, even though the Commission initially found that it was indecent.²⁷⁸ It reversed its prior position merely because the word was uttered during a news interview.²⁷⁹ The court viewed this reversal of opinion as evidence of the vagueness of these policies: “In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word ‘bullshitter’ was uttered during a news program.”²⁸⁰

Because of the vagueness of the policy and the vagueness of the application of the policy, the court found that the FCC’s indecency standards failed constitutional scrutiny.²⁸¹ Following this substantial blow to the FCC, the Commission appealed the ruling, arguing that the court’s ruling undermined the Commission’s overall ability to prevent the broadcasting of indecent material.²⁸² It also once again cited the need to protect families and children.²⁸³ Hopefully, this appeal will reach the Supreme Court where a final determination will be made on the constitutionality of current FCC policy.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 332.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 335.

²⁸² Amy Schatz, *FCC Appeals ‘Fleeting Expletives’ Decision*, WALL ST. J. (Aug. 26, 2010, 6:29 PM), <http://online.wsj.com/article/SB10001424052748703959704575453492807569162.html> (“The FCC said the court’s action threatened to have a ‘wide-ranging adverse impact’ on the agency’s ability to prevent indecent material from being broadcast and asked that the case be reheard.”).

²⁸³ *Id.*

V. FIRST AMENDMENT INTRUSIONS SHOULD BE TOLERATED . . . TO A POINT

It has been seventy-six years since the FCC was created,²⁸⁴ and its evolution is remarkable. It is doubtful that anyone could have foreseen the impact that the Commission would have on America when it was created in 1934. Remember, its purpose was to regulate communication and to make available efficient radio and wire communication services for the purpose of national defense and promotion of “safety of life and property” through communication services.²⁸⁵ While the Commission continues to serve this broad and vague purpose, America has never felt the Commission’s presence more than it does today. Its website boasts about its “ubiquitous presence in the lives of most Americans.”²⁸⁶ The History of Communications section of its website shows just how “ubiquitous” this presence really is.²⁸⁷ Apparently, because almost all electronic devices emit some sort of radio frequency, the FCC’s rules “protect” us when “[y]ou heat your breakfast waffle in the microwave” or when “[y]our child plays with a radio-controlled airplane.”²⁸⁸ The Commission also wants us to remember how important it is by reminding us:

Perhaps no one example better illustrates the breadth and importance of the FCC’s role in modern America than September 11, 2001, when all Americans were reminded of the importance of reliable, easily available, and interoperable communications—both for emergency personnel responding to a tragedy and individuals checking on family and friends.²⁸⁹

The value that the Commission places upon itself may be extreme, but the FCC does have value and it is important.²⁹⁰ Thus, some intrusion into First Amendment protections should be tolerated to allow for the regulation of indecency, but the question becomes: How much of an intrusion are we willing to accept?

²⁸⁴ See *About the FCC*, *supra* note 38.

²⁸⁵ 47 U.S.C. § 151 (2006).

²⁸⁶ *History of Communications*, *supra* note 8.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See *About the FCC*, *supra* note 38 (noting the FCC “is charged with regulating interstate and international communications by radio, television, wire satellite and cable”).

A. *A Limited Intrusion into First Amendment Protections Is Likely Necessary*

Of course, the FCC is not *conspicuously* ever-present.²⁹¹ Most Americans probably do not care what the FCC does or who it regulates. Most Americans likely have no idea what standards the Commission applies to what material. Nevertheless, the American landscape would be quite different if broadcast material went unregulated.²⁹² What might the local news say or show on the six o'clock news if it were completely unregulated? Might primetime television shows have the same material as a rated "R" movie? Would Carlin's seven words be commonly used on the radio?

It is hard to argue that some sort of "anything-goes policy" with regard to the broadcast medium would not have negative effects on society. It is difficult to argue that constant, unbridled exposure of children to indecent material will not shape adolescent development. The war over indecent programming, though, is fought mostly out of the public eye and out of the public mind.²⁹³ On one side, there are special interest groups, parental groups, and the Commission itself.²⁹⁴ On the other side, there are the broadcasters subject to regulation.²⁹⁵ Most of America probably falls somewhere in between.

It is common knowledge to most that broadcast television and radio do not show or discuss sexually explicit material and do not curse.²⁹⁶ Many

²⁹¹ See *Frequently Asked Questions*, *supra* note 88. Although 16 U.S.C. § 1464 allows the FCC to fine those who utter obscene, indecent, or profane language, the FCC relies on the filing of complaints; it does not monitor particular programs. *Id.*

²⁹² See Matthew Bloom, Comment, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 Yale J.L. & Tech. 109, 110, 121–22 (2007).

²⁹³ See Eric Boehlert, *Indecency Wars*, SALON (Apr. 14, 2005, 2:16 PM), http://www.salon.com/news/feature/2005/04/14/fcc_and_indecency.

²⁹⁴ See, e.g., Gautham Nagesh, *Parents Up in Arms over MTV's Racy 'Skins' Ask Congress to Investigate*, THE HILL (Jan. 21, 2001, 10:55 AM), <http://thehill.com/blogs/hill-icon-valley/technology/139307-mtvs-racy-qskinsq-has-parents-group-up-in-arms>; Boehlert, *supra* note 293.

²⁹⁵ See 18 U.S.C. § 1464 (2006); see also *About the FCC*, *supra* note 38.

²⁹⁶ See *Obscene, Indecent, and Profane Broadcasts*, FCC, <http://www.fcc.gov/cgb/sumerfacts/obscene.html> (last visited Feb. 7, 2011). The outrage that many Americans have over hearing profanity on a broadcasted program shows the expectation that it is not proper or legally allowed. See, e.g., Hilden, *supra* note 14; 'A Deficit of Decency,' *supra* note 18; Schlafly, *supra* note 19.

Americans probably do not care that such material is forbidden on broadcast television and radio because it is so simple in the twenty-first century to obtain indecent material,²⁹⁷ especially with the easy accessibility to the internet. Cable and satellite television and radio are a viable alternative. So too are movies. Therefore, we should accept the limited First Amendment exception with regard to indecency on broadcast television and radio because if it is indecency we want, we can find it just about anywhere else.

B. Clearer Standards Must Accompany This Limited Intrusion

Even though a limited intrusion is necessary, the Second Circuit in *Fox Television Stations, Inc. v. FCC* is correct that the current policies are vague and need simplification and clarification. There has been too much inconsistent application of the indecency policies, and because of this, broadcasters censor themselves perhaps more than they need to. If the FCC can constitutionally create a set of rules that is steadfast and clear, leaving little or no room for interpretation, then broadcasters should know exactly what they can and cannot air. If that happens, perhaps the legal battles over FCC policy will cease. Until that happens, broadcasters will continue to complain that they do not know what they may air, and the FCC will continue to justify its actions with its goal of protecting the children. Now in 2011, the issue is not whether the children should be protected; but rather, the issue is how far must broadcasters go to protect them? While further clarification is needed—and hopefully provided soon by the Supreme Court—the limited First Amendment exception at issue shields children as much as is reasonably necessary, and a more restrictive exception should not be tolerated.

VI. THE FUTURE: WILL THE FCC EVER BE ABLE TO BAN INDECENCY ON SUBSCRIPTION BROADCASTING SERVICES?

Even though the FCC currently does not and cannot regulate subscription broadcasting, such as cable television and satellite television and radio,²⁹⁸ the issue is not moot. As briefly mentioned above, former Commission Chairman Kevin Martin believes that the FCC should have

²⁹⁷ See, e.g., *Pornography Statistics*, FAMILY SAFE MEDIA, http://www.familysafemedia.com/pornography_statistics.html (last visited Jan. 22, 2011) (displaying the breakdown of pornography statistics including the number of websites, pages, and downloads). Every second, 28,258 internet users are viewing pornography. *Id.*

²⁹⁸ Bloom, *supra* note 292, at 116–17.

more power to regulate cable programming.²⁹⁹ Chairman Martin stated in congressional testimony that indecency and profanity restrictions against cable and satellite providers should be considered because such operators “refuse to offer parents more tools such as family-friendly programming packages.”³⁰⁰ Former FCC Chairman Michael Powell believed that it was “unsustainable for the courts to segregate broadcasting from other [media] for First Amendment purposes.”³⁰¹ He believed that “[i]t is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set.”³⁰² Martin and Powell are not alone in the belief that the FCC should be able to regulate indecency on cable. Numerous bills have been introduced in Congress seeking to impose indecency regulations against cable operators, but none of the proposals ever came to fruition.³⁰³

A. A La Carte *Service Alternative*

One idea that seems like a viable alternative to FCC indecency regulation of cable and satellite, though perhaps not the most efficient alternative, is *a la carte* services where subscribers could choose the channels they want and pay for only those channels selected.³⁰⁴ Because the concern over indecency has always centered around exposure to children,³⁰⁵ allowing parents to choose not to subscribe to any channels that show indecent material would seemingly serve that purpose without FCC intervention. If a parent decides to subscribe to a channel that shows indecent material, that is the choice of the parent, and the FCC should not step in to “protect” a child when the parent has chosen not to do so. The Commission has discussed *a la carte* programming but they ultimately rejected it as an option.³⁰⁶

At the urging of Senator John McCain, the Commission sought opinion on *a la carte* programming.³⁰⁷ The Commission received responses from “companies, interest groups, public officials, and other entities,” 90% of

²⁹⁹ Corn-Revere, *supra* note 178, at 2.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1.

³⁰² *Id.*

³⁰³ *See id.* at 3–4.

³⁰⁴ *See* Michael Grebb, *FCC: Why No a La Carte Cable?*, WIRED (July 30, 2004), <http://www.wired.com/science/discoveries/news/2004/07/64399>.

³⁰⁵ *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

³⁰⁶ Corn-Revere, *supra* note 178, at 4.

³⁰⁷ *Id.*

which opposed *a la carte* programming.³⁰⁸ It is not surprising that “companies,” especially cable and satellite companies, would reject *a la carte* programming because of the amount of money they would stand to lose if they were not able to charge customers for unwanted channels.³⁰⁹ Allowing subscribers to pick and pay for only those channels desired would result in most customers selecting only a handful of channels, unlike the current system where cable and satellite customers must pay for every one of the hundreds of channels found on those mediums.³¹⁰

Though the Commission sought opinions of cable companies, they never sought input from the group that it purports to protect—the American public.³¹¹ Had they, it is likely that the 90% rejection rate of the *a la carte* programming would have been much lower. Overwhelmingly, subscribers would jump at the chance to choose the channels they want because they would have more control and pay lower fees.³¹² One FCC report found that *a la carte* subscribers could choose as many as twenty channels without seeing any rise in fees, which is three more channels than the average household watches on cable.³¹³ Nevertheless, the Commission never sought input from consumers, and they rejected the idea of *a la carte* programming because “technical solutions to block unwanted content already exist at a lesser cost.”³¹⁴

B. Support for Increased FCC Regulation of Subscription Broadcasting Services

Those in favor of FCC regulation of indecency on cable can certainly point to the fact that indecent material, particularly sex, has become more risqué than ever.³¹⁵ A 2010 *USA Today* article titled “TV Sex: Uncut, Unavoidable” discussed how sex on TV today compares to sex on TV in decades past.³¹⁶ For example, in the 1950s married couples shown on TV

³⁰⁸ *Id.* n.20.

³⁰⁹ See Grebb, *supra* note 304.

³¹⁰ *Id.*

³¹¹ Corn-Revere, *supra* note 178, at 4.

³¹² See FCC, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 4 (2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

³¹³ *Id.*

³¹⁴ Corn-Revere, *supra* note 178, at 4.

³¹⁵ Gary Strauss, *TV Sex: Uncut, Unavoidable*, USA TODAY, Jan. 20, 2010, at D1.

³¹⁶ *Id.* at D2.

did not sleep in the same bed.³¹⁷ In the 1960s, *I Dream of Jeannie* star Barbara Eden showed her bellybutton, which at the time was edgy.³¹⁸ The 1970s showed *Charlie's Angels'* actresses running around braless, which was also considered very edgy for its time.³¹⁹ However, none of these examples compare to what viewers are exposed to today. In 2010, Starz, a subscription channel on cable and satellite television, debuted its series *Spartacus*.³²⁰ Viewers of *Spartacus* “[saw] full frontal male nudity, heterosexual, homosexual, and group sex, and graphic scenes rarely—if ever—seen on mainstream TV.”³²¹ Even the star of the series, Lucy Lawless, admitted that some viewers will be “truly horrified” and quickly turn the show off.³²² Such controversial programming has caused the Parents Television Council to believe that “[f]amilies are under siege, teenage girls are under siege.”³²³

C. Opposition to Increased FCC Regulation of Subscription Broadcasting Services

Those opposed to the FCC regulating indecency on subscription programming services seemingly have a powerful weapon: court decisions supporting their stance. First, there is *Pacifica*. As discussed above, the Court emphasized how narrow its holding was. Those opposed to regulation of indecency on cable and satellite could point to the fact that the Court in *Pacifica* was barely willing to allow a First Amendment exception to indecency broadcast on public television and radio,³²⁴ and

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at D1.

³²¹ *Id.*

³²² *Id.* at D2.

³²³ *Id.*

³²⁴ *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978).

It is appropriate, in conclusion, to emphasize the narrowness of our holding We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution The Commission’s decision rested entirely on a nuisance rationale under which context is all-important. As Mr. Justice Sutherland wrote a ‘nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.’

Id. (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

therefore, arguably would have been unwilling to apply the same exception to subscription programming services. Thirty-one years after *Pacifica*, the Supreme Court expressed a clear opinion in *Turner Broadcasting System v. FCC*.³²⁵ The case involved the constitutionality of the “must-carry” provisions in the Cable Television Consumer Protection and Competition Act of 1992, which required cable operators to carry the signals of a certain number of local broadcast television stations.³²⁶ One problem with this is that all over-the-airwaves broadcasts, national and local, were subject to the heightened First Amendment restriction laid down in *Pacifica*.³²⁷ The issue in this case, then, was whether requiring cable operators to carry some local channels violated freedom of speech or the press.³²⁸ The government argued that the same First Amendment standard should apply to cable television and broadcast television, but the Court rejected this contention: “[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”³²⁹ The Court discussed some physical and technological differences between cable and broadcast television before stating that “application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.”³³⁰

Though the Supreme Court did not address whether the same standard should apply to both cable and broadcast television until 1992, lower courts discussed the topic throughout the previous decade.³³¹ In 1981, Utah enacted a law penalizing anyone who distributed indecent or pornographic material by wire or cable.³³² A Utah district court invalidated the law as being facially overbroad because the law would apply to homes that receive cable even if they contain no children.³³³ While this ruling does not directly support the proposition that indecency on cable should remain unregulated, Judge Jenkins’ comments at the end of the opinion do

³²⁵ 512 U.S. 622 (1994).

³²⁶ *Id.* at 630.

³²⁷ *Id.* at 637.

³²⁸ *Id.* at 626.

³²⁹ *Id.* at 637.

³³⁰ *Id.* at 639.

³³¹ *See, e.g.,* *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Cmty. Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

³³² UTAH CODE ANN. § 76-10-1229(1) (LexisNexis 1981).

³³³ *Home Box Office*, 531 F. Supp. at 997.

support that proposition.³³⁴ He stated that “[t]here is no law that says you have to watch” the broadcast nor is there any law that “says you have to subscribe to a cable TV service.”³³⁵ In addressing indecency on television, he further stated: “We put up with it. What we do if we have occasion to be offended by something in a program is we get up and we turn it off. We do something else.”³³⁶ Judge Jenkins was essentially saying that it is not for the FCC to decide whether someone should find something indecent. If people find something indecent, then they should not watch. If a parent is concerned about indecent material on cable, do not subscribe.

The next year Jenkins presided over another case addressing the regulation of indecency on cable.³³⁷ He discussed the differences between cable and broadcast television and even went so far as to say that “[t]he transmission of electronic signals through private wires is not ‘broadcasting.’”³³⁸ Notably, Jenkins identified the key difference between cable and broadcast television: the ability not to subscribe, and therefore, not even have access to cable television.³³⁹ Furthermore, “[l]evels and degrees of choice, not just popularity or circulation, are the significant distinguishments.”³⁴⁰ The Eleventh Circuit Court of Appeals in 1985 invalidated a similar law as the one in Utah, applying the same analysis as Judge Jenkins.³⁴¹ The court noted that cable subscribers expressly choose to bring the service into their homes.³⁴²

These lower court cases stress one of the major arguments against FCC regulation of indecency on cable television—choice. Consumers have never better been able to control what is or is not seen and heard.³⁴³ Cable and satellite boxes now allow the consumer to block any channel, and many services even allow subscribers to block shows based upon rating.³⁴⁴ If a parent does not want a child to view a program that is rated TV-MA, for instance—which means the program is intended for mature audiences—then that parent can change the settings of the cable or satellite

³³⁴ *Id.* at 1001.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Cnty. Television, Inc. v. Roy City*, 555 F. Supp. 1164, 1165–66 (D. Utah 1982).

³³⁸ *Id.* at 1167.

³³⁹ *Id.* at 1168.

³⁴⁰ *Id.* at 1170.

³⁴¹ *Cruz v. Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985).

³⁴² *Id.* at 1420.

³⁴³ *See id.*

³⁴⁴ Thierer, *supra* note 179, at 6.

box to block *all* programs that contain such rating.³⁴⁵ Because of these settings on most cable and satellite boxes, a special interest group or parent should not be allowed to complain to the FCC about indecent material when the capability to remove such material is present but not utilized by the parent.

D. The Majority of Indecency Complaints Originate from a Single Group

Most of the complaints the FCC receives regarding indecency are from one special interest group, the Parents Television Council (PTC).³⁴⁶ According to an FCC report, during the year 2003, 99.8% of the complaints received by the Commission were from this group.³⁴⁷ In 2000, the FCC received around 350 complaints regarding indecent programming, but in 2003, that number increased to 240,000.³⁴⁸ The group submits a large number of the same complaint.³⁴⁹ The FCC responded by treating a number of identical complaints as one set.³⁵⁰ The PTC was not pleased and complained to Congress about the FCC not accepting “automatically generated spam complaints” as legitimate complaints.³⁵¹ Essentially one special interest group is responsible for almost all of the complaints received by the Commission. Furthermore, the complaints are not coming from concerned parents, but rather from a group with members that may not have children and may not have seen the material they are complaining about.³⁵² One could argue then that the FCC is essentially just an arm of the PTC. Because the Commission does not actively monitor broadcast programming,³⁵³ it seemingly only reviews cases and issues penalties when called upon by the PTC. Therefore, it is possible that the FCC would have reviewed few cases and issued few penalties in the past decade if the PTC did not exist.

³⁴⁵ *See id.*

³⁴⁶ Ken Fisher, *Activist Organization Responsible for 99% of FCC Complaints*, ARS TECHNICAL (Dec. 7, 2004, 7:38 PM), <http://arstechnica.com/old/content/2004/12/4442.ars>.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *See* Goldsamt, *supra* note 2, at 208–09.

Though past attempts to regulate indecency on cable and satellite have been made and rejected,³⁵⁴ there is no doubt that debate about whether the FCC should be able to regulate indecency on cable and satellite television and radio will continue. Eventually, Congress will likely pass a law allowing such regulation. The courts would likely review such a law. Until that day comes again, we will not know whether the FCC can regulate indecency on cable and satellite.

VII. CONCLUSION

The FCC has existed for seventy-six years. Over that span, the FCC has grown in stature and has largely shaped what can and cannot be publicly broadcast. It is not so much what we see that the FCC has regulated, but we have not seen. The struggle to define just what we cannot see and to determine whether the Commission has the authority to control such matters has not always been easy. The FCC existed for nearly thirty years before the U.S. Supreme Court addressed indecency and obscenity in *Pacifica*. It took nearly thirty more years for indecency to encompass more than just Carlin's seven filthy words.³⁵⁵ It was not until the early 2000s that the FCC finally definitively described what is indecent and what procedures determine whether something is indecent.³⁵⁶ It took eight years and numerous court cases just to establish an acceptable indecency safe harbor.³⁵⁷

The debate over whether the FCC should be able to regulate cable and satellite television and radio continues to this day. No doubt, the next seventy-six years will be riddled with debate, controversy, and court cases. Will violence ever be considered indecent? Will indecency on cable and satellite providers ever be regulated? Or will indecency regulations be thrown out all together? The last seventy-six years have been marked by changes in authority and law. The next seventy-six years should be no different.

³⁵⁴ See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000). The Court found § 505 of the Telecommunications Act of 1996 to be unconstitutional because there existed less restrictive means for regulating cable operators than to scramble sexually explicit channels. *Id.* at 816. The majority rejected the argument that *Pacifica* should apply equally to broadcast and cable television because the key difference between the two mediums is that cable systems have the ability to block unwanted channels on a household-by-household basis. *Id.* at 815.

³⁵⁵ See *supra* Part III.B.

³⁵⁶ See *supra* Part I.

³⁵⁷ See discussion *supra* Part III.D.