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ARTICLES

"SMUT AND NOTHING BUT"*: THE FCC, INDECENCY, AND REGULATORY TRANSFORMATIONS IN THE SHADOWS

LILI LEVI**

TABLE OF CONTENTS

* Tom Lehrer, *Smut*, "That Was the Year That Was" (Warner Bros./WEA 1965) ("All books can be indecent books/Though recent books are bolder,/For filth (I'm glad to say) is in/The mind of the beholder./When correctly viewed,/Everything is lewd./(I could tell you things about Peter Pan,/And the Wizard of Oz, there's a dirty old man!").

** Professor of Law, University of Miami School of Law. I am particularly grateful to Glen Robinson, Jon Weinberg, Lyrissa Lidsky, Tom Krattenmaker, and Steve Schnably for their very helpful detailed comments. Many thanks are also due to Caroline Bradley, Adam Candeub, Charlton Copeland, Michael Froomkin, Marnie Mahoney, Ralph Shalom, and participants in the UM Half-Baked Ideas Forum for conversations, suggestions, and comments. Michael del Sontro and Sophia Montz deserve recognition for valuable research assistance. All errors are mine.

INTRODUCTION

For almost a century, American broadcasting has received a lesser degree of constitutional protection than the print medium. It has been subject to Federal Communications Commission (FCC or the Commission) regulation under an expansive public interest standard.[1] Technological change, including the growth of cable and the Internet, has increasingly intensified competitive pressures on broadcasting. To some, it has also heightened the irrationality of broadcast exceptionalism.[2] When the FCC's enhanced indecency prohibitions swept up U2 frontman Bono's fleeting expletive during a live broadcast of a music awards show,[3] broadcasters finally thought they had found a vehicle to force revolutionary changes to the second-class status of broadcast media.[4]

1. Communications Act of 1934, Pub. L. No. 73-416, § 312(b), 48 Stat. 1064, 1087 (codified as amended at 47 U.S.C. §§ 151–613 (2000)).

2. For a recent argument that technological change has completely undermined justifications for lesser First Amendment protection for broadcasting, *see generally* Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of* Red Lion, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).

3. Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 1, 4975–76 (2004).

4. *See, e.g.*, John Eggerton, *Tech Policy Groups Call on Supreme Court to Overturn* Pacifica *Decision*, BROAD. & CABLE (Nov. 14, 2011, 1:35 PM), http://www.broadcastingcable.com/

However, in the broadcasters' first challenge to the Commission's fleeting expletive policy, the Supreme Court in *FCC v. Fox Television Stations, Inc.* (*Fox I*) rejected a challenge under the Administrative Procedure Act against the Commission's process for changing its indecency policies.[5] The broadcasters' second challenge—to the Commission's indecency policy in its entirety (and potentially to the whole edifice of broadcast regulation) in *FCC v. Fox Television Stations, Inc. (Fox II)*[6]—was no more successful. On June 21, 2012, in a profoundly anti-climactic opinion, the Supreme Court refused to address the First Amendment status of broadcasters and simply absolved the petitioners of liability for indecency on narrow due process grounds of fair notice.[7]

Nevertheless, the Court's silence speaks volumes. Its reticence to reach the broader regulatory questions percolating in the *Fox* cases implicitly suggests that a majority is not unduly troubled by continuing the exceptional treatment of indecent broadcasting. The *Fox I* and *Fox II* opinions reveal a Court unlikely to overrule its prior broadcast indecency precedent—*FCC v. Pacifica Foundation*[8]—or to find the Commission's overall indecency regime unconstitutional.

At the same time, the Court in *Fox II* invited the Commission to consider its approach in light of the public interest.[9] After a lengthy silence, the FCC recently issued a Public Notice seeking comment "on whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are."[10] The Notice indicated that, in the

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article/476688-Tech_Policy_Groups_Call_on_Supreme_Court_to_Overturn_Pacifica_Decision.php; *see also* Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747, 749 (2011) (suggesting that the *Fox II* Court "will finally be in a position to address the underlying First Amendment issues" and offering "a qualified defense of the libertarian vision of free speech associated with classical liberal theory," in support of revising the First Amendment status of broadcasting); *cf.* Brief for Amici Curiae Former FCC Officials in Support of Respondents, Federal Communications Commission (FCC) v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5544813 [hereinafter Brief for Former FCC Officials].

5. FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502 (2009).

6. FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012).

7. *Id.* at 2317–18, 2220.

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

9. *Fox II*, 132 S. Ct. at 2310 ("[T]his opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements[.]").

10. *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, DA 13-581, 2013 WL 1324503 (Apr. 1, 2013) [hereinafter *2013 Indecency Notice*]. The *2013 Indecency Notice* was published in the Federal Register on April 19, 2013. 78 Fed. Reg. 23,457, 23,563 (Apr. 19,

interim, the Commission's Enforcement Bureau had focused on "egregious" cases and reduced its backlog of pending indecency complaints by seventy percent.[11] While the focus on "egregious" cases hints that indecency enforcement might not have been the former FCC Chairman's top priority,[12] the current public comment proceeding officially opens the issue for public discussion. Over 100,000 responsive comments—most urging stringent indecency enforcement—had been filed with the Commission as of June 19, 2013[13] and close to 100 groups recently sought to put congressional pressure on the FCC to oppose changes weakening

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2013). Thereafter, at the request of the National Association of Broadcasters, the Commission extended the deadline for filing comments in the proceeding. *FCC Extends Pleading Cycle for Indecency Cases Policy*, Public Notice, DA 13-1071, GN Docket No. 13-86 (May 10, 2013), *available at* http://www.fcc.gov/document/fcc-extends-pleading-cycle-indecency-cases-policy.

11. *2013 Indecency Notice*, *supra* note 10. The agency originally made an unofficial statement that the Chairman had asked the staff to focus on the most egregious cases. *See* Doug Halonen, *FCC to Back Away from a Majority of Its Indecency Complaints*, THE WRAP (Sept. 24, 2012, 10:20 AM), http://www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766. The *2013 Indecency Notice* explained that more than a million complaints had been dismissed "principally by closing pending complaints that were beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent." *2013 Indecency Notice, supra* note 10.

12. Regarding the place of indecency on former Chairman Julius Genachowski's agenda, see Kenneth Jost, *Indecency on Television*, 22 CQ RESEARCHER 967, 982 (2012) (reporting media lawyers' views that "the indecency issue ranks low on the FCC's list of priorities"); Brendan Sasso, *FCC Shows Little Interest in Policing Indecency on TV*, THE HILL (Feb. 3, 2013, 7:00 AM), http://thehill.com/blogs/hillicon-valley/technology/280679-fcc-shows-little-interest-in-policing-tv-indecency (reporting that some predict Chairman Genachowski "will leave the issue for his successor to handle"). Indeed, after a Boston Red Sox player responded to the Boston Marathon massacre by saying "this is our f—ing city, and nobody is going to dictate our freedom," at a broadcast game, Chairman Genachowski tweeted "David Ortiz spoke from the heart at today's Red Sox game. I stand with Big Papi and the people of Boston - Julius." Elizabeth Titus, *FCC Chairman Julius Genachowski Tweets on David Ortiz F-bomb*, POLITICO (Apr. 20, 2013, 8:36 PM), http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html.

In addition, the Department of Justice dismissed a case against Fox for an episode of the reality show *Married by America* featuring pixelated nudity and sexual situations in scenes of bachelor and bachelorette parties. *See* John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, BROAD. & CABLE (Sept. 21, 2012), http://www.broadcastingcable.com/article/489505-DOJ_FCC_Drop_Pursuit_of_Fox_Married_by_America_Indecency_Fine.php.

13. *See* FEDERAL COMMUNICATIONS COMMISSION ELECTRONIC COMMENT FILING SYSTEM, http://apps.fcc.gov/ecfs/comment_search/paginate?sortColumn=dateRcpt&sortDirection= (last visited July 30, 2013); David Alan Coia, *Passions Flare in Public Comments on FCC's Indecency Policy*, NEWSMAX (June 20, 2013), http://www.newsmax.com/US/fcc-indecency-policy-comments/2013/06/20/id/511020.

indecency enforcement.[14] Incidents such as those at Super Bowl XLVII—Baltimore Ravens quarterback Joe Flacco's declaration that his team's victory "is fucking awesome" and his teammate's audible "holy shit" after the game—will doubtless keep the issue on the public and administrative agenda.[15] Indecency complaints—many generated by and made into causes celèbres by conservative groups[16]—have been holding up license renewals, some for almost a decade.[17] Despite its reduced indecency backlog, the Commission is still facing hundreds of thousands of pending complaints.[18]

Unfortunately, the *2013 Indecency Notice* explicitly seeks comment only on

14. John Eggerton, *PTC, Others Push Hill to Pressure FCC on Indecency*, BROAD. & CABLE (May 8, 2013), http://www.broadcastingcable.com/article/493336-PTC_Others_Push_Hill_to_Pressure_FCC_on_Indecency.php (describing letter sent by public interest groups to committee overseeing FCC); John Eggerton, *FCC's Indecency Policy Takes Some Heat*, BROAD. & CABLE (May 1, 2013), http://www.broadcastingcable.com/article/493193-FCC_s_Indecency_Policy_Takes_Some_Heat.php (noting letter to FCC Chairman from House Republicans critical of decision to focus on "egregious" cases).

15. *See, e.g.*, John Eggerton, *Ravens On-Air Swearing Comes During Live Portion of Super Bowl Coverage*, BROAD. & CABLE (Feb. 4, 2013, 1:21 AM), http://www.broadcastingcable.com/article/491679-Ravens_On_Air_Swearing_Comes_During_Live_Portion_of_Super_Bowl_Coverage.php; Brendan Sasso, *Parents Group Urges FCC to Crack Down on CBS over Super Bowl Profanity*, THE HILL (Feb. 4, 2013, 1:09 PM), http://thehill.com/blogs/hillicon-valley/technology/280871-parents-group-urges-fcc-to-crack-down-on-cbs-over-super-bowl-profanity. Complaints were also raised with the FCC over rapper M.I.A.'s obscene gesture during the halftime show of Super Bowl XLVI in 2012; Amy Schatz & Christopher S. Stewart, *Super Bowl's Big TV Score*, WALL ST. J. (Feb. 7, 2012), http://online.wsj.com/article/SB10001424052970204369404577206571361934132.html.

16. *See* Lili Levi, *The FCC's Regulation of Indecency*, FIRST REPORTS, 2008 FIRST AMEND. CTR., 1, 4, 28, 36, 45 [hereinafter Levi, FIRST REPORTS]; Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM. L.J. 19 (2008), http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf [hereinafter Levi, *Enhancing Agency Power*]; *see also Broadcast Indecency*, PARENTS TELEVISION COUNCIL (PTC), http://w2.parentstv.org/main/Campaigns/Indecency.aspx (last visited July 30, 2013).

17. *See, e.g.*, David Oxenford, *As License Renewal Cycle Approaches - Dealing with Last Cycle's Applications Held Up by Indecency Complaints*, BROAD. L. BLOG (Mar. 2, 2011, 6:43 PM), http://www.broadcastlawblog.com/2011/03/articles/indecency/as-license-renewal-cycle-approaches-dealing-with-last-cycles-applications-held-up-by-indecency-complaints/.

18. Former Commissioner McDowell testified before a congressional committee that the agency had reduced its pending backlog of approximately 1.5 million complaints against 9,700 programs, and had remaining 500,000 complaints about 5,500 programs. *Hearing on Oversight of the Fed. Commc'ns Comm'n, Before the Subcomm. on Commc'ns and Tech. of the H. Comm. on Energy and Commerce*,, 112th Cong. 7 (2012) (statement of Commissioner Robert M. McDowell, FCC). More recently, the *2013 Indecency Notice*, *supra* note 10, asserted a seventy percent reduction in the Commission's indecency backlog, leaving thirty percent of the complaints in play. The *Notice* also explicitly stated that the Enforcement Bureau was "actively investigating egregious indecency cases and [would] continue to do so." *Id.*

the appropriate treatment of fleeting expletives and nudity.[19] Both judicial and scholarly attention has focused on the Commission's about-face regarding the acceptability of fleeting expletives.[20] The Commission, however, should take this opportunity to assess its *overall* indecency regime.[21] The first step in that assessment must be to reveal the fundamental—indeed, revolutionary—ways in which the Commission's approach to the regulation of indecency has changed in the past decade. Indeed, the changes in doctrine, process, context, and regulatory justifications have been far more extensive than were either recognized by the Supreme Court or generally perceived in scholarship.

First, the Commission has significantly extended its regulation of broadcast indecency both substantively and procedurally.[22] From procedural changes designed to lessen complainants' burdens, to million-dollar fines, to turning contextual analysis from a shield into a sword, to the development of what amounts to liability for negligent indecency, the agency's indecency regime has extended far beyond the fleeting expletives

19. *2013 Indecency Notice*, *supra* note 10.

20. A Westlaw search on January 17, 2013 revealed over 1,200 articles mentioning "FCC" and "indecency." For a sampling of post-2004 scholarship on indecency, see, for example, CHRISTOPHER M. FAIRMAN, FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES (2009); Jerome A. Barron, FCC v. Fox Television Stations *and the FCC's New Fleeting Expletive Policy*, 62 FED. COMM. L.J. 567 (2010); Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with Its President, Tim Winter*, 33 HASTINGS COMM. & ENT. L.J. 293, 312 (2011); Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for* Pacifica v. FCC, 3 CHARLOTTE L. REV. 469 (2012); W. Wat Hopkins, *When Does F*** Not Mean F***?:* FCC v. Fox Television Stations *and a Call for Protecting Emotive Speech*, 64 FED. COMM. L.J. 1 (2011); Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631 (2013); Jessica C. Collins, Note, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225, 1244 (2010).

21. Statement of Commissioner McDowell, *supra* note 18 ("We owe it to American families and the broadcast licensees involved to carry out our statutory duties by resolving the remaining complaints with all deliberate speed. Going forward, the Commission must ensure that its indecency standards are clear, that broadcasters have the requisite notice and that Americans, especially parents such as myself, are secure in their knowledge of what content is allowed to be broadcast."); *see also* FCC COMMISSIONER AJIT PAI ON THE U.S. SUPREME COURT'S DECISION (FCC V. FOX TELEVISION STATIONS, INC.), *available at* http://www.fcc.gov/document/fcc-commissioner-ajit-pai-us-supreme-courts-decision (last visited July 30, 2013) ("Today's narrow decision by the U.S. Supreme Court does not call into question the Commission's overall indecency enforcement authority or the constitutionality of the Commission's current indecency policy. Rather, it highlights the need for the Commission to make its policy clear.").

22. *See, e.g.*, Levi, FIRST REPORTS, *supra* note 16, at 17–27.

and instances of nudity at issue in the *Fox* cases.

Second, a bird's-eye view reveals that the Commission's indecency regime has ripple effects far beyond its official scope. Voluntary commitments by broadcasters to "zero tolerance" indecency regimes, as part of negotiated deals with the Commission, have effectively outsourced the agency's investigative and enforcement roles.[23] The Commission's enhanced attention to indecency has doubtlessly lent weight to pressures from interest groups on advertisers, resulting in at least some sponsor-based censorship.[24] Moreover, even though the Commission has not asserted jurisdiction to enforce its indecency rules beyond broadcasting, the reality of content distribution in media today, as well as the FCC's own must-carry rules, might well lead to their indirect impact in non-broadcast media. That most of these developments have evaded judicial review is itself notable and troubling.

Third, the FCC's articulated rationales for regulating indecency—assisting parents and promoting an independent governmental interest in the protection of children—have also been quietly transformed. The rationale of assisting parents has shifted from temporal channeling designed to eliminate daytime indecency to "moral zoning" designed to provide a safe media space. The protection of children rationale has shifted focus from protecting individual children's psyches to the prevention of broader *social* harm. Most notably, the Commission has used the indecency context as a platform to float a proto-contractual regulatory rationale whose impact could be felt far beyond indecency regulation.

In total, the doctrinal and justificatory changes amount to a *sub rosa* transformation in FCC regulation. This Article argues that, whatever its constitutional status, this transformation is deeply problematic as a matter of policy. The FCC's substantive changes have quietly increased unaccountable administrative discretion to define aesthetic and journalistic necessity. The agency has conscripted broadcasters' own standards to bootstrap liability and adopted a presumptively inculpatory approach to the contextual assessment of indecency. The new regime has sacrificed expressive freedom in the service of a national cultural policy insulated from judicial review. The procedural changes have amplified the impact of pressure by advocacy groups, structurally increased the likelihood of indecency findings, and significantly heightened the chilling effect of indecency regulation. The Commission's penchant for resolution by

23. *Id.* at 32 (citing to Clear Channel "zero tolerance" policy).

24. *See, e.g.*, Press Release, Parents Television Council, PTC Releases Annual Ranking of Best and Worst TV Sponsors (Nov. 19, 2012), http://w2.parentstv.org/Main/News/Detail.aspx?docID=2609.

settlement has imposed a private indecency regime more extensive than one that could legitimately be adopted regulatorily, while simultaneously leaving the public at the mercy of broadcasters' presumably changeable decisions on private enforcement.

The Commission's approach is likely to entail some real and important social costs. Perhaps most importantly, today's indecency system is likely to chill the public interest documentary programming of public radio and television.[25] Given the public benefit of programming created by entities unhampered by profit considerations, such a chilling effect on the already-beleaguered public broadcasting system is particularly troubling. Even on the commercial side, it is likely that at least some small-market stations will choose to avoid live local programming—such as news and sports—due to the expense of time-delay technology. Such a result cuts against the FCC's touted commitments to localism.

Similarly, the Commission's revised regulatory justifications raise more questions than they answer. Touted as a moderating move responsive to technological reality today, the safe-zone approach is in fact an unrealistic attempt to wrest victory from the jaws of technological defeat. The Commission has not sufficiently addressed whether the notion of broadcast safe zones still makes sense in light of program-delivery convergence, and, if it does, whether less editorially invasive approaches could be cultivated through technological means. As for the commitment to forestall social harms, the Commission's approach is not, as touted, either neutral or truly grounded on protecting children. Instead, it reflects the government engaging in cultural regulation—choosing a particular side in contested moral and political terrain. This choice is justified neither by concerns about government endorsement nor by a focus on the educative role of television. The Commission's attempt to send a symbolic message about appropriate social discourse is either ineffective or, where effective, unduly captured by the views of narrow ideological interests. Finally, the Commission's use of indecency as the platform for revival of a proto-

25. There are lessons to be learned, for example, from the fact that PBS advised its producers to self-censor after the FCC found indecent *The Blues: Godfathers and Sons*, a Martin Scorsese documentary on blues musicians. Notices of Apparent Liability and Memorandum Opinion and Order, *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd. 2664, 2683 ¶ 72 (2006); 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, 257 (2008). Only fourteen of 300 public television stations aired an unedited documentary on the Iraq war because of soldiers swearing under fire. *See* J. Gregory Sidak & Hal J. Singer, *Evaluating Market Power with Two-Sided Demand and Preemptive Offers to Dissipate Monopoly Rent: Lessons for High-Technology Industries from the Antitrust Division's Approval of the XM–Sirius Satellite Radio Merger*, 4 J. COMPETITION L. & ECON. 697, 718 (2008).

contractual justification for regulation demonstrates the dangers of such a justification. The rationale fails to serve as an independent regulatory ground distinct from the careworn notions of broadcast scarcity and pervasiveness. It also lacks any inherent boundary and implicates concerns underlying the doctrine of unconstitutional conditions. That the government's articulation of this regulatory justification garnered apparent approval from some members of the Court in the *Fox* litigation raises the unfortunate possibility that the justification might be extended even beyond indecency.

The Commission might respond that its regulatory stance will remain reasonable in practice and that the enlargement of its powers in the abstract is not likely to have much practical importance—that its shadow regulatory transformations will remain in the shadows. But this subjects broadcasters to the potentially changeable whims of the censor. Broadcasters claim that deregulation will not lead to increased indecency on the airwaves. Yet the effectiveness of broadcaster self-regulation doubtless depends on the following factors: the competitive conditions in the industry as a whole, including cable; the broadcasters' assessments of the FCC's power and appetite for enforcement at any given point; and the effectiveness over time of sponsor boycotts. Regardless of broadcaster and FCC promises, it is far from clear that the market will effectively constrain either.

In sum, the regulatory regime for indecency constitutes bad communications policy. Yet wholly deregulatory solutions advocated by broadcasters and some free speech proponents are not politically viable. This does not necessitate maintenance of the *status quo*, however. Instead, the FCC should return to a policy of restraint. Engaging in an exploration of the second-best, this Article makes three categories of suggestions in that spirit. It does so by focusing on each of the three central players in the indecency regulatory context—broadcasters, the FCC, and consumers.

First, with a view to minimizing the chilling effect of indecency rule violations for broadcasters, this Article proposes that the Commission revise its forfeiture policies and return to proportionality in the amounts of forfeitures assessed for indecency violations.

Second, this Article recommends institutional adjustments designed to improve the FCC's internal processes regarding indecency. Procedurally, the Commission should: 1) improve and make more transparent the ways in which it processes indecency complaints; 2) explore a clear rule regarding how to count and report complaints; and 3) revise its approach to indecency consent decrees. With regard to substantive standards, this Article recommends that the FCC consider: 1) adopting a presumption of no liability in close cases; 2) reversing the new "negligent indecency" approach and the broadcaster standards bootstrap; 3) dismissing complaints

not submitted by actual program viewers; 4) using context to exculpate; 5) adopting a news exemption (or reversing news-related changes under the current standards); 6) limiting the aesthetic necessity inquiry; and 7) considering economic hardship and whether the broadcaster is a public station.

Third, with a view to consumer empowerment, this Article suggests that the Commission explore the viability of methods designed to enhance public knowledge and transparency. Recognizing that consumer-oriented recommendations might ultimately be less effective than the other two categories of proposals, this Article nevertheless pushes the Commission to resolve its long-pending fact-finding inquiry on ratings and blocking mechanisms. It also suggests that greater transparency with respect to the Monitoring Board that assesses the existing parental TV guidelines could bear fruit.

These suggestions might lead a reader to wonder whether there is not an inevitable tension between critiquing an administrative policy and making recommendations for increasing its efficiency. If the recommendations work, won't they ill-advisedly improve the enforcement of an untenable policy? If, on the other hand, they are inconsequential, then why bother? This Article attempts to straddle this tension because the first-best result is currently unlikely. In selecting among second-best recommendations, however, this Article does not seek simply to increase the efficiency of the indecency system. Instead, it attempts to find ways to improve the regime, lessen its coercive impact on speech, and promote regulatory reticence.

Section I sketches out the history of the FCC's approach to indecency on the air, describes the Supreme Court's responses—from *Pacifica* to *Fox I* and *II*, and attempts to assess the implications of what the Court did and did not say in its most recent decisions. Section II details not only the latest, most obvious policy changes addressed by the Supreme Court in the *Fox* cases but also the far less noted (and potentially more consequential) procedural and substantive changes to the FCC's indecency scheme. Section III reveals the fundamental changes in the FCC's regulatory justifications for its indecency regime and lays out the complex political picture against which these evolutions have taken place. Section IV recommends a policy of FCC restraint on indecency enforcement and makes practical recommendations to serve as directions for the new restraint—guided by the goals of reducing the chilling effect of indecency enforcement on broadcasters, improving the indecency regulation process at the FCC, and empowering parents.

I. THE FCC'S INDECENCY REGIME

The Commission is authorized to regulate broadcast indecency under the criminal code's Section 1464.[26] It does so by channeling to late-night hours "material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[27]

A finding of broadcast indecency can have significant consequences. The FCC can revoke station licenses, reject renewal applications, grant short-term license renewals, issue warnings and cease-and-desist orders, and impose monetary fines for violation of § 1464.[28] Violation of § 1464 can also lead to criminal penalties.[29]

A. History of Indecency Regulation

The FCC has sought to regulate broadcast indecency since the 1920s.[30] At the beginning, the Commission operated informally, chastising broadcasters for indelicate programming via letters using terms of ringing condemnation.[31] NBC's banning of Mae West from the air for a suggestive reading of a radio skit indicates that such informal reprimands were sufficient to maintain decorum on the air.[32] The Commission's informal

26. Section 1464 provides that "whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (2006). The statute does not define the terms "obscene, indecent, or profane," leaving that obligation to the FCC.

27. Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8000 ¶ 4 (2001) [hereinafter *2001 Policy Statement*] (identifying 10 PM to 6 AM as the safe harbor for broadcast indecency).

28. As the Court pointed out in *Fox II*, a finding by the FCC that a licensee has violated the agency's indecency rules can also have significant reputational harms for broadcasters. *See Fox II*, 132 S. Ct. 2307, 2319 (2012).

29. *See* 47 U.S.C. § 501 (2006) (describing criminal penalties for willful violations of the Communications Act).

30. For descriptions of the history of indecency regulation, see, for example, FAIRMAN, *supra* note 20; MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 89–108 (2001); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 103–141 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 162–190 (1987); WILLIAM RAY, THE UPS AND DOWNS OF RADIO-TV REGULATION (1990); Levi, FIRST REPORTS, *supra* note 16, at 10–14; Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 86–97 (1992) [hereinafter Levi, *The Hard Case*].

31. There is no evidence of formal enforcement actions. Levi, FIRST REPORTS, *supra* note16, at 10–11.

32. The transcript of the skit—about Adam and Eve in the Garden of Eden—had passed muster with the network's program censors. When it aired on the popular Edgar

directives were paralleled by codes of conduct adopted by the National Association of Broadcasters prohibiting the broadcast of "offensive language, vulgarity, illicit sexual relations, sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience."[33] Broadcaster self-regulation and informal FCC pronouncements apparently kept radio indecency in check until the 1970s.

In 1970, however, the FCC was faced with complaints about a small, non-profit Philadelphia station's airing of a pre-recorded interview in which Grateful Dead frontman Jerry Garcia peppered his answers with expletives.[34] Hoping to develop a test case, the Commission imposed a Notice of Apparent Liability for the broadcast on the basis of a broad definition of indecency that it had explicitly adopted for the first time.[35] However, because the station chose not to contest the Commission's action in the courts and simply paid the fine, judicial review of the Commission's developing approach to indecency had to wait until nonprofit Pacifica Foundation station WBAI (FM) aired the live show of comedian George Carlin's 12-minute "Filthy Words" monologue—with its repeated litany of "words you couldn't say on the public . . . airwaves . . . the ones you definitely wouldn't say, ever"—at 2:00 PM on October 30, 1973.[36]

Complaining that "the problem [of indecent broadcasts] has not abated and the standards set forth [in *WGBH*, the Jerry Garcia case] apparently have failed to resolve the issue,"[37] the Commission saw the Pacifica broadcast as an opportunity to clarify the extent of its jurisdiction and ensure its regulatory power.[38] In response to a single complaint by a

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Bergen show, however, Mae West's insinuating delivery highlighted all the innuendo in the text. Complaints were made to the FCC, and the Commission wrote the network a strongly worded reprimand. Ms. West was not to appear on NBC stations for decades thereafter. *See generally* Steve Craig, *Out of Eden: The Legion of Decency, the FCC, and Mae West's 1937 Appearance on* The Chase & Sanborn Hour, 13 J. OF RADIO STUD. 232 (2006). Private industry regulations on broadcast content, however, began to take hold in the 1950s and 1960s. *See* Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463, 1481–82; *see also* HEINS, *supra* note 30.

33. HEINS, *supra* note 30 at 92; Brown & Candeub, *supra* note 32, at 1483 (citing BRUCE A. LINTON, SELF-REGULATION IN BROADCASTING 11–15 (1967)).

34. Notice of Apparent Liability, *In re* WUHY-FM, Eastern Education Radio, 4548 Market Street, Philadelphia, Pa., 24 F.C.C.2d 408, 409 ¶ 3 (1970).

35. Levi, *The Hard Case*, *supra* note 30, at 88.

36. FCC v. Pacifica Found., 438 U.S. 726, 729–30 (1978).

37. Memorandum Opinion and Order, *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94, 94 ¶ 2 (1975) [hereinafter *Pacifica Order*]. The agency characterized the Garcia broadcast as only one of an increasing number of complaints of broadcast indecency. *Id.*

38. *See* Adam M. Samaha, *The Story of* FCC v. Pacifica Foundation *(and Its Second Life)*, *in* FIRST AMENDMENT STORIES (Richard W. Garnett & Andrew Koppelman eds., 2012).

member of Morality in Media,[39] the Commission found that WBAI's broadcast of the Carlin show had violated § 1464.[40] Defining "indecency" as extending beyond obscenity, the Commission adopted the patent offensiveness test—whereby "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"[41] would be deemed indecent under the statute. Nevertheless, the Commission chose not to impose punitive sanctions in the Pacifica Order (and prior § 1464 cases) and actively sought judicial review.[42] The U.S. Court of Appeals for the D.C. Circuit reversed the FCC, holding that its action constituted censorship prohibited by § 326 of the Communications Act of 1934.[43]

The Supreme Court reversed the D.C. Circuit and narrowly upheld the agency's authority to channel indecency against First Amendment challenge in *FCC v. Pacifica Foundation* in 1978.[44] Reversing the D.C. Circuit's conclusion that the FCC order violated the anti-censorship provision in § 326 of the Communications Act of 1934,[45] the Court upheld the Commission's indecency policy as applied in the Carlin case. The *Pacifica* Court spoke of the narrowness of its holding,[46] but it also explained the lesser constitutional status of broadcasting. Because broadcasting had a "uniquely pervasive presence"[47] and because it was "uniquely accessible to children,"[48] regulation that channeled speech to late-night hours should not be deemed inconsistent with the First Amendment.

Despite the FCC's ultimate win in *Pacifica*, the Commission retreated

39. *See* Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 3 MICH. ST. L. REV. 911, 921 (2005) (noting that the *Pacifica* complainant was apparently a member of the National Planning Board of conservative interest group Morality in Media); *see also* KRATTENMAKER & POWE, *supra* note 30 (characterizing the complaint as possibly part of a political strategy and suggesting that the complainant may not in fact even have heard the broadcast).

40. *Pacifica Order*, 56 F.C.C.2d 94.

41. *Id.* at 98 ¶ 11.

42. Robert Corn-Revere, FCC v. Fox Television Stations, Inc.*: Awaiting the Next Act*, 2008–2009 CATO SUP. CT. REV. 295, 301 (2008).

43. *Pacifica Order*, 56 F.C.C.2d 94, *rev'd sub nom.* Pacifica Found. v. FCC, 556 F.2d 9 (D.C. Cir. 1977). For an extensive description of the *Pacifica* story, see generally Angela J. Campbell, Pacifica *Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195 (2010).

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

45. *FCC v. Pacifica*, 556 F.2d 9.

46. *FCC v. Pacifica*, 438 U.S. at 750.

47. *Id.* at 748.

48. *Id.* at 749; *see also* Brief for Former FCC Officials, *supra* note 4, at 6–8.

immediately thereafter, and chose to use its regulatory power over indecency sparingly for the next decade.[49] It simply focused on pre-10 PM broadcast uses of the "seven dirty words" identified in *Pacifica*.[50] This was consistent with the Commission's announced policy of restraint even in the *Pacifica* case, where the agency stated that it was concerned only with "clear-cut, flagrant cases."[51]

The late 1980s led to a change. Conservative groups and White House interest, as well as the development of "shock jock" radio programming, put pressure on the Commission to expand indecency enforcement beyond the seven dirty words.[52] In three decisions, the Commission revealed that it would begin to enforce a "generic" definition of indecency harking back to the original *Pacifica* administrative decision.[53] The agency also established midnight—as opposed to 10 PM—as the start of the indecency safe harbor.[54] Despite its definitional expansion beyond the seven dirty words,

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49. Corn-Revere, *supra* note 42, at 305. Indeed, the Commission itself had argued to the Court in the *Pacifica* appeal that its decision should be read narrowly. *See id.* at 303 n.39 (citing Brief for FCC, *FCC v. Pacifica*, 438 U.S. 726 (No. 77-528), 1978 WL 206838, at *44). The Commission expressed its intention "strictly to observe the narrowness of the *Pacifica* holding." Memorandum Opinion and Order, *In re* Application of WGBH Educational Foundation, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978).

50. *See, e.g.*, Levi, FIRST REPORTS, *supra* note 16, at 11, n.18; Levi, *The Hard Case*, *supra* note 30, at 90–91; *see also* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 949 (1998) ("[W]hat followed *Pacifica* was less a reign of terror than a season of silliness.").

51. *See, e.g.*, Memorandum Opinion and Order, *In re* "Petition for Clarification or Reconsideration" of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM), New York, N.Y., 59 F.C.C.2d 892, 893 n.1 (1976).

52. *See, e.g.*, Levi, FIRST REPORTS, *supra* note 16, at 11–12 and sources cited therein.

53. Memorandum Opinion and Order, *In re* Pacifica Foundation, Inc., Los Angeles, California, 2 FCC Rcd. 2698 (1987) [hereinafter *Pacifica, Los Angeles Order*], *recons. granted sub nom.* Memorandum Opinion and Order, *In re* Infinity Broadcasting Corporation of Pennsylvania (*Infinity Order A*), 3 FCC Rcd. 930 (1987), *aff'd in part*, *vacated in part sub nom.* Action for Children's Television v. FCC (*ACT*), 852 F.2d 1332 (D.C. Cir. 1988); Memorandum Opinion and Order, *In re* Regents of the University of California, Licensee of KCSB-FM, Santa Barbara, California, 2 FCC Rcd. 2703 (1987), *aff'd in part*, *vacated in part sub nom. ACT*, 852 F.2d 1332; Memorandum Opinion and Order, *In re* Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd. 2705 (1987), *aff'd in part*, *vacated in part sub nom. ACT*, 852 F.2d 1332. *See also* Brown & Candeub, *supra* note 32, at 1488–90. The Commission explained that the three cases simply warned the broadcasters, without including fines, because the Commission was announcing new standards to clarify when it would exercise its enforcement authority. Public Notice, *New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987).

54. *Infinity Order A*, 3 FCC Rcd. 930, *aff'd in part*, *vacated in part sub nom. Action for Children's Television v. FCC* [*ACT I*], 852 F.2d 1332 (1988). In *ACT I*, the D.C. Circuit Court of Appeals rejected the assertion that this change was overly broad and unconstitutionally vague. *Id.* at 1338–40. The court concluded that the Commission's indecency definition

however, the Commission issued assurances that it would nevertheless wield its regulatory power with restraint.[55] The D.C. Circuit's approval of the Commission's revised approach to indecency in the 1980s appeared to hinge on the agency's continuing regulatory moderation.[56]

Indeed, in the following decade, television programming escaped indecency regulation altogether,[57] and sex-themed programming flourished on shock radio so long as it did not go as far as the antics of the infamous Howard Stern. The Commission released an industry guidance document on indecency in 2001, describing the two-step inquiry required in § 1464 cases.[58] Despite the language of the 1987 decisions announcing increased indecency enforcement, and the extensive illustrative examples in the 2001 Policy Guidance document, the period from 1987 to 2001 only led to the issuance of fifty-two fines for indecency.[59] Other than a $1.7 million dollar settlement by Infinity Broadcasting in exchange for the dismissal of then-pending actions against Howard Stern radio programming,[60] fines for

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had already passed constitutional muster in the Supreme Court's *Pacifica* decision and that vagueness was inherent in any attempt to define indecency. The court remanded the case so that the Commission could further support the particular timeframe it had chosen for the indecency "safe harbor." *Id.* at 1341, 1344. Congress responded by adopting a requirement that the Commission enforce its indecency rules twenty-four hours per day. On appeal, the D.C. Circuit struck down the regulations adopted by the FCC in response to the twenty-four hour ban. Action for Children's Television v. FCC (*ACT II*), 932 F.2d 1504 (D.C. Cir. 1991). In further response, Congress enacted the Public Telecommunications Act of 1992, pursuant to which the FCC was required to establish a safe harbor from midnight to 6 AM for indecency (except for public broadcasters, whose safe harbor would begin at 10 PM). The D.C. Circuit held in the third of the ACT cases—Action for Children's Television v. FCC (*ACT III*)—that even though the midnight to 6 AM safe harbor could pass the First Amendment narrow tailoring requirement standing alone, it would have to be struck down because of the public broadcaster exception. Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc).

55. *See, e.g.*, FAIRMAN, *supra* note 20; Levi, FIRST REPORTS, *supra* note 16, at 1–2, 11, 43, 55 n.18.

56. The court in *ACT I* specifically relied upon the Commission's continued commitment to a "restrained enforcement policy." *ACT I*, 852 F.2d at 1340 n.14; *see also* Brief for Former FCC Officials, *supra* note 4, at 9 ("[T]he [*ACT I*] court was alert to the dangers that a policy of reining in a small number of broadcast provocateurs could easily become a vehicle for an unconstitutional morals crusade against the entire industry.").

57. Brown & Candeub, *supra* note 32, at 1493.

58. *2001 Policy Statement*, *supra* note 27.

59. See Brown & Candeub, *supra* note 32, at 1492–93 n.180 and sources cited therein.

60. Until he left terrestrial radio for satellite radio, Stern used his program to attack the FCC and contend that he had been punished by indecency fines for having taken political views unpopular with the government. *See, e.g.*, Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look to Crackdown on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167, 188–89 & n.107 (2006); Anne Marie Squeo, *FCC to Penalize Clear Channel for Stern Show*, WALL ST. J., Apr. 8, 2004, at B1; Editorial, *The Silent Media*, BROAD. &

indecent programming ranged only from $25,500 to $49,000 during the second Clinton Administration.[61] This led some Commission-watchers to characterize the agency's pre-2003 indecency efforts as quite restrained.[62]

By contrast, 2003 became a watershed year in indecency regulation—beginning the most aggressive indecency enforcement effort in the FCC's history.[63] During the 2002 Billboard Music Awards program, Cher had responded to receiving an award by saying: "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em."[64] In the 2003 version of the show, award presenter Nicole Richie, star of the then-airing television series *The Simple Life*, quipped: "Have you ever tried to get cow [shit] out of a Prada purse? It's not so [fucking] simple."[65] These incidents, as well as Janet Jackson's infamous millisecond "wardrobe reveal" during the 2004 Super Bowl telecast,[66] led to waves of indecency complaints filed by members of the Parents Television Council (PTC) advocacy group.[67] Although the FCC staff had previously indicated that fleeting or isolated expletives would not be deemed to violate the

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CABLE (Apr. 12, 2004), http://www.broadcastingcable.com/article/CA409709.html (describing Stern's claim that the FCC focused on him because of his opposition to President Bush); *see also* Sarah McBride & Joe Flint, *Radio's Howard Stern Leaps to Satellite in $500 Million Deal*, WALL ST. J., Oct. 7, 2004, at A1.

61. Brown & Candeub, *supra* note 32, at 1493; *see also* John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines'*, CTR. FOR PUB. INTEGRITY (Apr. 9, 2004, 12:00 AM), http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200.

62. *See, e.g.*, Brief of Former FCC Officials, *supra* note 4, at 5–9; CBS Corp. v. FCC, No. 06-3575 (3d Cir. Nov. 29, 2006). These analysts contend that while the agency did enforce its indecency rules after 1987, the Commission's actions were directed to the *most* provocative kind of programming by "rogue" broadcasters at the time. *Id*. at 9.

63. Candeub, *supra* note 39, at 922–23 and sources cited therein; *see also* Notice of Apparent Liability for Forfeiture, *In re* Clear Channel Broadcasting Licenses, Inc., Licensee of Stations WPLA(FM), Callahan, Florida, and WCKT(FM), Port Charlotte, Florida, 19 FCC Rcd. 1768, 1815 (2004) [hereinafter *Clear Channel Notice*] (providing the separate statement of Chairman Michael K. Powell).

64. *Fox I*, 556 U.S. 502, 510 (2009). For an extended factual description of the cases at issue, see *id.* at 511.

65. *Id.* at 510.

66. CBS Corp. v. FCC, 535 F.3d 167, 172 (3rd Cir. 2008) (observing that the image of Jackson's bare breast lasted one-sixteenth of one second).

67. *Id.* (describing claims about complaints); *see also* Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1740–41 (2007) (explaining that 217 of the 234 complaints initiated were by the PTC after an expletive was said at the 2003 Golden Globe Awards); Levi, FIRST REPORTS, *supra* note 16, at 28–29 (reiterating that most of the complaints given to the FCC are generated by the PTC); Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMMLAW CONSPECTUS 431, 460 (2007) (indicating that the decrease in complaints written by the PTC led to the decline of complaints received by the FCC in 2005).

agency's indecency policy,[68] the Commission reversed course in 2004 and found actionably indecent U2 frontman Bono's comment during the Golden Globes Awards program that receiving his prize was "really, really fucking brilliant."[69]

The change in policy articulated in the *Golden Globes* order then served as the basis for the Commission's issuance of notices of apparent liability to Fox and those of its affiliates that had aired the Billboard Music Awards shows of 2002 and 2003 featuring the Cher and Nicole Richie expletives.[70] The Commission issued an Omnibus Order resolving multiple indecency complaints against television broadcasters in an effort to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard."[71] CBS's broadcast of the 2004 Super Bowl program triggered a $550,000 forfeiture in 2006 for direct and vicarious liability under § 1464.[72]

The Commission characterizes its indecency analysis as requiring "at least two fundamental determinations."[73] First, the agency determines whether the challenged material fits into the proscribable category of sexual

68. *Fox I*, 556 U.S. at 508. Staff guidance until 2004 had suggested that fleeting expletives needed to be repetitive in order to trigger sanctions under the indecency policy.

69. Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4982 ¶ 17 (2004); *see also id*. at 4980 (reversing its own Enforcement Bureau's Golden Globes order and overruling its prior approach to the permissibility of broadcasts of fleeting expletives). The Commission's Enforcement Bureau originally dismissed the Bono case because, under existing precedent, fleeting and isolated expletives were not deemed to violate § 1464 and the star's utterance did not describe or depict sexual or excretory activities or organs. Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19,859, 19,861–62 (2003). Media watchers explained the Commission's reversal as responding to "significant pressure from Congress." Corn-Revere, *supra* note 42, at 308.

70. Notices of Apparent Liability and Memorandum Opinion and Order, *In Re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd. 2664 (2006) [hereinafter *Omnibus Order*].

71. *Id.* at 2665 ¶ 2. In addition to the Cher and Nicole Richie instances, the Omnibus Order found indecent and profane ABC's broadcast of scripted expletives in various episodes of "NYPD Blue" and a CBS broadcast of "The Early Show" in which a guest used an unscripted expletive during a live interview. *Id*. at 2690–99 ¶¶ 101, 112 n.164, 125, 137. As in the Golden Globes, the Commission did not issue forfeiture orders against any of the licensees because the offending broadcasts occurred when then-existing precedent permitting fleeting expletives would have permitted the broadcasts. *Id.* at 2692–2700 ¶¶ 111, 124, 136, 145.

72. Forfeiture Order, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 2760 (2006) [hereinafter *Super Bowl Show*].

73. *2001 Policy Statement, supra* note 27, at 8002 ¶ 7.

or excretory depictions or descriptions.[74] Second, if the first prong has led to an affirmative finding, the agency determines whether "the broadcast [is] *patently offensive* as measured by contemporary community standards for the broadcast medium."[75] This assessment is consistently said to be contextual.[76] Moreover, the Commission asserts that "subject matter alone does not render material indecent."[77]

In engaging in its "highly fact-specific"[78] contextual analysis of patent offensiveness, the FCC looks at three "principal factors":

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[79]

The Commission "takes into account the manner and purpose of broadcast material. For example, material that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience."[80] In examining these three factors, the Commission "weigh[s] and balance[s] them on a case-by-case basis . . . because '[e]ach indecency case presents its own particular mix of these, and possibly, other factors.'"[81]

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74. *Id.* (stating that the material "must fall within the subject matter scope of [the] indecency definition – that is, the material must describe or depict sexual or excretory organs or activities.").

75. *Id.* at ¶ 8.

76. The Commission's 2001 Policy Statement states that the overall context of the broadcast in which the disputed material appeared is critical. *Id.* at ¶ 9.

77. *Omnibus Order*, *supra* note 70, at 2708 ¶ 187; *see also 2001 Policy Statement*, *supra* note 27, at 8011 ¶ 21 (stressing the importance of context when determining whether repetitive vulgar terms should be deemed indecent).

78. *2001 Policy Statement*, *supra* note 27, at 8003 ¶ 9.

79. *Id.* at ¶ 10 (emphasis removed); *see also* Order on Reconsideration, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 6653, 6654–6655 ¶ 4 (2006) [hereinafter *Super Bowl Show on Reconsideration*] (describing the three-part analysis as it relates to the Timberlake and Jackson halftime show).

80. Notice of Apparent Liability for Forfeiture, *In re* Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace" 21 FCC Rcd. 2732, 2734 ¶ 7 (2006) [hereinafter *Without a Trace*]. The Commission has previously explained that "the more explicit or graphic the description or depiction, the greater the likelihood that the material will be considered patently offensive." *2001 Policy Statement*, 16 FCC Rcd. at 8003 ¶12.

81. *Super Bowl Show*, 21 FCC Rcd. 2760, 2763 ¶ 5; *see also Super Bowl Show on Reconsideration*, 21 FCC Rcd. at 6654–55 ¶ 4 (articulating that in this case the first and third factors outweighed the second factor). Although the Commission does not explain in advance how this is to be assessed, it asserts that "in particular cases, one or two of the

Unlike obscenity, the patent offensiveness standard for indecency is said to be a national standard that focuses on the "average broadcast viewer or listener."[82] The Commission relies neither on experts nor on program popularity in order to define the views of the average audience member. Instead, it claims to make its patent offensiveness decisions on its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[83]

Despite initial statements indicating distaste for content regulation, Republican FCC Chairman Michael Powell presided over the imposition of fines totaling $7,928,080 for broadcast indecency in 2004.[84] The succeeding FCC Chairman, Kevin Martin, made explicit the fact that the elimination of indecency during primetime hours was a key component of his FCC policy.[85] Notably, regulation of indecency became a unifying goal for both Democratic and Republican Commissioners.[86] There were also

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factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency." *Without a Trace*, 21 FCC Rcd. at 2734 ¶ 5; *see also 2001 Policy Statement*, 16 FCC Rcd. at 8003 ¶ 10 (emphasizing that each factor must be balanced and that typically one factor alone will not be determinative of an indecency finding).

82. According to the Commission, "the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant." *2001 Policy Statement*, 16 FCC Rcd. at 8002 ¶ 8; *see also Super Bowl Show on Reconsideration*, 21 FCC Rcd. at 6655 ¶ 4 (finding the display of a woman's breast to be graphic and explicit to the average viewer).

83. Memorandum Opinion and Order, *In re* Infinity Radio License, Inc., 19 FCC Rcd. 5022, 5026 ¶ 12 (2004). The Commission has explicitly rejected reliance on polls: "[i]n determining whether material is patently offensive, we do not rely on polls, but instead apply the three-pronged contextual analysis described in the text." *Super Bowl Show*, 21 FCC Rcd. at 2762 ¶ 5 n.17; *see also Super Bowl Show on Reconsideration*, 21 FCC Rcd. at 6658–59 ¶ 14 (rejecting CBS's use of polls in determining what the average viewer finds offensive).

84. *See* Dunbar, *supra* note 61 (noting that, as of April 2004, the FCC imposed six fines that totaled $1.6 million); *see also* Fairman, *supra* note 67, at 1741 (explaining that Chairman Powell found the word fuck "coarse, abhorrent, and profane"); Reed Hundt, *Regulating Indecency: The Federal Communication Commission's Threat to the First Amendment*, 2005 DUKE L. & TECH. REV. ¶ 6 (quoting remarks by Chairman Powell before the Media Institute, which called for a single standard in First Amendment analysis).

85. Bill McConnell, *Kevin Martin's Challenge: New FCC Chairman Could Pose Problem for Big Media*, BROAD. & CABLE (Mar. 21, 2005), http://www.broadcastingcable.com/article/CA5 11792.html?; *see also* Kevin J. Martin, *Family-Friendly Programming: Providing More Tools for Parents*, 55 FED. COMM. L.J. 553, 557 (2003) (challenging broadcasters to show family-friendly programs during the first hour of primetime television).

86. Only Commissioner Adelstein expressed reservations about the expansion of the scope of enforcement to isolated words. *Omnibus Order*, *supra* note 70, at 2726–27 (statement of Comm'r Jonathan S. Adelstein concurring in part, dissenting in part). At the same time, he reiterated his support for an enhanced enforcement policy generally. *Id.* at 2784; *see also*

well-publicized efforts to extend indecency regulation from broadcast to cable.[87] In 2006, the Commission was also granted a significant expansion in its forfeiture authority by Congress in the Broadcast Decency Enforcement Act.[88] In addition, the FCC adopted a number of important changes to its indecency rules, which resulted in making it much easier for complainants to establish violations of the indecency prohibitions.[89] First, the Commission reversed course on whether fleeting expletives alone would be considered to violate § 1464. The agency also for the first time relied on "profanity" as a ground for a § 1464 violation and adopted a broad definition of profanity.[90] The threat of indecency regulation increased

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Broadcast Decency Enforcement Act of 2004: Hearings Before the Subcomm. on Telecomms. and the Internet of the H. Comm. on Energy and Commerce, 108th Cong. 83, 106 (2004) (statements of Kevin J. Martin & Michael J. Copps, FCC Comm'rs) (stressing the importance of providing more family-friendly shows on broadcast channels). Commissioner Taylor Tate argued in print in support of significant indecency fines and broadcaster responsibility to air family-friendly programming. John Eggerton, *Tate Promotes Positive Programs*, BROAD. & CABLE (June 12, 2006), http://www.broadcastingcable.com/article/CA6342898.html.

87. *See, e.g.*, Levi, *Enhancing Agency Power*, *supra* note 16, at 28 (discussing Chairman Martin's belief that, to address the problem of indecency adequately, cable would have to be regulated as well).

88. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491, 491 (2006) (codified as amended at 47 U.S.C. § 503(b)(2)(C)(ii) (2006)) (amending § 503(b) of the Communications Act to authorize significantly increased forfeiture penalties and indicating congressional concern about indecent broadcast programming); *see also* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 322–23 (2d Cir. 2010), *vacated*, 132 S. Ct. 2307 (2012) (describing the amendment and noting that as a result of the change, "the fine for a single expletive uttered during a broadcast could easily run into the tens of millions of dollars"). Congress had authorized the agency to impose civil forfeitures for violations of § 1464 in 1960. *See* 47 U.S.C. § 503(b)(1)(D) (2006); *see also Fox Television Stations*, 613 F.3d at 320 (citing to forfeiture authority). Thereafter, the Commission's Forfeiture Policy Statement established a base forfeiture amount of $7,000 for the transmission of indecent or obscene materials. Report and Order, *In re* Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd. 17087, 17113 (1997), *recons. denied*, 15 FCC Rcd. 303 (1999) [hereinafter *Forfeiture Policy Statement*]; *see also* 47 C.F.R. § 1.80(b)(4) (1999). "The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D), such as 'the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *Omnibus Order*, 21 FCC Rcd. at 2670 ¶ 21.

The Broadcast Decency Enforcement Act amended the Communications Act of 1934 to increase the FCC's maximum forfeiture authority from $32,500 per incident to $325,000 for each violation or each day of a continuing violation, so long as the fine for any continuing violation does not exceed $3,000,000 for any single act or failure to act. 47 U.S.C. § 503 (2006).

89. *See infra* Section II.

90. *See infra* note 160.

significantly in both intensity and credibility. Judicial challenges followed.

B. The Indecency Policy in the Courts

The Fox television stations, whose broadcasts of the 2002 and 2003 Billboard Music Awards had been found to violate the FCC's new fleeting expletives policy, challenged the new policy on both constitutional and statutory grounds in the Second Circuit.[91] Because the FCC had not imposed any sanctions for these violations and therefore had not afforded the parties the opportunity to contest the indecency charges, the Second Circuit granted the agency's request for a voluntary remand to the agency to address the petitioners' arguments.[92] After briefing pursuant to a public notice, the Commission issued an order upholding its prior finding that the Fox broadcasts were actionably indecent.[93]

When the case returned to the Second Circuit,[94] two judges of the three-judge panel found the FCC's decision to be "arbitrary and capricious" in violation of the Administrative Procedure Act.[95] The court found the Commission's change in policy not to have been adequately explained, in violation of the APA's requirement that agencies must provide reasoned explanations for reversals in policy. In a section of extended constitutional dicta, the majority also expressed skepticism that the fleeting expletives policy could withstand First Amendment scrutiny.[96] The majority expressed sympathy for the networks' argument that the FCC's approach to indecency was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."[97]

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91. *Fox I*, 556 U.S. 502, 510–11 (2009). The networks appealed the Omnibus Order, and the cases were consolidated before the U.S. Court of Appeals for the Second Circuit.

92. Order, *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd. 13,299, 13,301–02 ¶¶ 9–10 (2006) [hereinafter *Omnibus Remand Order*]; *see also Fox I*, 556 U.S. at 510–11.

93. *Omnibus Remand Order*, 21 FCC Rcd. at 13,314 ¶ 39, 13,326 ¶ 66 13,327–28 ¶¶ 71, 73, 13,329 ¶¶ 79–80. This order reaffirmed the Commission's indecency findings against Fox for the 2002 and 2003 Billboard Music Awards but reversed its finding against CBS for The Early Show broadcast and dismissed the complaint against ABC on procedural grounds.

94. The network's original appeal to the Second Circuit was reinstated on November 8, 2006 and was consolidated with a petition for review of the Omnibus Remand Order. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 454 (2d Cir. 2007) (granting motions to intervene by other networks, including CBS, and discussing several statutory and constitutional challenges collectively raised by the networks to the validity of the Omnibus Remand Order).

95. *Id.* at 447.

96. *Id.* at 464, 466.

97. *Id.* at 463.

The Supreme Court granted certiorari and, in *Fox I*, reversed and remanded the Second Circuit's finding that the Commission's fleeting expletives policy violated the Administrative Procedure Act (APA).[98] Writing for Chief Justice Roberts, and Justices Alito, Thomas, and Kennedy, Justice Scalia found that the FCC's orders were not "arbitrary and capricious" under the APA. In language that observers have read to announce the Supreme Court's legitimation of political justifications for agencies' policy changes,[99] the Court held that the FCC had adequately explained the reversal of its prior approach to fleeting expletives.[100] While the *Fox* case was winding its way through the Second Circuit, CBS had appealed the Janet Jackson forfeiture to the Court of Appeals for the Third Circuit.[101] That court found that the Commission had changed course on how it treated fleeting images of nudity in violation of the Administrative Procedure Act, vacated the FCC's orders, and remanded the case to the Commission.[102] Then the Supreme Court granted the FCC's petition for certiorari, vacated the Third Circuit's decision without an opinion, and remanded the case for consideration in light of the Court's decision in *Fox I*.[103] On remand, a panel of the Third Circuit reaffirmed its earlier finding that the FCC had acted arbitrarily in "improperly impos[ing] a penalty on

98. *Fox I*, 556 U.S. 502, 530 (2009).

99. *See, e.g.*, Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1829 (2011) (noting that the impact of the decision at the outer boundaries is hospitable "to the politicization of agency reason giving"); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 43 (2009) (arguing that courts can apply the arbitrary and capricious review in a way that gives "political influences an accepted place in rulemaking decisions"). *But see* Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 576 (2010) (stating that "agencies are expert in their areas of delegated authority, not in assessing the strength and direction of political winds"); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 192 (2012) (questioning the role of courts in distinguishing legitimate from improper political influences).

100. Justice Scalia wrote for the majority in *Fox I* that all agency change need not be subjected to "more searching review" or "justified by reasons more substantial than those required to adopt a policy in the first instance." *Fox I*, 556 U.S. at 514. In addition to "display[ing] awareness that it *is* changing position[,] . . . the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 515.

101. *See Super Bowl Show on Reconsideration*, 21 FCC Rcd. 6653, 6668 ¶ 38 (2006) (reaffirming FCC's initial forfeiture on reconsideration).

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

103. FCC v. CBS Corp. (*CBS II*), 556 U.S. 1218 (2009).

CBS for violating a previously unannounced policy."[104] The Third Circuit did not grant en banc review.[105]

In the meantime, the Second Circuit on remand "vacate[d] the FCC's order and the indecency policy underlying it[,]" holding that the policy "violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here."[106] That decision returned to the Supreme Court in *Fox II*.

The *Fox* cases presented the Supreme Court with a veritable spectrum of decisional choices.[107] On one end of the spectrum was the narrowest possible option, focusing simply on whether the FCC's shift of policy on fleeting expletives satisfied administrative law or constitutional due process norms. Next was the possibility of a First Amendment-based reversal of part or all of the FCC's changes to the indecency regime.[108] Further along the spectrum was the opportunity to use the *Fox* cases to overrule *Pacifica*. At the most deregulatory end of the spectrum was the option of using the indecency cases as a convenient occasion for the Court to reject, once and for all, the second-class constitutional status under which broadcasters had operated since the twentieth century. Requests for relief by both litigants and amici ran the gamut on this spectrum.

Critics argued that the FCC's indecency regime should be found unconstitutional under the First Amendment.[109] The Supreme Court did

104. CBS Corp. v. FCC (*CBS III*), 663 F.3d 122, 124 (3d Cir. 2011); *see also id.* at 129 ("We conclude that, if anything, the Supreme Court's decision fortifies our original opinion . . . ").

105. John Eggerton, *Third Circuit Won't Reconsider Super Bowl Decision*, BROAD. & CABLE (Jan. 18, 2012), http://www.broadcastingcable.com/article/479252-Third_Circuit_ Won_ t_Reconsider_Super_Bowl_Decision.php.

106. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010).

107. *See, e.g.*, Reply Brief for the Petitioners at 14–15, *Fox I*, 556 U.S. 502 (2009) (noting that respondents sought distinct forms of relief).

108. *Compare* Brief for Respondent Fox Television Stations, Inc. at 42–43, *Fox I*, 556 U.S. 502 (2009) (No. 07-582), 2008 WL 3153439 [hereinafter *Fox I* Brief for Fox] (noting that the networks sought to overrule the Supreme Court's *Pacifica* ruling and invalidate all broadcast indecency regulation), *and* Brief of Respondents NBC Universal, Inc. et al. at 47–48, *Fox I*, 556 U.S. 502 (2009) (No. 07-582), 2008 WL 3153438 (arguing that the FCC failed to fully satisfy the requirements of the Administrative Procedure Act (APA) for three reasons), *with* Brief for Amicus Curiae ABC Television Affiliates Ass'n Supporting Respondents at 5–7, *Fox I*, 556 U.S. 502 (2009) (No. 07-582), 2008 WL 3539492 [hereinafter *Fox I* Brief for ABC] (asserting that the FCC's fleeting expletive policy violates the APA based on the *Pacifica* decision), *and* Brief for Respondents CBS Television Network Affiliates Ass'n et al. at 10–12, *Fox I*, 556 U.S. 502 (2009) (No. 07-582), 2011 WL 5317316, (contending that the FCC ignored the Court's emphasis that *Pacifica* was a narrow holding).

109. *See, e.g.*, Erwin Chemerinsky, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1462–63 (2009) (arguing that "[t]he Court's medium-by-medium approach to indecency just does not make sense any longer."). For earlier arguments to that

not address the constitutional issue. In *Fox II*, the Court specifically explained that because it "resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy."[110]

As for CBS and the Super Bowl case at the Third Circuit, the Supreme Court denied certiorari after handing down its decision in *Fox II*.[111] Chief Justice Roberts's concurrence in the denial of certiorari was seen by the industry as "essentially warn[ing] broadcasters that the FCC has served fair notice that fleeting images and expletives are subject to indecency enforcement."[112]

Reading constitutional tea leaves is obviously a dangerous undertaking. On the one hand, Justices Ginsburg and Thomas have expressed doubts about the continuing viability of *Pacifica* in light of technological change.[113]

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effect, *see* KRATTENMAKER & POWE, *supra* note 30. Analysts complained that the FCC approach was doctrinally inconsistent, unpredictable in its application, and placed undue reliance on consent decrees. In addition, it was criticized as political—improperly responsive to the pressures of right-wing public interest groups like the PTC, whose electronically filed complaints purportedly exaggerated social concern. *See, e.g.*, Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 359–61 (2005); Kurt Hunt, Note, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. & TECH. L. REV. 223, 241–42 (2007). In addition, critics have said that the rules were ineffective on their own terms because of the expansive availability of indecent material on cable, satellite, and other electronic media, and because it is unrealistic in light of the times and changed social mores to suggest that FCC channeling of indecent material to late-night hours would actually prevent children from having access to it. *See, e.g.*, R. George Wright, *Broadcast Regulation and the Irrelevant Logic of Strict Scrutiny*, 37 J. LEGIS. 179, 187–88 (2012).

110. *Fox II*, 132 S. Ct. 2307, 2320 (2012). For an argument that constitutional avoidance is the wisest course in this policy space, see, for example, Note, *Vagueness – Second Circuit Strikes Down the FCC's Indecency Policy as Void for Vagueness*, 124 HARV. L. REV. 835, 841 (2011).

111. FCC v. CBS Corp. (*CBS IV*), 132 S. Ct. 2677 (2012).

112. John Eggerton, *Chief Justice Warns About Future Wardrobe Malfunctions*, BROAD. & CABLE (June 29, 2012), http://www.broadcastingcable.com/article/print/486602-Chief_Justice_Warns_About_Future_Wardrobe_Malfunctions.php (stating that, although Chief Justice Roberts expressed doubt about the correctness of the Third Circuit's conclusion regarding whether the Commission had changed course regarding fleeting sexual images as opposed to fleeting expletives, he nonetheless concurred in the Court's denial of certiorari because the FCC had made clear that it had abandoned its exception for fleeting expletives and ensured that "be it word or image . . . any wardrobe malfunctions will not be protected on the ground relied on by the court below") (quoting *CBS IV*, 132 S. Ct. at 2678) (internal citations and quotations omitted).

113. *See Fox I*, 556 U.S. 502, 530 (2009) (Thomas, J., concurring) (expressing skepticism about the viability of constitutional precedent used to support the regulation of broadcasting); *see also Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring) (indicating that *Pacifica* was "wrong when it issued" and that it "bears reconsideration"); *CBS IV*, 132 S. Ct.

Some have suggested that the extreme narrowness of the decision in *Fox II* might be due to a 4-4 split on the Court, with Justice Sotomayor recused, regarding whether to overrule *Pacifica*.[114] And the story of media innovation and convergence is one of constitutional adaptation to technological change.[115]

At the same time, the Court's opinions in *Fox I* and *Fox II* suggest that the Court is not rushing to overrule *Pacifica* on constitutional grounds. The majority opinion in *Fox I* provides a very aggressive reading of the FCC's regulatory power, with Justice Scalia's opinion for the majority shifting away both from the traditional idea of scarcity of frequencies, and from the *Pacifica* rationales, to a regulatory rationale grounded on the government's ability to condition license grants. Justice Scalia's opinion in *Fox I* also includes a clear statement representing the view that sexual expression is low-value speech. As for *Fox II*, there is little in the opinion or oral argument to suggest a great appetite to upend almost a century of FCC content regulation.[116] The oral argument in *Fox II* offered a number of different reasons to expect that the Court might hesitate to upend the fundamental regime of broadcast regulation. Whether because of a belief in the imminent obsolescence of the broadcast medium,[117] or the symbolic value of requiring a certain modicum of decency,[118] or the sense that there has been a significant increase in indecent material on the air,[119] or a

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at 2678 (Ginsburg, J., concurring).

114. Eugene Volokh, FCC v. Fox Television *Decided Narrowly on Lack-of-Fair-Notice Grounds*, THE VOLOKH CONSPIRACY (June 21, 2012, 11:31 AM), http://www.volokh.com/2012/06/21/fcc-v-fox-television-decided-narrowly-on-lack-of-fair-notice-grounds/ (suggesting that Justice Sotomayor might cast the fifth vote to overrule *Pacifica*).

115. *Cf.* Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 741 (2012) (believing that "the law should adjust to reflect the new communication context").

116. Broadcasters have argued that the definition referenced in *Reno v. ACLU*, 521 U.S. 844, 885 (1997), in which the Supreme Court struck down as unconstitutionally vague a definition of indecency in the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 233(a)–(b) (2006), was very similar to the generic definition of indecency used by the FCC in connection with § 1464. *See, e.g.*, *Fox I* Brief for ABC, *supra* note 108; *Fox I* Brief for Fox, *supra* note 108. But there are differences between the CDA provisions and the FCC's definition, and the *Reno* Court also expressly distinguished FCC regulation and *Pacifica* from the CDA. *ACLU*, 521 U.S. at 867, 871.

117. *See* Transcript of Oral Argument at 33, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293) (noting Justice Alito's comment that "broadcast TV . . . is living on borrowed time. It's not going to be long before it goes the way of vinyl records and eight-track tapes").

118. *Id.* at 22 (quoting Justice Scalia: "Sign—sign me up as supporting Justice Kennedy's notion that this has a symbolic value, just as we require a certain modicum of dress for the people that attend this Court and the people that attend other Federal courts. It's a symbolic matter.").

119. *Id.* at 24 (reflecting Chief Justice Roberts' point that words and images of the kind at issue in the case had not commonly aired in the prior history of broadcasting).

concern that overruling the FCC would lead to indecency on the air as a matter of course,[120] or the legitimacy of the objective of having a safe harbor,[121] or an acceptance of indecency regulation as a tolerable quid pro quo for licensing,[122] or temperamental tendencies to look for the narrowest possible ground of decision,[123] there are good reasons to expect judicial hesitation at the prospect of dismantling the traditional edifice of media regulation. At a minimum, *Fox I* and *II* together show that the Court is dealing with the FCC very leniently, despite the agency's shifting, fits-and-starts approaches to indecent speech, its apparent responsiveness to complaints generated by third-party interest groups, its willingness to achieve censorship indirectly through broadcaster self-regulation, its use of indecency as a lever to permit increased regulation of cable, and its apparently strategic use of its backlog of complaints. There is no guarantee that Justice Sotomayor would vote to reverse *Pacifica*. Moreover, whatever the status of *Pacifica* as such, a modified indecency regime might pass constitutional muster, given the deference paid by the Roberts Court to administrative action in at least some contexts.[124] Even if *Pacifica* is overruled, the FCC purports to rely on an alternative rationale to support

120. *Id.* at 34–35 (reflecting Justice Kennedy's concern).

121. *Id.* at 28 (citing to Chief Justice Roberts' question at oral argument).

122. Although Justice Kagan pressed the Solicitor General on what would make indecency regulation an acceptable condition on broadcast licensing, *id.* at 4, she also asked the broadcasters' counsel, "[b]ut how about this, Mr. Phillips: Look, you've been given a privilege, and that gives the government at least somewhat more leeway to impose obligations on you. Not—can't impose everything, but at least has a bit more leeway. And here we've had something that's very historically grounded. We've had this for decades and decades that the broadcast is—the broadcaster is treated differently. It seems to work, and it—it seems to be a good thing that there is some safe haven, even if the old technological bases for that safe haven don't exist anymore." *Id.* at 25–26.

123. *See, e.g.*, *id.* at 44 (quoting Justice Breyer: "Does this case in front of us really call for the earthshaking decision that you all have argued for in the—in the briefs?"). *See also* Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, Feb. 25, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223992, at 45 ("It seems clear that this Court is not prepared to revisit *Pacifica* and the constitutionality of the FCC's fleeting expletive and nudity policy."). For a recent article situating the Court's "duck[ing]" of constitutional issues in *Fox* as reflecting contending visions of the First Amendment in the Roberts Court, *see* Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499, 502 (2013).

124. Admittedly, the Roberts Court's overall approach to deference in the administrative context is a complex matter. *See* Clay Calvert & Justin B. Hayes, *To Defer or Not To Defer?: Deference and Its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13 (2012) (explaining the elasticity of the deference doctrine in the decisions of the Roberts Court).

indecency regulation.[125]

The ultimate constitutional resolution is uncertain. What seems clear for now is that the Court has left the FCC free to regulate indecency "as long as its policy for doing so provides constitutionally sufficient notice of the prohibited conduct"[126] and as long as it is clear when it changes its rules. At the same time, the Court has issued an invitation to the Commission in the *Fox II* opinion to review its indecency policy in light of the public interest, and future constitutional and statutory challenges to the Commission's indecency actions are certain to be filed. Under these conditions, it behooves the Commission to appraise carefully its current indecency regime in operation. That review requires a first step beyond what the Court took in *Fox I* and *II*—namely, revealing the multiplicity of changes the Commission has made to its approach to indecency since the early 2000s. The seeming limits to the inquiry implicit in the Commission's *2013 Indecency Notice* are too constraining.[127] A full description in turn reveals the problematic aspects of the FCC's regulatory shifts since 2003. A more restrained approach to indecency regulation by the FCC could permit the Court to adopt a constitutional compromise that would achieve a rough (albeit inevitably inelegant) balance between the incommensurable positions on both sides of the indecency issue.

II. BEYOND FLEETING EXPLETIVES—THE FULL RANGE OF CHANGES TO THE FCC'S INDECENCY POLICY

Because the *Fox* cases implicated the FCC's changed stance regarding fleeting expletives and momentary glimpses of nudity, little attention has been paid to the other substantive and procedural changes that the Commission has quietly but significantly made to strengthen indecency regulation extensively since 2003.[128] It is important to take a bird's-eye view to see what the mosaic of regulatory changes has affected.

First, the agency began to impose very high forfeitures for violations of its indecency policy. Second, it began entering into settlements with licensees conditioned on indecency commitments. Third, it made procedural changes that 1) reduced the burden on complainants making a prima facie case and 2) inflated the appearance of indecency complaints.

125. *See infra* Section II.C (discussing the FCC's revival of a quid pro quo rationale justifying regulation.)

126. Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1830 (2012).

127. *See supra* note 21, (noting the scope of FCC's current indecency policy inquiry).

128. *See generally* Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7 (2005); Brown & Candeub, *supra* note 32; Candeub, *supra* note 39.

Fourth, it made substantive changes to its liability standards, began to use context as a sword rather than a shield, revised its approach to news and consideration of merit, and adopted what amounts to a "negligent indecency" model.

Contrary to the Commission's assertions of modesty in this area, the effect of these various changes as a whole has been quite radical. They have both increased the FCC's power and spurred a private self-regulatory regime arguably stiffer than the Commission's. Either way, they have enhanced the chilling effect of indecency regulation. And, in light of the reality of media structure today, they have also had ripple effects beyond broadcasting. Perhaps the most notable aspect of all these changes has been the extent to which, as a whole, they preclude judicial review while effectuating self-censorship by broadcasters.

A. Changes Regarding Remedies

1. Fines

The most obvious change is the Commission's imposition of large—indeed, disproportionate—fines (called "forfeitures") for indecency broadcast outside the nighttime safe harbor. Even before Congress's recent approval of extensively increased forfeiture authority by statute, the agency had begun imposing high fines under its old rules by assessing them on a "per utterance" basis[129] and charging network affiliates as well as the networks themselves for indecency in network programming.[130] Because

129. *See* Notice of Apparent Liability for Forfeiture, *In re* Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, 18 FCC Rcd. 6915, 6919 ¶ 12 (2003) (announcing new "per utterance" policy, under which the FCC finds violations not on a per-program basis, but for each utterance of the forbidden language or image in the relevant program); *see also* Notice of Apparent Liability for Forfeiture, *In re* Clear Channel Broadcasting Licenses, Inc., Licensee of Stations WPLA(FM), Callahan, Florida, and WCKT(FM), Port Charlotte, Florida, 19 FCC Rcd. 1768, 1818 (2004) [hereinafter *Clear Channel WPLA Notice*] (separate statement of Comm'r Kevin J. Martin) (calling for higher fines); Notice of Apparent Liability for Forfeiture, *In re* Clear Channel Broadcasting Licenses, Inc., Licensee of Stations WBGG-FM et al., 19 FCC Rcd. 6773, 6779 ¶ 15 (2004) (applying "per utterance" policy); Notice of Apparent Liability for Forfeiture, *In re* Entercom Sacramento License, LLC, Licensee of Station KRXQ(FM) (*Entercom Notice*), 19 FCC Rcd. 20,129, 20,154–55 (2004) (separate statements of Comm'rs Michael J. Copps and Kevin J. Martin). The fact that the Commission has not inevitably assessed forfeitures on a per-utterance basis is not critical, given that it has announced its authority to do so and indeed has exercised it in some circumstances.

130. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 322 (2d Cir. 2010). The shift to a per-licensee standard for forfeitures meant that the maximum fine for each instance was multiplied by the number of affiliates airing the program. *See* Richard E. Wiley et al.,

the Commission's forfeiture authority was further expanded ten-fold by legislative action in 2005, one finding of indecency can lead to hundreds of thousands or even millions of dollars in fines. For the first time, the Commission responded to indecency complaints by an explicit consideration of the offender's economic resources as part of the process of imposing forfeitures.

The increases in fines were designed to address the impression that broadcasters, instead of being deterred from airing indecency, had absorbed prior indecency forfeitures merely as minor costs of doing business.[131] However, the disproportionate amounts of the fines would serve as a superdeterrent even for networks with deep pockets, especially if the networks indemnify their affiliated stations for network programming deemed indecent. Certainly the threat is amplified for small stations in small markets where a judgment on fleeting indecency could be a "bet the company" matter.[132] The chilling effect of the high fines is doubtless magnified by the Commission's use of its forfeiture decisions as occasions for reminding broadcasters in dicta of the agency's power to revoke licenses for failure to comply with its rules.[133]

Communications Law 2004: Contentious Times in a Shifting Landscape, 811 PLI/PAT 109, 168–69 (2004). The utterance of a single expletive could therefore lead to millions of dollars in forfeitures.

131. *See, e.g.*, *Clear Channel WPLA Notice*, 19 FCC Rcd. at 1815 (separate statement of Chairman Michael K. Powell) ("[T]hese increased enforcement actions will allow the Commission to turn what is now a 'cost of doing business' into a significant 'cost for doing indecent business.'"); *id.* at 1816 (separate statement of Comm'r Michael J. Copps, dissenting); Notice of Apparent Liability for Forfeiture, *In re* Infinity Holdings Corporation of Orlando, Licensee of Station WCKG(FM), 18 FCC Rcd. 19,955, 19,972 (2003) [hereinafter *Infinity WCKG Notice*] (separate statement of Comm'r Michael J. Copps, dissenting).

132. *See, e.g.*, Jim Puzzanghera, *Lawmaker Sees Both Sides of Broadcast Legislation; Rep. Greg Walden Has a Unique Perspective in Congress as Owner of Five Small Radio Stations*, L.A. TIMES, July 5, 2006, at C.1; Deborah Potter, *Indecent Oversight*, AM. JOURN. REV., Aug.–Sept. 2004, at 80.

133. *See, e.g.*, *Infinity WCKG Notice*, 18 FCC Rcd. at 19,965 ¶ 19 ("We reiterate our recent statement that additional serious violations by Infinity may well lead to a license revocation proceeding.") (internal quotation marks omitted), *rescinded on other grounds sub nom.* Order, *In re* Viacom Inc., 19 FCC Rcd. 23,100 (2004) [hereinafter *Viacom Order*]; *see also Clear Channel WPLA Notice*, 19 FCC Rcd. at 1816 (separate statement of Comm'r Michael J. Copps, dissenting) ("To fulfill our duty under the law, I believe the Commission should have designated these cases for a hearing on the revocation of these stations' licenses . . . ."). While the Commission has not commenced license revocation hearings in the indecency context, the fact that the possibility of revocation is even mentioned is likely to be noticed by broadcasters. Doug Halonen, *Feds Change the Rules: FCC Expands the Scope of Indecency Enforcement to Include Any Profanity*, 23 TELEVISION WEEK, Mar. 22, 2004, at 1; Todd Shields, *Common Decency: As Powell's FCC Tries to Find the Middle Ground Between Censorship and First Amendment Rights, the Media Continue to Push the Envelope*, 14 MEDIA WEEK, Feb. 6, 2004, at 18.

2. Settlements

The second notable characteristic of post-2003 indecency regulation is that it has proceeded in important instances through settlement agreements requiring broadcasters to pay money to the U.S. Treasury and to engage in indecency investigation and enforcement. For example, the Commission settled with Viacom for a "voluntary contribution" of $3,500,000 to the United States Treasury,[134] with Clear Channel for $1,750,000,[135] with Emmis for $300,000,[136] and with Beasley Broadcasting for $85,000.[137]

These settlements have led to grand corporate policy pronouncements that are more prohibitive than the FCC's own standards. Clear Channel, for example, made clear that it was adopting a "zero tolerance" policy with regard to indecency.[138] Many of the settlements also require very specific compliance agreements by the broadcasters, even where there are mere allegations of indecency policy violations rather than administrative

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Notably, license revocation threats have been made to major networks, even in circumstances of merely vicarious liability. *But see* Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal*, 80 GEO. WASH. L. REV. 442, 498 (2012) (observing that the FCC has become "a punching bag" because of its inability to revoke licenses for indecency regulation).

134. *Viacom Order*, 19 FCC Rcd. at 23,106 ¶ 9 (2004) (attaching and incorporating a Consent Decree between Viacom and the FCC), *aff'd*, Order on Reconsideration, *In re* Viacom Inc., 21 FCC Rcd. 12,223 (2006). Viacom subsequently paid a fee of $300,000 in 2007 as part of an additional consent decree regarding a claim that it had inadvertently failed to comply with provisions of the 2004 agreement. *See infra* note 140.

135. Order, *In re* Clear Channel Communications, Inc., 19 FCC Rcd. 10,880, 10,883 ¶ 10 (2004) [hereinafter *Clear Channel Order*] (attaching consent decree).

136. Order, *In re* Emmis Communications Corporation (*Emmis Order*), 19 FCC Rcd. 16,003, 16,007–08 ¶¶ 11, 13 (2004), *aff'd*, Order on Reconsideration, *In re* Emmis Communications Corporation, 21 FCC Rcd. 12,219, 12,221–22 ¶ 7 (2006) [hereinafter *Emmis Order on Reconsideration*] (rejecting challenges to Emmis consent decree).

137. Order, *In re* Beasley Broadcast Group, Inc., 23 FCC Rcd. 15,603, 15,610 ¶ 12 (2008) [hereinafter *Beasley Order*].

138. *See* John Eggerton, *Clear Channel Vows to Wash Out Dirty Jocks*, BROAD. & CABLE (Feb. 25, 2004, 1:30 PM), http://www.broadcastingcable.com/article/92718-Clear_Channel_Vows_to_Wash_Out_Dirty_Jocks.php. In keeping with that promise, the corporation fired Howard Stern. *See, e.g.*, *Howard Stern's Radio Show Is Suspended by Clear Channel*, N.Y. TIMES, Feb. 26, 2004, *available at* http://www.nytimes.com/2004/02/26/business/howard-stern-s-radio-show-is-suspended-by-clear-channel.html.

Of course, one might characterize such zero-tolerance commitments as a convenient public relations gambit on the part of the group owner and believe that Clear Channel would doubtless game the agreement and end-run its compliance obligations if it thought doing so would be economically desirable. *See generally* Eric Boehlert, *Clear Channel Boss Is Shocked – Shocked – To Find Indecency!*, SALON (Feb. 28, 2004, 12:43 AM), http://www.salon.com/2004/02/28/clear_channel_3/. Nevertheless, corporate policies of this kind are likely to have some impact at the operational level.

findings.[139] For example, some provide that the issuance of a Notice of Apparent Liability (NAL) or other proposed action will trigger investigation and suspension of personnel by the broadcaster, and termination of personnel if the Commission ultimately finds a violation of its indecency rules.[140] This obligates the licensees to suspend employees based simply on *allegations* of indecency, imposes "remedial training" on that basis, and sometimes even requires stations to assign a "program monitor" and impose a time delay when on-air talent accused of indecency on a prior occasion is permitted to return to live broadcasting.[141]

Not only are the consent decree compliance provisions an unusual type of internal control in the media context, but the settlements also suggest that broadcasters will likely censor themselves beyond what the government might legally be entitled to regulate.[142] The fact that consent decrees

139. In the Clear Channel consent decree, for example, the company agreed to implement a company-wide indecency compliance plan including automatic suspension, remedial training, and significant (up to five-minute) time delays for programs upon the employees' return. *See Clear Channel Order*, 19 FCC Rcd. at 10,886; *see also Emmis Order*, 19 FCC Rcd. at 16,007 ¶ 10; John Eggerton, *FCC Upholds Viacom Indecency Settlement*, BROAD. & CABLE (Oct. 17, 2006, 10:06 AM), http://www.broadcastingcable.com/article/106188-FCC_Upholds_Viacom_Indecency_Settlement.php (noting Viacom's agreement to the same conditions).

140. *See Viacom Order*, 19 FCC Rcd. at 23,106 ¶ 8(f).

141. *Clear Channel Order*, 19 FCC Rcd. at 10,883 ¶¶ 8–9; *Beasley Order*, 23 FCC Rcd. at 15,608–09 ¶ 10. Licensees might also adopt guidelines requiring indemnification from on-air personnel for violations of FCC rules—a development that might lead to more self-censorship than might be expected from a large institution. Performance bonds imposed by networks are also not out of the realm of possibility. *Cf.* Clay Calvert, *Past Bad Speakers, Performance Bonds & Unfree Speech: Lawfully Incentivizing "Good" Speech or Unlawfully Intruding on the First Amendment?*, 3 HARV. J. SPORTS & ENT. L. 245, 250 (2012) (questioning the constitutionality of government-imposed "performance bonds on past bad speakers as conditions precedent for future [speech]"). The National Religious Broadcasters' brief in *Fox* quotes from a broadcast guideline by Dow Lohnes, available online at the University of California, reminding broadcasters to "notify on-air talent, personalities, and guests that reimbursement of FCC fines and attorneys fees, as well as termination, may result from talent's utterance or depiction of obscene, indecent, or profane material during a broadcast." *Obscenity, Indecency, and Profanity: Guidelines for Broadcasters*, DOW LOHNES (June 2006), https://secure.ucop.edu/irc/services/documents/guidelines.pdf. There are reports of on-air talent taking out "indecency insurance." Sidak & Singer, *supra* note 25, at 718; *see* Maria Matasar-Padilla, *Music Lessons: What Adam Lambert Can Teach Us About Media Self-Regulation*, 29 CARDOZO ARTS & ENT. L.J. 113, 136 (2011) (reporting ABC's establishment of "a system by which [it] would create negative financial repercussions for performers who engaged in unexpectedly indecent or obscene behavior during a live broadcast").

142. *See, e.g.*, Editorial, *Pay for Play*, BROAD. & CABLE (Nov. 28, 2004, 7:00 PM), http://www.broadcastingcable.com/article/CA483385.html; *The Silent Media: Committed to the First Amendment*, BROAD. & CABLE (Apr. 11, 2004, 8:00 PM), http://www.broadcastingcable.com/article/CA409709.html?; *see also* FAIRMAN, *supra* note

sometimes require the licensee to file periodic compliance reports with the FCC reflecting both consultations with counsel and officer certification increases the likelihood that this would be the case.[143] Indeed, there are indications that the Commission would support industry-wide censorship efforts through the "voluntary" consent decree process.[144] Moreover, to the extent that the Commission enters into these agreements with vertically integrated companies having ownership interests across the breadth of today's media landscape, it may well be that the compliance obligations will have at least indirect impacts on business units that would not otherwise be subject to the content regulations of the FCC.[145]

20; Botein & Adamski, *supra* note 128, at 24–30.

Admittedly, the settlements also constrain FCC indecency enforcement in ways to which some Commissioners have objected. For example, the settlements prohibit the Commission from considering the settled indecency charges at renewal or in the context of license transfers. *See, e.g.*, *Emmis Order on Reconsideration*, 21 FCC Rcd. 12,219, 12,220 (2006) (explaining that "the Commission also agreed not to use the facts of the Consent Decree, the forfeiture orders, the pending inquiries or complaints, 'or any similar complaints' regarding programming aired before the Consent Decree's effective date for any purpose relating to Emmis or its stations, and to treat all such matters as null and void"). Commissioner Michael Copps responded to these provisions by arguing that recidivist broadcasters be challenged at license renewal. *See, e.g.*, *Emmis Order on Reconsideration*, 19 FCC Rcd. at 16,011 (concurring statement of Comm'r Michael J. Copps).

Moreover, the extent to which the settlement agreements in fact deter broadcasters cannot be fully established. Indecency watchdogs complained of the inadequacy of consent decrees by arguing that CBS had violated its 2004 consent decree with the Commission by airing a sexually laden episode of "Without a Trace." Rather than denying license renewal for the CBS stations at issue, the Commission entered another settlement agreement with the network. *See infra* note 147.

143. *See, e.g.*, *Beasley Order*, 23 FCC Rcd. at 15,609 ¶ 11 ("Beasley will file compliance reports with the Commission ninety days after the Effective Date, twelve months after the Effective Date, twenty-four months after the Effective Date and thirty-six months after the Effective Date. Each compliance report shall include a compliance certificate from an officer, as an agent of Beasley, stating that the officer has personal knowledge that Beasley has consulted with counsel to ensure compliance with this Consent Decree, together with an accompanying statement explaining the basis for the officer's compliance certification."). These kinds of officer certification requirements—reminiscent of the corporate law context's Sarbanes-Oxley Act—are far beyond the kind of accountability requirements previously imposed on electronic media in connection with program content.

144. In fact, the 2008 consent decree entered into by Beasley Broadcast Group provides that the licensee agree to "fully participate [subject to antitrust laws] with representatives of the broadcast, cable, and satellite industries in any efforts that may emerge to develop a voluntary industry-wide response to programming violative of the Indecency Rules." *Id.* at 15,609 ¶ 10(d).

145. Indeed, the Commission has also imposed indecency-promoting "voluntary" conditions as part of merger reviews in the satellite context. *See, e.g.*, Elizabeth A. Pike, Article, *Indecency, A La Carte, and the FCC's Approval of the Sirius XM Satellite Radio Merger: How the FCC Indirectly Regulated Indecent Content on Satellite Radio at the Expense of the "Public Interest*," 18 U.

Another significant aspect of the settlement process is that it avoids judicial assessment of the Commission's indecency approach (while publicly serving as a lesson for other broadcasters).[146] In addition to avoiding judicial review, the FCC's settlement process can enhance its enforcement capacity by reducing its burden since establishing a violation of a consent decree may be easier than establishing a violation of its underlying substantive regulations.[147]

B. Procedural Changes

Procedural changes to the indecency regime—changed prima facie case requirements, revised complaint-counting methods, increased administrative delay, and reduced delegation of authority to the Commission staff—have reduced the transaction costs formerly associated

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MIAMI BUS. L. REV. 221, 223–24, 254 (2010).

146. Some have claimed that the FCC pressures licensees to forbear from seeking judicial review of indecency actions. Brown & Candeub, *supra* note 32, at 1463–64 n.5. Appeals to the courts have also been forestalled by delays in the resolution of reconsideration orders. *Id.* at n.5; *see* Brief for Amici Curiae Nat'l Ass'n of Broadcasters et al. at 2, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5544814 ("[T]he Commission's procedural maneuvering appears designed to ensure that its most vulnerable orders never leave the Commission and thus can never be reviewed by a court."). Moreover, as Botein and Adamski point out, broadcasters may be more willing to settle "when the target cannot secure a full evidentiary hearing without refusing to pay and inviting a lawsuit." Botein & Adamski, *supra* note 128, at 27. And the pressure to settle may be even greater than that because of the lengthy delays associated with the FCC's decisionmaking in indecency cases. *See infra* note 154 and accompanying text.

147. The consent decree may eliminate the need for the FCC to establish certain elements that would be required in an independent enforcement action and can even create entirely new bases for liability. CBS learned this lesson when license renewals for some of its Utah stations were objected to on the ground that it had violated then-parent Viacom's 2004 Consent Decree by not suspending all employees involved in the decision to air an episode of "Without a Trace" as to which the Commission issued a Notice of Apparent Liability (NAL). *See* John Eggerton, *CBS Defends Inaction on Without a Trace*, BROAD. & CABLE (Oct. 22, 2007, 10:22 AM), http://www.broadcastingcable.com/article/110875-CBS_Defends_Inaction_on_Without_a_Trace.php. Ultimately, CBS resolved the matter by making a contribution of $300,000 to the government and entering into another Consent Decree with the FCC, having acknowledged for purposes of this latest consent decree "that it inadvertently failed to comply with the remedial steps specified in Section IV, Paragraph 8, Subsection (f) of the 2004 Consent Decree as contemplated by the Commission following issuance of the Without A Trace NAL" and assured the agency that it "understands the 2004 Consent Decree's terms, and has taken steps to ensure that additional such oversights do not recur in the future." Order, *In re* CBS Corporation, 22 FCC Rcd. 20,035, 20,040 ¶ 11 (2007). This is despite the fact that CBS originally claimed that it had not thought the 2004 Consent Decree applied to non-live, scripted programming, that it believed the program should not be considered indecent, and that the program at issue was a network show whose airing would be a matter for decision at the highest station levels.

with lodging indecency complaints and increased the likelihood of broadcaster liability.

1. Making Out a Prima Facie Case

The FCC's procedural changes to the indecency regime included revisions to the complaint process that greatly ease the complainants' burdens and shift costs to broadcasters. For example, because complainants no longer have to provide a tape or transcript of the offending program in order to make out a prima facie case,[148] broadcasters are in the position of having to provide evidence disproving the complainants' factual claims. But as a result of the recordkeeping deregulation of the Fowler Commission in the 1980s, most broadcasters no longer maintain full-fledged records of their aired programming.[149] The complaint procedure and changes in evidentiary rules also make it easy for advocacy groups such as the PTC to make claims under § 1464.[150] The

148. Previously, the burden was on the complainant to provide the Commission with full or partial tapes of offending programs, the date and time of the broadcasts, and the call signs of the stations involved. *2001 Policy Statement*, 16 FCC Rcd. 7999, 8015 ¶ 24 (2001) (explaining that "given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming."). Since 2003, however, the agency has proceeded on a number of indecency complaints despite the complainants' inability to provide such tapes or transcripts. *See, e.g.*, Memorandum Opinion and Order, *In re* Entercom Portland License, LLC, Licensee of Station KNRK(FM), Camas, Washington, 18 FCC Rcd. 25,484, 25,487 n.21 (2003). It has characterized its previous transcript-or-tape requirement as a "practice" that is waivable in appropriate circumstances. Memorandum Opinion and Order, *In re* Infinity Broadcasting Corporation of Los Angeles, Licensee of Station KROQ-FM, Pasadena, California, 16 FCC Rcd. 6867, 6870 (2001). Ironically, this procedural shift had occurred at the very moment that the process of complaining to the FCC about indecency had been effectively taken over by groups such as the PTC, an organization that has the resources to monitor, tape, and transcribe the programming it deems indecent. For a very thoughtful account of the procedural, evidentiary, and defense issues in FCC indecency enforcement, see Botein & Adamski, *supra* note 128, at 24–30.

149. *See, e.g.*, Memorandum Opinion and Order, *In re* Deregulation of Radio, 104 F.C.C.2d 505, 506 (1986); Memorandum Opinion and Order, *In re* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 104 F.C.C.2d 358 (1986); *see also* Botein & Adamski, *supra* note 128, at 24–26.

150. Some empirical studies indicate that most of the complaints have been computer-generated e-mails by members of that organization. *See, e.g.*, Thierer, *supra* note 67, at 460, 464. *But see* Calvert & Richards, *supra* note 18, at 326, 328 (claiming that only less than half of the half-million complaints about the Janet Jackson Super Bowl incident came through the PTC and that only 80 percent of the complaints were attributable to "other family groups").

changed reality is that more broadcasters face more occasions to respond to more FCC indecency inquiries, and it costs them more to do so.

Another element that adds to broadcasters' procedural burdens is the extent of delay that has historically accompanied indecency cases—even before the unprecedented number of cases pending today.[151] Delay has various problematic consequences—ranging from fading recollections to personnel changes to document purges that make it difficult for broadcasters to respond to Commission indecency inquiries. Thus, in combination, changes in the complaint process, FCC delay, and spotty licensee recordkeeping can effectively shift the burden of addressing § 1464 violations from complainants to licensees.

2. Changes in the Method of Counting Complaints

Another notable procedural shift concerns the Commission's process for counting complaints. This is important because of the role that the large—and purportedly increasing—number of complaints has played in the Commission's articulated justification for increasing its attention to indecency.[152]

The Commission, without fanfare, apparently changed its method of

151. *See supra* note 20 (reporting 500,000 pending complaints, down from 1.5 million). Delay has been a consistent characteristic in FCC indecency enforcement since the 1980s. Action for Children's Television v. FCC (*ACT IV*), 59 F.3d 1249, 1254–56 (D.C. Cir. 1995); Memorandum Opinion and Order, *In re* Infinity Radio License, Inc., 19 FCC Rcd. 5022, 5030 (2004) (dissenting statement of Comm'r Michael J. Copps) (describing a four-and-a-half-year delay in resolving indecency claims about a live rap/hip-hop music event "The Last Damn Show"); Notice of Apparent Liability for Forfeiture, *In re* Young Broadcasting of San Francisco, Inc., Licensee, Station KRON-TV, San Francisco, California, 19 FCC Rcd. 1751, 1765 (2004) (separate statement of Comm'r Michael J. Copps) (reprimanding delays in resolving indecency claims about news report on "Puppetry of the Penis"). In one striking example, the Commission was advised that the statute of limitations had run after it had finally voted to impose a forfeiture for airing indecency. Notice of Apparent Liability for Forfeiture, AMFM Radio Licenses, L.L.C., Licensee of Station WITH(FM), Washington, D.C., 19 FCC Rcd. 10,751 (2004) (reversing the NAL due to running of statute of limitations in case involving discussions, *inter alia*, of penile-enlargement devices); *see also* Order, *In re* Edmund Dinis, Former Licensee of Station WJFD-FM, New Bedford, Massachusetts, 19 FCC Rcd. 1907 (2004). The appeals process is also lengthy. *See* John Eggerton, *Facing Indecency Fines? Give Crigler a Call*, BROAD. & CABLE (Feb. 16, 2004) (noting that the rescission of a fine for indecency against KBOO-FM Portland, Oregon, for airing the Sarah Jones rap song "Your Revolution" took two years).

152. *See, e.g.*, *Omnibus Order*, 21 FCC Rcd. at 2665 ¶ 1 (2006) (describing "increasing public unease" demonstrated by the rise in complaints "from fewer than 50 in 2000 to approximately 1.4 million in 2004"). *See also* Fairman, *supra* note 123, at 76–77 ("Reliance on the complaints filed by the PTC is a perfect example of the way procedure perpetuates word taboo and institutionalizes it.").

counting complaints after the Janet Jackson "wardrobe reveal" incident—shifting from its previous practice of counting form complaints as a single complaint, to a practice of individually counting each complaint or e-mail.[153] It then used the total number of complaints to justify a shift in regulatory regime.[154] It did not, however, attempt to make its new process rigorous and reliable.[155] It also failed to address the questions about, *inter alia*, selection bias arising from the increasing use, by interest groups such as PTC, of electronic complaints available on the groups' websites.

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153. *See, e.g*, Botein & Adamski, *supra* note 128, at 17–18; Hunt, *supra* note 109, at 232–33; Thierer, *supra* note 67.

154. One might wonder to what extent the shift in how the agency counts complaints would have real policy impacts. Is it really persuasive to think that the change in complaint-counting methods would influence the FCC's policy decisions? If the Commission really was influenced by the number of complaints, then the shift in how they are counted demonstrates both the manipulability of this factor and how troubling it is to think that the agency regulated without regard to the skew in the representativeness of the data. (As previously noted, there is a tension between the Commission's claim to use a national standard for patent-offensiveness determinations and the agency's reliance on a purported increase in actual public complaints as the justification for regulating. Levi, FIRST REPORTS, *supra* note 16.) Even those skeptical about the actual influence of the number of public complaints on the FCC's indecency approach would admit that its new counting regime enabled the FCC to cloak regulatory assertiveness as mere responsiveness to public clamor for regulation.

In relying on public complaints, the FCC may have been anticipating judicial review and thinking of ways to support an argument for judicial deference. The Commission may also arguably have sought political advantage by appearing to regulate at the public's behest rather than on their own initiative. It is true that the FCC did not need to gain credibility with Congress on this point because Congress had shown itself to be in favor of vigorous enforcement since the 1980s, but appearing to regulate in response to public outcry might deflect criticism from those members of Congress who did not affirmatively support the FCC's new regime. In addition, the FCC could well conclude that an appearance of responsive regulation in the indecency context would stand the agency in good stead in the other contexts in which it had been subject to congressional inquiry and criticism in the past decade. Similarly, while one might question whether the Commission had reason to curry favor with the public in general, good "PR" with the public might both induce constituents to support the agency in Congress, and reduce the inefficiencies associated with interest group pressure. Ultimately, the Commission's strategic employment of complaint data to justify regulation is troubling whether it was designed to deflect judicial scrutiny or for political advantage with Congress and the public.

155. For example, it did not ensure that the same person's electronic complaint would not be counted multiple times if it were sent to different recipients and different offices at the agency. *See, e.g.*, Levi, FIRST REPORTS, *supra* note 16; Thierer, *supra* note 67; *see also* Brief for Former FCC Officials, *supra* note 4, at 34–35 (explaining artificiality of the complaint process, duplication of complaints in reports, and "misleading" character of Commission's reliance on growth in the number of public complaints).

3. Reduction of Delegated Authority

Historically, the Commission itself only became involved in indecency at the policy level. On a day-to-day basis, the process lay in the hands of the Media Bureau, the Enforcement Bureau, and the Office of the General Counsel. In the past, both Commission and staff decisions had been used interchangeably as precedent in attempting to provide guidance on the agency's application of indecency standards.[156] After the Commission reversed the decision of the Chief of the Enforcement Bureau in the Bono case, however, it also made clear that indecency decisions with precedential effect would thenceforth issue only from the Commission itself rather than its staff.[157]

This structural change can have numerous substantive consequences. For one, it is likely to increase delay. Moreover, since the Commission has not explicitly asserted that it will reverse all prior staff indecency decisions, it has effectively created an orphan staff indecency jurisprudence that will predictably increase uncertainty.[158] The prospects of delay and uncertainty might increase broadcasters' amenability to settlements and consent agreements with the Commission.

In addition, query whether such a structural change is more likely to increase the role of politics in the process and therefore lead to increasingly stringent application of the indecency regime. The concern is that

156. *See* Botein & Adamski, *supra* note 128, at 30. *See generally 2001 Policy Statement*, 16 FCC Rcd. 7999 (2001).

157. The Commission had previously permitted broadcasters to rely on FCC staff precedents in defending against indecency notices of inquiry (NOIs). *See* Botein & Adamski, *supra* note 128, at 30. By reminding broadcasters that staff opinions were not binding, the Commission effectively reversed that practice. *See, e.g.*, *Omnibus Remand Order*, 21 FCC Rcd. 13,299, 13,307–08 ¶¶ 21, 23; Brief for FCC et al. at 39–40, Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760) [hereinafter FCC Second Circuit Brief], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268846A1.pdf; *see also* Editorial, *Good Directions*, BROAD. & CABLE (Oct. 8, 2005), http://www.broadcasting-cable.com/article/CA6266853.html.

158. *See* FCC Second Circuit Brief, *supra* note 157, at 27 (characterizing the networks as requesting reversal of the *Omnibus Remand Order* "on the basis of other issues—presented in other cases—that the Commission has not finally resolved").

As happened with the Bono case, the Enforcement Bureau's indecency decisions might also be more likely to be reversed by the full Commission if they exculpate the broadcaster.

Arguably, the Bono case can be explained as an artifact of a time when the Commission had not yet clearly defined how aggressive its enforcement policy was going to be, and the Enforcement Bureau did not have clear guidance on the matter. Even though the agency's stance on fleeting expletives is now clear, however, much room for variance is still left with respect to application of other aspects of the policy. This suggests that the uncertainty that generated the Bono case is likely to be replicated.

Commission-level indecency adjudications might be particularly susceptible to attention and pressure by members of Congress.[159] Of course, controversial cases were probably vetted by Bureau chiefs or reviewed by the Chairman's office prior to the issuance of staff decisions even before the shift in the Commission's position on delegation, so the precise extent to which staff decisions could be insulated from political factors is an open question. While this is true, logic suggests that at least with regard to some cases, members of Congress could put pressure more directly and efficiently on the Commissioners themselves than on the FCC's civil servant staff. More significantly, one might wonder whether it is in fact more normatively desirable to repose decisional authority in unaccountable administrative functionaries as opposed to Commissioners who are visible, identified, and subject to politics-tempering judicial review. One's ultimate view on this issue likely depends both on one's views of democratic legitimacy and on the extent to which judicial review would in fact be likely to cleanse improper political influence. One's view might also be influenced by the actual transparency of staff processes.

C. Changes in Substantive Standards

These procedural shifts discussed in Section II.B were accompanied by substantive changes to the FCC's indecency regime (in addition to the changed treatment of fleeting expletives that triggered the *Fox* litigation). For a short-lived moment, the Commission began to find broadcasters liable for airing not only indecent but also profane programming, with the term "profane" defined to include far more than blasphemous expression.[160] More lastingly, the Commission reversed its asserted practice of treating context as an exculpatory factor. It began to rely on broadcasters' own programming standards as justifying liability. It changed its approach to news, suggesting a more skeptical attitude toward

159. It has been said that the Enforcement Bureau Chief's decision in the Bono case was reversed by the Commission as a result of political pressure on the Commissioners from Congress. *See, e.g.*, Corn-Revere, *supra* note 42. *Cf.* Fairman, *supra* note 123, at 77–78 ("Concentration of decision-making power in a handful of partisan appointees, chiefly the Chairman, who can exert excessive influence in the regulatory process affects word taboo. . . . Conflict between the FCC Commissioners and agency staff is at the center of the destabilizing shifts in indecency enforcement.").

160. The Bush-era FCC revived profanity as a separate and independent basis for a finding of indecency under § 1464, defining it very broadly. *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 452–66 (2d Cir. 2007); *see also* FAIRMAN, *supra* note 20, at 125–26; Candeub, *supra* note 39, at 924. By the time the *Fox* case had returned to the Supreme Court, however, the agency appeared to have retired profanity as an independent category for indecency violations.

journalistic judgment and the exculpatory value of merit. It effectively developed a "negligent indecency" approach, whereby failure to use technological methods of preventing fleeting expletives, for example, could trigger liability. It did not weigh in the broadcasters' favor that the challenged programming was presented live and the indecency was unscripted, unexpected, or accidental. It floated the possibility of respondeat superior liability despite the speech context, the *mens rea* requirement of § 1464 (as a criminal statute), and broadcaster attempts to warn performers of the need for indecency compliance. It applied its patent-offensiveness inquiry in a manner that would inevitably lead to administrative assessments of aesthetic necessity.

1. The Transformation of "Context"

The FCC's reliance on context analysis in indecency cases has often been criticized as inconsistent, subjective, and arbitrary.[161] Now, the Commission has revised its approach to context in a way that turns the inquiry on its head, effectively making context a one-way ratchet. Prior to 2003, the Commission looked at the context of a sexual expression as a mitigating, exculpatory factor. Now, by contrast, and without admitting any shift, the agency looks at program context in order to *reinforce* indecency findings—thereby turning the analysis of the expressive context of indecency into a sword rather than a shield. Something that might not be considered indecent on its own will now be interpreted as indecent if it is surrounded by other sexualized (albeit not indecent) material.[162] At the

161. For arguments criticizing the subjectivity of both the pre- and post-2003 context analysis, see, for example, Brief for Former FCC Officials, *supra* note 4, at 15–16 (arguing that "pointing to 'context' is not an explanation in itself" and that "with such subjective censorship, the FCC becomes the national nanny of who gets an artistic pass and who does not").

162. On radio, for example, the Commission found significant that the "Opie & Anthony" program often ran sexual contests for listeners. *Infinity WCKG Notice*, 18 FCC Rcd. 19,955, 19,962 ¶ 14 (2003); *see also* Bill McConnell, *Next Time, Your License*, BROAD. & CABLE (Oct. 6, 2003), http://www.broadcastingcable.com/article/CA327538.html. In the television context, the Commission focused on the risqué character of the choreography of the entire Super Bowl halftime show (even though it contained no nudity) and saw Janet Jackson's "costume reveal" as simply the patently offensive culmination of a highly sexualized performance of the song "Rock Your Body." The agency explained that "in cases involving televised nudity, the contextual analysis necessarily involves an assessment of the entire segment or program, and not just the particular scene in which the nudity occurs. Accordingly, in this case, our contextual analysis considers the entire halftime show, not just the final segment during which Jackson's breast is uncovered." *Super Bowl Show*, 21 FCC Rcd. 2760, 2765 ¶ 10 (2006); *see also Super Bowl Show on Reconsideration*, 21 FCC Rcd. 6653, 6658 ¶ 13 (2006). As the Commission explained: "The offensive segment in question did not

same time, the non-risqué character of surrounding programming is not necessarily used to mitigate the finding of indecency.[163]

The FCC's expansion of its context analysis to include inferences from programming contexts beyond the expression at issue is a problem because of the agency's refusal to recognize that what it considers as part of the inferential context and what it does not is itself a substantive—and potentially contestable—decision. Which contextual factors are considered and which are not will often be outcome-determinative, but that determination is not self-evident.

Moreover, the Commission has expanded its prior notion of context to include not only the expressive context of the speech complained of but also the nature of the program's format and asserted viewer expectations.[164] This expanded view of context allows the Commission to assert its own views of audience expectations.

2. A Changed Approach to News and Merit in Programming

Although the Commission has declared it "imperative [to] proceed with the utmost restraint when it comes to news programming"[165] because such expression is central to the First Amendment's free speech and press guarantees, the Commission's post-2003 decisions reveal an attitudinal shift that is likely to permit more intervention. First, despite tipping its hat to the First Amendment status of news, the Commission in the same breath

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merely show a fleeting glimpse of a woman's breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman's clothing to reveal her naked breast during a highly sexualized performance and while he sang 'gonna have you naked by the end of this song.' From the viewer's standpoint, this nudity hardly seems 'accidental,' nor was it. This broadcast thus presents a much different case than would, for example, a broadcast in which a woman's dress strap breaks, accidentally revealing her breast for a fraction of a second." *Super Bowl Show*, 21 FCC Rcd. at 2767 ¶ 13.

163. As ABC argued in its response to the government's petition for certiorari in *Fox II*, for example, the FCC's contextual analysis failed to consider the brief scene of nudity in NYPD Blue in the broader context of the program—the "larger story arc." Brief in Opp'n for ABC, Inc. et al. at 11, FCC v. Fox Television Stations, Inc., 131 S. Ct. 3065 (2011) (No. 10-1293), 2011 WL 2066574. By contrast, the agency looked at the overall "highly sexualized performance" of the Super Bowl halftime show to find patently offensive the momentary revelation of Janet Jackson's breast. *Super Bowl Show on Reconsideration*, 21 FCC Rcd. at 6658 ¶ 13.

164. In the Super Bowl forfeiture order, for example, the agency rested its finding that the Jackson halftime show was patently offensive by focusing on audience expectations about the type of programming at issue: "Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience, particularly during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity." *Super Bowl Show*, 21 FCC Rcd. at 2766–67 ¶ 13.

165. *Omnibus Remand Order*, 21 FCC Rcd. 13,299, 13,327 ¶ 71 (2006).

explicitly asserts that "there is no outright news exemption from our indecency rules."[166] This is despite the general belief, based on prior news cases, that the Commission would apply an implicit news exemption in assessing indecency.[167]

Moreover, despite its claims of relying on broadcasters' news judgments,[168] the Commission appears now to permit inquiry in indecency cases into whether or not a program is a bona fide news program.[169] It also appears implicitly to permit consideration of a news program's merit—to distinguish between coverage of "real" news and puff stories, and between sexual expression that is or is not incidental to a news story.[170] FCC assessments of news status are likely to increase with the increasing overlap between news and entertainment in today's media landscape.

Beyond news, the Commission's approach to the role of merit in indecency assessments appears to be changing. The agency's own assessments about the necessity of sexual elements in programming now

166. *Id.*

167. This assumption was grounded on cases such as *Peter Branton*, in which a radio station broadcast a wiretap tape of an expletive-laden telephone conversation by mobster John Gotti. *See* Letter to Peter Branton, 6 FCC Rcd. 610, 610 (1991); *see also Omnibus Remand Order*, 21 FCC Rcd. at 13,327 ¶ 70 n.213 (citing Memorandum Opinion and Order, *In re* Infinity Broadcasting Corporation of Pennsylvania, 3 FCC Rcd. 930, 937 n.31, *vacated on other grounds sub nom. ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter *Infinity Order A*]) (remarking that "context will always be critical to an indecency determination and . . . the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern"); *2001 Policy Statement*, 16 FCC Rcd. 7999, 8002–03 ¶ 9 (stating that "explicit language in the context of a *bona fide* newscast might not be patently offensive").

168. For example, the FCC's reference to CBS's "plausible characterization" of an interview of a "Survivor" contestant on "The Early Show" as a bona fide news interview suggests reliance on broadcasters' assessments of their own programming. *Omnibus Remand Order*, 21 FCC Rcd. at 13,328 ¶ 72 (discussing complaint about contestant's use of the word "bullshitter" in the interview).

169. *See, e.g.*, Memorandum Opinion and Order, *In re* Entercom Seattle License, LLC, Licensee of Station KNDD(FM), Seattle, Washington, 19 FCC Rcd. 9069, 9074–75 ¶ 15 (2004); Forfeiture Order, *In re* Entercom Seattle License, LLC, Licensee of Station KNDD(FM), Seattle, Washington, 17 FCC Rcd. 18,347, 18,349–50 ¶¶ 9–10 (2002); Levi, FIRST REPORTS, *supra* note 16, at 26 n.142.

170. In *Young*, the Commission imposed an indecency fine over the momentary view of a penis on a morning news program featuring an interview with members of an acting troupe putting on "Puppetry of the Penis." Notice of Apparent Liability for Forfeiture, *In re* Young Broadcasting of San Francisco, Inc., Licensee, Station KRON-TV, San Francisco, California, 19 FCC Rcd. 1751, 1751–52 (2004). The Commission did not accept the broadcaster's argument for news program immunity. In its *Omnibus Order*, the Commission distinguished the *Young* result from news footage showing the exposed penis of a flood victim on the ground that the puppetry "display was not incidental to the coverage of a news event . . . ." *Omnibus Order*, 21 FCC Rcd. at 2717 ¶ 218.

appear to outweigh the overall assessment of the merit or value of the work as a whole, even though people's perceptions of the patent offensiveness of specific elements in a work might be outweighed by their views of its overall value. The Commission also focuses more on the intent to shock than on the merit or value of the work. By contrast, even though the Commission never purported to assess merit on the basis of critical acclaim or the work's market acceptance, the agency in the past gave exculpatory credit for works of merit.

3. The Development of "Negligent" Indecency

There are also signs that the Commission has turned the *mens rea* requirement of a criminal statute into a mere negligence requirement for purposes of administrative liability by implicitly adopting a theory of indecency liability based on "negligent indecency."[171] The agency now appears to see "willfulness" as established by broadcasters' failure to guard fully against unanticipated indecency.[172]

Under the new regime, broadcasters cannot excuse indecency simply on the ground that their programming was aired live[173] because broadcasters could theoretically eliminate indecency even in live programming—with the use of time-delay systems and by taking appropriate steps to prevent

171. Botein & Adamski, *supra* note 128, at 21 (coining the phrase).

172. The FCC had taken the position in its original forfeiture order in the CBS Super Bowl case that CBS willfully breached § 1464 because it "consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity"; "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast"; and was vicariously liable under principles of respondeat superior for the willful actions of its agents, Justin Timberlake and Janet Jackson. *Super Bowl Show*, 21 FCC Rcd. 2760, 2768 ¶15 (2006); *see also* CBS Corp. v. FCC, 535 F.3d 167, 173 (3d Cir. 2008). On reconsideration, the FCC's Reconsideration Order revised the Commission's approach for determining CBS's liability under the willfulness standard. *See CBS Corp.*, 535 F.3d at 173–74 (citations omitted) ("The Commission reiterated its application of vicarious liability in the form of *respondeat superior* and its determination that CBS was directly liable for failing to take adequate measures to prevent the broadcast of indecent material. . . . But it abandoned its position that CBS acted willfully under 47 U.S.C. § 503(b)(1) by intentionally broadcasting the Halftime Show irrespective of its intent to broadcast the particular content included in the show. Instead, it determined CBS could be liable 'given the nondelegable nature of broadcast licensees' responsibility for their programming.' . . . The Commission has since elaborated on this aspect of the *Reconsideration Order*, explaining it as a separate theory of liability whereby CBS can be held vicariously liable even for the acts of its independent contractors because it holds non-delegable duties as a broadcast licensee to operate in the public interest and to avoid broadcasting indecent material.").

173. Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4980 ¶ 11 (2004); *Omnibus Remand Order*, 21 FCC Rcd. at 13,312–14 ¶¶ 34–38.

foreseeable indecent activity or utterances in live programming.[174] The Commission has also been imposing liability for indecency on a respondeat superior or vicarious liability theory, despite the lack of direct fault on the part of broadcasters and their asserted attempts to assure compliance by program participants.[175] The Commission has effectively ruled that warnings to performers by broadcasters would not suffice to meet the stations' burden, implicitly imposing on broadcasters an obligation to employ technology to censor programming.[176] Indeed, a broadcaster's failure to implement technological blocking mechanisms could count as evidence of its willfulness in airing actionable indecency.[177] Liability could even be imposed on broadcasters for failing to use time-delay technology effectively.[178]

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174. Thus, for example, the Commission stated that the networks could have foreseen indecent activity on air in the Nicole Richie case, *Omnibus Remand Order*, 21 FCC Rcd. at 13,312 ¶ 33, and the Super Bowl case, *Super Bowl Show on Reconsideration*, 21 FCC Rcd. 6653, 6660–61 (2006).

The Commission will expect technological measures to be used regardless of the news judgments of the broadcasters regarding the benefits of live, unmediated programming. The Commission argues, in its *Omnibus Remand Order*, that awards shows are not in fact typically aired live for parts of the country in different time zones, and that therefore the requirement of a time delay would not in fact "place live broadcasts at risk or impose undue burdens on broadcasters." *Omnibus Remand Order*, 21 FCC Rcd. at 13,313 ¶ 36.

For other examples of live programming that might have invited FCC indecency enforcement, see CBS Broadcasting Inc., Opposition to Notice of Apparent Liability for Forfeiture at 48–50, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, File No. EB-04-IH-0011 (3d Cir. Nov. 5, 2004) (discussing 2004 Democratic National Convention, California gubernatorial politics, and presidential scandals).

175. *See Super Bowl Show on Reconsideration*, 21 FCC Rcd. at 6660 ¶ 17 ("CBS acted willfully because it consciously and deliberately broadcast the halftime show and consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast."); *id.* at 6662 ¶ 23 (respondeat superior theory).

176. CBS provided evidence that it had apprised the halftime show performers about its policies, including policies regarding indecency. On the Commission's analysis, the only viable option available to CBS was installing time-delay mechanisms.

177. In the Super Bowl case, for example, the agency weighed in a liability finding that CBS failed to include a delay mechanism in light of the possibility that indecency might result during the suggestive choreography of the halftime show. *Super Bowl Show*, 21 FCC Rcd. at 2769–2770 ¶ 19 (footnotes omitted) ("In sum, there was a significant and foreseeable risk in a halftime show seeking to push the envelope and replete with sexual content that performers might depart from script and staging, and this is particularly true of Jackson and Timberlake given the sexually-provocative nature of their performance, the fact that it was promoted as 'shocking,' and the fact that it culminated with the scripted line 'gonna have you naked by the end of this song.' . . . [W]e conclude that CBS recognized the high risk that this broadcast raised of airing indecent material.").

178. For example, the Commission chastised Fox in the final 2003 Billboard Awards

The Commission takes the position that any other rule would invite gross manipulation.[179] However, the agency does not engage in a realistic assessment of the availability and expense of technological solutions. If it is true that networks spend upwards of $1 million to engage in video tape delays,[180] then the cost of technological compliance creates potentially insuperable problems for smaller and less profitable stations.[181] Moreover, while the technology may exist to bleep out fleeting expletives, it cannot address the more subtle, contextual assessments of sexual expression that do not involve identifiable expletives and nudity. The Commission's deployment of technology in this context is an ironic reversal of the trend in First Amendment jurisprudence to rely on technology to provide alternatives to regulation.

4. The Broadcast Standards Bootstrap

The negligent indecency development is bookended by the Commission's transformation of broadcasters' own standards and practices guidelines into the basis for legal liability.[182] The government took the position in the *Fox* cases that broadcasters' own programming standards provide "highly probative evidence" of contemporary community standards for the broadcast medium.[183] Thus, if program content would constitute a "dramatic departure" from broadcasters' own editorial norms, then it

order for using the same time-delay system that had previously proven inadequate to edit out Cher's expletive in another award ceremony. *Omnibus Remand Order*, 21 FCC Rcd. at 13,312–13 ¶¶ 34–35.

179. *Super Bowl Show*, 21 FCC Rcd. at 2771 ¶ 22 ("A contrary result would permit a broadcast licensee to stage a show that 'pushes the envelope,' send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility—leaving no one legally responsible for the result."); *see also Omnibus Remand Order*, 21 FCC Rcd. at 13,309 ¶ 25 ("We believe that granting an automatic exemption for 'isolated or fleeting' expletives . . . would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time.").

180. Botein & Adamski, *supra* note 128, at 32–34; *see also Fox I*, 556 U.S. 502, 558 (2009) (Breyer, J., dissenting) (citing reports of costs of $100,000 for installation and operation of bleeping/delay systems for small stations).

181. *Fox I*, 556 U.S. at 558–61.

182. *See* Brief Amici Curiae of The Reporters Comm. for Freedom of the Press et al. at 28–30, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5544812; *see also* Botein & Adamski, *supra* note 128, at 13 (commenting on broadcast networks' standards and practices departments).

183. Reply Brief for the Petitioners, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 6046214 [hereinafter *Fox II* FCC Reply]; *see also* Brief for the Petitioners at 34–35, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 3947560 [hereinafter *Fox II* Government Brief].

should be subject to regulation on that basis alone.

The FCC's conscription of the broadcasters' own programming practices standards is problematic. The self-incriminatory use of the standards is a regulatory bootstrap that is both unfair and counterproductive. The broadcasters' general standards are at best hortatory and aspirational, and they are not even used as prohibitive rules by the broadcasters themselves. Because they are standards rather than rules, they are not often subject to reevaluation and amendment by the broadcasters. The manner in which the standards are adopted, and the relationships between the licensees' business units and their Standards and Practices departments are complex. Even if initially adopted to propitiate the FCC during more regulatory times, the standards now purportedly signal what the broadcasters think might be disliked by their advertisers. As such, their goal and reference points are different from those of the FCC's indecency regime. (In addition to the question whether the standards are revised to keep up with the times, it is also the case that broadcasters recognize that different advertisers have different degrees of tolerance for edgy programming. Thus, the rules in practice are inevitably adapted to different advertisers.) Violation of the standards is not designed to trigger exorbitant punishment. The standards are also broad and vague, and they therefore cannot do the evidentiary work the Commission seeks. Even if they explicitly prohibit the use of expletives on the air, the rest of what they prohibit is far from evident. Moreover, there is a social interest in having broadcasters operate according to standards that reflect social norms. The FCC's use of those standards to justify regulation will increase the likelihood that the broadcasters will eliminate them.

On the FCC side, there is something institutionally unseemly in allowing the Commission to avoid a vagueness charge for its standards by justifying regulation based on the broadcasters' own vague standards. The Commission is transforming only the articulated private standards, rather than the entirety of the private norms and practices, into law. Moreover, the Commission ordinarily claims that it determines patent offensiveness on the basis of its own expertise. The agency's claim that the broadcasters' standards reflect community norms of offensiveness for the first time suggests that the offensiveness finding on which the Commission will hang exorbitant fines is not the Commission's own assessment, but the broadcasters'. But as a matter of practical reality, are not commercial broadcasters' assessments of offensiveness or acceptability in programming better reflected in program ratings than in general program standards? And even though an administrative agency can properly decide that self-regulation is not working and therefore switch back to regulation, it should not be able to have its cake and eat it too by simultaneously retaining a self-

regulatory regime while using its insufficiencies to serve as the basis for regulation.

In sum, allowing the Commission to rest its indecency regime on broadcasters' own self-regulatory codes is both inappropriate and counterproductive.[184]

5. Operation of the Patent Offensiveness Standards

The Commission's approaches to both prongs of the patent offensiveness finding reflect new emphases, and the government's reliance on an expansive definition of indecency as "non-conformance with existing standards of morality" evidences a regulatory shift.

a. Aesthetic Necessity

In applying its contextual analysis, the Commission has chosen a path that inevitably leads to editorial intrusion and aesthetic judgments despite the agency's claims of deference to broadcaster editorial judgments. By definition, the FCC staff members charged with reviewing programs against which indecency complaints have been lodged have to make editorially intrusive contextual decisions in the second prong of the indecency inquiry. That inquiry necessarily involves Commission staff in expressive decisions and basic editorial functions about what is necessary or gratuitous in a program. There is no way to separate out this finding from a substantive theory of what the program fundamentally means and from whether each element chosen was in fact needed in order to support the meaning. In many instances, this will mean that the Commission will incorrectly assume a clear separation between content and form or substance and style and second-guess fundamental artistic choices.[185]

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184. The government argued in *Fox II* that the FCC uses broadcasters' own standards not to establish the legal boundary of what Fox can broadcast, but to provide "highly probative" evidence of contemporary community standards and undermine Fox's vagueness claim. *Fox II* FCC Reply, *supra* note 183, at 3. But what the broadcasters' standards reflect is not necessarily the Commission's standards. Broadcasters' standards reflect advertising standards, which are not necessarily the same. Advertisers, for example, may not wish to be associated with programming that does not rise to the level of patent offensiveness, which is the FCC's touchstone for indecency regime violations.

185. *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

The artistic necessity test also makes the highly suspect suggestion that there is a single metric by which gratuitousness is to be assessed. What might be considered gratuitous by a Walt Disney director is likely to be considered barely sufficient by the Farrelly Brothers or Quentin Tarantino or Oliver Stone. In addition, the aesthetic necessity inquiry might in practice apply disproportionately to certain types of programming. Aesthetic necessity is a particularly difficult and norm-laden decision to make whatever the program, but it is inevitably contestable when the program is humorous or satirical.[186] Some scholars have argued that FCC regulation will unduly leach the emotive character of speech.[187] While that is an important danger, so is the fact that the new FCC regulation will censor the fundamental meaning and message of the speech. Moreover, it is precisely because it is gratuitous and unnecessary that transgressive speech can succeed in shocking the hearer for substantive, political, artistic, and social reasons. And the distinction the Commission seeks to make is also particularly unpersuasive in an artistic climate in which pornography and the stylistic vocabulary of pornography have become so incorporated

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One example that shows the editorial nature of the FCC's decisions in this area is the story of Martin Scorsese's PBS documentary on blues musicians. The Commission found that the artists' use of expletives throughout the program made the program indecent. Scorsese said that he thought the language was not only the truthful representation of how the participants spoke but also a necessary part of his documentary. John Eggerton, *FCC 'Whitewashing' Blues, Says Scorsese*, BROAD. & CABLE (May 8, 2006, 12:40 PM), http://www.broadcastingcable.com/article/104068-FCC_Whitewashing_Blues_Says_Scorsese.php; *see also Super Bowl Show*, 21 FCC Rcd. 2760, 2786 (2006) (statement of Comm'r Jonathan S. Adelstein, concurring) ("It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary."). By contrast, the Commission did not find the expletives used during the fictional depiction of the D-Day in Steven Spielberg's movie "Saving Private Ryan" to be indecent. Memorandum Opinion and Order, *In Re* Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 FCC Rcd. 4507 (2005). Obviously, there are ways in which to distinguish these cases. However, the important point here is that in assessing whether the language was necessary or gratuitous with respect to these two works, the Commission was making a directorial decision. In doing so, it was usurping the role of the editor and purporting to establish the fundamental meaning of the work.

186. *See, e.g.*, Christine Alice Corcos, *Some Thoughts on Chuck Lorre: "Bad Words" and "The Raging Paranoia of Our Network Censors"*, 22 REGENT U. L. REV. 369, 380 (2010) (discussing *Two and a Half Men* producer Chuck Lorre's view of his TV shows as critique of CBS and the FCC regarding indecent words).

187. *See, e.g.*, Hopkins, *supra* note 20.

into mainstream artistic presentations.[188] Finally, the artistic necessity inquiry now indulged in by the FCC is even more intrusive than the assessment of whether the programming has merit or, as in the obscenity context, redeeming social value. A program can be deemed to have merit and social value even though people might disagree as to the artistic necessity of its sexual components. In sum, these types of judgment calls about expression are precisely what should be considered off limits for the government.[189]

b. Determining Sexual or Excretory Character

With respect to the determination of whether expression is sexual or excretory, the FCC's essentialist interpretation is not limited to what it characterizes as the inherently sexual meaning of expletives like "fuck." The fact that the FCC has found both breasts and buttocks to satisfy the category of sexual or excretory references, regardless of whether they are shown in sexualized or excretory situations, shows that the Commission is working with contextual definitions of what is sexual or excretory. As for expletives, there is no context in which such language is uttered as an expletive in which it could reasonably be said to be about sex.[190] Arguably,

188. *See, e.g.*, Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007); Don Aucoin, *The Pornification of America*, BOSTON GLOBE, Jan. 24, 2006, at C1 ("Not too long ago, pornography was a furtive profession, its products created and consumed in the shadows. But it has steadily elbowed its way into the limelight, with an impact that can be measured not just by the Internet-fed ubiquity of pornography itself but by the way aspects of the porn sensibility now inform movies, music videos, fashion, magazines, and celebrity culture."). *See generally* POP-PORN: PORNOGRAPHY IN AMERICAN CULTURE (Ann C. Hall & Mardia J. Bishop eds. 2007) (collecting essays addressing the ubiquity of porn in American culture today).

189. It might be argued in response that the aesthetic determination by the FCC functions as an exculpatory inquiry for the broadcaster—after all, if the Commission finds that the sexual material was necessary, then it will not find a violation of its indecency rules. This does not respond to the argument in text, however, that whether or not it ultimately finds the challenged material necessary, the government's inquiry inevitably trenches into fundamental aspects of constitutionally protected expressive freedom.

Furthermore, questions might be raised as to what standard the Commission could properly use if the artistic necessity inquiry is foreclosed. What alternate approach can the Commission retreat to if it must abandon the assessment of gratuitousness? One possibility is a return to its prior approach of considering merit at a high level. When deployed along with the presumption recommended in Section IV *infra*, the expressively invasive character of the government's inquiry could be reduced. It is of course true that even the merit inquiry implicates free expression concerns. Yet, given that the indecency regime is unlikely to be abandoned, a pragmatic inquiry must focus on what can be done to reduce the most noxious aspects of the current policy.

190. *See Fox I*, 556 U.S. 502, 543 (2009) (Stevens, J., dissenting) ("There is a critical

the Commission's categories are also both under- and over-inclusive.[191] As the Tom Lehrer quote in the title of this article instructs us, everything is lewd, when properly viewed.[192]

Even if we accept the FCC's assertion that breasts and buttocks are inherently sexual, very little expression is clearly inherently sexual or excretory. Much of today's sexualized humor, for example, depends on double entendre where the humor lies precisely in the see-saw of the sexual subtext disguised by sexual deniability. Years ago, the FCC sought to address indecency in double entendre by whether the sexual import of the expression was clearly understandable or inescapable.[193] It is not even clear if this is still the standard the agency would use. But, in any event, it means that much flirtatious expression could be considered inherently sexual and subject to regulation.

More generally, the Commission's new semantic theory raises a deeper question of why the Commission chooses to focus on words that are deemed to have sexual or excretory meaning. Why not seek to regulate any

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distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart. As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.").

The approach that asserts a term's "inherent" meaning is also ahistorical. *See* Dave E. Hutchinson, Note, *"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation*, 61 FED. COMM. L.J. 229, 231 (2008) (describing the transformation of the sexual meaning of the term "jerk" from the late 19th to the 20th century); *see also* Brief for Former FCC Officials, *supra* note 4, at 14 n.11.

191. Brief for Former FCC Officials, *supra* note 4, at 13–14 (characterizing as "utterly perplexing" the FCC's efforts to distinguish various words—such as "ass," "dickhead," and "up yours" from words such as "bullshitter" and "fuck 'em"—as to inherently sexual character).

192. *See supra* note *.

193. *See 2001 Policy Statement*, 16 FCC Rcd. 7999, 8003–04 ¶ 12 ("Merely because the material consists of double entendre or innuendo, however, does not preclude an indecency finding if the sexual or excretory import is unmistakable."); *see also* Letter to Rusk Corporation, Licensee, Radio Station KLOL(FM), 8 FCC Rcd. 3228 (1993) ("[W]hile [the licensee] may have substituted innuendo and double entendre for more directly explicit sexual references and descriptions in some instances, unmistakable sexual references remain that render the sexual meaning of the innuendo inescapable."); Letter to Carl J. Wagner, Great American Television and Radio Company, Licensee, Radio Stations WFBQ(FM) et al., 6 FCC Rcd. 3692, 3693 (1990) ("While the passages arguably consist of double entendre and indirect references, 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.").

words that are considered offensive—in or out of context? If the focus of modern indecency regulation is attributable to the fortuity of George Carlin's filthy words monologue, that is insufficient reason to keep it so fixed.

c. Nonconformance with Accepted Standards of Morality

In its *Fox* briefing, the government explicitly referred to the "normal" definition of indecency as "nonconformance with accepted standards of morality."[194] Although this is a reference to a part of the Supreme Court's opinion in *Pacifica*,[195] its deployment in the context of the Commission's indecency policy now is instructive. In *Pacifica*, the Court deployed the notion of nonconformance with accepted standards of morality as a way of distinguishing between obscenity and indecency in § 1464. Moreover, the Carlin monologue at issue in *Pacifica* was considered a nuisance that could be time-channeled because its daytime airing did not conform with accepted standards of morality. The fact that the FCC is now bringing this statement to the forefront as what defines indecency—rather than its more complex generic standard—suggests the possibility of more invasive indecency regulation in the future. The FCC might find a program not to conform with accepted standards of morality even if it was not patently offensive to the average broadcast viewer or listener. The reference to accepted standards of morality is also an explicit admission by the government that it is engaging in morality legislation. This is a troubling position for the government to take with respect to speech, as noted below.[196] Moreover, it is a far cry from the *Pacifica* approach, under which the Court permitted the government to regulate not to enforce morality, but to ensure that children did not come across a nuisance during the day.

III. UNDERLYING SHIFTS IN THE FCC'S REGULATORY JUSTIFICATIONS

The procedural and doctrinal changes described in Section II have made it easier for complainants to bring indecency complaints, have chilled broadcaster speech, and have created incentives for stations to engage in constraining self-regulation—all with a reduced likelihood of judicial review and oversight.

More broadly, however, those changes also reflect important shifts in the traditional regulatory justifications for FCC involvement in this area. The

194. *See, e.g.*, *Fox II* FCC Reply, *supra* note 183, at 12–13 (quoting *Pacifica II*, 438 U.S. 726, 740 (1978)).

195. *Pacifica*, 438 U.S. at 740.

196. *See* Part III B.2, *infra* text accompanying notes 234–245.

FCC has reinterpreted its classic reasons for regulating indecency, attempting to adjust the *Pacifica* factors to fit modern conditions. It has also argued for indecency regulation not under such indecency-specific rationales, but under notions of broadcast scarcity and contractually-interpreted license conditions new to this regulatory context. The reinterpretations of the FCC's traditional regulatory justifications present important social risks and do not do the work the FCC requires of them.

A. Reframing the FCC's Articulated Reasons for Indecency Regulation

As the Court asserted in *Pacifica*, broadcasting has been granted lesser constitutional protection for speech because of the medium's exceptional characteristics: its unique pervasiveness and unique accessibility to children.[197] Those characteristics have permitted the Commission to

197. The first factor justifying time channeling in *Pacifica* is the unique pervasiveness of radio, while the second is radio's unique accessibility to children. The Commission has consistently argued for the continuing viability of these factors—claiming that despite technological change, broadcasting is still uniquely pervasive both in diffusion and viewership. With regard to the pervasiveness of diffusion, the Commission refers to the millions who still live in broadcast-only households. *Fox II* Government Brief, *supra* note 183, at 44–45; *see also* Brief of Amici Curiae Am. Acad. of Pediatrics et al. in Support of Affirmance at 16, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5544810 (presenting statistics on television and cable use in U.S. households). As for viewership, the Commission relies on the continuing dominance of broadcast television programming despite the availability of cable, arguing that "television broadcast programming has retained its dominance despite the proliferation of different ways of accessing it." *Fox II* FCC Reply, *supra* note 183, at 14; *see also Fox II* Government Brief, *supra* note 183, at 45. The agency also claims that even if cable has made inroads into broadcast network audiences, technological change has in no way reduced the pervasiveness of radio.

Although the FCC has argued for the continuing relevance of the factors used in *Pacifica* as justifications for channeling the Carlin monologue to late-night hours, it has also reinterpreted and reframed them. Pervasiveness has been associated with the continuing dominance of broadcast programming and also perhaps its continuing salience. Moreover, the discussion of pervasiveness now focuses not only on the extensive availability of broadcasting, but also on distinct demographic effects and the intrusion of broadcast into the home. The Commission's *Fox II* briefs, for example, focused on how low-income children are disproportionately represented in the group of broadcast-only households. *See generally Fox II* Government Brief, *supra* note 183; *Fox II* FCC Reply, *supra* note 183. The government also described the uniquely pervasive presence of broadcasting by reference to its intrusion into the home. *See Fox II* Government Brief, *supra* note 183, at 4–5. Perhaps most importantly, the Commission argued that the continuing pervasiveness of broadcasting is due in part to regulatory design including, for example, the Commission's own "must carry" rules. As for the unique accessibility of broadcasting to children, the Commission focused on the fact that alternative services to broadcasting are available only by subscription. *See Fox II* Government Brief, *supra* note 183, at 22; *see also Fox II* FCC Reply, *supra* note 183, at 20. The Commission also took the position that disturbing the prior regulatory regime would "upset parents' settled expectations" that broadcast television is a

regulate, it has traditionally claimed, for the dual objectives of assisting parents and promoting an independent government interest in the well-being of children.[198]

In reality, the original regulatory scheme in *Pacifica* rested on an awkward combination of public decorum and protecting children—awkward because there is no necessary connection between the two goals. The nuisance concept in *Pacifica* suggests that indecent expression might violate norms of public decorum regardless of the presence of children. (Although the presence of children in the audience can further add to adults' discomfort if they would prefer not to watch this kind of programming together, this is not necessarily a reflection of parental concern about harm to children from exposure to this material). As for the goal of protecting children from direct harm, neither the Court nor the FCC has defined this concern crisply. Even if exposure to bad language and sexual expression could affect children's social development negatively, it is difficult to determine how much of this influence can be attributed to radio and television when the social environment as a whole is rife with such material.

Whatever the merits of the original *Pacifica* theories, however, the Commission's reframing of its regulatory justifications has neither openly acknowledged their tensions nor provided a more desirable alternative.

1. A New Take on Assisting Parents—Moral Zoning to Provide a "Safe Haven"

The FCC has historically justified indecency regulation by the need to promote parental control. Indeed, assisting parents has been seen as an "uncontroversial" basis for regulation.[199] Such a regulatory goal is thought to be most acceptable from the point of view of a "neutral" government behaving merely as the agent of the public, helping parents make their own

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safe zone, *Fox II* Government Brief, *supra* note 183, at 52, so the uniqueness of accessibility is translated as a uniquely safe area on which parents can reasonably rely.

198. *See* Collins, *supra* note 20, at 1244 (listing "five potential government interests in shielding children from allegedly indecent materials in broadcasting: (1) supporting parental preferences; (2) preventing psychological harm; (3) preventing imitation of harmful behavior; (4) promoting civility and socially appropriate behavior; and (5) protecting from offense"); *see also* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 602 (2005).

199. *See, e.g.*, Ashutosh Bhagwat, *What If I Want My Kids To Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671, 673 (2003) (describing as "quite uncontroversial" the government's "interest in supporting and facilitating parental supervision over their children's access to sexually explicit speech"); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000) (describing and critiquing governmental interest in parental control); *see also* J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996) (characterizing parental control as the underlying regulatory justification).

normative decisions rather than imposing governmental cultural policy.

The broadcast challengers in *Fox II* rejected this regulatory rationale, claiming that it had been undermined by media developments. They asked what it could reasonably mean for the government to assist parental control by regulating broadcast in light of children's likely exposure to fleeting expletives and sexual situations in the plethora of media to which they now have ready access.[200] Without any showing of harm to children from exposure to broadcast indecency, they asked, why scapegoat over-the-air broadcasters in a context in which far more indecency can be found on unregulated cable and the Internet?[201]

In response, the Commission asserted that far from making broadcast regulation irrelevant and ineffective, "The rise of alternative, unregulated platforms for video programming has, if anything, strengthened the need for broadcast-indecency regulation."[202] Referring to increased indecency on the air, the reliance of parents on indecency-free daytime programming since 1927,[203] and asserted parental clamor for regulation (evidenced by increased numbers of indecency complaints), the Commission cast its changed indecency regime as nothing more than responsive regulation compelled by broadcaster misbehavior.

In regulating, the Commission adopted a different spin on the notion of assisting parents. On the reframed argument, the Commission no longer

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200. This query does not even address the parents who do not want Commission "assistance" of this sort.

201. In the current landscape, these theorists suggest that stringent enforcement will inevitably be ineffectual. Many of the briefs filed with the Supreme Court in the *Fox* litigation argued against indecency regulation on the ground that the Commission's initiatives were simply ineffective and anachronistic in light of the increased social acceptability of sexual expression and the availability of indecent material on non-broadcast media. *See* Adam Candeub, *Shall Those Who Live by FCC Indecency Complaints Die by FCC Indecency Complaints?*, 22 REGENT U. L. REV. 307, 308 (2010) ("[T]he degree that the broadcast indecency regulations in fact protect children from indecent material is marginal to nonexistent in our current media environment."); Wright, *supra* note 109.

202. *See Fox II* FCC Reply, *supra* note 183, at 15 (quoting *Fox I*, 556 U.S. 502, 529–30 (2009)) ("Because of 'the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable,' the need remains for 'more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.'"). At the same time, the rise of those alternative platforms has dramatically reduced the burden of broadcast indecency regulation on those adults who wish to produce or view indecent programming, *see Fox II* Government Brief, *supra* note 183, at 48–49, "just as the widespread availability of digital video recording devices that permit time-shifted viewing has materially reduced the burden of requiring indecent material to be broadcast after 10 p.m." *Fox II* FCC Reply, *supra* note 183, at 15 (citation omitted).

203. *Fox II* Government Brief, *supra* note 183, at 23, 52–53; *Fox II* FCC Reply, *supra* note 183, at 13–17.

purports to cleanse electronic media indecency during the day. Instead, it recasts its role as providing a relative "safe zone" in a sea of electronically available smut.[204]

2. From Individual to Social Harm—Reframing the Independent Governmental Interest in the Well-being of Children

The other interest in indecency regulation classically articulated by the FCC is an independent government interest in the physical and psychological well-being of youth.[205] As noted above, the particular type of harm to be feared from indecency has never been clearly articulated either by the FCC or by the Supreme Court. Critics have challenged the notion of harm to children from indecent television content.[206] The majority in *Fox I* deferred to the FCC's concerns about harm to children because of the

204. What are the purported benefits of such a safe haven from indecency? It is said to help parents who work and have little time to supervise their children's media use. On this approach, government regulation is necessary because existing consumer tools will not be adequate to the task (either because they are imperfect or because parents do not know how to use them). The existence of safe zones might also be thought to permit parents to make decisions about when to have awkward conversations with their children about sex—rather than having their timing dictated by networks. Implicit in paeans to moral zoning is the argument that it wrests control from corporate media (whose decisions are driven by profit motives rather than the public interest) and celebrities (to whom Justice Scalia refers in *Fox I* as "foul-mouthed glitteratae from Hollywood," *Fox I*, 556 U.S. 502, 527 (2009)), who both exert outsized influence on youth culture. *Cf.* Rodney A. Smolla, *Qualified Intimacy, Celebrity, and the Case for a Newsgathering Privilege*, 33 U. RICH. L. REV. 1233 (2000) (discussing Prof. Nagel's coinage of the term "pseudo-intimacy" to describe the construction of modern celebrity).

205. *See, e.g.*, Forfeiture Order, *In re* Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003, 23 FCC Rcd. 3222, 3236 (2008); *cf.* Ginsberg v. New York, 390 U.S. 629, 640 (1968) (asserting the state's "independent interest in the well-being of its youth" in the context of a New York statute prohibiting the sale to minors of material that would not be considered obscene for adults); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); *Pacifica*, 438 U.S. 726, 749 (1978).

206. Some have argued that the government has not shown evidence of harm to children. Others have complained that the Commission's regulatory regime conceives of children as including teenagers up to eighteen years old, whose acquaintance with sexual matters is likely to extend far beyond what they could learn from broadcast television indecency. Still others have characterized as speculative the particular kinds of harm to children presumed by the indecency regime. There is also a lack of consensus among social scientists about the particular types of psychological harms that can be caused by indecency. Indeed, even in the context of televised violence, in which there has been far more empirical research, the impact of media images on children's psychological states or behavior is contested. *See, e.g.*, Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in* Fox Television Stations?, 47 SAN DIEGO L. REV. 737 (2010); Fairman, *supra* note 123, at 53–58.

ethical constraints on attempting to test the asserted harms.[207]

Even if critics are right to lambast this version of the FCC's harm-based rationale for indecency regulation, the Commission's new approach suggests a reinterpretation of the independent governmental interest. Simply put, in this version, the independent governmental interest in the well-being of children is grounded on the assertedly *social* harms of indecency rather than any specific feared harm to children's psyches. Now, child protection has been read to subsume *Pacifica I*'s nuisance rationale and has in turn been transformed into an imperative focused on social rather than individual harm.

What is the social harm wrought by broadcast indecency? The answer is not entirely clear. Justice Scalia's opinion for the majority in *Fox I* asserts that children mimic behavior presented to them as "normal and appropriate."[208] This suggests that the Commission's feared social harm results from the apparent normalization of sexual expression in public. Such normalization could arguably harm individual children's ability to operate in the social world.[209] If many children change the norms of what is seen as appropriate, this could also lead to broader social harms.[210]

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207. The Supreme Court has shown some ambivalence toward governmental claims to an independent interest in regulations to promote the psychological welfare of children, and it is troubling that Justice Scalia in *Fox I* assumes away that ambivalence.

208. *Fox I*, 556 U.S. at 519. This argument is also reflected in the government's briefing in *Fox II* and in the *Fox II* oral argument. Justice Scalia effectively took judicial notice of this phenomenon by saying that empirical data demonstrating harm would not be required when "*it suffices to know* that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate." *Id.* at 519 (emphasis added). This intuition might find support in communications studies. For example, the communications theory of "cultivation analysis" looks to how repeated media messages can lead viewers to believe that what they are seeing is normal and appropriate. *See* Calvert & Richards, *supra* note 20, at 324; *cf.* LaChrystal D. Ricke, *Funny or Harmful?: Derogatory Speech on Fox's Family Guy*, 63 COMM. STUD. 119, 122 (2012) (describing "cultivation" analysis, which looks at how repeated messages can impact viewer's perception of social reality and have social consequences).

209. *See* Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 510–11 (2007) ("As the Supreme Court has acknowledged, a democratic government requires the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. This includes the inculcation of certain civic values that in turn will mold individual character so as to instill a sense of public duty. And one way to achieve this character development is to prevent childhood exposure to harmful speech and images.") (footnotes omitted) (internal quotation marks omitted); *see also* Collins, *supra* note 20, at 1253–58 (discussing governmental interests in promoting civility and socially appropriate behavior).

210. *See* Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 68–9 (2000) ("An example of a complicated mixture of grounds for protecting public

This rationale is not logically limited to the protection of public discourse for/by children; however, it bleeds beyond the powerful (if underanalyzed) child protection trope.[211] So what justifies regulating pursuant to a government interest in society-protecting "appropriate social discourse"? On one interpretation, this is just morality-based censorship of speech masquerading as protection of social discourse. This is akin to historians' descriptions of previous crackdowns on indecency outside the media context as aspects of government trying to enforce public order.[212]

On an alternative interpretation, however, normalizing indecency could reasonably be said to undermine the quality of community life and the opportunity for a rich and diverse democratic discourse open to all. If so, the government could claim a "legitimate [state] interest in establishing a series of ground rules for public discussion and debate"[213]—an interest in adopting something akin to Robert's Rules of Order so as to "sharpen the discussion and broaden participation in it."[214] In apparently shifting its regulatory rationales from individual psychic harm to social harm, the FCC

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morality may be found in the concern for the moral ecology of society and the possibility of parents raising their children with various good habits. The permission of particular acts by a community has something of an educative effect, contributing to the 'normalization' and hence the legitimization of such acts . . . These effects may be especially powerful on young people . . . What is at stake in the regulation of public morality is the souls of our children.").

211. Even the childhood effects are contested. Professor Garry, for example, points to social science documenting harm to children but cannot distinguish the effect of indecent and violent expression. *See* Garry, *supra* note 209, at 512 (citing relevant studies). Professor Garry might also be said to have made a leap from the appropriateness of government inculcation of civic virtues to promote citizenship to the conclusion that preventing childhood exposure to indecency is a way to achieve the character of dutiful citizen upon maturity. *But see* Wolfe, *supra* note 210 (describing benefit of public morality as child-focused). As for claims of connections between exposure to sexual television content and increases in teenage sexual activity, see Collins, *supra* note 20, at 1251–53 and sources cited therein, the scientific evidence is still thin and insufficiently granular to establish which sorts of sexual expression pose the greatest threat. Indeed, if—as one might suspect—the effects are attributable to the overall vulgarity and sexualization of many television programs, then even stringent FCC indecency enforcement could not eliminate the threat. *See* Calvert & Bunker, *supra* note 206 (describing the harm causation evidence issue).

212. *See, e.g.*, BEN WILSON, THE MAKING OF VICTORIAN VALUES: DECENCY AND DISSENT IN BRITAIN, 1789–1837 (1980).

213. Thomas G. Krattenmaker, *Looking Back at* Cohen v. California*: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 684 (2012).

214. *Id.* at 685. Professor Krattenmaker explains that, "Harm is done both to individuals and to society when language is used to degrade or to diminish the humanity or worth of any person in that society. It is not prudish to recognize that certain kinds of vulgarities . . . can wound people who are already among society's least protected, most vulnerable members. And permitting that sort of harm to individuals can harm our society as well, by further alienating or degrading those already at risk." *Id.* at 684–85 (footnote omitted).

could be joining an important strand in modern speech theory.[215]

In addition to the regulatory justification based on denying endorsement,[216] rules such as prohibitions of indecency can be styled as

215. Arguments justifying regulation of speech on the basis of social harm have been very common in discussions of the constitutionality of hate speech regulation. In his recent book arguing for the regulation of hate speech, Jeremy Waldron argues that mere offense cannot be a legitimate basis for governmental censorship. JEREMY WALDRON, THE HARM IN HATE SPEECH 105–06 (2012). Hate speech, he contends, should be prohibited not because individuals will feel offended but because of the impact of such expression on the ability of vulnerable populations to participate in democratic society as citizens of equal dignity. Recently, such arguments have emerged in other contexts as well—for example, as the impetus for a movement to regulate political discourse. *See, e.g.*, Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011); Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375 (2012). The difference is that in the indecency context, the agency is not regulating to protect politically weak and vulnerable populations and ensure their political participation. *See* Barak Orbach, *On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 443 (2012) (highlighting the downsides of regulating to promote civility norms in public discourse).

216. The FCC could be said to have reframed *Pacifica*'s nuisance rationale through the lens of government endorsement. On this view, government can regulate daytime indecency on TV lest the public believe that it endorses the appropriateness of such speech. As described in the *Fox II* opinion, "The Government . . . maintains that when it licenses a conventional broadcast spectrum, the public may assume that the Government has its own interest in setting certain standards." *Fox II*, 132 S. Ct. 2307, 2320 (2012) (citing *Fox II* Government Brief, *supra* note 183, at 40–53). Concerns about the appearance of government endorsement have also surfaced to explain the Lanham Act's exclusion of scandalous marks from registration. For discussions of trademark law treatment of scandalous marks, see, for example, Jennifer Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STANFORD L. & POL'Y REV. 119 (2012); Anne Gilson LaLonde, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476 (2011); Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010); Sarah Burstein, *Dilution By Tarnishment: The New Cause of Action*, 98 TRADEMARK REP. 1189 (2008); Jasmine Abdel-khalik, *To Live In In-"Fame"-y: Reconceiving Scandalous Marks as Analogous to Famous Marks*, 25 CARDOZO ARTS & ENT. L.J. 173 (2007); Llewellyn J. Gibbons, *Semiotics of the Scandalous*, 9 MARQ. INTELL. PROP. L. REV. 187 (2005); M. Christopher Bolen et al., *When Scandal Becomes Vogue: The Registrability of Sexual References in Trademarks and Protection of Trademarks from Tarnishment in Sexual Contexts*, 39 IDEA 435 (1999); Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REP. 661 (1993); Theodore H. Davis, Jr., *Registration of Scandalous, Immoral, ad Disparaging Matter Under Section 2(a) of the Lanham Act: Can One Man's Vulgarity Be Another's Registered Trademark?*, 83 TRADEMARK REP. 801 (1993); Regina Shaffer-Goldman, Note, *Cease-and-Desist: Tarnishment's Blunt Sword in its Battle Against The Unseemly, The Unwholesome, and the Unsavory*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241 (2010); Christopher T. McDavid, Note, *I Know It When I See It: Obscenity, Copyright, and the Cautionary Tale of the Lanham Act*, 47 U. LOUISVILLE L. REV. 561 (2009); Regan Smith, Note, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451 (2007); *see also* David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in*

symbolic statements by government that some things are inappropriate on television.[217] The FCC might also rest the permissibility of its social interest on a vision of broadcast television as an educational, socializing agent. Just as it has done with respect to the regulation of children's educational television programming, the Commission has implicitly cast television in an educative role.[218] On this view, broadcasters have chosen to operate in a medium that happens to have profound teaching capacity and impact and can, therefore, be deemed to have agreed to limit their expressive freedoms in some minor areas.

Copyright, 98 KY. L.J. 517 (2010) (noting the copyright ability of obscene and offensive material, in contrast to trademark law).

217. *Cf.* Adam Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012) (discussing the undertheorized logic of regulatory decisions justified by reference to appearance).

218. The FCC has adopted children's educational television programming requirements in response to the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990); *see also* Collins, *supra* note 20, at 1254–55 (noting congressional and FCC recognition of educational functions of broadcasters).

Since education extends beyond teaching children math and grammar to encompass their socialization and inculcation with norms and values, the FCC's focus on appropriate and inappropriate speech can be interpreted as akin to educational regulation.

The Supreme Court's education jurisprudence grants extensive judicial deference to school officials. Although *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969), grants students the right to speak without causing material disruption to the educational process, later cases approve restrictions on student speech beyond what would be considered constitutionally permissible outside the public school context. For example, the Court has permitted schools to censor "vulgar and lewd speech" to make the point that such expression is inconsistent with the values of public school education. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986). The Court said in *Fraser* that it is appropriate for public schools to inculcate in students "the habits and manners of civility" in order to promote self-government and "the maintenance of a democratic political system." 478 U.S. at 681. As the Court put it:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. . . . Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

478 U.S. at 681, 683.

3. The FCC's Shift to Proto-Contractual Arguments

In addition to maintaining the modern relevance of the *Pacifica* categories, the government in the *Fox* cases also attempted to ground regulation in a proto-contractual rationale, presumably designed to serve as a justificatory substitute if the Court were to overrule *Pacifica* (and scarcity-based *Red Lion*).[219] Specifically, the government's briefing in the *Fox* cases argued various versions of the general claim that indecency regulation was simply a part of the regulatory bargain in exchange for broadcasters' privileged access to a scarce public resource granted by government licensing.[220] This claim contains various strands.[221] It is at least, in part, a revival of the "*quid pro quo*" justification for broadcast regulation that the FCC had been developing since the 1990s,[222] but appears clearly in the foreground here for the first time.

B. The Risks of the FCC's Reframed Regulatory Justifications

The attempt to refashion the exceptional *Pacifica* factors for a modern age and, more significantly, to adopt a consent-based or quid pro quo justification for broadcast's continued regulatory second-class status, fails to compensate for the failures of the indecency regime.

1. The Limits of Safe Havens

There is something intuitively attractive about safe havens for children. Zoning has served in other contexts to limit noxious uses and reduce the extent to which they encroach on social life. Nevertheless, the Commission's revised notion of assisting parents is hardly as uncomplicated as the agency would wish or pretend. Broadcast safe havens impose costs on broadcasters without corresponding benefits in practice.[223] The Commission cannot properly regulate when it has not even explored

219. In contrast with *Pacifica*, which grounded exceptional First Amendment treatment of broadcasting on pervasiveness and accessibility to children, the Court in *Red Lion Broadcasting Co. v. FCC* upheld the Commission's broadcast fairness doctrine as justified by the scarcity of the electromagnetic spectrum. 395 U.S. 367 (1969). Historically, the Commission has not justified indecency regulation by reference to the traditional regulatory rationale of broadcast scarcity.

220. *Fox II* Government Brief, *supra* note 183, at 51-53.

221. *See infra* notes 251, 255 and accompanying text.

222. *See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1690–91 (1997).

223. *See, e.g.*, Wright, *supra* note 109, at 198–99 (arguing that "a broadcasting 'safe haven' rule would burden the speech rights of broadcasters, while at the same time being, as a practical matter, entirely unnecessary").

technological alternatives to regulating for safe zones. And "proponents of censorship are inevitably tempted to protect adults in the name of protecting children."[224]

Whatever its appeal in the abstract, is the idea of safe harbors meaningful and realistic today?[225] The agency has not actually assessed the possibility of establishing clearly identifiable safe zones in today's technological circumstances. It is not clear that parents can easily process zoning information in a converged media landscape. Since most consumers view television via cable or the Internet, they do not necessarily know whether they are watching FCC-regulated broadcast television or cable programming to which indecency rules do not apply.[226] To the extent that the television V-chip has weaknesses, the availability of more robust (and perhaps more accessible) cable and Internet filtering methods for parents might compensate for V-chip limits.[227] And improvements in the V-chip can reduce the need for safe zoning approaches, even for those viewers who do not have cable.[228] Finally, the FCC's new take on assisting parents does not answer the question of what the regulations should be. The safe harbor notion, as such, also fails to justify why broadcasters alone should be the subjects of regulatory attention.

Proponents of safe haven justifications might respond that the indecency regime will not, in fact, prove to be an ineffective finger in the dike of indecent programming on electronic media because of the increasingly converging structure of the media industry. Arguably, given the continuing relevance of broadcast content even in a media marketplace flooded by non-broadcast distribution mechanisms, regulated material could have

224. Balkin, *supra* note 199, at 1155.

225. Even in 1998, Professor Glen Robinson had characterized the attempt to protect children from George Carlin's seven dirty words, or even "a sustained monologue of dirty words, racial slurs and sexual innuendo" as "a quixotic ambition, unless we are to establish speech monitors in every playground and on every street corner." Robinson, *supra* note 50, at 959.

226. Candeub, *Indecency*, *supra* note 201, at 308 ("Most households receive their broadcast television through cable. Most people therefore click from regulated 'decent' broadcast programming to unregulated and perhaps 'indecent' cable programming without even noticing it."). For a powerful argument based on the technological obsolescence of the *Pacifica* factors, see Brief for Former FCC Officials, *supra* note 4, at 21–28.

227. To the extent that the justification for broadcast regulation is the "coarseness" in available filtering mechanisms, improvements in broadcast filtering will obviate the need for regulation. *See* Balkin, *supra* note 199, at 1148–50 ("If broadcast media can permit blocking and time-shifting of programming easily, cheaply, and painlessly, they will have largely approximated the filtering status of the print media.").

228. This does not address important questions, *inter alia*, about the censorious effects of decisions made by filtering intermediaries. Balkin, *supra* note 199, at 1131–32, 1165 ("In the Information Age, the informational filter, not information itself, is king.").

amplified effects in the media market as a whole.

This, however, overstates the case.[229] In any event, if the safe-haven approach *is* effective, then it raises the underlying tension between the goals of assisting parents and prohibiting indecency.[230] There are social tensions between norms of community and individual autonomy and differences even within communities.[231] If the Commission's attempt to carve out a safe space, in fact, indirectly affects (and cleanses) non-broadcast programming, then the Commission will have used a parental control rationale to empower the most intolerant parents, undermine the control of those who see things differently, and promote a particular moral viewpoint.[232] The picture of beleaguered conservative parents at the mercy of broadcasters, seeking a small enclave away from the sea of smut, does not reflect the full and more complex picture. Conservative groups have positioned themselves as moral norm entrepreneurs and claim much success.

So, far from being the relatively modest reframing of the classic parent-assistive regulatory rationale, the agency's new take on safe havens is either ineffective and unnecessary or effective and an example of disguised government cultural policymaking. When there is public dispute, the Commission's decision to put its thumb on the scale and use its indecency rules to prevent the purported social harm is suggesting this material is inappropriate and is tantamount to choosing one side of a split on national values. Ultimately, promoting parental control is not the neutral regulatory justification that it purports to be.

2. The Perils of Regulating to Prevent Social Harm

Similarly, the Commission's transformation of the government's interest in the well-being of children from a concern about harm to children to a

229. For example, given that broadcast indecency is only limited temporally, and not prohibited, edgy programming will still be produced for both cable and broadcast if it is thought to have a market. Moreover, co-owned, but different, distribution media are likely to produce brand-differentiated programming.

230. This tension has been previously noted in connection with the Commission's pre-2003 indecency regime. Bhagwat, *supra* note 199, at 679; *cf. ACT III*, 58 F.3d 654, 663 (D.C. Cir. 1995) (recounting and rejecting petitioners' argument that governmental goals of protecting children and helping parents were in irreconcilable conflict).

231. *See* Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 2–4 (2005) (noting that the current culture of self-expression is not always consistent with the moral boundaries of, at least, some communities).

232. If only 65% of poll respondents—not 95%—say they are worried about sex and violence on the airwaves, why privilege them? Ratings show that whether or not they like the indecency in the shows, viewers like the shows enough to tolerate the indecency.

concern about the social harms of indecency on public discourse reflects a shift in focus that brings with it significant risks. Even if there could be consensus that psychic harm to children must be avoided (with views differing only as to the actuality and scope of such harm), the Commission's transformed regulatory rationale is far more about affirmatively regulating morality and culture than protecting children's psyches.[233] But the FCC should not serve as the country's culture czar. Ultimately, the public-decorum or social-appropriateness claims that appear to underlie the Commission's desire to prevent social harm, not to mention the deeper moral claim about preserving culture, effectively put the government's weight on one side of a contested social/moral issue.[234] Those who believe

233. Professor Rubin's article suggests that this morality is so closely associated with Christian religious teaching that it should be considered a violation of the Establishment Clause. *See* Rubin, *supra* note 231, at 4, 34–40; *see also* Robinson, *supra* note 50, at 961–62 (describing Louis Henkin's "convincing" argument "that obscenity legislation was really morals legislation in disguise" and questioning whether there is "any meaningful distinction" between indecency and obscenity for purposes of this regulatory justification).

234. This is objectionable. *See* Balkin, *supra* note 199, at 1137 ("[T]he desire to use government to control culture by controlling what people watch on television cannot be a constitutional justification for the regulation of free expression."); Krattenmaker, *supra* note 213, at 688 ("Perhaps government has a claim to a greater legitimate role in regulating the public dialogue where its tools are less draconian [than jail terms, as in *Cohen v. California*] and its goals seem more acceptable than simply to enforce a temporary majority's desire for cultural and ideological conformity. However, I have yet to see such a case."); Robinson, *supra* note 50, at 965 (implying that, while it is possible to engage in means-ends analysis regarding goals such as localism or "protecting children against unwitting exposure to indecent messages . . . redefin[ing] the end as preserving 'culture' and the formerly reasoned assessment reduces to a brute political contest of competing preferences. There simply is no way to evaluate what means will secure that end. Indeed, there is hardly even a way of articulating what the end means in terms that can be reconciled with the liberal premises of the First Amendment.").

While some decry the coarsening of American culture, others express concern that regulating indecency is little more than placing government's imprimatur on majoritarian and prudish norms. In his dissent in *Pacifica*, for example, Justice Brennan worried that "in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain." *Pacifica*, 438 U.S. 726, 775 (1978) (Brennan, J., dissenting). *But see* Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841, 841–43 (2006) (discussing moral justifications for approval of mandatory sexual modesty laws).

In any event, even the Court's First Amendment jurisprudence in the educational context would not necessarily justify giving the FCC *carte blanche* as to broadcast indecency regulation. The Court's jurisprudence leaves fuzzy to some extent the demarcation between acceptable and unacceptable speech in the public school context. Moreover, permitting schools to inculcate fundamental values essential to maintaining a democratic political system does not mean permitting them to suppress dissent. The *Fraser* opinion described the

that the government should enforce morality norms in order to protect society, make the mistake of conflating society with the morality of one segment of the population—even if that segment is, arguably, the majority. If the regulation of indecency is an example of the government's attempt to ensure room for a traditional cultural narrative in response to the urgings of organized moral norm entrepreneurs, it is troubling on many levels.[235] It is

students exposed to the indecent language as a "captive audience" and emphasized the role of the schools as "instruments of the state." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680, 683 (1986). Finally, the Court in *Fraser* explicitly recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," indicating that such moral education would not be appropriate outside the school context. *Id.* at 682.

Nor is the government speech doctrine available to the Commission in this context. The Court has not found broadcast licensees to be governmental actors, despite the discussion by some Justices in *CBS, Inc. v. Democratic Nat'l Comm*. 412 U.S. 94, 114–21 (1973).

235. Some might argue that government neutrality on socio-moral issues is both impossible and undesirable. *See, e.g.*, Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2, 4–5, 19–20 (2000); Steven D. Smith, *Why Is Government Speech Problematic?: The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 946 (2010). Indeed, they might affirmatively attribute to government a role in endorsing important moral and social values. Doctrinally, they might point for support to the Supreme Court's developing government speech doctrine, which permits government, when speaking on its own, to endorse preferred social norms without interference from the First Amendment. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("If [the state is] engaging in [its] own expressive conduct, then the Free Speech Clause has no application."). For scholarly work on government speech, see generally MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011); David Fagundes, *State Actors As First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006); Greene, *supra*; Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Smith, *supra*; Nelson Tebbe, *Government Nonendorsement, Brooklyn Law Sch. Legal Studies Research Papers, Research Paper No. 287* (2013), *available at* http://ssrn.com/abstract=2125243 (proposing a limit of nondisparagement as a constraint on government speech); Wolfe, *supra* note 210 (describing the Supreme Court's contraction of public morality). And by contrast to libertarian or classically liberal theorists, First Amendment scholars of a democratic stripe might conclude that government has a positive role to play in regulating speech to achieve higher quality and more inclusive public discourse. *See generally* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996).

By contrast, others would point to the dangers posed by a government unconstrained by aspirations to neutrality on highly contested social and moral issues. *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."). Without the lodestar of government neutrality as to fundamental conceptions of the good, they would argue, what would ensure protection of minorities, disfavored groups, and those considered moral and cultural outliers at any given time? Similarly, even if the government has an appropriate role to play in the development

particularly problematic when that side, as noted above, is not the disadvantaged and voiceless minority it claims to be. And history suggests that we should be skeptical of historical claims of past consensus on traditional morality.[236]

As for the argument that the FCC's intervention is less morality regulation than democratic intervention to promote civil public discourse,

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of cultural policy, should it structure the speech marketplace more than what is necessary to create room for all points of view? Doctrinally, such critics might argue that there are in fact more constitutional constraints on government endorsement of particular visions of the good than might at first appear from government speech jurisprudence. *See generally* Tebbe, *supra.* Moreover, even those who are skeptical about the goal of government moral neutrality recognize the particular threat posed by government speech when government has been captured by a faction. *See, e.g.*, Smith, *supra*, at 962. Arguably, that is what has happened in the indecency context. *Cf.* Barak Orbach, *supra* note 215, at 446–47 (2012) (warning that "although 'civility' is a concept of inclusiveness, it determines participation and therefore it has exclusionary effects" and showing how "the use of 'civility' and 'incivility' as rules of engagements in group deliberations [threatens conformity] and increase[s] likelihood of costly mistakes"). Finally, even if democratic free speech theory legitimately justifies government involvement in creating the preconditions for democratic deliberation, the indecency context is sufficiently distant from core democratic and political discourse as to lead to a different cost-benefit calculation regarding government involvement.

However, this does not mean that not regulating is costless. Professor Post has importantly explained the fundamental tension underlying government regulation of indecent speech. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 627–33 (1990). Crudely put, the problem is that while government should be prohibited from penalizing speech violating decency and propriety norms because it should not select and privilege only some of the diverse communities that make up the country, disabling government from doing so may well undermine the very ability to engage in the kind of reasoned, deliberative discourse to promote democracy that decency norms may be responsible for enabling.

Perhaps this makes government regulation of indecent speech "inherent[ly] intract[able]." Jonathan Weinberg, *Cable TV, Indecency and the Court*, 21 COLUM.-VLA J.L. & ARTS 95, 125 (1997). As far back as the original *Pacifica* case before the FCC, then-Commissioner Glen Robinson admitted the conflict: "[T]here is no logical ground for compromise between the right of free speech and the right to have public utterance limited" for propriety's sake; "the conflicting claims" can only "be made to co-exist by *tour de force*." *Pacifica Order*, 56 F.C.C.2d 94, 110 (1975) (concurring statement of Comm'r Glen O. Robinson). Nevertheless, political reality suggests the continuation of some level of Commission regulation in this area. Recognition of the intractability of the problem should counsel modesty and restraint on the part of the Commission.

236. Neil M. Richards, *Privacy and the Limits of History*, 21 YALE J.L. & HUMAN. 165, 168, 170–71 (2009) (reviewing LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY (2007) [hereinafter FRIEDMAN, GUARDING LIFE'S DARK SECRETS]) ("[T]he lesson that *Dark Secrets* suggests to us is that when it comes to the regulation of sexuality (and particularly disfavored forms of sexual activity and expression), there are very few traditions other than a persistent and long-standing tradition of conflict over the relevant legal and social norms.").

the argument for regulating to prevent social harm in this context proves too much. It prompts the question of why we are only concerned about indecency when symbolic condemnation of violence might yield more social benefits. It could even more easily justify a rule that nobody could disseminate racist speech (at a minimum in a mode where children could get access to it).[237]

Attempting to regulate to prevent social harm is not worth the candle when the regulation is unlikely to be effective in light of broader technological and cultural trends. After all, what is the educative and socially beneficial effect of "clean" broadcast airwaves when children learn expressive norms and notions of appropriateness from other media as well, and when much social discourse is already coarse to a degree many decry? History warns us about the limits of regulating sin to maintain public order; such attempts are destined for failure. Professor Lawrence Friedman has characterized various aspects of 19th-century American law as reflecting a "Victorian compromise"[238] designed to protect a social order perceived as delicate and unstable.[239] Given the ultimate—and relatively rapid—failure

237. The revamped indecency policy arguably does little more than allow on-the-air demeaning sexualization of women, racial skews, and rampant violence. Broadcast sex is commodified, non-transgressive, mainstream material. On this view, there is no equality-reinforcing reason for the agency's regulatory choices.

238. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 127 (1993) [hereinafter FRIEDMAN, CRIME AND PUNISHMENT]; FRIEDMAN, GUARDING LIFE'S DARK SECRETS, *supra* note 236.

239. FRIEDMAN, GUARDING LIFE'S DARK SECRETS, *supra* note 236, at 14 ("In short, underlying the Victorian compromise was a theory of society. Society was a delicate plant. It was at all times in unstable balance. Each generation had to be trained in the proper norms and values. Rules about reputation and propriety were *necessary*. Vice and debauchery, unless they were controlled, would run riot; and the whole system of order would come tumbling down."); *see* Herbert Hovenkamp, *The Classical American State and the Regulation of Morals*, U. Iowa Legal Studies Research Paper No. 1–12, 2012, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041942 (for another account of morality regulation). Pursuant to the Victorian Compromise, clear and stringent sets of legal rules were seen as necessary to preserve morality and public order. At the same time, because some immoral conduct by upper-class men was inevitable and because respect for the reputations of such "pillars of society" was seen as essential to social stability, the law was permitted to provide zones of privacy where the stringent, bright-line rules of morality would not be enforced against them. "So long as the general social fabric was preserved, it did not matter if vice continued to exist beneath the surface." *See* Joshua C. Tate, *Gambling, Commodity Speculation, and the "Victorian Compromise"*, 19 YALE J.L. & HUMAN. 97, 98–99 (2007). Private sin, at least to some degree, was acceptable so long as public order was maintained. Prostitution and gambling were similarly acceptable so long as they were engaged in a discreet, private, and hidden fashion. *See id.* (citing FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 238, at 127). *Cf.* WALTER KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE (1997) (discussing acceptability of pornography for masculine elites in

of the "Victorian Compromise" in its own time, how much more unavailing must be the FCC's attempts to control social discourse today? The sin market is much bigger and much less discreet than what was envisioned during the period of the Victorian Compromise. Pornography is said to be the most rapidly growing expressive industry. Recently mainstream society has begun to flirt more openly with pornographic subjects, revealing clothing, and transgressive sexuality. Notably, pornographic style has become very common in non-pornographic representations.[240] The notion that FCC regulation of broadcast indecency could preserve public order or public morality in such circumstances is unpersuasive.

The government might claim some value in symbolic governmental statements, but that is a thin reed on which to rest the indecency edifice.[241] Symbolic statements are only meaningful and effective when everyone understands the symbols in the same way and when they have credibility. Moreover, the FCC's recent approach to indecency regulation—which fetishizes certain words but permits them to be aired when they are

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the 19th century).

240. The degree to which mainstream media and social life reflect norms of pornography has been the subject of much scholarly attention. *See, e.g.*, Adler, *supra* note 188; *see also* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 114–16 (1994) (explaining that "representations of sexual conduct are more subject to regulation than sex itself [because of] the demarcation between public and private spheres" and arguing that "sexual expression . . . inevitably confounds society's attempts to regulate it. It subverts every taboo by making it a fetish. The forbidden is simultaneously eroticized. As a result, attempts to regulate sexual expression are doomed to failure; by creating taboos to transgress, regulation only adds to sexual expression's appeal. At the same time, by obsessively seeking to regulate and control sexual expression, we construct a sexuality that is in turn obsessed with transgression and taboo, often to the exclusion of other values. Our regulations endlessly reproduce a pornographic conception of sexuality, which in turn limits our ability to remake sexuality in a different light.").

241. In addition to the difficulties of justifying FCC intervention on symbolic grounds, the argument that regulation is necessary to avoid the appearance of governmental endorsement of indecency is fundamentally flawed as well. It is far from clear that the availability of indecent programming during the day over the airwaves would necessarily be seen by the viewing public as government endorsement of any particular message. *Cf.* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (discussing how to determine when messages are attributable to the state); Lidsky, *supra* note 126. Even if that were not the case, and the public did think of what is on television as somehow allowed and therefore endorsed by government, the argument is both under- and over-inclusive as a regulatory justification. After all, even if the government can regulate to avoid endorsing fleeting expletives, what about the kinds of sexualized but not clearly indecent fare that pervade the electronic media and offend many viewers and listeners? If accepted, this kind of argument would have huge consequences for speech regulation in general.

presented sufficiently seriously that they are informative to elites without being pandering to the general public at large—contains contradictions within its own symbolism. Even though public behavior and attitudes can be influenced by the government's expressive actions, they are unlikely to be shifted by the erratic symbolic expression of an agency with which most people are not familiar. More broadly, justifying regulation for its symbolic value glosses over the questions of who made the FCC the expositor of symbolic values, and what kind of symbols the FCC has the moral authority to express. It also does not explain why the symbolism is confined just to broadcast programming, rather than all the electronic media that are subject to the Commission's jurisdiction.[242]

Finally, even if the FCC could permissibly regulate to promote a decorous vision of public discourse, that authority would not dictate the specifics of its indecency prohibitions. If the Commission were to interpret its authority broadly under this justification, it might choose a standard of "appropriateness" as a benchmark for indecency regulation. Yet this is unreasonable; appropriateness is an even more problematic standard than the current criterion of patent offensiveness. Something may be generally thought of as inappropriate without reaching the higher level of patent offensiveness. Much sexually-themed and referential material on television and radio would likely not be found patently offensive, although it would certainly be considered inappropriate by many viewers and listeners. To the extent that the revamped regulatory rationale conflates the well-being of children with promoting appropriate social discourse and permits regulation more stringent even than what the Commission's post-2003 decisions have wrought, it is unduly expansive.

3. The Dangers of a Turn to Proto-Contractual Regulatory Justifications

Finally, can the proto-contractual turn reasonably serve as an alternative regulatory ground if *Pacifica*, with its traditional rationales of pervasiveness and accessibility, is overturned? The government's argument ultimately cannot stand independently of scarcity under *Red Lion* or pervasiveness and accessibility under *Pacifica*. Moreover, apart from likely constitutional infirmities, the FCC's turn to a contractual justification for indecency

242. Direct Broadcast Satellite (DBS), for example, is both licensed and regulated by the FCC. Cable, though not licensed by the Commission, is regulated by the agency, and in some ways more intensely than broadcasting. As for the Internet, one could argue that it might logically be thought to fall into the FCC's ancillary authority as an electronic medium that competes with conventional regulated media. This is not an argument in favor of regulating these media. Rather, it is an explanation of why the "symbolism" defense of regulation does not adequately justify the differential treatment of broadcasting.

regulation has potentially far-reaching consequences that would be best avoided as a matter of sound regulatory policy for the electronic media.

The government's argument in the *Fox* cases is often articulated as a contractual one—based on notions of consent, bargain, and acquiescence by regulated entities.[243] On this view, licensee consent to indecency conditions avoids concerns about unconstitutional conditions.[244] But this is such a formal and artificial notion of consent as to be completely divorced from reality.[245] Moreover, because broadcasters can lose their licenses over violations of § 1464, the consent argument raises the question of coercion resulting from the possibly catastrophic loss resulting from the removal of a government benefit.[246]

The government has alternatively argued that the FCC's regulations are a public-regarding licensing quid pro quo whose appropriateness rests less on agreement or acquiescence by the licensees than on the implicit value of

243. *See Fox II* Government Brief, *supra* note 183, at 52 (explaining that parents' settled expectations of a broadcast safe haven impose a restraint on broadcasters "of which they were fully aware when they secured their licenses"). It should be noted that the FCC's new regulatory justification is not fully fleshed out and has in fact been argued in at least two (and perhaps three) versions.

244. *But see* Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012) (arguing that consent should be irrelevant to the unconstitutional conditions analysis).

245. Even if consent were viable in principle, at a macro level, it could not as such justify the shifting FCC interpretations in the indecency context over time. Consent is not a one-way proposition, or an agreement without temporal contexts. What licensees could have been deemed to have agreed to at time X, on the basis of the FCC's regulatory scheme at that time, does not necessarily extend to different FCC rules in a different overall regulatory context at time Y. Moreover, being aware of prohibitions on daytime indecency is one thing, while awareness of the FCC's specific interpretations of the prohibition is emphatically another—particularly as they have changed over the regulatory period. The government's argument would effectively attribute actual knowledge and acquiescence to regulated entities solely on the basis of regulatory subject matter. Finally, even if broadcasters could be deemed to have consented to indecency regulation historically, their litigation positions since 2003 suggest that they have not consented to the extension of the traditional regime.

246. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012). Though *NFIB* concerns federalism rather than the First Amendment, its holding on the Medicaid expansion suggests that in the Court's view, the threat of withdrawal of an existing grant of government resources may be coercive if the threat amounts to a "gun to the head," *id.* at 2604, or if "refusing to accede" to the threat "is not a realistic option," *id.* at 2662 (joint dissenting opinion). That might be one way to characterize the threat of withdrawing the broadcaster's license if it does not conform to the indecency rules. Coercion is not intrinsically unconstitutional, of course, but if government action involves coercion, the justification for the action cannot rest on a claim that the entity being regulated voluntarily agreed to it.

the license benefit granted by the FCC.[247] Government can constitutionally attach speech-restrictive conditions to the receipt of government benefits so long as those restrictions are reasonable and viewpoint-neutral. However, while it is beyond the scope of this Article to apply or rationalize unconstitutional condition doctrine,[248] indecency regulation serves as a textbook example of the challenges facing such regulatory justifications.

It is not clear that the broadcast license should be considered a government benefit or privilege that can be accompanied by these sorts of conditions.[249] Arguably, the scarcity ground of *Red Lion* could support the claim that government licensing is what makes broadcasting possible at all.[250] Allocation issues in broadcasting are not so fundamentally different from those in areas where they are solved by property rights regimes, and

247. *Fox II* Government Brief, *supra* note 183, at 53; *see also* Logan, *supra* note 222. To the extent that the government also makes an argument justifying the quid pro quo on the "public ownership" of the airwaves, that argument has been shredded in Robinson, *supra* note 50, at 911–12.

248. The doctrine of unconstitutional conditions has generated a large literature. *See, e.g.*, Adam B. Cox & Adam Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEG. ANALYSIS 62 (2013); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 5 n.20 (2001); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996); Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1995); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415–16 (1989) (characterizing unconstitutional conditions as "a minefield to be traversed gingerly"); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Robert Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935). For a particularly lucid discussion in the electronic media context, see Robinson, *supra* note 52, at 921–24 (describing "so-called unconstitutional conditions" as "the true Okefanokee of constitutional law").

249. *See* Hamburger, *supra* note 244, at 504 n.42. The argument that broadcasters can impose conditions on licenses "tends to prove too much." Balkin, *supra* note 199, at 1135 ("The government does not license the airwaves as an act of governmental largesse—the usual means of justifying conditions on licenses. Rather, the licensing scheme exists because the government decided to take complete control of the airwaves and parcel out licenses instead of auctioning off rights to broadcast at certain times in certain locations and with certain degrees of broadcast strength. The government does not license the manufacture and distribution of paper or printing presses. Even if it did so, it could not constitutionally justify imposing content-based conditions on their use. Thus, the conditions-on-licensing justification ultimately rests on the prior justifications for licensing, which depend in turn upon the scarcity rationale.").

250. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

scarcity is a widely discredited basis to justify content regulation.[251] It is not reasonable to think that government could constitutionally decline to allow broadcasting, thereby resting its power to condition licenses on its choice to permit it. [252]

But let us suppose that the FCC's licensing is to be analyzed against the rubric of unconstitutional conditions inquiries. Although the line between acceptable and unacceptable conditions has been criticized as wavering and confusing, there is little disagreement on the general proposition that in order to be constitutional, there must be some relationship between the contractual condition and a legitimate regulatory purpose.[253] The problem

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251. For criticisms of scarcity as a distinguishing basis for broadcast regulation, see, for example, POWE, *supra* note 30, at 197–209; KRATTENMAKER & POWE, *supra* note 30; MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 1013–20 (1986); Ronald H. Coase, *The Federal Communications Commission*, J.L. & ECON., Oct. 1959, at 1, 12–27; Robinson, *supra* note 50, at 911. Moreover, this argument does not recognize the change in the media market, in which licensees hold their stations not as gratis grants from the government, but in exchange for millions paid in a private market.

252. Nevertheless, some argue that if government, as regulator of the commons, can choose not to sell the spectrum, it can then arguably choose to trade spectrum rights for some kinds of programming obligations. Robinson, *supra* note 50, at 921 (asking whether, to the extent that the government's "bargaining prerogative[] . . . to create . . . use rights . . . to ensure effective use of the spectrum commons . . . presumably entails a power to sell those use rights . . . then does [government] not also have the power to arrange to take payment in kind rather than in coin, to trade spectrum rights for some form of programming instead of dollars?"). Even so, as Professor Robinson points out, "objections to bargaining between the state and the individual [can] arise . . . from the way that the state uses its control of public goods . . . to gain inappropriate bargaining advantages." *Id.* at 922. Others would argue that if there is a choice, in the broadcasting context, the government should always choose to operate through private ordering.

253. *See, e.g.*, Sullivan, *supra* note 248, at 1460. Professor Robinson would add to the inquiry the question whether those on the other side of the bargaining table in a bargain with government, "and others similar[ly] situated, are made better off by the bargain." Robinson, *supra* note 50, at 922. How we come out on that inquiry, however, depends on the perspective from which we choose to make the assessment. For example, Professor Robinson characterizes the FCC's children's television rules as a "great bargain" for broadcasters because they received $70 billion worth of spectrum in exchange for a mere three hours per week of programming obligations. *Id.* More generally, Professor Robinson concludes that "we have achieved a remarkable degree of free speech with only the most modest First Amendment interventions. . . ." *Id.* at 970. If we assess each FCC condition on broadcasters against the broad overview of the history of protection against competition provided for free via licensing, few government conditions would arguably rise to the level of bad bargains for broadcasters. *Cf.* Cox & Samaha, *supra* note 248 (observing that nearly all constitutional questions are convertible into unconstitutional conditions questions by expanding frames of reference and assessing exit opportunities).

The relationship between funding conditions and legitimate government purposes was recently addressed in a different context by the Supreme Court in Agency for International Development v. Alliance for Open Society, 133 S. Ct. 2321 (2013). There, the Court found

is that the quid pro quo argument proposed by the government has no clear connection to the FCC's particular indecency regime. Nor does the quid pro quo approach contain any inherent limit. Why is today's extensive indecency regulation the right quid pro quo for the privilege to

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unconstitutional a funding condition under the Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act requiring grantees to adopt an anti-prostitution policy. The majority focused its analysis on distinguishing between "conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 2328. On this approach, the condition failed because it compelled "the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 2332. The Court implicitly recognized, however, its prior precedent hinging unconstitutional conditions analysis on the relevance of the condition to the objectives of the program and on the coercive character of the condition. *Id.* at 2328 ("The dissent thinks that [a funding condition can unconstitutionally burden First Amendment rights] . . . when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. Our precedents, however, are not so limited."). While this raises the question of defining and assessing the fit between the condition and the government program's purpose, it indicates that courts should, at a minimum, look at that connection.

Even though FCC regulation does not involve a funding program like the Leadership Act at issue in *Alliance for Open Society*, the government's briefing in *Fox II* analogized indecency regulation to a condition on a government grant by characterizing the Commission's indecency conditions as part of a selection mechanism. *Fox II* FCC Reply, *supra* note 183, at 19 ("The salient feature of the broadcast medium . . . is that the government must select among would-be participants seeking to exploit this uniquely public resource . . . in order for the medium to function at all. As especially privileged beneficiaries of those selection and enforcement mechanisms, respondents may reasonably be required to accept public-interest obligations that could not constitutionally be imposed on persons who speak without government assistance."). This argument is akin to Justice Scalia's view in dissent in *Alliance for Open Society* that the government can properly select the recipients of its largesse by choosing those "who believe in its ideas." *Id.* at 2332. The *Alliance for Open Society* majority rebutted this analysis in its own context (see *id.* at 2330) with arguments useful here as well. In addition, the selection argument works even less well in the broadcast regulation context. Broadcast regulation is not analogous to grantee selection for narrow, well-defined government funding programs designed to promote a particular government point of view or project. Indecency regulation need not be the selection criterion necessary for the broadcast medium to function. And however differently the *Alliance for Open Society* Court can describe the Leadership Act's goals, there is far more plausible variety in describing the government's legitimate purpose in regulating the broadcast medium. Moreover, the fact that the government has to make a selection among licensees does not mean that the selection must be made on ideological grounds. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) ("Because [radio] cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."). Simply put, the government's selection-based argument in the indecency context assumes its conclusion.

operate a broadcast station? What makes this quid proportional to the quo?[254] The Commission's argument would mean that virtually any conditions could be attached to what the government has called the "highly favorable regulatory treatment" of broadcasters.[255]

The condition is also discriminatorily applied. Why, for example, are Direct Broadcast Satellite (DBS) providers not subject to the same indecency controls as broadcasters, despite being, like terrestrial broadcasters, licensed users of the spectrum?[256]

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254. *See* Logan, *supra* note 222, at 1737 (discussing the requirement that the "quid" be comparable to the "quo").

255. *Fox II* FCC Reply, *supra* note 183, at 16.

256. It is true that singling out broadcasting is not as under-inclusive as it might first appear, given that for the present time, broadcast-originated programming still accounts for the lion's share of what is viewed by the public, whatever the means of transmission. This means that broadcasting serves as something of a choke point for the largest share of programs delivered to television households. If the FCC regulates all broadcast-originated programming, it will then necessarily (albeit indirectly) also regulate the programming as seen on cable or DBS. Nevertheless, this reality does not eliminate the formal discrimination in the Commission's approach to different media.

There is also the argument that what has been described in the text as problematically discriminatory application is better characterized as the kind of opportunity for exit that would render FCC broadcast regulation a tolerable restraint rather than an unconstitutional condition. In their exit- and sorting-focused take on unconstitutional conditions analysis, for example, Professors Cox and Samaha specifically target mass media indecency regulation as an analytical example:

> [A] long-standing response to those who support limits on risqué content is that sensitive audience members should "just change the channel." But easy exit in this context cuts in the opposite direction, as well. Hardy audience members who prefer content driven by economic forces rather than government officials and affiliated interest groups are free to migrate away from broadcast. This leaves a large mainstream audience with the option of choosing stations with FCC oversight. One might say that government oversight becomes built into broadcaster brands. And those in the broadcasting business are hardly locked into that delivery mechanism. NBC is not an immobile asset; the people and capital behind its facade can migrate (and to a degree have migrated) into unregulated territory. What seems to be jurisdictionally underinclusive decency regulation has had the effect of enhancing audience choices, and making a sorting analysis more appropriate . . . .

Cox & Samaha, *supra* note 248, at 97.

Yet, while the FCC has not sought to apply its indecency regime either to cable or to DBS, arguments can be made that the FCC can regulate indecency in electronic media other than broadcasting. The Supreme Court in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 748 (1996), for example, "approved in principle that limited control of indecent content could be extended to cable television . . . ." Robinson, *supra* note 50, at 967. Moreover, both the easy exit asserted by Cox & Samaha, and their implicit acceptance of audience choice as legitimating differential treatment, deserve testing. *Cf.* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 164–65 (2013) (arguing against the "partial regulation" model because "[w]hatever the scope of permissible experimentation [within the

When all is said and done, an attempt to cabin the Commission's regulatory conditions by saying that media content—unlike the general welfare of children[257]—is uniquely related to the purpose of licensing ultimately circles back on either the conventional ground for licensing—scarcity—or the special character of broadcasting under *Pacifica*. If the quid pro quo rationale ultimately rests on one or the other of the traditional justifications for broadcast exceptionalism, then it cannot properly serve as the independent regulatory ground sought by the government.[258] In turn, scarcity is a "particularly badly suited justification" for regulation of indecency.[259] And pervasiveness is unpersuasive as a regulatory justification not only because broadcasting is no longer the most powerful and dominant communication medium but also because technological means of parental control might be able to cabin it.[260] To the extent that the traditional regulatory rationales invite critique, the quid pro quo argument

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First Amendment], it should not be arbitrary. The way we treat communications media ought to be based on "real differences in the methods of communication").

257. The FCC could not permissibly condition the grant of a license on the condition that the licensee give 10% of its profits to a charity for the well-being of children, even though giving to such a charity might be a legitimate public purpose, because it is not a purpose that the Commission is empowered to promote. Some who have argued that the FCC's public interest obligations should be seen as a proportional quid pro quo for licensing benefits justify content regulations such as children's programming requirements and political broadcasting rules on the ground that they promote robust and diverse private speech—which is also the goal of the FCC's licensing scheme. *See, e.g.*, Logan, *supra* note 222, at 1739–40. Even if that level of parallelism were sufficient, however, it is inapplicable in the case of indecency regulation (which by definition is designed to reduce, rather than promote, "robust and open" private speech at least during the day). *Id.* at 1744–46 (recognizing this problem and concluding that the quid pro quo argument is harder in the context of indecency regulation).

258. *See, e.g.*, Balkin, *supra* note 199, at 1133 (explaining that justifications for content-based regulations other than scarcity and pervasiveness—"the fact that broadcasters hold licenses from the government, and the importance of empowering democracy—tend to be parasitic on the scarcity rationale").

Yet another regulatory justification, gleaned from the government's briefing in *Fox II*, rests on the historical past of FCC content regulation. The government's insistence on the legalizing effect of such history implicitly may be an argument about the appropriate scope of judicial review. *See Fox II* Government Brief, *supra* note 183, at 52. However, given both the extensive public interest regulation that the FCC has imposed on licensees at one point or another over the past eighty years, and the shifts in the Commission's treatment of indecency over time as recounted above, the past provides neither its own regulatory justification nor clear constraints on FCC discretion. Under such circumstances, history cannot alone justify deferential judicial review.

259. Balkin, *supra* note 199, at 1134 ("At best, scarcity provides a reason to put things on the air, not to keep things off.").

260. Balkin, *supra* note 199, at 1136–38 (describing the five ways in which courts have interpreted the notion of pervasiveness).

cannot circumvent it.

Moreover, at least arguably, the FCC's broadcast regulation has ripple effects beyond over-the-air broadcasting. The Commission's move to a contractual regulatory argument also raises the broader question of whether regulatory expansion justified under a contractual approach is likely to lead to further, more expansive regulation in broadcasting or beyond. Aside from constitutional problems with claims of expansive government power to condition grants, the discretion given regulators by the Commission's quid pro quo rationale is profoundly worrisome as a policy matter.

IV. WHY THE FCC'S CURRENT INDECENCY REGIME IS BAD POLICY

In the final analysis, many of the factors described above have constitutional overtones. But there does not have to be a finding of constitutional proportions in order to claim that the negative consequences of the FCC's indecency policy outweigh any positive impact of symbolic safe havens. Even if the Court were to find that the fleeting expletives policy and the indecency regime as a whole would pass constitutional muster,[261] the Commission should nevertheless hesitate to engage in

261. Depending on the Commission's approach to indecency going forward, challenges to the constitutionality of the regime are likely to be brought. *See* Lidsky, *supra* note 126. On the constitutional status of "child-protection censorship," see Garfield, *supra* note 198. Although indecency regulation is content-based regulation and therefore definitionally triggers strict scrutiny, First Amendment analysis in the broadcast context has been described as following "strict scrutiny light." Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1574 (2005). In addressing the constitutionality of the indecency rules in 1995, the D.C. Circuit Court of Appeals in *Action for Children's Television v. FCC* cited the Supreme Court's opinion in *New York v. Ferber* to find compelling the state's interest in safeguarding the physical and psychological well-being of minors. *ACT III*, 58 F.3d 654, 661 (D.C. Cir. 1995) (quoting New York v. Ferber, 458 U.S. 747, 756–57 (1982)). Whether the Commission's indecency rules are sufficiently narrowly tailored to satisfy such a compelling interest would presumably depend both on the specific aspect of the rules at issue and on how skeptical a court wished to be regarding the technological fixes. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000); *cf.* Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535, 1537 (concluding, in the Internet context, that "the more effective user-based filtering technology becomes in restricting minors' access to sexually-themed content, the less likely courts are to uphold other legislative means of restricting minors' access to such content"). Even in the non-broadcast context, Snyder v. Phelps, 131 S. Ct. 1207 (2011), demonstrates that Cohen v. California, 403 U.S. 15 (1971), "does not address the regulation of private, apolitical interpersonal speech and should not be taken to do so." Krattenmaker, *supra* note 213, at 682; *see also* Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221 (1996) (pointing to the tension between FCC indecency regulation—and other FCC regulation more generally—and traditional First Amendment vagueness analysis).

rigorous indecency enforcement. The extensive description in Sections II and III above of the changes wrought in the indecency regime suggests the many reasons why the new approach is bad policy today.

A. Unintended Consequences: The Threats to Local Programming and Public Broadcasting

The FCC's attention to indecency regulation in the past decade raises the question of unintended consequences. The procedural and substantive changes in the indecency policy (as described in Section II above) lead to measurable harms to important values beyond the scope of the indecency debate.

As pointed out in Justice Breyer's dissent in *Fox I*,[262] the Commission's current approach to indecency has an important unintended effect on local broadcasters and the local press. In light of the expense of time-delay technology, a small station may reasonably react to the FCC's negligent indecency approach by avoiding live coverage of news and other community events.[263] Despite the critiques to which much local news can be subject, local reporting is still a very important part of function of the press. Particularly in light of the massive economic challenges facing local and regional newspapers,[264] local television news—such as it is in fact, local—serves as even more of a bulwark against erosion of the local press. The Commission's indecency policy thus stands in tension with its longstanding commitment to localism as a lodestar of regulatory policy.[265]

The various indecency policy shifts, as well as the expansion in forfeiture

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262. *Fox I*, 556 U.S. 502, 556–61 (2009) (Breyer, J., dissenting); *see also* Stuart Benjamin, FCC v. Fox *and the Demise of Local Broadcasting*, THE VOLOKH CONSPIRACY (May 9, 2009, 9:06 AM), http://www.volokh.com/posts/1241874410.shtml.

263. *See, e.g.*, Shelly Rosenfeld, *An Indecent Proposal?: What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry*, 12 TEX. REV. ENT. & SPORTS L. 225, 235–36 (2011); Kathleen Wallman, *Defining Indecency As an Artifact of Cultural Policy*, 24 REV. POL'Y RES. 119, 120, 128–29 (2007); David Lee, Comment, *How Detailed of an Explanation Is Required When an Administrative Agency Changes an Existing Policy?: Implications and Analysis of* FCC v. Fox Television Stations, Inc. *on Administrative Law Making and Television Broadcasters*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 681, 713–14 (2010).

264. *See* Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1545–47 (2012).

265. *See generally* Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd. 1324 (2008). Other FCC policies may conflict with excessive emphasis on indecency as well. *See* Wallman, *supra* note 263, at 123, 127, 129–30 (arguing that "patterns of enforcement in indecency may create a cultural policy that is less hospitable to other values that have been identified as important to cultural policy" and mentioning diversity in addition to localism); *see also Fox I*, 556 U.S. at 557 (Breyer, J., dissenting) ("The FCC cannot claim that local coverage lacks special importance. To the contrary, 'the concept of localism has been a cornerstone of broadcast regulation for decades.'") (citation omitted).

authority, pose particularly difficult problems for public radio and television stations. As is pointed out in the amicus brief of the Public Broadcasting Service (PBS):

> A single expletive broadcast in a program carried by all 353 PBS member stations could result in a forfeiture of nearly $115 million. This amount is over a quarter of the Fiscal Year 2012 federal appropriations for the Corporation for Public Broadcasting's general fund, which provides the federal support for public broadcasters.[266]

This is a monumental and potentially existential impact, which is particularly threatening for public broadcasters. Given the smaller number of broadcast network affiliates, the financial threat to public broadcasting may be even more significant than to the commercial sector.

The impact is not just likely to be financial, however. Public broadcasting is always under siege from Congress and other critics over ideological disagreements. FCC indecency findings would likely serve as arrows in the quiver of those wishing to cut or eliminate public broadcasting.

The briefing for the *Fox* cases at the Supreme Court contains data on broadcaster claims of the chilling effect of indecency regulation. On the public television side,[267] the PBS amicus brief in *Fox II* provides numerous

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266. Brief of PBS as Amicus Curiae Supporting Respondents at 15, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293) [hereinafter PBS Brief].

267. The briefs contain examples of chill at commercial stations as well. The amicus brief of the National Association of Broadcasters has the following account of the effect of the fleeting expletives policy:

> Broadcasters have been forced to rethink whether and how to present local and national news and sports. . . . Live reports from journalists embedded with U.S. troops have been suppressed, and broadcast footage from war zones has been withheld from broadcast. Broadcasters have expressed concerns about carrying live audio or video from arraignments and trials, emotionally charged demonstrations, and the scenes of breaking news such as disasters. Many broadcasters are also concerned about or have decided against carrying live high school or college sporting events or locker room interviews.

Brief for Nat'l Ass'n of Broadcasters, *supra* note 146, at 24–25.

Examples abound from the sublime to the ridiculous. There are reports of radio stations cutting or editing iconic rock songs such as Lou Reed's "Walk on the Wild Side" and Steve Miller's "Jet Airliner" despite a decade of unedited airing prior to the shift in the FCC's indecency regime. *See* Sidak & Singer, *supra* note 25, at 718. The fleeting view of an elderly female patient's breast during an episode of the television program "ER" caused the program not to be aired. Collins, *supra* note 20, at 1257. In reporting on an attack on a Paul Gauguin painting of two nudes at the National Gallery, local stations are said to have either blurred the breasts in the painting or shown the figures from the shoulders up. Brief for Nat'l Ass'n of Broadcasters, *supra* note 146, at 26. Recently, CBS reportedly censored a GoDaddy Super Bowl commercial because it "feature[d] a close-up of tongue action." Margaret Eby, *Too Much Tongue for TV?: CBS Censors GoDaddy's Super Bowl Commercial of Bar*

examples of the chilling effect.[268] What is notable about most of these examples is that they concern meritorious programming about significant matters of public interest.

The maintenance of public broadcasting is vitally important. Much of the most significant television and radio programming of the age has come from public radio and television. This may be in part because public broadcasting need not consider the salability of its programming to commercial advertisers and is therefore freer to air unprofitable but socially

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Refaeli Making Out with Lucky Nerd, N.Y. DAILY NEWS (Feb. 1, 2013), http://www.nydailynews.com/entertainment/tv-movies/bar-refaeli-kisses-geek-love-super-bowl-ad-article-1.1253364.

268. Approximately two dozen PBS stations edited the footage, in "American Experience: Eyes on the Prize" (the award-winning documentary series about the civil rights era), of a civil rights activist addressing a rally and using an expletive. PBS Brief, *supra* note 266, at 17. Some stations chose to edit a conversation between George H.W. Bush and then-President Lyndon Johnson in the documentary "American Experience: George H.W. Bush." *Id.* In the documentary, the narrator repeats a conversation in which President Johnson advises then-Representative George H.W. Bush to run for the Senate because "the difference between being a member of the Senate and a member of the House is the difference between chicken salad and chicken shit." *Id.* PBS's 2007 documentary about Enron—"Enron: The Smartest Guys in the Room"—was edited to remove expletives in phone recordings of Enron traders using expletives. *Id.* at 17–18. Public television station WNET excised an image of a graffiti reading "Fuck America" in an episode of the series "Extreme Oil" filmed in Azerbaijan, "even though foreign sentiment—intense hostility to the United States—was an important element of the program's message . . . ." *Id.* at 18. Public station WGBH, producer of "Frontline: A Soldier's Heart" (a documentary addressing U.S. soldiers' difficulties in accessing PTSD treatment), edited a veterans advocate's report of a soldier's superior calling a PTSD sufferer a "fucking pussy" by excising the expletive from the quote, only to have Denver public station KRMA-TV receive a FCC Letter of Inquiry regarding the use of the word "pussy" in the program. *Id.* at 18. PBS edited some of the historical cartoons depicting sexual activity in the documentary Marie Antoinette, after spending "considerable resources to determine the legal status of the cartoons and the language describing the King's sexual activities in light of the new FCC policy," but some stations nevertheless refused to air the program. *Id.* at 18–19. Broadcasters considered whether to omit footage in "Antiques Roadshow" of a nude lithograph of Marilyn Monroe. *Id.* at 19. Many of the videos and lyrics in a documentary about the misogyny and sexism in modern hip-hop were edited out of a documentary entitled "Hip Hop: Beyond Beats and Rhymes." *Id.* Indeed, some of "the very lyrics at issue in the documentary were ultimately edited." *Id.* PBS also distributed an edited version of a documentary called "Operation Homecoming," about the experience of American soldiers serving in Iraq and Afghanistan, which contained coarse language and gestures from soldiers' own writings and videos. *Id.* at 19–20. Many public television stations aired an edited version of a Ken Burns documentary about World War II entitled "The War" and included personal accounts of combat experience and explanations of the terms FUBAR and SNAFU. *Id.* at 20. PBS's brief in *Fox II* described these instances as "but some of the many examples of honest, valuable content that viewers have lost because of the FCC's vague new indecency policy." *Id.* at 20.

beneficial programming (or more controversial programming), or experiment in ways feared to be too costly for PBS's commercial counterparts. Public radio and television also seek to serve, *inter alia*, populations whose interests would not necessarily be at the forefront of commercial programmers. Sometimes, this may mean that the public programming will be edgier, less polite in the mainstream mold, and more true to life in outsider communities. And in those circumstances, it is likely that some content will air that would be considered "inappropriate" by the FCC and even perhaps the commercial broadcast establishment.

Whatever one thinks of the merits and value of particular public broadcasting programs, there is an important underlying value to public programming that cannot be matched by commercial fare. At a minimum, therefore, FCC indecency enforcement that would threaten the viability of a profoundly important part of American culture is both a worrisome possibility and a particularly bad idea.

B. The Problems with Indecency Regulation Through a Political Lens

Another problem with the FCC's current foray into indecency is its political context. The FCC's actions can be explained by contrasting accounts. Although the Commission claims to be regulating in a proportional response to public clamor, some see the agency as captive to the views of an ideological minority. On another view, the FCC is using public complaints as a convenient blind to regulate according to its own ideology or in response to congressional pressure.[269] Either way, the political take on FCC indecency regulation is concerning as a matter of policy.

It is unacceptable if the FCC's action is an example of an administrative agency serving as the regulatory tool of an ideological minority.[270] That

269. *See* Botein & Adamski, *supra* note 128, at 8, 14 (arguing that the driving force in the FCC's indecency policy changes has been political rather than moral or a response to change in public attitudes). Professors Botein and Adamski in fact provide multiple possible political explanations for the Commission's activity—including the possibility of resource-rich interest groups such as the PTC "exploit[ing] an opportunity to promote their agendas in an election year" and the possibility of the "Bush-Cheney Administration us[ing] its personal ties to both Chairman Powell and then-Commissioner (later Chairman) Martin to emphasize their party's commitment to eradicating indecency." *Id.* at 17. And this without mentioning congressional pressure. Another take on this is that it is an example of regulation in response to moral panic.

270. Even if public complaints have increased, and even if these complaints have in fact sincerely and substantively influenced FCC enforcement, the Commission has misinterpreted their significance and meaning. *See supra* Section II. Moreover, in relying on the numerosity of complaints as a regulatory trigger, the Commission has neither addressed the sample bias in the current crop of complaints nor recognized the dangers posed to

most of the complaints to the Commission have been generated through the online activities of private interest groups—"family groups"[271] such as the PTC[272]—casts doubt on the Commission's assertion that the increasing number of indecency complaints reflects both increasing broadcast indecency and the general public's desire for regulation.[273] To the extent that the Commission actually interprets the complaints to reflect public concern, it fails to recognize the amplifying effect of its own indecency process on such purported evidence of public views; it erroneously assumes that the public in general agrees with the complaints made by PTC supporters.[274] Apart from constitutional concerns, government endorsement of the views of the narrowest advocacy communities is

communicative diversity by enhanced government regulation in this area. *See, e.g.*, Candeub, *Indecency*, *supra* note 201, at 321 (discussing the threat to religious broadcasting posed by increased government media regulation including indecency policy).

271. *See* Calvert & Richards, *supra* note 20, at 325, 328 (identifying PTC and others as such).

272. *See, e.g.*, FAIRMAN, *supra* note 20, at 121.

273. *Cf.* Candeub, *Indecency*, *supra* note 201, at 309 ("The complaint process allows political actors to reveal credible information about their political strength and affiliation. It is a type of public exhibition. By filing complaints, cultural conservatives display their powerful muscles. Politicians—by issuing forfeiture notices to broadcasters—demonstrate their commitment to serve that power."); Holohan, *supra* note 109, at 361 ("The problem with the PTC's influence is not just that it overstates the indecency problem. The PTC's influence, coupled with the FCC's reactive approach to detecting violations, allows the PTC to channel the FCC's immense enforcement power toward programming that the PTC itself finds objectionable. This creates a strong possibility of selective prosecution, exacerbated by the PTC's political ties."). *See also* John Eggerton, *PTC Pushes Public to Complain to FCC About Indecency Policy*, BROAD & CABLE, May 7, 2013, http://www.broadcastingcable.com/article/493295-PTC_Pushes_Public_to_Complain_to_FCC_About_Indecency_Policy.php ("The Parents Television Council has declared May 6-10 '#NoIndecencyFCC Week,' and is encouraging the public to file comments at the FCC about the proposal to focus on egregious indecency cases as well as to tweet their displeasure. PTC opposes what it sees as the effort to limit indecency complaints by the commission.").

274. Of course, one might argue that just because complaints are form letters generated via the PTC does not mean that large numbers of people are not, in fact, offended by indecency on television and radio. They may simply have been finally given the tools with which to express their beliefs to the government with a minimum of transaction costs. But the ways in which challenged programming is described on anti-indecency websites may unduly inflame visitors to the sites, even if they might not have been offended if they had seen the programming in context. Also, people who belong to organizations like the PTC, the American Family Association (AFA) or Morality in Media join groups of like-minded people with regard to certain groups of issues that might fall under an umbrella of family values or family concerns. Once they join, however, they may submit to significant social influence with respect to what they should find indecent and complain about to the FCC. *See* Robert J. MacCoun, *The Burden of Social Proof: Shared Thresholds and Social Influence*, UNIV. OF CAL. BERKELEY, SCH. OF L. (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1441539.

undesirable—perhaps especially as they relate to expressive values. Given the difficulty of managing divergent public values on such speech issues, the uncertainty of what the public "really" believes, and the deficiencies of the policies the Commission has adopted, the agency should not take the risk of becoming the unwitting tool of cultural regulation entrepreneurs.

Movements for cultural regulation "logically direct their efforts at regulating media that are both popularly influential and institutionally vulnerable."[275] Broadcast television fits this profile perfectly. The perceived weakness of broadcasting should not give purchase, through capture of the FCC, to narrow movements for such cultural regulation. This is both because it leads to an overvaluing of socially conservative views but also because of its distracting effect. Aggressive indecency enforcement may promote the appearance of government governing—another example (like terrorism preparedness drills) that is designed to convince people that the powerful in society (government and influential media corporations) are doing their part to control social ills. Such regulation could also be deployed as part of an overall regulatory approach that addresses easily understandable narrow issues with emotional salience, while keeping the public distracted from the much broader effects of less accessible rules (such as those regarding media consolidation).

The problem of capture by conservative family groups is not the only objection when the Commission's actions are seen through a political lens. It is troubling even if the agency's indecency regime represents capitulation to members of Congress under the guise of public calls to regulate. By regulating, the FCC can satisfy a Congress on which the agency is dependent for its funding and propitiate a legislature, some of whose members have called for FCC elimination or reform. On the one hand, apparent across-the-aisle agreement on the purported need to protect children from indecency may suggest that in regulating, the Commission is legitimately responding to democratic, legislative will. The Supreme Court's decision in *Fox I* suggests that the administrative consideration of political factors in changing policies is not by definition problematic.[276] At the same time, however, the FCC may be responding to a small group of

275. PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 326 (2004); *see also* Balkin, *supra* note 199, at 1139–40 (explaining that "calls for censorship . . . arise most heatedly in moments of great cultural change and uncertainty," as cultural upheaval, triggered by changes in both norms and technology, leads to anxiety in the population).

276. *See Fox I*, 556 U.S. 502, 515, 523 (2009); *see also* Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1828 (2012) (noting that Justice Scalia's opinion in *Fox* suggested that the basis for satisfying the reason-giving standard "need not necessarily be apolitical").

legislators rather than Congress as a whole by enhancing its indecency regime. Although no legislator can be seen as championing indecency regardless of harm to children, it is not clear that Congress as a whole would support the Commission's stringent indecency regulations. Indeed, perhaps pragmatic legislators wish simply to punt indecency decisions to the FCC so that they can blame the Commission if their constituents are dissatisfied.

Finally, the FCC's approach is worrisome on an alternative political account as well—one according to which the Commission's recent appetite for indecency regulation comes not from interest group or congressional pressure but from the agency's own strategically disguised ideological initiatives or tendencies to institutional self-protection. Of course, the FCC is in one sense a political body with a fundamental institutional interest in maintaining power and continuing relevance. Despite variations in the invasiveness of indecency enforcement since 2003, the FCC's initiatives amount to a reassertion of the FCC as a significant political, cultural, regulatory, disciplining force. There is today very little left with which the Commission can control broadcasters' programming decisions. In a world in which license terms are lengthy, licenses are presumptively renewable, and assignments are made by auction, few regulatory hooks remain available to the Commission. Thus, indecency regulation can serve as a strategic move to maintain control by the FCC.[277] The power to impose huge fines buttresses the FCC's leverage vis-à-vis regulated entities. The indecency policy allows the FCC to drive a wedge between the networks and their affiliates, further eroding network power. Institutionally, it might also be used as a way to manage the consequences of other regulatory failures.[278] This possibility of indecency regulation as the tail that wags the otherwise unbiddable dog is also problematic.

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277. Does this cast doubt on the possibility that the Commission's deployment of a contractual rationale for regulation could become a regulatory Trojan horse? Although it might—which is why this Article does not make a strong claim that the revision in regulatory justifications will enable broader regulatory initiatives—it is also possible that the new rationale could be used to revive regulation from the limited realm to which the decline of the scarcity rationale has led it.

Viewing the FCC as using indecency regulation as a means of enhancing its authority and relevance does not mean that the agency will engage in regulatory conduct that it does not believe is substantively desirable. It does suggest, however, that the agency might be influenced in its assessment of what is substantively desirable by reference to such political factors.

278. To the extent that—as some have claimed—media consolidation has led to increased amounts of indecency on the air, a renascence of regulation in that area might be seen as repairing the consequences of the Commission's other deregulatory rules.

C. The Availability of Less Restrictive Technological Solutions

Less restrictive technological means can be promoted, without all the censorship risk. Moreover, even though ratings and blocking mechanisms on the broadcast side cry out for improvement, the vast majority of television viewers in this country subscribe to cable, with its more extensive consumer-protective technological solutions. In any event, the Commission has not attended to the promotion of consumer-side technological aids, despite congressionally-prompted attention to the question. Congress passed the Child Safe Viewing Act of 2007[279] in 2008, requiring the Commission to initiate an inquiry examining the state of the marketplace with respect to the availability and deployment of blocking technologies and ratings systems.[280] In its responsive Report to Congress in 2009, the Commission concluded that:

> Taken as a whole, the record indicates that no single parental control technology available today works across all media platforms. Moreover, even within each media platform, these technologies vary greatly with respect to the following criteria: (i) cost to consumers; (ii) level of consumer awareness/promotional and educational efforts; (iii) adoption rate; (iv) customer support; (v) ease of use; (vi) means to prevent children from overriding parental controls; (vii) blocking content/black listing; (viii) selecting content/white listing; (ix) access to multiple ratings systems; (x) parental understanding of ratings systems; (xi) reliance on non-ratings-based system; (xii) ability to monitor usage and view usage history; (xiii) ability to restrict access and usage; (xiv) access to parental controls outside of the home; and (xv) tracking. In addition, a common theme that runs throughout the comments is the need for greater education and media literacy for parents and more effective diffusion of information about the tools available to them. Many commenters urge the government to play a more substantial role in meeting this need.[281]

Having described the landscape, however, the agency did not make any affirmative recommendations. Instead, it identified a set of further unresolved questions, such as:

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279. Child Safe Viewing Act of 2007, Pub. L. No. 110-452, 122 Stat. 5025 (2008) (describing the FCC as canvassing "the existence and availability of advanced blocking technologies; . . . methods of encouraging the development, deployment, and use of such technology . . . that do not affect the packaging or pricing of a content provider's offering; . . . and the existence, availability, and use of parental empowerment tools and initiatives already in the market").

280. Report, Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 24 FCC Rcd. 11,413, 11,414 (2009) [hereinafter FCC Safe Viewing Report].

281. *Id.* at 11,415 ¶ 5.

> • To what extent are parents aware of the control technologies that exist today? Does parental awareness differ among media?;
>
> • Are there reasons besides lack of awareness that keep parents from using these technologies? If so, what are they, and do they differ among media?;
>
> • It appears that adoption of control technologies may be greater for the Internet than for broadcasting and other traditional media sources: Why is this so?;
>
> • Are there data to determine the pace of innovation in parental control technologies, whether innovation is proceeding at a pace consistent with other consumer technologies, and whether evolving needs of parents, caregivers, and children are being satisfied in a timely manner?[282]

The Report concluded by assuring Congress that "the Commission intends to issue a further *Notice of Inquiry* to explore these issues and others related to the goal of protecting children and empowering parents in the digital age."[283] While the Commission did, in fact, open a proceeding in 2009,[284] it has not pursued or concluded this inquiry to date.

D. What Are Broadcasters Likely To Do?

FCC Commissioners have repeatedly pointed to the increase in indecency complaints in the past decade. According to "decency groups," the increase in complaints has been prompted by an across-the-board increase in casual indecency both on television and on radio, even in the precincts of what has historically been thought of as family entertainment.[285] Critics of broadcasters and the FCC claim that indecency grew at least in part because of the insufficiency of Commission enforcement. With FCC enforcement delays and easily absorbable small fines, broadcasters could comfortably steer very close to—and often over—the danger zone so long as their programming continued to be profitable. In any censorship regime, the speech of the regulated speaker is to some degree asymptotically defined by the censoring rule. The censorship rule stands as an invitation to broadcasters to get as close as possible to the line of what is unacceptable, but not to cross it. The censorship regime itself

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282. *Id.* at 11,416 ¶ 6 (footnotes omitted).

283. *Id.* at ¶ 7.

284. FCC Releases Notice of Inquiry on Serving and Protecting Children and Empowering Parents in an Evolving Media Landscape, 2009 WL 3413027 (F.C.C.) (Oct. 23, 2009); Notice of Inquiry, Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 FCC Rcd. 13,171 (2009).

285. *See* Abigail T. Rom, Note, *From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words You Can Never Say on Broadcast Television*, 44 VAL. U. L. REV. 705, 706 (2010) (citing to PTC studies).

becomes an element in the decision about what content to air—influencing the choice of material. The changes wrought by the FCC since 2003 appear to have unduly amplified that reality.

Arguments focusing on the asserted increase in broadcast indecency also predict its likely increase as a result of the current media climate. Thus, proponents argue, daytime broadcasting will be further overrun with indecency—as a matter of "common sense"[286]—if the FCC does not step in aggressively.[287] Why should we anticipate increased broadcast indecency? Echoing others, the government claimed in the *Fox II* briefing that increases in niche programming and competition with cable and satellite would push broadcasters to emulate more risqué programming featured on cable and DBS.[288] The majority's opinion in *Fox I* found that the FCC's prediction of increased fleeting expletives on air was "rational (if not inescapable)."[289] Earthier programming may also be generated by changes in program formats—such as reality programs and procedural crime dramas that often focus on sexualized crime. Moreover, many decry what they see as the coarsening morality of America, which invites increasingly shocking and transgressive programming. Finally, both media watchers and some FCC Commissioners have adverted to an argument that indecency may be

286. *Fox II* FCC Reply, *supra* note 183, at 14.

287. For example, the Commission warned that a per se exemption for fleeting expletives would "permit broadcasters to air expletives at all hours of the day so long as they did so one at a time." Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 460 (2d Cir. 2007) (citing *Omnibus Remand Order*, 21 FCC Rcd. at 13,309 ¶ 25).

288. Indeed, the government characterized the National Association of Broadcasters brief as an admission that broadcasters seek relaxation of the indecency rules in order to allow broadcasters to compete more with cable. *See Fox II* FCC Reply, *supra* note 183, at 14; *see also* Calvert & Richards, *supra* note 20, at 312; Jost, *supra* note 12, at 982–83.

The dissent in the Second Circuit's *Fox* opinion also predicts an increase in indecency because of broadcasters' need to compete with cable. Judge Leval

> would bet [his] money on the agency's prediction [that] . . . [t]he words proscribed by the Commission's decency standards are much more common in daily discourse today than they were thirty years ago [and] the regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with such expletives. The media press regularly reports how difficult it is for networks to compete with cable for that reason. It seems to me the agency has good reason to expect that a marked increase would occur if the old policy were continued.

Fox Television Stations, 489 F.3d at 472–73 (Leval, J., dissenting). However, as the majority pointed out, "no evidence supporting this proposition is contained in the record that was considered by the FCC when rendering its decision." *Id.* at 460 n.11 (majority opinion); *see also* Holohan, *supra* note 109, at 368 (concluding that "the *Pacifica* rules give broadcasters a severe competitive disadvantage").

289. *Fox I*, 556 U.S. 502, 518 (2009); *see also Fox Television Stations*, 489 F.3d at 472–73 (Leval, J., dissenting).

associated with—and perhaps even promoted by—media consolidation.[290]

What broadcasters are likely to do with respect to indecency, if left unregulated, is actually a hard question. On the one hand, empirical data reflecting increased broadcast indecency suggest a correlation with a rise in cable indecency.[291] This suggests that what is available on cable and perhaps the Internet will influence what broadcast programmers think is appropriate in prime time. On the other hand, courts have opined that threats of increased indecency are "divorced from reality."[292] The PTC's president has taken the position that there is not a major broadcast market for "the edgier content."[293] The tolerance of their advertisers is also a critical factor for broadcasters. If major advertisers shy away from increasingly explicit programming on television, broadcasters will be compelled to adjust.[294] Recent empirical data on how well sexually-

290. *See* Michael J. Copps, *The "Vast Wasteland" Revisited: Headed for More of the Same?*, 55 FED. COMM. L.J. 473, 478 (2003); Byron L. Dorgan, *The FCC and Media Ownership: The Loss of the Public Interest Standard*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443, 449 (2005); Katherine A. Fallow, *The Big Chill?: Congress and the FCC Crack Down on Indecency*, COMM. LAW., Spring 2004, at 25 n.14 (citing to testimony by Commissioners on the effect of consolidation on local affiliates' power to reject indecent programming); Press Release, FCC, Comm'r Michael J. Copps Calls for Re-Examination of FCC's Indecency Definition, Analysis of Link Between Media Consolidation and "Race to the Bottom" (Nov. 21, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228735A1.pdf; *see also* S. REP. NO. 108-253, at 6 (2004) (referring to PTC testimony attributing "a coarsening of content on the airwaves" to media consolidation). *But see* Abner Greene et al., *Indecent Exposure?: The FCC's Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087, 1118 (2005) (comments of Mr. John Fiorini, III, Wiley Rein & Fielding L.L.P.) (attributing increase in indecent content to competition rather than consolidation); Michael Powell, Chairman, FCC, Remarks at the National Association of Broadcasters Summit on Responsible Programming (Mar. 31, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245663A1.pdf.

291. *See* Fox Television Stations v. FCC, 489 F.3d 444, 472–73 (2d Cir. 2007) (Leval, J., dissenting). *See also* PARENTS TELEVISION COUNCIL, *The Alarming Family Hour*, http://www.parentstv.org/PTC/publications/reports/familyhour/familyhour-92007-finalPDF.pdf (providing data on increased broadcast indecency); PARENTS TELEVISION COUNCIL, HABITAT FOR PROFANITY, http://w2.parentstv.org/main/MediaFiles/PDF/ Studies/2010_HabitatforProfanity.pdf; Dale Kunkel et al., *Sex on TV*, THE HENRY J. KAISER FAMILY FOUNDATION (2005), http://kff.org/other/sex-on-tv-4-report/.

292. *See* Fox Television Stations, 489 F.3d at 460 (noting that broadcasters have never barraged the airwaves with expletives even prior to the Golden Globes).

293. Calvert & Richards, *supra* note 20, at 313–14.

294. On the likelihood of self-censorship by broadcasters, see, for example, Corcos, *supra* note 186; Fairman, *supra* note 123, at 89–90; Matasar-Padilla, *supra* note 141, at 141; Eric J. Segall, *In the Name of the Children: Government Regulation of Indecency on the Radio, Television, and the Internet—Let's Stop the Madness*, 47 U. LOUISVILLE L. REV. 697, 712 (2009). For one anecdotal example, American Idol runner-up Adam Lambert apparently did not appear on ABC for two years following a highly sexualized performance on the 2009 American Music Awards

oriented program promotional ads correlate with program ratings also suggest that broadcasters should be aware of possible unintended consequences of using sex as a promotional device.[295] Moreover, despite anecdotal accounts, the precise degree to which cable programming—and particularly basic cable—contains more sexual content than broadcasting is unclear.[296] Also, recent evidence suggests a reduction in cable viewing, a development whose possible impact on broadcast indecency is also unclear.[297] Perhaps station branding will help limit indecency on the air regardless of regulation;[298] and perhaps changes in the popularity of different types of program formats will influence the likely degree of sexual expression.[299]

The question of what broadcasters are likely to do in response to a restrained indecency regime is likely to depend on what industry structure and media ownership will look like in the future. There is also a question about whether, and to what extent, cable will continue to be sold in tiered

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show. *See* Shirley Halperin, *Adam Lambert Returns to 2011 AMAs As Presenter; Producer Says He 'Was Never Banned'*, HOLLYWOOD REP. (Nov. 19, 2011, 12:24 AM), http://www.hollywoodreporter.com/news/adam-lambert-american-music-awards-263878; John F. Stephens & Matthew G. Stein, *The Future of the FCC's New Indecency Policy*, L.A. LAW., May 2010, at 14, 17. Indeed, in its comments filed in the Commission's pending indecency proceeding, CBS explicitly assured the agency that "[i]t need not be concerned that doing so will make of broadcast television some sort of red-light district. That has not happened with respect to the post-10 p.m. 'safe harbor,' and it will not happen in daytime, or primetime…" John Eggerton, *CBS: FCC Should Adopt 'Egregious Case' Indecency Enforcement Policy*, BROAD. & CABLE, June 20, 2013, http://www.broadcastingcable.com/article/494166-CBS_FCC_Should_Adopt_Egregious_Case_Indecency_Enforcement_Policy.php (internal quotation marks omitted).

295. John J. Davies, *TV Ratings and Verbal and Visual Sexual Content in Promotional Ads*, 17 J. PROMOTION MGMT. 378 (2011).

296. Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That Is the Question: Offensive Language on Prime-Time Broadcast and Cable Programming*, 53 J. BROAD. & ELEC. MEDIA 22, 24 (2009). *But see* PARENTS TELEVISION COUNCIL, *Cartoons Are No Laughing Matter: Sex, Drugs and Profanity on Primetime Animated Programs*, (Aug. 16 2011), http://www.parentstv.org/PTC/news/release/2011/0816.asp (PTC study finding high levels of sexual references in cable cartoon programming).

297. *See* Brief for Nat'l Religious Broadcasters as Amicus Curiae in Support of the Petitioner at 21, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 4048808 (noting reduced cable viewing and increase in broadcast viewing).

298. *See* Blake Lawrence, *To* Infinity *and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148, 174 (2011); *see also* Fairman, *supra* note 123, at 91; Kristin L. Rakowski, *Branding as an Antidote to Indecency Regulation*, 16 UCLA ENT. L. REV. 1, 42 (2009).

299. It may be that sexual references are more likely in some program formats than others. If, for example, reality programming tends to lead to increased sexual references, then a lessening in popularity of such program formats might correspondingly reduce such expression.

and bundled fashion, as it has been. While the Ninth Circuit recently rejected a judicial challenge to cable tiering on antitrust grounds,[300] and while the current FCC appears to have lost momentum on former Chairman Kevin Martin's push for *a la carte* cable regulation,[301] Senator John McCain is currently pushing for cable *a la carte* legislation and has recently written to the FCC asking the agency to "take steps" to adopt his Television Consumer Freedom Act.[302] What happens to the cable business model should also be factored into a discussion of the likelihood of indecency on the air in the future. While predictions of broadcast television overrun with explicitly sexual content during daytime hours are overstated, what we can conclude in this uncertain area is that some increase in sexualized television content is possible.

In the final analysis, because of the important costs of indecency regulation and the reality that the FCC is unlikely to eliminate indecency regulation altogether, the policy burden will be to propose reforms that both reduce the negative effects of indecency regulation and address the complex programming incentives that broadcasters now face. The FCC's rules should be enforced with restraint, relying on some measure of broadcaster self-regulation constrained by reasonable FCC backstops.

V. EXPLORING THE SECOND BEST: RECOMMENDATIONS FOR REGULATORY RESTRAINT ON THREE FRONTS

There is historical precedent for administrative forbearance in the broadcast indecency context, with the FCC having chosen to target only George Carlin's "seven dirty words" even after the Supreme Court's 1978 decision in *Pacifica* could have been interpreted to justify significantly more stringent enforcement of the agency's indecency rules.[303] Now too, the FCC should choose relative forbearance as a matter of policy to avoid the negative consequences detailed in Section III above.

This is not to say that forbearance should simply lead to an impoverished bright line approach like the arbitrary prohibition of the seven dirty words. Instead, the particulars of the Commission's restraint should be informed by reference to the three major players in the area—broadcasters, the FCC

300. Brantley v. NBC Universal, Inc., 675 F.3d 1192 (9th Cir. 2012).

301. *See* Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243, 246–47 (2006); *see also* Pike, *supra* note 145, at 224 (discussing "voluntary" merger conditions requiring *a la carte* offerings in satellite radio).

302. Seth Abramovich, *John McCain Pushes for a la Carte Cable Options in Letter to FCC*, HOLLYWOOD REP. (June 12, 2013, 3:55 PM), http://www.hollywoodreporter.com/news/john-mccain-pushes-a-la-567663.

303. *See supra* notes 54–59 and accompanying text.

itself, and consumers. The suggestions are designed to reduce chill principally by looking to proportionality as the key goal for the monetary threat level of indecency rule violations for broadcasters, to improve the FCC's internal indecency review processes, and to promote consumer empowerment.

A. Chill Minimization via Proportionality in Forfeitures

The changes to the FCC processes and standards recommended above should go a long way toward ameliorating the chilling effect of indecency regulation on broadcasters. Nevertheless, broadcasters' expressed concerns lead to a recommendation regarding forfeiture amounts.

The Supreme Court's opinion in *Fox II* specifically pointed to the very large amount of the forfeiture imposed on ABC and its affiliates for the nude buttocks shown during an episode of *NYPD Blue*, implying the extent of the penalty.[304] The Second Circuit's opinion in *Fox* specifically noted that the change in the Commission's forfeiture authority "could easily run into the tens of millions of dollars"[305] and observed that the FCC, which had imposed $440,000 in indecency fines in 2003, imposed "a record $8 million in fines" in 2004.[306] It would surely reduce the potential chilling effect of the Commission's indecency regime if the agency decided to reduce the amounts of the fines imposed for violations of the indecency rules. It could do so by returning to its practice of imposing fines on a per-program, rather than a per-broadcast, basis. Even if broadcasters were not taking the possibility of FCC indecency forfeitures seriously prior to 2005—when the amount of money at risk was $32,500 per program—the ten-fold increase in the agency's statutory forfeiture authority certainly enhances the financial threat posed today by the threat of a violation finding. The Commission's new approach—of treating each expletive uttered during a program as a separate violation of the indecency rules, and of treating each licensee's broadcast of a program containing indecency as a separate violation—leads to a disproportionate chilling effect. Even though the Commission's remedial flexibility should not be eliminated, there should be restraints on the severity of the monetary and criminal sanctions for indecency violations.[307]

304. *Fox II*, 132 S. Ct. 2307, 2319 (2012).

305. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 323 (2d Cir. 2010).

306. *Id.* at 322 n.3.

307. For a similar view, although one that focuses more on speech value and speaker expectations than on the proportionality recommended in this Article, see Garfield, *supra* note 198, at 633–34 ("Criminal sanctions or severe fines would be inappropriate in any context in which the speech arguably has redeemable value and the speaker reasonably

B. Institutional Adjustments—Improving the FCC's Processes

The second category of rule changes proposed here concerns the FCC's internal processes—both for applying and adopting indecency policies.[308]

1. Improving the Process for Handling Indecency Complaints

Others have criticized the FCC's approach for handling indecency complaints, including the lack of clarity in FCC responses to complainants.[309] This Article recommends initiatives to promote both transparency and redundancy in the process.

a. Promoting Transparency, Consistency, and Accountability in Indecency Review

The FCC should study the institutional characteristics of its current indecency review process in order to: 1) streamline the process and 2) enhance the likelihood of consistency by incorporating cross-checks and redundancy reviews. The review process should strive to be not only efficient and timely, but also consistent and accountable. The exercise of discretion in this area should be bounded by multiple reviews by different

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could have believed that the speech would not have been actionable."); *see also* Amy Kristin Sanders, *When Is Enough Too Much?: The Broadcast Decency Enforcement Act of 2005 and the Eighth Amendment's Prohibition on Excessive Fines*, 2 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 75 (2007); *cf.* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1014–15 (2012) (arguing for a "penalty-sensitive" understanding of the free speech right and finding such an approach in *Pacifica*); Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853 (2012) (arguing that while agency monetary penalties are said to be a deterrent, they are actually retributive and illegitimate because they lack the transparency and structural protections that legitimize retribution in the criminal context).

308. As noted in Section I, the Commission has historically addressed indecency through a combination of adjudications and "industry guidance." It would be useful, however, for the agency to address explicitly its decision to proceed by industry guidance rather than rulemaking or other process more open to public participation. *See* Campbell, *supra* note 43 (arguing, *inter alia*, that the FCC should abandon adjudication and proceed by rulemaking in the indecency area). As part of its consideration, the Commission should consider the effectiveness, in practice, of rulemaking in providing adequate and diverse public response. *See* Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395 (2011); *see also* Peter M. Shane, *Empowering the Collaborative Citizen in the Administrative State: A Case Study of the Federal Communications Commission*, 65 U. MIAMI L. REV. 483 (2011) (discussing the FCC's attempts to institutionalize "open, participatory, and collaborative government"); *cf.* Jonathan Weinberg, *The Right To Be Taken Seriously*, 67 U. MIAMI L. REV. 149 (2012).

309. *See, e.g.*, Genelle I. Belmas et al., *In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67, 108 (2007) (explaining that complainants receive a cursory letter of an indecency denial, an insufficient response that could be ameliorated if, "[a]t minimum, the FCC . . . articulate[d] to individual complainants more of the rationale behind its findings.").

Commission staff members or groups, reducing the likelihood not only of inconsistency but also of ideological skews in processing at any given staff level.

With regard to application of the Commission's rules, the agency's website discloses little about the process for indecency review.[310] An initial difficulty with this review process as described is its lack of detail and clear information—which means that recommendations must necessarily be made in a vacuum. Regardless, a few observations come immediately to mind. For example, the process as described does not appear to have sufficient redundancies to increase the likelihood of consistent exercise of discretion. How many people review each complaint? What is the process by which uncertainties are resolved? The relationship between the lawyers and non-legal enforcement staff on these issues is also unclear. Is there a chain of review, de jure or de facto?

Along with its lack of built-in cross-checks, the process also invites organizational and informational difficulties. Why are there multiple databases of indecency information managed by different parts of the agency staff? How and by whom are the datasets accessible internally? How does the availability of information in different agency venues, under different jurisdictions, affect the efficiency and rigor of the review process? Just as scholarly attention has begun to focus on the effects of interagency relationships on regulation,[311] query how the relationships of the various different FCC subsections affects the application of indecency rules.

The review process also does not appear to have an articulated timeframe to which Commission staff must hew. Even before the agency's conscious decision to refrain from resolving many indecency complaints during the pendency of the *Fox* and *CBS* cases,[312] broadcasters consistently

310. When complaints are received by the Commission electronically or otherwise, they are "log[ged] . . . into one of several databases managed by the Consumer and Governmental Affairs Bureau and the Enforcement Bureau." FCC, COMPLAINT PROCESS, http://transition.fcc.gov/eb/oip/process.html (last visited July 30, 2013). The Commission staff "reviews each complaint" to determine whether it states a claim under the agency's rules. *Id*. As of January 2010—the last time the web page was updated—the Enforcement Bureau apparently had seventeen attorneys and sixteen "other support personnel" working on indecency matters, but would "increase[] staffing as demand requires." FCC, WHO HANDLES INDECENCY COMPLAINTS?, http://transition.fcc.gov/eb/oip/Handle.html (last visited July 30, 2013). As of 2010, the Investigations and Hearings Division of the Enforcement Bureau handled most complaint reviews, with "senior staff . . . involved at all levels of the investigative process." *Id.*

311. For citations to the burgeoning scholarship on interagency coordination, see Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 886 n.2 (2012).

312. *See, e.g.*, FCC, REGULATION OF OBSCENITY, INDECENCY AND PROFANITY, http://transition.fcc.gov/eb/oip/ (last visited July 30, 2013).

complained of the history of delay in FCC indecency determinations.[313] The failure of the Commission's website to refer to any timeframes for resolving indecency complaints does not suggest attention to the harmful effects of delay.

Finally, the Commission is not clear about the relationship of staff and Commission review in the indecency context. The FCC staff's indecency jurisprudence had historically served as both a guideline for broadcasters and internal precedent for decisionmaking by the staff and the Commission.[314] But in the *Golden Globes* case, the Commission reversed its own Enforcement Bureau decision and indicated the non-precedential character of staff decisions in this area.[315]

Rather than making micromanaging recommendations—at least partly because sufficiently detailed information about what the Commission actually does now is not publicly available to inform such recommendations—this Article recommends that the Commission study its processes. In theory, though, what could the Commission do to improve its indecency review process? On the time front, the Commission could adopt a timeline template to serve as a guidepost for its deliberations. With respect to the availability of information in a variety of places, the Commission could coordinate and centralize existing materials. With respect to the specific review modes at the staff level, the Commission could promote group decisionmaking or require multiple levels of review or staff rotation. Particularly if the Commission were to adopt the staff rotation idea, it would be important to ensure that staff members with historical knowledge and expertise in the area be extensively consulted in decisionmaking.

b. Counting Complaints

Another aspect of the Commission's indecency processes that deserves attention is its approach to counting and reporting complaints. On the chance that the existence and number of public complaints actually influence the Commission's assessment of the problem, it should rationalize its complaint-counting process, eliminate double counting, and find a way to take into consideration the source and interest group affiliations of the complaints. Another possibility would be for the FCC to return to its previous "consolidated complaint process"[316]—the practice of counting form complaints generated from particular websites as single complaints. If

313. *See supra* note 146.
314. *See supra* note 156 and accompanying text.
315. *See supra* note 69 and accompanying text.
316. Hunt, *supra* note 109, at 232.

the Commission does not make such changes, then it should not be able to rely on these crude complaint numbers as a regulatory justification.

c. Conditioned Settlements

While this Article is sensitive to the need for FCC remedial flexibility and does not recommend eliminating conditioned settlements of indecency complaints, it does recommend that the Commission revisit the particulars of some of its prior compliance mandates with a critical eye. It reminds the Commission that at a time when broadcast license renewals have been delayed for years because of pending indecency complaints,[317] broadcaster willingness to enter into consent decrees conditioned on decency requirements may be neither "voluntary" in the fullest sense nor fully attributable to licensee recognitions of fault.[318]

Specifically, the Commission should not require Sarbanes-Oxley-inspired officer compliance certifications regarding indecency compliance as part of license renewal settlements simply because of prior allegations of noncompliance. Similarly, consent decrees should not trigger immediate employee suspension upon the mere issuance of a NAL. Nor should the Commission impose a requirement of a program monitor or effective time-delay technology when an on-air personality previously identified in an indecency NAL is permitted to return to live programming.

2. Standards Changes

In addition to improving the review process institutionally, the Commission's indecency regime would benefit from changes to substantive standards. While the two revisions recommended here appear minor at first glance, they would likely have significant beneficial long-term effects on the margins.

a. Adopting a Presumption of No Liability in Close Cases

The Commission should adopt a tiebreaking presumption that if there is

317. The filing of the license renewal application affords authority for continued operation under "interim authority" pursuant to an FCC postcard accepting the renewal application and stating that the licensee has interim authority to continue to operate. Many stations have been operating on such "interim authority" for eight years and file renewal applications without the previous ones having been granted. This is mostly, but not exclusively, due to indecency complaints.

318. *See, e.g.*, Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 63–68 (2000) (criticizing FCC consent decrees).

any staff disagreement about a finding of indecency in a particular case (and particularly with regard to the second prong of the Commission's contextual inquiry), the broadcaster will not be found liable. The benefit of such a presumption is to serve as a counterweight to the inevitably subjective assessment of gratuitousness.

b. Reversing the "Negligent" Indecency Approach and the Broadcaster Standards Bootstrap

The Commission should reverse its negligent indecency approach and not overvalue a broadcaster's failure to use technology to prevent indecency.[319] It should also refrain from using broadcasters' own standards and practices policies as inculpatory evidence in indecency investigations.

c. Dismissing Complaints Not Submitted by Actual Program Viewers

The Commission's opinion in the *Married by America* case notes that the FCC did not consider complaints made by viewers who did not assert that they had viewed the program in question.[320] The Commission should make a practice of this. Even if it is appropriate to censor broadcast speech in response to the offended reactions of an actual viewer, it is another matter entirely to make programming unavailable in a particular market because someone from a different market, who has not even seen the program, believes that the people in the airing market should have been offended by it.[321]

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319. The Court of Appeals for the Third Circuit noted in *CBS Corp.* that "the First Amendment precludes a strict liability regime for broadcast indecency." CBS Corp. v. FCC, 535 F.3d 167, 200 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009). Thus, according to the Third Circuit, the government would have to prove recklessness as a constitutional minimum. Regardless of the final judicial determination of the question as a matter of constitutional or statutory law, the Commission should reverse course on negligent indecency as a matter of policy. Imposing an obligation on broadcasters to adopt technological measures to prevent indecency and ensure their effective deployment imposes significant costs, particularly on smaller broadcasters, and raises thorny evidentiary questions. *See also* Botein & Adamski, *supra* note 128, at 21–23 (noting the ease of "building one evidentiary inference upon another" and criticizing the lack of clarity in negligent indecency as a basis for liability).

320. Forfeiture Order, *In re* Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003, 23 FCC Rcd. 3222, 3236 (2008).

321. Otherwise, the public becomes simply voters rather than "victims." Brief for Amici Curiae Former FCC Commissioners and Officials in Support of Respondents at 25, *Fox I*, 556 U.S. 502 (2009) (No. 07-582), 2008 WL 3539496 [hereinafter *Fox I* Brief for Former FCC Officials]. This is not a major point, however, because it will often doubtlessly be easy for groups like the PTC to generate complaints from actual viewers. Nevertheless, putting

d. Using Context to Exculpate

To the extent that the Commission looks at the entire context of a program to assess compliance with the second prong of its indecency inquiry,[322] it should be restrained in the way it characterizes program elements beyond the complained-of sexual or excretory reference. Specifically, it should return to its prior practice of using the rest of a complained-of program to exculpate, rather than inculpate, the broadcaster.

e. Adopting a News Exemption (or Reversing the Agency's News-Related Change)

The Commission's recent attempts to distinguish "real" from artificial news, and only exempt sexual expression from liability for indecency in the bona fide news context, are misguided.[323] Instead, the Commission should either explicitly adopt a news exemption from the indecency rules or return to its pre-2003 approach.[324]

f. Limiting the Aesthetic Necessity Inquiry

The Commission should also scale back its recent approval of more extensive administrative assessments of the aesthetic necessity of sexual expression to the challenged work.[325] This is because of the extent to which such inquiries necessarily intrude into fundamental expressive judgments and replace creators' and producers' aesthetic judgments with those of Commissioners.

g. Considering Economic Hardship and Whether the Broadcaster Is a Public Station

The FCC should also study whether to consider, in indecency cases, the public or commercial character of the broadcaster concerned. The Commission has asserted recently that it considers the economic resources of the station before deciding on the amount of the forfeiture penalty once liability has been established.[326] But this consideration has been utilized to increase forfeiture amounts based on the ownership of the broadcaster,

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that burden on such organizations will help in those circumstances where offended actual viewers are not easy to find. It will also send a message that indecency regulation is less a morality crusade than an attempt to help "victims."

322. *See supra* notes 77–79.

323. *See supra* notes 167–68.

324. *See supra* notes 165–67.

325. *See supra* notes 184–88.

326. *See supra* notes 126–27 and accompanying text..

engendering outsized penalties for stations owned by large media companies.[327] The Commission should more explicitly consider economic hardship as a factor in its enforcement. Moreover, in addition to these economic factors, the Commission might conclude—because of a commitment to the public broadcasting system—that it should consider whether a purportedly indecent program was aired by a public radio or television station.[328]

C. Consumer Empowerment

In addition to the recommendations in this Article regarding forfeitures and FCC processes, the FCC should also consider whether it can achieve its goals through indecency rules designed to promote consumer empowerment—public information and transparency.

Consumer-regarding initiatives should be tested by whether they provide viewers with adequate information to make viewing choices. As a first step in doing so, the FCC should focus carefully on the accuracy and adequacy of the existing program ratings system voluntarily adopted by broadcasters.[329] Interest groups such as the PTC have released studies

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327. *See supra* Section V.A (recommending revision of forfeiture policy).

328. It has been suggested that the problem of broadcast indecency can be resolved through the operation of the market, via branding. *See* Fairman, *supra* note 123; Lawrence, *supra* note 298; Rakowski, *supra* note 298. However, the business model for broadcasting has historically focused on providing an array of programming to satisfy a broad range of viewer tastes. *See* Horst Stipp, *The Branding of Television Networks: Lessons from Branding Strategies in the U.S. Market*, 14 INT'L J. MEDIA MGMT. 107, 111 (2012), *available at* http://www.tandfonline.com/doi/pdf/10.1080/14241277.2012.675756. Moreover, even to the extent that broadcast networks use branding to differentiate themselves, it is unlikely that such branding would focus on sexual content as the differentiating factor.

329. Broadcasters negotiated and voluntarily adopted a ratings system to be used in connection with the V-Chip in response to the Telecommunications Act of 1996. Recently, the broadcast networks committed to providing ratings for their programming when streamed online. *See* John Eggerton, *Broadcast Nets to Add Content Ratings Online*, BROAD. & CABLE (June 10, 2012, 9:21 PM), http://www.broadcastingcable.com/article/485723-Broadcast_Nets_to_Add_Content_Ratings_Online.php.

Admittedly, ratings apply only to television, not radio, and many of the indecency actions since 2003 have concerned live programming with child-friendly ratings. Nevertheless, the question of whether television ratings are working well is of great practical significance. With regard to live network programming, networks will likely use time-delay technology whenever they have reason to fear unscripted expletive use. Those expletives escaping technological constraints will likely become subject to reasonable FCC fines. So what will remain at issue as a practical matter is likely to be the non-expletive sexual and excretory references in scripted programming.

In addition to assessing and regularizing the ratings system, the FCC should also consider an information-forcing requirement that would generate and publicize information about advertisers. *See, e.g.*, Brown & Candeub, *supra* note 32. This could enable the public

to protest to the advertisers rather than having the government engage in censorship. Program advertisers do not hide their identities, however, raising the question of precisely what would have to be disclosed under an FCC reporting scheme. Entities like the PTC currently provide some such listings on their web sites. *See, e.g.*, PARENTS TELEVISION COUNCIL, http://w2.parentstv.org/main/action/ContactSponsors.aspx (last visited July 30, 2013). Regardless, the public can complain to advertisers directly if it wishes to do so, without the intermediation of the PTC. In considering disclosure-forcing rules of this kind, the Commission will need to assess what more would be gained for the public by disclosure requirements entailing not-insignificant compliance expenditures by broadcasters. It is unclear whether this information would be provided in a sufficiently timely manner even by broadcasters attempting to comply. There may also be additional costs to the provision of such information that might not be worth incurring in light of its availability elsewhere. *Cf.* Richard Warner & Robert H. Sloan, *Behavioral Advertising: From One-Sided Chicken to Informational Norms*, 15 VAND. J. ENT. & TECH. L. 49, 53–54 (2012) (explaining how, in the behavioral advertising context where consumers engage in pay-with-data exchanges, game theory suggests that the prevalent approach of "notice and choice" cannot ensure informed consent and harms of behavioral advertising cannot be eliminated through appropriate collective action such as a consumer boycott). Some also cast doubt on the desirability of the kind of private pressure and advertiser boycotts indulged in by the PTC. *See, e.g.*, Matthew S. Schneider, Note, *Silenced: The Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves Is Monopolization*, 29 CARDOZO L. REV. 891, 898–99 (2007) (suggesting that advertiser boycotts should be considered violative of antitrust laws); Matasar-Padilla, *supra* note 141, at 139–40 (remarking on relationship between networks and conservative advocacy groups). The Commission will also have to address the concern that involving advertisers in the process of closely monitoring programs could lead to very bad program outcomes—itself an important social cost.

Finally, the FCC might wish to explore the viability of a rule requiring all indecency complaints and Commission responses to be uploaded onto the FCC website in searchable form as soon as they are received. Such a rule could have significant benefits. For those individuals or media groups accessing such information, this process would not only identify the programs particularly triggering concern but would also reveal whether the complaints were form filings generated by particular interest groups via their websites. A broader public conversation could be generated which could in turn inform the FCC about public sentiment. It would also prevent the FCC bureau double-counting that has in the past been criticized as a feature of the Commission's generalizations from complaints. On the other hand, requiring such information would impose extensive costs. There are doubtless privacy concerns in releasing indecency complaints, and redaction of identifying information is likely to be very labor-intensive and time-consuming for the FCC staff. To the extent that the goal is to empower parents, the specific structure of disclosure chosen by the Commission—the way in which the information is organized and presented—would probably be the most significant factor in whether such a disclosure scheme would meet that goal. It is unclear that anyone other than organized, ideological interest groups would use the information provided, and they could certainly publicize the complaints filed by their members with the FCC via their websites without the need for government to do so. Parents already have private options for gathering information about programming content. It is unclear whether they would find it either practical or beneficial to process all the indecency complaints in the Commission's inbox. Perhaps most importantly, there are reasons to question whether public complaints are as significant to the FCC's decisionmaking in this area as has been claimed. If not, then imposing administrative costs on the FCC to publicize would be a

making strong empirical claims and purporting to show that the current ratings system is not adequate either in design or application.[330] The PTC asserts that current program ratings are both inconsistently applied and minimally understood by parent viewers.[331] Such claims should be carefully and extensively examined.[332] As noted above, the Commission has not concluded its 2009 inquiry into ratings and blocking mechanisms. Nor does the Commission's Notice of Inquiry directly address the question of whether the current voluntary rating system is adequate. The Commission should conclude its pending docket, with particular attention paid to the "open V-chip" and the possibility of cross-platform blocking solutions.[333] In addition, the FCC could promote consumer education and

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pointless and distracting exercise.

330. *See* Douglas A. Gentile et al., *Parents' Evaluation of Media Ratings a Decade After the Television Ratings Were Introduced*, 128 PEDIATRICS 36 (2011), *available at* http://pediatrics.aappublications.org/content/128/1/36.full.pdf. On the other hand, the Monitoring Board has filed comments with the FCC purporting to show that parents are, overall, satisfied with the television ratings system. *See* Hart Research, *Research Public Opinion Strategies Research, Key Findings from TV Ratings Research* (filed May 2, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021916367. These conflicting data must be analyzed and rationalized.

331. *See supra* notes 271–73. *But see* E-mail from Jane Mago to William Lake et al., (Apr. 6, 2012, 2:43 PM), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021916367 (attaching results of studies commissioned by the TV Parental Guidelines Monitoring Board and asserting parental satisfaction with ratings).

332. It might be questioned whether that kind of inquiry, if undertaken by the FCC or under its auspices, would itself improperly require government to engage in censorious assessments of speech. The Commission would have to structure the assessment process with sensitivity to this issue.

333. Empowering Parents and Protecting Children in an Evolving Media Landscape, 74 Fed. Reg. 61,308, 61,314–15 (Nov. 24, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-11-24/html/E9-27664.htm. The Commission, in its pending inquiry, "identified five areas for further study with respect to parental control tools across media platforms: (i) level of consumer awareness of such tools; (ii) pace of adoption; (iii) ease of use; (iv) familiarity with and understanding of ratings systems; and (v) pace of innovation." *Id.*

Two of the possibilities mentioned in the Commission's pending notice of inquiry are particularly attractive. First, the Commission has noted the problem that "content that parents may block via the V-chip on the home television set, such as a program that is rated TV-14, may be freely accessible to their children on the Internet." *Id.* at 61,313. The FCC has found that "no single parental control technology available today works across all media platforms." *Id.* at 61,314. Available technologies also "vary greatly" along various matrices even within each media platform. *Id.* So one possibility would be exploring "the creation of a uniform rating system that would apply to various platforms . . . ." *Id.* The other interesting possibility relates to whether the current V-Chip technology can support an "'open V-chip' that would allow parents to select from multiple ratings systems." *Id.* at 61,315. The Commission asks, "What steps, if any, should Congress, the Commission, or industry take to give parents access to multiple content ratings for television in addition to ratings assigned by content producers?" *Id.*

media literacy by helping parents understand and navigate the broadcast rating system. The Commission should also actively undertake its promised inquiry and provide for transparency regarding ratings and the Oversight Monitoring Board's processes.[334]

Ultimately, these suggestions for ways to promote FCC restraint are merely recommendations for further exploration.[335] Most importantly, one

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Further study, rather than immediate adoption, is recommended here regarding the open V-chip and cross-platform ratings systems because of some flaws identified in the context of web ratings. *See, e.g.*, Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997); *see also* Balkin, *supra* note 199, at 1165 (discussing coarseness and political character of ratings); Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 917 (2012); Robinson, *supra* note 50, at 953 ("The attempt to create an effective ratings scheme presents numerous problems, not least of which is a high risk of classification errors that will cause the ratings to fail to satisfy their intended purpose."). As the Commission noted, "Is further investment in the V-chip warranted, given the relatively low use of the V-chip and the increasing number of alternative parental control tools available to pay TV subscribers?" Empowering Parents and Protecting Children in an Evolving Media Landscape, 74 Fed. Reg. 61,308, 61,315. More generally, is the low level of V-chip acceptance by parents due to lack of awareness, confusion, or difficulty of use, or is it due to a lack of concern about the content of television programming over the air? Given the expense of producing and maintaining comprehensive open third-party ratings systems, and the fact that only closed, proprietary versions emerged on the web, what could help promote more successful developments in the broadcast context? And will the public greet the enhanced blocking system "with a collective yawn?" *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 816 (2000) (quoting Justice Kennedy's description of the blocking regulation at issue in the case).

334. In addition to inquiring into what steps would help increase the adoption of the V-chip by parents, the FCC's pending inquiry asks whether "improvements in the operation and visibility of the industry's Oversight Monitoring Board, which fields complaints about ratings, [would] be helpful" in addressing possible parental "doubts affect[ing] parents' interest in using V-chip technology." Empowering Parents and Protecting Children in an Evolving Media Landscape, 74 Fed. Reg. at 61,314.

The TV Parental Guidelines Monitoring Board is a private entity that describes itself as being "responsible for ensuring there is as much uniformity and consistency in applying the Parental Guidelines as possible." *See* TV Parental Guidelines Monitoring Board, *TV Ratings Oversight*, http://www.tvguidelines.org (last visited July 30, 2013). The Board "is comprised of experts from the television industry and public interest advocates." *Id.* It "also reviews complaints about specific program ratings to help ensure accuracy." *Id.*

335. Such exploration must focus on possible drawbacks. For example, with regard to changes that would presumably decrease the chilling effect of the current rules, reducing forfeiture amounts might well lead to the pre-2003 climate, in which indecency fines were seen by broadcasters as reasonable costs of doing business. Precluding indecency-related settlement conditions could reduce both FCC and broadcaster flexibility. Dismissing the negligent indecency approach would permit broadcasters who could well afford to use technology to help avoid indecency from doing so.

Similarly, with regard to the proposed improvements to the FCC's processes, each proposal admittedly raises questions. For example, increasing process redundancies might lead not to consensus and clarity but to delay and paralysis at the Commission. Adopting a

might question the entire project of attempting to reform this deeply flawed policy. Can these suggestions in fact succeed in rolling back the indecency doctrine to make it sensible? Is there really a case for attempting to do so when broadcasting is no longer the dominant medium, and when indecent broadcasts are no longer principally the work of a handful of radio talk show hosts or their guests? Worse yet, would inconsequential reforms ironically provide the illusion of regulatory effectiveness for a policy that, if ever sensible, has in fact outlived its time? Simply put, doesn't the critique in Sections III and IV above necessarily stand in tension with any such attempts at reform?

The best justification for this exploration of the regulatory second-best is the likelihood that the Court will not rush to overturn *Pacifica*, and that continuing congressional and interest group pressure on the FCC will lead to some activity on the indecency front. Under these circumstances, it is not realistic to expect the dismantling of the entire regulatory edifice. It is also the case that the enforcement regime of the past decade has deepened the underlying flaws of the prior indecency policy. The improvements that this Article commends to the Commission for exploration are not simply designed to promote the efficiency of the existing regime. Even if regulatory tinkering, as suggested here, does not eliminate the fundamental flaws of the core indecency policy, it focuses attention on how to mitigate the excesses of the past decade. Proportionality in forfeitures and the rollback of negligent indecency could achieve a de facto sunset for indecency regulation which political reality would not permit to occur today.[336]

CONCLUSION

In the past nine years, the Supreme Court twice had the opportunity to reverse *Pacifica* or to reject the differential First Amendment treatment of

presumption of liability in close cases might well undermine the application of the indecency policy to innuendo. As for the administrative process used by the Commission to adopt indecency policies, there is at least some possibility that a rulemaking alternative would be little more than a sham. Adopting a clear rule regarding how to count complaints might be deemed to silence real complainants, particularly if the Commission went back to its original counting approach.

336. This Article does not present each category of suggested reform as equally consequential or effective. It may well be that changes to the forfeiture regime would far more effectively reduce the threat of indecency regulation than the structural and consumer-oriented suggestions would improve the operation of the regime. Even so, promoting consumer self-help might foster the underlying goals of the indecency policy, and injecting more accountability into the FCC's internal processes might both improve the results and enhance acceptance of FCC action in the exceptional cases in which the Commission is likely to act.

broadcasters. It did neither. Nor, however, did it explicitly affirm the entirety of the FCC's approach to indecency on the air. Two justices—Justices Thomas and Ginsburg—indicated that they would vote to overrule *Pacifica*. On the other hand, the Court's opinion in *Fox II* floated—without discounting—a revival of FCC regulatory power under a newly expansive regulatory rationale that could justify not only indecency regulation but a more expansive regulatory footprint for the FCC than has been in vogue since the deregulatory turn in the 1980s.

Now the Commission is faced with an invitation from the Court to review its indecency policy with a view to the public interest. The current regime is deeply flawed in its standards, application, and reframed justifications. Yet, since the evidence does not suggest either that the Court will reverse *Pacifica* or that the FCC will dismantle its indecency system *in toto*, the most we can hope for is to convince the Commission to scale back its current approach and adopt an indecency regime, going forward, that is restrained in both analysis and enforcement.

This Article suggests practical changes that would enable the Commission to juggle its perceived political obligations to Congress, the expressive interests of broadcasters and the unoffended, and even the concerns of parents. In order to lessen the chilling effect of indecency regulation on broadcasters—and, particularly, on non-profit licensees and small local concerns—this Article suggests that the Commission engage in careful analysis of proportionality in forfeitures. In order to promote consistency and predictability at the Commission, this Article proposes a series of procedural and substantive revisions to FCC indecency review. Procedurally, it calls for the Commission to improve the transparency and accountability of its indecency review process, including increased redundancy in staff review to promote consistency and control for ideological bias. It also suggests exploring revised ways of counting and reporting indecency complaints, and revising the provisions of its consent decrees in indecency cases. Substantively, this Article recommends that the Commission consider the following standards changes: adopting a presumption of no liability in close cases; reversing the new "negligent indecency" approach and the broadcaster standards bootstrap; dismissing complaints not submitted by actual program viewers; using context to exculpate; adopting a news exemption (or reversing the recent changes to the Commission's historical approach to news indecency); limiting the aesthetic necessity inquiry; and considering economic hardship and whether the broadcaster is a public station. Finally, in order to promote consumer empowerment, this Article calls for the Commission to explore an improved and more transparent ratings system. Such solutions, while admittedly imperfect, could help the Commission discontinue its dangerous

and almost certainly ineffective "Victorian crusade"[337] against smut on broadcast television.

337. John Eggerton, *Former FCC Chairs Slam Commission's 'Victorian Crusade'*, BROAD. & CABLE (Nov. 10, 2011, 11:02 AM), *available at* http://www.broadcastingcable.com/article/476529-Former_FCC_Chairs_Slam_Commission_s_Victorian_Crusade_.php (last visited July 30,, 2013); *see also* Brief for Former FCC Officials, *supra* note 4, at 3; *Fox I* Brief for Former FCC Officials, *supra* note 321, at 3.

MAKING THE ADMINISTRATIVE STATE "SAFE FOR DEMOCRACY": A THEORETICAL AND PRACTICAL ANALYSIS OF CITIZEN PARTICIPATION IN AGENCY DECISIONMAKING

REEVE T. BULL*

In recent years, academics, politicians, and journalists have hailed the rise of a new model of governance in which citizens take a more active role in government decisionmaking. To the extent citizen participation advocates offer a normative justification for their proposals, they tend to appeal to democratic ideals, contending that increased citizen involvement lends enhanced legitimacy to the government's actions. This Article seeks to explore these normative justifications in greater depth and offer a new model for integrating public input into government decisionmaking. Confining its focus to citizen participation in the decisionmaking of administrative agencies, it first examines whether or not democratizing such processes is desirable and, after concluding that increased citizen participation is beneficial in at least a limited set of circumstances, explores the characteristics that render such participation effective and useful. This Article also considers several of the practical aspects of enhanced citizen participation and proposes certain legal reforms that would allow agencies to pursue such citizen involvement.

Specifically, this Article advocates the use of advisory committees, including demographically representative panels of citizens to provide public input on matters of

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agency policy. Though the agency would not be bound to honor a committee's conclusion, which would merely constitute one entry in the administrative record on which an agency would base its decision, such committees might prove invaluable in offering accurate, informed data concerning public opinion on important matters of policy. By merely exploiting new technologies and making relatively minor amendments to the Federal Advisory Committee Act, the law that governs the activities of advisory committees, the federal government could enable its agencies to experiment with the use of such committees. These relatively modest reforms could be enormously beneficial in providing relevant public input to administrative agencies and quelling popular perceptions of a "democracy deficit" in the workings of the administrative state.

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INTRODUCTION

In the summer of 2009, in the period preceding the passage of the Patient Protection and Affordable Care Act[1] (typically dubbed "Obamacare" by its critics for its association with the Obama Administration's health care policies), advocates of universal health care were pitted against those who felt that a national health care system would

1. Pub. L. No. 111-148, 124 Stat. 119 (2010).

improperly increase costs and/or decrease the quality of medical care. "Town hall" meetings hosted by Senators and Representatives seeking to garner public input on the proposed legislation often degenerated into angry shouting matches in which opponents of the law accused its advocates of attempting to foist "socialized medicine" on an unwilling American public.[2] Perhaps the most controversial critique of the legislation came from the 2008 Republican candidate for the Vice Presidency, Sarah Palin. Palin infamously accused the Obama Administration of attempting to implement "death panels" that would ration health care to Americans based upon their perceived usefulness to society, with more "productive" citizens receiving superior care whilst the disabled, infirm, and elderly receive sub-par care or are simply left to die[3] and, in the words of Charles Dickens, "decrease the surplus population."[4]

Though it takes a volatile imagination to characterize the end-of-life counseling provisions in the proposed health care law as "death panels,"[5] these words undoubtedly obtained some purchase on the public imagination. As a result, the health care law provoked intense controversy during its passage and remains a highly polarizing piece of legislation.[6]

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2. *See, e.g.*, *Health Care Town Halls Turn Violent in Tampa & St. Louis*, FOXNEWS.COM, Aug. 7, 2009, http://www.foxnews.com/politics/2009/08/07/health-care-town-halls-turn-violent-tampa-st-louis/ (noting that Democratic lawmakers attempting to deliver remarks on the proposed health care law in Tampa were met with shouts of "'You work for us!,' 'Tyranny! tyranny! tyranny!,' and 'Read the bill!'").

3. *See* Michael Kessler, *Sarah Palin's "Death Panel" Lies*, WASH. POST, Aug. 13, 2009, http://onfaith.washingtonpost.com/onfaith/georgetown/2009/08/the_death_panel_lies.html (quoting Sarah Palin as stating "the America I know and love is not one in which my parents or my baby with Down syndrome will have to stand in front of Obama's 'death panel' so his bureaucrats can decide, based on a subjective judgment of their 'level of productivity in society,' whether they are worthy of health care").

4. CHARLES DICKENS, A CHRISTMAS CAROL, IN PROSE: BEING A GHOST STORY OF CHRISTMAS 12 (Hill Press 1966) (1843) (When informed that "many would rather die" than seek provisions at public poorhouses, Ebenezer Scrooge replies "if they would rather die . . . they had better do it, and decrease the surplus population").

5. *See* Ezra Klein, *Is the Government Going to Euthanize Your Grandmother? An Interview with Senator Johnny Isakson*, WASH. POST, Aug. 10, 2009, http://voices.washingtonpost.com/ezra-klein/2009/08/is_the_government_going_to_eut.html (quoting *Republican* Senator Johnny Isakson as responding to Palin's "death panel" claims by stating "how someone could take an end of life directive or a living will as that is nuts").

6. *See, e.g.*, Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP POLITICS, Feb. 27, 2012, http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx. At its inception, the Affordable Care Act provoked intense controversy, with Americans starkly divided in their support for or opposition to the Act (with 49% in favor and 40% opposed). *Id.* Since that time, support for the law has slowly dwindled and opposition has gradually increased, with 45% of Americans currently

Though Ms. Palin's precise claims are easily debunked, her remarks reflect a general anxiety felt by a large number of American citizens: that they have lost the ability to influence government policymaking and instead are subject to the whims of elitist bureaucrats who, like the Caesars of Ancient Rome, dictate policy from a distant capital with little to no interest in the everyday concern of their public charges.[7]

A similar uproar emerged when the United States Preventive Services Task Force, an independent panel of experts appointed by the United States Department of Health and Human Services, recommended that women begin regular mammogram screenings for breast cancer at the age of fifty rather than forty, as had been the standard in the past.[8] Though the panel's recommendation was based upon scientific evidence strongly indicating that the drawbacks of early screening outweighed its benefits, many assumed that the panel's recommendation was an attempt by the Obama Administration to ration health care.[9]

In short, recent health care controversies betray deep-seated suspicions of the federal government and, in particular, federal agencies, on the part of the American public.[10] Of course, a certain degree of disconnect between policymakers and the general public is inevitable. First, agencies

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opposed and 44% in favor. *Id.* Though Americans as a whole are roughly equally divided between the pro- and anti-camps, members of the two major political parties are fairly uniform in their support for or opposition to the law: 87% of Republicans favor repeal of the Act while 77% of Democrats oppose repeal. *Id.*

7. *See, e.g.*, Nancy Coppack, *The United Bureaucracy of America*, BRYAN/COLLEGE STATION TEA PARTY, May 23, 2011, http://bcsteaparty.com/2011/05/bureaucracy-of-america ("His salary paid by the taxpayer, the bureaucrat is the face of tyranny and opposition rather than service.").

8. *See* Gina Kolata, *Panel Urges Mammograms at 50, Not 40*, N.Y. TIMES, Nov. 16, 2009, http://www.nytimes.com/2009/11/17/health/17cancer.html.

9. *Id.*

10. *See, e.g.*, Clint Bolick, *Obamacare's Other Unconstitutional Provision*, DEFINING IDEAS, Dec. 16, 2011, http://www.hoover.org/publications/defining-ideas/article/103021 (criticizing the Affordable Care Act for its creation of multiple new agencies and, in particular, for its investiture of significant power in the Independent Payment Advisory Board, which is responsible for recommending legislation designed to contain the rising costs of healthcare). Needless to say, the publicity surrounding the Supreme Court's recent decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), reveals the extent of public antipathy toward increased governmental intrusion into the erstwhile domain of the private sector. Prior to the issuance of the Supreme Court's decision, which ultimately upheld most provisions of the Affordable Care Act including the highly controversial "individual mandate," which required citizens to procure health insurance or face a monetary penalty, *id.* at 2600, 72% of Americans (and 56% of Democrats) expressed a belief that the "individual mandate" provision of the Affordable Care Act is unconstitutional. Jones, *supra* note 6.

often rely on esoteric, highly technical information that is overly complex for the typical citizen. For instance, though climate science overwhelmingly indicates that industrial carbon emissions create a significant threat of catastrophic climate change,[11] the average citizen does not observe any uniform pattern of each year's weather being warmer than the previous year's and therefore doubts that climate change exists.[12] Second, public policymaking tools sometimes rely upon assumptions that some citizens find distasteful. For instance, cost-benefit analysis requires the assignment of a dollar value to individual lives, a notion that may conflict with Judeo-Christian doctrines regarding the pricelessness of human life. Nevertheless, widespread antipathy towards administrative agencies[13] may also reflect a sense that the public has been foreclosed from making decisions regarding the proper allocation of resources, decisions that instead are made by relatively insulated bureaucrats remote from mechanisms of democratic accountability and unaware of citizens' preferences.

This Article examines the extent to which public input can and should be considered in agency policymaking and assesses possible mechanisms for enhancing such input where appropriate. Section I examines the theoretical justifications for increased citizen input in the administrative state. It acknowledges the decline of the non-delegation doctrine and the reality that administrative agencies increasingly engage in policymaking, a fact that arguably justifies improved citizen participation in agency decisionmaking. It then chronicles existing efforts to promote enhanced public input but concludes that these efforts largely consist of hortatory proclamations in favor of citizen involvement and generally lack any set of

11. *See* Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCI. 1686 (2004), *available at* http://www.sciencemag.org/content/306/5702/1686.full ("Scientists publishing in the peer-reviewed literature agree with [the Intergovernmental Panel on Climate Change], the National Academy of Sciences, and the public statements of their professional societies. Politicians, economists, journalists, and others may have the impression of confusion, disagreement, or discord among climate scientists, but that impression is incorrect.").

12. For instance, the winter of 2009–10 was unusually cold in parts of North America and Europe, an anomaly caused by "Arctic oscillation." Kenneth Chang, *Feeling That Cold Wind? Here's Why*, N.Y. TIMES, Jan. 9, 2010, http://www.nytimes.com/2010/01/10/weekinreview/10chang.html. One would expect a certain degree of variation in regional temperatures, even in an environment undergoing sustained warming, but laymen often interpret any temporary downturn in average temperatures as disproving the scientific consensus behind anthropogenic climate change.

13. *See* Gallup Consulting, *Gallup Study Provides Valuable Insights on the Individual Experience with Federal Agencies*, GOV'T EXECUTIVE 2, http://www.govexec.com/pdfs/111609l1.pdf ("Nearly half of Americans tend to view federal agencies neutrally (46%), with significantly more negative views (34%) than positive ones (20%).").

unifying principles or concrete goals.

Section II situates the issue of the appropriate level of input into agency policymaking within the broader theoretical debate over the appropriate role of "democratic" elements within our constitutional republic. It examines recent literature that argues that the Nation's founders valued "democracy" not for its own sake, but rather as a check on the representative elements of government. It applies this insight to administrative agencies, contending that general calls for "enhancing democracy" in the administrative state are misguided, but that a nuanced integration of certain "democratic" elements where appropriate is beneficial.

Section III then considers aspects of effective public participation. In particular, it contends that whenever an agency seeks public input, it should strive to ensure that the group providing input is representative of the national populace and that the participants are well-informed on the relevant issues. It considers existing proposals for enhancing public input and puts forth a new model involving the use of citizen advisory committees.

Lastly, Section IV explores potential objections to the citizen advisory committee proposal. It answers criticisms related to inappropriate reliance on deliberative groups, excessive cost, and the non-binding nature of committee determinations. Finally, it explores various legal issues, most notably those raised by the Federal Advisory Committee Act (FACA), and proposes relatively minor adjustments to the law that would facilitate use of such committees.

Ultimately, every modern government must maintain a delicate balance. On the one hand is "mobocracy,"[14] where the caprices of the uninformed masses dictate public policy. On the other is technocratic oligarchy, where a selected group of "elitist" decisionmakers impose their "enlightened" will upon the general populace. American administrative agencies, like the Republic as a whole, evince elements of both systems, inviting mass input in some areas while relying largely on technical expertise in others, attempting to achieve an optimal balance between democratic norms on the one hand and ideals of efficient and accurate decisionmaking on the other. This Article explores the theoretical foundations of that balance and offers modest suggestions for readjusting it. Equilibrium between competing goals necessarily leaves some dissatisfied; however, the present system has left a disturbingly large segment of the public alienated and dispirited,

14. Robert Justin Lipkin, *Which Constitution? Who Decides?: The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1076 (2006).

feeling that their government neither values their input nor makes decisions that ultimately promote the public good. By readjusting the modern system of administrative procedure to allow meaningful collaboration with the public in certain areas—rather than an empty charade wherein the government nominally gathers public input and then promptly ignores it[15]—and eschewing public participation where it is neither desirable nor beneficial—rather than disingenuously acting as if public opinion were relevant to technical issues, such as the viability of climate change science—our government could garner greater trust amongst the electorate while improving the overall quality of its policymaking.

I. PUBLIC ACCOUNTABILITY OF ADMINISTRATIVE AGENCIES

A. The Decline of the Non-Delegation Doctrine and the Increasing Relevance of Citizen Input

Traditional theories of the administrative state viewed agencies as the terminus of a "transmission belt," bearing responsibility for implementing the technical details of public policy decrees issued at earlier stations.[16] Voting citizens choose the President and Members of Congress, who adopt policy, and agencies simply decide the most efficient means of executing that policy. The "non-delegation doctrine" theoretically polices the line between the role of Congress and that of administrative agencies, but as

15. In this light, some have argued that the entire notice-and-comment requirement of § 553(c) of the Administrative Procedure Act (APA) is an exercise in futility, representing a merely symbolic practice of gathering public input that has little bearing on agency decisionmaking. *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."). *But see* Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs (OIRA), Keynote Address at Joint Brookings Institution/Administrative Conference Forum on the Future of E-Rulemaking (Nov. 30, 2010) ("In the last year and a half at least, and I bet it's true before, [the Kabuki theater] cliché just turns out to be wrong. Proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously."), transcript available at http://www.brookings.edu/~/media/events/2010/11/30%20electronic%20rulemaking/20101130_electronic_rulemaking_1. Whether or not one subscribes to this perspective, the APA simply requires agencies to consider the "relevant matter" presented in public comments, 5 U.S.C. § 553(c) (2006), and in practice, agency decisionmakers generally limit their attention to relevant data contained in such comments and largely ignore any policy preferences expressed therein. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1346 (2011).

16. Richard B. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

every law student learns a few weeks into an administrative law survey course, that doctrine is essentially a dead letter.[17] The last serious application of the non-delegation doctrine occurred in the middle of the New Deal, when the Supreme Court that had evinced some degree of hostility to the policies of President Franklin Delano Roosevelt struck down provisions of statutes that granted broad decisionmaking authority to the Executive Branch.[18]

In *Mistretta v. United States*,[19] the Court formally acknowledged that the non-delegation doctrine was not intended to draw a clean line between policymaking and implementation, and explicitly rejected the argument that delegations "may not carry with them the need to exercise judgment on matters of policy."[20] Articulating the so-called "intelligible principle" theory of non-delegation, the Court asserted "[s]o long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'"[21]

The premise that Congress sets policies and agencies iron out the details of such policy directives, which is central to the "technocratic" theory of the administrative state,[22] has had to confront the end of the non-delegation era. Thus, at least in certain instances, bureaucrats set national policy with no direct input from the electorate. Of course, the system is not devoid of checks and balances. The elected branches always possess ultimate

17. *See* PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 66 (rev. 10th ed. 2003) ("Nearly two centuries of nondelegation caselaw reveals a Court that consistently talks a harsh line against the delegation of 'legislative power,' but rarely finds a statutory delegation it can't sustain.").

18. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23, 551 (1935) (finding the Live Poultry Code was an impermissible delegation of legislative powers as it allowed the President to create a law if one had not been approved by Congress); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (asserting that Congress cannot abdicate its legislative power in favor of administrative agencies).

19. 488 U.S. 361 (1989).

20. *Id.* at 378.

21. *Id.* at 372 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

22. *See* Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 566 (1987) (noting that proponents of the New Deal feared that politics would "contaminat[e] the purity of technocratic decisionmaking"); Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 170 (2001) ("During the New Deal, agencies in the U.S. were viewed as neutral technocrats who served the public by deciding technical issues based on special expertise.").

authority over agencies: Congress can delegate authority more narrowly, withhold funding from agencies that pursue disfavored policies, or legislatively override an agency's decision.[23] Similarly, the President can generally remove the head of an executive agency[24] and can exercise centralized control over agency decisionmaking.[25] The federal courts can review agency decisionmaking under the Administrative Procedure Act (APA).[26] Finally, the public itself possesses a number of opportunities for participation in agency decisionmaking processes as guaranteed by the APA and the various transparency laws.[27]

At the same time that agencies have taken a greater role in governmental policymaking, everyday citizens have become substantially more capable of informing the process. With the rise of e-rulemaking and the erosion of barriers to entry in the rulemaking comment process,[28] agencies sometimes receive hundreds of thousands of comments on a given rulemaking. Most of these comments are unsophisticated (and oftentimes duplicative) and add little to the relevant pool of information,[29] but nonetheless demonstrate the strength of public sentiment concerning the subject of the proposed rule. Under the "technocratic" theory, the agency should simply ignore the number of comments received and glean whatever relevant information the comments contain (with the marginal value of a duplicative or unsophisticated comment being zero). Nonetheless, as Professor Nina

23. *See, e.g.*, Congressional Review Act, 5 U.S.C. §§ 801–08 (2006).

24. Paul R. Verkuil et al., *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 78 (2002) ("In the case of executive agencies, whose officers are removable at will, the President can remove an official for failure to follow supervision."). The President's ability to remove the head of an agency is more limited with respect to independent regulatory agencies, whose members Congress often makes removable only "for cause." Humphrey's Executor v. United States, 295 U.S. 602, 631 (1935); *see also* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'").

25. *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (requiring agencies to submit major rules to the OIRA for review).

26. 5 U.S.C. § 702 (2006).

27. *See, e.g.*, Freedom of Information Act 5 U.S.C. § 552 (2006); Government in the Sunshine Act 5 U.S.C. § 552b (2006); Federal Advisory Committee Act 5 U.S.C. app. § 14 (2006).

28. *See, e.g.*, E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (2002).

29. *See* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 959 (2006) ("According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of those comments reportedly had anything original to say.").

Mendelson has argued, the prospect of an agency simply ignoring the preferences expressed in such comments, particularly in those instances in which the agency receives an overwhelming response, is "very hard to square with a vision of rulemaking as a democratic process."[30] Recent efforts to enhance citizen participation in agency decisionmaking reflect an underlying intuition that citizen input can be valuable, but agencies have yet to develop a comprehensive framework for integrating policy-related input into their decisions.

B. Existing Efforts to "Democratize" Agency Decisionmaking

Though calls for enhanced public input into agency decisionmaking pervade legal writings,[31] little beyond negotiated rulemaking has actually been adopted into law as a result of such scholarship.[32] Nonetheless, in recent years, executive branch officials (including the President) have explicitly endorsed enhanced citizen participation, and legal scholars have put forth detailed proposals for accomplishing that goal.

The Executive Branch's endorsement of enhanced public-private collaboration has generally been hortatory rather than directive. For instance, President Barack Obama issued a memorandum to agency heads within his first few days in office calling for "a system of transparency, public participation, and collaboration," without providing much detail on

30. Mendelson, *supra* note 15, at 1359.

31. *See, e.g.*, Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 298–99 (2010) ("Collaborative governance can take many forms, including many experiments in deliberative democracy, collaborative public or network management, and appropriate dispute resolution in the policy process; these processes all share a related role by providing ways for people to exercise voice and to work together in governance."); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 417 (2005) ("[R]egulators could systematically experiment with, and compare, different methods for blending public input with expert opinions about risk and science."); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 6 (1997) ("I argue that the goals of efficacy and legitimacy are better served by a model that views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process . . . . "); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343–44 (2004) ("Government [has] harnesse[d] the power of new technologies, market innovation, and civic engagement to enable different stakeholders to contribute to the project of governance.").

32. *See, e.g.*, Negotiated Rulemaking Act of 1990, Pub. L. No. 101–648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561–70); *see also* Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 50 Fed. Reg. 52,895 (Dec. 27, 1985); Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 47 Fed. Reg. 30,708 (July 15, 1982).

how agencies might go about effectuating that mandate.[33] A subsequent Executive Order built upon those proposals, asserting that "regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."[34] Unfortunately, the Executive Order relies largely upon existing mechanisms for public comments and contains no concrete recommendations for supplementing those existing processes.[35]

Academic proposals for increasing public input into agencies' decisionmaking, though highly detailed, typically do not propose any comprehensive system for enhanced citizen participation or grapple with the legal implications of adopting the programs proposed. For instance, Professor Beth Simone Noveck, who has written extensively on the promises of modern technology for enhancing public participation in government, declares that "advances in communications, information sharing and record keeping mean that participation once thought impracticable on a large scale is now possible."[36] In support of this claim, Noveck offers a number of examples of enhanced public participation facilitated by technology. For example, Professor Noveck describes a software called "Unchat," a program that enables "synchronous small group deliberation" designed "to create deliberation processes."[37] Essentially, "Unchat" enables a virtual "town hall" meeting, permitting a group of participants to convene in an online forum similar to a discussion board.[38] As a legal matter, it is not entirely clear whether "Unchat" could

33. Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009).

34. Exec. Order No. 13,563, § 2, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

35. *Id.*

36. Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 7 (2003).

37. *Id.* at 60.

38. *Id.* at 62–63. Unlike a traditional Internet discussion forum, "Unchat" offers a number of features that allow the board to optimize the discussion based on the goals of the particular meeting. For instance, the user can select whether or not to appoint a moderator for the discussion. *Id.* at 75–76. The software also allows participants to send a selected number of private messages directly to other users rather than posting to the overall forum (termed "whispering") and post a selected number of messages to the forum without the permission of the moderator (termed "shouting"). *Id.* at 81–82. The user can also require participants to take a quiz on preparatory materials prior to entering the discussion. *Id.* at 86. In this sense, the process resembles a physical town hall meeting, wherein participants may be asked to study certain materials prior to attending the forum and, once at the actual meeting, may choose to whisper thoughts to fellow attendees in close proximity or shout certain statements over the objection of the facilitator.

be used by agencies in gathering information relevant to a proposed rule or other agency action.[39]

Other academics have put forth similar proposals. For instance, Professor James Fishkin has conducted a number of experiments involving "citizen juries." Essentially, Professor Fishkin convenes a random group of citizens who have been provided with materials offering background information on a particular issue.[40] After having read the materials, the citizens meet in large groups, in which relevant experts will provide additional background information, and in small jury-like groups, in which the citizens deliberate on the assigned issue.[41] Professor Fishkin measures citizens' preferences over the course of the process, and, in every iteration of the experiment, a significant number of citizens change their earlier positions.[42] Again, it is not entirely clear to what extent an agency could convene a "citizen jury," either in-person or online, and use the results of the deliberations as a data point in subsequent agency actions.[43]

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39. A number of potential constraints on an agency's ability to conduct such an information-gathering exercise exist. First, if the agency is seeking group consensus from a specifically selected set of participants, the forum arguably must comply with the various strictures imposed by the Federal Advisory Committee Act (FACA). *See* Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993). Second, though the principle is quite controversial, if the agency has already initiated a formal rulemaking process, it arguably has an obligation to avoid ex parte contacts with any party without formally integrating those comments into the rulemaking docket. Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977). Section IV.D addresses these and other potential constraints in detail.

40. James S. Fishkin, *The Televised Deliberative Poll: An Experiment in Democracy*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 135 (1996); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFFALO L. REV. 903, 910–11 (2006).

41. *See id.*

42. Fishkin, *supra* note 40, at 137–38; Leib, *supra* note 40, at 910–11.

43. *See supra* note 39. Professor Cynthia Farina and her colleagues at the Cornell eRulemaking Initiative have developed an online application known as "Regulation Room" that works *within* the legal framework of traditional notice-and-comment rulemaking, providing an enhanced opportunity for citizens to submit public comments in connection with rulemakings that may engender strong public interest. Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 397 (2011) ("Regulation Room is purposefully designed to include elements that could make rulemaking more transparent, participatory, and collaborative."). Regulation Room involves a discussion forum that works in tandem with an agency's formal collection of public comments, permitting a more free-flowing discussion of the topics implicated by a proposed rule. *Id.* at 412–13. Regulation Room staff breaks a proposed rule into a series of topics suitable for consideration by general citizens, facilitates discussion by posing relevant questions, and then summarizes the public discussion in a formal comment submitted to the sponsoring agency. *Id.* at 413–14. Unlike Professors Noveck's and Fishkin's proposals, which involve solicitation of public input on underlying policy questions, Regulation Room is designed to "comport with the nature of

The literature reflects an underlying assumption that enhancing citizen participation in administrative decisionmaking (and government decisionmaking more generally) is a positive development and contains a number of promising ideas for achieving expanded public input. As a general matter, this confidence in the value of citizen participation accords with the conclusions of Section I.A of this Article: if agencies are to make substantive policy rather than merely implementing the technical details of federal statutes, then the public should, to the greatest extent possible, enjoy the opportunity to contribute to and even exert some degree of control over such policymaking. Much as elected governmental officials, at least under more "democratic" views of our Constitutional system, are chosen to implement the policy preferences of a public that cannot practicably vote on each contemplated government decision by plebiscite,[44] agency policymakers should make the fullest use of the various advances in public-private collaboration.

On the other hand, it would represent a fairly radical departure from the prevailing paradigms of administrative law to treat agencies as mere conduits for implementation of the policy preferences of the general public.[45] Thus, enhanced public participation is in some tension with the current reality, where public input is limited and focused on obtaining relevant technical information rather than ascertaining public policy preferences. To the extent the literature is motivated by a belief that public input can be relevant to agency policymaking,[46] it raises the question of the precise extent to which public policy preferences should impact agency decisionmaking. The next Section seeks to answer this question, calling upon democratic theory to examine the precise level of public involvement

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rulemaking as a technocratically rational (as opposed to preference aggregation) process," seeking to glean relevant information from public comments rather than conduct a referendum on questions of policy. *Id.* at 410. Nevertheless, the successful use of Regulation Room in connection with two prominent Department of Transportation rulemakings suggests that citizens can provide meaningful input on even relatively complex questions when provided with relevant, comprehensible information and an opportunity to consider a particular issue. *See id.* at 441–43.

44. Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 104 (2003) ("There are practical barriers to plebiscites, such as the natural apathy of class members with small stakes in the litigation and the cost of voting mechanisms as well as voter education.").

45. *See, e.g.*, Farina et al., *supra* note 43, at 430 (criticizing "the assumption that rulemaking is a plebiscite").

46. *See, e.g.*, Bingham, *supra* note 31, at 332 ("Numbers [of comments . . .] can provide useful information; the comments may all be the same, but if they all identify the same strongly held value among thousands of ordinary citizens, this may be important information for an agency to consider.").

that administrative agencies should encourage.

II. PUBLIC PARTICIPATION IN A CONSTITUTIONAL DEMOCRACY

Dean Edward Rubin explains that the term "democracy" derives from ancient Greece.[47] Following the reforms of Solon and Cleisthenes, the Greek city-state that came closest to achieving the democratic ideal was ancient Athens.[48] Given the Greco-Roman vintage of Western culture, modern "democracies" universally consider themselves heirs of the Athenian democratic heritage. Unfortunately, harkening back to this revered culture, though perhaps inspiring, obscures fundamental disparities between true democracies, such as ancient Athens, and modern governments. As Dean Rubin asserts, "the difficulty with the [term democracy's] adoption into the Western political tradition is that it is not very useful—it has no relationship to any government that has ever existed in the post-classical, Western world."[49] Western governments and those inspired by the Western tradition (which include the vast majority of modern governments) are invariably *representative*, integrating some scheme whereby the people select a group to represent their interests rather than voting on all matters directly.[50] Such schemes of representation owe more to medieval corporatism, wherein commoners seeking to form collective entities would select certain members to act on behalf of the group, than to the polis of ancient Athens.[51]

The drafters of the American Constitution were keenly aware of the limitations of classical democracy[52] and sought to implement a government that relied on representation to integrate the will of the people into government decisionmaking. According to Professor Rebecca Brown, the unique genius of the founders lay not in their implementation of a representative scheme of government, which was fairly common in Europe and was central to the British parliamentary system against which the

47. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 715 (2001).

48. LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING AMERICAN DEMOCRACY IN THE INFORMATION AGE 34 (1995). Though Athens undoubtedly implemented the most democratic government of ancient Greece, it is worthwhile to note that the franchise was limited to a small minority of Athenian citizens. *Id.*

49. Rubin, *supra* note 47, at 717.

50. *Id.* at 718.

51. *Id.* at 718–19.

52. *See* THE FEDERALIST NO. 10 (James Madison) ("Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.").

colonists rebelled, but rather in treating the people as a separate entity from the elected government with the power to check the government's actions through exercise of the franchise.[53]

Thus, whereas the British Constitution essentially held that members of Parliament were proxies who acted on behalf of all commoners of the realm, the American founders, recognizing the abuses that could emerge from the fiction that "the government and the people were one," preserved a consistent role for the people to police their representatives' conduct at the ballot box.[54] As Professor Brown avers, "The accountability provisions do not establish a preference-maximizing constitution. They establish a tyranny-minimizing constitution."[55] In this light, the "will of the people" simply comprises an additional check in a Constitution replete with various checks and balances to ensure that no portion of the government comes to monopolize power. Thus, to speak of "democracy" as if it were the chief end of our constitutional system of government ignores the actual intent of the founders: the popular franchise is merely a means of constraining the power of the elected government.

Dean Rubin applies similar insights both to the traditional branches of government and to the administrative state. With respect to the elected branches, regularized elections of representatives solve the practical problems of succession, competence, and nonresponsiveness.[56] As the Chinese philosopher Mencius recognized, aristocratic systems tend to follow a particular lifecycle whereby a new dynasty gives way to corruption and incompetence and is eventually replaced by another dynasty.[57] The history of America's mother country illustrates how quickly this cycle can work its course; English history is abounds with beloved monarchs such as Henry II and Edward III whose progeny proved far less capable.[58] Elections resolve these issues by ensuring that a leader who has become incompetent or unresponsive is relatively quickly succeeded by a more capable successor.[59]

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53. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 558–59 (1998) ("The Constitution's answer, arrived at with much difficulty and contest, was that the people would stand apart from their representatives and would enforce the terms of their delegation of power to the government. The people's power would be given away, but reclaimed in an oversight role on election day.").

54. *Id.* at 564–65.

55. *Id.* at 565.

56. Rubin, *supra* note 47, at 764.

57. REG LITTLE & WARREN REED, THE CONFUCIAN RENAISSANCE 10 (1989).

58. *See* WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES 46–58, 66–74, 88 (Henry Steele Commager ed., 1965).

59. Rubin, *supra* note 47, at 758–60.

The administrative state, by contrast, already handles the issues of succession and competence through the appointment process.[60] With respect to responsiveness, though citizens elect neither the heads of agencies (who are appointed by the President and confirmed by the Senate) nor their staffs (who are hired at the behest of the agency heads), they have a number of opportunities to participate in the various actions undertaken by the agencies.[61] This public interaction is valuable both to the agencies, which benefit from participation by everyday citizens, and to the citizens themselves, who "feel they have had some input into the process."[62] In deciding upon the level of citizen participation that agencies will implement, the focus should not be upon making the administrative state "more democratic," which improperly exalts a style of governance that was viewed by neither the nation's founders nor the creators of the administrative state as an end in and of itself. Instead, the focus should be on "achiev[ing] agreed-upon goals such as security, prosperity, and liberty."[63] That is, to the extent that public input is beneficial in administrative decisionmaking, it should be sought and considered; to the extent such input is not beneficial, administrators should not seek it out of an unnecessary obeisance to the principles of democracy.

Of course, up until the last few decades, the debate about the virtues of public involvement in government decisionmaking was largely academic. As James Madison recognized, "a democracy . . . will be confined to a small spot. A republic may be extended over a large region."[64] For reasons of practicality, any government much larger than ancient Athens could not practically rely on direct citizen participation because it is impossible to convene a large number of citizens to vote on all matters of public importance.[65] Modern technology has called that longstanding assumption into question. It is not difficult to imagine a computerized system whereby citizens could vote in an Internet plebiscite on all major issues. Though implementing such a system to replace or even supplement representative government would contravene the Constitution's careful balance of powers at the national level and likely violate the "republican form of government" clause at the state level,[66] administrative agencies can, and perhaps should,

60. *Id.* at 775.
61. *See id.* at 776–77.
62. *Id.* at 783.
63. *Id.* at 784.
64. THE FEDERALIST NO. 14 (James Madison).
65. *See* GROSSMAN, *supra* note 48, at 36.
66. U.S. CONST. art. IV, § 4, cl. 1. *But see* Leib, *supra* note 40, at 914–15 (proposing a "popular branch of government" consisting of a random sample of eligible voters who would

exploit new technologies to allow relatively direct participation by average citizens. Thus, Dean Rubin's insight that agencies should seek public input only to the extent it is valuable becomes particularly salient. In the next Section, this Article explores the characteristics of effective public participation and examines the contexts in which agencies should seek such input.

III. ENHANCING PUBLIC PARTICIPATION IN THE MODERN ADMINISTRATIVE STATE

The previous Section makes clear that agencies should not pursue opportunities to enhance citizen participation in the administrative process out of a misguided obligation to promote democracy. Nevertheless, if cultivated properly, public participation can both enhance the quality of agency decisionmaking and imbue citizens with a sense of investedness in the workings of the administrative state. But exactly what are the qualities of effective public participation? The next Section explores such properties and the irreconcilable tensions between them; for instance, more widespread participation gives citizens a greater sense of connectedness to the process, but it comes at the cost of rendering agency decisionmaking much less efficient. The Section then explores a number of potential models for procuring citizen input, examining the extent to which each potential model achieves the various desiderata of effective participation. Finally, the Section proposes a new model for citizen participation that, at least in a select set of circumstances, admirably satisfies the various goals of public input.

A. Policies of Effective Public Participation

Ideally, public participation in agency decisionmaking should possess the following characteristics: (1) it should be widespread, including as many citizens as practicable; (2) it should be informed; (3) it should be educational for the participating citizens; (4) it should produce information that is useful to the agency seeking public input; and (5) it should be conducted efficiently. This subsection analyzes these qualities and some of the tensions that arise in any effort to balance them.

(1) *Widespread Participation*: Agencies already solicit public input through the notice-and-comment process of informal rulemaking,[67] but the process is often skewed to favor more organized interests that can marshal the

meet to discuss and decide upon issues and work alongside the elected branches).

67. *See* 5 U.S.C. § 553(c) (2006).

resources to lobby the agencies more effectively.[68] An alternative system of soliciting public input would collect information from a much broader segment of the populace and weigh input from individual citizens equally, in keeping with the principle of "one person, one vote."[69] This more open system is arguably superior for two reasons. First, agencies are more likely to receive accurate information if more perspectives are represented rather than relying on a selective and skewed information set.[70] Second, even though polling[71] a statistically valid cross-section of the overall public should yield a result essentially as accurate as soliciting the views of every citizen individually, promoting widespread participation creates a sense of investedness on the part of public participants and minimizes alienation from the decisionmaking apparatuses of government.[72]

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68. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3, 3 (1971) ("As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 725–26 (1986).

69. Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

70. The principle that truth is more likely to emerge when all sides of a question are represented is fundamental to the Anglo-American system of law. *See, e.g.*, Penson v. Ohio, 488 U.S. 75, 84 (1988) (asserting that the adversarial system of justice is premised on the notion that truth is best discovered when the most powerful arguments on both sides of a question are considered). Furthermore, the principle is not merely a relic of an archaic legal regime. Empirical investigations have shown that aggregating data points from a large number of participants can produce a remarkably accurate result, largely because errors in one direction cancel out those in the other direction. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS xiii–xiv (2005) ("[U]nder the right circumstances, groups are remarkably intelligent, and are often smarter than the smartest people in them. . . . [W]hen our imperfect judgments are aggregated in the right way, our collective intelligence is often excellent.").

71. Whenever an agency disseminates a series of identical inquiries to a group of ten or more persons outside of the federal government, it must comply with the Paperwork Reduction Act (PRA). 44 U.S.C. § 3502(3)(A) (2006). Amongst other things, the PRA requires that agencies evaluate the necessity of proposed information collections, § 3506(c)(2)(B)(i), solicit public comments on information collection instruments, § 3506(c)(2), and obtain approval of each collection instrument from the OIRA prior to utilizing it, § 3504(c)(1). In Section IV.D, this Article will discuss the restraints that the PRA might place upon agencies' interactions with private groups and will explain how agencies might structure such interactions to avoid triggering the statute.

72. *See* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 33, 39–40 (2005) ("[P]ublic participation can be viewed as intrinsically valuable for citizens themselves, for such participation fosters important personal virtues."); *see also* Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 921 (2006) (noting that one of the benefits of e-

(2) *Informed Participation*: Citizen participation is most valuable to agencies if participating citizens comprehend the issues on which they provide input. From the early days of the Republic, many states offered free public education on the theory that an electorate must understand at least the basic tenets of constitutional government to exercise the franchise effectively.[73] In the administrative state, a similar train of thought underlies theories of "deliberative democracy." As Beth Simone Noveck states, "Theorists from Rousseau to Dewey emphasize that consent is not merely the aggregate of personal preferences, but the result of 'reasoned public discussion of political questions.'"[74]

Notwithstanding the universal preference for informed citizens, such theoretical ideals are seldom attained in practice. Even in formal elections, which are sufficiently infrequent that voters should theoretically be able to invest the time to study the candidates' positions prior to casting their ballot, empirical research indicates that voters are often terribly uninformed.[75] When citizens contribute to administrative decisionmaking, where the issues are often more complex than those that drive traditional elections, one can expect many (if not most) participants to base their input on irrelevant considerations. Nevertheless, as the work of Professor Fishkin analyzed in Section I.B demonstrates, citizens who receive information on the topic they are considering and who can discuss their thoughts with others often change their views, suggesting that they are capable of reaching an informed conclusion if given the opportunity to do so.[76]

(3) *Participation as Civic Education*: The process of learning about an issue and providing informed input thereon serves an important educational purpose for the participants. An apt analogy is the Anglo-American system

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rulemaking includes "making participants feel that their views have been heard").

73. *See* HORACE MANN, LECTURES ON EDUCATION 122–23 (1845) ("I venture, my friends, at this time, to solicit your attention, while I attempt to lay before you some of the relations which we bear to the cause of Education, because we are the citizens of a Republic; and thence to deduce some of the reasons, which, under our political institutions, make the proper training of the rising generation the highest earthly duty of the risen.").

74. Noveck, *supra* note 36, at 6; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988) ("Politics has a deliberative or transformative dimension. Its function is to select values, to implement 'preferences about preferences,' or to provide opportunities for preference formation rather than simply to implement existing desires.") (citation omitted).

75. Jodi Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L., 1, 32 ("Voters are often uninformed about the issues. One poll revealed that only 15% of those surveyed felt that they consistently knew enough about ballot measures to make an informed decision.").

76. Fishkin, *supra* note 40, at 137–38; Leib, *supra* note 40, at 910.

of trial by jury, which is justified not only by the superior truth-finding function of juries, but also by the public benefit derived from civic service as a juror.[77] As Alexis de Tocqueville remarked, "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people, which society can employ."[78]

The educational functions of citizen participation are closely tied to the first two policies. First, the right to participate in governmental processes should extend broadly, ideally to all citizens, to promote civic education as widely as possible. Second, institutions seeking citizen participation should strive to ensure that participants are informed on relevant issues to meet the goals of the exercise. Not surprisingly, the policies are in some tension with one another. For instance, a relatively small group of citizens, such as a jury, may be capable of efficiently considering all relevant material and collectively reaching a group consensus, an exercise that is highly educational for the participants. In a relatively large group, however, the likelihood that only a small sub-group will assume responsibility for considering the background information and reaching a result while others "free ride" on their efforts greatly increases. This diminishes the educational value of the exercise for all but the most active participants.

(4) *Usefulness of Participation in Agency Decisionmaking*: Though purely symbolic participation in which citizens suggest a result that the decisionmaking body ignores would inculcate civic virtues in the participants, the process might also lead to frustration.[79] Hence, the results of the participatory processes should ideally be of some use to the governmental entities sponsoring the exercise. Public input is only useful to the technocratic functions of agencies insofar as it produces information to which the agency would not otherwise have access. To the extent that agencies assume the role of policymakers, public input is also important for reasons of institutional legitimacy.

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77. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 232 (Isaac Kramnick ed., 2007) ("The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions."); *see also* Terrence M. Messonnier, *Neo-Federalism, Popular Sovereignty, and the Criminal Law*, 29 AKRON L. REV. 549, 598 (1996) ("Serving on a jury educates its members on civic problems, and exposes citizens to the views of fellow members of the community.").

78. DE TOCQUEVILLE, *supra* note 77, at 233.

79. Indeed, were an agency merely to solicit public input and then promptly ignore it, citizens would eventually become dispirited and cease participating, erasing any educational value that such a Sisyphean task might otherwise create. Benjamin, *supra* note 72, at 921.

Agency decisionmakers can sometimes discern public opinion without actually soliciting public input, but they naturally approach policy matters with a different set of assumptions than do public participants. Though citizen judgments are often subject to cognitive errors,[80] citizens sometimes will reach fully valid decisions that differ from those of bureaucrats simply as a result of differing conceptions of value.[81] In assessing the comparative risks associated with a particular policy decision, bureaucrats tend to rely on sophisticated models that seek to maximize a specific benefit or minimize a specific harm, such as reducing the total number of annual deaths.[82] Citizens, by contrast, often apply a much more complex, less abstracted model.[83] For instance, citizens may show greater concern at the risks of being infected with HIV than with those caused by smoking, though smoking-related illnesses result in far more deaths annually.[84] Thus, seeking direct citizen input can provide the agency with information on public policy preferences that it cannot simply develop based on its own expertise.[85]

The goal of procuring useful information is advanced by promoting certain earlier mentioned policies and hindered by others. For instance, input from informed citizens will be more useful than that from uninformed citizens. By contrast, the policy of widespread participation can lead to irrelevant or even useless results. Specifically, soliciting input from a statistically representative sample of citizens should produce a result as accurate, and therefore useful, as polling the entire populace.[86] Moreover,

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80. The eminent cognitive psychologist Daniel Kahneman has catalogued a significant number of cognitive errors that human subjects frequently commit in assessing specific problems. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

81. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 48 (1995).

82. *Id.* at 49.

83. *Id.* at 48.

84. *See id.* at 50–51 (noting how citizens judge the severity of certain risks on factors other than likelihood of causing death).

85. The State of Oregon recognized this insight in setting up a deliberative process for determining how to distribute Medicaid funds. *Id.* at 92–94. The State arranged for meetings allowing members of the public to deliberate on the issue of how they would rank various health conditions in terms of relative impairment of quality of life. *Id.* at 92–93. Based on the public's input, the state was able to rank certain conditions and treatments so as to allocate limited funds in an optimal way. *Id.* at 93.

86. Of course, were a poll conducted, individuals who are particularly interested in the poll questions are far more likely to participate than are those who are not, leading to a skewed result. The distortion is likely to be somewhat less than in traditional notice-and-comment rulemaking, however, insofar as one must opt out of participation in the poll, whereas filing a comment requires an affirmative act on the part of the commenter. *See, e.g.*,

to the extent that participation is expanded, the participants are likely to be less informed, and the result of the exercise therefore becomes decreasingly useful, except perhaps as a means of gauging likely public reaction to a predetermined policy outcome.[87]

(5) *Efficient Participation*: Agency resources will constrain any effort to procure public input, so the process should be conducted as efficiently as possible. The drive for efficiency could stand in tension with any one of the previously enumerated policies. Despite the many virtues of widespread participation, the cost of participation will expand in proportion to its extent. There is, of course, likely to be a diminishing marginal cost of participation, which may reach zero, to the extent that agencies can exploit technology to disseminate information to an unlimited mass of persons, but activities that require human assistance, such as explaining complex issues, will always increase in cost to the extent participation is expanded.[88] Similarly, though informed citizens will generally reach superior conclusions and will derive personal benefits from the process, the cost of educating the participants and affording them time to deliberate could be substantial. Resource constraints inevitably place a limit on efforts by an agency to achieve a useful result, and the agency may be forced to circumscribe its efforts to ensure that the process is conducted efficiently.

B. Potential Models for Citizen Participation

No system of public participation can simultaneously maximize all of the various social goals addressed in the previous subsection. Thus, a practical system will necessarily sacrifice some goals in favor of others. This subsection will explore several potential methods of citizen participation in agency policymaking and consider the extent to which they accomplish the

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RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 83–87 (2008) (discussing the importance of default rules and how most will follow the "path of least resistance").

87. Modern communications technology can significantly decrease the costs of spreading information, and one can certainly envision a process wherein agencies electronically disseminate information to all potential participants. Indeed, agencies already must include explanatory materials in the statement of basis and purpose of a proposed rule, RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW & PROCESS 326 (3d ed. 1999), and the marginal cost of distributing this information to additional recipients is effectively zero if it is made available electronically. Nevertheless, the marginal cost of *explaining* the information to additional participants is not zero, and it would be far more economical to commission a group of experts to explicate an issue for a small group than for a large group or the entire populace.

88. *See supra* note 87.

various desiderata set forth in the preceding subsection.

(1) *Referendum Model*: The most straightforward means of gathering public input would be to collect all comments that an agency already must gather in connection with notice-and-comment rulemaking procedures,[89] tabulate the number of comments in favor of a particular course of action and those opposed, and then select the option favored by the largest number of commenters. Notwithstanding its simplicity, this mechanism of public participation has been almost universally rejected by courts,[90] administrative law scholars,[91] and by agencies,[92] all of which strongly asseverate that the rulemaking process is not a plebiscite.

Though the referendum model is in tension with the technocratic model and therefore likely strikes many as fundamentally incompatible with the underlying goals of the administrative state,[93] the referendum model fairly effectively achieves several of the underlying aims of effective citizen participation. First, participation is exceedingly widespread insofar as every individual citizen, corporation, non-profit entity, governmental agency, or other group that wishes to submit a comment may do so. Second, the model is also highly efficient and is likely to impose scant costs upon the agency: the APA already requires the solicitation of public comments in most rulemakings, and the expense of calculating the number of comments favoring and opposing a given policy is likely *de minimis*.

Despite its virtues, the referendum model fails to satisfy the remaining goals of effective citizen participation. First, the participation is unlikely to be particularly well-informed. Though a proposed rule must be

89. 5 U.S.C. § 553(c) (2006).

90. *See, e.g.*, U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001) ("The Commission has no obligation to take the approach advocated by the largest number of commenters . . . ."); Natural Res. Def. Council v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) ("The substantial evidence standard has never been taken to mean that an agency rulemaking is a democratic process by which the majority of commenters prevail by sheer weight of numbers.").

91. *See, e.g.*, Farina et al., *supra* note 43, at 430; Stuart W. Shulman, *The Internet Still Might (But Probably Won't) Change Everything*, 1 I/S: J. L. & POL'Y FOR INFO. SOC'Y 111, 138 (2004) ("Administrative law scholars worry about a perceived shift away from agency discretion and expert decisions toward the politics and the psychology of plebiscites. They are not alone. At a recent agency focus group, one participant stressed, 'Rulemaking is not a democracy.'").

92. *See, e.g.*, A GUIDE TO THE RULEMAKING PROCESS, FEDERALREGISTER.GOV, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Aug. 2, 2013) ("The notice-and-comment process . . . is not like a ballot initiative or an up-or-down vote in a legislature. An agency is not permitted to base its final rule on the number of comments in support of the rule over those in opposition to it.").

93. Harter, *supra* note 22, at 566; Peerenboom, *supra* note 22, at 170.

accompanied by an explanation of the need for and purpose of the rule,[94] the written material is often exceedingly verbose and quite abstruse, rendering intelligent participation very unlikely for all but the most erudite citizens.[95] Second, for similar reasons, the exercise is unlikely to be educational for those everyday citizens who do participate: the few intrepid souls who bother to file comments are unlikely to comprehend the subject matter of the proposed rule and will likely gain little to nothing from the experience.

Most importantly, the result produced by tabulating the number of public comments filed for and against a particular policy is unlikely to be particularly useful to the soliciting agency. First, the group of individuals who respond to a request for comments may not represent the populace as a whole, and the response therefore may not reflect the general public will.[96] Second, since the right to submit comments is not limited to individual citizens, difficult questions concerning the proper tabulation of votes would emerge. For instance, in keeping with the principle of "one person, one vote,"[97] should an organization's comment represent the same number of votes that the organization has members? If so, must all members first affirm their assent to the organization's position? In keeping

94. 5 U.S.C. § 553(c) (2006); PIERCE, *supra* note 87, at 326.

95. Coglianese, *supra* note 29, at 958–59 ("The occasional rulemaking does continue to attract a large number of citizen comments, but most of these comments remain quite unsophisticated, if not duplicative. According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of these comments reportedly had anything original to say."). *But see* Cuéllar, *supra* note 31, at 416 ("[T]hough individual members of the public who write comments usually make unsophisticated statements, those messages tend to include, at their core, constructive insights relevant to agencies' legal mandates.").

96. Indeed, there is every reason to expect that the response to a solicitation for comments is very likely to be wildly unrepresentative of overall public opinion. In those instances in which agencies receive thousands of comments in connection with a given rulemaking, most of the comments received are frequently form comments that an organization has urged its members to submit. *See* Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes about E-Rulemaking*, 62 ADMIN. L. REV. 451, 456–57 (2010); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1476 n.311 (2012). Thus, one can easily envision a case where 99% of the comments received are form comments opposing a given policy when a strong majority of the public would favor the policy (or vice versa). Treating comments as a vote would further incentivize interest groups to organize comment writing campaigns so as to skew the process in favor of their preferred policy.

97. Reynolds v. Sims, 377 U.S. 533, 558 (1964) (citing Gray v. Sanders, 372 U.S. 368, 381 (1963)).

with the legal fiction of corporate personhood,[98] should comments by corporations be considered? If so, should the entire corporation be considered one vote or should it receive the same number of votes as it has shareholders? Must the agency implement a system to prevent voter fraud? Third, the entire process would be subject to capture by regulated entities.[99] Even if the agency limited each corporate commenter to a single vote, affected industries could still mount a campaign urging citizens to submit form comments favoring the corporate position. In short, simply tabulating public comments, though seemingly straightforward, is so riddled with potential flaws and so susceptible to abuse that it is unlikely to prove viable in practice.

(2) *Taking Account of Value-Laden Comments*: Professor Nina Mendelson has proposed a refinement to the referendum model that corrects for many of the flaws illustrated above without imposing substantial additional costs on the agency. Unlike the previous model, which treats the comment process as a plebiscite, Professor Mendelson's model relies upon the following criteria to determine if value-laden public comments (i.e., those that express a normative position on the course of action proposed by the agency) should be considered: "(1) comments submitted are particularly numerous, (2) a particular viewpoint represents a strong majority or a supermajority of the comments filed, (3) the comments raise an issue relevant under the agency's statutory authorization, (4) the comments are coherent and persuasive, and (5) the comments point in a different direction from that considered by the agency."[100] Professor Mendelson's model preserves the chief virtues of the referendum model, to wit, it permits universal participation and it relies on the preexisting notice-and-comment process and therefore imposes minimal marginal costs on the agencies.

Though Professor Mendelson's model mitigates the various flaws associated with the referendum model, it does not eliminate them entirely. Her system partly corrects for the risk of a highly skewed set of respondents by requiring that the comments point strongly in a given direction,[101] but an organization that does not represent the public will could still hijack the process by urging its members to flood the agency with form comments.[102]

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98. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819); *see also* Citizens United v. FEC, 130 S. Ct. 876, 900 (2010).

99. Stigler, *supra* note 68, at 3 ("As a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."); Wiley, *supra* note 68, at 725–26.

100. Mendelson, *supra* note 15, at 1375.

101. *Id.*

102. Of course, Professor Mendelson's proposal protects against this problem to a certain degree by placing a preference on persuasive comments, *id.*, and a comment that is

In this light, Professor Mendelson's proposal is likely to be most successful in those scenarios wherein participation by the general public is fairly robust, the cross-section of commenters matches the demographic characteristics of the underlying populace reasonably well, and corporations and other interest groups neither overwhelm general citizen participation nor excessively influence such participation by encouraging the submission of comments expressing a particular viewpoint.

(3) *Information Markets*: A major feature of both the referendum model and Professor Mendelson's variation thereof is the exceedingly low cost of commenting.[103] This has the virtue of promoting widespread participation, but it also can incentivize the submission of unsophisticated comments to the extent that citizens believe they can influence the agency decisionmaking process with minimal expenditure of effort. One potential means of correcting for this problem is to require a pecuniary investment to participate and offer a monetary incentive for submitting information that proves particularly valuable to the agency.

Information markets, wherein participants wager a sum of money on the resolution of an issue and receive a payout if their submission proves particularly accurate, offer one means of ensuring that participants have "skin in the game" and therefore will strive to offer accurate input.[104] Though creating a market for regulatory participation may strike some as an anathema, reducing the noble tradition of the Athenian polis to the vulgar hustle of the Las Vegas casino, information markets actually achieve many of the goals of effective citizen participation. Though participation may not be as widespread as in the referendum model, an agency could encourage broad involvement by setting a low investment cost, and the possibility of a reward for reaching the "correct" conclusion may actually increase overall participation. Participants are also more likely to learn about the issues at hand if they have a monetary stake in the outcome, and their participation is therefore more likely to be informed and to produce positive educational externalities for the participants themselves. Finally, if participation were sufficiently widespread, the process could be conducted

identical to another has little to no marginal persuasive value.

103. In light of technological developments, submitting a public comment has never been simpler or more inexpensive. Pursuant to the E-Government Act of 2002, agencies must allow commenters to offer their views in an online forum. Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (2002). Agencies have satisfied this obligation through the development of regulations.gov, a website that allows users to search for pending requests for comments at all agencies and submit such comments online.

104. Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1023–24 (2005).

at minimal to no cost to the agency: the participation fees could fund the prize offered to the investors who provide the "correct" response.

Notwithstanding their numerous virtues, information markets possess one major drawback that is likely to limit the circumstances in which they can yield a useful result: such markets are only possible for problems yielding an objectively correct answer.[105] Thus, information markets will generally not produce valuable information on the normative issues that are most likely to benefit from citizen input.[106] Nevertheless, some normative problems can be recast in a form that is susceptible to such analysis. For instance, the Environmental Protection Agency (EPA) could accept estimates on the amount of public resources citizens would be willing to allocate to combating the likely effects of climate change, and those individuals who submit values that are closest to the consensus estimate would receive a monetary reward.[107] Though the process may be susceptible to manipulation, including efforts by affected interests to artificially inflate or deflate the market,[108] such interference would prove ineffective in a widely subscribed market,[109] and the agency could implement regulations to combat outright fraud and prohibit participation by individuals with vested interests. In short, the set of circumstances in which agencies might deploy information markets is relatively limited; however, they can provide valuable input in those instances in which the agency can reconceptualize a normative inquiry as a question with an

105. *Id.* at 1045 ("No information market could be helpful in answering normative questions, simply because there is no way to establish whether a particular investor was correct.").

106. Professor Cass Sunstein proposes that information markets may be useful for answering questions of the following type: determining whether a foreign government will fall; assessing the costs and benefits of a proposed environmental regulation; estimating future pollutant concentrations; projecting future budget deficits; and assessing the potential fallout from a natural disaster. *Id.* at 1025–27. Each of these problems admits of an objectively correct solution.

107. Of course, by phrasing the problem in this manner, the agency has fundamentally altered the nature of the inquiry: it is not seeking a personal normative expression of one's willingness to pay to remediate environmental harm, but rather an objective estimate of one's fellow citizens' willingness to pay. Though this largely removes any personal value judgment from the process, it has the virtue of forcing citizens to consider the interests of their compatriots and to produce an estimate that accounts for others' viewpoints.

108. For instance, were the Environmental Protection Agency (EPA) to conduct a market assessing public willingness to pay to combat climate change, affected industries might short sell the relevant futures to produce an artificially low estimate.

109. Specifically, such interference would be unsuccessful insofar as sophisticated investors would recognize the artificial expansion or contraction in the market and would invest in the opposite direction, thereby correcting the imbalance. *Id.* at 1037.

objectively correct answer and in which the equities favor limiting participation to paying investors.

(4) *Jury Model*: Since the reign of King Henry II, England and former realms of the British Empire that have adopted the common law have utilized a system of trial by jury in both criminal and civil cases.[110] Essentially, the common law jury represents a delegation of government decisionmaking power to a selected group of private citizens empowered to serve as the voice of the community. David Arkush has proposed that administrative agencies adopt a variant of the traditional jury system, empanelling boards of over one thousand randomly selected citizens and empowering them to answer policy questions pertaining to administrative decisionmaking.[111] Unlike a criminal or civil jury, the proposed citizen jury would not answer open-ended inquiries, but rather would focus on discrete questions susceptible to simple binary or multiple-choice answers.[112] Like a traditional jury, the citizen jury's determination would be binding upon the agency.[113]

The jury model, like each of the aforementioned models, possesses certain strengths and weaknesses. Arkush advocates providing "resources adequate to the task of making the decision presented," including "money, information, and time."[114] In this light, the participation is likely to be relatively sophisticated, given that the participants will perhaps feel a moral obligation to consider the question presented if provided with compensation and an adequate opportunity to contemplate the key issues. Similarly, the experience of participating in a decisionmaking process related to a significant issue under consideration by an agency would probably prove educational to the participants. Finally, though the cost of convening a jury including a thousand or more participants is likely to be substantial, Arkush estimates that the EPA could deploy a one thousand person citizen jury to consider issues implicated by each of its major rules for an annual cost of approximately $9 million, which is a mere 0.1% of the agency's annual budget.[115]

Arkush's jury model also suffers from a number of drawbacks. First, though the proposed citizen juries would include one thousand or more

110. *The Civil Jury*, 110 HARV. L. REV. 1408, 1415–16 (1997) (discussing the role of both Henry II and the Norman Conquerors in developing the right of trial by jury).

111. David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. (forthcoming 2013) (manuscript at 36–37).

112. *Id.* at 36–37.

113. *Id.* at 36.

114. *Id.* at 37.

115. *Id.* at 43–44.

jurors,[116] the participant pool still represents a very small segment of the broader public. As such, the potential participation is quite limited in comparison to the previously discussed models, wherein any citizen can theoretically participate. Second, Arkush would require that the agency adopt the "verdict" of the citizen jury on those issues that the jury decides.[117] Regulatory problems generally feature both technical questions (e.g., the concentration of a pollutant at which adverse health effects arise) and policy questions (e.g., whether the deleterious effects of the pollutant justify the costs required to abate it), and regulators often conflate both types of issues.[118] Unless regulators are extremely cautious in disambiguating questions of science and policy, parties adversely affected by an agency's decision will likely allege that the agency acted arbitrarily and capriciously in relying on public input on technical issues on which the citizen jury is unqualified to opine.[119] Further, mandated implementation of the citizen jury's "verdict" may place an agency in a politically untenable position; the mere fact that more than 50% of jurors on a citizen jury favored a particular course of action does not mean that the policy selected will prove viable on the broader political stage, wherein competing considerations (e.g., limited budgets, congressional and presidential priorities, division of responsibility with other agencies and with state and local governments) may render the preferred course of conduct infeasible. In short, though delegating decisionmaking power to citizen juries certainly advances democratic principles, it has the effect of straitjacketing the agency policymaking function and potentially tying agencies to policies that will be highly susceptible to challenge in the courts, the political arena, or both.

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116. *Id.* at 33.

117. *Id.* at 36.

118. *See* Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 482 (2012) ("Because the goal of the rational-instrumental paradigm is to make agencies a transmission belt, it is in an administrator's self-interest to claim that 'science made me do it' as legal and political cover for a set of professional judgments."); BIPARTISAN POLICY CENTER, IMPROVING THE USE OF SCIENCE IN REGULATORY POLICY 15 (2009), *available at* http://bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20fnl.pdf (noting the tendency of regulators to conflate scientific and policy issues). Even assuming that regulators always act in good faith and never try to conceal policy decisions as scientific problems, technical and policy issues can be exceedingly difficult to disambiguate. For instance, determining statistical significance or deciding the quantity of evidence required to accept a proposition as "proven" inherently integrates both technical and policy determinations. Carl F. Cranor, *Science Courts, Evidentiary Procedures and Mixed Science-Policy Decisions*, 4 RISK 113, 118–19 (1993).

119. 5 U.S.C. § 706(2)(A) (2006).

C. A New Model for Public Participation: Citizen Advisory Committees

No model of citizen participation in agency decisionmaking is likely to achieve each of the objectives articulated in Subsection III.A, especially as the various goals often pull in conflicting directions (e.g., widespread participation is less likely to be well-informed or to prove especially educational for the participants). Furthermore, the appropriate participation mechanism will often depend on the circumstances surrounding a particular problem. For instance, reviewing value-laden public comments may be the optimal means of public input when the agency cannot devote significant resources to constructing a separate participatory process. In contrast, relying upon the verdict of a citizen jury may be preferable wherein the issue depends heavily on general public buy-in and justifies a large outlay of agency funds.

One potential mechanism for gathering public input that has shown some promise based on a series of experiments conducted by social science researchers is the use of relatively small bodies of citizens that study expert materials and deliberate upon a particular issue of public policy. Professors Richard Pildes and Cass Sunstein describe experiments where agencies or private foundations sought public input from a small group of citizens brought together in a setting amenable to deliberation.[120] In each instance, the group addressed a relatively technical, complex issue.[121] To ensure that the participants understood the matters at hand, the convening authorities also provided some initial instruction and gave participants the opportunity to digest this information prior to deliberating on the issue.[122] Finally, the citizens met in relatively small groups wherein they discussed the relevant questions prior to submitting their input.[123] The experiments yielded a number of promising results. As Pildes and Sunstein observe, "laypeople will substantially change their views on many issues involving science and technology if they are exposed to a complete and balanced discussion—one that both acknowledges relevant uncertainties and presents a framework of options."[124]

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120. Pildes & Sunstein, *supra* note 81, at 89–94.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 90; *see also* CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, & GOVERNMENT, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 92–93 (1993), *available at* http://www.ccstg.org/pdfs/RiskEnvironment0693.pdf (describing a study involving a panel of citizens convened to consider relatively complex scientific issues associated with solid waste disposal and global warming and observing that "the public will substantially change its views on many [science and technology]-rich issues if they are

As discussed in Section I.B, Professor James Fishkin has achieved similar results. In an experiment conducted in the United Kingdom, he assembled a group of citizens deemed to be "representative of the entire country."[125] Fishkin convened the participants in a group setting and allowed them to discuss and debate certain selected issues with fellow participants.[126] He compared the stated views of participants prior to the deliberative session with their ultimate votes following the workshop and found that support for particular stances often increased or decreased by 10% or more following the deliberations.[127] As Fishkin concludes, "their new, considered judgments represented what the public would think if it actually had a better opportunity to think about the issues."[128]

Building upon the success of these experiments, agencies might structure relatively small, deliberative bodies of citizens to serve as advisory committees designed to address policy issues relevant to agency decisionmaking.[129] Such an advisory committee would include a number of citizen representatives that is sufficiently large to ensure a diversity of viewpoints yet small enough to allow relatively extensive interaction amongst the members of the group, such that the group can deliberate on the question at issue.[130] Though the ideal number of participants will vary

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exposed to a full and balanced discussion that acknowledges uncertainty and presents a framework of choices" and that public participants "come to positions that 'strikingly' paralleled those of prominent scientists").

125. Fishkin, *supra* note 40, at 136.

126. *Id.* at 137.

127. *Id.* at 137–38.

128. *Id.* at 137.

129. In some instances, federal agencies have already deployed citizen advisory boards to address discrete issues affecting defined groups of persons. Professor John S. Applegate describes the Department of Energy (DOE) and EPA successful use of a site-specific advisory board to determine how to dispose of nuclear waste in the community of Fernald, Ohio. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 926–31 (1997). The advisory board functioned much as a widely inclusive negotiated rulemaking committee, with its membership drawn from "members of local and national environmental groups, neighbors of the site, township and county government officials, representatives of the major trade union councils at the site, local businesspeople, health professionals, and area educators." *Id.* at 930. Professor Applegate examines the principles that characterize the successful use of such citizen advisory boards and recommends greater use thereof. *Id.* at 932–51. Though this Article proposes an even more ambitious use of advisory committees including representatives drawn from throughout the nation to address far-reaching issues, DOE and EPA's successful use of a site-specific advisory board suggests that small groups of non-experts can engage in relatively sophisticated collaborative decisionmaking on complex, controversial questions.

130. *See* Sunstein, *supra* note 74, at 1548–49 (describing the benefits of group deliberation); *see also* Noveck, *supra* note 36, at 6 ("Deliberation is more than just talk; it

from case to case depending upon the complexity of the issue and the number of perspectives to be represented,[131] the total size of the group likely would not exceed a few dozen participants, as a larger number would likely stifle group interaction.[132] The agency should ensure that the participants represent a cross-section of the United States populace; the membership should reflect, at a minimum, the ethnic, gender, and geographic diversity of the overall population. In addition, the agency should seek diversity of viewpoints as relevant to the subject matter under consideration.[133] For instance, a committee examining a politically sensitive topic should include both Republicans and Democrats. Similarly, a panel dealing with welfare reform should include representatives from diverse socioeconomic backgrounds.

To ensure that the committee includes a sufficiently diverse group of citizens, agencies likely would need either to seek legislation rendering committee service mandatory, as in federal and state juries, or to make committee service sufficiently attractive so that an adequate number of citizens from each relevant demographic group would voluntarily participate, which likely would require drawing from a very large pool and offering some sort of compensation for service. Though agencies would probably use citizen advisory committees only in a very small number of rulemakings that implicate particularly serious issues of policy, the collective

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requires weighing together various approaches to solving problems . . . . Deliberation may also be a means of exercising democratic virtues, articulating policy options, understanding how others view a problem and its potential solutions, and talking through the options to find common ground, even where disagreement is rife.") (internal citations omitted).

131. To the extent possible, recruiting nine or fewer citizen committee members would ensure that the agency does not inadvertently trigger the PRA when posing inquiries to the participants. 44 U.S.C. § 3502(3)(A) (2006). Section IV.D will discuss considerations associated with the PRA in greater detail.

132. By way of comparison, negotiated rulemaking committees, which similarly involve participants who represent diverse interest groups, generally include no more than twenty-five individuals. Negotiated Rulemaking Act of 1990, 5 U.S.C. § 565(b) (2006) ("The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership."); *see also* DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 127 (1995) ("In practice, it appears that the maximum number of parties for which the process can be kept manageable is approximately 25."). Citizen advisory committees, which would likely be subject to similar considerations concerning the optimization of group interaction, also should seldom exceed twenty-five members.

133. *See* Federal Advisory Committee Act, 5 U.S.C. app. §§ 5(b)(2), 5(c) (2006) (requiring that members of federal advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed"); 41 C.F.R. § 102-3.60(b)(3) (2012) (same).

burden of mandated service would potentially be quite heavy, given the tremendous number of problems addressed by federal agencies, thereby rendering the first alternative politically unpopular and likely unviable.

Accordingly, agencies would likely solicit committee members by randomly selecting candidates from amongst all individuals with certain demographic characteristics, offering an invitation and a promised monetary stipend (with a value based upon the projected time commitment of committee service) to selected candidates, and then screening volunteers to ensure that the ultimate group reflects a demographic cross-section of the overall populace and that the participants can objectively assess the problem at hand (much as attorneys conduct voir dire to winnow down a pool of prospective jurors).

By structuring committees in this manner, agencies arguably would face a considerable risk of obtaining a skewed panel containing disproportionately large numbers of individuals with passionate views on the issue in question and of relatively impecunious citizens or those with leisure time for whom committee service reflects a less severe imposition.[134] Of course, the same problem arises in the use of traditional civil and criminal juries: relatively humble citizens for whom the modest compensation afforded to jurors more closely approximates their regular income and persons who feel strongly about the issues at hand are less likely to circumvent jury service (e.g., in a capital murder trial, victims' rights advocates and ardent opponents of the death penalty may be much more willing to serve than an average citizen).[135] Thus, agencies must maintain a high degree of vigilance in interviewing prospective committee members to ensure that they are willing to impassively and objectively assess the issues

134. Though the risk of obtaining a skewed pool of volunteers looms quite large in theory, Professor Fishkin's work suggests it may not prove particularly problematic in practice. Professor Fishkin randomly selected 869 potential volunteers for participation in a deliberative poll, and the 300 who agreed to participate were statistically indistinguishable from the larger pool in terms of "age, class, geographical representation, gender, education, and every other important dimension." Fishkin, *supra* note 40, at 136. Further, the class of volunteers did not contain disproportionately large numbers of politically active individuals: "We assessed this both with specific knowledge questions and newspaper readership. In both cases, it was obvious that we got an excellent microcosm . . . ." *Id.* In any event, though the risk of obtaining a skewed sample set may not pose a significant risk in all cases, agencies should nevertheless police against it by ensuring that the participants are willing to objectively consider the issue at hand.

135. Archon Fung, *A Tea Party for Obama: The Power of Mobilized Independent Citizens Is Easily Forgotten and Often Denied by the Washington Cognoscenti*, AMERICAN PROSPECT, (Mar. 27, 2010), http://prospect.org/article/tea-party-obama-0 ("Imagine . . . if criminal juries were made up only of people who actively wanted to participate: Many juries would be composed of the families of victims and defendants, and justice would suffer.").

at hand, disqualifying individuals who express an unwillingness to consider differing perspectives if necessary.

Of course, the group empowered to select the criteria upon which committee members are to be selected would possess significant power to affect the result. Were the agency itself to define these criteria and select the committee members who satisfy them, it may favor groups or individuals likely to rubber-stamp its preferred outcome. This could be remedied in one or both of the following ways. First, agencies might issue guidance that pre-defines the qualifications for panel members or even create an independent body empowered to define the dimensions on which committees must be balanced and select members who meet those criteria. Second, to the extent an agency relies upon the conclusions of a citizen advisory committee to support a policy it adopts, a court reviewing that rule could examine the balance of members to ensure that the panel was impartial.[136]

Once formed, the committee would operate in a manner similar to the groups described by Professors Pildes, Sunstein, and Fishkin. Committee members would receive background materials that provide analysis of the issues at hand, and they would study such materials prior to participating in any formal meeting.[137] The participants would then have the opportunity to debate the relevant issues over a period of time, which could be as long as several weeks or months.[138] At the conclusion of these discussions, the participants would ideally have reached consensus, but if they do not agree upon a particular recommendation, they could then hold a vote, with the majority position constituting the group recommendation. The agency then would consider this recommendation in deciding upon the policies it would pursue in subsequent rulemaking or other policy-setting activities. Though it would not be bound to follow the advisory committee's recommendation, the agency would be wise to carefully consider it, especially if the recommendation evidences a strong public preference for a particular policy course.

Prior to the "digital revolution," convening citizen advisory committees to consider various issues before an agency may have proven prohibitively expensive in all but the rarest instances. In particular, the need for geographic diversity on the committee would have posed significant logistical and monetary issues, insofar as the agency would be required to

136. *See, e.g.*, Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1232–33 (10th Cir. 2004); Cargill, Inc. v. United States, 173 F.3d 323, 334 (5th Cir. 1999).

137. Fishkin, *supra* note 40, at 135; Leib, *supra* note 40, at 910; Pildes & Sunstein, *supra* note 81, at 90–91.

138. Leib, *supra* note 40, at 910; Pildes & Sunstein, *supra* note 81, at 90–91.

defray all of the expenditures associated with convening a group in a single location. Fortunately, technological advances have obviated the need to assemble all participants in a single geographic locale. Using teleconferencing technology, an agency could host a "virtual" meeting whereby all committee members participate remotely via web video. An even more economical solution would be for the agency to arrange a meeting on an online discussion board.[139]

Though the use of citizen advisory committees will not necessarily be optimal in all instances and need not serve as the exclusive mechanism of procuring public input, such advisory committees satisfy many of the desiderata for effective citizen participation. First, as in the experiments described by Professors Pildes, Sunstein, and Fishkin, the committee members would receive expert instruction on the issues relevant to the policy question under consideration,[140] ensuring that the participants should be relatively well-informed. Second, the process of considering the expert-furnished materials and deliberating with a diverse group of fellow citizens should ensure that the process is educational for the participants. Third, the result is likely to prove exceedingly useful to the agency, for the views expressed by a group of citizens with demographic characteristics similar to the overall populace should hew fairly closely to the preferences of the general public. Indeed, the result is likely to be far superior to treating the process as a referendum, wherein the result is often skewed by low participation[141] and misleading advertising directed towards

139. In a recent recommendation relating to FACA, ACUS has specifically asserted the legality of agencies' hosting advisory committee meetings via online discussion boards and urged them to do so in appropriate circumstances. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 6, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012). Under ACUS's proposal, an agency could implement a moderated web forum that would allow advisory committee members to post their thoughts on a dedicated website over the course of days, weeks, or months. REEVE T. BULL, ONGOING WEB FORUM MEETINGS OF FEDERAL ADVISORY COMMITTEES: A PROPOSED USE OF "NEW MEDIA" UNDER THE FEDERAL ADVISORY COMMITTEE ACT 1–7 (Mar. 17, 2011), *available at* http://www.acus.gov/wp-content/uploads/downloads/2011/03/FACA-Web-Forum-Memo-3-17-2011-_2_.pdf. Such a web forum would meet all of the requirements of FACA, see generally *id.*, and it would arguably be more transparent than traditional committee meetings insofar as perusing the committee's discussions on a nationally accessible website is much simpler than attending an in-person meeting held at a set time at a specific locale.

140. Fishkin, *supra* note 40, at 135; Leib, *supra* note 40, at 910–11; Pildes & Sunstein, *supra* note 81, at 90.

141. Ronald M. Pierce, *Valuing the Environment: NOAA's New Regulations Under the Oil Pollution Act of 1990*, 22 PEPP. L. REV. 167, 185 n.135 (1994) ("An actual referendum may be skewed by low voter turnout or failure of some groups to vote at all."); Michael Vitiello &

participants,[142] or simply conducting an opinion poll, wherein the participants have likely not studied the issues presented in any detail. At the same time, the agency would not be bound to follow the recommendations of the advisory committee and could balance the importance of implementing the policy preferences of the public against competing legal and political considerations. Fourth, the proposal is likely to be fairly cost effective as the committees would be relatively small,[143] though it is likely to cost the agency somewhat more than proposals such as Professor Mendelson's, which utilize existing public comments.[144]

With respect to widespread participation, by contrast, the citizen advisory committee proposal is less effective than the referendum model, Professor Mendelson's recommendation, or even information markets insofar as it forecloses participation by all but a small subset of citizens. Of course, as will be explained in more detail in the following Section, the FACA requires that advisory committees permit members of the general public to submit written comments, offer oral statements before the committee, or both.[145] Thus, citizens who are not selected to serve on an advisory committee can still influence the process by presenting information relevant to the committee's deliberations. Nevertheless, disaffected citizens would still potentially assail the committee's conclusions as illegitimate, contending that the participants selected were not truly representative of the overall populace or that they received biased information during their deliberations.[146]

Andrew J. Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275, 1289 (1998) (describing how the initiative process is an imperfect application of direct democracy insofar as "low voter turnout skews results").

142. *See, e.g.*, GROSSMAN, *supra* note 48, at 14 ("What chance do ordinary citizens have to come to sound public judgments on health care reform, for example . . . given the unlimited sums of money available for lobbying and political campaigns by those with large-scale financial professional interests . . . ?"); Kevin O'Leary, *The Voice of the Crowd—Colorado's Initiative: The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1492 (2007) ("The evidence is in: mass direct democracy is anemic. Voters are uninformed, manipulated by slanted television ads, and rarely determine the agenda on which they vote.").

143. *Cf.* Arkush, *supra* note 111, at 36–37 (proposing citizen juries that would consist of 1000 or more participants).

144. *See* Mendelson, *supra* note 15, at 1375.

145. 5 U.S.C. app. § 10(a)(3) (2006); 41 C.F.R. §§ 102-3.140(c)–(d) (2012).

146. By way of comparison, the mere fact that criminal defendants are tried before a "jury of their peers" hardly settles the issue of their guilt or innocence in the court of popular opinion, as high profile defendants such as O.J. Simpson and Casey Anthony could undoubtedly attest. *See* Paul Duggan, *Casey Anthony and the Court of Public Opinion*, WASH. POST, July 5, 2011, http://www.washingtonpost.com/local/casey-anthony-and-the-court-

In this light, the citizen advisory committee model is not intended as a panacea or as the sole mechanism of procuring public input. In some instances, one of the alternative models described in Section III.B may prove preferable or a beneficial supplement to the use of such a committee. Nevertheless, in many instances, citizen advisory committees will provide the optimal means of integrating public input into agency decisionmaking. In particular, agencies should closely consider the use of such committees in those cases wherein: (1) an issue is sufficiently important to justify the investment of resources and time in constructing an advisory committee; (2) popular opinion expressed in public comments is likely to differ from the well-considered views of a deliberating body of citizens; and (3) the problem involves competing political considerations such that delegating the decisionmaking function to a citizen jury is inappropriate.

Notwithstanding these significant advantages, the citizen advisory committee model is susceptible to certain criticisms, particularly as it relies upon group deliberation. The next Section explicates and responds to some of the more salient criticisms. It also examines the legality of the use of citizen advisory committees and recommends minor revisions to existing law to facilitate their use.

IV. POTENTIAL OBJECTIONS AND RESPONSES

A. Deficiencies of the "Deliberative Model"

An unstated assumption of the preceding Section is the belief that a deliberating group of citizens can reach a result superior to that attainable by merely aggregating the preferences of a representative sample of citizens expressing their views individually.[147] Though the American system of government reflects a fundamental faith in the power of deliberative bodies

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of-public-opinion/2011/07/05/gHQAUAbkzH_story.html ("In magazine racks this week, the cover of People features a photo of [Casey] Anthony, and wonders: 'Getting Away With Murder?' A lot of people think so, shouting angrily in front of the courthouse and banging out righteous condemnations on the Web."); Susan Donaldson James, *Court of Public Opinion Harsh on Simpson*, ABC NEWS (Sept. 17, 2007), http://abcnews.go.com/TheLaw/OJSimpson/story?id=3614685&page=1 ("Scour the Internet blogs and it's hard to find an O.J. Simpson supporter these days.").

147. *See, e.g.*, David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1144 n.107 (2012); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1691 (1984); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 4–5 (2009); Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 171–72 (2012).

of everyday citizens,[148] numerous scholars have conducted empirical research on the dynamics of group interaction and concluded that deliberating bodies often fail to achieve their full potential. Furthermore, group interactions can diminish the decisionmaking capabilities of a group (such that a deliberative group reaches a result that is objectively worse than the result the same set of persons acting individually would reach).

Under idealized conditions, a group should be capable of reaching a result superior to that which an atomized body of decisionmakers would achieve. To provide a simplified, abstract example, the correct answer to a problem may require the aggregation of data points A, B, and C. Though any individual is unlikely to possess each of these data points, a group of citizens who are permitted to exchange information may include several members with data point A, several with B, and several more with C, and interchange during group deliberations will lead to the combination of the relevant inputs and the production of a correct result.[149] Alternatively, even in situations in which the correct result does not require the aggregation of individual data points, group interaction may still be beneficial if it disseminates correct information amongst the deliberating members. For instance, imagine that reaching a correct outcome requires access to data point A, but 80% of the populace lacks access to that information. In a deliberating group, the 20% of members with access to A will ideally convince a large proportion of the remaining 80% of members of the correct result, and a majority of group members may ultimately reach the correct conclusion (whereas a random poll of the populace would almost certainly produce an incorrect result).[150] Though such a group will not reach a result superior to what the enlightened 20% of the public would achieve acting alone, it will serve to educate group members who do not initially possess the relevant data.

Of course, this model is vastly oversimplified, and the mere fact that group deliberation may possess certain virtues in theory does not establish

148. *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

149. *See* Sunstein, *supra* note 104, at 980 ("Deliberation could aggregate existing information in a way that leads the group as a whole to know more than any individual member does.").

150. *See id.* at 979–80 ("Groups might operate in such a way as to equal the performance of their best members. One or more group members will often know the right answer, and the other group members might well become convinced of this fact.").

that those virtues will eventuate in practice. Relaxing the simplifying assumptions, the aforementioned examples all presume that an objectively correct answer exists. Most problems of public policy are not susceptible to resolution by the application of an objective methodology. Furthermore, even assuming that a "right" answer exists, deliberating groups frequently fail to reach it, according to recent empirical research related to the dynamics of group interactions. Professors Mathew D. McCubbins and Daniel B. Rodriguez conducted a series of experiments wherein they posed math problems to various groups of test subjects, offering a reward ($1) for a correct answer and a bonus ($10) if all members of a group reached the correct answer.[151] They constructed the following groups: (1) a control group, wherein subjects must solve the problems individually; (2) a group wherein subjects can freely exchange information and collectively solve the problems; (3) a group wherein subjects must pay a fee ($2) to impart information but can receive information without charge; (4) a group wherein subjects must pay a fee ($2) to receive information but can impart it gratis; and (5) a group wherein subject must pay a fee ($2) to impart or receive information.[152] Ultimately, they found that the ability to exchange information freely improved aggregate results vis-à-vis the control group, but groups in which participants were required to pay to receive information performed worse than the control group, and the group required to pay to send or receive information performed substantially worse.[153] Professors McCubbins and Rodriguez concluded that the final group, group five, most closely models real-life deliberation, since sending or accepting information generally entails certain costs (e.g., expenditure of time, risking adverse social consequences if the information imparted is incorrect), and that deliberation is therefore unlikely to improve group decisionmaking.[154]

The mathematical precision of McCubbins and Rodriguez's model perhaps detracts from its applicability to real world deliberative scenarios. For instance, though communication indubitably entails certain costs, one

151. *See generally* Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9 (2006).

152. *Id.* at 24–25.

153. *Id.* at 32.

154. *Id.* at 31 ("Given that [the final] experimental condition is most similar to real world deliberative settings, this result suggests that scholars' assumption that deliberation will improve social welfare is unfounded."). Though McCubbins and Rodriguez acknowledge that real-life problems will not always admit of objectively correct solutions, they suggest that deliberation will prove even less valuable in subjective problems insofar as "it is quite possible (in fact, likely) that no one in the deliberative group will have knowledge about the particular problem or issue at hand." *Id.* at 35.

could question whether the expense of group communication generally represents 20% of the potential payoff the group might achieve by reaching a correct result. Nevertheless, other scholars have catalogued a series of flaws associated with deliberation that do not depend upon assigning an arbitrary cost to group exchanges. Professor Cass Sunstein has persuasively argued that groups that include relatively homogenous members tend to polarize, adopting group positions that are more extreme than the aggregated individual positions of the members.[155] This occurs, in part, because individuals who are already predisposed towards a particular position will likely become even stauncher advocates of that viewpoint when confronted with more radical partisans (so as to maintain a positive reputation in the group).[156] In addition, the limited pool of arguments available in a group predisposed toward a particular viewpoint may lead participants to conclude (falsely) that no compelling arguments on the other side exist.[157] Hence, assuming that polarization is an undesirable outcome, group interaction may lead to results that are objectively worse than those obtained in the absence of deliberation.

Furthermore, even in relatively heterogeneous groups wherein polarization is less of a concern,[158] deliberative bodies may suffer from various inherent flaws. First, "information cascades" may occur even if the group does not suffer from a limited argument pool. For instance, if A believes position X and reveals this fact, B may be more likely to support position X as well if she does not strongly oppose it; C, in turn, may not wish to contradict A and B, even if he was initially somewhat disinclined to support position X, and so on.[159] Second, individuals with relatively low social status (e.g., impoverished individuals, members of disadvantaged minority groups) may be reluctant to contribute to the discussion even if they possess information that would be valuable to the deliberative process.[160] Third, certain cognitive errors may be amplified in the group setting. For instance, empirical research has shown that groups are more susceptible than individual decisionmakers to "framing effects," wherein subtle alterations to the phraseology of a question can lead to large,

155. *See generally* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

156. *Id.* at 75, 83–84.

157. *Id.* at 75, 82–83.

158. *Id.* at 105 ("In terms of institutional design, the most natural response is to ensure that members of deliberating groups, whether small or large, will not isolate themselves from competing views . . . .").

159. *Id.* at 82–83; Sunstein, *supra* note 104, at 999–1002.

160. Sunstein, *supra* note 155, at 111–12.

irrational changes in the response.[161] Hence, deliberation may actually diminish the decisionmaking capacities of a group of citizens, and the proposed citizen advisory committees may prove inferior to a simpler process wherein citizens simply express their views individually.

Fortunately, the various limitations associated with deliberation are generally not insurmountable, and one can lessen many of the potential flaws by carefully designing a deliberative body. With respect to the problem of polarization, ensuring that the deliberative body reflects a statistically valid sample of the American electorate should act as a prophylactic against the "echo chamber" effect of deliberations amongst groups of like-minded individuals.[162] Of course, promoting group heterogeneity can create certain unintended consequences, as relatively low-status group members are often reticent in a diverse assemblage in which their views constitute a minority position, but are more likely to speak out in a more homogenous group in which their views are more strongly represented.[163] Though some degree of self-silencing is probably inevitable, a citizen advisory committee could correct for this problem by holding deliberations amongst the larger group, but allowing small groups of like-minded persons to conduct "breakout sessions" wherein they meet privately to develop their positions. Then, a representative of each sub-group could present these arguments to the broader group in its deliberations.

The other problems associated with group deliberation, which tend to involve suppression of viable arguments and the susceptibility of group members to cognitive errors, could also be mitigated (though likely not completely eliminated) by careful structuring of the deliberative group. One valuable innovation is the use of a moderator, who can elicit participation from all group members, ensure that the debate retains a civil tone (and thereby hopefully diminish the self-silencing phenomenon), and encourage participants to take account of all relevant information.[164] In

161. Sunstein, *supra* note 104, at 991–92. For instance, a group of prospective patients is more likely to opt to undergo an optional procedure if told that "90% of patients who received this treatment are alive after 10 years" than if told that "10% of patients who received this treatment are dead after 10 years," notwithstanding the fact that the two statements are identical. THALER & SUNSTEIN, *supra* note 86, at 36; *see also* KAHNEMAN, *supra* note 80, at 367.

162. Sunstein, *supra* note 155, at 105.

163. *Id.* ("A certain measure of isolation will, in some cases, be crucial to the development of ideas and approaches that would not otherwise emerge and that deserve a social hearing. Members of low-status groups are often quiet within heterogeneous bodies, and deliberation in such bodies tends to be dominated by high-status members.").

164. *Id.* at 117.

addition, the group should receive instruction by experts on both sides of a competing issue, which would ensure that deliberating members have access to relevant information and diminish the effect of cognitive errors that might otherwise taint group decisionmaking.[165] Groups are also less likely to suppress unconventional arguments if the group is encouraged to engage in "critical thinking" and if the moderator fosters an environment in which novel ideas are promoted.[166] Relatively high profile group members can also be recruited to act as "devil's advocates," given that other group members are more likely to consider contrarian arguments carefully if raised by high-ranking group members.[167] Finally, group members are less likely to be swayed by "reputational cascades," in which they are reluctant to reach a conclusion that differs from the group consensus,[168] if they are permitted to cast their ballots privately.[169]

This is not to suggest, of course, that a properly structured deliberative body will always reach optimal results. Nor does it suggest that flaws such as group polarization or cognitive errors can be completely eradicated. The various palliative mechanisms should, however, be sufficient to correct some of the more egregious limitations of deliberative decisionmaking, and one can reasonably expect that, in a number of cases, the use of deliberating groups will be superior to alternative means of gathering public input. Thus, though a citizen advisory committee may not always be the optimal mechanism, especially in those instances in which group polarization is particularly probable,[170] it is likely to prove beneficial in a

165. Michael Binder et al., *Shortcuts to Deliberation? How Cues Reshape the Role of Information in Direct Democracy Voting*, 48 CAL. W. L. REV. 97, 115–17 (2011); McCubbins & Rodriguez, *supra* note 151, at 35–39; Sunstein, *supra* note 104, at 1019–20.

166. Sunstein, *supra* note 104, at 1013–14.

167. *Id.* at 1015–17.

168. Sunstein, *supra* note 155, at 83–84 ("There can be reputational pressures and reputational cascades as well, in which people speak out, or remain silent, or even engage in certain expressive activity, partly in order to preserve their reputations, at the price of failing to say what they really think."); Sunstein, *supra* note 104, at 985–86.

169. Sunstein, *supra* note 104, at 1018–19.

170. Polarization is especially likely in those instances in which individuals have strongly-held, preconceived beliefs related to a particular issue. Social science researchers have discovered that, though deliberating citizens will frequently change their views if they receive relevant information bearing upon a question of public policy, individuals with strong partisan affiliations are much more likely to parrot their party's views on that issue even in the face of evidence that would undermine that position. Binder et al., *supra* note 165, at 117. Hence, a deliberative vote on a relatively non-partisan issue, such as the optimal level of patent protection to afford to innovators, is likely to prove far more successful than a vote on a more politically charged issue, such as whether religiously-affiliated institutions should be required to provide birth control to female employees.

sufficiently large number of instances that agencies should strongly consider the use of such committees when attempting to gather information on public policy preferences.

B. Excessive Cost

Even if one accepts the premise that, at least in a number of cases, the use of deliberative citizen advisory committees is superior to existing participation mechanisms, the cost of utilizing such committees is almost certainly greater than that of the simpler participatory vehicles. Though the cost of conducting citizen deliberation is likely to be significantly reduced through the use of a "virtual meeting" forum,[171] the agency would still face considerable expenses associated with identifying a statistically valid set of potential participants, recruiting experts to brief the committee members and moderators to conduct the deliberations, and providing a stipend to all members so as to encourage participation. This cost, of course, likely pales in comparison to the overall budget of the agency. Arkush has used fairly liberal assumptions to calculate that the EPA's presentation of all its major rules[172] to citizen panels including one thousand individuals would cost roughly $9 million per year, which represents approximately 0.1% of EPA's annual budget.[173] Though certain aspects of the present proposal would cost more than Arkush's system, such as the upfront investment required to develop a software suite allowing effective deliberation, the overall expense would likely be significantly less insofar as the number of committee members contemplated on each panel is much smaller. Assuming that the typical citizen advisory committee would contain around twenty members, the overall annual cost for even a large agency with significant rulemaking activity is likely to be well below $ 1 million.[174]

Of course, in a constrained budget environment in which agencies are

171. *See supra* Section III.B.

172. As a general matter, "major rules" are those that meet the definition of "significant regulatory action" in Executive Order 12,866. Exec. Order No. 12,866, § 3(f), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993). That order defines significant regulatory actions as those that have an annual impact of $100 million or more, interfere with actions planned by other agencies, materially affect certain financial programs, or raise novel legal or policy issues. *Id.*

173. Arkush, *supra* note 111, at 43–44.

174. Specifically, if the typical citizen advisory committee consists of twenty members, then it is 1/50 the size of the jury contemplated by Arkush. Assuming all other factors are equal, the annual cost of the present proposal would be $180,000. Admittedly, certain aspects are likely to cost more than Arkush's system, as acknowledged above, but the overall cost should likely be well short of one million dollars.

relentlessly seeking cost *savings*, an *additional annual expense* of even a few hundred thousand dollars may prove excessive. Nevertheless, though the citizen advisory committee proposal is likely to represent an immediate short-term expense to agencies, it offers numerous countervailing benefits that may justify the initial expenditure. First, the agency may acquire enhanced legitimacy in the eyes of the general public as a result of its outreach efforts, though the benefits of such goodwill are difficult to quantify. Second, the agency may enjoy long-term cost savings as a result of its public consultation efforts if the enhanced legitimacy it develops leads to a decrease in challenges to agency decisions. Though it is likely Pollyannaish to conclude that parties adversely affected by an agency's decision will voluntarily forgo the opportunity to sue in appreciation of the agency's outreach efforts, the added legitimacy that public consultation can lend to a decision may diminish the prospects of successful challenges to agency actions (thereby weakening the incentive to file suit, increasing the likelihood that meritless suits will be dismissed early in the litigation process, or both). As will be discussed in the next subsection, providing "credit" for an agency's public consultation efforts on judicial review should enhance the incentives for engaging in such outreach.

C. Disincentives to Public Participation

Unlike Mr. Arkush's model for citizen juries[175] (but like Professor Mendelson's proposal),[176] the decisions of a citizen advisory committee would not be binding upon the agency.[177] This eliminates the various legal and political issues associated with fully delegating decisionmaking authority to a private body of citizens,[178] but it also raises the specter that citizens will deem their participation futile insofar as the agency is under no obligation to adopt their recommendations. Were citizens to perceive their involvement to be completely superfluous, they may lack any incentive to invest the time required to carefully consider the issues and render an informed decision.[179] In this light, it is important that the agency carefully

175. Arkush, *supra* note 111, at 36 ("This system is *direct* because it involves citizens deciding policy matters themselves with binding authority.").

176. Mendelson, *supra* note 15, at 1378–79.

177. *See, e.g.*, Pub. Citizen v. DOJ, 491 U.S. 440, 446 (1989) (stating that the work of advisory committees should be advisory and not binding); Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1225 (10th Cir. 2004) (stating that the advice of a resource advisory council was not binding); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 736 F. Supp. 2d 24, 28 (D.D.C. 2010) (stating that advisory committee work should be only advisory).

178. *See supra* Section III.B.

179. Benjamin, *supra* note 72, at 921.

consider the recommendations of the citizen advisory committee and adopt them whenever feasible.

At the same time, agencies may lack any incentive to procure public input and accord it the consideration required to ensure vigorous citizen participation. No statute explicitly directs agencies to integrate public opinion into its decisionmaking process.[180] An agency assessing whether to use a citizen advisory committee would face a stark calculus: the immediate benefits of seeking such input are quite abstract, given that the law does not affirmatively require solicitation of public views,[181] whereas the potential costs loom large, since a litigant may challenge an agency's reliance on public opinion or its failure to pursue the policy course favored by a citizen advisory committee as "arbitrary and capricious."[182]

The case law addressing agencies' reliance upon policy-laden public comments or upon policy-oriented public input solicited outside of the notice-and-comment process is sparse, though a few cases have held that an agency need not adopt the position favored by the majority of commenters.[183] As a theoretical matter, one could envision a number of approaches to judicial review of agency decisions that rely partially or fully upon public input: (1) at one extreme, a court could hold that reliance upon the input of a citizen advisory committee is per se arbitrary and capricious; (2) at the other extreme, a court could uphold all agency decisions that accord with the policy preference expressed by a citizen advisory committee as valid; (3) a court could consider the input of a citizen advisory committee irrelevant and require other factors to justify any agency decision; or (4) a court could consider the policy preferences expressed by a citizen advisory committee as probative (but generally non-dispositive) evidence in support of a particular policy (and potentially consider a citizen advisory committee's opposition to an agency's ultimate decision as evidence weighing against the propriety of the course taken).

The first three alternatives can be summarily dismissed. Penalizing an agency's consideration of the public's views on judicial review would be in tension with presidential directives that encourage agencies to solicit and

180. *Id.* at 907.

181. Of course, the agency may encounter soft norms in favor of seeking citizen input. For instance, the Obama Administration has encouraged agencies to promote public participation to the greatest extent practicable. Exec. Order No. 13,563, § 2, 76 Fed. Reg. 3821, 3821–22 (Jan. 21, 2011); Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (memorandum dated Jan. 21, 2009).

182. 5 U.S.C. § 706(2)(A) (2006).

183. *See, e.g.*, U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001); Natural Res. Def. Council v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987).

consider public input.[184] Rubber-stamping agency decisions that accord with a citizen advisory committee's conclusions, by contrast, would improperly treat administrative agencies, originally conceived as a technocratic arm of the government, as little more than polling organizations acting as conduits for enacting popular will into law,[185] and it would be in tension with those cases that have held that rulemaking is not a plebiscite.[186] Merely ignoring a citizen advisory committee's conclusions on judicial review would improperly suggest that public input is necessarily irrelevant to an agency's work, an assumption that reflects the discredited notion that agencies merely "fill in the details" of policy pronouncements issued by Congress,[187] and would eliminate any incentive for agencies to utilize citizen advisory committees or otherwise solicit public input beyond that required under the APA.

Thus, a reviewing court must provide an agency "credit" for having invested the resources in convening a citizen advisory committee and considering its conclusions, but it must neither penalize the agency for having sought public input nor hold the agency too closely to the committee's conclusions, lest any incentive for utilizing such committees disappear. Accordingly, if an agency solicits the input of a citizen advisory committee on a particular question of policy and integrates the committee's conclusion into the evidence supporting its ultimate rule, a reviewing court should consider the committee's decision as evidence supporting the proposed rule so long as it is material to the policy question posed (i.e., the committee's conclusion concerns a matter of policy rather than a technical

184. Exec. Order No. 13563, § 2(a), 76 Fed. Reg. 3821, 3821–22 (Jan. 21, 2011) ("Regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."); Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (memorandum dated Jan. 21, 2009) ("Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.").

185. *See, e.g.*, Coglianese, *supra* note 72, at 56 ("Efforts to increase citizen participation through e-rulemaking will need to tread carefully so that those judgments that regulatory agencies are charged with making on the basis of scientific or technical expertise do not become displaced by decision-making by plebiscite.").

186. *See Natural Res. Def. Council*, 822 F.2d at 122 n.17 ("The number and length of comments, without more, is not germane to a court's substantial-evidence inquiry.").

187. Mistretta v. United States, 488 U.S. 361, 378 (1989) ("Our cases do not at all suggest that delegations . . . may not carry with them the need to exercise judgment on matters of policy.").

issue and the agency is not otherwise foreclosed from considering citizen input). Conversely, if an agency solicits the input of a citizen advisory committee and ultimately reaches an inconsistent conclusion, the court may consider the committee's findings as countervailing evidence, but it should tender a high degree of deference to the agency's conclusion and accept any tenable justification for departing from the committee's recommendations. By crediting a citizen advisory committee's recommendations as evidence in favor of an agency's conclusions, reviewing courts would preserve incentives for agencies to solicit public input, and exhibiting a high degree of deference to agency decisionmaking in those instances in which the agency chooses to depart from a committee's conclusion would minimize the disincentives for such voluntary public engagement.[188]

D. Potential Legal Issues

Agencies commissioning citizen advisory committees and considering the conclusions they render in agency decisionmaking raises a number of legal issues. Though none of the potential legal complications are insurmountable, agencies must nevertheless exercise caution to ensure that they do not inadvertently act unlawfully. Most notably, as advisory committees, such groups would be subject to FACA. An agency can deploy a citizen advisory committee within the confines of FACA, though the statute makes the operation of such committees somewhat unwieldy, and this Article proposes several modest reforms to the law designed to streamline the process. The use of citizen advisory committees may also create issues under the Paperwork Reduction Act (PRA) or raise concerns regarding ex parte contacts. This subsection discusses each of these issues in turn.

(1) *Federal Advisory Committee Act*: FACA is a federal statute that regulates agencies' ability to obtain advice from groups of persons outside of the government.[189] Enacted in 1972, it addressed two pressing concerns: (1) Congress feared that federal advisory committees, (i.e., groups of persons including at least one non-federal employee that provide advice to the government)[190] had proliferated unnecessarily and did not function

188. In addition to the benefits that inure on judicial review of a rule, an agency that solicits public input would also honor the presidential directives that encourage public engagement and increase the likelihood that the general citizenry will view the agency as responsive.

189. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app.).

190. 5 U.S.C. app. § 3(2) (2006).

efficiently; and (2) Congress wished to limit the ability of special interests to hijack the advisory committee process and exert undue influence on committee advice.[191] In response to the first concern, FACA imposes a number of requirements on advisory committees to ensure that they operate efficiently and cease to exist when they have accomplished their mission. Relevant provisions of FACA require that each committee have a charter that describes its intended mission,[192] that the agency head periodically review the work of the advisory committees his or her agency hosts to ensure that each is working towards its respective goals,[193] and that the General Services Administration (GSA) conduct an annual review of all advisory committees to ensure that they are operating efficiently and to urge agencies to terminate those committees that have outlived their useful lifespan.[194]

In response to the second concern, FACA imposes a number of requirements to ensure that committees operate objectively and serve the overall public interest. The Act accomplishes these goals in two separate ways. First, it directly limits the ability of special interests to dominate committee business by requiring that committee membership "be fairly balanced in terms of the points of view represented" and that the authority creating a committee implement appropriate controls to ensure that it is not "inappropriately influenced by . . . any special interest."[195] Second, the Act strives to ensure committee objectivity by applying Louis Brandeis's insight that "publicity is justly commended as a remedy for social and industrial diseases."[196] Specifically, FACA requires that committees meet publicly and that they offer members of the public the opportunity to provide input on the committees' work.[197] All advisory committee meetings must be announced in advance in the Federal Register[198] and must be held in a

191. 5 U.S.C. app. § 2(b) (2006) (enumerating various purposes of the Act, which, as a general matter, reflect the desire to ensure that committees do not outlive their useful lifespan and that committees conduct their work openly); Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L.J. AM. U. 111, 117 (1996) (The "goals [surrounding the enactment of FACA] reflect previous worries that advisory committees had become a hidden vehicle for special-interest access to agency decisionmakers.").

192. 5 U.S.C. app. § 9(c) (2006); 41 C.F.R. §§ 102-3.70–75 (2012).

193. 41 C.F.R. § 102-3.105(e).

194. 5 U.S.C. app. § 7(b); 41 C.F.R. § 102-3.100(b).

195. 5 U.S.C. app. §§ 5(b)(2)–(3), (c).

196. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

197. 5 U.S.C. app. § 10.

198. 5 U.S.C. app. § 10(a)(2); 41 C.F.R. § 102-3.150.

place permitting attendance by a reasonable number of interested citizens.[199] Members of the public must have the opportunity to file written statements for consideration by the committee and, if the committee's guidelines permit their doing so, the opportunity to speak before the committee.[200] All documents considered by the full committee must be made available for public viewing and copying upon request.[201] At the conclusion of a meeting, the committee must prepare meeting minutes, which the committee chairperson must certify within ninety days of the meeting.[202]

Agencies could substantially reduce the costs associated with traditional, in-person committee meetings by using the "virtual meeting" process described in Section III.C, which would meet all of the requirements imposed by FACA.[203] Unfortunately, even if they were to utilize such "virtual meetings," the strictures of FACA are still likely to hamper agencies' ability to engage citizen advisory committees. To facilitate the use of such committees, Congress should enact certain amendments to FACA. Such action is appropriate because the proposal for citizen advisory committees implicates few, if any, of the original policy concerns that motivated FACA's passage. Most significantly, the concern that advisory committees would be controlled by special interests, a major motivation for the enactment of FACA,[204] is essentially inapplicable in the context of citizen committees. The only potential means for organized interests to influence the process would be through submission of comments for the committee's consideration,[205] the same public input mechanism available to the entire citizenry.[206] Similarly, the concern that committees

199. 5 U.S.C. app. § 10(a)(1); 41 C.F.R. §§ 102-3.140(a)–(b).

200. 5 U.S.C. app. § 10(a)(3); 41 C.F.R. §§ 102-3.140(c)–(d).

201. 5 U.S.C. app. § 10(b); 41 C.F.R. § 102-3.170.

202. 5 U.S.C. app. § 10(c); 41 C.F.R. § 102-3.165.

203. For instance, the committee would announce the web address for the forum fifteen days in advance in the Federal Register, Bull, *supra* note 139, at 7–8, thus satisfying the notice requirements. 5 U.S.C. app. § 10(a)(2); 41 C.F.R. § 102-3.150(a). Members of the public would be able to view all postings and submit comments to the forum, Bull, *supra* note 139, at 5–7, thereby satisfying the public attendance and comment requirements. 5 U.S.C. app. § 10(a); 41 C.F.R. § 102-3.140. For a complete analysis of how such "virtual meetings" comply with each of the major provisions of FACA, see generally Bull, *supra* note 139.

204. Croley, *supra* note 191, at 117.

205. 5 U.S.C. app. § 10(a)(3); 41 C.F.R. § 102-3.140(c).

206. Of course, these public comments may be equally as unrepresentative as those submitted through notice-and-comment rulemaking, but they would be counter-balanced by expert presentations to the citizen advisory committee. Thus, it would be entirely appropriate for the agency to exhort committee members to ignore policy preferences expressed in the comments received and simply review them for relevant information, given

would unreasonably proliferate or survive far beyond the completion of their mission does not apply in the citizen advisory committee context: an agency would convene such an advisory group only when it required input on a specific issue of policy and would presumably disband the group upon receiving the committee's advice.[207]

In light of the attenuated applicability of the concerns driving the enactment of FACA to citizen advisory groups, Congress would presumably be justified in amending the Act to facilitate such interactions. First, Congress could significantly streamline the chartering process, eliminating any requirement that an agency consult with the GSA, and instead simply require that the agency itself formally determine the scope of a proposed committee's work prior to convening such a committee.[208] Congress also could eliminate the formal Federal Register notice requirement[209] and instead permit the agency to announce meetings on its website or by a mailing list, which likely would reach a larger number of potential attendees, in any event. Finally, the President should rescind Executive Order 12,838 insofar as it imposes a cap on the number of advisory committees an agency may host.[210] Capping the total number of

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that the committee itself is representing the public perspective. Furthermore, committee members should rely primarily upon the expert presentations and should avoid becoming bogged down in the extensive, highly detailed comments that affected interests may submit. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1325–26 (2010) (discussing the problem of "filter failure," wherein regulators are subjected to a barrage of information from regulated entities). Unlike the APA, which requires agencies to consider the "relevant matter presented" in public comments, 5 U.S.C. § 553(c), FACA does not explicitly require committee members to place any weight on public comments, and committee members should therefore only consider such comments to the extent they provide relevant information that is not adequately addressed in the pre-deliberation expert presentations.

207. *See* HOUSE. COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 4, 12, 15–16 (1970) (expressing concerns about the proliferation of unnecessary advisory committees).

208. 5 U.S.C. app. § 9(a)(2). Administrative Conference Recommendation 2011-7 would resolve this issue by eliminating any requirement that agencies consult with the General Services Administration (GSA) prior to forming a discretionary advisory committee, though agencies would still be required to file a formal charter. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 1, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012).

209. 5 U.S.C. app. § 10(a)(2); 41 C.F.R. § 102-3.150(a).

210. Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 12, 1993). The Administrative Conference has recommended the removal of this cap on the total number of government-wide discretionary advisory committees. Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 4, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012) ("The President and the Office of Management and

advisory committees is an extremely blunt and inefficient mechanism for ensuring that committees do not proliferate unnecessarily. Instead, agencies should be required to justify each citizen committee they establish as part of the revised chartering process, which should ensure that the agency does not create an unnecessarily large number of committees.

(2) *Paperwork Reduction Act*: The PRA, a law enacted in 1980 with the intention of reducing the burden of governmental collections of information on private individuals, businesses, and state and local governments,[211] imposes limits on agencies' ability to solicit information from groups of citizens. Whenever an agency intends to circulate an information collection instrument that contains identical inquiries to a group consisting of ten or more parties, it must undergo a relatively elaborate approval process.[212] Specifically, the Act requires agencies to establish offices tasked with overseeing information collection activities, to justify the necessity of information collections, and to obtain public comment on proposed information collections.[213] In addition, agencies must submit proposed information collections to the Office of Information and Regulatory Affairs (OIRA) for approval.[214] If OIRA approves an instrument, "it assigns it a control number that must appear" on disseminated copies of the document.[215] If any agency fails to do so, individuals who fail to comply with such requests for information cannot be penalized.[216]

Though the PRA may create certain inconveniences associated with convening a citizen advisory committee, an agency can structure group interactions so as to avoid triggering the Act. Indeed, citizen advisory committees are far less likely to trigger the PRA than is a poll of the general populace or a sub-set thereof, another distinct advantage of the citizen advisory committee model. Specifically, a form survey circulated to ten or more individuals would implicate the PRA,[217] thereby requiring the agency to obtain public comments on the proposed survey and OIRA approval thereof, a process that would likely require expenditure of significant time and resources. Given that an agency would almost certainly require more than nine responses to obtain a statistically valid sample of the relevant

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Budget should eliminate the cap on the number of discretionary advisory committees established by Executive Order 12,838 and Circular A-135.").

211. Pub. L. No. 96-511, § 3501(1), 94 Stat. 2812 (1980).

212. *See* 44 U.S.C. §§ 3502(3), 3507; PIERCE, *supra* note 87, at 403.

213. PIERCE, *supra* note 87, at 403.

214. 44 U.S.C. § 3504(c)(1); PIERCE, *supra* note 87, at 403.

215. PIERCE, *supra* note 87, at 404.

216. *Id.*

217. 44 U.S.C. § 3502(3).

population, the likelihood of triggering the PRA is large.

By contrast, an agency would not necessarily submit formal surveys consisting of a battery of identical inquiries to a citizen advisory committee. Rather, the process is more likely to resemble the experiments conducted by Professor Fishkin, wherein a group of participants receives briefing materials and then conducts a series of discussions and debates with the aim of reaching a consensus on a particular issue.[218] In short, the process would be more akin to deliberations of a criminal or civil jury rather than a survey of a statistically representative sample of poll subjects, and it therefore generally would not implicate the PRA.[219] Furthermore, though the size of citizen advisory committees is likely to vary from a handful of participants to several dozen, many groups would likely feature nine or fewer participants, and any information collection device submitted to such an assemblage would not trigger the Act.[220] In short, though the PRA poses a potential impediment to the use of citizen advisory committees, an agency can easily structure the process to avoid running afoul of the Act.

(3) *Limitations on Ex Parte Contacts*: A final legal doctrine that could ostensibly limit an agency's pursuit of outside input via a process other than the formal commenting procedure of the APA is the prohibition on ex parte contacts. In *Home Box Office, Inc. v. Federal Communications Commission*,[221] the Court of Appeals for the District of Columbia Circuit held that agency officials should refrain from discussing matters implicated in a proposed rulemaking with private parties once a notice of proposed rulemaking has been issued.[222] In the event that such ex parte contacts nonetheless occur, the agency should document them in written form and place the

218. Fishkin, *supra* note 40, at 136–38; Leib, *supra* note 40, at 910–11.

219. Of course, the agency would need to exercise some degree of caution in avoiding any activity that might trigger the PRA. For instance, though an agency may wish to circulate an informal poll amongst the citizen committee members to gauge their initial opinions, doing so might trigger the Act. Therefore, the agency would need to remain vigilant in structuring the deliberations of the participants to avoid the use of any information collection instruments with a series of identical questions.

220. 44 U.S.C. § 3502(3) (2006). Civil juries often consist of nine or fewer jurors. *See* Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 137 n.6 (1997); Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 268 (2002). Though a citizen advisory committee including nine or fewer citizens may not be sufficiently large in all instances, the successful use of civil juries consisting of as few as six jurors suggests that a relatively small group may be adequate in many cases.

221. 567 F.2d 9 (D.C. Cir. 1977).

222. *Id.* at 57.

documentation in the public file for the rulemaking docket.[223] To the extent that this decision remains valid precedent,[224] it is unlikely to pose an impediment to the citizen advisory committee proposal for two reasons. First, the committee process is likely to begin prior to the issuance of a notice of proposed rulemaking, insofar as the agency would likely use the committee's recommendation to shape the proposed rule, and the prohibition on ex parte contacts would therefore not be implicated.[225] Second, to the extent the agency adopts the "virtual meeting" proposal discussed above, a record of all outside contacts will exist insofar as the discussion will take place entirely in written form on an online web forum; as such, the agency can merely attach that discussion to its rulemaking docket.[226]

CONCLUSION

Americans have largely lost faith in their system of elected government. Opinion polls inquiring as to the effectiveness of the President, Congress, or the overall government have shown a significant deterioration in already abysmal results.[227] This widespread condemnation derives from a variety of sources, but a major cause is certainly the perceived disconnect between the aspirations of the general public and the decisions rendered by unelected bureaucrats.[228]

When agencies exercise a policymaking role, they arguably are under an obligation to consider public input. Incorporating insights from democratic theory, this Article contends that agencies should seek enhanced public input when it actually promotes a better outcome. In assessing the value of public input, agencies should consider the extent of citizen participation,

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223. *Id.*

224. *See* Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) ("Where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility."); *see also* Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1997); Viacom Int'l Inc. v. FCC, 672 F.2d 1034, 1044 (2d Cir. 1982).

225. *See Home Box Office*, 567 F.2d at 57 (proscribing ex parte contacts only "once a notice of proposed rulemaking has been issued").

226. *See id.* (noting that to the extent that ex parte contacts occur, agencies should maintain a written record thereof and place that record in the public file for the rulemaking docket).

227. Michael Cooper & Megan Thee-Brenan, *Disapproval Rate for Congress at Record 82% After Debt Talks*, N.Y. TIMES, Aug. 4, 2011, http://www.nytimes.com/2011/08/05/us/politics/05poll.html (citing an 82% disapproval rating for Congress, a record low dating back to the period when statistics were first collected, and significantly better but still disappointing results for the President).

228. *See* Coppack, *supra* note 7.

the ability of citizens to reach informed conclusions, the educational effect of participation on the citizenry, the usefulness of the product, and the efficiency of the overall process. This Article contends that the use of citizen advisory committees can effectively advance these policies, though alternative input models may prove preferable under different sets of circumstances.

Of course, enabling the use of citizen advisory committees will not necessarily lead to a renaissance of citizen participation in the administrative state. Citizens may not immediately exploit the opportunities for civic engagement opened by such reforms, and the use of citizen committees to obtain public input on agency policymaking is unlikely to immediately reverse the charges of "elitism" and "unresponsiveness" leveled against the federal government. Given that the system proposed necessarily sacrifices widespread public participation in favor of other policies, members of the public opposed to an agency's decisions are likely to contend that it selected biased committee members, that it submitted slanted materials to the participants, and that it otherwise failed to consider the views of the "real Americans" who oppose the agency's policies. Thus, this Article does not promote the citizen advisory committee concept as a panacea to any perceived illegitimacy of the administrative state. Though the proposed reforms will not bring a "democratic" golden age to the administrative state, as that term has come to be (mis)used, they would advance a more modest goal of achieving a more appropriate balance between participation by the general citizenry and decisionmaking by the people's government, a process that has arguably comprised the preeminent goal of our constitutional republic from its inception.

COMMENT

NEGOTIATED FEDERAL SENTENCING GUIDELINES: A CURE FOR THE FEDERAL SENTENCING DEBACLE

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INTRODUCTION

In January of 2005, the Supreme Court in *United States v. Booker*[1] held the Federal Sentencing Guidelines unconstitutional as previously applied because they violated defendants' Sixth Amendment right to a jury trial, and the Court upheld the Sentencing Guidelines as advisory only.[2] While the Federal Sentencing Guidelines are indeed advisory, district court judges continue to use them as a starting point,[3] thereby preserving the Federal Sentencing Guidelines' influence on sentencing and incarceration.[4] Although Congress created the United States Sentencing Commission (USSC or the Commission) to "provide certainty and fairness" in sentencing and to "avoi[d] unwarranted sentencing disparities,"[5] the Federal Sentencing Guidelines have been considered "too harsh . . . and require[e] the imposition of prison sentences too often and for . . . too long."[6]

Indeed, the USSC and the Sentencing Guidelines have since been characterized as a "debacle"[7] and regarded as the "most disliked sentencing

1. 543 U.S. 220 (2005).

2. *Id.* at 245 ("the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing"); *id.* (explaining that "the provision of the [Sentencing Reform Act] that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV 2011), [is] incompatible with [the] . . . holding . . . [and] conclud[ing] that this provision must be severed and excised, as must one other statutory section, § 3742(e) . . . .").

3. *See* Gall v. United States, 552 U.S. 38, 46 (2007) (acknowledging that although the Federal Sentencing Guidelines are advisory, sentencing judges "must give serious consideration to the extent of any departure from the Guidelines and must explain [their] conclusion that an unusually lenient or an unusually harsh sentence is appropriate . . . "); *see also* UNITED STATES SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENT'G, iv (2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf (reporting that post-*Booker*, "the majority of district courts . . . considered the applicable guidelines range first . . . .").

4. *See* Mark T. Doerr, Comment, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 236 (2009) (reporting that a consequence of the post-*Booker* advisory guidelines is that "above-Guidelines-range sentences are imposed at a rate double that of the rate before *Booker*") (citation omitted) (emphasis omitted).

5. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (declaring that one of the purposes of the United States Sentencing Commission (USSC or the Commission) is to establish a federal sentencing policy that provides certainty and fairness in sentencing).

6. Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328 (2005) ("Incarcerative sentences are imposed far more often than they were before the guidelines, and the length of imposed sentences has nearly tripled.").

7. Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME & JUST. 137, 138 (1993).

reform initiative in the United States"[8] in the last century. This Comment examines one of the causes of the federal sentencing reform debacle: the notice-and-comment approach to guidelines rulemaking.

Like many other agencies, the Commission engages in notice-and-comment rulemaking procedure,[9] which does not always encourage face-to-face collaboration and the exchange of ideas prior to the initial drafting of the proposed rule.[10] Under negotiated rulemaking, by contrast, government agencies create an inclusive atmosphere where mutually agreeable decisions are created and stakeholder participation is encouraged prior to the drafting of the proposed rule.[11]

"Negotiated rulemaking, sometimes referred to as regulatory negotiation or 'reg-neg,' emerged in the 1980s as an alternative to the traditional"

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8. *Id.* at 138–39 (highlighting that the North Carolina and Texas sentencing commissions, in their infancy, "repudiat[ed] the [F]ederal [G]uidelines as a model for anything they might develop"); *id.* at 139 (stating that the North Carolina Commission actively avoided use of the word "guidelines" in its legislative proposals in order to avoid conflation with the Federal Sentencing Guidelines); *id.* ("At a meeting of state sentencing commissions in Boulder, Colorado, in February 1993, an Ohio representative reported that the Ohio commission early in its work resolved that 'Ohio should not adopt the type of rigid sentencing guidelines exemplified by the Federal Guidelines.'") (citation omitted).

9. *See* 28 U.S.C. § 994(x) (2006) ("The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section."); *see also* UNITED STATES SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE, (Aug. 2007), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Practice_Procedure_Rules.pdf ("The Commission . . . is subject to only that provision of the Administrative Procedures Act, section 553 of title 5, United States Code, relating to publication in the *Federal Register* and a public hearing procedure, with regard to proposed sentencing guidelines or amendments thereto." (citing 28 U.S.C. § 994(x)) (italics in original). The USSC's Rules of Practice and Procedure informational publication does not mention the USSC's engagement in Negotiated Rulemaking. *Id.*

10. *See* Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens in Public Decisions*, 60 MONT. L. REV. 499, 500 (1999) (explaining that agencies that typically engage in traditional rulemaking may or may not engage or consult interested stakeholders).

11. *Id.*; *cf.* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 18–23, 115 (1982) (providing an analysis of the benefits, drawbacks, and complaints of the traditional notice-and-comment rulemaking approach and proposing that federal agencies adopt negotiated rulemaking as an alternative approach). *But see* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, Working Paper RWP01-2024, JOHN. F. KENNEDY SCH. OF GOV'T, HARVARD UNIV., FACULTY RESEARCH WORKING PAPER SERIES,, *available at* http://www.hks.harvard.edu/m-rcbg/research/c.coglianese_new.york_assessing.advocacy.pdf (arguing that negotiated rulemaking neither saves time nor reduces litigation); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J. 1255, 1259 (1997) (contending there is a lack of evidence demonstrating that negotiated rulemaking produces better results than conventional rulemaking).

rulemaking approach.[12] Government agencies that adopt negotiated rulemaking learn from the people and organizations they seek to regulate by sitting down with them and coming to a consensus on what all parties can live with before the agencies draft and submit new rules for comment.[13]

Despite the federal sentencing system's negative reputation, the idea of sentencing commissions can be successful.[14] The state of Washington is a testament to successful sentencing commissions because of its negotiated rulemaking approach.[15] Similar to the USSC, the Washington State Sentencing Guidelines Commission (WSGC) is a statutorily created administrative body[16] designed to develop sentencing rules that are "presumptive only," allowing for sentencing judges to exercise discretion and impose sentences that depart from the sentencing rules.[17] The WSGC is comprised of twenty voting members and consists of judges, prosecutors, defense attorneys, law enforcement officers, elected officials, a victims' advocate, and ordinary citizens.[18] In addition, instead of drafting the proposed sentencing rules behind closed doors, Washington's commission members visit the communities that are being victimized by crime.[19] Together, the stakeholders engage in town hall meetings to discuss what they think is fair and come up with options where incarceration is a last resort and mandatory prison terms are reserved for the most violent

12. McKinney, *supra* note 10, at 500.

13. *Id.*; *see* Harter, *supra* note 11, at 30–32 (comparing the processes in notice-and-comment rulemaking with negotiated rulemaking, and clarifying that under traditional rulemaking, agencies engage with various stakeholders sequentially and one at a time, while under negotiation rulemaking, interested parties will have the opportunity to sit down and address the issues together).

14. Tonry, *supra* note 7, at 137–39 (asserting that beyond the USSC's failures and reputation, "The sentencing commission idea will survive the federal debacle.").

15. *See* Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 150–51 (2011) (asserting that the Washington State Sentencing Guidelines Commission's (WSGC's) experience has been successful because of Washington's focus on deliberative democracy, where citizen participation is expected and influential in rulemaking).

16. Effective July 1, 2011, the WSGC was eliminated as an independent agency by ESSB 5891. WASHINGTON STATE SENT'G GUIDELINES COMMISSION, WA.GOV, http://www.ofm.wa.gov/sgc/ (last visited Aug. 3, 2013).

17. Taslitz, *supra* note 15, at 150.

18. SENT'G GUIDELINES COMMISSION MEMBERS, WA.GOV, http://www.ofm.wa.gov/sgc/members/default.asp (last visited Aug. 3, 2013).

19. *See* Taslitz, *supra* note 15, at 151 (citing Matthew Jill, *One Small Step: The Past, Present, and Future of the Federal Sentencing System*, 44 CRIM. L. BULL. 90, 107–08 (2008)) (explaining that the WSGC, "including citizen representatives, held statewide public hearings at which 'ordinary people, citizens, voters, and representatives of civil society and professional associations expressed a range of views on crime control and penal sanctioning'").

offenses, such as murder, assault, and rape.[20] Washington's democratic, "deliberative" approach has "diffused social tension, encouraged compromise, maximized viewpoint diversity, and ultimately restrained state harshness."[21]

This Comment contrasts the traditional notice-and-comment rulemaking approach used by the USSC with the negotiated rulemaking model adopted by Washington. Part I discusses the development of the USSC and Sentencing Guidelines, highlights the major criticisms of the Sentencing Guidelines, and presents a real-life example of how the Sentencing Guidelines affect individuals. Part II provides an overview of negotiated rulemaking. Part III highlights the sentencing reform experience in the State of Washington. Part IV recommends that an alternative commission be created and that federal sentencing guidelines be adopted like the State of Washington's by using a deliberative negotiating procedure. Such a reform will not only work toward better policy, but will also address the Federal Sentencing Guidelines' severity and harshness, ultimately moving the Federal Sentencing Guidelines closer to Congress's initial goal of "certainty and fairness" in sentencing.[22] Part IV also addresses potential hurdles inherent in developing an alternative commission and reforming the Federal Sentencing Guidelines. Finally, this Comment concludes by proposing that despite potential short-term hurdles in negotiated rulemaking, scrapping the current federal guidelines system and adopting an alternative rulemaking procedure is the only way for the federal sentencing system to institute reasonable and consistent guidelines that make public participation integral to the rulemaking process.

I. DEVELOPMENT OF THE FEDERAL SENTENCING GUIDELINES

A. Pre-Guidelines Federal Sentencing

Prior to passage of the Sentencing Reform Act of 1984 (SRA), federal sentencing followed an "indeterminate" structure.[23] For the majority of offenses, "Congress proscribed a range of punishment that could be imposed for an individual convicted of a particular offense . . . ."[24] Judges were given wide discretion to impose sentences within the statutory range

20. *Id.* at 150–51.

21. *Id.* at 151.

22. 28 U.S.C. § 991(b)(1)(B) (2006).

23. *See* Brief for Orrin G. Hatch et al. as Amici Curiae Supporting Petitioners, United States v. Booker, 543 U.S. 220 (2005) [hereinafter Brief for Petitioners] (Nos. 04-104, 04-105), 2004 WL 1950640, at *4.

24. *Id.*

based on various mitigating and aggravating factors a court deemed relevant.[25] Congress also placed no limitation "on the information concerning the background, character, and conduct of a person convicted of an offense which a [sentencing] court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[26] Moreover, "so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals."[27]

In the 1970s and 1980s, the federal discretionary sentencing system came to be grossly disfavored by state and federal actors, partly because it produced arbitrary and inconsistent sentences among otherwise similarly situated defendants "within different judicial districts across the country—and even among judges in the same district."[28] Sentencing disparities, in some cases, were also based on judicial deliberation of a defendant's race, sex, and other illegitimate factors.[29] The federal "parole system permitted the release of prisoners based upon inconsistent ideas regarding the potential for rehabilitation, exacerbated [sic] the lack of uniformity."[30]

B. Overview of the Sentencing Reform Act and Sentencing Guidelines

In 1984, Congress enacted the SRA as part of the Comprehensive Crime Control Act of 1984.[31] The SRA was the product of a bipartisan and inter-branch legislative effort to eradicate the crises of sentencing disparities and inequalities that beset the federal system.[32] No longer were judges given

25. *Id.*; *see also* Dorszynski v. United States, 418 U.S. 424, 437 (1974) (characterizing judicial power and discretion in sentencing before the SRA was enacted as virtually "unfettered").

26. 18 U.S.C. § 3661 (2006).

27. Bowman III, *supra* note 6, at 1322.

28. Brief Supporting Petitioners, *supra* note 23, at *4.

29. *Id.*

30. UNITED STATES SENT'G COMM'N, *supra* note 3. Despite judicial discretion in determining sentences, parole boards ultimately determined the length of sentences offenders actually served. *See* Bowman III, *supra* note 6, at 1321 n.23. Each federal prison had its own parole board, which had "discretionary power to release any prisoner who served at least one-third of his original stated sentence if the board was satisfied that 'there [was] a reasonable probability that [the prisoner] [would] live and remain at liberty without violating the laws,' and that release 'is not incompatible with the welfare of society.'" *Id.*

31. Pub. L. No. 98-473, 98 Stat. 1837 (1984); Romano v. Luther, 816 F.2d 832, 835 (2d Cir. 1987).

32. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (establishing the general purpose and objectives of the Commission); *see also* 28 U.S.C. § 994(f) (2006) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentencing disparities."); UNITED STATES SENT'G COMM'N, *supra* note 3, at 2 ("[The SRA] sought to

unfettered discretion to impose sentences based on arbitrary and illegitimate factors.[33] "The SRA transformed federal sentencing into a determinate system,"[34] it abolished parole,[35] and "required [defendants] to serve at least eighty-five percent of the sentence imposed by the court."[36]

The cornerstone of the SRA was the creation of the USSC, an independent agency within the judicial branch[37] charged with promulgating sentencing guidelines for federal sentencing courts.[38] Congress created the Commission for several reasons: first, to bring order to the unorganized federal Criminal Code; second, to ensure that the Sentencing Guidelines would be "monitor[ed], stud[ied] and refin[ed] over time" (while understanding that they would be "imperfect" in their infancy); and finally, to protect the Sentencing Guidelines from political interference.[39]

The USSC consists of seven voting members who are all appointed by the President and confirmed by the Senate.[40] The SRA provides that at least three of the members must be federal judges.[41] The SRA further mandates that no more than four commissioners can be in the same political party.[42] The Attorney General, or his designee, is a nonvoting member of the Commission,[43] but the defense bar is not institutionally represented on the Commission.[44]

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eliminate unwarranted disparity in sentencing and to address the inequalities created by sentencing indeterminacy."); Brief Supporting Petitioners, *supra* note 23, at *4 (expressing that the indeterminate federal sentencing system was a primary cause of the widespread disparities in sentencing both nationally and even within federal districts).

33. *See* 18 U.S.C. § 3553(a)(2) (2006) (outlining that sentencing should be tailored: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

34. Bowman III, *supra* note 6, at 1323.

35. Walden v. U.S. Parole Comm'n, 114 F.3d 1136, 1138 (11th Cir. 1997).

36. *See* Bowman III, *supra* note 6, at 1323. *But see id.* at 1323 n.31 (explaining that the time served by most defendants was higher, with one study reporting that defendants served an average of eighty-seven percent of their initial sentence).

37. 28 U.S.C. § 991(a) (2006); s*ee also* Mistretta v. United States, 488 U.S. 361, 393 (1989) (expressing that the USSC "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch").

38. *See generally* 28 U.S.C. §§ 991, 994, 995(a)(1) (2006).

39. Bowman III, *supra* note 6, at 1324.

40. 28 U.S.C. § 991(a).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*; *see also* Bowman III, *supra* note 6, at 1324.

Rather than creating an entirely new sentencing system, the USSC developed a guidelines structure based on predetermined sentencing ranges for various offenses, which consisted largely of the mathematical average of the pre-guidelines sentences.[45] "The [F]ederal [S]entencing [G]uidelines are, in a sense, simply a long set of instructions for . . . the sentencing table . . . a two-dimensional grid which measures the seriousness of the current offense on its vertical axis and the defendant's criminal history on its horizontal axis."[46] An initial determination of a particular sentencing range is calculated by the intersection of the offense levels and criminal history categories on the sentencing grid; the sentencing ranges are expressed in months.[47] Sentencing severity levels are distinguished by the sentencing ranges, and mitigating and aggravating factors alter the severity of the sentence for the relevant offense.[48]

C. Criticisms of the Sentencing Guidelines

The Sentencing Guidelines have become rules and regulations that few comprehend and of which even fewer approve.[49] "Many sentencing judges, practitioners, and academics criticized the guidelines system as being too

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45. The Commission Guidelines Manual details how the sentencing ranges were derived:

> In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system . . . . While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity.

United States Sentencing Comm'n, Guidelines Manual, § 1A4(g) (2011).

46. Bowman III, *supra* note 6, at 1324.

47. *Id.* at 1324–25.

48. William K. Sessions III, *Federal Sentencing Policy: Changes Since The Sentencing Reform Act of 1984 and the Evolving Role of the Sentencing Commission*, 91 WIS. L. REV. 85, 91 (2012).

49. *See generally* Erik S. Siebert, Comment, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 867–78 (2010) (arguing that the process of federal sentencing reform, particularly related to drug reform, is flawed); Tonry, *supra* note 7, at 138 (summarizing that the Federal Sentencing Guidelines have been "commonly criticized on policy grounds [because] . . . they unduly limit judicial discretion and unduly shift discretion to prosecutors, on process grounds [because] . . . they foreseeably cause judges and prosecutors to devise hypocritical stratagems to circumvent them, on technocratic grounds [because] . . . they are too complex and are hard to apply accurately, on fairness grounds [because] . . . they . . . tak[e] only offense elements and prior criminal history into account, [creating circumstances where] very different defendants receive the same sentence, and on normative grounds [because] . . . they greatly increased the proportion of offenders receiving prison sentences and are generally too harsh").

. . . rigid, . . . harsh,"[50] racially discriminatory,[51] overly complex,[52] and unreasonable.[53] Interestingly, especially given Congress's intent to insulate the Commission from politics,[54] much of the severity in the federal Sentencing Guidelines is attributable to congressional and executive actions, apart from the work of the Commission.[55] For instance, the war on drugs has drowned the U.S. prison system by placing millions of non-violent offenders in prisons for excessively long periods of time,[56] and at

50. Sessions III, *supra* note 48, at 92.

51. *See generally* Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War On Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 396–400 (2002) (arguing that the federal sentencing scheme, particularly related to cocaine sentencing rules, has unreasonably and disproportionately targeted and disenfranchised African-Americans).

52. *See* Sessions III, *supra* note 48, at 92; Matthew Jill, *One Small Step: The Past, Present, and Future of the Federal Sentencing System*, 44 CRIM. L. BULL. 91, 97 (2008) (arguing that the Federal Sentencing Guidelines are "immensely complex, narrowly tailored, [and] restrictive").

53. *See* Letter from The Honorable Myron H. Bright, U.S. Circuit Judge, Eighth Circuit, to The Honorable Patti B. Saris, Chair, United States Sentencing Commission, 3 (Jan. 10, 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Bright.pdf (opposing the USSC's current ideas for reform and pointing out that some guidelines are not reasonable, lack strong underpinnings, and fail to deserve the same quantum of deference on appeal); Adam Lamparello, *Incorporating the Procedural Justice Model Into Federal Sentencing Jurisprudence in the Aftermath of* United States v. Booker: *Establishing United States Sentencing Courts*, 4 N.Y.U. J. L. & LIBERTY 112, 126 (2009) ("[D]espite the fact that pre-Guidelines sentences were often imposed without any explicit purpose or underlying justification, such sentences became an integral, if not indispensable, aspect of the Guidelines' paradigm."). This Comment assumes the validity of the federal sentencing system's criticisms.

54. *See supra* note 39 and accompanying text.

55. *See* Ronald F. Wright, *The United States Sentencing Commission As An Administrative Agency*, 4 FED. SENT'G REP. 134, 136 (1991) ("Congress has consistently undermined the Commission's capacity to coordinate sentencing policy and to respond to the most reliable types of information available" partly because of Congress's common practice of enacting mandatory minimum sentences for crimes, and Congress's directives to the Commission to increase offense levels for particular crimes); Sessions III, *supra* note 48, at 92–95 (highlighting that Congress imposed mandatory minimums for numerous drug-related offenses); *see also* Bowman III, *supra* note 6, at 1341 ("Congress frequently increases and scarcely ever decreases the severity of federal sentences . . . .").

56. *See* John Schmitt et al., CENTER FOR ECONOMIC AND POLICY RESEARCH., THE HIGH BUDGETARY COST OF INCARCERATION, 1 (2010), *available at* http://www.cepr.net/documents/publications/incarceration-2010-06.pdf ("Non-violent offenders make up over 60 percent of the prison and jail population. Non-violent drug offenders now account for about one-fourth of all offenders behind bars . . . ."); Editorial, *Sensible Sentences for Nonviolent Offenders*, N.Y. TIMES, June 24, 2012, at A38 ("The number of inmates in state and federal prisons has doubled in the past 20 years to more than 1.5 million. Annual spending on state and federal corrections systems is more than $57 billion . . . [a] primary cause of rising costs is longer sentences."); *cf. Drug War Statistics*, DRUGPOLICY.ORG, http://www.drugpolicy.org/drug-war-statistics (last visited Aug. 3, 2013) (reporting that 1.53 million individuals in the

huge costs[57] with little benefit to society.[58] According to a recent poll, the American public overwhelmingly believes that the U.S. war on drugs has failed,[59] making the longer, harsher sentencing guidelines in non-violent drug offense cases even more unreasonable.

Furthermore, the federal cocaine-sentencing scheme, in particular, has grossly contributed to racial disparities and unreasonable sentences, with African-Americans being sentenced to serve time in federal prisons at alarmingly higher rates and for longer periods of time than whites.[60] Federal sentencing rules that distinguish between powder and crack cocaine contribute to these disparities.[61] This "difference in crack/powder cocaine sentencing is significant because African-Americans are more likely to use crack, while white drug users are more likely to use powder cocaine,"[62] despite the fact that there is no physiological difference between crack and powder cocaine.[63]

The first crack and powder cocaine sentencing disparities were enacted

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United States were arrested in 2011 on non-violent drug charges).

57. *See* Matt Sledge, *The Drug War and Mass Incarceration By The Numbers*, HUFFINGTON POST (April 8, 2013), http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html ("Over four decades . . . American taxpayers have dished out $1 trillion on the drug war.").

58. *See* PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS, 4 (2012), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Time_Served.pdf ("For a substantial number of offenders, there is little or no evidence that keeping them locked up longer prevents additional crime."). *But see* SHOULD INCARCERATION BE SUBSTITUTED FOR WITH TREATMENT FOR DRUG OFFENDERS?, ACLU.ORG, http://aclu.procon.org/view.answers.php?questionID=000732 (last visited June 8, 2013) (highlighting Rachel Hutzel's argument against substituting treatment for incarceration for drug offenders because "[t]he majority of traffic-related deaths are drug or alcohol-related. And personal crimes such as child endangering and domestic violence are usually fueled by drugs or alcohol. . . . Treatment, without punishment, is unfair to victims of drug-motivated crimes . . . . Further, treatment is ineffective to deal with dealers . . . who profit enormously from the addiction of others.") (quoting Rachel Hutzel, *Many Drug Offenders Need Punishment, Not Just Treatment*, DAYTON DAILY NEWS, June 23, 2009)).

59. *See* Lucia Graves, *Drug Wars Poll Shows Americans Believe U.S. Is Losing*, HUFFINGTON POST (Nov. 13, 2012), http://www.huffingtonpost.com/2012/11/13/drug-war-poll-losing_n_2125464.html (reporting that seven percent of the American public believes the war on drugs has been successful; eighty-two percent believe the war on drugs has failed; and twelve percent are not sure).

60. *See* Nunn, *supra* note 51, at 396–99.

61. *See* 21 U.S.C. § 841(b)(1)(A) (Supp. IV 2011) (setting forth penalties for possession of cocaine with intent to distribute); *cf.* Bowman III, *supra* note 6, at 1329 ("No discussion of sentence severity of the [F]ederal [S]entencing [G]uidelines would be complete without consideration of drug sentences.").

62. Nunn, *supra* note 51, at 396–97.

63. *Id*. at 396.

with the passage of the Anti-Drug Abuse Act of 1986 (ADAA).[64] Later, based on the mandatory minimums set forth in the ADAA, the USSC imposed a 100:1 crack-to-cocaine sentencing ratio in the Sentencing Guidelines.[65] Since then, the majority of federal cocaine prosecutions have been disproportionately against African Americans.[66]

Congress heightened its already pervasive role in the sentencing process with the passage of the Violent Crime Control and Law Enforcement Act of 1994,[67] where it required the USSC to provide recommendations to Congress, subject to congressional approval, that address the varying penalties for different forms of cocaine and include recommendations for "retention or modification of such differences in penalty levels."[68] The USSC made a series of recommendations related to unreasonable cocaine sentencing disparities to Congress in 1995,[69] 1997,[70] and 2002,[71] yet

64. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841); Nunn, *supra* note 51, at 397. In the 1980s crack cocaine and the violence related to it sparked great public concern. Siebert, *supra* note 49, at 872 (internal citations omitted). Congress responded by introducing crack-to-cocaine sentencing disparity proposals, "ranging from a 20-to-1 proposal introduced by the Reagan Administration, to a 50-to-1 proposal introduced by the House Democrats and a 100-to-1 proposals introduced by the Senate Democrats." *Id.* The House Democrats' proposal was initially adopted. *Id.*

65. *See* Siebert, *supra* note 49, at 872–73 (citing UNITED STATES SENT'G COMM'N, GUIDELINES MANUAL, § 2D1.1 (1987)).

66. *See* Nunn, *supra* note 51, at 397 n.117 (citing United States v. Armstrong, 517 U.S. 456, 479–80 (1996)) (Kennedy, J., dissenting) (pointing out that although whites represent sixty-five percent of crack cocaine users, they comprised of only four percent of federal defendants charged with trafficking crack, while blacks experienced eighty-eight percent of crack cocaine prosecutions).

67. Pub. L. No. 103–322, 108 Stat. 1796 (codified at 42 U.S.C. § 13701); Siebert, *supra* note 49, at 874.

68. *See* Pub. L. No. 103–322, Title XXVIII, § 280006, Sept. 13, 1994, 108 Stat. 2097; Siebert, *supra* note 49, at 874.

69. *See* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY, chap. 8, (Feb. 1995), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/CHAP8.HTM (recommending to Congress that the 100:1 quantity ratio for crack and powder cocaine be "re-examined and revised"); Siebert, *supra* note 49, at 875.

70. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY, 9 (Apr. 1997), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/19970429_RtC_Cocaine_Sentencing_Policy.PDF (recommending to Congress that the triggers for mandatory minimums for crack and powder cocaine be brought to a 5:1 quantity ratio); *see* Siebert, *supra* note 49, at 876.

71. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY (May 2002), *available at* http://www.ussc.gov/Legislative_and_

Congress declined to follow the recommendations.[72] The enactment of the Fair Sentencing Act of 2010[73] finally lessened such disparities in sentencing between crack and powder cocaine from 100:1 to 18:1,[74] yet still maintaining the arbitrary and racially discriminatory distinctions between the two forms of cocaine.[75]

In addition to Congress's role in the federal sentencing scheme, the Justice Department's aggressive advocacy of tougher sentencing directed toward Congress, and subsequently on the USSC, has also deeply impacted the severity with which the federal sentencing courts punish individuals.[76] This aggressive sentencing culture has given the United States the distinction of incarcerating its citizens at alarmingly higher rates than many other countries.[77]

This aggressive sentencing system is not only bad for African-Americans and non-violent defendants in the war on drugs[78] but it also presents a major fiscal burden on society at large, especially given the fiscal challenges currently faced by the United States.[79] In 2010, it cost over $25,000 to incarcerate an inmate in the federal system.[80] Moreover, in 2010, over two

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Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/ch1.pdf (recommending to Congress that that 100:1 quantity ratio for crack and powder cocaine be reduced to a 20:1 quantity ratio; *see also* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENT'G POLICY, 8 (May 2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (recommending to Congress that the crack and powder 100:1 quantity ratio be reduced and insisting that the 100:1 ratio undermines congressional objectives set forth in the Sentencing Reform Act).

72. Siebert, *supra* note 49, at 877.

73. 21 U.S.C. § 841.

74. Lauren Burke, *Retroactivity: Supreme Court Rules on Crack Cocaine Sentences*, POLITIC365.COM (June 21, 2012), http://politic365.com/2012/06/21/supreme-court-rules-some-crack-cocaine-sentences-are-retroactive/.

75. Nunn, *supra* note 51, at 396.

76. *See* Bowman III, *supra* note 6, at 1340 (pointing out the Justice Department's role in creating statutory and guidelines sentencing rules, and criticizing the Department's advocacy of tougher sentencing levels and "unyielding opposition to any mitigation of existing sentencing levels").

77. *See* Roy Walmsley, *World Prison Population List (Ninth ed.)*, INT'L CENTRE FOR PRISON STUDIES, *available at* http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf (highlighting that over 10.1 million individuals are incarcerated in the world, and almost a quarter are in the U.S.).

78. *See supra* notes 58–60.

79. *See* Bright Letter, *supra* note 53, at 4.

80. Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57081, 57081 (Sept. 15, 2011) (noting that the average cost of incarceration for an offender in Fiscal Year 2010 was $25,838).

hundred thousand prisoners were in the custody of the federal correctional system;[81] over half were serving time for drug offenses,[82] while only ten percent were serving time for violent offenses.[83]

In addition to the fiscal consequences resulting from the aggressive Sentencing Guidelines, the current federal sentencing system undercuts procedural justice and runs the risk of fostering poor perceptions regarding its "institutional legitimacy, competency, and ability to effectuate fair outcomes."[84] Such poor perceptions can cause criminal defendants and the public to lose faith in the sentencing process and the courts' ability to produce fair and just results.[85] Such distrust in the legal system may increase crime, and may discourage communities from cooperating with police or the judicial process in general.[86]

D. Sentencing Horror Story and Collateral Consequences

So far, this Comment has described some of the broad social effects of the Sentencing Guidelines system.[87] This section highlights one individual impacted by that system and describes several of the collateral consequences associated with the individual's punishment.

Maria, a first time offender, served six years of a minimum five-to-ten-year sentence for selling one vial of crack cocaine.[88] She had sold the drugs to support her own drug use.[89] "At eighteen Maria started using drugs as a way of helping her cope with the severe physical abuse she suffered . . . at the hands of her stepfather."[90] While in prison Maria earned her high school diploma and participated in various vocational classes.[91] Unfortunately, the prison did not provide Maria with treatment or

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81. PAUL GUERINO ET AL., PRISONERS IN 2010, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2 (Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

82. *Id.* at 1.

83. *Id.*

84. Lamparello, *supra* note 53, at 129.

85. *Id.*

86. Jon Hurwitz and Mark Peffley, *Racial Polarization on Criminal Justice Issues: Sources and Political Consequences of Fairness Judgments* 4 (2001), *available at* http://as-houston.ad.uky.edu/archive/as17/as17.as.uky.edu/academics/departments_programs/PoliticalScience/PoliticalScience/FACULTYRESOURCES/Resources/Ulmer/Documents/WP_2004_03.pdf.

87. *See supra*, Part I.C.

88. *Words From Prison: The Collateral Consequences of Incarceration*, ACLU.ORG (June 12, 2006), http://www.aclu.org/womens-rights/words-prison-collateral-consequences-incarceration.

89. *Id.*

90. *Id.*

91. *Id.*

counseling for substance abuse.[92]

After her release from prison Maria sought employment, but was consistently turned down because of her criminal record.[93] Faced with the difficulties of obtaining employment, Maria decided to pursue a college education, but soon learned while completing a federal student loan application that her drug-related conviction prevented her from receiving financial assistance.[94]

Maria moved in with family, but once her stay became too burdensome she attempted to obtain her own housing.[95] Maria applied for a public housing voucher, but to no avail, as her record as a drug offender barred her from receiving public housing assistance.[96] Depressed by her difficulties with securing employment and housing, Maria began to use drugs again.[97] Desperate for shelter, she also began living with an abusive man.[98]

Eventually Maria asked her parole officer about in-patient drug treatment programs.[99] After spending some time in the facility, Maria realized that it did not suit her needs and requested a transfer.[100] "The program emphasized an aggressive, military-style approach to ending drug use, but did not address" the underlying causes of her initial drug use.[101] Despite Maria's concerns, her parole officer directed her to remain in the facility.[102] Maria left anyway, and was arrested and charged with violating parole.[103] Maria "was sentenced to one year in prison for [that] violation."[104] Unable to cope with the sentence, she attempted suicide.[105] In response, Maria was prescribed "anti-depressant drugs, but [was not offered] counseling or treatment for her drug addiction or the violence she

92. *Id.*

93. *Id.* ("Most states allow employers to deny jobs to anyone with a criminal record, regardless of how much time has passed or the individual's work history or personal circumstances.").

94. *Id.* ("The federal Higher Education Act of 1998 makes students convicted of drug-related offenses ineligible for any grant, loan, or work-study assistance."); 20 U.S.C. § 109(r).

95. *Words From Prison: The Collateral Consequences of Incarceration, supra* note 88.

96. *Id.* The Public Housing Administration is charged with overseeing the selection of tenants for public housing. 24 C.F.R. § 960.202(a). A tenant may be excluded for drug-related criminal activity. § 960.204(a).

97. *Words From Prison: The Collateral Consequences of Incarceration, supra* note 88.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

had suffered as a child."[106]

Maria's unfortunate story is not unique, and is attributable, in part, to the unforgiving severity of the Sentencing Guidelines, the United States' war on drugs, and the government's focus on incarceration as a foolproof solution. Under reasonable sentencing guidelines and sentencing policy, individuals like Maria, who are addicted to drugs and have no history of violence, would receive rehabilitative treatment to address the root of his or her substance problem, instead of incarceration which would have no rehabilitative effect. In order to fully address the failings of the USSC and the Sentencing Guidelines, it is important to understand how the USSC engages in sentencing rulemaking and how it imposes amendments to the Sentencing Guidelines.

II. AN OVERVIEW OF NEGOTIATED RULEMAKING

Negotiated rulemaking, unlike the traditional notice-and-comment approach, provides stakeholders with the opportunity to contribute to the development of a regulation *before* "the issuance of [a] notice and the opportunity for the public to comment on a proposed rule."[107] By encouraging collaborative framing of the issues and options for solutions, negotiated rulemaking can "increase citizen participation in public decision making; improve the substance of a proposed rule; shorten the length of time necessary to implement a final rule; increase the level of compliance; and reduce litigation."[108]

Negotiated rulemaking emerged on the federal scene in the early 1980s, when "the Administrative Conference of the United States published a recommended framework for negotiated rulemaking" at federal agencies.[109] The recommendations served as a guideline for agencies that sought to utilize the negotiating approach, by outlining when negotiated rulemaking would be beneficial and offering suggestions on how to appropriately carry out the new rulemaking approach.[110]

In 1983, the Federal Aviation Administration (FAA) was the first agency

106. *Id.*

107. JEFFERY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 45 (3d ed. 1998); *accord* McKinney, *supra* note 10, at 500 (pointing out that negotiated rulemaking offers interested parties the opportunity to contribute to the draft of the proposed rule).

108. McKinney, *supra* note 10, at 500.

109. *Id.* at 501 (citing Administrative Conference of the United States, Recommendation 82–4, in Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.82–84 (1998)).

110. *Id.* at 501. Philip Harter, the consultant for the Administrative Conference for the United States, and author of the negotiated rulemaking recommendations, cautioned that negotiated rulemaking would not be feasible in all situations. *See* Harter, *supra* note 11, at 7.

to use negotiated rulemaking.[111] Faced with unpopular old rules and an unmanageable number of interpretations of the rules,[112] the FAA decided to convene a committee of airline representatives, pilots, public interest organizations, and other interested individuals to brainstorm a new set of mutually agreeable rules concerning flight and rest time for domestic airline pilots.[113] The FAA's previous attempts to revise the rules with the traditional notice-and-comment process had been met with opposition and were later withdrawn.[114] This time, the FAA's deliberative democratic approach created a final popular rule that avoided legal challenge for over fifteen years.[115]

Following the FAA's successful experience with negotiated rulemaking, other federal agencies have used the approach, including: the Occupational Safety and Health Administration; the Nuclear Regulatory Commission; Farm Credit Administration; Federal Communications Commission; Federal Trade Commission; and the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, and Interior.[116] The Environmental Protection Agency, and the Departments of Transportation and Energy have also embraced the negotiated rulemaking process.[117]

Negotiated rulemaking's early successes led to its formalized adoption in 1990 with the enactment of the Negotiated Rulemaking Act (NRA),[118] which was later amended and made permanent in 1996.[119] "The NRA does not require use of [negotiated rulemaking]; rather, it was intended to clarify agency authority and to encourage agency use of the process," and to make its adoption discretionary.[120] According to the NRA, if an agency

111. McKinney, *supra* note 10, at 502.

112. *Id.* (highlighting that the FAA has over 1,000 interpretations of the rules concerning flight and rest time for domestic airline pilots).

113. *Id.*

114. *Id*.

115. *Id.*

116. *Id.* at 502–03.

117. *See DOE Announces Changes to the Energy Conservation Process*, DEPARTMENT OF ENERGY (Nov. 16, 2010, 7:18 pm), http://energy.gov/gc/articles/doe-announces-changes-energy-conservation-standards-process (announcing its transition to negotiated rulemakings and the creation of a standing negotiated rulemaking committee); *see also* Lubbers, *supra* note 107, Appendix (reporting that between 1991 and 2007 the EPA and the Department of Transportation convened nine and thirteen negotiated rulemakings respectively).

118. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561–70 (2006)); *see also* Lubbers, *supra* note 107, at 989 n.9 (explaining the subsequent history of the Negotiated Rulemaking Act).

119. LUBBERS, *supra* note 107, at 989 n.9.

120. *Id.* at 989 (citing 5 U.S.C. §§ 561, 563 (2006) (describing the purpose and determination process of negotiated rulemaking)).

determines it would like to engage in negotiated rulemaking, it must follow certain protocol.[121] First, interested agencies must determine whether the use of the negotiated rulemaking approach would be in the public interest.[122] Then, the head of the agency must consider the following: whether a rule is actually needed;[123] whether identifiable interests will be affected by the rule;[124] whether it is reasonably likely that a committee can be created and that the stakeholders will act in good faith;[125] whether it is reasonably likely that a consensus will be reached in a certain time frame;[126] whether the negotiated rulemaking process will unreasonably delay notice of the proposed rulemaking and the publication of the final rule;[127] whether the agency has the adequate resources to support the committee;[128] and whether the agency will try its best, consistent with legal obligations, to submit the negotiated consensus for notice and comment.[129] Upon successful consideration of the foregoing factors, agencies must establish a negotiated rulemaking committee.[130] The NRA does not force agencies to publish a proposed or final rule simply because it was the product of negotiated rulemaking.[131]

The NRA also strongly encourages the assistance of "convenors" or neutral facilitators in carrying out negotiation sessions.[132] Convenors' duties include identifying stakeholders and individuals who would be "significantly affected" by issues involved in the proposed rule and identifying their concerns.[133]

Negotiated rulemaking has since drawn both criticism and praise. Criticisms of negotiated rulemaking center around high short-term resource costs, both financial and physical, that could potentially befall both the

121. § 563.
122. § 563(a).
123. § 563(a)(1).
124. § 563(a)(2).
125. § 563(a)(3).
126. § 563(a)(4).
127. § 563(a)(5).
128. § 563(a)(6).
129. § 563(a)(7); *cf.* Lubbers, *supra* note 107, at 993 (explaining that agencies are authorized to accept outside funds to support the negotiated rulemaking process, provided no conflict of interest ensues).
130. 5 U.S.C. §§ 564–65 (2006).
131. *See* LUBBERS, *supra* note 107, at 989 (noting that the language of the Act "is permissive" and that the congressional intent was not to "impair any rights otherwise retained by agencies").
132. 5 U.S.C. § 563(b); *accord* Lubbers, *supra* note 107, at 993 (remarking that agencies may use private facilitators or government employees as facilitators).
133. 5 U.S.C. § 563(b)(1).

agency and negotiation participants.[134] For instance, agencies may have to incur the expense for the convenors or facilitators to manage the negotiation process.[135] All interested parties and individuals may have to spend a considerable amount of time working with the agency to hash out the rule at every stage of the rule's development, including post-development.[136] Moreover, involving more stakeholders in the regulation development process invites more time spent on reviewing proposals, and in engaging in discussion.[137]

Negotiated rulemaking proponents insist that its long-term benefits should not be ignored. They respond that the negotiated approach can increase community involvement in decisionmaking[138] and as a result, lessen the amount of legal challenges to the final rule.[139] Moreover, regulation compliance can be drastically improved with negotiated rulemaking, especially given that rules are developed through open discussion and negotiation.[140] Even President Clinton has openly acknowledged negotiated rulemaking's benefits: in 1993, Clinton issued an Executive Order directing agencies to, "where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[141] Clinton later urged agencies to "Negotiate, Don't Dictate," and "to expand substantially . . . efforts to promote consensual rulemaking."[142]

Although negotiated rulemaking has not been broadly adopted by federal agencies, its potential for producing popular, fair, and effective regulations the first time around is great, and it has been successful in various state sentencing commission systems, namely in the State of Washington.

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134. *See generally* LUBBERS, *supra* note 107, at 996–1005 (elucidating various reasons for the waning of negotiated rulemaking at the federal level).

135. *See* McKinney, *supra* note 10, at 500–01 (stating that agencies must spend resources to retain a convenor or facilitator).

136. *See id.* (highlighting the costs associated with negotiated rulemaking).

137. *See id.* (showing the extra step required by all parties during negotiated rulemaking).

138. *See supra* note 107 and accompanying text.

139. *See supra* note 108 and accompanying text.

140. McKinney, *supra* note 10, at 500.

141. *See* Lubbers, *supra* note 107, at 995 (quoting Exec. Order No. 12,866, § 6(a), 58 FED. REG. 51,735, 51,740 (Sept. 30, 1993)).

142. *Id.*

III. SENTENCING IN THE STATE OF WASHINGTON

A. Washington's Sentencing Commission and Sentencing Guidelines

The WSGC was statutorily created in 1981, under the Sentencing Reform Act of 1981 (WSRA).[143] By 1987, Washington's sentencing guidelines were in place, which was not long after the Federal Sentencing Guidelines were enacted.[144] The sentencing guidelines' accountability to the public is inherent in the WSRA.[145] The purpose of the WSRA is to develop a sentencing system for felony offenders that promotes discretionary sentencing and: first, to ensure that the imposed punishment is "proportionate to the seriousness of the offense and the offender's criminal history;" second, to "promote respect for the law by providing punishment which is just;" third, to ensure that punishments are commensurate with similarly situated offenders; fourth, to "protect the public;" fifth, to promote opportunity for rehabilitation; sixth, to efficiently use the states resources; and finally, to reduce recidivism.[146]

A fundamental element of the Washington's sentencing guidelines is its "just desserts" rationale. The WSGC proposed a less restrictive version of the three strikes rule.[147] Now, mandatory minimum prison terms are reserved only for the violent crimes of murder, assault, and rape.[148] In the case of low-level offenders, the guidelines also "heavily emphasize" rehabilitation and alternatives to incarceration, such as "community supervision, community service, and restitution."[149] Moreover, Washington's sentencing guidelines "linked imprisonment to state prison capacity, [and] generously encouraged good time credits and work release."[150] Actively trying to isolate the state from the sentencing disparities in the federal sentencing system, the WSGC worked to ensure that the guidelines "apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime

143. Sentencing Reform Act of 1981, WASH. REV. CODE. ANN. § 9.94A.010 (West 2010).

144. *See* Tonry, *supra* note 7, at 141 (elaborating on the chronological timeline of sentencing commissions and guidelines enactments in various states, including the USSC).

145. *See* § 9.94A.010 ("The purpose of this chapter is to make the criminal justice system accountable to the public . . . .").

146. *Id.*

147. David Boerner & Roxanne Leib, *Sentencing Reform in the Other Washington*, 28 CRIME. & JUST. 71, 105 (2001).

148. *Id.* at 105.

149. Taslitz, *supra* note 15, at 150.

150. *Id.*

or the previous record of the defendant."[151] As such, Washington's guidelines "are presumptive only, permitting departure by sentencing judges for good reasons."[152]

B. Sentencing Rulemaking in the State of Washington

From the beginning, the WSGC provided a platform for several conflicting interests and viewpoints related to sentencing.[153] Unlike the USSC, the WSGC is not judiciary and prosecution heavy. Instead, it goes further to include varied interests such as victims' and citizens' organizations, interested individuals, and "varied representatives of neighborhoods, races, and classes in the process."[154] Typical organizations include the American Civil Liberties Union Prisoners' Right Committee, and the Families and Friends of Missing Persons and Violent Crime Victims.[155] During negotiation meetings, all of the present stakeholders are strongly encouraged to actively and meaningfully participate in the development of issues and options for solutions, and as a result state severity has been restrained.[156]

Sentencing rules related to sex crimes provide a strong example of Washington's negotiated rulemaking approach. In 1983, when the WSGC experienced challenges establishing sentences for sex crimes, it engaged victim advocates and treatment providers.[157] The "victim advocates argued that presumptive prison sentences for intrafamily crimes would be viewed as too harsh . . . and would discourage prosecution."[158] As a result, the victim advocates argued for "an option combining supervision and outpatient treatment."[159] "Treatment providers pointed to the compulsive nature of these crimes and argued that without treatment, sex offenders would likely reoffend after release."[160] In the end, the WSGC drafted a sexual offense sentencing alternative that included the advice of both interest groups and allowed for treatment for sex offenders who lacked prior sex convictions, but excluded sex offenders who were convicted of forcible rape.[161]

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151. *See* Boerner & Leib, *supra* note 147, at 86 (citing §9.94A.340).
152. Taslitz, *supra* note 15, at 150.
153. *Id.* at 150–51.
154. *Id.* at 151.
155. *Id.*
156. *Id.*
157. Boerner & Leib, *supra* note 147, at 94.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

The WSGC and guidelines experienced success early on: "[b]y the late 1980s, [application of the] guidelines had reduced [Washington's] imprisonment rates by twenty percent,"[162] causing Washington to drop from twenty-fifth in the nation in incarceration rates in 1984 to thirty-ninth in 1988.[163] Washington's success is attributable to its emphasis on community participation in the formulation of sentences.[164]

IV. NEW NEGOTIATED FEDERAL SENTENCING GUIDELINES

The USSC and Congress are currently contemplating federal sentencing reform in light of *Booker* and its progeny.[165] Speaking as the Chair of the USSC, Judge Patti B. Saris has recommended that Congress adopt several reforms such as a heightened appellate review standard that implores appellate courts to apply a reasonableness standard to within-guidelines sentences and a requirement that sentencing judges provide justification for significant variances from the guidelines.[166] Judge Saris also recommended that Congress impose a high standard of review for sentences that are imposed as a result of "policy disagreement" with the guidelines among other recommendations.[167] These recommendations would undercut *Booker* and give the guidelines a mandatory effect.[168]

One of the major assumptions underlying Judge Saris' and the Commission's recommendations is that all of the guidelines are reasonable.[169] However, this Comment's previous discussion concerning the war on drugs and the crack and powder cocaine sentencing disparity undermines the Sentencing Guidelines' reasonableness presumption,[170] as some of the Sentencing Guidelines have been criticized for lacking strong

162. Taslitz, *supra* note 15, at 150.

163. Boerner & Leib, *supra* note 147, at 95.

164. *See* Taslitz, *supra* note 15, at 151 (arguing that the State of Washington's enlightened guidelines resulted from deliberative democracy).

165. *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker*: Hearing Before the H. Subcomm. on Crime, Terrorism, Homeland Security, of the H. Comm. on the Judiciary*, 112th Cong. 12 (2011) (statement of Judge Patty B. Saris, Chair, United States Sentencing Commission).

166. *Id*.

167. *Id.* at 12–13. Judge Saris also recommended that Congress "clarify statutory directives to the sentencing courts and Commission that are currently in tension," require that sentencing judges give substantial weight to the Sentencing Guidelines while deliberating a sentence, and "codify the three-part sentencing process." *Id.*

168. *See* Bright Letter, *supra* note 53, at 1–2 (stating that the Commission's recommendation to overrule Booker gives judges less discretion in sentencing, and reverts back to a mandatory sentencing regime).

169. *Id.* at 3.

170. *See generally supra* Part I.B.

underpinnings and justifications,[171] and have even been challenged by the Commission itself for those inadequacies.[172]

As the Commission and Congress contemplate federal sentencing reform, Washington's success with negotiated rulemaking should be at the forefront of the reform.[173] Washington's legislature had the opportunity to copy the federal approach to sentencing but chose not to. As a result, the state's sentencing guidelines encompass the interests of various stakeholders and advocates, and emphasize treatment and rehabilitation over mass incarceration.[174] In order to experience similar results on the federal level, Congress will have to overhaul the current guidelines.[175]

As explained in the preceding sections, the USSC is faced with a series of structural and procedural dilemmas that have caused undesirable sentencing outcomes in various aspects of the criminal law and drug sentencing in particular.[176] For instance, the Sentencing Guidelines at their core are merely mathematical averages of pre-guidelines sentences,[177] which have been criticized as unreasonable for their disproportionate and disparate sentences imposed by sentencing judges based on race, sex, and other illegitimate factors.[178] Moreover, the USSC is bound by its enabling legislation and is at the mercy of the executive and legislative branches, which have been more interested in incarceration and longer sentences as solutions to crime.[179] This command-and-control approach to sentencing has produced a severely harsh sentencing system and an alarmingly high number of prisoners.[180]

In an effort to not abruptly dismantle and disrupt the current sentencing

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171. *See* Nunn, *supra* note 51, at 396 (discussing the difference in sentencing for crack and powder cocaine, and the lack of physiological difference).

172. *See generally supra* Part I.B (explaining the Commission's numerous recommendations to Congress to eliminate the crack and powder cocaine sentencing quantity ratio).

173. *See* Angie Drobnic Holan, *RomneyCare & ObamaCare: Can You Tell the Difference?*, POLITIFACT.COM, (Mar. 20, 2012, 4:58 PM), http://www.politifact.com/truth-o-meter/article/2012/mar/20/romneycare-and-obamacare-can-you-tell-difference/ (discussing a recent example of Congress adopting a state initiative, namely, the Affordable Care Act).

174. *See supra* Part III.B.

175. *Cf.* Bowman III, *supra* note 6, at 1350 ("Real federal sentencing reform may thus only be possible if the guidelines in anything like their current form are scrapped.").

176. *See supra* note 53 and accompanying text (indicating the various ways in which sentencing guidelines remain flawed).

177. *See supra* note 45 and accompanying text.

178. *See supra* notes 28–29 and accompanying text (showing a history of uncertainty in federal sentencing systems).

179. *See supra* notes 56, 68–76 and accompanying text (highlighting legislative, and executive interference with sentencing guidelines).

180. *See supra* notes 58, 77 and accompanying text.

scheme, steps to comprehensive sentencing reform, based on theoretical, practical and fiscal considerations, and varying public viewpoints should take place in the background. Congress will have to statutorily grant authority to an alternative sentencing rulemaking body. Like the current USSC, the alternative commission should be an independent agency housed within the judicial branch.[181] However, unlike the current USSC, the alternative commission should be comprised of a balanced cohort of criminal experts and community members. For instance, in addition to federal judges and federal prosecutors, the alternative commission should consist of at least twenty representatives from victims' advocacy organizations, innocence projects, civil rights organizations, academia, and the federal public defender service. The initial representatives should be recommended and appointed by the executive and confirmed by the Senate for a term of six years.

The purpose of the alternative commission should be to research, negotiate, and draft entirely new sentencing rules, isolated from the political pressures of Congress and the Justice Department. Where the current USSC is confined to statutory ranges and minimums set by Congress, the alternative commission should have the authority to draft sentencing guidelines that are justified by research and negotiated consensus from various stakeholders. Moving away from the federal government's mass incarceration stance, one of the major goals of the alternative commission should be to develop sentencing guidelines that emphasize rehabilitation and incarceration alternatives where appropriate. In developing every aspect of the sentencing guidelines, the alternative commission should be mandated to actively engage the community, taking advantage of hearings settings, town hall forums, and informal negotiation meetings.

Such reform will probably not come easily, as there may be pushback from members of Congress, federal prosecutors, judges and even current Commission members who would rather not disrupt the current process. Lack of resources may be touted as justification for not taking on this reform. Appreciation for negotiated rulemaking may be small, with opponents arguing that such rulemaking is not appropriate in every setting, especially given that more players being involved in the sentencing rulemaking process early on may slow the process of producing an initial sentencing rule.

Indeed, while political will may be tough to muster, the current sentencing regime and members of Congress must realize that real sentencing reform and truth in sentencing will not happen with Band-Aid reform. We cannot ignore the sentencing disparities and unjustified

181. 28 U.S.C. § 991(a) (2006).

sentencing ranges for various offenses by claiming that all will be rectified if sentencing courts simply treat the guidelines as mandatory, and appellate courts impose a heightened standard of reasonableness. Such reform will never get to the heart of the federal sentencing debacle—unreasonable, harsh, and racially discriminatory sentences. If a new federal sentencing commission following a negotiated rulemaking procedure recommends more sensible guidelines, and if the rulemaking procedure includes diverse public interests as in the State of Washington, that can create political pressure on Congress to endorse the sentencing alternatives and abandon the current statutory structure.

CONCLUSION

While creating a new set of federal sentencing guidelines that adopts an alternative negotiated rulemaking procedure may be met with opposition, its benefits will outweigh the short-term costs in resources and time.[182] The United States leads the world in incarceration rates,[183] but its citizens are not more deserving of imprisonment than citizens of other countries. The United States Government can learn from the State of Washington.[184] When a diverse set of citizens' groups, individuals, and organizations are included in the creation of sentencing guidelines, sanctions are less harsh, less likely to be challenged, and more likely to be commensurate with the underlying offense.[185]

182. *See supra* Part IV.
183. *See supra* note 77 and accompanying text.
184. *See supra* Part III.
185. *Id.*

RECENT DEVELOPMENT

ADMINISTRATIVE LAW GOES TO WALL STREET: THE NEW ADMINISTRATIVE PROCESS

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INTRODUCTION

In 1938, James Landis published the now-classic book *The Administrative Process*.[1] Although the book's brilliant insights are many, Landis offered an eloquent statement on the emergence of new administrative forms in the United States bureaucracy. The book was published in the midst of a firestorm of political debate about the new bureaucracy. In a series of decisions in the mid-1930s, the Supreme Court invalidated a series of New Deal statutes. The "switch in time that saved nine" took place just a year before the book was published. Indeed, one of the book's key claims was that the structure of government bureaucracy and administrative law ought to parallel the structure of regulated industries. Why should the government structure be constrained by separation of powers principles if private industry is not? Quite apart from one's view of the merits of this argument, the underlying intuition that the structure of government regulatory institutions ought to be a function of underlying industry structure is once again vogue in politics and academia. Indeed, we are in the midst of something of an agency design renaissance—a time period of fundamental change with respect to the federal bureaucracy—deriving mainly, although not exclusively, from the emergence of new administrative forms of financial regulation.

To wit, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the legislation colloquially known as Dodd-Frank (Statute or Act), has allegedly caused a sea change in financial regulation.[2] The Statute itself is nearly a thousand pages long and not exactly beach reading. It has

1. JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

2. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at scattered provisions of the U.S. Code (Supp. IV & V 2011, 2012)).

engendered hundreds of popular press articles and scholarly debate, and was a common object of criticism on the Presidential campaign trail.[3] Most of this discussion has quite reasonably focused on the necessity and wisdom of the Statute's substance. Is it desirable or feasible to regulate over-the-counter swap markets? How much oversight and control should the federal bureaucracy exercise over large bank or non-bank financial institutions? Can an administrative agency effectively regulate the offering and provision of consumer financial products? Are the extraordinary costs of a new financial regulatory structure worth the potential benefits?

All these questions and the numerous other substantive concerns that accompany debates about Dodd-Frank are of enormous practical import. Yet, they also obviate the most important and intriguing architectural elements of Dodd-Frank that sound in administrative law and agency design. Many facets of the new financial regulatory structure are either entirely novel or hybrid entities that are rarely encountered in the administrative law landscape. Both the overarching structure of Dodd-Frank and the rules and orders promulgated pursuant to that structure are sure to be challenged root and branch in litigation. My goal in this essay is to sketch some of the institutional topology and administrative law puzzles that result from recent efforts to reform financial regulation, with an eye on acknowledging the new emerging administrative process.[4]

This essay is organized around three overarching themes. First, the new administrative process creates novel public institutions most akin to "superagencies." Some of the individual elements of these agencies are familiar, but the Statute combines these bits in unusual and challenging ways. The result is a far cry from the ideal-type bureaucratic entity at which most administrative law doctrines are tailored. These superagencies are not obviously better or worse than their institutional ancestors, but the new form warrants more significant analysis. Second, the new administrative process's underlying theory of agency design is essentially a

3. During a Florida GOP debate, Mitt Romney claimed that Dodd-Frank is "just killing the residential home market and it's got to be replaced," while Newt Gingrich said, "If you could repeal Dodd-Frank tomorrow morning, you would see the economy start to improve overnight." Jim Puzzanghera, *Geithner Says 2010 Law Made Financial System 'Stronger And Safer'*, L.A. TIMES (Feb. 3, 2012) at B5, *available at* http://articles.latimes.com/print/2012/feb/02/business/la-fi-geithner-reform-20120203.

4. A number of organizations, both law firms and nonprofits have written excellent summaries of Dodd-Frank. Although my discussion draws on many of these sources, the reports themselves are quite useful independent readings. The law firm Davis Polk has an online Dodd-Frank resource center: davispolk.com/dodd-frank, which both summarizes the law and tracks regulatory progress. Morrison & Foerster has a useful summary as well: mofo.com/files/Uploads/Images/SummaryDoddFrankAct.pdf. Other useful reports and memos are available on the websites of many major law firms.

"web-of-jurisdiction" model. The regulatory framework makes extraordinary use of partially overlapping agency authority. It incorporates well-understood administrative law doctrines; yet, the statute also directly alters them. Courts often embrace the legal fiction that Congress legislates against the backdrop of existing regulatory understandings and administrative law. The new financial regulation statutes, however, take explicit account of these doctrines, purporting to direct the application or nonapplication of judicial practice to financial regulatory institutions. Third, the new administrative process makes unprecedented use of deadlines and timing rules to structure the development of new agencies and substantive regulation. Congress has used statutory deadlines sporadically to spur recalcitrant administrative agencies, but there are more deadlines in Dodd-Frank than were effected in all of the 1990s.[5] Not only is the volume of deadlines unprecedented, but they are also coming due faster and the overwhelming majority of deadlines have been missed.

Before continuing, a quick caveat is in order. The bureaucracy is forever changing, and there is a temptation to think that each new institution is novel or somehow transformative. In general, that impulse is worth resisting. That said, an important task for scholars of the administrative state is to pursue a blend of "fit" and "justification."[6] As new administrative forms arise, it is important to ask how these institutions fit into the existing administrative framework and how well the deviation from past practice is justified. Such a project requires tacking back and forth between bits of new institutional arrangements and the administrative law framework into which they are to be slotted. This can be an awkward analytic task, but, in aspiration at least, also productive and important.

I. SUPERAGENCIES

From the perspective of institutional design, Dodd-Frank creates a series of intriguing new administrative structures. Rather than glance in the direction of all of them, the current Part focuses on two of the most prominent new bureaucratic structures: the Financial Stability Oversight Council (FSOC or Council) and the Consumer Financial Protection Bureau (CFPB or Bureau). These agencies are tasked with quite different

5. A pocket of literature in administrative law addresses agency deadlines. *See generally* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

6. With apologies to Dworkin. *Cf.* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) (positing that decisions made in the absence of clear precedent or statutory authority are made and should be made based on principle rather than policy considerations).

substantive problems. Oversimplifying a bit, the Council is supposed to protect the integrity of the U.S. financial system, while the Bureau is supposed to protect consumers in the financial marketplace. They also have very few structural similarities. Yet, in each case, the bundle of institutional arrangements creates a sort of superagency. By superagency, I do not mean to connote a broad set of substantive powers. Both of these agencies have broad powers, but so too do a lot of other bureaucratic entities. Rather, either in function or form, both agencies operate in a way quite distinct from the typical regulatory agency.

A. Financial Stability Oversight Committee

1. Overview

One of the most prominent new bureaucratic structures created by the Act is the FSOC.[7] Membership on the Council is comprised of two groups: voting members and nonvoting members.[8] The voting members each receive one vote per member.[9] The Council is chaired by the Secretary of Treasury. The rest of the voting members are the Chairman of the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Director of the Bureau of Consumer Financial Protection, the Chairman of the Securities and Exchange Commission (SEC), the Chairperson of the Federal Deposit Insurance Commission (FDIC), the Chairperson of the Commodity Futures Trading Commission (CFTC), the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration, and an independent with insurance expertise subject to appointment by the President with the advice and consent of the Senate. The nonvoting members of the Council are made up of the Director of the Office of Financial Research, the Director of the Federal Insurance Office, a state insurance commissioner, a state banking supervisor, and a state securities commissioner.

The goals for the Council are expansive, as is the nature of its authority. A main job of the Council, however, is "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace."[10] The specific duties of the Council are laid out in § 112(a)(2), but as a general matter the Council is

7. Dodd-Frank Act § 111 (codified at 12 U.S.C. § 5321 (Supp. IV 2011)).
8. Dodd-Frank Act § 111(b)(1)–(2) (codified at 12 U.S.C. § 5321(b)(1)–(2)).
9. *Id.*
10. *Id.* § 112(a)(1)–(A) (codified at 12 U.S.C. § 5322(a)(1)–(A)).

supposed to collect information that would allow it to identify potential threats to nationwide financial stability and to coordinate among member agencies to ensure that such risks do not arise.

Part of the significant power of the Council is the authority to determine that a U.S. nonbank financial company shall be subject to supervision by the Board of Governors if the Council determines that material financial distress at the institution, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the institution could pose a threat to the financial stability of the United States.[11] Such a determination is "nondelegable" and must be made by a vote of not fewer than two-thirds of the voting members then serving, including an affirmative vote by the Chairperson.[12] A similar rule applies to a Council's determination that a foreign, nonbank financial company must be supervised by the Board of Governors.[13]

All of these determinations are subject to judicial review and must be reevaluated annually.[14] The Council may rescind a determination by a two-thirds majority of the voting members then serving, including an affirmative vote of the Chairperson. Both the initial determination of risk and the subsequent potential determination of nonrisk are expressly guided by factors elaborated in the statute. The statute requires that the Council provide notice to a financial company of a proposed determination, including an explanation of its basis.[15] No later than thirty days after the date of the notice receipt, the nonbank financial company may request an opportunity for a written or oral hearing. If a hearing is requested, then no later than sixty days after the date of a hearing, the Council must notify the company of the final determination along with a statement of the basis for the decision.[16] If no timely hearing is requested, the Council shall notify the institution of the final determination.[17]

The above requirements are waivable for emergency necessity by the same two-thirds vote with the Chairman voting in the majority. Such a waiver of procedural requirements is itself subject to procedural requirements beyond the voting rule. The Council must allow a company to request an opportunity for a written or oral hearing to contest the waiver.[18] The Council must also consult with the primary financial

11. § 113(a)(1) (codified at 12 U.S.C. § 5323(a)(1)).
12. *Id.*
13. § 113(b)(1) (codified at 12 U.S.C. § 5323(b)(1)).
14. § 113(d), (h) (codified at 12 U.S.C. § 5323(d), (h)).
15. § 113(e)(1) (codified at 12 U.S.C. § 5323(e)(1)).
16. § 113(e)(3) (codified at 12 U.S.C. § 5323(e)(3)).
17. § 113(e)(4) (codified at 12 U.S.C. § 5323(e)(4)).
18. *Id.*

regulatory agency if one exists for each company that is being considered for supervision.[19] As noted, the Council's determinations are subject to judicial review, either in the D.C. Circuit or in the district court for the judicial district in which the home office of the company is located.[20] The statute purports to limit judicial review to whether the final determination was "arbitrary and capricious."[21]

If any institution supervised by the Board of Governors is determined to pose a grave threat to the financial stability of the United States, the Board shall, by two-thirds supermajority vote, limit the ability of the company to merge or become affiliated with another company, restrict the ability of the company to offer financial products, require the company to terminate activities, and if those requirements are inadequate, the Board may require the company to sell or transfer assets to unaffiliated entities. Such determinations require notice and the opportunity for an oral or written hearing.[22]

To this point, Title I sets out the basic structure and composition of the Council and develops a framework for identifying potential risky institutions subject to supervision by the Board of Governors. After an institution has been identified, a range of requirements follows. First, within six months after a final Council determination, the company must register with the Board of Governors.[23] To prevent or mitigate risks to the financial stability of the United States that arise from the material financial distress, failure, or ongoing activities of large, interconnected financial institutions, the Council may make recommendations to the Board of Governors concerning the establishment and refinement of prudential standards and reporting and disclosure requirements applicable to companies supervised by the Board of Governors.[24]

This is only a partial and already too dense overview of the Council, but it should suffice for purposes of discussion. Although the substance of these requirements is, of course, a main, if not the main, concern for industry and policymakers, for current purposes, the general structure of decisionmaking, rather than the specific details of policy recommendations, is the key consideration.

19. § 113(g) (codified at 12 U.S.C. § 5323(g)).
20. § 113(h) (codified at 12 U.S.C. § 5323(h)).
21. *Id.*
22. § 121 (codified at 12 U.S.C. § 5331(a)–(b)).
23. § 114 (codified at 12 U.S.C. § 5324).
24. § 115 (codified at 12 U.S.C. § 5325(a)(1)).

2. An Agency-of-Agencies

The leadership of many administrative agencies is structured as a multimember board. The Federal Election Commission (FEC), Federal Communications Commission (FCC), National Labor Relations Board (NLRB), not to mention the Appalachian Regional Commission, are all examples. What is somewhat less common—but certainly not unheard of—is to craft a multimember board itself made up of the leadership structure of other agencies, as Dodd-Frank does. In recent memory, the Endangered Species Act (ESA) Exemption Committee, or "god-squad," is another prominent case.[25] Although the ESA precludes government action that would result in the extinction of a species, it also contains an appeals provision. If the Secretary of the Interior finds that a proposed agency action would violate the statute, the agency may apply to the Committee made up of the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one individual from each affected state appointed by the President.[26] By regulation, the collective representatives of affected states have one vote.[27] After some threshold findings and a hearing, the Committee makes a final determination on whether or not to grant an exemption from the ESA, the grant of which requires a supermajority of five of the seven members of the Committee.[28]

There are standard accounts of why to structure a decisionmaking body as a multimember board of a committee. On Condorcetian grounds, a collective body made up of individuals with modest competence is very likely to make a correct decision when judgments are aggregated using majority rule.[29] Furthermore, a multimember board allows for a representation of divergent interests in a way that a single decisionmaker simply cannot. Both these rationales are perfectly coherent justifications for a multimember decisionmaking body representing diverse views (with

25. *See generally* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993). *See also* Endangered Species Act (ESA), 16 U.S.C. § 1531 (2006)).

26. 16 U.S.C. § 1536(e)(3).

27. 50 C.F.R. § 453.05(d) (2012).

28. 16 U.S.C. § 1536(h)(1).

29. Such arguments have become mainstream in modern legal theory. *See, e.g.*, CASS SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009); CASS SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006); Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009); *see also* David Austin-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POLIT. SCI. REV. 34 (1996).

uncorrelated errors). To be sure, in both the Council and god-squad contexts, each of these informational considerations is relevant.

Yet, another confusing impulse exists pertaining to the desirability of insulation or anti-insulation. In the ESA context, one lodestar idea was that the Committee should be insulated from the ordinary give and take of politics. For example, the main issue in *Portland Audubon Society v. Endangered Species Commission*[30] was whether ex-parte contacts between representatives of the White House and the Committee during a period of deliberations violated the Administrative Procedure Act (APA).[31] In the Committee's adjudicatory role, insulation from politics is critical. By the same token, by composing the Committee with leaders of other agencies, the vast majority of which are appointed by the President and not insulated by "for cause" removal restrictions, the ESA ensures some degree of political control.

At one level then, the composition of the Council is intuitive and perhaps even obvious. Pick representatives of the relevant agencies with regulatory authority and presumably substantive expertise and put them all on a committee. Where the composition of FSOC and the god-squad differ, however, is in the nature and degree of insulation of the membership. Membership on the Council is made up in part by chairpersons of other commissions like the SEC, CFTC, and the Federal Reserve Board (Fed. Board). At least some of these chairpersons are, by statute or norm, insulated from at-will presidential removal.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[32] the Supreme Court assumed that SEC Commissioners were insulated from at-will removal by the President and could be removed only for "inefficiency, neglect of duty, or malfeasance in office."[33] This insulation, combined with subsequent insulation of the Accounting Oversight Board, is unconstitutional according to the Supreme Court.[34] The Court's method of assuming a statutory fact based on agreement by the parties and then holding that stipulated agreement unconstitutional—without deciding that the statutory interpretation was correct—is unusual, as explained by Justice Breyer in dissent.[35] Nevertheless, if the statutory and constitutional analysis

30. 984 F.2d 1534 (9th Cir. 1993).

31. 984 F.2d at 1538; *see also* Administrative Procedure Act (APA), 5 U.S.C. §§ 500–596 (Supp. V 2012).

32. 130 S. Ct. 3138 (2010).

33. *Id.* at 3148–49 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office, and we decide the case with that understanding.'") (citations omitted).

34. *Id.* at 3143–44.

35. *Id.* at 3182–85.

is correct, the voting members of FSOC are insulated as well. The new agency-of-agencies is therefore facially much less subject to any short-term political control than, for example, the ESA Exemption Committee.

To this point then, we have a working model of an "agency-of-agencies"—an administrative structure composed of the heads of other agencies that is built on grounds of information, expertise, and (intentionally or not) a fair measure of structural political insulation. To this basic structure, a series of procedural and jurisdictional characteristics are added, which together form one variant of superagency.

3. Voting Rules and Timing Rules

The Statute makes use of a series of voting rules and timing rules to guide different determinations by the Council. Both the internal decisionmaking procedures and the interaction with other administrative institutions are extensively regulated by the Statute. These procedural and jurisdictional requirements overlay the institutional architecture. Consider first a handful of voting rule and timing requirements.

When one of the voting member posts is not occupied by a confirmed individual, "acting officials" may serve in the unoccupied post.[36] The Council must meet at least once a quarter and adopt its own rules for conducting business, except that the default voting rule is majority vote of the "voting members then serving."[37] First, note the presence of *nonvoting* members of the Council. The Statute requires that these nonvoting members not be excluded from any of the proceedings, meetings, discussions, or deliberations except that the Chairperson may on an affirmative vote of the member agencies exclude the nonvoting members "when necessary to safeguard and promote the free exchange of confidential supervisory information."[38] The nonvoting members serve terms of two years, and the independent member of the Council serves for a term of six years.[39]

The use of nonvoting members is something like designing an implicit committee to advise the explicit committee. Given that the nonvoting members have only persuasive authority, it is unclear precisely what the impact on voting member behavior will be. There is also a curious conceptual awkwardness to the design. Nonvoting members presumably represent viewpoints that are important enough to be heard and integrated

36. Dodd-Frank Act, Pub. L. No. 111-203, § 111(c)(3), 124 Stat. 1376, 1392–93 (2010) (codified at 12 U.S.C. § 5321(c)(3) (Supp. IV 2011)).

37. § 111(e)–(f) (codified at 12 U.S.C. § 5321 (e)–(f)).

38. § 111(b)(3) (codified 12 U.S.C. § 5321(b)(3)).

39. § 111(c) (codified at 12 U.S.C. § 5321 (c)(1)).

into Council decisions, but not important enough to constitute a vote. Compare the members of the ESA Exemption Committee from each affected state, who together get one vote to represent all their interests.

Second, the Statute makes extensive use of supermajority voting requirements. The characteristics of sub, simple, and super majority voting rules have been extensively canvassed elsewhere.[40] However, two familiar points are worth reiterating here. The supermajority rule, of course, gives greater weight to the status quo ante. And, majority rule is generally superior on informational grounds.[41] Consider the requirement of a supermajority to classify a financial institution as qualifying for supervision by the Fed. Board. On the one hand, given the significant new regulatory obligations that would be generated, it seems right that the Council should be *really* sure that supervision is required. By the same token, this is a setting of judgment aggregation, not preference aggregation. There is a right answer to whether supervision is necessary in any given case even if there is extensive uncertainty about what that answer is. From the perspective of efficient information aggregation, the supermajority rule is almost certainly inferior to a simple majority rule.[42]

Third, the FSOC supermajority voting requirements sometimes—but not always—require that the Chairperson be in the majority to carry. In effect, this is an asymmetric weighted voting rule. The Chairperson is given significantly more weight in determining the outcome than any of the other voting members *if* the Chairperson is in the minority. Indeed, by construction, all other voting members could favor the proposal and it would not pass if the Chair did not favor it. Most commission voting rules are not structured in this way, and, at first glance, the procedure fits awkwardly into existing administrative practice.

In an effort at justification, we might understand the weighted voting rule to be an attempt to add political control. The Chairperson of FSOC is the Secretary of Treasury, an office not insulated by any "for cause" removal provision. Thus, notwithstanding the apparent insulation of the

40. *See generally* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007); Peyton Young, *Optimal Voting Rules*, 9 J. ECON. PERSP. 51, 54 (1995).

41. DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); Austin-Smith & Banks, *supra* note 29; Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POLIT. SCI. 617 (1992). *But see* Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952); Kenneth A. Shepsle & Barry R. Weingast, *Institutionalizing Majority Rule: A Social Choice Theory with Policy Implications*, 72 AM. ECON. REV. 367 (1982).

42. *See generally* Mark Fey, *A Note on the Condorcet Jury Theorem with Supermajority Voting Rules*, 20 SOC. CHOICE & WELFARE 27 (2003).

Council, the weighted voting rule helps correct for this. So understood, the design of the Council is a blend of membership selection, voting rules, insulation, and political control.

Nevertheless, imagine a comparable voting rule for the Supreme Court or even a majority rule with a requirement that the Chief Justice always be in the majority. Criminal appeals could always be resolved in favor of the State unless a majority of the Justices, including the Chief Justice, voted otherwise. Or, in administrative law, the agency's statutory interpretation would prevail unless a majority of justices including the Chief votes otherwise. This proposal seems facially absurd, in part because it fits terribly into our existing practice, and in part, because it gives inordinate weight to the views of one individual of a multimember panel that should value each vote with roughly equal weight. An open query, then, is whether there is something wrong with our intuitions about judicial panels or whether the FSOC voting rule is out of kilter.

Fourth, these supermajority rules are combined with a series of timing rules.[43] A timing rule imposes a specific timeframe for a decision, specifies a delay before implementation of a decision, or requires reconsideration of a decision either with or without a sunset of the prior decision. In the context of the FSOC, many determinations have to be revisited annually and those requirements are paired with a subsequent supermajority requirement. Thus, while it is costly to classify an institution as requiring supervision, it is equally costly to remove that classification. There is something appealing about the symmetry of the rule. However, note that the rule biases outcomes toward two necessarily different status quo antes, first the nonclassification and then the classification. Given that one of them was clearly incorrect, it is not clear why a biased procedure is better than a simple majority rule (on informational grounds).

Fifth, there are other settings in which a supermajority vote is required, but the Chairperson need not be in the majority for the proposal to carry, for example, § 119 of Title I. The Council shall seek to resolve a dispute among two or more member agencies if (1) there is a dispute about jurisdiction over a particular entity or activity or product; (2) the disputing agencies cannot resolve the dispute in good faith without intervention; and (3) notice is provided to the disputants of the intent to request dispute resolution by the Council.[44] After consideration of relevant information, the Council may issue a recommendation in writing with an explanation of

43. *See generally* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

44. Dodd-Frank Act, Pub. L. No. 111-203, § 119(a), 124 Stat. 1376, 1408 (2010) (codified at 12 U.S.C. § 5329(a) (Supp. IV 2011)).

reasons and approval by an affirmative vote of two-thirds of the voting members of the Council then serving.[45] Thus, for a subset of decisions, the Chairperson must be in the majority, suggesting both are intentional design elements.

4. Regulating the Regulators

A final element of the Council worthy of consideration is that it often functions as a regulator of regulators. Much of its authority is actually overseeing other oversight agencies.[46] In one instance, the Council is given the authority to issue recommendations to the primary financial regulatory agencies to apply new or heightened standards and safeguards to regulated entities.[47] Such recommendations must be preceded by notice and opportunity for comment.[48] That is, it seems the Council recommendations must rely on informal rulemaking procedures as specified by the APA.[49] Such recommendations *must* take costs to long-term economic growth into account and may include prescribing or prohibiting the activity or practice entirely.[50] Note that this provision is both a restriction and expansion of the range of regulatory alternatives. The recommended outcome must be cost-benefit justified, but it may also include outright prohibition or bans, a rarity. Once a standard has been recommended, the primary financial regulatory agency has nondiscretionary duties. The primary regulatory agency (receiver of the recommended rules) "shall impose the standards" or shall explain in writing to the Council within ninety days why the agency has determined not to follow the recommendation.[51]

Many statutes contain recommendation or consultation requirements prior to agency action.[52] Four sorts of administrative practice are relevant. First, sometimes one agency promulgates a rule and another agency

45. § 119(b)–(c) (codified at 12 U.S.C. § 5329(b)–(c)). Note the slightly different voting rule: the affirmative supermajority need not include the Chairperson to carry. *See id.*

46. Eric Biber discusses agency authority of this sort as the "agency as regulator." Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 6 (2009).

47. Dodd-Frank Act, § 120(a) (codified at 12 U.S.C. § 5330(a)).

48. § 120(b)(1) (codified at 12 U.S.C. § 5330(b)(1)).

49. *See generally* APA, 5 U.S.C. § 553 (2006)).

50. Dodd-Frank Act, § 120(b)(2) (codified at 12 U.S.C. § 5330(b)(2)).

51. § 120(c)(2) (codified at 12 U.S.C. § 5330(c)(2)).

52. For example, the ESA requires all federal agencies to consult with the National Marine Fisheries Service or the Fish and Wildlife Service, if the agencies are proposing an action that may affect listed species or their designated habitat. 16 U.S.C. § 1536(a)(2) (2006)); *see also* Bennet v. Spear, 520 U.S. 154 (1997).

enforces it—so called split-enforcement regimes.[53] Second, sometimes a statute requires an action by one agency prior to an action by another agency. For example, § 7 of the ESA requires that the Fish & Wildlife Service make a "no jeopardy" finding before the "action" agency can move forward.[54] Third, and most relevant here, occasionally one agency gets to direct action by another agency or at least specify the terms of that action. The Federal Power Act[55] allows the Fish & Wildlife Service or the National Marine Fisheries Service to direct the Federal Energy Regulatory Commission (FERC) to adopt a binding restriction for fish passage in a hydropower project. The permit may not be renewed without compliance. The Secretary of Energy can also propose rules, regulations, and statements of policy in areas that fall under the jurisdiction of FERC.[56]

Note that the recommendation regime in Dodd-Frank is not quite identical to any of these settings. It is the Council that proposes the rule, takes comments on the rule, and replies to those comments. Once the Council has issued the recommendation, however, the primary regulatory agency must adopt it or explain in writing why it is not adopting the recommendation. It is hard to know whether this will constitute a great deal of discretion or virtually none, but one may assume that the agencies with primary regulatory authority will be unlikely to reject the FSOC recommendation. If the primary agency adopts the recommendation and the rule is challenged in litigation, to what extent is the primary agency's view relevant and to what extent the Council's view relevant? For example, at least in the context of *Skidmore* deference,[57] courts regularly ask about the relevant institutional expertise of the agency defending the rule. Yet, when the primary agency did not propose the rule or take comments on the rule, it places the court in a somewhat difficult position.

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53. *See* George Robert Johnson, Jr., *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987); *see also infra* Part II.A.1–2.

54. 16 U.S.C. § 1536 (2006).

55. 16 U.S.C. § 803(j)(1) (2006).

56. 42 U.S.C. §§ 7171–7173(a) (2006). *See generally* Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 51 n.199 (2010); Biber, *supra* note 46, at 6.

57. Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See generally* Michael Herz, *Judicial Review of Statutory Issues Outside of the* Chevron *Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 125 (John F. Duffy & Michael Herz eds., 2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 750–56 (2002); Richard W. Murphy, *A "New" Counter-Marbury: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1 (2004); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105 (2001).

B. Consumer Financial Protection Bureau

1. Overview

Whereas FSOC pulls much of its membership and structure from existing administrative agencies, the Bureau of Consumer Financial Protection is part new agency and part reconstituted agency. Subtitle A of Title X establishes the Bureau of Consumer Financial Protection as "an independent bureau which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[58] The Bureau is established "in the Federal Reserve System" but it is "independent" and "shall be considered an Executive agency."[59] Needless to say, this is a somewhat puzzling series of descriptive phrases to string together.

The Director of the Bureau must be a U.S. citizen and shall be appointed by the President, by and with the advice and consent of the Senate.[60] The Deputy Director is appointed by the Director and serves as Acting-Director in the absence or unavailability of the Director.[61] The Director's term is five years and the President "may remove the Director for inefficiency, neglect of duty, or malfeasance in office."[62] This is essentially a restriction that prevents the President from removing the Director at will. The Bureau's principal office must be in Washington, D.C., but regional offices may also be established, much as the Environmental Protection Agency (EPA) and other agencies have regional field offices. The Bureau has near-unilateral authority to set up shop, including its own policies, employees, seal, contracts, and so on. The Bureau also may subdelegate any of its authority to a selected employee or agent.[63]

The Bureau is given extensive powers and responsibilities, but consider only a handful. First, the Bureau is given general rulemaking and adjudication authority.[64] The Act lays out specific standards that the Bureau must consider when prescribing a rule under the federal consumer financial laws. The Bureau must consider the potential costs and benefits to consumers and "covered persons"[65] and the impact of proposed rules on

58. Dodd-Frank Act § 1011(a) (codified at 12 U.S.C. § 5491(a) (Supp. V 2012)).
59. *Id.*
60. § 1011(b)(2)–(3) (codified at 12 U.S.C. § 5491(b)(2)–(3)).
61. § 1011(b)(5) (codified at 12 U.S.C. § 5491(b)(5)).
62. § 1011(c)(3) (codified at 12 U.S.C. § 5491(c)(3)).
63. § 1012(b) (codified at 12 U.S.C. § 5492(b)).
64. § 1022(a)–(b) (codified at 12 U.S.C. § 5512(a)–(b)).
65. § 1022(b)(2)(A)(i) (codified at 12 U.S.C. § 5512(b)(2)(A)(i)).

"covered persons" and on consumers in rural areas.[66] The Act also imposes a consultation requirement with the appropriate prudential regulators and other federal agencies *prior* to proposing a rule and during the comment process for consistency with prudential, market, or systemic objectives administered by such agencies.[67]

2. Independence, Dependence, and Nondependence

It is not quite clear what it means to be an "independent bureau" established "in the Federal Reserve System" that is "considered an Executive agency." What is clear is that Dodd-Frank offers up a second model of superagency. In constitutional law scholarship, "independence" is a legal term of art, generally signaling solely that the head of an agency is insulated from at-will removal by the President.[68] As noted, that is certainly true of the Bureau, but independence in this setting is really a bundle of institutional features that far outpace whatever insulation at-will removal provides.

a. Funding

Consider first the funding mechanism for the Bureau. Rather than direct appropriation from Congress, the operating budget of the Bureau is transferred from the Board of Governors at a level between the amount "determined by the Director to be reasonably necessary to carry out the authorities of the Bureau"[69] and ten, eleven, and twelve percent of total operating expenses of the Federal Reserve system in 2011, 2012, and 2013 respectively. Nor is the provision of these funds reviewable by congressional appropriations committees.[70] At first glance, a provision that makes the Bureau reliant on the Board for funding might be understood to increase accountability of the Bureau to the Board. The nondiscretionary nature of the funding, however, means that this is not a plausible account. Moreover, the exclusion of Bureau funds from the congressional appropriations process means that one commonly cited mechanism of controlling agency behavior is not available. The NLRB, for example, is funded through the ordinary congressional appropriations process, which has rendered it the subject of political disputes. The mechanism of funding

66. § 1022(b)(2)(A)(ii) (codified at 12 U.S.C. § 5512(b)(2)(A)(ii)).

67. § 1022(b)(2)(B) (codified at 12 U.S.C. § 5512(b)(2)(B)).

68. *But see* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) (arguing that "for cause" removal protection is neither a necessary nor sufficient condition for operational independence).

69. § 1017(a) (codified at 12 U.S.C. § 5497(a)(1)).

70. § 1017(a)(2)(C) (codified at 12 U.S.C. § 5497(a)(2)(C)).

combines with the removal insulation provision to generate even more independence than would otherwise be produced.

b. Parent Agencies

Absent either the threat of removal or funding as ways of controlling the Bureau, the precise relationship between the Bureau and the Board is unclear. After all, the Bureau is established *within* the Board of Governors. For many other bureaus operating within other agencies, there is a natural tether of responsiveness and oversight that runs from the parent agency to the bureau. What of the Bureau and the Board?

The Act goes to quite extensive lengths to specify the permissible relationship between the Bureau and the Board of Governors. The Board may itself delegate to the Bureau the authority to examine the compliance of any person subject to its jurisdiction with federal consumer financial laws.[71] However, the Board may not intervene in any matter or proceeding before the Bureau. The Board may not appoint, direct, or remove any officer or employee of the Bureau. Nor may the Board merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors of the Federal Reserve banks.[72] That is, the Board may neither intervene wholesale or retail in decisions of the Bureau, nor may the Board attempt to add layers of control.

Similarly, the rules and orders of the Bureau may not be subject to approval or review by the Board.[73] Nor may any:

> [O]fficer or agency of the United States have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony or comments to the Congress, if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the Director or such officer, and do not necessarily reflect the views of the Board of Governors or the President.[74]

All of this is as far away from strong-form parental agency oversight as one can imagine.

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71. § 1012(c)(1) (codified at 12 U.S.C. § 5492(c)(1)).
72. § 1012(c)(2)(A)–(C) (codified at 12 U.S.C. § 5492(c)(2)(A)–(C)).
73. § 1012(c)(3) (codified at 12 U.S.C. § 5492(c)(3)).
74. § 1012(c)(4) (codified at 12 U.S.C. § 5492(c)(4)).

Notwithstanding all of the structural and financial independence of the Bureau, there are some intriguing constraints on the Bureau's regulations. First, in some settings, "the Council *may* set aside a final regulation prescribed by the Bureau."[75] The procedure is carefully elaborated in the Statute. Within ten days of the publication of a Bureau rule in the Federal Register:

> [A]n agency represented by a member of the Council may petition the Council . . . to stay the effectiveness of, or set aside, a regulation if the member . . . has in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system.[76]

Any petition would have to be published in the Federal Register itself and transmitted to the respective Senate and House committees.[77]

"Upon the request of any member agency, the Chairperson may stay the effectiveness of a regulation" to allow the Council to consider the petition, but only for ninety days or less.[78] "The decision to issue a stay of, or set aside, any regulation . . . shall be made" by two-thirds of the Council members then serving.[79] (Note that the Chairperson need not be in the majority to set aside the regulation). The Act does, however, utilize a supermajority voting requirement to insulate Bureau decisions, and imposes a substantive limitation on the reasons that may lawfully justify the vote.

> A member . . . may vote to stay the effectiveness . . . only if the agency or department represented by that member has--
>
> (i) considered any relevant information provided by the agency submitting the petition and by the Bureau; and
>
> (ii) made an official determination, at a public meeting where applicable, that the regulation which is the subject of the petition would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.[80]

If the Council sets aside a regulation, it is unenforceable. Although the Council must publish a decision to set aside a regulation, the decision is not

75. § 1023(a) (codified at 12 U.S.C. § 5513(a)) (emphasis added).
76. § 1023(b) (codified at 12 U.S.C. § 5513(b)(1)).
77. § 1023(b)(2) (codified at 12 U.S.C. § 5513(b)(2)).
78. § 1023(c)(1)(A)–(B) (codified at 12 U.S.C. § 5513(c)(1)(A)–(B)).
79. § 1023(c)(3) (codified at 12 U.S.C. § 5513(c)(3)(A)).
80. § 1023(c)(3)(B) (codified at 12 U.S.C. § 5513(c)(3)(B)).

subject to notice-and-comment rulemaking procedures.[81] It is, however, subject to judicial review. All told, the ability to set aside a Bureau regulation constitutes some constraint, but it seems fair to say that it does not significantly undermine the rest of the insulation measures.

c. Sibling Agencies

What of the Bureau's relationship with sibling agencies? Many of the Bureau's authorities come from preexisting institutional entities. The Bureau receives some authority from the Board of Governors, FDIC, the Federal Trade Commission (FTC), the National Credit Union Association (NCUA), the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development (HUD). By and large, the Statute simply says that the Bureau gets, for example, "all powers and duties that were vested in the Board of Governors, relating to consumer financial protection functions, on the day before the designated transfer date."[82] That said, sometimes authority is not crisply allocated.[83] In the case of the FTC, for example, the Bureau may enforce a FTC rule or the FTC may enforce a Bureau rule, respectively, as they pertain to deceptive trade practices.[84] The FTC still gets judicial deference on interpretation of the Federal Tort Claims Act, and the Bureau on all other consumer financial regulations.[85]

Bureaucratic reorganizations like this are not new, of course. Large-scale reorganizations were undertaken by President Carter in the late-1970s and also in the aftermath of September 11.[86] Yet, the result is often—as is the case here—a web of ambiguously overlapping jurisdiction by related agencies. To Dodd-Frank's credit, it addresses most of these issues explicitly. Nevertheless, whether focusing on the Bureau, the Council, SEC, CFTC, or FDIC, it is clear that there is a good deal of shifting jurisdiction and authority, some of which is simply changing hands, but some of which is exercised concurrently by multiple agencies.

Indeed, this problem, or at least situation, has been the subject of a

81. § 1023(c)(7) (codified at 12 U.S.C. § 5513(c)(7)).

82. § 1061(b)(1)(B) (codified at 12 U.S.C. § 5581(b)(1)(B)).

83. *See infra* Part II.

84. § 1061(b)(5)(B)–(C) (codified at 12 U.S.C. § 5581(b)(5)(B)–(C)).

85. § 1061(b)(5)(E) (codified at 12 U.S.C. § 5581(b)(5)(E)).

86. The Homeland Security Act of 2002, Pub. L. No. 107-296, 117 Stat. 2135 (2002) (codified at 6 U.S.C. §§ 101–596 (2006)), reorganized much of the federal bureaucracy under the aegis of the Department of Homeland Security, a new agency charged with managing domestic security risks. President Carter's bureaucratic reorganization plans in the late-1970s were also expansive. *See* Reorganization Plan No. 3, 92 Stat. 3788 (1978) (transferring administrative responsibilities pursuant to Executive Orders 12127 and 12148).

handful of recent papers in administrative law[87] and discussed in a recent Supreme Court case.[88] Given the central importance of these shared authority regimes to Dodd-Frank, Part II offers a more elaborate discussion of shared authority in general and in the new financial regulation. For the moment, note simply that these regimes do nothing to undermine the basic view that the Bureau occupies an unusual terrain when it comes to agency independence.

d. Office of Information and Regulatory Affairs

A final possibility is that the regulatory review process of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) would constrain the Bureau. FSOC rules have been submitted to OIRA for review and finalized.[89] However, no CFPB rule has been submitted to OIRA, and the conventional understanding is that there is no requirement to participate in the centralized regulatory review process.[90] The justification for that view is straightforward. By its terms, Executive Order 12866 does not apply to independent agencies and historically has not applied to the Fed. Board. If the CFPB is either an independent agency or a unit of the Board, then no participation in regulatory review is required. Alternatively, if the "for cause" insulation of the CFPB head "amounts to" the creation of an independent agency, then perhaps that too would insulate the Bureau from OMB.

While these arguments may be plausible, the conclusion is certainly not inevitable. After all, the Statute also clearly indicates that the CFPB is an "executive agency" and executive agencies are within the stated jurisdictional scope of Executive Order 12866. Thus, while all or at least most parties seem to agree that the CFPB need not submit rules to OIRA for review, the Statute nowhere expressly exempts the Bureau and need not be read to implicitly exempt the Bureau. Regardless, if the conventional

87. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping & Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006).

88. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1883–84 (2013) (Roberts, J., dissenting) (citing Dodd-Frank's web-of-jurisdiction model and its attendant uncertainties to help illustrate how the Court supposedly erred in holding a court must defer to an agency's interpretation of a statutory ambiguity that concerns the scope of an agency's jurisdiction).

89. *See, e.g.*, 12 C.F.R. § 1310 (2013).

90. *See, e.g.*, *Who's Watching the Watchmen?: Hearing Before the Subcomm. On TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 43–52 (2011) (statement of Todd Zywicki, Professor, George Mason University).

wisdom is correct, it is yet another mark in favor of the superagency thesis.

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Together then, the Council and Bureau constitute new bundles of institutional architecture, regulatory authority, and procedural mechanisms that do not fit neatly into the existing administrative landscape. Whether one considers the agencies hybrid agencies or superagencies, it seems clear that more work analyzing the conceptual foundations and practical implications is required.

II. WEBS OF AGENCY AUTHORITY

In addition to offering new models of superagencies, Dodd-Frank also builds upon and generates new webs of agency jurisdiction. The result is a complex set of task assignment and administrative authority. By and large, however, this web is crafted by design rather than accident. This is not a case of unnecessary duplication, but rather the adoption of overlapping authority as a principal organizing principle for financial regulation. Even as regulatory duplication is targeted in political commentary, the web-of-authority model is seemingly becoming the new norm for new administrative structures. As one court recently noted, "we live in an age of overlapping and concurring regulatory jurisdiction."[91] Such regimes have many variants, however, and each can receive different treatment in the courts. Part of what is interesting about Dodd-Frank's use of overlapping jurisdictional regimes is that the Statute expressly builds upon existing judicial treatment of regimes and then modifies those doctrines by statute.

A. Background

By way of conceptual background, suppose Congress is considering enacting a new statute to address policy space X, that there are only two governmental units, A and B, and that Congress wishes to allocate some authority to one entity and some authority to the other. Conceptually, Congress might allocate authority along two dimensions: exclusivity and completeness. With respect to exclusivity, Congress might grant authority to one agency alone or to both. With respect to completeness, Congress might delegate authority to act over the entire policy space or only a subset

91. FTC v. Ken Roberts Co., 276 F.3d 583, 593 (D.C. Cir. 2001) (quoting Thompson Med. Co. v. FTC, 791 F.2d 189, 192 (D.C. Cir. 1986)); *see* FTC v. Texaco, Inc., 555 F.2d 862, 881 (D.C. Cir. 1977); *see also* FTC v. Cement Inst., 333 U.S. 683, 694–95 (1948) (allowing two separate agencies with statutorily prescribed jurisdiction to conduct simultaneous enforcement proceedings against one party for the same offense).

of the space.

Combining the dimensions of exclusivity and completeness yields four potential statutory schemes. (1) Congress could delegate complete and exclusive jurisdiction. In the complete and exclusive regime, there is no policy authority held simultaneously by both agencies, and the combination of the policy space regulated by both agencies is the entire policy space. (2) Congress could delegate incomplete and exclusive jurisdiction. This statutory scheme excepts a subset of the policy space from the jurisdiction of either agency. The remainder of the space is exclusively within the jurisdiction of either agency A or agency B. The important difference between regimes (1) and (2) is that some potential authority in the policy field that could have been given to an agency is not given to either agency. (3) Congress could delegate complete authority to agencies A and B, but with nonexclusive jurisdictional assignments. The concurrent authority might be perfectly coterminous or, more likely, only partially overlapping. (4) Lastly, Congress might generate a nonexclusive shared jurisdiction scheme in which the grant of authority is incomplete (or nonexhaustive). At least some portion of each agency's authority would be shared with the other agency. What differentiates regime (4) from regime (3) is that there is also some subset of the policy space not clearly given to either agency, although, of course, the scope and existence of this pocket will usually be ambiguous.[92]

Dodd-Frank makes use of most, if not all, of these potential regimes. Sometimes a task is clearly given to a single institution. Elsewhere one statutory or regulatory provision may be enforced by multiple agencies. Sometimes one agency may enforce another agency's rules. Elsewhere one agency may "recommend" a rule to another agency that the second agency must adopt. In other settings, one agency's rule may be set by a second agency. To give a slightly more robust sense of the details, consider two web-of-authority mechanisms on display in Dodd-Frank.

1. Either-Or Enforcement

The *either-or* mechanism is a variant of the split-enforcement model, in which one agency is given the authority to issue rules and another agency is given the authority to enforce those rules.[93] The Occupational Safety and Health Act (OSHA) delegates rulemaking authority for workplace safety standards while granting the Occupational Safety and Health Review

92. *See generally* Gersen, *supra* note 87.

93. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991).

Commission adjudicatory authority for violations.[94] In other settings, multiple agencies have the authority to enforce the same statute, but each against different regulated parties.[95]

The either-or enforcement scheme is distinct. In the context of the SEC and the CFTC, *either* Commission may enforce the rules promulgated by the *other* Commission. In effect, for any given set of rules implementing these portions of the statutes, there are two institutions that may opt to enforce or decline to enforce. One might think about this regime in a number of different ways. At first cut, the regime increases the probability of enforcement. Adding another agent who may choose to enforce if the promulgating agency declines would seem to strictly increase the probability of a rule's enforcement. At second cut, this is not so clear. A problem with overlapping authority is the risk of free riding. Because all enforcement actions are costly, it might be the case that agency A would prefer that a rule be enforced, but would also prefer that some other agency bear the costs of enforcement. In a world where only one agency may enforce a rule, enforcement will occur in this scenario because the agency prefers enforcement to no enforcement. In a world where multiple agencies could enforce, however, things are less certain. Either agency may attempt to free ride on the other agency and be less likely to pursue the enforcement action. Adding multiple enforcers does not inevitably imply more enforcement.

2. Mother-May-I

The *either-or* enforcement regime generates multiple bites at the same rule, but the enforcement decision is always at the option of the agency pursuing the enforcement. That is, either agency may decide not to enforce the rule and either agency may alone decide to enforce the rule. In other portions of the statute, the enforcement scheme differs. One agency is given the authority to mandate that another agency enforce a given rule. For example, upon an affirmative vote by a majority of the Council, the Council "may require the Supervisory Agency to—(A) exercise the enforcement authority referenced in subsection (c); and (B) take enforcement action against the designated financial market utility."[96]

94. *See* 29 U.S.C. § 661 (2006); *see also* Freeman & Rossi, *supra* note 87, at 18.

95. Freeman & Rossi, *supra* note 87, at 18. For example, the Federal Deposit Insurance Act operates in this way. *See* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246 (D.C. Cir. 2003).

96. Dodd-Frank Act § 807(e)(4)–(f) (codified at 12 U.S.C. § 5466(e)(4)–(f) (Supp. IV. 2011)) (dealing with examination and enforcement actions against designated financial market utilities).

Under limited circumstances then, the Council may dictate to another agency that it *must* enforce its rules against a specific regulated party. This regime is one variant of a set of administrative rules in which one agency dictates the terms of action by another agency. Such regimes push the boundaries of accountability by reducing the clarity about which institution is responsible for which actions.

B. Understanding Shared Jurisdiction Schemes

If shared jurisdiction schemes generate nontrivial difficulties for courts and private actors, why utilize them? There are at least two standard reasons. First, shared jurisdiction schemes might allow Congress to take advantage of the informational expertise of multiple agencies. To illustrate, even if the SEC is the "best" agency to generate and enforce rules pertaining to a given financial product, if the CFTC also has some expertise, the shared jurisdiction regime allows information from both agencies to be aggregated in the policy domain. There is nothing fancy at work here; just as the collective judgment of a reasonably competent group of individuals may outperform a sole expert, so too may the collective judgment of several agencies outperform a single expert agency. Relatedly, it may simply be that one agency has better institutional competence at promulgating rules, for example, and a different agency has more ability to effectively pursue enforcement actions.

A second possibility is that shared jurisdiction schemes are a way to manage the principal–agent problem generated when Congress delegates to the bureaucracy. By crafting a regime in which multiple agents compete with each other, Congress might encourage the development and accurate revelation of information by agencies. Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent.[97] For example, if agencies prefer to increase jurisdiction rather than decrease it, assigning overlapping jurisdiction could give agencies an incentive to invest in information at time 1, so that their jurisdiction is not eliminated at time 2.[98] If Congress wants to take advantage of agency knowledge, but is concerned that agencies will shirk and fail to invest heavily enough in the development of expertise, manipulating jurisdiction can help manage that possibility. If one agency invests in developing

97. *See* Gersen, *supra* note 87.

98. Even this is not obvious. James Q. Wilson sought to explain why expansionist bureaucracies often shun new responsibilities. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989). Agencies might lose a sense of mission, or jurisdictional expansion might introduce additional opportunities for failure.

expertise and the other does not, Congress can shift from regime 2 to regime 1, giving the agency that invested in expertise exclusive authority. The threat of jurisdictional loss is a sanction for the failure to produce desirable informational expertise. So understood, concurrent-authority regimes are one potential mechanism to manage agency problems in political institutions.

C. Problems and Puzzles

The potential downsides of concurrent-authority regimes are genuine. First, when Congress observes only outcomes and not effort, overlapping jurisdiction can incentivize both agencies to shirk their duties.[99] Second, bureaucratic redundancy can create waste and duplicative monitoring as well.[100] Third, concurrent-authority regimes can generate a lack of clarity about which institution is responsible for policy success or failure.[101] Such clarity is generally taken to be a prerequisite for accountability in government. Fourth, coordinating agencies can be costly. Fifth, one needs a mechanism for resolving inter-agency conflicts. Sixth, that mechanism often requires judicial intervention of one sort or another.

Just by way of illustration, Freeman and Rossi recently argued that coordination across agencies with overlapping or duplicative authority in the same policy domain is the central problem for concurrent-authority

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99. *See* CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES 332 (1999); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 286–87 (2003); Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1 (1994); *see also* JONATHAN B. BENDOR, PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT 244–45 (1985); Dan S. Felsenthal & Eliezer Fuchs, *Experimental Evaluation of Five Designs of Redundant Organizational Systems*, 21 ADMIN. SCI. Q. 474, 474 (1976); Rowan Miranda & Allan Lerner, *Bureaucracy, Organizational Redundancy, and the Privatization of Public Services*, 55 PUB. ADMIN. REV. 193 (1995).

100. *See* Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, in POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY (George A. Krause & Kenneth J. Meier, eds. 2003); Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297, 310 (1983). *But see* William A. Niskanen, *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 637 (1975) (arguing that competition decreases cost of monitoring).

101. *See* Ethan Bueno de Mesquita & Dimitri Landa, Working Paper, *Does Clarifying Responsibility Always Improve Policy?* (2012), *available at* http://home.uchicago.edu/~bdm/PDF/clarity.pdf; G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 50–52 (2000); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010); Margit Tavits, *Clarity of Responsibility and Corruption*, 51 AM. J. POL. SCI. 218, 219–21 (2007).

statutory schemes.[102] Focusing mainly on the environmental context, they argue that the risk of multiple agencies working at loggerheads is quite significant and they survey a wide range of coordination mechanisms, both descriptively and normatively.[103] Properly understood, the coordination problem is about two agencies, each of which has clear and exclusive authority, acting in such a way as to produce inconsistency or negative externalities across their respective jurisdictions. Coordinating these different agencies entails taking into account the respective information, goals, and methods that each agency is otherwise entitled to use.

Closely related, but conceptually distinct, is the problem of inter-agency conflict resolution. Here, there are two distinct sorts of potential agency conflicts. The first involves a concurrent-authority regime in which both agencies clearly have authority to act. In this case, there is no dispute about which agency is authorized to act. Rather, the two agencies disagree, for example, about the proper interpretation of a statutory provision relevant to each agency's authority. A distinct form of agency conflict entails a jurisdictional dispute, which arises most often in settings where the statute is not clear about which agency, if any, is authorized to act in some policy domain.

In any of the above settings, courts must often decide to *which* agency to defer in the context of *Chevron*, *Skidmore*, or other doctrinal deference regimes. When a statute is administered by multiple agencies, do agency views about statutory meaning receive deference in the *Chevron* framework?[104] Some shared jurisdiction statutes are "general" statutes, which no agency truly "administers." For statutes like the Freedom of Information Act (FOIA) or National Environmental Policy Act (NEPA), "it is universally agreed that no single agency with enforcement power has been charged with administration of these statutes, and hence that *Chevron* does not apply."[105] Congress should not be taken to have implicitly delegated law-interpreting authority to any agency simply because no agency administers the statute.[106] In *Professional Reactor Operator Society v.*

102. Freeman & Rossi, *supra* note 87.

103. *Id.*

104. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 851 (2001); *see also* Sutton v. United Airlines, 527 U.S. 471, 478–80 (1999); Bragdon v. Abbott, 524 U.S. 624, 642 (1998). As Merrill and Hickman point out, in the pre-*Chevron* case law, the fact that a statute was administered by multiple agencies was sometimes cited as a factor for giving reduced deference. *See* New Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 144–45 (1976).

105. Merrill & Hickman, *supra* note 104, at 893.

106. The Supreme Court has never conclusively said that interpretations of statutes administered by multiple agencies do not qualify for *Chevron* deference, but Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 136–37 (1997), is probably the closest. *See also*

Nuclear Regulatory Commission,[107] the D.C. Circuit refused to give *Chevron* deference to the Nuclear Regulatory Commission's interpretation of the APA, because the "Supreme Court has indicated . . . that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer."[108]

Dodd-Frank, of course, is not a general nonadministered statute in the FOIA or APA sense. Rather, it is a statutory regime in which *multiple* agencies are expressly given overlapping administrative authority. In similar cases of concurrent jurisdiction, courts have sometimes concluded no agency was given law-interpreting authority in the relevant sense, but have more often sought to identify which of the multiple agencies is the primary agency to which law-interpreting authority was granted. For example, in *Martin v. Occupational Safety & Health Review Commission*,[109] the Supreme Court was faced with a conflict between the Secretary of Labor and the Health Review Commission, both of which have responsibility for implementing OSHA.[110] The Court rejected the Commission's interpretation, holding that the Secretary was the agency entitled to deference, not the Commission.[111] The Supreme Court appeared to reason that Congress delegates law-interpreting or "force of law" authority to a single agency.[112] Said the Court:

> Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative

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Merrill & Hickman, *supra* note 104, at 893 n.289.

107. 939 F.2d 1047 (D.C. Cir. 1991).

108. *Id.* at 1051.

109. 499 U.S. 144 (1991).

110. *See generally* Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991); George Robert Johnson, *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987). *See also* Mingo Logan Coal Co. v. EPA, 850 F. Supp. 2d 133 (D.D.C. 2012) (stemming from a split of authority under Clean Water Act § 404 between the Environmental Protection Agency (EPA) and the Army Corps of Engineers, which led to noncooperation and legal action), *overruled* by 714 F.3d 608 (D.C. Cir. 2013) (reversing and holding that the EPA, not the Army Corps, had authority).

111. *Martin*, 499 U.S. at 157.

112. This idea is even implicit in the way the Court phrased the issue presented: "The question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this 'interpretive' lawmaking power under the OSH Act." *Id.* at 151.

actor in the best position to develop these attributes.[113]

ETSI Pipeline Project v. Missouri[114] is similar. The case involved a dispute over whether the Flood Control Act of 1944[115] created overlapping or exclusive agency jurisdiction. The Flood Control Act granted authority to the Federal Power Commission, the Department of Agriculture, the Department of Interior, and the Secretary of War.[116] Both the Secretary of Interior and the Secretary of War asserted the authority to enter into contracts respecting use of certain reservoirs.[117] In a unanimous opinion, Justice White concluded that the plain language of the Act granted exclusive authority to the Secretary of War, rather than the Secretary of Interior who claimed concurrent authority.[118]

It is against this backdrop that Dodd-Frank's provisions must be understood. Judicial practices like those discussed above risk giving statutory authority to the wrong agency; in the face of conflicting agency judgments, courts may resolve that conflict by giving decisionmaking authority to a different agency than Congress would have preferred. They also constitute a significant doctrinal problem to which Dodd-Frank provides a solution.

D. Solutions

There are two main types of design mechanisms used to manage problems generated by the web-of-authority structure. The first is a set of coordination mechanisms, very much of the sort recently emphasized by Freeman and Rossi.[119] The second, more conceptually interesting mechanism is a series of "directive deference" provisions in the Statute that incorporate and modify existing administrative law doctrine.

1. Coordination Old and New

To start with, Dodd-Frank relies on a series of mechanisms to manage the coordination problem across agencies. In some settings, the Statute

113. *Id.* at 153.

114. 484 U.S. 495 (1988)*; see also* Timothy K. Armstrong, Chevron, *Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203, 246–48 (2004).

115. Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (codified as amended at 33 U.S.C. §§ 701–710 (2006).

116. *Id.*

117. *See* ETSI, 484 U.S. at 502–05; *see also* Flood Control Act of 1944 at 890, 903–07.

118. *See ETSI*, 484 U.S. at 497 (explaining that Justice Kennedy took no part in the consideration or decision).

119. *See* Freeman & Rossi, *supra* note 87.

relies on inter-agency memoranda of understanding rather than litigation. The CFTC and FERC are required to "negotiate a memorandum of understanding to establish procedures for . . . resolving conflicts concerning overlapping jurisdiction between the [two] agencies."[120] Addressing potential conflicts between the Bureau and the Attorney General, the Statute requires that "to avoid conflicts and promote consistency regarding litigation of matters under Federal law, the Attorney General and the Bureau shall consult regarding the coordination of investigations and proceedings, including by negotiating an agreement for coordination . . . ."[121] However, "nothing in this paragraph shall be construed to limit the authority of the Bureau . . . to interpret Federal consumer financial law."[122] To "avoid duplication of or conflict between rules" of the Bureau and the Federal Trade Commission (FTC), the agencies shall negotiate an agreement for rulemaking including a consultation requirement prior to rule proposal.[123] The inter-agency consultation requirements that are such are a major theme in Freeman and Rossi's recent work are on extensive display in Dodd-Frank.[124]

2. Directive Deference

The Statute's primary and more innovative approach, however, is to adopt a series of provisions that purport to direct the application or nonapplication of administrative law doctrines—most often concerning whether and when courts should defer to agency judgments. Dodd-Frank's solution to these problems is elegant in its simplicity. The Statute simply tells the court exactly what to do. This possibility was raised by Elizabeth Garrett about a decade ago in a somewhat different context,[125] but at that time it was exceedingly rare for Congress to say much of anything clear about judicial deference and administrative agencies.[126]

Chevron famously sets out a framework for judicial review of agencies' statutory interpretations. At "Step One" of *Chevron*, judges ask whether the statute speaks to the "precise question at issue;" if so, then the judges simply

120. Dodd-Frank Act, Pub. L. No. 111-203, § 720(a)(1), 124 Stat. 1376, 1657–58 (2010) (codified at 15 U.S.C. §8308(a)(1)(A)–(C) (Supp. IV 2011)).

121. § 1054(d)(2)(B) (codified at 12 U.S.C. § 5564(d)(2)(B)).

122. § 1054(d)(2)(C) (codified at 12 U.S.C. § 5564(d)(2)(C)).

123. § 1061(b)(5)(D) (codified at 12 U.S.C. § 5581(b)(5)(D)).

124. Freeman & Rossi, *supra* note 87, at 1158 (distinguishing discretionary consultation from mandatory consultation and citing the National Environmental Policy Act (NEPA) as a prime example of the latter); *see also* NEPA, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321–4370(h) (1970)).

125. Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637 (2003).

126. *Id*. at 2640.

enforce its commands. If the statute contains a gap—if it is silent or ambiguous on the relevant question—the judges are to proceed to "Step Two," at which they ask whether the agency's interpretation is "reasonable," or, in other words, whether the agency's interpretation falls within the scope of the statute's ambiguity.[127] In *United States v. Mead Corp.*,[128] the Court, following recent commentary,[129] suggested that *Chevron* rests on an "implicit congressional delegation" of law-interpreting authority to agencies.

On this view, the global default rule of *Chevron*—statutory silence or ambiguity yields law-interpreting authority by agencies—derives from an implicit general instruction by Congress. Although this idea seems best characterized as a legal fiction, the idea seems to have been embraced by the modern Court. Doing so necessitates saying something about the APA, which on its face seems to require that courts are to decide all relevant questions of law.[130] Unless statutory meaning is outside the purview of law—very few, if any, hold—*Chevron* would seem inconsistent with the APA.[131] To avoid this problem, some commentary suggests that judicial doctrine regarding deference to agencies is itself among the legal rules or law that courts are to apply.[132]

If the legal foundation for the *Chevron* doctrine, which today provides a detailed roadmap of the landscape for judicial deference to administrative agencies, is implicit congressional intent, then the implicit and general legislative request could surely be eliminated, modified, or seemingly directed by Congress. Yet, efforts by Congress to direct the application of legal doctrine has always been met with mixed reviews. On the one hand, it is relatively uncontroversial that Congress may, as it has done in the APA and a host of other statutes, establish a standard of review that courts must apply, for example, the "substantial evidence" or "arbitrary and capricious" standards in the APA. On the other, critics suggest there is something unseemly or inappropriate when Congress wades into management of judicial doctrine.[133]

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127. *See* Chevron U.S.A., Inc. v. Nat'l Def. Res. Council, 467 U.S. 837, 845 (1984).

128. 533 U.S. 218, 237 (2001).

129. *See* Merrill & Hickman, *supra* note 104.

130. *See* 5 U.S.C. § 706 (2006) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . .").

131. *But see* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

132. *See generally* Ronald Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 9–14, 19–22 (1985); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

133. *Compare* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMM. 191 (2001) (contending that Congress has no constitutional

In several sections, Dodd-Frank expressly addresses judicial deference rules, purporting to tell the courts how to apply their existing deference doctrines in the context of Dodd-Frank agencies.

(1) Title VII, Subtitle A, deals with CFTC and SEC regulation of Over-the-Counter Swaps Markets.[134] The Statute imposes various consultation obligations on each agency, but it also outlines a procedure to deal with disagreements.[135] If either the SEC or CFTC determines that a final rule or order of the other Commission conflicts with the relevant part of the Statute, that Commission may sue in the D.C. Circuit.[136] The Statute requires that the D.C. Circuit "give deference to the views of neither Commission."[137] Rather, the court shall determine whether the agency judgment is in conflict with the Statute.[138] Similarly, the agencies share authority for categorization of "novel derivative products." Here too, either the CFTC or the SEC may petition the D.C. Circuit for review of a final order of the other Commission.[139] The court "shall give no deference to, or presumption in favor of, the views of either Commission."[140]

(2) Because the Bureau's rulemaking authority could be understood to overlap with the jurisdiction of other agencies, the Act goes to some length to clarify the relative priority of Bureau judgments. Such provisions are discussed elsewhere in the draft, but one such provision relies on judicial deference doctrines to accomplish this task. The Act requires that:

> [T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, or interpret, or administer the provisions of such Federal consumer laws.[141]

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authority to tell federal courts how to decide cases), *with* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000) (arguing that the "prudential" nature of *stare decisis* allows Congress to permissibly, for prospective legislation, direct the Court to decide constitutional or statutory interpretation issues without regard to prior precedent).

134. Dodd-Frank Wall Act, Pub. L. No. 111-203, § 712(a)(1)–(2), 124 Stat. 1380, 1641 (2010) (codified at 15 U.S.C. § 8302(a)(1)–(2) (Supp. IV 2011)).

135. *See id.* § 712(c) (codified at 15 U.S.C. § 8302(c)).

136. § 712(c)(1) (codified at 15 U.S.C. § 8302(c)(1)).

137. § 712(c)(2) (codified at 15 U.S.C. § 8302(c)(2)).

138. *See* § 712(c)(1)(A)–(B) (codified at 15 U.S.C. § 8302(c)(1)(A)–(B)) (providing that the test is whether an agency judgment is in conflict with subsection (a) or (b), as applicable).

139. § 719(b)(1) (codified at 15 U.S.C. § 8307(b)(1)).

140. § 719(b)(3) (codified at 15 U.S.C. § 8307(b)(3)).

141. § 1022(b)(4)(B) (codified at 12 U.S.C. § 5512(b)(4)(B)).

In cases involving conflicting judgments by multiple agencies working in the same policy domain, courts must often make a judgment about which agencies, if any, should get deference for their views. This inquiry is highly contextualized, turning on agency expertise, statutory structure, implied congressional intent, and the like. One possibility is that neither agency's views warrant deference when both have partial responsibility in a given statutory domain. Another is that there is implicitly a primary agency that a court should seek to identify and then defer to the primary agency's views. One finds strands of both views in case law. The above provision seeks to short circuit that inquiry, providing a clear statutory answer: when the Bureau is one of several agencies whose views could be given judicial deference, the courts should defer to the Bureau—pretending that the Bureau were the sole agency operating in the field, rather than one of many.

(3) Subtitle D of Title X deals with the relationship between federal and state law. The Act requires that when reviewing a determination made by the Comptroller regarding preemption of state law, a court must "assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and the other factors which the court finds persuasive and relevant to its decision."[142] This provision purports to structure and guide the deference that a court would or would not otherwise grant to agencies making judgments pertaining to preemption, an especially unsettled area of administrative law.

(4) Section 1061 addresses transfer of functions from other agencies to the Bureau. To address the residual authority that the Act does not modify, the Act adds a deference clause:

> No provision of this title shall be construed as altering, limiting, expanding, or otherwise affecting the deference that a court affords to the—
>
> (i) Federal Trade Commission in making determinations regarding the meaning or interpretation of any provision of the Federal Trade Commission Act, or of any other Federal law for which the Commission has authority to prescribe rules; or
>
> (ii) Bureau in making determinations regarding the meaning or interpretation of any provision of a Federal consumer financial law (other than any law described in clause (i)).143

142. § 1044(b)(5)(A) (codified at 12 U.S.C. § 25b(b)(5)(A)).

143. § 1061(b)(5)(E) (codified at 12 U.S.C. § 5581(b)(5)(E)).

Because the Statute modifies so much of the existing regulatory framework, there is an obvious risk that the courts might interpret the Statute as modifying the requisite deference to be given to existing agency judgments. The same idea seems to underlie § 104: "No provision of this title may be construed as altering, limiting, or otherwise affecting the deference that a court affords . . . ." A handful of other provisions echo the language used in the above examples but add nothing analytically. A preliminary search of the U.S. Code returns only forty parts of the Code in which the term deference is used at all, and the vast majority of these are not really on point. These efforts to modify judicial deference doctrine via statute,[144] are not without potential pitfalls, however.

a. Legality

Congressional authority to mandate doctrinal rules for judicial review has been prominently analyzed in the context of Thayerian deference to legislative judgments of constitutionality.[145] The Necessary and Proper Clause gives Congress the power to enact legislation for carrying into execution the judicial power, while Article III, Section Two, Clause Two gives the Supreme Court jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[146] There is robust literature on the precise powers these clauses provide to Congress.[147] Yet, short of a congressional attempt to direct the outcome of a specific case, the Constitution clearly provides Congress with some authority to regulate judicial review of agency statutory interpretation.[148] Enabling legislation

144. *See* Garrett, *supra* note 125.

145. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). For more recent discussions, see Thomas C. Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993); Stephen B. Presser, *On Tushnet the Burkean and in Defense of Nostalgia*, 88 NW. U. L. REV. 42 (1993); Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9 (1993).

146. U.S. CONST. art. III, § 2, cl. 2.

147. *Compare* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (exploring, dialectically, the constitutional and normative limits of Congress' power vis-à-vis the judiciary), *with* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 907 (1982) (analyzing the "internal" and "external" constraints on Congress' power under the Exceptions Clause).

148. *Compare* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2086 (2002) (challenging the assumption that the judiciary is the proper branch to prescribe rules of statutory interpretation, and concluding that Congress can and

establishes quorum rules for the Supreme Court and lower courts, and codifies rules of evidence and procedure for the federal courts. Recent legislation has even precluded specific interpretations of statutes in live litigation, albeit with a general interpretive directive.[149] So long as the regulation does not undermine the "essential functions" of the Judiciary, Article III would seem not to preclude it.[150] Congress generally may not lawfully direct the outcome of a specific case,[151] but it is not controversial that Congress may mandate the use of certain rules of evidence and procedure.[152] Others have argued that Congress could and should craft general statutory requirements for statutory interpretation by courts.[153] The directive deference rules are a parallel idea. With respect to judicial review of agency actions, Congress may preclude agency actions from judicial review altogether[154] (at least to the extent that the challenge does not raise constitutional claims),[155] restrict the venue and timing of judicial review of agency action, and specify the legal standard by which courts will review agency action. So long as *Chevron* is not a constitutional doctrine, Congress remains free to modify it, and that is precisely what Dodd-Frank seeks to accomplish.

b. Judicial Implementation

Setting aside any concerns about legality, there is an additional question about how such provisions will be interpreted in the courts. Although the most likely outcome may simply be that the courts do as the Statue indicates, several pockets of existing administrative law cases give some pause. First, courts and commentary agree that the legislature has the authority to preclude judicial review of many agency decisions—subject to Due Process requirements. Nevertheless, courts have often carved out an exception for challenges to an entire decisionmaking scheme rather than a

should exercise this power), *with* Linda Jellum, *Which Is To Be Master?*, 56 UCLA L. REV. 837 (2009) (arguing that Congress' attempts to control the process of interpretation to promote specific policy objectives are fraught with a host of undesirable and impermissible problems).

149. *See, e.g.*, Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 108-108, § 127, 117 Stat. 1241, 1263 (2004).

150. Hart, *supra* note 147.

151. *See* United States v. Klein, 80 U.S. 128 (1872).

152. *See* FED. R. EVID.; FED R. CIV. P.

153. *See* Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2102–03 (2002).

154. 5 U.S.C. § 704 (2006).

155. *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974); Czerkies v. Dep't of Labor, 73 F.3d 1435 (7th Cir. 1995) (en banc).

specific decision[156] and have often construed limits on court jurisdiction narrowly.[157] Second, recall that some critics of *Chevron* have argued it is inconsistent with the APA dictate that courts decide all matters of law. One response to this concern is that deference doctrines are part of the "law" that judges are to decide and apply. The result could be that courts defer to agencies on some legal questions, notwithstanding a seemingly clear directive to do otherwise. The point is not that one side of this debate is right or wrong, only that judicial behavior does not always comport with seemingly clear statutory directives about interpretive practice.

c. Desirability

Suppose that implementation were costless and that courts followed whatever deference directive the legislature wrote into statutes. No doubt one's view about deference directives turns, in part, on prior views about relative institutional competence of courts and legislatures and one's characterization of the underlying judgment. If deference doctrines were merely a statement of underlying policy preference, then it is hard to see why judgments by courts would be either more democratically legitimate or better in any instrumental sense. If Congress likes strawberry ice cream better than vanilla, why are courts better situated to articulate that taste?

A better characterization is that deference is really about how much decisionmaking authority and discretion to allocate to one political institution instead of another. Deference doctrines are instrumental in a means–ends sense. In application, a legislative deference directive will tend to be more like a rule, whereas a judicial deference doctrine will tend to be more like a standard. Of course, this is not quite right because a judicial deference doctrine could be formulated as a rule and the legislative

156. *See Czerkies*, 73 F.3d at 1435; *see also* 5 U.S.C. § 702 (2006) (waiving the federal government's sovereign immunity from actions seeking judicial review of federal administrative decisions except with respect to actions for "money damages"); Georgia v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003) (upholding the Board of Immigration Appeals' "use of the streamlining procedure in a case whose facts presented no substantial issue of law and no basis for granting asylum" albeit "without explicitly deciding the issue" of reviewability); Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670, 673 (7th Cir. 1992); Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 293 (6th Cir. 1991) (finding a statutory bar to pre-enforcement constitutional challenges in an environmental protection statute); Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988); Higgins v. Kelley, 824 F.2d 690 (8th Cir. 1987) (per curiam) (finding that a veterans' benefits law did preclude constitutional challenges). *See generally* Ronald Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203 (2011).

157. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895–97 (1984); *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010).

deference directive formulated as a standard. Yet, to the extent that the latter is inevitable ex ante and the former inevitable ex post, the two alternative ways of implementing a deference regime correspond somewhat to the typical rules–versus–standards debates.[158] The ex ante directive produces more certainty going forward, but the ex post doctrine allows for more integration of changing circumstances. The ex ante rule economizes on decision costs in the future, but risks higher error costs if facts on the ground change rapidly. Since the rules–versus–standards debate generates no clear statement that a rule is better than a standard or vice versa, it would be surprising if there was a clear winner in the congress–versus–courts deference analysis either. What is intriguing, however, is the level of granularity at which Dodd-Frank deference directives seek to utilize and to intervene in existing administrative law doctrine.

* * *

In sum, Dodd-Frank makes extensive use of the web-of-authority model, but also offers a series of innovative solutions to problems associated with similar statutory schemes. These provisions both incorporate and make adjustments to existing administrative law doctrine as part of the more general statutory scheme. Dodd-Frank is an instance of the melding of legislation with regulation, the crafting of law that blends administrative law doctrine, statutory interpretation, and legislative drafting. In short, it is a new administrative process.

III. DEADLINES

Dodd-Frank generated significant new obligations on the agencies and it imposed roughly four hundred total rulemaking requirements. Notably, nearly three-fourths of these also contained specific deadlines for completion.[159] Approximately three-fourths of the deadlines that had been reached by the end of 2011 were not met by the agencies.[160] That is, by 2012, two hundred Dodd-Frank rulemaking requirements had passed and 149 had been missed. This state of affairs raises two sets of questions. First, how should we understand the extensive legislative use of deadlines to structure bureaucratic process? Second, what is the import of missing

158. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

159. Davis Polk, *Dodd-Frank Progress Report* (Jan. 2012), *available at* http://www.davispolk.com/files/Publication/0070db24-e562-4666-832c-03ad96defd42/Presentation/PublicationAttachment/b1836732-9b89-46be-a9e5-07c77a08d62a/Jan2012_Dodd.Frank.Progress.Report.pdf.

160. *Id.*

seventy-five percent of these statutory deadlines?[161]

Statutory deadlines are scattered throughout administrative law, but the scope and scale of their use in Dodd-Frank is unheard of. In 1998 and 1999, there were only eighty-nine and sixty deadlines respectively.[162] Dodd-Frank increases the number of annual deadlines among all other agencies by at least one hundred percent, and maybe as much as four hundred percent depending on one's choice of the baseline. Even if one takes a conservative view, Dodd-Frank used more deadlines than any other single statute or even area of policy.[163] Nor does Dodd-Frank fit the recalcitrant agency model, because the rulemaking requirements are new and many of the institutional structures fresh. At first glance, the use of so many deadlines—set at intervals many critics have perceived to be unreasonably quick—seems an odd amount of micromanagement for such a massive bureaucratic overhaul.

A. Background

Virtually all modern models of the interaction between Congress and the bureaucracy rely on a principal–agent model either implicitly or explicitly. Lacking the expertise and time to promulgate regulatory policy directly, Congress must delegate authority to a bureaucratic agent—in this case several bureaucratic agents. All potential agents exhibit some degree of

161. A pocket of literature in administrative law addresses agency deadlines. Gersen & O'Connell, *supra* note 5; Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987); Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987); Eric Biber, *The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction Under the Administrative Procedure Act*, 60 ADMIN. L. REV. 1, 28–36 (2008); Gregory L. Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAYTON. L. REV. 71 (1979); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 72 (1997). The study of deadlines is related to the study of statutory hammers. *See, e.g.*, M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149 (1995); George A. Bermann, *Administrative Delay and its Control*, 30 AM. J. COMP. L. 473 (1982). The discussion herein draws extensively on my prior work with Anne Joseph O'Connell.

162. Gersen & O'Connell, *supra* note 5.

163. Statutorily specified deadlines are found throughout much modern environmental legislation. *See generally* ENVTL. ENERGY STUDY INST. & ENVTL. L. INST., STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT (1985). *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-669, CLEAN AIR ACT: EPA SHOULD IMPROVE THE MANAGEMENT OF ITS AIR TOXICS PROGRAM (2006) (Clean Air Act); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-613, CLEAN AIR ACT: EPA HAS COMPLETED MOST OF THE ACTIONS REQUIRED BY THE 1990 AMENDMENTS, BUT MANY WERE COMPLETED LATE (2005).

preference divergence with the principal—that is, they have policy views that differ from those of the legislature—and have better information or expertise than does the principal. As a result, the legislature or any principal may adopt a mix of substantive and procedural restrictions on bureaucratic discretion to manage the problem. Substantive restrictions on agency policy might derive from a narrow statutory mandate, from a low level of discretion (equivalently a very high level of statutory detail), express prohibition on certain policies, or a narrow bound of agency jurisdiction or authority. Yet, some degree of discretion is inevitable if the principal wants to take advantage of agency expertise.

Given the level of substantive constraint, Congress must select from a menu of familiar procedural restrictions. An agency's organic statute might require that specific decisionmaking procedures be utilized,[164] as Dodd-Frank does. Alternatively, the organic statute might trigger requirements of the APA, requiring formal rulemaking for certain types of decisions,[165] formal adjudication,[166] or informal notice-and-comment rulemaking, again, as Dodd-Frank does. Or, the organic statute might merely mandate that specifically identified actors within the bureaucracy consider evidence, consult with other institutions, and make ultimate policy decisions,[167] a by-now-familiar feature of the statute.

Statutory deadlines might be understood to fit into this framework in one of three ways. First, there could simply be a tradeoff between substantive and temporal preferences of legislators. Consider two legislators bargaining over a potential statute. One legislator prefers strong regulation immediately implemented. The second prefers no regulation ever implemented. Under plausible assumptions, the first legislator might agree to delay implementation in exchange for more regulatory authority or compromise to weaker regulatory authority with quicker implementation. Any enacted legislation can be understood as an implicit compromise along substance, process, and timing. Because many legislators in favor of new financial regulation no doubt recognized that administrative delay was a

164. *See, e.g.*, National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

165. *See* United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

166. *Compare* City of W. Chicago v. Nuclear Regulatory Comm'n, 701 F.2d 632 (7th Cir. 1983) (finding that the Atomic Energy Act of 1954 only requires an "informal hearing" in which the Nuclear Regulatory Commission (NRC) only considers written materials), *with* Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1444–45 n.12 (D.C. Cir. 1984) (finding that the NRC could not bar the provision of a hearing prior to issuing licenses for nuclear power plants).

167. *See, e.g.*, *Fla. E. Coast Ry.*, 410 U.S. at 226–27 (construing §1(14)(a) of the Interstate Commerce Act to not require all the procedural requirements of § 556 formal adjudication).

genuine risk, one can certainly imagine a bargain across the timing and substance dimensions.

Second, statutory deadlines can be understood as one of the structure and process mechanisms used to manage the agency problem inherent in delegation. Suppose, for example, a principal is worried that given the politically controversial, not to mention challenging tasks, required to develop and implement the new financial regulatory structure, at least some of the agents may shirk. An agent can shirk either by enacting substantive regulations that are of low quality or by being too slow, holding the quality of the regulation constant. Because the agent has better information about the regulatory domain, monitoring the latter variety of shirking is quite challenging. Monitoring the former, however, is relatively easy. Simply set a deadline and then see if it is met. This does not solve the shirking problem, but if the two sorts of shirking are positively correlated, a missed deadline may be an effective way to identify other sorts of more important shirking by agencies.

Third, statutory deadlines can be understood as a way of managing the risk of legislative drift. Although for parsimony's sake, it is common to assume that the principal is a fixed institutional actor; in reality, even the median legislator changes over time. For an enacting legislative coalition, there are always at least two threats to a new statute. The first is bureaucratic drift—the risk that agencies implementing the statute will alter it or implement policy that is not quite what a fully informed principal would prefer. There is also, however, a corresponding threat of legislative drift. A future legislature might amend or repeal the statute. Decisions about the content, substantive restrictions, and procedural restrictions must reflect a balance between these two types of threats.

Statutory deadlines balance these risks in a distinct manner. When the agency is required to issue its rule during the current period Congress, the deadline guards against bureaucratic drift by ensuring that the enacting period Congress gets to see (and possibly object to or overrule) the final regulation. When a deadline comes due after the current period Congress, it increases the risk of legislative drift. The timing rule affects monitoring as well. By controlling the timing of agency action, deadlines allow legislators to ensure their presence (or absence) to respond to criticism and complaints by private parties.[168]

Consider a time period of frequent political turnover (high instability) during which Congress enacts legislation authorizing the regulation of some facet of the financial services industry. Setting a deadline for the issuance of

168. Mathew D. McCubbins & Thomas Schwartz, *Police Patrol Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POLIT. SCI. 165 (1984).

new SEC regulations prior to the next election may provide some greater degree of protection for the regulatory regime. The future legislature can always repeal or alter the program, but once regulations have been implemented, perhaps some form of status quo bias will make it marginally harder to eliminate them—especially during periods of divided government.[169] Conversely, when deadlines come due within a given electoral cycle—as many Dodd-Frank deadlines do—there is potential for the enacting coalition to exert greater control.

B. Remedies

Part of the puzzle with respect to statutory deadlines is what exactly the remedy is for breach.[170] Although statutory deadlines are common, statutory penalty clauses are rare. Consider three variants of penalties. First, Congress might respond to a missed deadline with either oversight hearings or budgetary sanctions. The deadline in this case is merely a signal about underlying agency activities; the corresponding remedy is tighter monitoring or a decrease in funding. The problem with the appropriations remedy, however, is twofold. First, for most of the agencies involved in Dodd-Frank, the promulgation of new rules is a comparatively minor part of their overall workload. Thus, while it is possible to sanction an agency with decreased resources, it is a crude sanction. Either it will reduce the agency's ability to do other important tasks or the agency may be able to reallocate resources because money is fungible.[171] Moreover, with respect to the CFPB, the adopted funding mechanism has entirely eliminated Congress's ability to sanction for missed deadlines via the appropriations process.

Second, a missed deadline might simply generate a *soft* penalty. A soft penalty is one that does not affect the agency's budget, authority, or legal status directly, but is nevertheless politically costly because the agency loses political legitimacy or reputation. Without wading into deep metaphysical waters pertaining to why citizens obey the law, for administrative institutions exercising significant regulatory authority over major financial institutions, a general perception of competence is important. Just as legislators might use a series of missed deadlines to signal something about

169. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1999).

170. Missed deadlines may also be attributable to underfunding of the agency. *See* Joel Seligman, *Key Implications of the Dodd-Frank Act for Independent Regulatory Agencies*, 89 WASH. U. L. REV. 1, 24–25 (2011).

171. This is not quite true in the context of agency budgeting and spending. The ability of agencies to move funds across programs within a budget line or across budget lines is not entirely discretionary. Nor is it entirely precluded, however.

underlying agency competence, so too might citizens and firms make a similar inference. The Dodd-Frank deadline program presents some difficulties in this regard. If seventy-five percent of the deadlines have been missed, this could be taken to signal either bureaucratic incompetence or legislative incompetence—the enactment of a deadline schedule that is simply not feasible to meet without sacrificing quality.

Third, absent a congressionally imposed penalty (either ex ante or ex post), the courts will be the most common source of a remedy. The interaction between courts and statutory deadlines in administrative law has been somewhat unpredictable over the years. Until relatively recently, there was an active debate about whether the failure to promulgate a new rule by a statutory deadline eliminated any agency authority to promulgate the rule after the deadline had passed. In several cases, petitioners argued that the agency's authority was itself temporally limited or, put differently, contingent on the completion of the statutory assignment within the statutory timeline.[172]

For example, in *Barnhart v. Peabody Coal Co.*[173] the parties challenged the Commissioner of Social Security's untimely assignment of beneficiaries to coal companies for the payment of health insurance premiums under the Coal Industry Retiree Health Benefit Act of 1992. The Court acknowledged that the Commissioner "had no discretion to choose to leave assignments until after the prescribed date, and that the assignments in issue here represent a default on a statutory duty, though it may well be a wholly blameless one."[174] Nevertheless, the Supreme Court upheld the Commissioner's action because the Coal Act does not explicitly provide for what would happen in such a case.[175] Quoting a prior Supreme Court opinion, the Court noted, "If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[176] Similarly, *Brock v. Pierce County*[177] involved action beyond a deadline by the Secretary of Labor. The Court was unwilling "to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency

172. Many state administrative procedure acts put a firm, and apparently enforceable, time limit on completion of a rulemaking proceeding. Ronald Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855, 866–71 (2011).

173. 537 U.S. 149 (2003).

174. *Id.* at 157.

175. *Id.* at 161–62.

176. *Id.* at 159 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)).

177. 476 U.S. 253 (1986).

action, especially when important public rights are at stake."[178] As the Court said, "When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act."[179]

Following the Supreme Court, lower courts have generally upheld binding agency policies enacted after a statutory deadline has passed, so long as the statute does not spell out explicit consequences for late action.[180] The natural struggle in the lower courts, then, is determining whether the statute provides such consequences.[181] Other statutes, like Resource Conservation and Recovery Act, do contain remedies in the form of "hammer" provisions that implement "a congressionally specified regulatory result" if the deadlines are not met.[182] These provisions often impose "harsh default prohibitions" to motivate quicker agency action.[183] Yet, without a clearly specified hammer, it remains unlikely most courts will impose one.

Even though the failure to meet a statutory deadline does not result in a loss of all authority, it is not necessarily the case that the failure is legally irrelevant. There is, at least, a colorable legal argument if the agency missed a mandatory deadline without justification, the late action would qualify as "an abuse of discretion" under § 706(2)(A) of the APA. For example, *International Union v. Chao*[184] held a late agency decision was not

178. *Id.* at 260.

179. *Id.*

180. *See, e.g.*, Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action."); Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1304 (D.C. Cir. 1991) ("We are especially reluctant to so curb EPA's substantive authority [to add sites to the National Priority Lists] in light of Supreme Court decisions declining to restrict agencies' powers when Congress has not indicated any intent to do so and has crafted less drastic remedies for the agency's failure to act.").

181. *See, e.g.*, Dixie Fuel Co. v. Comm'r of Soc. Sec., 171 F.3d 1052 (6th Cir. 1999), *rev'd* Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003). Late agency action may raise additional concerns if the agency wants its action to apply retroactively. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 216, 224–25 (1988) (Scalia, J., concurring) ("If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite the limitation of the APA.").

182. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 15–16 (4th ed. 2006); Magill, *supra* note 161 at 153–57; Richard C. Fortuna, *The Birth of the Hammer*, ENVTL. FORUM, 18, 20 (1990). Such provisions are more popular in divided government. *Cf. id.*

183. Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 883 (2006); *see also* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8 n.40 (1994).

184. 361 F.3d 249 (3d Cir. 2004).

arbitrary and capricious because, in part, the deadline was aspirational, not mandatory.[185] Nevertheless, the argument was not rejected out of hand.

Perhaps the most significant implication of all the statutory deadlines is the possible exemption of Dodd-Frank rulemakings from the ordinary requirements of the APA. Virtually all of the Dodd-Frank rules to which deadlines apply are legislative rules, for which notice-and-comment is the default procedural requirement. The APA, however, excepts notice-and-comment requirements for "good cause." Historically, agencies faced with deadlines often contend that deadlines make "notice and public procedure thereon . . . impracticable, unnecessary, or contrary to the public interest."[186] This is one of the issues raised in a recent Congressional Research Service report on the Dodd-Frank regulations timetable.[187] Thus, while the deadlines spur agency action forward, they may also preclude meaningful public participation in the rulemaking process.

Similar issues arose a generation ago in the context of the Clean Air Act.[188] In 1978, after receiving plans from states designating areas as compliant and noncompliant with national ambient air quality standards for various air pollutants, the EPA Administrator promulgated a rule without prior comment, modifying those plans and imposing various obligations under the Act. Five courts of appeals ruled that the Administrator did not have the requisite "good cause" to ignore the APA's notice-and-comment provisions;[189] two courts of appeals sustained the Administrator's choice of procedure.[190] The Supreme Court declined to decide the circuit split.[191] The five courts of appeals, in permitting challenges to the Administrator's actions, emphasized that the Administrator had sufficient time to provide notice on the proposals and to take comment before promulgating a final rule.[192] Of particular relevance

185. *Id.* at 253–54; *see also* Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991 (D.C. Cir. 1996).

186. 5 U.S.C. § 553(b)(3)(B) (2006).

187. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU (2010).

188. *See* LUBBERS, *supra* note 182, at 111; Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 125–29 (1984).

189. U.S. Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981); W. Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979); United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979); *see also* Jordan, *supra* note 188, at 127–28.

190. Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980); U.S. Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979).

191. *See* U.S. Steel Corp. v. EPA, 444 U.S. 1035 (1980) (denying certiorari).

192. As the Third Circuit explained,

to several courts was the fact that the agency published the final rule a month after the statutory deadline.[193] The Sixth and Seventh Circuits accepted the EPA Administrator's reliance on the "good cause" exemption, agreeing that the statutory deadline made prior notice-and-comment impractical. The Sixth Circuit noted that other circuits "appear to us to ignore the sense of urgency which characterized the Congressional debate preceding the passage of the Clean Air Act Amendments of 1977."[194] The Seventh Circuit held that "the 'good cause' exception may be utilized to comply with the rigors of a tight statutory schedule."[195] Unlike the other circuits, these two courts were therefore not troubled by the Agency's

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> We cannot, however, accept the Administrator's protestations that the statutory schedule precluded prior notice and comment. The Administrator received the Pennsylvania designations on December 5, 1977. As the Administrator informed this court, he modified state designations only when they were clearly incorrect. The Administrator should have been able to publish the Pennsylvania designations within ten days after December 5, 1977, offering them not as a final rule but as a proposed rule . . . . Under the circumstances here, we conclude that the period for comments established by the APA would have run by January 15, 1978. If the Administrator took about ninety days to review the comments, he could have issued a final rule on about April 15, 1978, instead of the March 3 date he achieved without notice and comments. The states would then have had until January 1, 1979, in which to draft their plans. Although this period would be about one month less than the time that the Administrator was able to give the states, the period should still have been adequate.

Sharon Steel Corp., 597 F.2d at 380 (footnotes omitted).

These courts emphasized that the Administrator gave no reason for "why it could not at least have published the . . . initial lists upon receipt and accepted comments during the time it was reviewing the lists." U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979). Such quick action "would have afforded petitioners some warning of the imminent designations and allowed them opportunity to influence the agency's action." *Id.*; *see also New Jersey*, 626 F.2d at 1047.

193. *U.S. Steel Corp.*, 595 F.2d at 213; *see also New Jersey*, 626 F.2d at 1043 n.3; *Sharon Steel Corp.*, 597 F.2d at 379 n.4. And they pointed to the agency's repeated remarks that the designations in the final rule were "preliminary" in the statute's regulatory scheme, suggesting the agency could have issued the designations as a proposed rule. *New Jersey*, 626 F.2d at 1041.

194. *Republic Steel Corp.*, 621 F.2d at 803. The Sixth Circuit did not find the issue close: "If the circumstances of this case do not justify employment of the good cause exception, we will be hard put to find any justification for its use." *Id. But cf.* Fla. Power & Light Co. v. United States, 673 F.2d 525 (D.C. Cir. 1982) (finding that the fifteen-day comment period was justified by statutory deadline).

195. U.S. Steel Corp. v. EPA, 605 F.2d 283, 287 (7th Cir. 1979). These two courts were therefore not troubled by the agency's provision of post-rule commenting. *Republic Steel Corp.*, 621 F.2d at 804 ("Under these circumstances, we think that the Administrator's solution of promulgating a schedule of non-attainment areas and subsequently receiving objections and comment, and thereafter effecting such changes as were required, was a reasonable approach consistent with the Administrative Procedures Act.").

provision of post-rule commenting.[196]

The old Clean Air Act cases pointedly illustrate precisely the bind for courts enforcing statutory deadlines. If the court upholds the agency action, it has essentially nullified the statutory deadline. If the court strikes down the agency action, it adds additional delay in the administrative process, an outcome manifestly inconsistent with the temporal scheme. Thus, the action most consistent with the statutory scheme is often to uphold the action, notwithstanding the legal awkwardness.[197] "Past experience has taught this court that remand means an additional two-year delay . . . ."[198] Doctrinally, there is no bright line rule on deadlines and good cause. As a result, most courts apply a multifactor analysis in assessing whether an agency can rely on a deadline to forgo traditional notice-and-comment procedures.[199] Good cause usually exists when the deadline is "very tight and where the statute is particularly complicated."[200] And, courts seem to be somewhat more accommodating when the action is "of limited scope or duration."[201] This hardly seems a fair characterization of most of the Dodd-Frank rules. This precise calculus seems likely to reappear in the context of Dodd-Frank, raising the specter of deadlines without remedies. In short, the regime is yet another example of the new administrative process.

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The deadline regime in Dodd-Frank provides something of a counterweight to the web-of-authority mechanisms. In the overlapping jurisdiction context, the statute carefully builds on judicial doctrine and

196. *Republic Steel Corp.*, 621 F.2d at 804.

197. As the Seventh Circuit explained: "We have already noted the Congressional concern manifest in the Clean Air Act that national attainment be achieved as expeditiously as practicable. This concern was reflected in the desire that the due administration of the statutory scheme not be impeded by endless litigation over technical and procedural irregularities." *U.S. Steel Corp.*, 605 F.2d at 290.

198. *Republic Steel Corp.*, 621 F.2d at 804.

199. Most important, the mere existence of a deadline is not sufficient for establishing good cause. *See, e.g.*, Nat'l Res. Def. Council v. Abraham, 355 F.3d 179, 205–06 (2d Cir. 2004).

200. Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994). Courts have viewed forty-nine and sixty days as sufficiently "tight," but not twelve months, fourteen months, and eighteen months. Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 106–07 (D.D.C. 2006) (citing cases mostly from the courts of appeals).

201. LUBBERS, *supra* note 182, at 111. For example, interim rulemaking that precedes final rulemaking is more acceptable. Am. Transfer & Food Storage v. Interstate Commerce Comm'n, 719 F.2d 1283, 1294 (5th Cir. 1983).

adjusts it to serve underlying statutory purposes. In the context of statutory deadlines, Dodd-Frank is much less informative. Perhaps it will not prove consequential, but that remains to be seen as agency actions and failures to comply with statutory timetables are challenged in litigation.

CONCLUSION

The new administrative process presents a host of problems and puzzles for administrative law. Yet, it is equally true that financial reform statutes, perhaps more than any other administrative statute in recent memory, paint on a working canvass of existing administrative law. In some settings, the Statute acknowledges and incorporates judicial practice by reference. In other settings, the Statute seeks to direct and alter judicial practice. Whether the new administrative process endures, remains to be seen, but for the moment, it means a mismatch between many classroom discussions of administrative structures and the reality of new bureaucratic and regulatory form.

SYMPOSIUM COMMENTS

ADMINISTRATIVE LAW REVIEW SYMPOSIUM AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, APRIL 16, 2013

LESSONS FROM BROADCAST REGULATION FOR THE TWENTY-FIRST CENTURY: A SYMPOSIUM

MARK S. FOWLER*

Former Federal Communications Commission (FCC) Chairman Julius Genchowski last week gave his farewell speech to broadcasters in Las Vegas. Chairman Genchowski takes with him two big things: a credible record of achievement and the word "broadband."

This morning, I received this telegram: "Post forty of the International Brotherhood of Electrical Workers Union wishes you a happy thirtieth anniversary of the Fowler-Reagan marketplace public interest standard, 312 to 264."

I want to thank American University Washington College of Law, all members of its *Administrative Law Review*, and the Communications Law Society for the honor of sharing the keynote address with Judge Dan Brenner.

I also want to acknowledge my debt and everlasting gratitude to Judge Brenner for his six years of service, at my side, in good times and bad. He created the intellectual foundation for moving from a "Dudley Do-Right" government regulated broadcast industry to a marketplace model, where

* Mark Fowler served as Chairman of the Federal Communications Commission (FCC) under President Ronald Reagan from 1981 to 1987. The author is grateful for the dedication of all of his FCC colleagues to the principles of the First Amendment and free enterprise.

the people, not the government, decide what is broadcast.

The pillar of that foundation is indeed, the subject of today's symposium: the *Texas Law Review* article we wrote thirty years ago.[1] I'll let you guess which of us did most of the writing.

I'd like to tell you of my journey of six years at the FCC from a personal perspective. Memoirs can be based on one of six levels of reality:

(a) What happened;
(b) What I believe happened;
(c) What I would like to have happened;
(d) What I want to believe happened;
(e) What I want you, assembled today, to believe happened; and
(f) What I want you to believe I believe happened.

With that simple disclaimer, where to start?

Early 1981. At the front desk of a New Orleans hotel, there was a message. It read: "President Reagan Nominates Mark Fowler as FCC Chairman." Two hours later, I was on a plane heading back to Washington, DC.

I assembled a team of bright, talented people ready to take office. We divided our efforts into three parts: idea people, front people, and action people. Our ideas departed from over fifty years of FCC regulation. Like an antique that had over the ages been painted many times, the public interest standard had gradually been slathered with layer upon layer of regulations on broadcasters. The FCC was the FCC: the Federal "Cannot" Commission.

We wanted to strip away that paint, and unveil a better standard: reliance on the people making choices on program content in the marketplace. This, after all, was the ultimate influence on broadcasters even as they put up with mindless regulations. Trouble was, so many of these regulations violated our understanding of the First Amendment: that Congress was to make no law abridging freedom of the press or speech.

While many major industries had been deregulated by the alphabet agencies—the FCC, the Federal Trade Commission, the Civil Aeronautics Board, and so on—broadcasting had remained a conspicuous exception. The FCC itself had deregulated some common carrier services, cable TV, and even CB radio. But as for broadcasting, the FCC remained the last of the New Deal dinosaurs.

In the *Texas Law Review* article, we introduced a marketplace approach to broadcast regulation. In one speech, ridiculed by many, I stated that television was just another appliance: it was a toaster with pictures. On its

[1] Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

surface, this was a seemingly silly comment.

But it posed important questions. Why did the government regulate broadcast content when all other mass media was free of regulation? Why shouldn't the electronic press, the press that used air and electrons, be as free as the press that used paper and ink? All justifications advanced for the distinction weren't valid reasons, but excuses to regulate.

Why was there no regulation of books, movies, newspapers, and so on? Television *should* be just another appliance. The First Amendment demanded it. Thus, Judge Brenner and I introduced the print model for FCC regulation.

Upon assuming office, I said that we were not going to deregulate or reregulate—we were going to unregulate and we would be henceforth guided by the First Amendment and marketplace forces. I believed that broadcasting was a business, competing for consumers, subject to competitive marketplace forces. Broadcasters were not, and could not be regarded as "public trustees," which was code for subject to government content control. We said that the consumer, acting in the marketplace, would determine what was broadcast. The public's interest would define the public interest.

The Washington, DC telecommunications community was shocked, mortified, and even outraged. They might have agreed that governing is about principles, but the principle was to never act on principle. We were called names: ideologue, "Mad Man Mark," and so on. High praise, we thought.

We would, for the next six years, work to strip away hundreds of outdated, wrong, counterproductive, superfluous, or just plain silly rules and policies. In Washington, many people have the ability to stop things, but few have the ability to move things. It's been said that Washington has the engine of a lawn mower and the brakes of a Humvee. It was a tough slog, as advocates of even more FCC regulation bitterly attacked, using a Democrat-controlled Congress and a hostile press to stymie our program.

Abolition of the Fairness Doctrine (the Doctrine) was a major goal. It was a wound with salt in the First Amendment. It required broadcasters to broadcast programming addressing all major issues of public importance in a fair and balanced way, presenting all major viewpoints.

But the Doctrine discouraged the presentation of public issues; broadcasters were afraid of loss of license or fines if issues were not properly balanced by each station, or if an issue of public importance—according to the FCC—had been overlooked. Better to minimize risk by doing the minimum public affairs programming. Typically, this mandated programming was broadcast in the wee hours of the morning or late at night.

When a complaint was filed, the FCC's staff would listen to hours of tapes, using stopwatches to measure the amounts of time devoted to an issue, deciding if an issue not addressed should have been, whether it was a controversial issue of public importance. Meantime, the license renewal was held in abeyance—a not-so-subtle chilling of broadcast political speech.

The government donned "censor robes," and with a red grease pencil censored broadcast content. We said this was unnecessary, terribly wrong, and even dangerous. We said that editing was what editors were for, not the government. In addition, there was evidence that several presidential administrations had attempted to use the Doctrine to intimidate broadcasters or political opponents.

In 1985, we issued a report based upon a record established in a public rulemaking, to establish the administrative law predicate for eliminating the Doctrine. We found that the intrusion of government into program content—caused by the enforcement of the Doctrine—restricted the electronic press' freedom and inhibited the broadcast of controversial issues of public importance.

In 1987, under the courageous leadership of my successor, Chairman Dennis Patrick, the FCC formally abolished the Doctrine. In June 1987, the Congress tried to preempt the FCC action, but the legislation was vetoed by President Ronald Reagan.

This was at a time when there were basically three broadcast networks, PBS, and the major newspapers, all of whom had a liberal bent, and all of whom continued to attack the President daily.

When we issued the order in 1985—which found the Doctrine both unconstitutional and bad policy—certain senior people in the Reagan White House groused that Fowler was eliminating the only protection the President had against the daily pounding of the liberal broadcast media.

President Reagan overruled his staff, stating that there were thirty-two things his opponents could hang him for, and this was just number thirty-three. He supported our initiative. I admired President Reagan for many things; this was just one example.

I also wish to correct the speculation that we acted to clear the way for conservative talk radio. This is wrong. From 1985 through 1987, neither Chairman Patrick nor I was aware of something called "conservative talk radio." There was no such thing. Nor could we imagine it then. It would begin to bloom around the country after the FCC acted, and grow to become a major media force in the early 1990s.

Today it's accurate to say that abolition of the Doctrine is supported by both parties, and to the credit of former Chairman Genachowski, the current FCC has also renounced the Doctrine. This entire story demonstrates the power of an idea versus the great political power or

special interests of the political class—an idea set forth in the *Texas Law Review* three long decades ago.

It is one small confirmation of the public interest benefits of the marketplace and the First Amendment. No outside force or coercion and no loss of freedom of the press or speech is necessary to produce all sorts of broadcast programming in the public interest.

It may not always be of highest quality, but is the government to be the arbiter of what is quality? And, for the diehard critics, I challenge them to name one controversial issue of public importance—federal, local, or international—not covered by broadcast media. They cannot. The print model for broadcasting works.

Reliance on marketplace forces affects an end run around the soft and not-so-soft corruption we have seen for decades in Washington. As government has grown over the past one hundred years, a large bureaucracy has grown to administer it. Success at the FCC depends, in part, on having the right lobbyists working on your behalf. The best lobbyists usually have personal relationships with the regulators.

Getting a senior position at the FCC is often a stepping stone to a lucrative job in the private sector—the so-called "revolving door." Special FCC staffed task forces on a particular area of regulation also function as job fairs for that staff.

I recall being called up to a particular Republican House member's office to be beaten up for refusing to give more subsidies to a small independent telephone company that had been a large fund contributor to the member. I was called up not once, but several times. This member was also a key member of the House Telecommunications Subcommittee and a strong backer of our deregulatory program. We stood our ground, and the relationship was never the same going forward. I called this "soft corruption."

One of the advantages of getting the government out of regulating the economy is that it stops this kind of corruption cold. Correspondingly, with today's ever more bloated, growing federal government, the skies over Washington are increasingly darkened by hundreds of Lear jets bringing in Fortune 500 CEOs to plead special interest legislation or regulatory decisions. Usually, the public interest, and the average citizen suffer.

With more rules and regulations comes more complexity. This requires more government personnel to administer them. Where the mission of one agency, for example, the Environmental Protections Agency, conflicts with another's, let's say the Department of Energy, another layer of bureaucrats is required to arbitrate between the two. Each and every major decision lies under a heavy fog of paid lobbyists and compromised congressmen. Every year, corruption seems to worsen. Today, Washington corruption is

at a high water mark, in both the Congress and the executive branch. It is one of the few signs of bipartisan activity in our capital. In some respects, Washington resembles a banana republic. Deregulation is a decisive germicide to this corruption.

There was another major objective in our administration: to foster new technologies and competition. Deregulation was the "letting go," and encouraging new entrants and competition was the "letting in." Incumbents loved the one, loathed the other. But the sting of competition forced incumbents to either get better or get a fatal case of economic pneumonia. It gave new players with new technologies and innovations the opportunity to take to the field. The public could watch the game and choose its favorite team. That better defines the public interest than any FCC commissioner or bureaucrat ever can.

If you aspire to be Chairman—and here I'm talking to you, Jessica, Tom, Larry, and others—here are some of the lobbyist presentations you are likely to hear:

"Mr. Chairman, we are for competition, but . . . ." Translated: "Disregard everything up to the word 'but,' and now start listening."

Or: "Thanks for giving us so much of your valuable time to see us." Translation: "I know I am using up a chit, so don't rub it in."

Or: "We would like to make a courtesy call." Translated: "I've got to show my new client how much clout I have in town, so please schmooze with him for fifteen minutes."

Or: "We know how busy you are." Translated: "We know how busy you are with the lobbyists for the other side."

Or: "We've supported everything you've done." Translated: "*EVERYTHING,* until you were sworn in."

Or: "We've checked with the Hill, and everyone seems to be on board." Translated: "All I can promise is that they will not impound the FCC's funding for twenty-four hours."

Or: "Whatever's best for you." Translated: "Whatever's best for me."

Finally, "We agree with you, Chairman. Of course you realize this has serious implications." Translated: "Better check under your car with mirrors."

Public service can be gratifying. I had a talented, dedicated team. Comrades at the front. We celebrate with each other every Christmas here in Washington, as we have done for each of the past thirty years.

When you are in a leadership position, it is important to hold to fundamental principles. When we decided to move in a big way on an issue, it always felt like stepping off a high cliff, knowing that fierce opposition, name calling, lobbying, manipulating, backstabbing, and rumor mongering were sure to follow. And that was just in the *Washington Post*

newsroom!

So, to sum up, I believe in the marketplace because I believe in the people's right to choose, not the government's. You may agree or disagree, but we did it our way. We are grateful that you all turned out, regardless of your politics, to hear us out, again, thirty years later. I hope you could say, "*Not* still crazy, after all these years."

Thanks, all of you.

EXPLAINING YOURSELF: THIRTY YEARS AFTER "A MARKETPLACE APPROACH TO BROADCAST REGULATION"

DANIEL BRENNER*

It's an enormous, humbling honor to be asked to speak about the work of a person whose work I have long admired—me. The first time I was ever asked to speak about something I wrote was in the eighth grade. I was asked to speak about it in the principal's office at Beverly Vista Elementary School. And like today's article, it was a co-written effort. In that case my co-writer was Paul Diamond, the publication was entitled the "Merry Fat Cat Fink," and it was a satirical newsletter as only satirists in the eighth grade can accomplish.

The faculty advisor behind it slithered out of sight, and Paul and I were required to gather up the few copies. In that case I must say I picked my writing partner well, at least in terms of a pedigree. His dad, I.A.L Diamond, had won the Oscar for writing the film "The Apartment" four years earlier with Billy Wilder. Paul would go on to write a film about our senior year of high school which pretty much bombed at the box office but launched the acting career of Steve Guttenberg of "Police Academy" fame.

Anyway, I was lucky enough to join another wonderful partner to write the article that was published in the 1982 *Texas Law Review*,[1] Mark Fowler. Anyone who has worked with Mark knows he is a supportive, fresh thinker who disdained the trappings of high office, even though he held one for nearly six years. He was instantly receptive to the challenge of making a formal policy case for changes in regulation. And he realized that to be credible, he had to have more than rhetoric or the power of a voting majority on the Federal Communications Commission (FCC). So we wrote this article over 1981 and 1982 in order to make sure that changes in

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1. Mark S. Fowler & Daniel L. Brenner, *A Market Place Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

broadcast law were grounded in a full understanding of the history of the FCC's decisionmaking. This especially applied to content-based decisions. Fowler was convinced that broadcasters should be entitled to the same First Amendment protections as those who worked at newspapers.

Recall, in the decade before, the U.S. Supreme Court had found that broadcasting and newspapers weren't entitled to the same protection. In 1969, in *Red Lion Broadcasting Co. v. FCC*,[2] the Court upheld the government's right to require radio and television stations to abide by the fairness doctrine and the right of replies to personal attacks. Five years later, in *Miami Herald Publishing Co. v. Tornillo*,[3] the Court unanimously found that the First Amendment protected newspapers from having to provide a right of reply. And, scarcity was cited as the reason for regulation in *Red Lion.*[4]

This scarcity rationale seemed fuzzy to me as a law student and even fuzzier when Mark and I thought about its impact on the First Amendment. The protections of the First Amendment against no laws abridging freedom of the press, including the electronic press, we were sure, would be increasingly important. And yet the FCC regulated the electronic press more than newspapers could ever be.

What is the scarcity rationale? It argues that there are more takers than spaces for those who want to operate broadcast stations. So government must pick who gets which frequencies under the public interest standard. There were, and are, noncontent related elements of the standard, things like diversity of ownership, local ownership, and credits for applicants who belonged to a class that had been historically underrepresented in broadcast ownership. But in the end, the FCC could, and did, consider programming content in the evaluation of an applicant or a licensee seeking renewal.

That is, everything else being equal, a licensee whose programming serves more diverse interests and tastes should be favored over a licensee who will cater to narrow tastes, interests, and viewpoints. The FCC licensing policies tried mightily to avoid reaching a decision based on this criterion. But it lurks behind every indecency finding today, just as it became the basis for the *Red Lion* decision, which upheld the fairness doctrine and the personal attack rules.

The winners in this process were big winners and were in many cases the existing owners of radio licenses. How big? Well, imagine the wealth and power created by an FCC license in the 1960s and '70s, when a network affiliate could command a third or more of the viewing from all TV

2. 395 U.S. 367, 396 (1969).
3. 418 U.S. 241, 256–58 (1974).
4. *Id.* at 248–52.

households.

Congress established "the public interest, convenience, or necessity"[5] as the linchpin of regulating spectrum. This public interest test was invoked to deal with perceived scarcity, which in turn was based on the way the FCC allocated frequencies in its 1952 order.[6]

The scarcity rationale has been accepted by the Supreme Court for decades. In the 1943 *National Broadcasting Company*[7] case, Justice Frankfurter upheld ownership limits on networks.[8] He concluded that licensing under the public interest standard did not violate the First Amendment.[9] And the Supreme Court in 2012 declined to address whether rules against indecent broadcasts violate the Constitution in the *Fox Television Stations*[10] case, even though it threw out the FCC's rulings on procedural grounds. It did not reject the scarcity basis for regulating.[11]

What's wrong with this rationale? For one thing, in 1982, there were markets where there were spaces, but no takers. That is, the FCC's own table of allocations had communities where no one had applied to operate a TV station on available channels. So how could you argue that those who had TV station licenses should be subject to regulation based on spectrum scarcity? And yet, ironically, in these smallest markets, you might be the *most* concerned about a lack of diversity of voices and the power of the broadcaster in those situations. For example, the Nellie Babbs case from Dodge City, Kansas, arose during Mark's tenure.[12] A radio station played

5. 47 U.S.C. § 307(a) (2006).

6. Federal Communications Commission (FCC), Sixth Report on Television Allocations: Amendment of Section 3.606 of the Commission's Rules and Regulations, Sixth Report and Order, 1 Rad. Reg. (Pike & Fischer) Part 3, 91:601 (1952). For a useful review of the FCC's broadcast's policies see Sherille Ismail, *Transformative Choices: A Review of 70 Years of FCC Decisions*, 1 J. INFO. POL'Y 6 (2011).

7. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 227 (1943).

8. *Id.*

9. *Id.* at 226–27.

10. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) (overturning the FCC's decision for lack of notice to affected parties).

11. *Id*. (stating that "it is unnecessary for the Court to address the constitutionality of the current indecency policy").

12. *See In re* Applications of Cmty. Serv. Broad., Inc., 7 F.C.C. 5652 (1992). In this case, the individual who permitted the broadcasts, Nellie Babbs, was not in control of the station. *See* Barry Massey, *FCC Staff Supports Settlement of KTTL Licensing Case*, ASSOCIATED PRESS (Aug. 26, 1986, 7:38 PM), *available at* http://www.apnewsarchive.com/1986/FCC-Staff-Supports-Settlement-Of-KTTL-Licensing-Case/id5769c4f347ace715b6dded12f6f8-0f6f (explaining that Nellie Babbs transferred her interest in the radio station to her ex-husband, Charles Babbs, in October 1985 pursuant to the couple's divorce). The court had issued a restraining order to prevent Nellie Babbs from interfering in the operation of the partnership business or entering the radio station premises. *Id*. The husband sold the

recordings filled with bigoted and racist attacks nightly. It tested the strength of our argument, although the market ultimately tired of these broadcasts and the station was transferred. To this day I don't have a great answer to how that station served the public interest. But surely scarcity was not a true justification, had the FCC actually intervened to deny the station its license.

Another shortcoming of the scarcity rationale is that the *Tornillo/Red Lion* distinction had it backwards: large daily newspapers, not TV or radio, were the scarcer medium. How could newspapers, who were far scarcer in terms of head-to-head competition, be protected by the print model; but broadcasters, who might number in the dozens in large cities, be regulated, all in the name of scarcity? And in 1982, newspapers were often the most influential editorial voice; despite their diminishing revenues and circulation, they still are, compared to radio or even TV stations.

Another shortcoming of the licensing scheme was the FCC's almost laughable attempts at getting broadcasters to furnish public affairs programming by decree. For instance, stations would run community forum shows at 6:00 AM on Sunday and declare that they were meeting the needs and interests of the community. They were, if by "community" you were referring to insomniacs or the folks responsible for turning on the heat for early church service.

Or, take application of the fairness doctrine, which was ultimately eliminated by Mark's successor, Dennis Patrick, following efforts by Mark himself.[13] The idea of presenting contrasting viewpoints or different sides in a story is the hallmark of most journalism; and coverage of important issues is the essence of news. Those are the two prongs of the fairness doctrine, introduced in 1949.[14]

But the fairness doctrine could be, and was, used to go after unpopular speech, as the investigation into the *Red Lion* case revealed years later.[15] It's

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station to a company who had filed a competing license so the FCC never dealt directly with the charges. The FCC earlier had designated the station's license for hearing on whether it should be renewed but did not designate review on the contents of the offending broadcasts because they did not constitute a "clear and present danger." Cattle Country Broadcasting; Hearing Designation Order and Notice of Apparent Liability, 50 Fed. Reg. 37,272, 37,273 (Sept. 12, 1985).

13. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 656–58 (D.C. Cir. 1989).

14. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247–51, 1258 (1949).

15. The case was part of a Democratic "massive strategy . . . to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide it was too expensive to continue." *See* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 115 (1987) (quoting Bill Ruder, Democratic operative). The case is also discussed in FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN

worth recalling what that case was about. It arose in 1964 when a radio preacher, Billy James Hargis, used a prerecorded radio program to attack Fred Cook, the author of a book highly critical of Barry Goldwater, the Republican candidate for president. With Democratic Party support, Cook demanded free response time from the almost two hundred stations that broadcast the show to rebut the Hargis charges. All of the stations except one complied with the fairness doctrine-based demand. WGCB, a station in the Pennsylvania hamlet of Red Lion, proposed to sell commercial time for the rebuttal instead of offering free airtime to Cook. The FCC ordered free time.[16]

But little stations weren't the only target and liberals weren't the only to invoke its remedial powers. The very first documentary offered by the 1972 documentary news program *NBC Reports* was *Pensions: The Broken Promise*, which exposed inadequacies in national pension funds that resulted in severe losses for veteran workers. The report won a Peabody Award and praise from the American Bar Association. But it was also investigated by the Nixon Administration's FCC, in response to a complaint by the conservative media watchdog group Accuracy in Media. It complained that the report was one-sided and thus violated the fairness doctrine. The case went all the way to the U.S. Supreme Court, which let the appeals court decision stand.[17] But it cost the National Broadcasting Company (NBC) (and its news division) hundreds of thousands of dollars to defend itself.

And as a practical matter, in either of these or other fairness doctrine cases, the doctrine really provided an untimely cure to the perceived problem. If the FCC found a violation and ordered balance, there was no reason to suspect that viewers would see the mandated response anyway, so there was often no practical value of the doctrine as government fiat.

Looking at the law review article's impact, it is clear that FCC policy up until 1982 had given scant attention to the real-world, economic aspects of spectrum licensing. The past thirty years have proved that the impact of Fowler and Brenner may have been greatest in bringing more critical thinking to how spectrum should be valued and licensed. Drawing from the work of Ronald Coase[18] and others, we argued for the somewhat obvious point that spectrum is a resource like other resources in society.

BROADCASTING (1976).

16. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 371 (1969).

17. Nat'l Broad.Co. v. FCC, 516 F.2d 1101, 1109 (D.C. Cir.1974), *cert. denied sub nom.* Accuracy in Media v. Nat'l Broad. Co., 424 U.S. 910 (1976) (holding that the National Broadcasting Company did not violate the fairness doctrine by producing *Pensions*).

18. *See, e.g.*, Robert H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON 1, 17–24 (1959).

And like other resources, American society should use market mechanisms to assign who gets the use of that resource.

We didn't go as far as insisting that the "highest and best" user of the spectrum should supplant incumbents. We didn't, in particular, challenge the right of broadcasters to remain on their frequencies and be replaced by other spectrum users if the other users could demonstrate a better use of the channels. In short, we weren't anywhere as radical as the FCC and Congress are today.

The current FCC and Congress, through reverse auction rulemaking, are trying to apply market forces to spectrum use.[19] The Fowler and Brenner *Texas Law Review* article more simply averred that a system of granting broadcast licenses based on First Amendment considerations should be unconstitutional, just as it would violate the First Amendment to license printing presses on content-related grounds. That left the market to do so.

A critic might say Fowler and Brenner punted because we did not call for the return of all licenses and a spectrum auction to determine who would operate broadcasting (or other spectrum-based activity), based on who would pay the most. Then, as now, broadcaster investment in stations and facilities raised insurmountable political hurdles as well as takings issues under the Constitution. But we did suggest license fees as a reasonable way to obtain some of the economic benefits that incumbent broadcast licensees had received and continued to receive.

And we affirmatively pointed out that our marketplace approach would not always deliver programs that addressed minority tastes and interests, whether cultural, ethnic, or emerging. So we argued that some of the spectrum fees could—and should, at least one author believed—go to support public broadcasting. That way, unmet programming in American society, from long-form news programs to hard-hitting documentaries to high-culture offerings to sports that lacked widespread appeal, would be available. If the public wanted it, let the market provide it. If the public couldn't or wouldn't register its desire through the market, have a mechanism to provide it through public broadcasting to at least broaden the mix. True libertarians might say tough tinsel—funding public broadcasting causes more harm than good. That was not the view of the article.

The public interest model, it must be said, had a salutary role that was

19. Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, 27 FCC Rcd. 12,357, 12,359 (2012) (implementing Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402, 6403, 125 Stat. 156 (2012) (Spectrum Act)).

never explicit in the FCC's policies if you believe more news, documentaries, and high culture was important to add to TV's mix. Communications attorneys and government affairs types could warn their broadcast clients—especially those who got caught rigging contests, having lousy hiring practices, or double-billing advertisers—that it might be time to class up the act. For instance, after the quiz show scandals of the early 1960s, CBS Broadcasting, Inc. (CBS) launched *CBS Reports*.[20]

And to this day the same network runs the Kennedy Centers Honors in December. Legend has it that, apart from all the good will it generates from the Washington elite who attend—how they get free tickets to this gala and dinner is one of the enduring mysteries of the nation's ethics laws—the show was initially telecast during a week that the ratings companies didn't rate programs. It was my recollection that founder Bill Paley later urged that there be weeks set aside for no ratings, so program executives could program without having to answer to the bean counters at the ad agencies and down the halls.[21] Today, of course, with Facebook providing the equivalent of ratings for every keystroke, it would be impossible. We are a measured society, and not in a good way!

So what have we learned some thirty years after the article? Four years after its publication, I went to teach at University of California, Los Angeles (UCLA) Law School and became the Director of its Communications Law Program. Charlie Firestone, who is presenting at this symposium and is at the Aspen Institute, was tasked with finding his successor and recruited me. The idea of returning to Los Angeles appealed to me. But shortly after I accepted, the hiring was attacked by a group, no longer in existence, called National Citizens Committee for Broadcasting (NCCB).

No matter that all three previous directors had recruited me and issued a public letter decrying the campaign (maybe I should have been more supportive of personal attack rules). The attack ignored that I was a Democrat, had been hired by the previous Democratic Chairman as his assistant, and had campaigned for the Democratic Presidential candidate, George McGovern, a decade before. The NCCB angrily complained to the law school faculty, students, and administration that a Reagan appointee was coming to UCLA to undermine the school's program. Charles Young, UCLA's longtime and fabled chancellor, said (with some exaggeration) upon meeting me at a faculty event, "I have had more letters

20. TELEVISION NEWS ANCHORS: AN ANTHOLOGY OF PROFILES OF THE MAJOR FIGURES AND ISSUES IN UNITED STATES NETWORK REPORTING (Thomas Fensch, ed., 2001).

21. WILLIAM S. PALEY, AS IT HAPPENED: A MEMOIR (1979). Curiously no reviews of this book exist online.

about you than anyone else I can remember."

Like many episodes in life, there are often two sides. Let me share one important personal one. Dr. Everett Parker was a board member of the NCCB. Dr. Parker's name emblazons the United Church of Christ's annual award for public service and is known to many of us. He was liberty's champion when he took on a Mississippi TV station in the 1960s for refusing to air programs or news stories that featured black Americans. Eventually the station, WLBT-TV, had its license stripped—not by the FCC but by the D.C. Circuit, in an opinion by then Judge Warren Burger.[22] There has never been an American, I think, who made better use of the broadcasting laws than Dr. Parker.

Dr. Parker reached out to me during this ugliness to say that, although he didn't agree with the policy conclusions of the *Texas Law Review* article, he used it in his classes at Fordham as a teaching tool, and he thought I would be a fine teacher and director. And he was disgusted at the behavior of his fellow NCCB board members in conducting this attack. He resigned from the Board. His assurance during this period meant the world to me.

But back to the future, so to speak: as the 2012 *Fox Television Stations* indecency case makes clear, the article did not change too much in broadcast regulation. It is as if regulators or legislators cannot fathom a world without a "stop" button on the electronic press. The popularity of culture trends makes it hard for the government not to react to content—from Vice President Quayle's 1992 attack on *Murphy Brown*[23] to the Super Bowl wardrobe malfunction[24] to President Obama's disdain[25] for Fox's coverage of the birther issue[26] to the right's insistence that the liberal news media "buried" Rand Paul's filibuster on the Obama Administration's drone policy.[27]

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22. Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 997, 1009 (D.C. Cir. 1966).

23. *See* Vice President Dan Quayle, The *Murphy Brown* Speech (May 19, 1992), *available at* http://livefromthetrail.com/about-the-book/speeches/chapter-18/vice-president-dan-quayle (criticizing the television show *Murphy Brown*).

24. *See* CBS Corp. v. FCC, 663 F.3d 122, 125 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012) (discussing the FCC's reaction to the exposure of Janet Jackson's breast during the Super Bowl XXXVIII halftime performance).

25. *See* Ben Smith, *President Obama Takes on the Birther Political Circus*, POLITICO (Apr. 27, 2011, 3:03 PM), http://www.politico.com/news/stories/0411/53823.html.

26. *See* Melody Johnson & Eric Shroeck, *Fox News Goes Full Birther*, MEDIA MATTERS FOR AMERICANS (Apr. 20, 2011, 9:12 AM), http://mediamatters.org/research/2011/04/20/fox-news-goes-full-birther/178860 (explaining how Fox News embraced the birther issue).

27. Ed O'Keefe & Aaron Blake, *Paul's Filibuster in Opposition to Brennan, Drone Policy Ends after Nearly 13 Hours*, WASH. POST (Mar. 6, 2013), http://articles.washingtonpost.com/2013-

On this last score, TV critics have long grouched about how little coverage is given to important public policy issues. Fred Friendly's 1967 memoir of his CBS days bemoaned the carriage of repeats of *I Love Lucy* instead of Senate hearings on the Vietnam War.[28] But today important hearings do not go uncovered. Thanks to C-Span 1, 2, 3 (and really no reason to stop there), it is possible to bring attention to public affairs events.

Which points to what really happened after our article was published. We didn't herald "a marketplace approach" to broadcast regulation. What happened was that the marketplace *approached* and swarmed over broadcasting. Cable penetration in 1982 was mainly in areas that had poor reception. Remember, CNN had launched only in 1980.[29] Today, with hundreds of networks, including local, national, and world news—not only on cable but on digital broadcasting as well—Americans have a huge amount of broadcast news and public affairs coverage, and not only from a U.S.-centric perspective.

About ninety percent of U.S. households subscribe to multi-channel video providers, that is, cable and direct-broadcast satellite (DBS).[30] And while there are cord cutters, these homes often use high volumes of Internet-provided content. Commercial broadcasters are but one of many voices in a rich market of content.

Cable and DBS face their own economic challenges, particularly in figuring out a way to continue program diversity amidst ever-increasing costs tied to sports and entertainment. Public broadcasting, too, is searching for its role in the construct suggested by the 1982 article. It's pretty amazing to realize that tennis was only on public TV for the longest while. The commercial marketplace eventually acquired all of those rights. But those who would say cable has made public TV obsolete should ask whether we have a commercial counterpart to programs like *Frontline, News Hour,* or educational kids programming.

As noted earlier, the article's effect on radio and television regulation was less eventful than its injection of spectrum economics into communications policy discussions.

Not only did Mark's tenure see the advent of widespread cable and

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03-06/politics/37497854_1_modern-filibuster-filibuster-end-debate.

28. *See* FRED W. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL . . . 213, 250 (1967).

29. COMPANY HISTORY, TURNER BROADCASTING SYSTEM, INC., http://www.turner.com/#/company/history (last visited Aug. 3, 2013).

30. *See, e.g.*, DMA HOUSEHOLD UNIVERSE ESTIMATES: NOVEMBER-2011, TVB.ORG, http://www.tvb.org/admin.tvb.org/iframe/dma/Cable_and_ADS_Penetration_by_DMA.asp (last visited Aug. 3, 2013). Penetration may be declining as more homes cut the cord or rely on Internet-based video.

telephone competition; the Fowler FCC authorized the first cellular licenses. The first licenses—analog—were assigned two to a market. One was called the wireline set-aside, given to AT&T (remember this is all pre-divestiture of Ma Bell) for its contributions to launching the service. The second was available using comparative hearings, the same clunky device in the FCC's toolbox that it had used for broadcasting licenses.

To his great credit, Chairman Fowler dissented to the set-aside for AT&T.[31] He did not believe one company should get all these licenses for its past contributions. I say great credit because as Chairman he could have priggishly held up cellular licensing by using his prerogative over the scheduling of the agency's decisions. This tactic, unfortunately, has become more common as the FCC became more politicized. Instead, he let the vote go forward and dissented.

Now before this law school erects too big a statue to Mark, let's recall that he didn't quite bring Mr. Market to the fore. He was unable to implement spectrum auctions to decide who got the cellular licenses. In fact, the FCC would try lotteries[32] before Congress realized that it could raise and keep revenues through auctions,[33] and could stop the foolishness that characterized comparative hearings for cellular licenses. Think about it: the FCC was giving away what turned out to be billion-dollar grants based on who had their lawyers and engineers concoct the winning contour map for service.[34] And the FCC had switched to lotteries primarily because the comparative process led to unacceptable delays, not because it failed to account for the economic value of the spectrum involved.

So the law review article, while not specially calling for auctions for all spectrum, did introduce the views of Coase and spectrum resources into a

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31. An Inquiry Into the Use of Bands 825–845 MHZ & 870–890 MHz for Cellular Commc'ns Sys., 86 F.C.C.2d 469 (1981), *reconsideration,* 89 F.C.C.2d 58, 105–07 (1982) (Fowler, Chairman, dissenting on reconsideration).

32. Amendment of the Commission's Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Application Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C.2d 175, 189–90 (1984), *aff'd on reconsideration*, 101 F.C.C.2d 577 (1985), *aff'd on further reconsideration*, 59 Rad. Reg. 2d (P & F) 407 (1985). The D.C. Circuit also approved the use of lotteries in general in Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1561–62 (D.C. Cir. 1987).

33. As part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387–392 (the 1993 Budget Act), Congress added Section 309(j) to the Communications Act of 1934 authorizing the FCC to award licenses for rights to use the radio spectrum through competitive bidding.

34. The FCC had historically used comparative hearings if more than one qualified applicant sought a license. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (discussing the statutory right to comparative hearings); Use of Bands 825–845 MHz & 870–90 MHz for Cellular Commc'ns Sys., 86 F.C.C.2d 469, 490–91 (1981) (noting that settlements are encouraged as an alternative to comparative hearings).

policy debate that had never paid much attention to them. The result has been billions to the U.S Treasury, rapid deployment of advanced networks, and a keener appreciation for using spectrum more efficiently to maximize throughput. (It has also led, in the view of some, to more consolidation in the wireless industry, although the market appears to be holding steady at four facilities-based providers).

That wasn't all. When you start thinking about spectrum, big ideas come to mind: why does a broadcast TV signal have to be six megahertz (MHz), especially after you transition to digital? Of course the FCC didn't want to fight that fight. I think it's fair to conclude that broadcasters got the digital dividend of being able to convert to high-definition television (HDTV) and still have two to three MHz for other uses.[35] Or consider the more basic question: why would you use spectrum for an essentially in-the-home service like TV instead of deploying or redeploying it for mobile communications? In other words, we had been using wireline facilities for telephone services until the 1990s and wireless facilities for TV; it should have been the other way around.

Now we're living through a reformulation again, but with broadband shaping our thinking. The wireline networks in the home are being replaced or supplemented by wireless. Wireline telephone subscription is declining sharply in the home, replaced by smart phones. And whole-house cable and DBS networks are being augmented by private unlicensed Wi-Fi networks. It's all about spectrum, from that standpoint.

And we're really at the dawn of this new age of spectrum. That's because as more devices seek out unlicensed—unmetered—Wi-Fi hotspots, the value of licensed spectrum will be affected. Curiously, some cable operators got out of the licensed spectrum business last year with the sale of Spectrum Co.[36] But cable operators are building Wi-Fi as fast as Wall

35. As one commenter put it in reviewing the 2010 National Broadband Plan:

> Throughout the section of the report dealing with the potential recapture of TV frequencies, the Commission suggests that the television frequencies are underutilized, and that television broadcasting is not the highest and best use for the channels. In the view of the Commission, this spectrum is not being used efficiently at the moment, as many television stations have the ability to transmit their over-the-air signals in less than the full 6 MHz of spectrum allotted to each television station. While High Definition programming and opportunities for multi-channel operations are possible on the current channel allotments, in the Commission's opinion, too few broadcasters are making full use of the spectrum.

David Oxenford, *FCC National Broadband Plan,* BROADCAST LAW BLOG (Mar. 16, 2010), http://www.broadcastlawblog.com/2010/03/articles/broadband-report/fcc-national-broadband-plan-what-it-suggests-for-tv-broadcasters-spectrum/.

36. Applications of Cellco P'ship For Consent To Assign AWS-1 Licenses, 27 FCC Rcd. 10,698, 10,699–700 (2012).

Street will let them.[37] It doesn't mean the end of licensed spectrum. But it does mean that more and more consumer features will incorporate spectrum as part of their functionality. Wi-Fi has the consumer appeal that 800-number calling had a generation ago. Consumers love "free."

Finally, one has to consider the effects of a deregulated marketplace on broadcasting and society. That was, after all, the thing that got me into hot water when I went to UCLA Law School. In 1976, the motion picture *Network* presaged a TV world where lowest common denominator programming reached new lows, even during the news hour. Watching some reality TV today suggests that the movie had great predictive powers. And in the radio context, when the fairness doctrine was eliminated, station owners felt more comfortable bringing on highly partisan voices that would attract an audience. Loudmouths often do. But who would have expected it to be such a long-term phenomenon?

There are many reasons for the growth of right-wing or what some would call, in the short run, anti-Obama radio. Much of it has nothing to do with policy or even President Obama, in my view. We live in an angry world much of the time, despite our many blessings as citizens of this country. I doubt the reinstatement of the fairness doctrine would stem this anger or those who give voice, gain profit, or both, from it. Certainly the same voices, and even those in need of major pharmacological intervention, can be found on unlicensed media like cable networks or even that favorite of public interest advocates, leased and public access channels. And let's not talk about the Internet.

And there has been some good that has resulted from a more free-wheeling broadcast medium. While they may lag behind the creativity of cable networks, the major broadcast networks are surely taking advantage of the greater freedom a less regulated market produces—*The Simpsons*, *Modern Family*, and many others consistently bring creativity to free, over-the-air TV. Again, I doubt Coase and his acolytes, Fowler and Brenner, had much to do with it, but the door has opened up for more creative risk-taking in the medium.

Of course the market has made TV more competitive, increasing the costs to broadcasters. HDTV made a better viewing experience and led to lightweight, flat screens, but broadcasters had to buy into new transmission equipment. And marquee talent, especially for live sports, has become

37. *See* Roger Yu, *Comcast to Expand Number of Neighborhood Wi-Fi Hotspots*, USA TODAY, June 10, 2013, http//www.usatoday.com/story/tech/2013/06/10/comcast-wifi-hotspots/2407219/; *Cable MSO Discovers Way To Unlock Wi-Fi Potential*, SCREENPLAYSMAG.COM (Dec. 3, 2012), http://www.screenplaysmag.com/2012/12/03/cable-mso-discovers-way-to-unlock-wi-fi-potential/.

more expensive for broadcasters as over-the-air, satellite, and Internet distributors vie for the content. Live sports acts as broadcasting's bulwark against the inevitable move to a virtually all on demand program world that Netflix and cable's video on demand represent.

Every big contract announced in sports filters into cable and DBS rates, whether a subscriber, a sports network, or a cable company likes it or not. I'm all for people earning as much as they can. But let's admit that the process of paying high cost jock talent through the current system isn't a buyer-meets-seller market. And this problem is not going away under the current model.[38] We may be at an inflection point where the TV business has to change: cable operators carrying a content-rich bundle will have a harder time paying for niche programming because marquee athletes and actors or hit shows can and will get higher and higher pay. Must-have networks can drain the nickels away from should-have networks.

And even those must-haves—the broadcast network affiliates—may not have quite the comfortable future that today's retransmission consent payments made by cable operators and DBS suggest. Should the cable and DBS industry move to incorporate an *Aereo*-like solution[39] to bypass traditional local station retransmission and products like Hopper[40] strip out advertising, broadcasters may be forced to shift to a pay model.

That's a lot of change to think emanated from a law review article. And it probably reflects more hubris than historical causation. But I'm proud and appreciative of the opportunity provided by this symposium to reflect on this work some thirty years later and so grateful to the many who contributed to our thinking and writing, then and now.

Ideas matter. And as Mark taught me in working with him on developing the print model for broadcasting, ideals matter too.

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38. In May 2013, Sen. John McCain introduced legislation to unbundle cable packages. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013). *See also* John Eggerton, *McCain Introduces A La Carte Bill, Television Consumer Freedom Act Would Force Programmers, Operators to Unbundle TV stations, Co-Owned Cable Channels*, MULTICHANNEL NEWS (May 9, 2013, 5:49 PM), http://www.multichannel.com/distribution/mccain-introduces-la-carte-bill/143218.

39. *See* WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 680–81 (2d Cir. 2013) (denying a preliminary injunction against a company that enabled users to watch broadcast television over the Internet).

40. Broadcasters have challenged the legality of services that strip out advertising. Fox Broad. Co. v. Dish Network, L.C.C., No. CV 12-04529, 2012 WL 5938563 (C.D. Cal. Nov. 7, 2012).