

# ARTICLES

## “SMUT AND NOTHING BUT”\*: THE FCC, INDECENCY, AND REGULATORY TRANSFORMATIONS IN THE SHADOWS

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\* 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!”).

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## 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.<sup>1</sup> 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.<sup>2</sup> When the FCC’s enhanced indecency prohibitions swept up U2 frontman Bono’s fleeting expletive during a live broadcast of a music awards show,<sup>3</sup> broadcasters finally thought they had found a vehicle to force revolutionary changes to the second-class status of broadcast media.<sup>4</sup>

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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.<sup>5</sup> 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)*<sup>6</sup>—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.<sup>7</sup>

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*<sup>8</sup>—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.<sup>9</sup> 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.”<sup>10</sup> The Notice indicated that, in the

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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.<sup>11</sup> While the focus on “egregious” cases hints that indecency enforcement might not have been the former FCC Chairman’s top priority,<sup>12</sup> 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<sup>13</sup> 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/hillcon-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](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=](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>.

indecenty enforcement.<sup>14</sup> 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.<sup>15</sup> Indecency complaints—many generated by and made into causes célèbres by conservative groups<sup>16</sup>—have been holding up license renewals, some for almost a decade.<sup>17</sup> Despite its reduced indecency backlog, the Commission is still facing hundreds of thousands of pending complaints.<sup>18</sup>

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

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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](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](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](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](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. Comm’n’s Comm’n, Before the Subcomm. on Comm’n’s 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.<sup>19</sup> Both judicial and scholarly attention has focused on the Commission’s about-face regarding the acceptability of fleeting expletives.<sup>20</sup> The Commission, however, should take this opportunity to assess its *overall* indecency regime.<sup>21</sup> 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.<sup>22</sup> 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

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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, *Bleeeeeeep! 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.<sup>23</sup> 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.<sup>24</sup> 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

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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.<sup>25</sup> 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-

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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 uncensored 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.<sup>26</sup> 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."<sup>27</sup>

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.<sup>28</sup> Violation of § 1464 can also lead to criminal penalties.<sup>29</sup>

### A. History of Indecency Regulation

The FCC has sought to regulate broadcast indecency since the 1920s.<sup>30</sup> At the beginning, the Commission operated informally, chastising broadcasters for indelicate programming via letters using terms of ringing condemnation.<sup>31</sup> 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.<sup>32</sup> The Commission's informal

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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* note 16, 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.”<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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,”<sup>37</sup> the Commission saw the Pacifica broadcast as an opportunity to clarify the extent of its jurisdiction and ensure its regulatory power.<sup>38</sup> In response to a single complaint by a

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,<sup>39</sup> the Commission found that WBAI's broadcast of the Carlin show had violated § 1464.<sup>40</sup> Defining "indecent" 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"<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> Reversing the D.C. Circuit's conclusion that the FCC order violated the anti-censorship provision in § 326 of the Communications Act of 1934,<sup>45</sup> the Court upheld the Commission's indecency policy as applied in the Carlin case. The *Pacifica* Court spoke of the narrowness of its holding,<sup>46</sup> but it also explained the lesser constitutional status of broadcasting. Because broadcasting had a "uniquely pervasive presence"<sup>47</sup> and because it was "uniquely accessible to children,"<sup>48</sup> 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

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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.<sup>49</sup> It simply focused on pre-10 PM broadcast uses of the “seven dirty words” identified in *Pacifica*.<sup>50</sup> 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.”<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup> The agency also established midnight—as opposed to 10 PM—as the start of the indecency safe harbor.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup>

Indeed, in the following decade, television programming escaped indecency regulation altogether,<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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,<sup>60</sup> 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.<sup>61</sup> This led some Commission-watchers to characterize the agency’s pre-2003 indecency efforts as quite restrained.<sup>62</sup>

By contrast, 2003 became a watershed year in indecency regulation—beginning the most aggressive indecency enforcement effort in the FCC’s history.<sup>63</sup> 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.”<sup>64</sup> 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.”<sup>65</sup> These incidents, as well as Janet Jackson’s infamous millisecond “wardrobe reveal” during the 2004 Super Bowl telecast,<sup>66</sup> led to waves of indecency complaints filed by members of the Parents Television Council (PTC) advocacy group.<sup>67</sup> 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 COMM.LAW CONSP. 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,<sup>68</sup> 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."<sup>69</sup>

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.<sup>70</sup> 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."<sup>71</sup> CBS's broadcast of the 2004 Super Bowl program triggered a \$550,000 forfeiture in 2006 for direct and vicarious liability under § 1464.<sup>72</sup>

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

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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.<sup>74</sup> 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.”<sup>75</sup> This assessment is consistently said to be contextual.<sup>76</sup> Moreover, the Commission asserts that “subject matter alone does not render material indecent.”<sup>77</sup>

In engaging in its “highly fact-specific”<sup>78</sup> 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.<sup>79</sup>

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.”<sup>80</sup> 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.’”<sup>81</sup>

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.”<sup>82</sup> 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.”<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> Notably, regulation of indecency became a unifying goal for both Democratic and Republican Commissioners.<sup>86</sup> 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/CA511792.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.<sup>87</sup> In 2006, the Commission was also granted a significant expansion in its forfeiture authority by Congress in the Broadcast Decency Enforcement Act.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> After briefing pursuant to a public notice, the Commission issued an order upholding its prior finding that the Fox broadcasts were actionably indecent.<sup>93</sup>

When the case returned to the Second Circuit,<sup>94</sup> two judges of the three-judge panel found the FCC's decision to be "arbitrary and capricious" in violation of the Administrative Procedure Act.<sup>95</sup> 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.<sup>96</sup> The majority expressed sympathy for the networks' argument that the FCC's approach to indecency was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."<sup>97</sup>

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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).<sup>98</sup> 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,<sup>99</sup> the Court held that the FCC had adequately explained the reversal of its prior approach to fleeting expletives.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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*.<sup>103</sup> 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

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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.”<sup>104</sup> The Third Circuit did not grant en banc review.<sup>105</sup>

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.”<sup>106</sup> That decision returned to the Supreme Court in *Fox II*.

The *Fox* cases presented the Supreme Court with a veritable spectrum of decisional choices.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> The Supreme Court did

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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*, BROADCASTING & CABLE (Jan. 18, 2012), [http://www.broadcastingcable.com/article/479252-Third\\_Circuit\\_Won\\_t\\_Reconsider\\_Super\\_Bowl\\_Decision.php](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.”<sup>110</sup>

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*.<sup>111</sup> 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.”<sup>112</sup>

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.<sup>113</sup>

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](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*.<sup>114</sup> And the story of media innovation and convergence is one of constitutional adaptation to technological change.<sup>115</sup>

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.<sup>116</sup> 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,<sup>117</sup> or the symbolic value of requiring a certain modicum of decency,<sup>118</sup> or the sense that there has been a significant increase in indecent material on the air,<sup>119</sup> 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,<sup>120</sup> or the legitimacy of the objective of having a safe harbor,<sup>121</sup> or an acceptance of indecency regulation as a tolerable quid pro quo for licensing,<sup>122</sup> or temperamental tendencies to look for the narrowest possible ground of decision,<sup>123</sup> 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.<sup>124</sup> Even if *Pacifica* is overruled, the FCC purports to rely on an alternative rationale to support

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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](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).

indecenty regulation.<sup>125</sup>

The ultimate constitutional resolution is uncertain. What seems clear for now is that the Court has left the FCC free to regulate indecenty “as long as its policy for doing so provides constitutionally sufficient notice of the prohibited conduct”<sup>126</sup> 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 indecenty policy in light of the public interest, and future constitutional and statutory challenges to the Commission’s indecenty actions are certain to be filed. Under these conditions, it behooves the Commission to appraise carefully its current indecenty 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 indecenty since the early 2000s. The seeming limits to the inquiry implicit in the Commission’s *2013 Indecency Notice* are too constraining.<sup>127</sup> A full description in turn reveals the problematic aspects of the FCC’s regulatory shifts since 2003. A more restrained approach to indecenty 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 indecenty 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 indecenty regulation extensively since 2003.<sup>128</sup> 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 indecenty policy. Second, it began entering into settlements with licensees conditioned on indecenty commitments. Third, it made procedural changes that 1) reduced the burden on complainants making a *prima facie* case and 2) inflated the appearance of indecenty complaints.

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

126. Lyrisa 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 indecenty 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<sup>129</sup> and charging network affiliates as well as the networks themselves for indecency in network programming.<sup>130</sup> Because

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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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup>

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*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 Puzanghera, *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,<sup>134</sup> with Clear Channel for \$1,750,000,<sup>135</sup> with Emmis for \$300,000,<sup>136</sup> and with Beasley Broadcasting for \$85,000.<sup>137</sup>

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.<sup>138</sup> 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](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-sterns-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/](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.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup>

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.<sup>142</sup> The fact that consent decrees

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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](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.<sup>143</sup> Indeed, there are indications that the Commission would support industry-wide censorship efforts through the “voluntary” consent decree process.<sup>144</sup> 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.<sup>145</sup>

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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).<sup>146</sup> 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.<sup>147</sup>

### 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](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,<sup>148</sup> 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.<sup>149</sup> The complaint procedure and changes in evidentiary rules also make it easy for advocacy groups such as the PTC to make claims under § 1464.<sup>150</sup> The

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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.<sup>151</sup> 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.<sup>152</sup>

The Commission, without fanfare, apparently changed its method of

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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.<sup>153</sup> It then used the total number of complaints to justify a shift in regulatory regime.<sup>154</sup> It did not, however, attempt to make its new process rigorous and reliable.<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup>

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.<sup>158</sup> 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

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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](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.<sup>159</sup> 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.<sup>160</sup> 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

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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; Candeb, *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.<sup>161</sup> 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.<sup>162</sup> At the

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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*, BROADCASTING & 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.<sup>163</sup>

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.<sup>164</sup> 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”<sup>165</sup> 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.”<sup>166</sup> This is despite the general belief, based on prior news cases, that the Commission would apply an implicit news exemption in assessing indecency.<sup>167</sup>

Moreover, despite its claims of relying on broadcasters’ news judgments,<sup>168</sup> the Commission appears now to permit inquiry in indecency cases into whether or not a program is a bona fide news program.<sup>169</sup> 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.<sup>170</sup> 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

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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.”<sup>171</sup> The agency now appears to see “willfulness” as established by broadcasters’ failure to guard fully against unanticipated indecency.<sup>172</sup>

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

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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.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> Indeed, a broadcaster's failure to implement technological blocking mechanisms could count as evidence of its willfulness in airing actionable indecency.<sup>177</sup> Liability could even be imposed on broadcasters for failing to use time-delay technology effectively.<sup>178</sup>

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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.<sup>179</sup> 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,<sup>180</sup> then the cost of technological compliance creates potentially insuperable problems for smaller and less profitable stations.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup> Thus, if program content would constitute a “dramatic departure” from broadcasters’ own editorial norms, then it

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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 proscription 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.<sup>184</sup>

##### 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.<sup>185</sup>

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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.<sup>186</sup> Some scholars have argued that FCC regulation will unduly leach the emotive character of speech.<sup>187</sup> 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](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.<sup>188</sup> 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.<sup>189</sup>

*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.<sup>190</sup> Arguably,

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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.<sup>191</sup> As the Tom Lehrer quote in the title of this article instructs us, everything is lewd, when properly viewed.<sup>192</sup>

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.<sup>193</sup> 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.”<sup>194</sup> Although this is a reference to a part of the Supreme Court’s opinion in *Pacifica*,<sup>195</sup> 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.<sup>196</sup> 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

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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.<sup>197</sup> Those characteristics have permitted the Commission to

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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.<sup>198</sup>

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.<sup>199</sup> 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.<sup>200</sup> 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?<sup>201</sup>

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."<sup>202</sup> Referring to increased indecency on the air, the reliance of parents on indecency-free daytime programming since 1927,<sup>203</sup> 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.<sup>204</sup>

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.<sup>205</sup> 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.<sup>206</sup> The majority in *Fox I* deferred to the FCC’s concerns about harm to children because of the

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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 Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Pacific*, 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.<sup>207</sup>

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 P'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."<sup>208</sup> 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.<sup>209</sup> If many children change the norms of what is seen as appropriate, this could also lead to broader social harms.<sup>210</sup>

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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.<sup>211</sup> 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.<sup>212</sup>

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”<sup>213</sup>—an interest in adopting something akin to Robert’s Rules of Order so as to “sharpen the discussion and broaden participation in it.”<sup>214</sup> 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.<sup>215</sup>

In addition to the regulatory justification based on denying endorsement,<sup>216</sup> rules such as prohibitions of indecency can be styled as

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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, and 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.<sup>217</sup> 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.<sup>218</sup> 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.

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*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*).<sup>219</sup> 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.<sup>220</sup> This claim contains various strands.<sup>221</sup> 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,<sup>222</sup> 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.<sup>223</sup> The Commission cannot properly regulate when it has not even explored

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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.”<sup>224</sup>

Whatever its appeal in the abstract, is the idea of safe harbors meaningful and realistic today?<sup>225</sup> 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.<sup>226</sup> 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.<sup>227</sup> And improvements in the V-chip can reduce the need for safe zoning approaches, even for those viewers who do not have cable.<sup>228</sup> 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

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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.<sup>229</sup> 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.<sup>230</sup> There are social tensions between norms of community and individual autonomy and differences even within communities.<sup>231</sup> 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.<sup>232</sup> 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

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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.<sup>233</sup> 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.<sup>234</sup> Those who believe

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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.<sup>235</sup> It is

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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 Shiffirin, *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.<sup>236</sup>

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

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).<sup>237</sup>

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”<sup>238</sup> designed to protect a social order perceived as delicate and unstable.<sup>239</sup> Given the ultimate—and relatively rapid—failure

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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](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.<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup>

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

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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.<sup>243</sup> On this view, licensee consent to indecency conditions avoids concerns about unconstitutional conditions.<sup>244</sup> But this is such a formal and artificial notion of consent as to be completely divorced from reality.<sup>245</sup> 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.<sup>246</sup>

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

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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.<sup>247</sup> 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,<sup>248</sup> 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.<sup>249</sup> Arguably, the scarcity ground of *Red Lion* could support the claim that government licensing is what makes broadcasting possible at all.<sup>250</sup> Allocation issues in broadcasting are not so fundamentally different from those in areas where they are solved by property rights regimes, and

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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.<sup>251</sup> 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.<sup>252</sup>

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.<sup>253</sup> 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?<sup>254</sup> 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.<sup>255</sup>

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?<sup>256</sup>

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<sup>257</sup>—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.<sup>258</sup> In turn, scarcity is a “particularly badly suited justification” for regulation of indecency.<sup>259</sup> 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.<sup>260</sup> 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,<sup>261</sup> the Commission should nevertheless hesitate to engage in

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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*,<sup>262</sup> 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.<sup>263</sup> 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,<sup>264</sup> 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.<sup>265</sup>

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.<sup>266</sup>

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,<sup>267</sup> 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.<sup>268</sup> 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.<sup>269</sup> 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.<sup>270</sup> That

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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”<sup>271</sup> such as the PTC<sup>272</sup>—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.<sup>273</sup> 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.<sup>274</sup> Apart from constitutional concerns, government endorsement of the views of the narrowest advocacy communities is

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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](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](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.”<sup>275</sup> 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.<sup>276</sup> At the same time, however, the FCC may be responding to a small group of

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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.<sup>277</sup> 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.<sup>278</sup> This possibility of indecency regulation as the tail that wags the otherwise unbidable 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 renaissance 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<sup>279</sup> 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.<sup>280</sup> 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.<sup>281</sup>

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?<sup>282</sup>

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.”<sup>283</sup> While the Commission did, in fact, open a proceeding in 2009,<sup>284</sup> 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.<sup>285</sup> 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”<sup>286</sup>—if the FCC does not step in aggressively.<sup>287</sup> 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.<sup>288</sup> The majority’s opinion in *Fox I* found that the FCC’s prediction of increased fleeting expletives on air was “rational (if not inescapable).”<sup>289</sup> 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

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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.<sup>290</sup>

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.<sup>291</sup> 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.”<sup>292</sup> The PTC’s president has taken the position that there is not a major broadcast market for “the edgier content.”<sup>293</sup> 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.<sup>294</sup> Recent empirical data on how well sexually-

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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](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](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](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.<sup>295</sup> Moreover, despite anecdotal accounts, the precise degree to which cable programming—and particularly basic cable—contains more sexual content than broadcasting is unclear.<sup>296</sup> Also, recent evidence suggests a reduction in cable viewing, a development whose possible impact on broadcast indecency is also unclear.<sup>297</sup> Perhaps station branding will help limit indecency on the air regardless of regulation;<sup>298</sup> and perhaps changes in the popularity of different types of program formats will influence the likely degree of sexual expression.<sup>299</sup>

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](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,<sup>300</sup> and while the current FCC appears to have lost momentum on former Chairman Kevin Martin's push for *a la carte* cable regulation,<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup> 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

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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.<sup>304</sup> 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”<sup>305</sup> and observed that the FCC, which had imposed \$440,000 in indecency fines in 2003, imposed “a record \$8 million in fines” in 2004.<sup>306</sup> 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.<sup>307</sup>

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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.<sup>308</sup>

#### 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.<sup>309</sup> 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.<sup>310</sup> 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,<sup>311</sup> 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,<sup>312</sup> broadcasters consistently

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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.<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup>

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"<sup>316</sup>—the practice of counting form complaints generated from particular websites as single complaints. If

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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,<sup>317</sup> 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.<sup>318</sup>

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

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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. Tramoto, *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.<sup>319</sup> 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.<sup>320</sup> 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.<sup>321</sup>

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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,<sup>322</sup> 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 inculcate, 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.<sup>323</sup> Instead, the Commission should either explicitly adopt a news exemption from the indecency rules or return to its pre-2003 approach.<sup>324</sup>

*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.<sup>325</sup> 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.<sup>326</sup> 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.<sup>327</sup> 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.<sup>328</sup>

### 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.<sup>329</sup> 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](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 & Candeb, *supra* note 32. This could enable the public

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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—itsself 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.<sup>330</sup> The PTC asserts that current program ratings are both inconsistently applied and minimally understood by parent viewers.<sup>331</sup> Such claims should be carefully and extensively examined.<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup>

Ultimately, these suggestions for ways to promote FCC restraint are merely recommendations for further exploration.<sup>335</sup> 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.<sup>336</sup>

#### 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

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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”<sup>337</sup> against smut on broadcast television.

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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](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.