

Winter 2010

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#### Recommended Citation

Abigail T. Rom, *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 (2010).

Available at: <https://scholar.valpo.edu/vulr/vol44/iss2/9>

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# FROM CARLIN'S SEVEN TO BONO'S ONE: THE FEDERAL COMMUNICATIONS COMMISSION'S REGULATION OF THOSE WORDS YOU CAN NEVER SAY ON BROADCAST TELEVISION

## I. INTRODUCTION

In 1961, the new chairman of the Federal Communications Commission ("FCC" or "Commission") gave a speech to the National Association of Broadcasters that became famously known as "The Vast Wasteland" speech.<sup>1</sup> In a brave move, Chairman Newton Minow challenged the broadcasters in attendance to watch their own channels, free of distraction.<sup>2</sup> He warned the broadcasters that they would find a vast wasteland:

You will see a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, Western badmen, Western good men, private eyes, gangsters, more violence and cartoons. And, endlessly, commercials—many screaming, cajoling and offending. And most of all, boredom. True, you will see a few things you will enjoy. But they will be very, very few. And if you think I exaggerate, try it.<sup>3</sup>

More importantly, Chairman Minow challenged the broadcasters to remember that they were accountable, not to the financial shareholders, but to the shareholders of the airwaves—the viewing public.<sup>4</sup> He also noted that children spend as much time watching television as they do in school, and accordingly asked the broadcasters, "Is there no room on television to teach, to inform, to uplift, to stretch, to enlarge the capacities of our children?"<sup>5</sup>

In 1978, the Supreme Court echoed Chairman Minow's concern for children when it held that the broadcast media's pervasiveness and accessibility to children warranted applying lesser First Amendment

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<sup>1</sup> Newton N. Minow, Speech Before the National Association of Broadcasters (May 9, 1961), reprinted in *Television and the Public Interest*, 55 FED. COMM. L.J. 395 (2003).

<sup>2</sup> *Id.* at 398.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 399.

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scrutiny to the regulation of broadcast indecency.<sup>6</sup> This decision, in response to George Carlin's famous *Seven Words You Can Never Say on Television* monologue, established that expletives should not be broadcast on the public airwaves.<sup>7</sup>

Three decades later, the Parents Television Council ("PTC") released the results of an exhaustive study that analyzed instances of foul-language on the broadcast airwaves during primetime.<sup>8</sup> Compared to 1998, the PTC found that nearly twice as many expletives were aired during primetime network television during 2007.<sup>9</sup> In addition, the PTC found that "harsher" forms of expletives were used, such as variations of "fuck" or "shit."<sup>10</sup> These results appear to support Chairman Minow's vast wasteland and demonstrate a need for the FCC to regulate such content.<sup>11</sup>

In the years since Chairman Minow's speech, the FCC has become more active in cleaning up the vast wasteland via indecency regulation.<sup>12</sup> Responding to highly publicized instances of fleeting indecency on broadcast television, the FCC in 2004 changed its indecency policy so that variations of the words "fuck" and "shit" would be considered indecent per se.<sup>13</sup> However, the FCC may not presume that variations of

<sup>6</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (finding that the ease of access and government's strong interest in the well-being of youth justified special treatment of indecent broadcasting). The iconic Carlin, who is remembered for his comic and "furious social commentary," died at age seventy-one on June 22, 2008. Mel Watkins & Bruce Weber, *George Carlin, Comic Who Chafed at Society and Its Constraints, Dies at 71*, N.Y. TIMES, June 24, 2008, at C12, available at <http://www.nytimes.com/2008/06/24/arts/24carlin.html?pagewanted=1&r=1#>.

<sup>7</sup> See generally *Pacifica*, 438 U.S. at 750 (holding that Carlin's monologue was indecent in the broadcasting context); Citizen's Complaint Against Pacifica Found. Station WBAI (FM) (*Pacifica Complaint*), 56 F.C.C.2d 94 (1975) (declaratory order) (articulating an indecency policy in response to the broadcast of Carlin's monologue).

<sup>8</sup> Press Release, Parents Television Council, PTC Finds Increase in Harsh Profanity on TV (Oct. 29, 2008), available at <http://parentstv.org/PTC/news/release/2008/1029.asp>. The Parents Television Council analyzed all primetime television entertainment programs broadcast on the major networks between 1998 and 2007. *Id.*

<sup>9</sup> *Id.* The PTC recorded 11,000 expletives in 2007. *Id.*

<sup>10</sup> *Id.* ("Not only are harsher profanities like the f-word and s-word airing during hours when children are likely to be in the viewing audience, but they are airing with greater frequency."). The PTC found that in 1998, ninety-two percent of expletives on broadcast television could be categorized as "mild." *Id.* In 2007, seventy-four percent of the expletives were categorized as "mild," while nearly a quarter of the expletives were a form of fuck, shit, or bitch. *Id.* In 2007, half of the instances of the variations of "fuck" were broadcast during the 8:00 p.m. viewing hour. *Id.*

<sup>11</sup> See *infra* note 139 and accompanying text (discussing the PTC study to rebut critics of FCC indecency regulation).

<sup>12</sup> See *infra* Part II.B (discussing the creation of an indecency policy).

<sup>13</sup> See *infra* notes 76-84 and accompanying text (summarizing the changes to the FCC's indecency policy). See generally Katherine A. Fallow, *The Big Chill? Congress and the FCC*

“fuck” and “shit” are presumptively indecent without violating the Constitution.<sup>14</sup> In addition, because of the recent litigation questioning the validity of the FCC’s per se prong of its indecency policy, it is unclear what policy standards must be followed.<sup>15</sup> Thus, the FCC must revise its current indecency policy to continue protecting the public’s convenience, interest, and necessity, to remedy the constitutional problems with the FCC’s indecency policy, and to protect broadcasters’ free speech by putting them on clear notice of what type of content should be avoided.<sup>16</sup>

To this end, Part II provides a background of the FCC’s regulatory history and scheme, including Congress’s mandate that the FCC regulate in the public interest, convenience, and necessity, with a focus on indecency policy.<sup>17</sup> Part III argues that the FCC’s new fleeting indecency policy is unconstitutional, but that the FCC must still regulate broadcast indecency for the public convenience, interest, and necessity.<sup>18</sup> Part IV proposes a new indecency policy that provides clearer guidelines.<sup>19</sup>

## II. BACKGROUND

Part II provides a background of the FCC’s regulatory history and scheme, focusing on its indecency policy.<sup>20</sup> Congress created the FCC to regulate the broadcast spectrum.<sup>21</sup> Since its creation in 1934, the FCC has exercised its powers according to the public convenience, interest, and

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*Crack Down on Indecency*, COMM’N LAW., Spring 2004, at 1 (illustrating the publicity and action taken following the 2003 Golden Globe Awards and 2004 Super Bowl Halftime show).

<sup>14</sup> See *infra* Part III (discussing the unconstitutionality of fleeting indecency policy).

<sup>15</sup> See *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *cert. granted and vacated*, 129 S. Ct. 2176 (2009) (remanding in light of *Fox v. FCC*); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S.Ct. 1647 (2008). The Supreme Court granted certiorari in *Fox v. FCC* and heard oral arguments on Nov. 4, 2008. Transcript of Oral Argument, *FCC v. Fox Television Stations, Inc.*, 128 S.Ct. 1647 (2008) (No. 07-582), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-582.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-582.pdf).

The main issue on appeal was whether the FCC had adequate reasoning for changing its indecency policy. *Id.* See Courtney Livingston Quale, Note, *Hear an [Expletive], There an [Expletive], But[!] . . . the Federal Communications Commission Will Not Let You Say an [Expletive]*, 45 WILLIAMETTE L. REV. 207, 251 (2008) (providing a summary of the oral arguments); *infra* notes 99–103 and accompanying text (discussing Supreme Court’s decision). See also *infra* notes 86, 91 (discussing the Administrative Procedure Act and the “arbitrary and capricious” standard).

<sup>16</sup> See *infra* Part IV (proposing new policy).

<sup>17</sup> See *infra* Part II (discussing the statutory creation of the FCC and its regulatory history).

<sup>18</sup> See *infra* Part III (discussing validity of justifications and unconstitutionality of fleeting indecency policy).

<sup>19</sup> See *infra* Part IV (proposing future action for the FCC).

<sup>20</sup> See *infra* Parts II.A–D (using a chronological approach).

<sup>21</sup> See *infra* note 32 and accompanying text (discussing the creation of the FCC).

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necessity.<sup>22</sup> The FCC is empowered to regulate broadcast indecency, and in recent years its policy has garnered much attention.<sup>23</sup> Part II.A discusses the FCC's congressional authority and the judicial support of this statutory authority, as well as how First Amendment principles interact with the FCC's regulatory scheme.<sup>24</sup> Part II.B discusses the development of the FCC's indecency policy.<sup>25</sup> Part II.C discusses the FCC's change in its treatment of fleeting indecency.<sup>26</sup> Finally, Part II.D discusses the Second Circuit's and Supreme Court's treatment and rejection of the FCC's fleeting indecency policy.<sup>27</sup> Overall, Part II provides the necessary foundation for the analysis that the FCC's policy for fleeting indecency is unconstitutional and for the contribution of a proposed policy that protects both the public's interest and the broadcast media's right to free speech.<sup>28</sup>

A. *The FCC's Statutory Authority and Powers*

The Radio Act of 1927 ("Radio Act") was the first major piece of broadcasting legislation.<sup>29</sup> The airwaves spectrum, according to the Radio Act, was as a public resource that no individual could claim as property.<sup>30</sup> In addition, the Radio Act established the Federal Radio

<sup>22</sup> See *infra* note 32 and accompanying text (discussing Congress's mandate that the FCC regulate for the public convenience, interest, and necessity).

<sup>23</sup> See generally *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding the regulation of broadcast indecency as applied); Fallow, *supra* note 13 (discussing recent applications of the FCC's indecency policy).

<sup>24</sup> See *infra* Part II.A (discussing legislation and Supreme Court decisions).

<sup>25</sup> See *infra* Part II.B (using FCC orders and federal court decisions).

<sup>26</sup> See *infra* Part II.C (discussing recent FCC orders that depart from previous policy).

<sup>27</sup> See *infra* Part II.D (providing a summary of *Fox Television Stations, Inc. v. FCC*, 489 F.3d 333 (2d Cir. 2007) *rev'd*, 129 S. Ct. 1800 (2009)).

<sup>28</sup> See *infra* Parts III, IV (analysis of FCC policy and contribution of new policy).

<sup>29</sup> Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927). With the Radio Act of 1927, Congress created a government allotment system in which the government retained ownership over the broadcast spectrum, but allowed private individuals, firms, or corporations to operate channels under a license in order for a private marketplace to exist. *Id.*

<sup>30</sup> *Id.* § 1 (stating that the government is to maintain control over all channels of radio transmissions and is to provide the "use of such channels, but not the ownership thereof, by individuals, firms, or corporations . . . under licenses granted by Federal authority"). "Broadcasting" is defined by statute as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(6) (2006). See generally Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605 (1998). The Radio Act of 1912 was the first piece of legislation that governed radio. *Id.* at 608. It gave the government the power to issue licenses by request, but did not allow for the denial of licenses because the government had assumed that the spectrum could accommodate all frequencies requested. *Id.* However, the unregulated growth of the industry resulted in too many frequencies and interference. *Id.* In response, then Secretary of Commerce

Commission ("FRC") to regulate as "public convenience, interest, or necessity" required.<sup>31</sup> Seven years later, Congress passed the Communications Act of 1934 ("Communications Act"), which created the FCC.<sup>32</sup> The Communications Act maintained much of the language of the Radio Act and required that the FCC enforce and execute the provisions according to the public convenience, interest, and necessity.<sup>33</sup>

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Herbert Hoover promoted a system of self-regulation, and he first expressed the idea that the public owned the airwaves. *Id.* At a 1925 radio conference, Hoover stated, "[t]he ether is a public medium, and its use must be for public benefit." *Id.* (quoting Herbert Hoover, U.S. Sec'y of Commerce, Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio 7 (Nov. 9-11, 1925) (Government Printing Office 1926)). The public's right to the airwaves spectrum became the central idea of the Radio Act of 1927. *Id.*

<sup>31</sup> Radio Act of 1927, § 4. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981). The Supreme Court has given deference to the FCC's interpretation of the public interest. *Id.* "Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *Id.* *See also infra* notes 36-39 and accompanying text (discussing the Supreme Court's treatment of the public convenience, interest, and necessity as factors). *See generally* Krasnow & Goodman, *supra* note 30, at 60 (discussing the early application of the public interest standard as extending to both technical matters and programming content).

<sup>32</sup> Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613). The Communications Act of 1934 repealed the Radio Act of 1912, abolished the Federal Radio Commission, and gave the FCC power to regulate communication services by telegraph, telephone, cable, and radio. 78 CONG. REC. 12,405 (1934). *See* 47 U.S.C. § 154(i) ("The [FCC] may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."). The President appoints five members to the FCC, and, along with Congress, designates one of the five as chairman. *Id.* § 154(a). *See also* FCC v. Pottsville Broad. Co., 309 U.S. 134, 137 (1940) (stating that Congress enacted the Communications Act of 1934 under fear that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."). In order to determine the proper procedures to follow, administrative agencies must follow both the statute authorizing the agency's power and the Administrative Procedure Act ("APA"). RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 293 (5th ed. 2009). The APA provides four types of procedures including formal adjudication, informal adjudication, formal rulemaking, and informal rulemaking. *Id.* at 294. These four methods serve as a starting point, but the authorizing statute "acts as the basis for determining which of the procedures described in the APA an agency is required to use in taking particular types of actions." *Id.* at 295. Thus, the FCC is bound by both the APA and any procedures specified within 47 U.S.C. §§ 151-613. *See id.* ("[T]he APA and agency organic acts must be read in *pari materia* in order to determine the procedures an agency must follow in a given case.").

<sup>33</sup> Communications Act of 1934, § 303. *See also* Krasnow & Goodman, *supra* note 30, at 626. The public interest standard could be considered a double-edged sword: "The flexibility inherent in this elusive public interest concept can be enormously significant to the FCC not only as a means of modifying policies to meet changed conditions and to obtain special support but also as a source of continuing and sometimes hard-to-resolve controversy." *Id.* *See generally* Elizabeth D. Lauzon, Annotation, *Construction and Application of Communications Act of 1934 and Telecommunications Act of 1996 - United States*

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In order to create a pro-competitive market that would allow for technological advancement, Congress enacted major updates and changes through the Telecommunications Act of 1996 but maintained that the FCC's main objectives were the public convenience, interest, and necessity.<sup>34</sup>

The FCC's licensing and regulatory powers include policing radio wave traffic and the composition of that traffic, such as choosing among those who apply for broadcast licenses.<sup>35</sup> Such powers may appear to be broad, but these powers are limited by what the FCC determines is in the public's best interest, convenience, and necessity.<sup>36</sup> According to the

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*Supreme Court Cases*, 32 A.L.R. FED. 2D 125 (2008) (summarizing important Supreme Court cases that construe and apply the Communications Act of 1934).

<sup>34</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (maintaining "public convenience, interest, or necessity" language). The Telecommunications Act of 1996 was originally introduced as the Telecommunications Competition and Deregulation Act of 1995. S. 652, 104th Cong. (1995). The Act was introduced "[t]o provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes." *Id.* See generally Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1607 (2008) (suggesting that media ownership regulation should be aimed at "creating a better agency relationship between elected officials and the citizenry" and that political discourse will improve if the government regulates media ownership).

<sup>35</sup> *NBC v. United States*, 319 U.S. 190, 214-16 (1943) (quoting 47 U.S.C. § 303, which lists the powers of the FCC). See generally JOHN D. ZELEDNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA* 361 (5th ed. 2007) (discussing the FCC's licensing procedures); Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235 (2004) (arguing that the FCC should employ affirmative action practices when assigning licenses); Matthew A. Klopp, *Constitutional Malfunction: Does the FCC's Authority to Revoke a Broadcaster's License Violate the First Amendment?*, 13 COMMLAW CONSPPECTUS 309, 327 (2005) (arguing that the FCC's power to revoke a broadcaster's license based on content is a prior restraint in violation of the First Amendment).

<sup>36</sup> See *NBC*, 319 U.S. at 216 (stating that the public interest, convenience, and necessity standard is not to be interpreted as so indefinite to provide an unlimited power); *Pottsville*, 309 U.S. at 137-38 (stating that consideration of the public interest, convenience, and necessity is the touchstone created by Congress). In 1946, the FCC published "Public Service Responsibilities of Broadcast Licensees" to articulate its view of the public interest standard. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 21 (2004). This report:

[S]pecified that licensees were required to devote an "adequate" amount of broadcast time to the coverage of local, national and international issues of public concern. It instructed broadcasters that they were expected to air a "reasonable" number of "sustaining" programs, meaning programs not sponsored by commercial advertising but funded by the broadcaster itself, and local live programming. It warned licensees that they should limit advertising

Supreme Court, the public interest standard serves as an instrument for discretion and is characteristic of the fluid nature of broadcasting.<sup>37</sup> Because the nature of the broadcasting industry and the public interest standard are subject to change, the FCC must act within its statutory duty to adjust its regulations.<sup>38</sup> The factors' fluidity, however, is not intended to create an indefinite assignment of power, and as such, the factors must be interpreted through the scope, character, and quality of services at issue, as well as through the First Amendment.<sup>39</sup>

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech."<sup>40</sup> FCC licensing regulations have been challenged on First Amendment grounds, but the Supreme Court has held that no free speech right exists in possessing a broadcast license.<sup>41</sup> In *NBC v. United States*, the Court found that the FCC did not violate the First Amendment by denying broadcast licenses based on

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to "a reasonable amount" of overall programming time. A new FCC broadcast license renewal form required applicants to report on their program offerings in six categories: education, entertainment, news, religion, discussion and talks.

*Id.* (quoting FCC, PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES (1946)) (internal footnotes omitted).

<sup>37</sup> See *Pottsville*, 309 U.S. at 138. In *Pottsville*, the Pottsville Broadcasting Company ("PBC") appealed the FCC's denial of PBC's application for a permit. *Id.* at 139. The FCC based the denial on the grounds that PBC was financially disqualified and failed to adequately support local interests. *Id.* at 139. Instead of reviewing PBC's application standing alone, the FCC considered it against two other potential broadcasters in order to compare and determine which would best serve the public's interest. *Id.* at 140. The court of appeals reversed the FCC and ordered the FCC to consider PBC's application according to the court of appeals' decision. *Id.* at 140. The Supreme Court granted certiorari to resolve the administrative law issues. *Id.* at 135. The Court found that because the FCC committed legal error and did not give PBC legal rights beyond those possessed by the two other applicants, the court of appeals could not create a priority in the administrative policy that Congress had not created. *Id.* at 145. The Court said that to force the FCC to follow the court of appeals' order would cause "contingencies of judicial review and of litigation," rather than the public interest, to become decisive factors in determining which private entity would receive a license. *Id.* at 145-46.

<sup>38</sup> *NBC*, 319 U.S. at 225 ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."). See Krasnow & Goodman, *supra* note 30, at 625 (stating that the public interest standard is useful in "keeping up with changing means of communication").

<sup>39</sup> *NBC*, 319 U.S. at 216 (citing *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933)) ("This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power."). See generally ZELEZNY, *supra* note 35, at 356 (discussing the limited First Amendment protection afforded to the broadcast media as compared to the print media).

<sup>40</sup> U.S. CONST. amend. I.

<sup>41</sup> See *infra* notes 42-44 and accompanying text (discussing *NBC*, 319 U.S. 190 and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)).

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public interest, convenience, or necessity.<sup>42</sup> In so holding, the Court reasoned that, by its nature, broadcasting is not available to all who wish to use the airwaves, and unlike other modes of expression, the use of the broadcast airwaves may be permissively denied to some.<sup>43</sup> Moreover, in *Red Lion Broadcasting Co. v. FCC*, the Court reiterated that the scarcity of broadcast airwaves permitted the government to regulate access and use, and that the people, not the broadcasters, “retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.”<sup>44</sup>

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<sup>42</sup> 319 U.S. at 227. In *NBC*, the Court held that the FCC had congressional authority to regulate chain broadcasting, and that the regulations as enforced were lawful exercises of power. *Id.* at 224, 226. In the case, NBC and CBS networks brought suit to enjoin the enforcement of the chain broadcasting regulations promulgated by the FCC. *Id.* at 193. The facts showed that the FCC undertook a detailed investigation into the practice of chain broadcasting and consequently enacted several regulations directed at distinct practices deemed detrimental to the public interest. *Id.* at 196-97. The networks attacked the regulations as beyond the FCC’s regulatory scope, as arbitrary and capricious, as a result of an unconstitutional delegation of congressional power, and as violating free speech rights under the First Amendment. *Id.* at 209. See generally *The Impact of the FCC’s Chain Broadcasting Rules*, 60 YALE L.J. 78 (1951) (discussing that the FCC had done little to enforce its chain broadcasting rules, and as such, the broadcast industry practices had not changed substantially).

<sup>43</sup> *NBC*, 319 U.S. at 226. The *NBC* court stated “[f]reedom of utterance is abridged to many who wish to use the limited facilities of radio” because “[u]nlike other modes of expression, radio inherently is not available to all.” *Id.* The Court further explained: “That is [radio’s] unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.” *Id.* Thus, because Congress properly delegated licensing power to the FCC, there would be no denial of free speech so long as the FCC used the public interest, convenience, and necessity standard when granting and rejecting licenses. *Id.* at 227. See Varona, *supra* note 36, at 60 (comparing the scarcity of radio to newspaper). Varona states that “[t]he use of broadcast spectrum is ‘rivalous,’ meaning that its medium is of fixed capacity and prone to interference if speakers are not ‘channeled’ and restricted in their activities. Newsprint, by contrast, is nonrivalous. Anyone wishing to be a newspaper publisher may be one.” *Id.*

<sup>44</sup> 395 U.S. at 390 (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . .”). *Red Lion* dealt with the constitutionality of the fairness doctrine—which has since been abandoned as a policy. See Jerome A. Baron, *What Does the Fairness Doctrine Controversy Really Mean?* 12 HASTINGS COMM. & ENT. L.J. 205 (1989). The case also discussed the equal time provision of the Communications Act of 1934. See 47 U.S.C. § 315 (2006); ZELEZNY, *supra* note 35, at 389 (“Use of time [on a broadcast channel] by a candidate triggers the broadcaster’s obligations to provide equal opportunities.”). The Court explained that once a broadcaster possesses a license no constitutional right exists to monopolize the license. *Red Lion*, 395 U.S. at 389. In addition, the First Amendment allows the government to require a licensee to present views and voices that are representative of the community, which would otherwise be barred from the airwaves. *Id.*

This scarcity rationale has traditionally served as the primary justification for broadcast regulation, including indecency regulation.<sup>45</sup>

*B. The FCC's Indecency Regulation Policy*

To ensure that the broadcast airwaves function according to First Amendment principles, the FCC is prohibited from censoring broadcast communications and from promulgating any regulation that would interfere with free speech rights.<sup>46</sup> Although the FCC cannot censor broadcasts, Congress empowered it to enforce a criminal statute that prohibits the broadcast of obscene, indecent, and profane language on the public airwaves.<sup>47</sup>

<sup>45</sup> See *infra* Part II.B (providing a chronological presentation of the FCC's indecency policy changes and case law).

<sup>46</sup> 47 U.S.C. § 326. The statute states in full:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

*Id.* However, as common practice, the FCC may consider the content of past broadcasts when considering a licensee's renewal application. *FCC v. Pacifica Found.*, 438 U.S. 726, 736 (1978) (citing *KFKB Broad. Ass'n v. Fed. Radio Comm'n*, 47 F.2d 670 (1931)). In addition, 47 U.S.C. § 326 "was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language." *Id.* at 737.

<sup>47</sup> See Radio Act of 1927, Pub. L. No. 69-632, § 30, 44 Stat. 1162, 1173 (1927) (codified as amended at 18 U.S.C. § 1464 (2006)) ("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."); Indus. Guidance On the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broads. Indecency (2001 *Industry Guidance*), 16 F.C.C.R. 7999 (2001) (policy statement) ("Congress has given the [FCC] the responsibility for administratively enforcing 18 U.S.C. § 1464. . . . [T]he Commission may revoke a station license, impose a monetary forfeiture, or issue a warning for the broadcast of indecent material."). Congress enacted 18 U.S.C. § 1464 as part of the Radio Act of 1927, but later moved the provision to the criminal code. *Pacifica*, 438 U.S. at 738. See also 47 C.F.R. § 73.4165 (2008) (regulation for obscene language); 47 C.F.R. § 73.4170 (2008) (regulation for indecent language).

The Supreme Court, in *Cohen v. California*, held that obscenity is an unprotected form of speech, but that the government may not criminalize distasteful or offensive utterances without a particularized and compelling purpose. 403 U.S. 15, 26 (1971). *Cohen*, the appellant, was arrested for wearing the phrase "Fuck the Draft" printed on a jacket into a courthouse. *Id.* at 16. The Court stated that the speech at issue did not fall within the limited categories of speech that do not enjoy First Amendment protection, such as obscenity. *Id.* at 19–20. The Court reasoned that, while such speech may be vulgar or offensive to some, this is a necessary side effect of open debate. *Id.* at 24–25. As this note is concerned with indecency, there will be no further discussion of obscenity. See generally *Miller v. California*, 413 U.S. 15 (1973) (articulating the test for obscenity).

In *Duncan v. United States*, the Ninth Circuit upheld a charge of broadcasting profane language. 48 F.2d 128 (9th Cir. 1931). The court defined profane language as "[i]rreverent

In 1975, the FCC first articulated an indecency policy in response to a radio broadcast of George Carlin's *Seven Words You Can Never Say on Television*.<sup>48</sup> The FCC described the standard for indecent material as "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>49</sup> But when few

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toward God or holy things." *Id.* at 133. Because Duncan's broadcast included the phrase "By God" irreverently and announced an intention to curse others in the name of God, the court found that Duncan could be punished under the words of the statute. *Id.* at 134. For discussion of the words "obscene, indecent, and profane" in the statute, see generally *United States v. Simpson*, 561 F.2d 53 (7th Cir. 1977) (discussing the meaning of indecent as distinguished from obscene); *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972) (discussing definitions of profane and indecent); *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966) (discussing the distinctions between obscene, indecent, and profane).

<sup>48</sup> See Citizen's Complaint Against Pacifica Found. Station WBAI (FM) (*Pacifica Complaint*), 56 F.C.C.2d 94 (1975) (declaratory order). This decision arose out of George Carlin's famous *Seven Words You Can Never Say on Television* monologue, a recording of which was broadcast on a New York radio station around 2:00 p.m. *Id.* para. 4. The FCC received a complaint from a father who tuned into the broadcast while driving with his young son in the car. *Id.* para. 3. The monologue consisted of dirty words that, according to Carlin, should not be said on the public airwaves. *Id.* para. 5. The FCC forwarded the initial complaint to the radio station for comment. *Id.* para. 6. In its response, the station explained that the monologue was aired as part of a weekly program that discussed contemporary society's attitudes about language. *Id.* para. 6. It was the radio station's view that Carlin was a social satirist and his monologue was a natural contribution to the discussion. *Id.* In addition, the radio station said that it had warned listeners of the potentially offensive language. *Id.*

The FCC's order began by listing four reasons why the broadcast medium may be regulated more rigorously than other forms of expression, including that:

- (1) children have access to radios and in many cases are unsupervised by parents;
- (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference;
- (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and
- (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

*Id.* para. 9 (internal citation omitted). The FCC singled out the use of radio by children as especially compelling. *Id.* The FCC then defined indecent language as that which is patently offensive as measured by contemporary community standards. *Id.* at para. 11.

<sup>49</sup> *Pacifica Complaint*, 56 F.C.C.2d para. 11. The FCC used nuisance law, which channels behavior as opposed to actually prohibiting behavior, as a model for its policy. *Id.* In applying its new standard to the Carlin monologue, the FCC found that the words used "depict[ed] sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and [were] accordingly 'indecent' when broadcast on radio or television." *Id.* para. 14. However, the FCC did not impose sanctions because it was using the case as an opportunity to clarify its policy standards. *Id.* The Commission defended its policy because the number of words that fall under the definition was limited and because during late hours such words with some value could be broadcast if warning was given. *Id.* para. 16. Moreover, the Commission

children are in the audience, the FCC stated that the standard could change and the Commission would also consider the literary, artistic, political, or scientific value of the alleged indecent speech.<sup>50</sup> The D.C. Circuit Court of Appeals, however, overturned the policy, which led to the seminal Supreme Court case, *FCC v. Pacifica Foundation*.<sup>51</sup>

In *Pacifica*, the Supreme Court considered whether the words at issue were indecent under 18 U.S.C. § 1464 and whether the FCC's announced policy violated the First Amendment.<sup>52</sup> The Court found that Carlin's

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felt that a lack of action could lead to "widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children." *Id.*

<sup>50</sup> *Id.* para. 12 (citing *Miller v. California*, 413 U.S. 15, 24 (1973) (stating that the indecency definition would remain the same, but the FCC would consider literary, artistic, political, or scientific value). In *Miller v. California*, the Supreme Court set out a three-part test for obscenity. 413 U.S. at 24. The third factor in the test for obscenity asks whether a work as a whole lacks serious literary, artistic, political, or scientific value. *Id.* The Court provided the example of medical books that depict human anatomy as depictions that would be potentially obscene, but would fail the third factor. *Id.* at 26. See generally Edward John Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. ILL. U. L.J. 1159 (1987) (discussing the interpretation of the third factor of the *Miller* test). Main describes the third factor as the most important prong of the obscenity test, because it is "the diagnostic trait by which a work is classified as protected speech" and "identifies the fundamental interest behind the [F]irst [A]mendment guarantee of free speech: the unrestrained communication of ideas." *Id.* at 1176.

<sup>51</sup> *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977) (stating that despite the FCC's best intentions, the effect of its order was to inhibit the free exchange of expression), *rev'd* 438 U.S. 726 (1978). The D.C. Circuit characterized the FCC's order as direct censorship in violation of 47 U.S.C. § 326. *Id.* at 14.

<sup>52</sup> *Pacifica*, 438 U.S. at 734. In *Pacifica*, the Court limited its review to whether the FCC's policy was constitutional as applied to the particular broadcast of Carlin's monologue. *Id.* at 742. An "as applied" challenge involves evaluating how the challenged policy or statute "operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations." 16 C.J.S. *Constitutional Law* § 187 (2008). In contrast, "a facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exist under which the statute would be valid." *Id.* (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990)). The Court denied *Pacifica*'s allegation of overbreadth and stated that indecency must be governed by context. *Id.* In addition, the Court stated that while some broadcasters may censor themselves, the FCC's standard would only deter patently offensive references to excretory and sexual organs and activities, which in the Court's view, lie at the perimeter of First Amendment. *Id.* at 743. Unconstitutional overbreadth means that a statute or policy prohibits a substantial amount of protected speech which limits the free exchange of ideas. *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). However, the Supreme Court describes the invalidation of statutes or policies on overbreadth grounds as "strong medicine," especially when such statutes or policies proscribe particularly harmful speech. *Id.* See *New York v. Ferber*, 458 U.S. 747, 769 (1982) ("Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'") (quoting *Broadrick v. Oklahoma*, 413 U.S.

monologue may have been protected in other contexts, but distinguished the broadcast media in two ways:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read.<sup>53</sup>

The Court found that the ease of access to broadcasting and the government's strong interest in the well-being of youth justified special treatment of indecent broadcasting.<sup>54</sup>

After the *Pacifica* decisions, the FCC followed a narrow policy of indecency regulation limited to excessive uses of dirty words such as those in Carlin's monologue.<sup>55</sup> However, in 1987, the FCC enunciated a

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601, 613 (1973)). Thus, the Court requires that an overbroad statute or policy must reach a "substantial" amount of protected speech, in relation to the statute's or policy's overall sweep. *Williams*, 128 S.Ct. at 1838 (2008). In order to determine whether a statute or policy is overbroad, courts must first construe the challenged statute and then determine whether the statute covers a substantial amount of protected speech. *Id.* at 1838, 1841.

<sup>53</sup> *Pacifica*, 438 U.S. at 748-49 (citing *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970)) (internal citation omitted). Thus, the Court undertook a contextual analysis that involved distinguishing the broadcast medium from other forms of expression. *Id.* at 747-48. The Court recognized these two bases of distinction in addition to the traditional basis of scarcity. *Id.* at 748. Like the FCC, the Court narrowed its holding based on nuisance theory, which requires consideration of relevant variables such as time of day, content of program, and differences in medium. *Id.* at 750. See generally Joshua B. Gordon, Note, *Pacifica is Dead. Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451 (2006) (discussing and critiquing *Pacifica* in more detail).

<sup>54</sup> *Pacifica*, 438 U.S. at 750. The Court quoted to *Ginsberg v. New York*, 390 U.S. 629 (1968), for the proposition that the "government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749. In *Ginsberg*, the owner of a lunch-counter violated state law by selling obscene magazines to a sixteen-year-old. 390 U.S. at 631. The Court found that because the state had an interest in protecting the well-being of minors, it was within the right of the state to regulate the sale of obscene materials to minors. *Id.* at 639. See generally MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001) (discussing the assumption that children need to be protected from indecency to protect their development).

<sup>55</sup> See Application of WGBH Educ. Found., 69 F.C.C.2d 1250, para.10 (1975) (memorandum opinion and order) ("We intend strictly to observe the narrowness of the *Pacifica* holding."); New Indecency Enforcement Standards to be Applied to All Broad. &

broader policy.<sup>56</sup> The Commission stated that broadcasts with repetitive uses of sexual or excretory words and phrases were not the only broadcasts that could be found indecent; however, if complaints were concerned only with the language of a broadcast, then a finding of deliberate and repetitive use in a patently offensive way would be necessary to find the broadcast indecent.<sup>57</sup> If the indecency alleged went beyond language, the context of a particular broadcast would then be examined.<sup>58</sup> The FCC reiterated that the nuisance rationale underlaid its indecency policy and rejected the scarcity rationale as its main authorization to regulate indecency.<sup>59</sup> In addition, the Commission

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Amateur Radio Licensees, 2 F.C.C.R. 2726, 2726 (1987) (public notice) (stating that the Commission had previously limited enforcement efforts to the seven particular words in the Carlin monologue).

<sup>56</sup> *New Indecency Enforcement Standards*, 2 F.C.C.R. at 2726. This enforcement policy was issued in order to clarify the policies which arose out of three warnings issued earlier the same month. *Id.* See generally *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705 (1987) (memorandum opinion and order); *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987) (memorandum opinion and order); *Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987) (memorandum opinion and order).

<sup>57</sup> *New Indecency Enforcement Standards*, 2 F.C.C.R. at 2726; *Pacifica Found., Inc.*, 2 F.C.C.R. para. 13. In addition, the FCC put broadcasters on notice that it would enforce indecency on a case by case basis, including broadcasts after 10:00 p.m., because evidence had shown that many children were still in the audience after that time. *New Indecency Enforcement Standards*, 2 F.C.C.R. at 2726. Prior to this policy clarification, the practice had been to allow indecent broadcasts after 10:00 p.m. if such broadcasts were preceded by a warning. *Id.* In each of the three warnings issued during the same month of 1987, the indecent broadcasts occurred after 10:00 p.m. *Id.* See *Infinity Broad. Corp.*, 2 F.C.C.R. para. 27 n.47 (stating that the preference was a case-by-case determination, but that midnight represents a time when less children would be in the audience). In *Infinity*, the FCC stated that the hours between midnight and six in the morning represented the time during which broadcasters could air indecent material accompanied by a warning, because the risk that children would be in the audience during that time frame was low. *Id.*

<sup>58</sup> *New Indecency Enforcement Standards*, 2 F.C.C.R. at 2726; *Pacifica Found., Inc.*, 2 F.C.C.R. para. 13 (“[S]peech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium.”).

<sup>59</sup> *New Indecency Enforcement Standards*, 2 F.C.C.R. 2726. See *NBC v. United States*, 319 U.S. 190 (1943) (reasoning that the scarcity rationale allowed the FCC to regulate the broadcast airwaves). Some argue that a lack of scarcity in the modern media supports a near-complete deregulation of the broadcast airwaves. See ZELEZNY, *supra* note 35, at 360 (discussing whether the scarcity rationale is still valid); Ronald J. Krotoszynski, Jr, *The Irrelevant Wasteland: An Exploration of Why Red Lion Doesn't Matter (Much) in 2008, The Crucial Importance of the Information Revolution, and the Continuing Relevance of the Public Interest Standard in Regulating Access to Spectrum*, 60 ADMIN. L. REV. 911 (2008) (arguing that *Red Lion* and the scarcity rationale are no longer relevant); Ian J. Antonoff, Comment, *You Don't Like It . . . Change the (Expletive Deleted) Channel!: An Analysis of the Constitutional Issues that Plague FCC Enforcement Actions and a Proposal for Deregulation in Favor of Direct Consumer Control*, 15 SETON HALL J. SPORTS & ENT. L. 253, 273 (2005) (“Because of the ever-increasing availability of broadcast and communication media, the government no longer

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stated its belief that channeling indecent broadcasts into certain time periods represented a valid time, place, and manner restriction on speech.<sup>60</sup>

In 1988, the District of Columbia Circuit Court of Appeals (“D.C. Circuit”) upheld the broader policy, but also found that channeling indecent broadcasts after midnight was arbitrary and capricious because the FCC failed to adequately consider what time constraints should be drawn.<sup>61</sup> Before the FCC could respond to the court’s order, Congress passed legislation that required the FCC to monitor indecent broadcasts twenty-four hours a day, which the FCC codified as part of its

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needs to be concerned with the reservation of resources as far as communication is concerned.”); Matthew C. Holohan, Note, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 366 (2005) (“Because technological developments have blurred the distinction between broadcast and non-broadcast electronic media, differing treatment of these forms of communication is no longer legally defensible.”). See also Quale, *supra* note 15, at 228. Quale explains that when broadcast television switches to digital transmissions in 2009, the “combination of analog frequency reclamation and the augmented broadcasting potential through the use of digital frequencies” will make “the limited and scarce nature of the electromagnetic spectrum . . . arguably . . . nonexistent.” *Id.*

<sup>60</sup> *New Indecency Enforcement Standards*, 2 F.C.C.R. at 2726 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976)). The Commission explained that, like an owner of a movie theater, who can limit the admission of children to certain films, the broadcast medium must be able to enforce a practicable means to separate adults from children in the broadcast audience. *Id.* at 2726. See generally 16A AM. JUR. 2D *Constitutional Law* § 512 (1998) (discussing time, place, and manner restrictions generally). Time, place, and manner restrictions are valid if the regulation is neutral, the incidental burden on speech is no more than necessary, and it “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.*

<sup>61</sup> *Action for Children’s Television v. FCC (Act I)*, 852 F.2d 1332, 1341 (D.C. Cir. 1988) (vacating the *Infinity* and *University of California* decisions). The court also rejected claims that the definition was unconstitutionally vague and overbroad. *Id.* at 1339–40. The appellants argued that the generic indecency definition, as distinguished from the “seven dirty words” definition, was impermissibly and inherently vague. *Id.* at 1337–38. The void for vagueness doctrine stems from due process, not First Amendment, jurisprudence. *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). A statute or policy is unconstitutionally vague if it fails to put a person of ordinary intelligence on notice that his or her conduct violates the law, or if a lack of standards encourages discriminatory enforcement. *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). In *ACT I*, the court discussed the Supreme Court’s finding of indecency in *Pacifica*, which it understood as implicitly rejecting that the FCC’s policy was impermissibly vague. *ACT I*, 852 F.2d. at 1339. Appellants also argued that the definition was overbroad because it lacked an exception for material with merit. *Id.* In rejecting the argument, the court reiterated that the government’s strong interest in protecting children could outweigh any merit of a particular broadcast. *Id.* at 1340. According to the court, the “overall value of a work will not necessarily alter the impact of certain words or phrases on children.” *Id.* Thus, the overall value of material does not prevent a finding of indecency. *Id.* See *supra* note 52 (discussing constitutional overbreadth).

administrative code.<sup>62</sup> In 1991, the D.C. Circuit struck down the total ban as unconstitutional.<sup>63</sup> A year later in 1992, Congress mandated that the FCC adopt regulations that would create a safe harbor between the hours of midnight and six in the morning, during which broadcasters could air indecent broadcasts.<sup>64</sup> Once again, the D.C. Circuit ruled on the constitutionality of the regulations.<sup>65</sup>

In *Action for Children's Television* ("ACT III"), the court found that the FCC had demonstrated that the creation of a safe harbor period

<sup>62</sup> Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988) (requiring the FCC to enforce 18 U.S.C. § 1464 twenty-four hours a day); 47 C.F.R. § 73.3999 (1990). The regulation stated in full: "The Commission will enforce the provisions of section 1464 of the United States Criminal Code, 18 U.S.C. 1464, on a twenty-four hour per day basis in accordance with Pub. L. No. 100-459." *Id.* See generally Michael J. Cohen, Note, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 118 (2005) (discussing the development of safe harbor periods in more detail).

<sup>63</sup> *Action for Children's Television v. FCC (ACT II)*, 932 F.2d 1504, 1509 (D.C. Cir. 1991) (stating that Congress's mandate was unconstitutional because the congressional debates preceded the 1988 decision and nothing in the intervening months had changed the 1988 decision's precedential value). The *ACT II* court ordered the FCC to:

[R]edetermin[e] . . . the times at which indecent material may be broadcast, to carefully review and address the specific concerns [the court] raised in *ACT I*: among them, the appropriate definitions of children and reasonable risk for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts.

*Id.* at 1510 (citing *ACT I*, 852 F.2d at 1341-44) (internal quotation marks omitted).

<sup>64</sup> See Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992); 47 C.F.R. § 73.3999 (1993). The regulation stated in full:

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene. (b) No licensee of a public broadcast station, as defined in 47 U.S.C. 397(6), that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent. (c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.

47 C.F.R. § 73.3999 (1993).

<sup>65</sup> *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654 (D.C. Cir. 1995). Appellants challenged the regulations for the following reasons:

First, the statute and regulations violate the First Amendment because they impose restrictions on indecent broadcasts that are not narrowly tailored to further the Government's interest . . . second, [the regulation] unconstitutionally discriminates among categories of broadcasters by distinguishing the times during which certain public and commercial broadcasters may air indecent material; and third, the Commission's generic definition of indecency is unconstitutionally vague.

*Id.* at 659.

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furthered a compelling government interest and was narrowly tailored to further that interest.<sup>66</sup> The court stated that the regulation reduced children's exposure to indecent broadcasts and did not overly interfere with adults' ability to watch and listen to such material.<sup>67</sup> As a result, the court upheld a safe harbor period between 10:00 p.m. and 6:00 a.m.<sup>68</sup>

In 2001, the FCC issued comprehensive industry guidance that described its methods for regulating indecent broadcasts.<sup>69</sup> The guidance stated that to support a finding of indecency, first, "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," and second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium."<sup>70</sup> When making indecency determinations, the

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<sup>66</sup> *Id.* at 661, 667 ("[W]e believe the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency."). The court had examined empirical evidence that suggested fifty-five percent of respondent children watched television without parental supervision. *Id.* at 661. In addition, the court differentiated broadcasts from cable subscriptions, stating that: "[B]roadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material." *Id.* at 660.

<sup>67</sup> *Id.* at 667 ("Although the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young.").

<sup>68</sup> *Id.* at 669. *See generally* 47 C.F.R. § 73.3999 (2007) (current form of the regulation). The regulation had also included a public broadcaster exemption which allowed some broadcasters to begin airing indecent material at ten p.m. 47 C.F.R. § 73.3999 (1993). Because the court found that neither Congress nor the Commission had adequately explained the exception, it concluded that the midnight to six a.m. safe harbor was invalid. *ACT III*, 58 F.3d at 669. The mere fact that Congress included a lesser time period negated its argument that starting at midnight was the least restrictive means. *Id.* at 668. Although the court found that, standing alone, the midnight to six a.m. safe harbor was constitutional, it could not ignore the ill-explained exception, and thus, struck the more restrictive time period. *Id.* at 669.

<sup>69</sup> *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broads. Indecency (2001 Industry Guidance)*, 16 F.C.C.R. 7999 (2001) (policy statement). The FCC discussed the judicial and legislative decisions that have shaped the enforcement of 18 U.S.C. § 1464, noting that the First Amendment limits how the FCC can regulate indecent content. *Id.* paras. 3–6, at 8000–01.

<sup>70</sup> *2001 Industry Guidance*, 16 F.C.C.R. paras. 7–8, at 8002 (citing *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1840–41 (2000)). This two-prong analysis consisted of an objective indecency definition and a subjective patently offensive test. *Id.* The FCC stated that the under the patently offensive prong, "community standard" is not a local determination, but that the standard is "that of an average broadcast viewer or listener and not the sensibilities of any individual complainant." *Id.* para. 8, at 8002 (quoting *WPBN/WTOM License Subsidiary*, 15 F.C.C.R. at 1841). The language "contemporary community standards" is taken from the test for obscenity articulated in *Miller v. California*, 413 U.S. 15, 24 (1973). In *Miller*, the Supreme Court rejected the notion of a national standard and stated that an attempt to find a national standard would be an "exercise in

FCC said it would consider the full context of challenged broadcasts.<sup>71</sup> The Commission highlighted the principle contextual factors as:

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futility." *Id.* at 30. Moreover, the Court stated, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32. While the Court was silent in *Pacifica* about the contemporary community standard applied to broadcast media, the Court has extended the *Miller* reasoning to non-broadcast media. See *Ashcroft v. ACLU*, 535 U.S. 564, 583 (2002) ("[In the Internet context, i]f a publisher chooses to send its material into a particular community . . . it is the publisher's responsibility to abide by that community's standards."); *Sable Comm'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124-25 (1989) (finding that for "dial-a-porn" services, just because "distributors of allegedly obscene materials may be subject[] to varying community standards" a federal statute will not be "unconstitutional because of the failure of application of uniform national standards of obscenity"); *FCC v. Pacifica Found.*, 438 U.S. 726, 744-745 (1973). See generally Michael Kaneb, Note, *Neither Realistic nor Constitutionally Sound: The Problem of the FCC's Community Standard for Broadcast Indecency Determinations*, 49 B.C. L. REV. 1081, 1084-85 (2008) (comparing the FCC's indecency policy to obscenity statutes for the internet, cable, and telephone). Kaneb argues that the FCC's use of a national community standard is inconsistent with First Amendment jurisprudence and its regulatory responsibilities, and thus that the Supreme Court should require the FCC to apply local community standards. *Id.* at 1085.

<sup>71</sup> 2001 *Industry Guidance*, 16 F.C.C.R. para. 9, at 8002. The FCC stated that such context-dependent determinations are highly fact-specific and that various factors have been considered in past cases. *Id.* para. 9, at 8003. To illustrate, the Commission included a sample of cases in which indecency complaints were granted and rejected. *Id.* paras. 13-23, at 8004-15. The examples included radio and television cases. *Id.* The FCC included the following radio broadcast as an example of an indecent broadcast due to the "inescapable" sexual content:

I whipped out my Whopper and whispered, Hey, Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy. I couldn't help but grab her delicious Mounds, . . . this little Twix had the Red Hots. . . . [A]s my Butterfinger went up her tight little Kit Kat, and she started to scream Oh, Henry! Oh, Henry! . . . Well, I was giving it to her Good'n Plenty, and all of a sudden, my Starburst . . . [S]he started to grow a bit Chunky and . . . [s]ure enough, nine months later, out popped a Baby Ruth.

*Id.* para. 14, at 8006. Compare that broadcast to the following which was not found to be indecent:

As you know, you gotta stop the King, but you can't kill him . . . So you talk to Dick Nixon, man you get him on the phone and Dick suggests maybe getting like a mega-Dick to help out, but you know, you remember the time the King ate mega-Dick under the table at a 095 picnic . . . you think about getting mega-Hodge, but that's no good because you know, the King was a karate dude . . .

Power! Power! Power! Thrust! Thrust! Thrust! First it was Big Foot, the monster car crunching 4x4 pickup truck. Well, move over, Big Foot! Here comes the most massive power-packed monster ever! It's Big Peter! (Laughter) Big Peter . . . Formerly the Big Dick's Dog Wiener Mobile. . . So look out Big Foot! Big Peter is coming! Oh my God! It's coming! Big Peter! (Laughter).

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(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>72</sup>

In its discussion of the second factor, the FCC stated that the repetition of sexual or excretory materials exacerbates a broadcast's offensiveness and that fleeting references usually do not support a finding of indecency.<sup>73</sup> After issuing this guidance, the FCC began to crack down on indecency and further broadened the scope of materials considered indecent.<sup>74</sup>

### C. Development of Fleeting Indecency Regulation

In a 2004 attempt to further regulate indecency, the FCC changed its policy regarding potentially indecent fleeting materials in *Golden Globe Awards*.<sup>75</sup> The first change concerned applying the first step of the

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*Id.* para. 15, at 8007.

<sup>72</sup> 2001 *Industry Guidance*, 16 F.C.C.R. para. 10, at 8003. The FCC stated that no single factor is determinative, but that the factors are balanced in order to ultimately determine what is indecent. *Id.* The illustrative examples provided by the FCC were divided based on these three factors. *Id.* at 8003, 8008, 8010. In the first set of examples, the Commission stated that under the first factor, the likelihood of indecency increased as the explicitness and graphic nature of the broadcasts increased. *Id.* para. 12, at 8003. In the second set of examples, a lack of repetition had often weighed against a finding of indecency under the second factor. *Id.* para. 17, at 8008. Finally, in the third set of examples, the third factor depended upon the apparent purpose for which the material was presented. *Id.* para. 20, at 8010.

<sup>73</sup> *Id.* para. 17, at 8008. The FCC stated:

Repetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.

*Id.*

<sup>74</sup> See *infra* Part II.C (discussing new fleeting indecency policy).

<sup>75</sup> See *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program (Golden Globe Awards)*, 19 F.C.C.R. 4975, para. 8, at 4978 (2004) (memorandum opinion and order). In 2004, the FCC acted in response to numerous complaints about the Golden Globes awards show, during which the singer Bono uttered the word "fucking" on live network television. *Golden Globe Awards*, 19 F.C.C.R. para. 3, at 4975-76. An FCC panel originally did not find the utterance indecent, but a full panel reversed. *Id.* paras. 1-2, at 4975. See also *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005 (2006 Order)*, 21 F.C.C.R. 2664, para. 74, at 2684 (2006)

indecenty test, which is whether the material described sexual or excretory activities.<sup>76</sup> The FCC stated that in its view, "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."<sup>77</sup> Thus, the Commission found that any use of "fuck" would meet the requirements of the first step of the indecency analysis per se.<sup>78</sup> Likewise, the FCC found that variations of the word "shit" have an inherently excretory connotation, and presumptively meet the requirements of the first step of the indecency analysis.<sup>79</sup>

Second, in determining whether the material dwelled on or repeated the sexual or excretory organs or activities under the second step of the indecency test, the FCC stopped placing disproportionate weight on whether material was repeated or fleeting.<sup>80</sup> Instead, the FCC

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(notices of apparent liability and memorandum opinion and order) (changing application of the indecency test's first step for uses of "shit").

<sup>76</sup> *Golden Globe Awards*, 19 F.C.C.R. para. 8, at 4978. In 2001, the FCC articulated that, in order for material to be found indecent, "the material must describe or depict sexual or excretory organs or activities," and "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *2001 Industry Guidance*, 16 F.C.C.R. paras. 7-8, at 8002 (citing WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1840-41 (2000)).

<sup>77</sup> *Golden Globe Awards*, 19 F.C.C.R. para. 8, at 4978 (finding this conclusion consistent with the Supreme Court's determination in *Pacifica* that "fuck" depicts sexual activities). The FCC then asked whether the use of "fuck" was patently offensive under contemporary community standards. *Id.* para. 9, at 4979. Because no political, artistic, or any other independent reason was offered for the word's use, the FCC found that its use was shocking and gratuitous. *Id.* In the Commission's view, a failure to take action against such shocking and gratuitous language "when children were expected to be in the audience . . . would likely lead to more widespread use of the offensive language." *Id.*

<sup>78</sup> *See id.* para. 8, at 4978. The per se rule includes non-literal uses of "fuck", such as Bono's use of "fucking" as an adjective. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459 (2007) (discussing literal and non-literal uses of the f-word); *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 13299, para. 23, at 13308 (2006) (order) (upholding prior *2006 Order* and stating that "any strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning").

<sup>79</sup> *2006 Order*, 21 F.C.C.R. paras. 74-78, at 2684-85. The FCC found "shit" had an inherently excretory meaning. *Id.* para. 74, at 2684. In addition, the Commission explained that some words, such as "shit" and "fuck," are so grossly offensive that they are presumptively profane. *Id.* para. 19, at 2669. However, the FCC also stated that this presumption can be overcome if it is demonstrated that the language was essential for education or artistic purposes, or of a matter of public importance. *Id.*

<sup>80</sup> *Compare Golden Globe Awards*, 19 F.C.C.R. para. 9, at 4979 (memorandum opinion and order) ("Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language."), with *2001 Industry Guidance*, 16 F.C.C.R. para. 17, at 8008 ("[W]here

emphasized its contextual analysis, which would equally apply the three principle factors explained in *2001 Industry Guidance* and take “into account the manner and purpose of broadcast material.”<sup>81</sup>

Finally, the FCC explicitly abandoned past precedent that indicated isolated or fleeting broadcasts would not be found indecent.<sup>82</sup> The Commission put broadcasters on future notice that a lack of repetition does not mandate that “otherwise patently offensive” material is not indecent.<sup>83</sup> The FCC justified its new approach to indecency because, in

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sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.”)

<sup>81</sup> *2006 Order*, 21 F.C.C.R. at para. 15, 2668. For example, the FCC explained that:

[M]aterial that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience. In particular, we recognize the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment’s free press guarantee.

*Id.* This contextual approach was applied in *Young Broadcasting of San Francisco, Inc.*, 19 F.C.C.R. 1751 (2004) (notice of apparent liability for forfeiture).

In *Young*, the alleged indecency took place when a morning news show hosted performers from the “Puppetry of the Penis” stage show. *Id.* para. 3, at 1752. The two performers wore capes, but were nude underneath. *Id.* During the course of the interview, the performers offered to demonstrate the “puppetry,” and the news hosts agreed. *Id.* Although the performers demonstrated their talents off-screen, the penis of one performer was fully, but briefly, exposed on-camera. *Id.* *Young Broadcasting* challenged the allegation of indecency, in part, due to the fleeting duration of the depiction. *Id.* para. 11, at 1755. The FCC compared the full frontal nudity in *Young* to full frontal nudity in the film *Schindler’s List*, which was found to be incidental to the broadcast and was not pandering, titillating, or shocking in context. *Id.* para. 14, at 1756. See *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, para. 13, at 1842 (2000) (“[B]roadcast of *Schindler’s List* [was] not patently offensive as measured by contemporary community standards for the broadcast medium . . . . Based on the full context of its presentation . . . including the subject matter of the film, the manner of its presentation, and the warnings that accompanied the broadcast of [the] film . . .”). However, the FCC found the newscast depiction to be graphic, explicit, and, under the third factor, intended to titillate, pander to, and shock viewers. *Young*, 19 F.C.C.R. para. 14, at 1757.

<sup>82</sup> *Golden Globe Awards*, 19 F.C.C.R. para. 12, at 4980. The FCC quoted the *Pacifica* policy that required a deliberate and repetitive use of expletives in a patently offensive manner in order to be found indecent. *Id.* The FCC then departed from that portion of the policy and “any similar cases holding that isolated or fleeting use of the ‘F-Word’ or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent.” *Id.* Additionally, the FCC stated that this change in policy was not inconsistent with the Supreme Court’s decision in *Pacifica* because the Court left open the issue of whether occasional expletives were indecent. *Id.* para. 16, at 4982. The Commission justified the change on the same basis as *Pacifica*: the well being of children and the ease with which children access the broadcast medium. *Id.*

<sup>83</sup> *Golden Globe Awards*, 19 F.C.C.R. para. 17, at 4982 (“By our action today, broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the ‘F-Word’ or a variation thereof in situations such as that here.”).

its view, a lack of action would lead to more widespread use of offensive language when children would be in the audience.<sup>84</sup> In 2007, the new policy's justifications and application were challenged in court.<sup>85</sup>

D. *Fleeting Indecency Policy Tested: Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007)*

In *Fox v. FCC*, the Second Circuit reviewed the FCC's policy outlined in *Golden Globe Awards* and *2006 Order*, and rejected the FCC's policy to sanction fleeting materials because the policy was arbitrary and capricious.<sup>86</sup> In order to determine if the FCC's policy changes were

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The FCC found the Golden Globes broadcast indecent, but did not issue a penalty because previous policy would have permitted the broadcast, and there was not requisite notice to support a monetary penalty. *Id.* para. 15, at 4981-82.

<sup>84</sup> *Golden Globe Awards*, 19 F.C.C.R. para. 9, at 4979.

<sup>85</sup> See *infra* Part III.C (discussing the Second Circuit and Supreme Court case addressing the FCC's fleeting indecency policy).

<sup>86</sup> *Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007) rev'd, 129 S. Ct. 1800 (2009)*. See *infra* notes 99-103 and accompanying text (discussing Supreme Court's reversal of the Second Circuit). The case was before the court as a petition for review after the FCC had issued notices of liability to Fox and CBS for broadcasts that included uses of "shit" and "fuck." *Id.* at 453. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006); 47 U.S.C. § 402 (2006) (describing the administrative policies for judicial review of an agency decision). The court explained that:

Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

*Fox*, 489 F.3d at 455 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Agencies are free to change policies, but an agency must know that it has changed course, provide valid reasons for the change, and show that such changes are within the agency's authority. *Id.* at 456 (quoting *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)). This includes requiring that the agency explain why the reasoning behind the prior policy is no longer dispositive: "a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*" *Id.* at 457 (quoting *N.Y. Council*, 757 F.2d at 508). See generally PIERCE, SHAPIRO & VERKUIL, *supra* note 32, at 388 (describing the arbitrary and capricious test).

*Accord CBS Corp. v. FCC, 535 F.3d 167, 175 (3d Cir. 2008)* (finding the FCC's fleeting indecency policy to be arbitrary and capricious when used to assess a \$550,000 forfeiture penalty), *cert. granted and vacated*, 129 S. Ct. 2176 (2009) (remanding in light of *Fox v. FCC*). *CBS v. FCC* was before the Third Circuit as a petition for review, because CBS appealed the monetary forfeiture imposed upon it by the FCC under 47 U.S.C. § 503(b) for broadcasting indecent material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. *Id.* at 171. The material deemed indecent was broadcast as part of the Super Bowl XXXVIII halftime show in February 2004 featuring musical performers Justin Timberlake and Janet Jackson. *Id.* The musical act consisted of Timberlake's popular song "Rock Your Body," sexually suggestive choreography, and the lyrics "gonna have you naked by the end of this song."

done for valid reasons, the court addressed each of the rationales put forth by the FCC to justify those changes.<sup>87</sup> The FCC first reasoned that its policy protected children from suffering the first blow of isolated or fleeting expletives, but the court rejected this rationalization because the theory bore no rational relation to the FCC's actual indecency policy.<sup>88</sup> The court stated that viewers, including children, would still be forced to

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*Id.* at 171-72. While Timberlake sang the excerpted lyric he tore away a part of Jackson's bustier which exposed her breast for nine-sixteenths of one second. *Id.* at 172. CBS had a five-second delay in place for verbal indecency, but no such technology for video images was implemented. *Id.* Approximately ninety million viewers watched the halftime show, and the FCC received a large number of complaints about the incident. *Id.* at 171. Following an investigation into the incident, with which CBS complied, the FCC subsequently issued a \$550,000 forfeiture order. *Id.* at 171-72.

In its review of the order, the court agreed with the Second Circuit in *Fox* that the FCC had changed its indecency policy with regard to fleeting materials. *Id.* at 178. However, the FCC argued that CBS should have known that fleeting or isolated material was actionable due to the FCC's decision in *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broads. Indecency* (2001 Industry Guidance), 16 F.C.C.R. 7999 (2001). *Id.*; see *supra* notes 71-72 and accompanying text (describing the contextual approach). The court rejected this argument, because the FCC's enforcement precedent did not support this assertion. *CBS*, 535 F.3d at 180. The FCC further argued that *Golden Globe Awards* applied only to fleeting expletives, not fleeting images, such as nudity. *Id.* at 181; see *supra* notes 75-84 and accompanying text (discussing the *Golden Globe Awards* order). Thus, according to the FCC, it applied its 2001 indecency approach and the forfeiture order was not a retroactive application of *Golden Globe Awards*. *CBS*, 535 F.3d at 181. The court also rejected this argument, because the FCC had never differentiated between images and utterances in any prior decisions or orders. *Id.* The court stated that the proper inquiry was whether:

[T]he FCC's characterization of its policy history is accurate. If it is not, then the FCC's policy change must be set aside as arbitrary and capricious, because it has failed to even acknowledge its departure from its former policy let alone supply a 'reasoned explanation' for the change as required by *State Farm*.

*Id.* at 183. See generally *State Farm*, 463 U.S. at 39-57 (describing standard for determining whether agencies have properly adapted its rules to changing circumstances). Because the evidence showed that the FCC had never treated images or utterances differently, and because the FCC refused to acknowledge a change in policy, the court held that the policy "of including fleeting images within the scope of actionable indecency is arbitrary and capricious . . . and therefore [is] invalid as applied to CBS." *CBS*, 535 F.3d at 189. On alternative grounds, the court also found that the FCC misapplied the concept of respondeat superior to CBS, but this topic is outside the scope of this note. See *id.*

<sup>87</sup> *Fox*, 489 F.3d at 457 (noting that the court may only consider reasons put forth by the agency itself).

<sup>88</sup> *Id.* at 458. The court also stated that the FCC had failed to adequately explain why its policy for the previous thirty years allowed fleeting expletives to be an acceptable first blow. *Id.* The reasoning did not fit the actual policy, in the court's view, because the FCC stated at oral argument that not every occurrence of a fleeting expletive would be indecent or profane under its rules. *Id.* For example, the FCC stated that an expletive occurring during a bona fide news interview or instances when expletives were integral to a work would be excused. *Id.*

accept the first blow of expletives that would occur during excused programs, and thus the FCC's policy did not support its assertion of concern for the viewing public.<sup>89</sup> The court also rejected the FCC's arguments that an exemption for fleeting expletives would cause a barrage of expletives at all hours of the day and that the categorical requirement of repetition would be at odds with the FCC's contextual approach to indecency.<sup>90</sup> Thus, the court found that the FCC had not provided a reasoned analysis to justify a departure from previous policy and that the new policy was invalid under the Administrative Procedure Act.<sup>91</sup>

<sup>89</sup> *Id.* at 459. See generally Justin Winquist, Comment, *Arbitrary and F^@#\*! Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in Fox Television Stations, Inc. v. FCC* (2007), 57 AM. U.L. REV. 723 (2008) (discussing the Second Circuit's discussion of the first blow theory and how the court's analysis precludes any content-based approach to indecency). The "first blow" rationale was first described by the Supreme Court in *Pacifica*. See *FCC v. Pacifica*, 438 U.S. 726, 748–49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

<sup>90</sup> *Fox*, 489 F.3d at 460. The court determined that these arguments were "devoid of any evidence that suggest[ed] a fleeting expletive [was] harmful," and did not establish "that this harm [was] serious enough to warrant government regulation." *Id.* at 461. In its rejection of these two arguments, the court noted that the FCC's new policy also included a categorical approach—that all uses of "fuck" or "shit" fail under the first prong of the indecency test—which seemed to conflict with the contextual approach the FCC followed. *Id.* at 460. The court also said the FCC failed to provide an adequate explanation as to why fleeting expletives suddenly would qualify under the unchanged indecency test. *Id.* See generally Jane D. Brown et. al., *Sexy Media Matter: Exposure to Sexual Content in Music, Movies, Television, and Magazines Predicts Black and White Adolescents' Sexual Behavior*, 117 PEDIATRICS 1087 (2005); Anita Chandra et. al., *Does Watching Sex on Television Predict Teen Pregnancy? Findings From a National Longitudinal Survey of Youth*, 122 PEDIATRICS 1047, 1052 (2008) ("[F]requent exposure to sexual content on television predicts early pregnancy."). While these two studies address the harm arising out of sexual content, studies in the future could show similar harm arising from youth exposure to expletives on broadcast television. See Brown, *supra*; Chandra, *supra*.

<sup>91</sup> *Fox*, 489 F.3d at 462. The court remanded back to the FCC for further proceedings consistent with the opinion, but the Supreme Court granted the FCC's writ of certiorari. See *id.* at 467; *FCC v. Fox Television Stations, Inc. (Fox II)*, 129 S. Ct. 1800 (2009). See also *Fox*, 489 F.3d at 469 (Leval, J. dissenting). In dissent, Judge Leval found that the FCC had offered a reasoned and sensible, "although not necessarily compelling," explanation for its change in policy. *Id.* Departing from the majority, Judge Leval determined that the reasons proffered by the FCC were sufficient to comply with the Administrative Procedure Act's requirements because "[i]t made clear acknowledgment that its *Golden Globe [Awards]* and [2006] *Order* rulings were not consistent with its prior standard regarding lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change." *Id.* at 470. Judge Leval faulted the majority for failing to give proper deference to the FCC by substituting its own judgment for that of the agency and for setting aside the FCC's judgment based on disagreement. *Id.* at 472. Thus, because the majority failed to give the FCC deference in matters within the agency's competence, Judge Leval dissented. *Id.* at 473. See generally 5 U.S.C. § 706(2)(A) (2006) (arbitrary and

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Even though the court disposed of the case under administrative law theories, it still chose to address the constitutional issues that were fully briefed and argued before the court because the court was skeptical that the FCC would be able to put forth a reasoned analysis that would pass constitutional muster.<sup>92</sup> First, the court agreed with Fox and the other networks that the FCC's indecency test did not provide proper clarity and unduly chilled free speech.<sup>93</sup> Second, the court compared the FCC's indecency test with the identical test applied in the internet context that was struck down in *Reno v. ACLU* as unconstitutionally vague.<sup>94</sup> Third,

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capricious standard); *State Farm*, 463 U.S. at 43 ("The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency.") (internal quotation marks omitted); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (stating that administrative decisions should not be set aside "simply because the court is unhappy with the result reached").

<sup>92</sup> *Fox*, 489 F.3d at 462 (noting that indecent speech is fully protected by the First Amendment, including that which falls under the FCC's policies). See generally *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989) (noting that indecent, but not obscene, speech is protected under the First Amendment). The court introduced this portion of the opinion in a footnote, stating that "[w]e recognize that what follows is dicta, but we note that 'dicta often serve extremely valuable purposes.'" *Fox*, 489 F.3d at 462 n.12 (quoting Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1252 (2006)). Furthermore, the court stated that it was following the fundamental principle of judicial restraint on constitutional questions. *Id.* at 462.

<sup>93</sup> *Fox*, 489 F.3d at 463 (noting also that the test required broadcasters to "'steer far wider of the unlawful zone'" (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). See John Eggerton, *Chernin: FCC Needs to Stop Regulating Speech*, BROAD. & CABLE, Oct. 21, 2008, <http://www.broadcastingcable.com/article/CA6607430.html> (last visited Nov. 11, 2008). In this article, News Corp. President and COO Peter Chernin is quoted as describing the FCC's per se indecency policy as "an absolute threat to the First Amendment." *Id.*

<sup>94</sup> *Fox*, 489 F.3d at 463 ("Because of the 'vague contours' of the regulation, the Court held that 'it unquestionably silences some speakers whose messages would be entitled to constitutional protection.'" (quoting *Reno v. ACLU*, 521 U.S. 844, 874 (1997)). See *Reno*, 521 U.S. 844. The networks argued that the FCC's indecency test was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Fox*, 489 F.3d at 463. However, in *FCC v. Pacifica*, the Supreme Court discussed the definition of indecency, and did not suggest that the FCC's construction of the term was unconstitutionally vague. 438 U.S. 726, 739-41 (1978) (discussing the definition of indecency and accepting the FCC's conclusion that Carlin's monologue was indecent under the FCC's interpretation of the term). Moreover, in *Action for Children's Television v. FCC (ACT I)*, the D.C. Circuit stated that the *Pacifica* holding has been understood as implicitly rejecting that the FCC's policy was impermissibly vague. 852 F.2d 1332, 1339 (D.C. Cir. 1988). The court noted that in *Pacifica*, the Supreme Court did not address whether the indecency definition used by the FCC was unconstitutionally vague. *Id.* at 1338 (citing *Pacifica*, 438 U.S. at 741). Moreover, the court noted that the Supreme Court quoted the definition with some approval. *Id.* at 1339. Given the tradition of the FCC's indecency policy dating back to *Pacifica* and the Supreme Court's tendency to distinguish broadcasting from all other types of media or technology, it is unlikely that the Supreme Court would invalidate the FCC's policy as void for vagueness. See generally *United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000)

the court questioned whether the FCC was given arbitrary discretion to sanction speech based on the speech's merit, which the Supreme Court has held unconstitutional in the licensing context.<sup>95</sup> Finally, the court questioned the appropriate level of scrutiny in response to Fox's arguments that the broadcast media should no longer enjoy the special status that allows the media to avoid exacting scrutiny.<sup>96</sup> However, the

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(noting that the key difference between cable and broadcasting is that the option to block programming is absent from broadcasting); *Reno*, 521 U.S. at 867 (“[A]s a matter of history [the broadcast media have] ‘received the most limited First Amendment protection,’ [and the internet has no comparable history.]”) (quoting *Pacifica*, 438 U.S. at 748); *Sable*, 492 U.S. at 127–28 (stating that telephone services are different than broadcasting because it requires users to take an affirmative step, unlike broadcasting which is pervasive).

<sup>95</sup> *Fox*, 489 F.3d at 464. To succeed on this argument, the networks need only show that the FCC policy prevents the FCC from exercising its discretion in a content-based manner. *Id.* The Supreme Court repeatedly has held that speech regulations cannot be based on the subjective discretion of government officials, because such discretion could become a means for suppressing viewpoints. *Id.* (citing *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988)). In the licensing context the Supreme Court has held that in situations where “the government requires a license or permit in order for speech to occur,” three requirements must be met: (1) “the government [must have] an important reason for licensing”; (2) “there [must be] clear criteria leaving almost no discretion to the licensing authority”; and (3) “there must be procedural safeguards.” ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 964–65 (3d ed. 2006). These criteria are applied when licensing is used as a prior restraint. *Id.* at 964. See generally *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“[P]rior restraint[s] [are] . . . administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.”) (quoting MELVILLE NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 4.03 (1984)).

<sup>96</sup> *Fox*, 489 F.3d at 465. Exacting or strict scrutiny generally is applied in First Amendment contexts. *Id.* at 464. However, because the broadcast media is unique for the reasoning set forth in *Pacifica*, restrictions on broadcast speech are upheld if the restriction is “narrowly tailored to further a substantial governmental interest.” *Id.* at 464–65 (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984)). Fox and the networks argued that the basis for the broadcast media's unique treatment had been eviscerated, due in part to the prevalence of cable and satellite television. *Id.* at 465. The court recognized that in the future, the increasingly difficult task of describing broadcast media as uniquely invasive could lead to the application of strict scrutiny in this area. *Id.* Further, the networks relied on *Playboy*, which applied strict scrutiny to the cable television industry. *Id.* See 529 U.S. 803. *Playboy* involved a statute which required cable operators who provided sexually explicit channels to either fully scramble the content or limit the transmission of such material into the safe harbor period between ten p.m. and six a.m. 529 U.S. at 806. The statute was invalidated because a less restrictive means was available. *Id.* at 815. In *Fox*, Fox argued that the V-chip technology provided a similarly less restrictive alternative for the broadcast media. *Fox*, 489 F.3d at 466. Although the court did not find the argument completely persuasive, *Playboy* may indicate that technological advances would diminish the FCC's constitutional oversight of the broadcast media. *Id.* See generally Marie A. Ryan, Note, *To V or Not to V – That is the Regulatory Question: The Role of the V-Chip in Government Regulation of Broadcast and Cable Indecency*, 4 CARDOZO WOMEN'S L.J. 137, 168–75 (1997) (providing a general background of the V-chip's development).

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court declined to part from Supreme Court precedent that has repeatedly recognized a different standard for broadcast media.<sup>97</sup> As a result, the Second Circuit invalidated the FCC's policy on administrative law grounds, but only expressed constitutional doubts.<sup>98</sup>

On certiorari, the Supreme Court reversed the Second Circuit on administrative grounds.<sup>99</sup> The Court found that the FCC had acknowledged a change from prior policy and provided rational justification for the change.<sup>100</sup> Specifically, the Court said that it made sense not to distinguish between literal and non-literal uses of expletives, that it was within the Supreme Court's holding in *Pacifica* to consider the patent offensiveness of isolated expletives, and that it was logical "that a safe harbor for single words would 'likely lead to more widespread use of the offensive language.'"<sup>101</sup> The Court declined to decide the constitutional issues, but noted the possibility that the FCC's policy could be unconstitutional.<sup>102</sup> In closing, the Court stated: "The

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<sup>97</sup> *Fox*, 489 F.3d at 465. See, e.g., *Reno*, 521 U.S. at 867 ("[A]s a matter of history [the broadcast media have] 'received the most limited First Amendment protection . . . .'" (quoting *Pacifica*, 438 U.S. at 748)).

<sup>98</sup> See *Fox*, 489 F.3d at 467 ("[W]e are doubtful that the by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Network [Broadcasters].").

<sup>99</sup> *FCC v. Fox Television Stations, Inc. (Fox II)*, 129 S. Ct. 1800, 1819 (2009). First, the Court rejected the Second Circuit's application of a heightened standard to changes in administrative policy, stating that "[w]e find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review." *Id.* at 1810. Second, the Court made clear that it would not "apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties." *Id.* at 1811.

<sup>100</sup> *Id.* at 1812 ("There is no doubt that the Commission knew it was making a change.").

<sup>101</sup> *Id.* at 1813 (quoting *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program (Golden Globe Awards)*, 19 F.C.C.R. 4975 (2004) (memorandum opinion and order)). Additionally, the Court rejected the Second Circuit's reasoning that the FCC's "first blow" theory of harm was unsupported. *Id.* The Court stated that empirical evidence of harm was not necessary, but that "it suffice[d] to know that children mimic the behavior." *Id.* The Court noted that the FCC produced no evidence of quantifiable harm in *Pacifica*, but the Court found then, as in *Fox II*, that the government's interest in the well-being of children justified regulation. *Id.* The Court also rejected the Second Circuit's reasoning that the "'first blow' theory of harm would require a categorical ban on all broadcasts of expletives." *Id.* at 1814. This reasoning was undermined by the FCC's actual practice and prior context-based policy, and would be better directed at an attack on the context-based system, not the fleeting expletive policy. *Id.* Finally, the Court agreed with the FCC that "complete immunity for fleeting expletives, ardently desired by broadcasters, [would logically] lead to a substantial increase in fleeting expletives." *Id.*

<sup>102</sup> *Id.* at 1819 ("It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution."). The Court would not decide the issue without a lower court's opinion. *Id.*

Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children."<sup>103</sup>

Congress created the FCC to regulate the broadcast airwaves for the public interest, convenience, and necessity.<sup>104</sup> As part of this mandate, the FCC has regulated broadcast indecency through safe harbor times and a complaint-driven indecency policy, and these policies have been given deference based on the broadcast medium's uniquely pervasive nature and accessibility to children.<sup>105</sup> The FCC has also acted under this mandate to change the way in which it regulates fleeting indecency, but these changes are unconstitutional and have been met strongly by critics.<sup>106</sup>

### III. ANALYSIS

Since the passage of the Radio Act in 1927, the FCC has been entrusted to regulate the broadcast airwaves for the public convenience, interest, and necessity.<sup>107</sup> The scarcity of resources, the uniquely pervasive nature of the broadcast media, and the government's interest in protecting children have each greatly shaped broadcast indecency policies and have served as justifications for providing less First Amendment protection to broadcasters.<sup>108</sup> Part III.A explains that the FCC's attempted policy on fleeting indecency exceeds constitutional

<sup>103</sup> *Id.* (finding that the Second Circuit disagreed with the FCC's policy choices, but that the Court could not substitute its own judgment for that of the agency).

<sup>104</sup> *See supra* notes 32–33 and accompanying text (discussing legislation that created the FCC).

<sup>105</sup> *See generally* Genelle I. Belmas et. al., *In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67, 74 (2007) (discussing the complaint process); *How the FCC Resolves Obscenity/Indecency/Profanity Complaints*, <http://www.fcc.gov/eb/oip/flow.pdf> (last visited Jan. 13, 2009); *supra* discussion Part II.B (discussing the development of indecency policy including safe harbor provisions). Belmas undertook the first systematic review of consumer complaints denied by the FCC. Belmas, *supra* at 105. Belmas found "that profanity in lyrics, conversation, or dialogue, along with sexual material and nudity, are of major concern to . . . American viewers and listeners," though "many Americans lack understanding of the functions or regulatory powers of the FCC." *Id.* at 99.

<sup>106</sup> *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007); *infra* Part III.B (discussing criticism of FCC regulations).

<sup>107</sup> *See supra* notes 36–39 and accompanying text (describing the public factors under which the FCC regulates).

<sup>108</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (discussing pervasive quality of media and the government's interest in protecting children); *supra* notes 43–44 and accompanying text (describing scarcity rationale).

boundaries because it does not properly protect against the arbitrary discretion of the FCC in determining what speech is indecent.<sup>109</sup> Part III.B discusses how Congress's continuing mandate that the FCC regulate for the public convenience, interest, and necessity requires that the FCC regulate broadcast indecency despite arguments from the broadcast networks and scholars that broadcast indecency regulation is no longer justified.<sup>110</sup> Part III.C illustrates that if, alternatively, the critics prevail and broadcast indecency regulation is subjected to strict scrutiny like other media, the FCC's policy could survive a facial challenge.<sup>111</sup>

A. *The FCC's Fleeting Indecency Policy Affords the FCC an Unconstitutional Level of Discretion*

In 2004, the FCC changed its established policy to include the regulation of fleeting materials.<sup>112</sup> One criticism is that the application of the new policy is inconsistent and in conflict with the First Amendment.<sup>113</sup> For example, in *Fox v. FCC*, the Second Circuit was skeptical that the FCC's fleeting indecency policy could pass constitutional muster.<sup>114</sup> The Second Circuit was correct that the FCC cannot mandate that some words meet the first prong of the indecency test per se because this change removed the barrier that prevented the FCC from arbitrarily using discretion to determine what speech is indecent.<sup>115</sup>

In *Fox*, the Second Circuit questioned the FCC's determination that some words were per se sexual or excretory under the first prong of the indecency policy because it could permit the FCC to "sanction speech based on its subjective view of the merit of that speech."<sup>116</sup> This concept

<sup>109</sup> See *infra* Part III.A (discussing how per se determination of the first prong gives the FCC too much discretion).

<sup>110</sup> See *infra* Part III.B (discussing that the *Pacifica* justifications still serve as valid bases for deferential treatment of broadcast indecency regulation).

<sup>111</sup> See *infra* Part III.C (discussing how the FCC could regulate broadcast indecency and still meet strict scrutiny); *supra* note 52 (differentiating between an "as applied" and "facial" challenge).

<sup>112</sup> See *supra* Parts II.B-C (describing prior policy and the changes).

<sup>113</sup> See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007) (questioning the constitutionality of the FCC's indecency policy).

<sup>114</sup> *Fox*, 489 F.3d at 464 ("[T]he FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech.").

<sup>115</sup> See *id.* (discussing that the policy may give the FCC too much discretion).

<sup>116</sup> *Id.* (stating that the networks need not prove the FCC subjectively "exercised its discretion in a content-based manner," but whether the policy prevented it from doing so) (quoting *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992)). In *Fox*, the Second Circuit questioned the constitutionality of these changes based on

was borrowed from the licensing context, in which, to constitute a valid prior restraint, there must be an important government interest in licensing, there must be "clear criteria leaving almost no discretion to the licensing authority," and "there must be procedural safeguards."<sup>117</sup> While the FCC's policy is not a prior restraint, the concept provides a useful framework for evaluating the FCC's per se indecency policy.<sup>118</sup>

In applying this framework to the FCC's per se indecency policy, the FCC has two important reasons for regulating indecent broadcasts: the pervasiveness of broadcasting and broadcasting's unique accessibility to children.<sup>119</sup> In addition, the FCC's indecency regulations do have procedural safeguards.<sup>120</sup> However, the second requirement of a valid prior restraint is not met by the FCC when it determines that some words are inherently sexual or excretory in nature, because the second factor of the FCC's indecency test alone vests too much discretion in the FCC.<sup>121</sup>

Prior to 2004, the FCC's indecency policy set out clear criteria that prevented an abuse of discretion by including an objective prong that limited the subjective decision-making of the FCC.<sup>122</sup> Under that policy, the FCC first objectively determined whether the challenged material depicted sexual or excretory organs or activities.<sup>123</sup> Because material that was not determined to be objectively sexual or excretory in nature would be dismissed as protected speech, this prong of the indecency test served

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precedent from the licensing context. *Id.* In the licensing context, the Supreme Court has invalidated speech regulations that give too much discretion to government officials. *Id.*

<sup>117</sup> CHEMERINSKY, *supra* note 95, at 964-65. These criteria are applied when licensing is used as a prior restraint. *Id.* at 964. *See generally* Alexander v. United States, 509 U.S. 544, 550 (1993) ("[P]rior restraints' [are] 'administrative and judicial orders *forbidding* certain communications when issued advance of the time that such communications are to occur.") (quoting NIMMER, *supra* note 95, § 4.03).

<sup>118</sup> *See* Fox, 489 F.3d at 464 (applying the licensing prior restraint framework to question the constitutionality of the FCC's indecency policy).

<sup>119</sup> *See* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

<sup>120</sup> *See generally* How the FCC Resolves Obscenity/Indecency/Profanity Complaints, *supra* note 105. The FCC's process is based upon consumer complaints. *Id.* The Commission reviews complaints and either publishes an order dismissing the complaint or issues a Notice of Apparent Liability to the broadcaster in question. *Id.* The broadcaster's response is analyzed, and the FCC then either dismisses the complaint or issues a Forfeiture Order granting the complaint. *Id.* The broadcaster may challenge the Forfeiture Order by an appeal to the federal courts of appeals. *See* 47 U.S.C. § 402 (2006) (describing the administrative policies for judicial review of an agency decision).

<sup>121</sup> *See generally* Fox, 489 F.3d at 464 (questioning whether the FCC has too much discretion under the policy).

<sup>122</sup> *See* Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broads. Indecency (2001 *Industry Guidance*), 16 F.C.C.R. 7999, 8002 (2001) (policy statement).

<sup>123</sup> *Id.* para. 7, at 8002.

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as an important barrier against the contextual analysis of the second prong.<sup>124</sup> Under the more subjective second prong, the FCC determined whether the material was patently offensive under contemporary community standards, and “the *full context* in which the material appeared [was] critically important.”<sup>125</sup> The limitless variety of possible broadcasts required that the FCC be more flexible and subjective when determining this prong.<sup>126</sup> Together, both questions ensured that the FCC did not exercise its regulatory power arbitrarily.<sup>127</sup>

However, in 2004 when the FCC determined that all uses of “fuck” and “shit” were inherently sexual or excretory in nature, it removed the objective step that prevented the FCC from basing its regulatory decisions solely on subjective discretion.<sup>128</sup> Without that barrier, the FCC’s indecency policy becomes a one-step determination based on its interpretation of the factors, which could be based solely on a determination of the speech’s merit.<sup>129</sup> The FCC might not consistently

<sup>124</sup> *Id.* para. 8, at 8002 (citing WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1840–41 (2000)). *See also* How the FCC Resolves Obscenity/Indecency/Profanity Complaints, *supra* note 105.

<sup>125</sup> 2001 *Industry Guidance*, 16 F.C.C.R. para. 9, at 8002. *See supra* text accompanying note 72 (citing *id.* para. 10, at 8003, which states the factors considered when applying this contextual approach).

<sup>126</sup> *See id.* para. 9, at 8003 (“[C]ontextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.”).

<sup>127</sup> *See id.* paras. 7–9, at 8002–03.

<sup>128</sup> *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 464 (2d Cir. 2007) (discussing concern that current FCC indecency test gives too much discretion to the FCC); Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, para. 8, at 4978 (2004) (memorandum opinion and order) (finding variations of the word “fuck” to be presumptively sexual in nature); Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664, para. 74, at 2684 (2006) (notices of apparent liability) (finding variations of the word “shit” to be presumptively excretory in nature). *But see FCC v. Fox Television Stations, Inc. (Fox II)*, 129 S. Ct. 1800, 1814 (2009) (noting that it was not arbitrary and capricious for the FCC to maintain some discretion through its context-based policy). The Supreme Court in *Fox II* noted that the FCC’s policy of using context to determine whether fleeting expletives were indecent was not arbitrary and capricious. *Id.* While under administrative law the policy change was not arbitrary and capricious, the Court failed to note that the per se policy did not just allow the FCC to retain “some” discretion, but the FCC transformed the indecency policy into a purely subjective test. *See id.* The Court did not respond to the Second Circuit’s speculation that the policy could be unconstitutional under this theory. *See id.* at 1818.

<sup>129</sup> *See Fox*, 489 F.3d at 464 (stating that the FCC’s policy may give it the discretion to “sanction speech based on its subjective view of the merit of that speech”); 2001 *Industry Guidance*, 16 F.C.C.R. para. 8, at 8003 (applying contemporary community standards of the broadcast medium). *See also* Quale, *supra* note 15, at 230. Quale states that the second prong of the policy is flawed, because “‘contemporary community standards’ become

abuse its power, but it has created that “pervasive threat inherent in [the censor’s] very existence that constitutes the danger to freedom of discussion.”<sup>130</sup> Because of this danger, the FCC must eliminate the policy that variations of “fuck” and “shit” are inherently sexual or excretory in nature.<sup>131</sup> Although the FCC’s current indecency policy gives the FCC too much discretion, the general regulation of broadcast indecency is still required, because it serves the public interest.<sup>132</sup>

*B. Regulating Broadcast Indecency for the Public Interest, Convenience, and Necessity*

Critics of broadcast indecency regulation argue that the justifications for regulating the content of the broadcast media are no longer valid.<sup>133</sup> Thus, it is argued that like the regulation of other media, the regulation of broadcast indecency must meet strict scrutiny.<sup>134</sup> While the scarcity rationale is no longer a relevant justification for allowing the FCC to regulate broadcast indecency, the basic rationales articulated in *Pacifica* are still valid.<sup>135</sup> As such, the public interest, convenience, and necessity require that broadcast indecency regulation still be evaluated under a deferential scrutiny by the judiciary.<sup>136</sup>

The scarcity rationale was the traditional basis for the broadcast industry’s limited First Amendment protection.<sup>137</sup> The broadcast industry, scholars, and even the FCC, have acknowledged that the scarcity rationale is no longer a valid basis for indecency regulation.<sup>138</sup>

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solely what organized interest groups, FCC staffers, and FCC Commissioners find patently offensive” and the opinion of the average viewer or complainant is ignored. *Id.*

<sup>130</sup> *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

<sup>131</sup> *See infra* Part IV (proposing new policy that eliminates the per se policy under the first prong).

<sup>132</sup> *See infra* discussion Part III.B (defending the justifications for regulating broadcast indecency).

<sup>133</sup> *See infra* discussion Part III.B (describing arguments against the regulation of broadcast indecency).

<sup>134</sup> *See Fox*, 489 F.3d at 465 (2d Cir. 2007) (“[I]t is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”).

<sup>135</sup> *See infra* notes 150–60 and accompanying text (discussing that broadcast television is still uniquely pervasive and accessible to children).

<sup>136</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”).

<sup>137</sup> *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that the scarcity rationale permits the government to regulate the access and use of the broadcast airwaves).

<sup>138</sup> *See Pacifica Found., Inc.*, 2 F.C.C.R. 2698, para. 11, at 2699 (1987) (memorandum opinion and order) (“[W]e no longer consider the argument of spectrum scarcity to provide

From an economic standpoint, it is argued that any good or service in great demand is scarce, so that the broadcast spectrum is no different than print media.<sup>139</sup> From a technological standpoint, it is argued that the proliferation of media choices has made broadcast television irrelevant or, at least, no longer unique.<sup>140</sup> However, even if the scarcity rationale no longer distinguishes broadcasting from other types of media, a lack of scarcity does not eviscerate the distinct and unique properties of the broadcast media recognized in *Pacifica*.<sup>141</sup>

In *Pacifica*, the Supreme Court distinguished the broadcast media because it was uniquely pervasive and accessible to children.<sup>142</sup> Recently, these justifications have been criticized for being out of sync with modern life and unsupported by actual harm.<sup>143</sup> A comprehensive

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a sufficient basis for [indecent] regulation.”); ZELEZNY, *supra* note 35, at 360 (stating the argument that the marketplace is full of channels of communication, broadcasting and otherwise); Krotoszynski, *supra* note 59, at 929 (“Even at its inception, the scarcity rationale was not a particularly powerful justification for affording broadcasters degraded First Amendment rights.”).

<sup>139</sup> Krotoszynski, *supra* note 59, at 929 (“The underlying economic reality is that if any input in providing a good or service commands a price greater than zero, it is ‘scarce’ in economic terms and limits market entry.”).

<sup>140</sup> *Id.* at 932 (“[T]he ability to distribute programming free and clear of television and radio stations makes their importance as a means of disseminating information and ideas far less important a concern in 2008 than was the case in 1968—or even 1998.”); Holohan, *supra* note 59, at 366 (“Because technological developments have blurred the distinction between broadcast and non-broadcast electronic media, differing treatment of these forms of communication is no longer legally defensible.”). For example, in the 1960s, when *Red Lion* was decided, there were approximately 700 television stations in the United States. ZELEZNY, *supra* note 35, at 360. In 2002, there were 1700 television stations, in addition to the approximately 8000 cable television systems and the internet. *Id.*

<sup>141</sup> See *Pacifica*, 438 U.S. at 748–49. The *Pacifica* Court stated:

[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read.

*Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See JEFFREY MCCALL, VIEWER DISCRETION ADVISED: TAKING CONTROL OF MASS MEDIA INFLUENCES 36 (2007) (discussing the arguments for and against “authentic” programming); Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard For the Information Age*, 15 COMM.LAW CONSPICUOUS 431, 449 (2007) (criticizing the pervasiveness justification as “far too inclusive and [it] could be applied to any media outlet that is determined by regulators to be particularly pervasive in [people’s] lives”); Holohan, *supra* note 59, at 365 (“[N]one of the institutions leading the anti-indecency crusade have identified any actual harm caused by objectionable programming.”).

study of broadcast television content between 1998 and 2007 by the Parents Television Council found that the use of harsh expletives had risen sharply during hours when children are in the audience.<sup>144</sup> The broadcast industry recognizes that harsh language and content has increased, but defends such content as being reflective of modern life.<sup>145</sup> In response, supporters of broadcast regulation cite public polls that suggest a majority of respondents would favor stricter content policies, higher fines for violations, and indecency restrictions on cable.<sup>146</sup> While public approval does not equate to constitutional approval, these polls do suggest that such programming is not indicative of modern life.<sup>147</sup> Moreover, even though many people may use coarse language, most recognize that it is often inappropriate.<sup>148</sup> Because broadcast television is part of the public airwaves, mandating a certain level of decorum is justified.<sup>149</sup>

Despite the evidence of offensive content, the broadcast industry also claims that any risk of harm to children by broadcasting has been undermined or completely repudiated since the time of *Pacifica*, and that no harm has been supported by evidence.<sup>150</sup> However, recent studies have linked both broadcast and cable television usage with higher

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<sup>144</sup> Press Release, Parents Television Council, *supra* note 8. The Parents Television Council analyzed all primetime television entertainment programs that were broadcast on the major networks between 1998 and 2007. *Id.* Moreover, the study found that harsher expletives were broadcast earlier in the day during 2007 than during 1998. *Id.*

<sup>145</sup> See Eggerton, *supra* note 93. News Corp. President and COO Peter Chernin said "Fox [will] fight to the end for [the] ability to put occasionally controversial, offensive, and even tasteless content on the air" because such programming is "provocative and accurately reflects our society." *Id.*

<sup>146</sup> MCCALL, *supra* note 143, at 47. A Pew Research poll from 2005 found that seventy-five percent of respondents wanted tighter enforcement on indecency, sixty-nine percent in favor of higher fines, and sixty percent in favor of holding cable accountable for indecency. *Id.* See also Belmas, *supra* note 105, at 99 (stating that it is clear that indecent material is "of major concern to . . . American viewers and listeners who took the time to write a letter or note of complaint to the [FCC]"). In 2005, Congress passed a bill that would increase the penalties for broadcasting indecent materials from a maximum of \$25,000 per broadcast to \$325,000 per broadcast. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2005). In 2007, legislation was introduced that would require the FCC to maintain a policy that a single word or image may be considered indecent. Protecting Children from Indecent Programming Act, S. 1780, 110th Cong. (2007). The statute was referred to committee, but has not been passed. *Id.*

<sup>147</sup> See MCCALL, *supra* note 143, at 36. McCall argues that primetime television is recognized by viewers as far from authentic. *Id.*

<sup>148</sup> *Id.* at 36 ("Even the most lowbrow of speakers has the gumption to not use foul language in business settings . . . and in any setting for which proper decorum is expected.").

<sup>149</sup> *Id.*

<sup>150</sup> See John Eggerton, *Media Institute Weighs In On Indecency*, BROAD. & CABLE, Aug. 8, 2008, <http://www.broadcastingcable.com/article/CA6585792.html?nid=3343>.

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instances of teen sex and teen pregnancy, suggesting a correlation between broadcast television content and destructive behavior.<sup>151</sup> That correlation supports the theory of protecting youth from indecent content by regulating broadcast indecency.<sup>152</sup>

In addition, critics argue that because children have access to indecent material from a variety of unregulated sources, continuing to give FCC regulation of the broadcast industry deferential treatment is unfair.<sup>153</sup> However, the Supreme Court has consistently distinguished broadcasting from other forms of media.<sup>154</sup> In *Fox*, the networks argued that there was no basis for treating broadcast industry different from other forms of media, in part, because a majority of American households subscribe to cable or satellite television services.<sup>155</sup> Yet, the argument that an abundance of media eliminates the need for regulating indecency wrongly assumes that parents or other viewers have an equal opportunity to affirmatively say “no” to broadcast material as they do with non-broadcast material.<sup>156</sup> In *Playboy*, the Court differentiated cable

<sup>151</sup> See *Brown*, *supra* note 90; *Chandra*, *supra* note 90, at 1052 (finding that “frequent exposure to sexual content on television predicts early pregnancy”). *Chandra* selected programs from both broadcast and cable television that were popular with teens. *Chandra*, *supra* note 90, at 1049. Such programs included live-action, reality, sitcoms, dramas, and animated shows. *Id.*

<sup>152</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (stating that the government’s interest in the well-being of youth justified regulating broadcast indecency).

<sup>153</sup> See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 466 (2d Cir. 2007) (“The proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the ‘uniqueness’ of broadcast media . . . .”); *Eggerton*, *supra* note 93.

<sup>154</sup> See *United States v. Playboy Entm’t Group*, 529 U.S. 803, 815 (2000) (noting that the key difference between cable and broadcasting is that the option to block programming is absent from broadcasting); *Reno v. ACLU*, 521 U.S. 844, 867 (1997) (noting that “as a matter of history” the broadcast media have “received the most limited First Amendment protection,” and that the internet has no comparable history) (quoting *Pacifica*, 438 U.S. at 867); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127–28 (1989) (stating that telephone services are different than broadcasting because it requires users to take an affirmative step, unlike broadcasting which is pervasive).

<sup>155</sup> *Fox*, 489 F.3d at 465 (“The Network [Broadcasters] contend[ed] that the bases for treating broadcast media ‘differently’ have eroded over time . . . .”) (internal quotation marks omitted).

<sup>156</sup> See *Playboy*, 529 U.S. at 815; *Fox*, 489 F.3d at 466 n.14 (citing 47 U.S.C. § 303(x) (2006) as mandating the placement of a blocking feature enabling viewers to filter commonly rated programs on their television.) This technology is commonly known as the V-chip, and it acts as a filter for individual programs of a chosen rating, which is distinguishable from blocking entire cable channels or declining cable service altogether. See FCC, V-Chip: Viewing Television Responsibility, <http://www.fcc.gov/vchip> (last visited Jan. 13, 2009). The National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America created a television ratings system, which was approved by the FCC. See *id.* See generally *Ryan*, *supra* note 96, at 168–75 (providing a general background of the V-chip’s development). *Playboy* was decided in 2000, the year in

from broadcasting because cable users can block certain channels, and no comparable technology exists for broadcast television.<sup>157</sup> In contrast, broadcast television is free, and viewers or listeners might become unwilling participants because “the airwaves confront[] the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment’s rights of an intruder.”<sup>158</sup> In *Pacifica*, the Court rejected the argument that a viewer could simply turn off offending content to avoid further offense, and, despite the availability of other media forms, that statement is still correct.<sup>159</sup> Unless and until viewers can affirmatively block broadcasts in a similar manner to non-broadcast media, an inherent difference between the forms exists.<sup>160</sup>

Because the *Pacifica* justifications still exist, the FCC still has authority to regulate indecent content in broadcasting.<sup>161</sup> Given the public’s opinion, Congress’s support, and studies of the ill-effects of indecent programming on children, the FCC should regulate indecent content on broadcast television to fulfill its duty to protect the public interest.<sup>162</sup> Nonetheless, even if the Supreme Court were to apply strict scrutiny to broadcast indecency regulation, the FCC’s regulation should

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which the requirement of 47 U.S.C. § 303(x) became active. See 47 U.S.C. § 303(x) (2006); 529 U.S. 803. In *Playboy*, the Supreme Court still relied on a user’s ability to affirmatively block channels to differentiate between cable and broadcasting, which suggests the V-chip may not negate the pervasiveness of broadcasting. See 529 U.S. at 815.

<sup>157</sup> *Playboy*, 529 U.S. at 815 (“[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners . . .”). See *supra* notes 96, 156 (discussing V-chip technology).

<sup>158</sup> *Pacifica*, 438 U.S. at 748. See also *Action for Children’s Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (“[B]roadcast audiences have no choice but to ‘subscribe’ to the entire output of traditional broadcasters.”); see Quale, *supra* note 15, at 207 (stating that broadcasting is an integral and free aspect of society).

<sup>159</sup> *Pacifica*, 438 U.S. at 748–49.

<sup>160</sup> See *Playboy*, 529 U.S. at 815. In *Fox*, the Second Circuit asserted in dicta that V-chip technology would provide a less restrictive alternative than a total indecency ban. 489 F.3d at 466. The court likened this technology to the choice viewers have with cable channels and suggested that this advancement could negate the FCC’s authority to regulate indecency. *Id.* The FCC argued that the V-chip is an ineffective alternative because “most parents do not know how to use it, programs are often inaccurately rated, and fleeting expletives . . . could elude V-chip blocking.” *Id.* Moreover, because of the deferential treatment afforded to broadcasters, a less restrictive alternative to regulation is not necessary. See *Pacifica*, 438 U.S. at 726 (applying a deferential standard to broadcast media).

<sup>161</sup> See Eggerton, *supra* note 93 (stating that FCC should no longer regulate broadcast content).

<sup>162</sup> See *supra* notes 150–60 and accompanying text (defending the validity of broadcast indecency regulation).

still be upheld as serving a compelling interest through narrowly tailored means.<sup>163</sup>

C. *Why the FCC's Indecency Regulation Passes Strict Scrutiny*

In *Fox*, the Second Circuit questioned whether it remained proper to view broadcast regulation under a deferential scrutiny.<sup>164</sup> Even if the Second Circuit's view were accepted, the regulation of broadcast indecency could survive strict scrutiny in a facial challenge.<sup>165</sup> First, the justifications articulated in *Pacifica* would serve as the FCC's compelling interests.<sup>166</sup> Second, an indecency policy, and not the V-chip, could serve as the least restrictive means.<sup>167</sup>

Congress has directed the FCC to act for the public's interest, convenience, and necessity.<sup>168</sup> The regulation of broadcast television is in the public's interest, convenience, and necessity because of its uniquely pervasive presence in viewers' homes and its accessibility to children.<sup>169</sup> Because an indecent broadcast "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone" is paramount, the FCC has a compelling interest to regulate such broadcasts.<sup>170</sup> In addition, the government has a compelling "interest in the well-being of its youth and in supporting parents' claim to authority in their own household" because broadcasting is uniquely accessible to children.<sup>171</sup> Thus, even if strict scrutiny is applied, the justifications that formerly served as a basis for deferential treatment should be recognized as compelling interests in the strict scrutiny analysis.<sup>172</sup> The FCC must meet those interests with the least restrictive means.<sup>173</sup>

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<sup>163</sup> See *supra* notes 96 (discussing strict scrutiny).

<sup>164</sup> 489 F.3d at 465.

<sup>165</sup> *Id.* ("[A]t some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.").

<sup>166</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (stating that broadcasting is uniquely pervasive into the home and uniquely accessible to children).

<sup>167</sup> See *infra* notes 174–80 and accompanying text (discussing why an indecency policy, and not the V-chip, is the least restrictive means to serve the government's compelling interests). See also *infra* Part IV (proposing a new policy that could serve as the least restrictive means).

<sup>168</sup> 47 U.S.C. § 303 (2006).

<sup>169</sup> See *Pacifica*, 438 U.S. at 748–49.

<sup>170</sup> *Id.* at 748.

<sup>171</sup> *Id.* at 749 (internal quotation marks omitted).

<sup>172</sup> See *supra* notes 150–60 and accompanying text (discussing continuing validity of the *Pacifica* justifications).

<sup>173</sup> See *infra* notes 174–80 and accompanying text (discussing indecency regulation as least restrictive means).

In *Fox v. FCC*, the networks argued that, under strict scrutiny, the FCC could not regulate indecent broadcasts because the V-chip would serve as a lesser restrictive means.<sup>174</sup> Assuming that parents understand how to use their V-chips and that the rating system is accurate, the V-chip could be an effective tool for preventing children from viewing offensive content.<sup>175</sup> However, the V-chip only addresses broadcasting's unique accessibility to children because the V-chip's purpose is to allow parents to control the content that their children can view based on ratings.<sup>176</sup> The V-chip does not adequately address broadcasting's pervasiveness because it can do nothing to prevent indecent content that violates the safe harbor provisions or slips through the ratings system.<sup>177</sup> Moreover, while protecting children is an important interest, broadcast television invades the privacy of the home for both adults and children, and it should not be expected that adults would use the V-chip to avoid unwanted indecent content broadcast on the public airwaves.<sup>178</sup> The V-chip's deficiencies would make it difficult for a challenger to argue that the V-chip is the least restrictive means under all circumstances.<sup>179</sup> Thus, in order for the FCC to truly address both the interests of privacy in one's home and protecting children from indecent broadcasts, the FCC must be able to take action against those who violate the indecency regulations.<sup>180</sup>

The FCC's current indecency policy is unconstitutional because it gives the FCC too much discretion in determining what material is indecent and thus, unprotected.<sup>181</sup> However, the public interest still

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<sup>174</sup> 489 F.3d 444, 466 (2d Cir. 2007) (basing this argument on *Playboy*). In *United States v. Playboy*, the FCC could not require the scrambling of certain channels because parents were able to request that the cable company block offending channels. 529 U.S. 803, 815 (2000). However, the use of the V-chip is distinguishable from the blocking technology in *Playboy* because the issue with cable was certain indecent channels, not individual programs of a certain rating. *See id.*

<sup>175</sup> *See Fox*, 489 F.3d at 466 (stating that the FCC viewed the V-chip as an ineffective tool because parents do not know how to use it and the ratings system could miss fleeting expletives).

<sup>176</sup> *See generally* FCC, V-Chip: Viewing Television Responsibility, *supra* note 156.

<sup>177</sup> *See generally* 47 C.F.R. § 73.3999 (2008) (safe harbor rule); *Action for Children's Television v. FCC*, 58 F.3d 654, 669 (D.C. Cir. 1995) (upholding safe harbor times).

<sup>178</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[I]ndecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.”).

<sup>179</sup> *See* 16 C.J.S. *Constitutional Law* § 187 (2008) (“[A] facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exist under which the statute would be valid . . .”).

<sup>180</sup> *See generally Pacifica*, 438 U.S. at 748–49 (discussing the justifications for treating the broadcast medium differently).

<sup>181</sup> *See supra* discussion Part III.A (discussing that first prong is unconstitutional).

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requires that indecent broadcasts be regulated due to broadcasting's continuing pervasiveness and accessibility to children.<sup>182</sup> Even if strict scrutiny is applied, the FCC has compelling interests for regulating broadcast indecency, and an indecency policy would be the least restrictive means.<sup>183</sup> Based on the foregoing, the FCC must revise its current indecency policy to continue protecting the public's convenience, interest, and necessity; to remedy the constitutional problems with the FCC's indecency policy; and to protect broadcasters' free speech by putting them on clear notice of what type of content should be avoided.<sup>184</sup>

## IV. A PROPOSED POLICY FOR REGULATING BROADCAST INDECENCY

Despite a barrage of criticism from broadcasters, scholars, and courts, the FCC must still regulate broadcast indecency for the public interest.<sup>185</sup> The FCC adequately can address its concern for fleeting indecency through the application of its contextual approach, but the FCC's policy of per se sexual or excretory words is unconstitutional because it allows for arbitrary discretion of power.<sup>186</sup> Moreover, due to the litigation invalidating much of the FCC's most recent policy, it is unclear what policy broadcasters will be responsible for following.<sup>187</sup> In response, Part IV proposes a new indecency policy to correct the constitutional problems and to give clear guidance to the industry.<sup>188</sup>

In the interests of clarity and of avoiding constitutional problems, the FCC must revisit its indecency policy.<sup>189</sup> First, the FCC must retain an objective step in its indecency analysis by returning to its 2001 interpretation of the first prong of its indecency test and eliminating per se determinations of some words.<sup>190</sup> Thus, the first step in the FCC's

<sup>182</sup> See *supra* discussion Part III.B (discussing that public interest requires broadcast regulation).

<sup>183</sup> See *supra* discussion Part III.C (discussing why broadcast regulation could meet strict scrutiny).

<sup>184</sup> See *infra* Part IV (proposing new policy).

<sup>185</sup> See *supra* Part III.B (discussing that *Pacifica's* justifications are still valid as bases for the FCC's indecency regime).

<sup>186</sup> See *supra* text accompanying notes 82–84 (stating that fleeting utterances are not insulated from the contextual approach); Part III.A (discussing constitutionality of per se indecency policy).

<sup>187</sup> See *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007) *rev'd*, 129 S. Ct. 1800 (2009).

<sup>188</sup> See *infra* Part IV (proposing new policy).

<sup>189</sup> See *supra* text accompanying notes 186–87 (discussing why FCC must revise its policy). See also Belmas, *supra* note 105, at 102 (suggesting that the FCC create and publicize “clear, defensible indecency guidelines”).

<sup>190</sup> See Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency (2001 *Industry Guidance*), 16 F.C.C.R.

indecent analysis simply should ask whether the challenged material describes or depicts sexual or excretory functions.<sup>191</sup> Second, the FCC must revise its second prong of the indecency test, which the FCC described in 2001 as asking whether the challenged material was patently offensive as measured by contemporary community standards for the broadcast medium.<sup>192</sup> The FCC provides three factors to aid in its determination and has defined the standard as “that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.”<sup>193</sup> In order to provide clearer guidance to the industry, the FCC should revise this second prong of the indecency analysis.<sup>194</sup>

In its revision of the indecency test's second prong, the FCC should incorporate the contextual factors into the main text of the policy, placing greater weight on explicitness and shock value.<sup>195</sup> Thus, the policy would better protect against the language that is explicit or shocking for no valuable purpose.<sup>196</sup> In addition, the FCC should revise the “contemporary community standard” language to better reflect the subjective and contextual approach of the second prong.<sup>197</sup> The new policy should include the perspective of the reasonable viewer and mention the importance of the complaint process in indecency enforcement.<sup>198</sup>

Below, the proposed indecency policy is printed in full:

- 1) The material in the broadcast must fall within the subject matter scope of the indecency definition – that is,

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7999, para. 7, at 8002 (2001) (policy statement) (“[T]he material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities.”).

<sup>191</sup> See *id.* (describing the first prong of the indecency test).

<sup>192</sup> *Id.* para.8, at 8002 (stating that under the second prong, broadcasts must be “*patently offensive* as measured by contemporary community standards for the broadcast medium”).

<sup>193</sup> *Id.* The three factors are:

- (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; [and] (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.*

*Id.* para. 10, at 8003.

<sup>194</sup> See *infra* text accompanying note 199 (proposing revisions to the indecency test).

<sup>195</sup> See generally 2001 *Industry Guidance*, 16 F.C.C.R. para. 10, at 8003 (listing factors).

<sup>196</sup> See generally *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (stating that indecent words offend for the same reason obscene material offends).

<sup>197</sup> See generally 2001 *Industry Guidance*, 16 F.C.C.R. para. 8, at 8002 (describing contemporary community standard).

<sup>198</sup> See generally FCC, Complaint Process, <http://www.fcc.gov/eb/oip/process.html> (last visited Jan. 13, 2009) (describing the FCC's complaint process).

the material must describe or depict sexual or excretory organs or activities.

2) The broadcast must be patently offensive *as measured by the reasonable broadcast viewer.*

i) Although the sensibilities of any individual complainant will not be given excessive weight, the number of complaints about the specific broadcast will be taken into the final consideration.

3) When determining whether material is patently offensive, *the Commission will focus on the explicitness or graphic nature of the material. Material that is presented gratuitously or for its own shock value will not be considered valuable speech.*

4) *Fleeting instances of material that describe or depict sexual or excretory organs or activities will not be immune from regulation if the overall broadcast is found to be patently offensive.*

i) We note that technological advances have made it possible as a general matter to prevent the broadcast of a single offending word or action without blocking or disproportionately disrupting the message of the speaker or performer.

ii) *The use of the technological advancements discussed in paragraph (4)(i) is strongly encouraged during live broadcasts.*<sup>199</sup>

This policy, although longer than the current two-prong indecency test, provides clearer guidelines and puts broadcasters on sufficient notice in regard to the importance of the contextual factors.<sup>200</sup> It also puts broadcasters on clear notice that fleeting instances of indecent material are subject to regulation.<sup>201</sup> Although this policy addresses the

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<sup>199</sup> Material in normal typeface is paraphrased from *2001 Industry Guidance*, 16 F.C.C.R. 7999 and *Complaints Against Various Broadcasts Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) (memorandum opinion and order). Material in italic typeface is the proposed changes of the author.

<sup>200</sup> Compare *2001 Industry Guidance*, 16 F.C.C.R. para. 7-8, at 8002 (two-prong policy), with *supra* text accompanying note 199 (proposed policy). Critics may argue that this policy does not differ substantially enough from the current policy, except for eliminating the *per se* determination under the first prong. However, by explicitly incorporating the FCC's interpretive guidance into the actual policy, a clearer and less discretionary policy is created.

<sup>201</sup> See *supra* text accompanying note 199 (proposed policy).

issues identified above, to give the policy more weight, the FCC should introduce the policy as a proposed federal rule.<sup>202</sup>

Codifying a federal rule is desirable for broadcast indecency regulation because the process requires public notice and solicitation of the public's comments.<sup>203</sup> Following this procedure will enable the FCC to solicit input from the public, thus truly considering the public interest, convenience, and necessity.<sup>204</sup> In addition, the broadcast media would also be involved in the process, which will not only put them on clear notice, but also will ensure that the opinions of the industry are taken fully into consideration.<sup>205</sup> Finally, if the FCC's indecency policy was incorporated into a federal rule, it would ensure that the FCC could not unilaterally change its policy.<sup>206</sup> If the FCC enacted the proposed policy, it would remedy the constitutional problems with the current indecency policy and protect broadcasters' free speech by putting them on clear notice of what type of content should be avoided.<sup>207</sup>

#### V. CONCLUSION

In 1961, then FCC Chairman Minow concluded his speech to the National Association of Broadcasters with the following words:

Television and all who participate in it are jointly accountable to the American public for respect for the special needs of children, for community responsibility, for the advancement of education and culture, for the acceptability of the program materials chosen, for decency and decorum in production, and for propriety in advertising. This responsibility cannot be discharged by any given group of programs, but can be discharged only through the highest standards of respect for the American home, applied to every moment of every program presented by television.

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<sup>202</sup> See 5 U.S.C. § 553 (2006) (agency rule making procedure). Agencies must publish notice of the proposed rule in the Federal Register, solicit public comment on the proposed rule, and consider the public's response before publishing a final rule. *Id.*

<sup>203</sup> See generally *id.*

<sup>204</sup> See generally *id.*

<sup>205</sup> See generally Eggerton, *supra* note 93 (discussing media executive's displeasure with the FCC); Eggerton, *supra* note 150 (discussing media organization's displeasure with the FCC).

<sup>206</sup> See 5 U.S.C. § 553. The notice and comment procedure acts as an additional safeguard against arbitrary policy changes. See Administrative Procedure Act, *id.* § 706(2)(A) (2006) (stating that reviewing courts shall set aside agency actions which are arbitrary and capricious).

<sup>207</sup> See *supra* text accompanying note 199 (proposed policy).

Program materials should enlarge the horizons of the viewer, provide him with wholesome entertainment, afford helpful stimulation, and remind him of the responsibilities which the citizen has toward his society.<sup>208</sup>

Despite the passage of forty-eight years, these words still serve as pertinent advice to television broadcasters. Television does not always meet the standards described by Chairman Minow, and, as a result, the FCC's indecency regulation acts as a check on broadcasters to ensure that the public's interest, convenience, and necessity are being served. To serve that end, the FCC must enact a policy that remedies the constitutional problems with the FCC's current indecency policy and protects broadcasters' free speech by putting them on clear notice of what type of content should be avoided.<sup>209</sup> Ideally, the broadcast networks would then aspire to provide the public with better content, not in the vein of self-censorship, but with the purpose of serving society.

**Abigail T. Rom\***

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<sup>208</sup> Minow, *supra* note 1, at 404 (reading from the National Association for Broadcasters' television code).

<sup>209</sup> See *supra* text accompanying note 199 (proposed policy).

\* I would like to thank Valparaiso University School of Law Professors Rosalie Levinson and David Myers for helping me formulate and polish this Note, and Professor Sy Moskowitz for his continued support. I also thank Professor Jeffrey McCall of DePauw University. His guidance and teaching were instrumental to my growth as a thinker and writer. On a personal note, my family deserves much credit in shaping the person I have become, and I thank them for unending support. I especially thank my husband Gary (and Managing Editor) for editing this Note, but more importantly, for keeping me sane while I wrote it.