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THE FEAR FACTOR: HOW FCC FINES ARE CHILLING FREE SPEECH

Noelle Coates*

INTRODUCTION

The bare bum of Homer Simpson glides over the glass ceiling of a cathedral, horrifying the churchgoers below; Jerry, George, Elaine, and Kramer engage in an infamous contest of restraint from self-pleasure; Ellen DeGeneres reveals her homosexuality to her sitcom's audience. Moments such as these, irreverent and envelope-pushing, defined television in the 1990s. It was an era of hands-off regulation of the airwaves, and as the decade ended, all signs indicated that the era would continue. "I don't believe that government should be your nanny," uttered Michael K. Powell, the newly-appointed chairman of the Federal Communications Commission (FCC), in 2001.¹ Broadcasters, whose exercise of editorial autonomy was lucrative indeed, and those viewers who found television's most controversial moments to be those most enjoyable, breathed a sigh of relief.

While not suggesting that the above are moments of great artistic significance, moments such as these pass over the broadcast airwaves into living rooms so to create a virtual national community. By giving people something to talk about the next day, or the next decade, television unites, if only in a shallow way, a nation uniquely and resolutely heterogeneous. People who have nothing in common other than their ultimate demise can simultaneously share and react to an image of tragedy, a catchphrase, a flash of an aging pop star's breast. One viewer might be bored, another delighted, yet another repulsed, but a powerful opportunity for universality of experience exists, even if that experience is not always the most enlightened. No single image has exemplified this concept more than the infamous Super Bowl "wardrobe malfunction." During the live telecast of Super Bowl XXXVIII in January 2004, watched by an average of 89.6 million people,² Justin Timberlake removed a portion of Janet Jackson's clothing — revealing her breast and inspiring a revolution against

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¹ Stephen Labaton, *New F.C.C. Chief Would Curb Agency Reach*, N.Y. TIMES, Feb. 7, 2001, at C1.

² *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 F.C.C.R. 19230, 19240 n.65 (2004) [hereinafter *Super Bowl Notice*].

indecenty on the airwaves. It was, to some, proof that television's power to unite the nation in a positive way is overwhelmed by its power both to offend and to endanger the moral fiber of the country. The Parents Television Council asserted: "[Television] can be a wonderful way to educate, inspire, and entertain America's children. Sadly it's doing the opposite and undermining the positive values parents are trying to instill in their young ones."³

Ms. Jackson's bare breast alone prompted over half a million complaints to the FCC,⁴ a colossal increase over the 14,000 total complaints lodged in 2002.⁵ By the end of 2004, the FCC received half a million more complaints about other alleged incidents of indecenty on the airwaves.⁶

The FCC, long maligned for its inactivity and hands-off deregulation of the airwaves,⁷ responded by imposing a meteoric rise in fines. Scant years after he espoused laissez-faire treatment of television content, Chairman Powell's FCC became somewhat of a prudish nanny — an exacting, expensive one at that. Advising people to turn off the television, it seems, is not nearly as lucrative as levying monetary penalties. In 2004, the FCC levied \$7.7 million in indecenty fines, a piddling amount compared to what the Environmental Protection Agency reaps,⁸ but one that is \$7.69 million greater than the fines collected in the first year Powell served on the FCC.⁹ In fact, before the Jackson/Timberlake incident, the FCC had not proposed any fines for indecenty on television since 2002,¹⁰ when it fined a San Francisco television station \$27,500 for the inadvertent exposure of a performer's penis while preparing to demonstrate "genital origami."¹¹

³ Parents Television Council, About Us, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Sept. 9, 2005).

⁴ Super Bowl Notice, *supra* note 2, at 19231 n.6.

⁵ Michael K. Powell, Chairman, Fed. Comm'n Comm'n, Remarks at the National Association of Broadcasters Convention; FCC Chairman's Breakfast "Conversation with Sam Donaldson" (Apr. 20, 2004), transcript available at 2004 FCC LEXIS 2431 [hereinafter Broadcasters Convention Remarks].

⁶ Frank Rich, *The Year Of Living Indecently*, N.Y. TIMES, Feb. 6, 2005, at B1.

⁷ See, e.g., Tom Shales, *Fowler's Way: Foul is Fair; The Lowly Legacy of the Former FCC Head*, WASH. POST, Apr. 20, 1987, at B1.

⁸ For example, in March 2005, FirstEnergy Corporation agreed to pay \$1.1 billion in fines and cleanup costs as part of its agreement with the EPA for violating the Clean Air Act. *Ohio Utility to Pay \$1 Billion in Pollution Case*, WASH. POST, Mar. 19, 2005, at A7.

⁹ Eric Boehlert, *Like Father, Like Son*, SALON, Jan. 24, 2005, <http://www.salon.com/news/feature/2005/01/24/powell/print.html>.

¹⁰ JOHN DUNBAR, CTR. FOR PUB. INTEGRITY, INDECENCY ON THE AIR, SHOCK-RADIO JOCK HOWARD STERN REMAINS "KING OF ALL FINES," Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239>.

¹¹ The FCC has been far more active regulating and fining indecenty on radio. Most notably, the FCC proposed \$2.5 million in fines against Infinity Broadcasting Corporation for airing the ever-controversial Howard Stern Show and \$378,000 against radio personalities Opie and Anthony for airing the live play-by-play of a couple allegedly having sex in Manhattan's St. Patrick's Cathedral. *Id.*

For the fleeting exposure of Ms. Jackson's breast, the FCC levied \$550,000 in fines.¹² Then, in October 2004, the FCC fined 169 Fox stations a record-breaking \$1.2 million for airing a program entitled *Married by America* which featured digitally-obscured nudity and strippers.¹³ Powell justified the increased activities of the FCC as a response, not to "public pressure" but to more intense "public concern,"¹⁴ evidenced by the higher number of complaints.

This public concern could be warranted, as increased fines for indecency on the airwaves might be a result long overdue given the years of deregulation and unenforced indecency standards.¹⁵ Moreover, it might be an accurate reflection of a public who reelected George W. Bush, a president both lauded and criticized for "advanc[ing] the agenda of Christian social conservatives."¹⁶ Despite the obvious harmony of the anti-indecency movement with that particular agenda, members of the public from all political persuasions have voiced concerns about indecency on the airwaves. The movement has been seized by both liberals and conservatives as "a subject for agreement with popular appeal that cuts across party lines."¹⁷ For instance, Democrat commissioner Jonathan S. Adelstein criticized the fine levied against CBS for the Jackson/Timberlake incident as nothing more than a "slap on the wrist."¹⁸

Nonetheless, it is difficult to reconcile this pronounced puritanical streak with the nation's enduring affection for the tawdry, tacky, and scantily-clad. The most profitable movie ever made, after all, is not a family-friendly comedy, but a pornographic film entitled *Deep Throat*.¹⁹ The top musical track of 2004²⁰ was not a

¹² *FCC Proposes Statutory Maximum Fine of \$550,000 Against Viacom-Owned CBS Affiliates for Apparent Violation of Indecency Rules During Broadcast of Super Bowl Halftime Show*, 2004 FCC LEXIS 5428 (Sept. 22, 2004).

¹³ *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, 19 F.C.C.R. 20191, at 20191-92 (2004) [hereinafter Fox Notice].

¹⁴ Broadcasters Convention Remarks, *supra* note 5.

¹⁵ Kate McSweeney, Note, *Hijacking the First Amendment for Economic Gain: The Federal Communications Commission, The Consolidation of the Public Airwaves, and Smut: A Comment on the State of the Broadcast Industry*, 11 GEO. MASON L. REV. 609, 653 (2003).

¹⁶ Laurie Goodstein, *Personal and Political, Bush's Faith Blurs Lines*, N.Y. TIMES, Oct. 26, 2004, at A21.

¹⁷ Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 82 (2004).

¹⁸ Geraldine Fabrikant, *CBS Fined Over Super Bowl Halftime Incident*, N.Y. TIMES, Sept. 23, 2004, at C2.

¹⁹ Ann Hornaday, *When Porn Became Popular*, WASH. POST, Feb. 11, 2005, at C5. The cost of the 1972 production of *Deep Throat* was \$22,500, and it has earned \$600 million since. Wikipedia, DEEP THROAT, at http://en.wikipedia.org/wiki/Deep_Throat_%28movie%29 (last visited Sept. 9, 2005).

²⁰ 2004 Year End Charts, BILLBOARD, at <http://www.billboard.biz/bb/biz/yearendcharts/2004/htttitl.jsp> (last visited Sept. 9, 2005).

rousing Christian rock anthem, but a pop song that included a lyrical request for “a lady in the street, but a freak in the bed.”²¹ Whereas television may have once been a harbinger or catalyst of societal change,²² today’s most popular programming, including *Extreme Makeover* and *Fear Factor*, reflects the viewing preferences of a population in search of something other than edification or enlightenment.

Moreover, despite arguments that television’s quality should be restored post-haste to the glory days when it had social significance and import,²³ television has long been criticized for airing “a mixture of the childish, the sleazy, the frivolous, and the brutal.”²⁴ In 1988, for example, critics and activists focused their ire on the “rot” of daytime talk shows that opted for “trivial and titillating,” such as “swinging sexual suicide,” over “real issues.”²⁵ What has changed is money: the levying of ever-increasing monetary fines by a government agency against private entities for the content of speech. Despite the FCC’s assertion that its mandate is to help “facilitate both personal freedom and the public good,”²⁶ its recent war against indecency waged via the imposition of these fines has, in fact, had the opposite effect.

What has not changed is the First Amendment:²⁷ “[T]hat society may find speech offensive is not a sufficient reason for suppressing it. . . . For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”²⁸ With its fines, the government has not remained neutral: it has become the judge of what is indecent and what should be subject to fines. The result has been an unconstitutional and impermissible chilling of speech — a violation of the First Amendment rights of broadcasters. While the Court has held that recipients of speech are also entitled to First Amendment protection,²⁹ that musical performances are protected,³⁰ and that Ms. Jackson’s right to dance topless “is not

²¹ USHER, *Yeah!*, on *CONFESSIONS* (LaFace Records 2004).

²² Consider, for example, *The Mary Tyler Moore Show* in the 1970s, which featured a young woman in search of a career not a husband.

²³ See, e.g., James Poniewozik, *The Decency Police*, TIME, Mar. 28, 2005, at 24 (quoting a man worried about his child being exposed to indecent television: “We have to go back to the ’50s. The world is going crazy.”).

²⁴ DAVID LOWENTHAL, *NO LIBERTY FOR LICENSE 88* (1997).

²⁵ Tom Shales, *Talk is Cheap; Oprah, Phil, Geraldo, Sally & the Sleaze Factor*, WASH. POST, Nov. 18, 1988, at C1.

²⁶ The FCC History Project, <http://www.fcc.gov/omd/history> (last visited Sept. 9, 2005).

²⁷ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”).

²⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

²⁹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (discussing the “First Amendment right to ‘receive information and ideas’”).

³⁰ See *Fact Concerts, Inc. v. Newport*, 626 F.2d 1060, 1063 (1st Cir. 1980) (“[T]he first amendment . . . protects [the] right to produce jazz concerts.”), *rev’d on other grounds by* 453 U.S. 247 (1981).

without its First Amendment protection,³¹ this Note focuses on the rights of broadcasters to make decisions about the content of the airwaves free from the looming presence of a government agency. This Note argues that, despite the federal courts having consistently upheld the FCC's regulation of the airwaves,³² the FCC's power to impose fines for indecent material should be reevaluated by both Congress and the courts in light of the increased scope and scale of its activity. Out of caution and confusion, broadcasters have made a series of self-censoring decisions, opting to change the content of what is broadcast rather than to air material which may offend someone and risk a million dollar fine. This self-censorship, which is likely to increase, demonstrates the fissures in the foundations of the FCC's authority. Part I presents evidence of broadcasters censoring the content of their speech. Part II describes the authority through which the FCC can assess the content of speech and levy fines if such assessment reveals indecency. Part III argues that self-censorship should not be acceptable and discusses factors that exacerbate this self-censorship, including an impermissibly expansive and vague test employed by the FCC and a system that allows for an intolerable amount of discretion on the part of unelected officials. Part IV evaluates the future of the FCC's fight against indecency and suggests that only by encouraging and allowing the autonomy of the viewer will we achieve the freedom of speech as envisioned by the First Amendment.

I. EVIDENCE OF SELF-CENSORSHIP IN THE FACE OF ENORMOUS FINES

It might be too early for a complete, empirically accurate evaluation of the effect that the mounting fines and negative attention have and will have on the choices broadcasters make. Nonetheless, the many examples of recent self-censoring choices illuminate the fact that broadcasters have "refrain[ed] from broadcasting material that may be 'decent,'"³³ which is hardly a "not inappropriate" chill on speech. Without objective, lucid guidelines and with the ever-present possibility of penalties, the television industry is clearly on edge.³⁴ As one executive explained, "We can't have a clear view of the FCC guidelines because the FCC guidelines are not clear. We have to be checking and second-guessing ourselves now, and that's really difficult."³⁵ As a result, as evidenced below, broadcasters have begun to censor themselves, from

³¹ See *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation.").

³² See Fox Notice, *supra* note 13, at 20192.

³³ Jay A. Gayoso, Comment, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality From the Airwaves*, 43 U. MIAMI L. REV. 871, 915 (1989).

³⁴ Richard Huff, *Fox Pulls Plug on Mickey Rooney's Risque Super Bowl Commercial*, N.Y. DAILY NEWS, Jan. 8, 2005, at 10.

³⁵ David Bauder, *FCC Decisions Making Hollywood Television Executives Very Nervous*, ASSOCIATED PRESS, Jan. 24, 2005.

blurring the animated behind of a cartoon character to refusing to rebroadcast a movie of renowned historical value.

A. *The Super Bowl Commercials*³⁶

If the Super Bowl of 2004 will be remembered for a flashed breast, a flatulent horse, and a flag-wearing rapper, the Super Bowl of 2005 will be best remembered for what was *not* there — anything remotely risqué. To avoid the “limelight” that could be focused on their “racy” products or commercials, advertisers sought to “be much tamer” in 2005.³⁷ Also eager to avoid the FCC’s attention, Fox refused to run a commercial that exposed, for a mere three seconds, the bare naked behind of 84-year-old Mickey Rooney,³⁸ as it did not “conform with [Fox’s] standards and practices” and thus “was deemed inappropriate to air.”³⁹ Fox also rejected several other commercials because of their questionable content.⁴⁰

Even a satire of censorship was censored. During the first half of the Super Bowl, a commercial from GoDaddy.com aired which featured an amply endowed young woman almost exposing her breast at a mock congressional hearing on indecency. It was possibly the spiciest commercial of the game, and it was too much for Fox to digest. The broadcaster’s own internal censorship board deemed it to be too risky and cancelled the scheduled re-run of the commercial during the second half of the game. A Fox official explained: “[I]t became obvious to us that its content was very much out of step with the tenor set by the other ads and programming.”⁴¹ Replied the commercial’s creator: “We worked hard to make sure we didn’t cross the line but we poked fun at censorship and guess what? We were censored.”⁴²

B. *Programming Choices*

Five years ago, *Family Guy*, a cartoon featured on the Fox Network, aired two episodes in which the naked buttocks of the cartoon characters were shown. In late

³⁶ The value of commercial speech has been affirmed by the Supreme Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975). It receives less rigorous protection from the First Amendment. For instance, it can be subject to prior restraints. *Va. State Bd. of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

³⁷ Wayne Friedman, *Ads Tame for Super Game: Racy Commercials Disappear as Some Campaigns End and National Mood Turns Conservative*, TELEVISION WEEK, Jan. 17, 2005, at 1.

³⁸ Huff, *supra* note 34.

³⁹ *Id.*

⁴⁰ Stuart Elliott, *A Super Bowl Spot Meant to be Provocative Apparently Succeeds After Only One Broadcast*, N.Y. TIMES, Feb. 8, 2005, at C1.

⁴¹ *Id.*

⁴² *Id.*

2004, when the episodes re-aired, those buttocks were pixilated because the network “was nervous about what the [FCC] might think.”⁴³

To honor Veteran’s Day in 2001 and in 2002, ABC aired, unedited, *Saving Private Ryan*, a brutally realistic film containing graphic battlefield scenes lauded by critics for their accurate depiction of the horrors of war.⁴⁴ In November 2004, ABC affiliates representing about 30 percent of the country chose not to air the Academy Award-winning film “for fear of FCC fines.”⁴⁵ Owners of several ABC stations were “afraid” that those very scenes would “lead to sanctions” by the FCC,⁴⁶ even though the previous airings had not been sanctioned.⁴⁷ The social, historical, and political relevance of *Saving Private Ryan* is unquestionably higher than some of the films viewers were able to enjoy instead — *Batman Forever* and *Return to Mayberry*.⁴⁸ Nevertheless, some broadcasters steadfastly refused to re-air the film “[w]ithout an advance waiver from the FCC,”⁴⁹ yet the FCC is not permitted to assess material for possible violations before it airs.⁵⁰

Another opportunity for viewers to see, as General Wesley Clark calls it, “the unvarnished truth”⁵¹ about war was lost when PBS created a “clean” version of a documentary about the war in Iraq. The “raw” version contained thirteen expletives that some feared might draw the attention and the fines of the FCC.⁵² Stations in Boston and Seattle risked the indecency fines, finding the language to be “in context,” while others in more conservative regions opted for the clean version.⁵³

This list of instances of self-censorship continues to expand. An episode of *Antiques Roadshow* narrowly escaped the censors when it featured an antique

⁴³ Bauder, *supra* note 35.

⁴⁴ See, e.g., Janet Maslin, *Panoramic and Personal Visions of War’s Anguish*, N.Y. TIMES, July 24, 1998, at E1 (“What’s unusual about [the battle scenes] is [their] terrifying reportorial candor.”).

⁴⁵ Rick Kissell, *Golden Oldies: ‘CSI,’ ‘ER’ Hold Luster*, DAILY VARIETY, Nov. 15, 2004, at 5.

⁴⁶ Lisa de Moraes, *‘Saving Private Ryan’: A New Casualty of the Indecency War*, WASH. POST, Nov. 11, 2004, at C1.

⁴⁷ The previous airings had not escaped the notice of the American Family Association, which complained to the FCC of the movie’s “violence, bloodshed, language and profanity.” *Id.*

⁴⁸ *Id.*; John D. Solomon, *What’s Indecent?*, USA TODAY, Feb. 9, 2005, at A13.

⁴⁹ de Moraes, *supra* note 46.

⁵⁰ See *infra* Part III.B.

⁵¹ Poniewozik, *supra* note 23.

⁵² David Bauder, *Iraq Documentary Offers ‘Clean’ or ‘Raw’*, PITTSBURGH POST-GAZETTE, Feb. 19, 2005, at C9. Just as broadcasters are banned from airing indecent material, so are they the profane. The FCC’s guidance in the area of profanity has been equally vague. See *infra* note 169.

⁵³ *Id.*

lithograph of a nude celebrity.⁵⁴ The *Los Angeles Times* detailed a variety of decisions made by broadcasters to alter the content of broadcast programming in 2004 after the Janet Jackson incident made Hollywood “sensitive” to indecency concerns. Among them, producers of NBC’s *ER* succumbed to “pressure” from affiliate stations and obscured “a glimpse of an 80-year-old patient’s breast.”⁵⁵ After years of showing “partial nudity,” *NYPD Blue* was forced to conceal “certain body parts” during a sex scene.⁵⁶ Teenage characters on Fox’s *The O.C.* were required to refrain from the “extreme behavior” in which many real teenagers engage on a regular basis, including sex, drug use, and drinking.⁵⁷ More recently, a Fox affiliate in Providence, Rhode Island chose to use a five-second delay in its broadcast of the city’s 2005 July 4th parade out of fear that “[t]ipsy attendees might say something off-color.”⁵⁸

The examples above illustrate self-censoring choices made before a program is broadcast. Similar choices are likely made at earlier stages when shows are being considered for production. One veteran Hollywood producer predicts: “[The self-censorship] will have an effect on shows that the networks look at and decide aren’t even worth producing.”⁵⁹ Shows that were worth producing for the Fall 2005 season eschewed indecency for “distressing levels of brutality against women.”⁶⁰ Professor Jeffrey Sconce of Northwestern University attributed the rush of televised violence against women to the Jackson/Timberlake incident — “since the American broadcasting system has more restrictions against sexuality, you can get away with more amplifying violence.”⁶¹

As self-censorship seeps throughout the industry, the danger increases that broadcasters will become the functional equivalent of a government censor. Government censorship boards are popular in Egypt, for example, where the government exerts monopoly control over all broadcasters, and filmmakers must submit their scripts to a government committee of censors for their approval before beginning production.⁶² Such official censorship boards are exactly what the Framers wished to permanently forestall. “[T]he essence of the first amendment was a resolve to cut

⁵⁴ Calvert, *supra* note 17, at 83.

⁵⁵ Scott Collins et al., *The Decency Debate*, L.A. TIMES, Mar. 28, 2004, at E26.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Paul Davidson, *Indecent or Not? TV, Radio Walk Fuzzy Line*, USA TODAY, June 3, 2005, at B1.

⁵⁹ Poniewozik, *supra* note 23.

⁶⁰ Jennifer Armstrong, *Femmes Fatal*, ENT. WKLY., Aug. 5, 2005, at 8.

⁶¹ *Id.*

⁶² See, e.g., *Silence in the Nile: Egyptian Freedom of Speech Under Peril*, <http://www.derechos.org/wi/2/egypt.html> (last visited Sept. 9, 2005); *Censorship Permissions in Egypt: A Step by Step Description*, <http://www.mediahouse.org/censorship.htm> (last visited Sept. 9, 2005).

Congress off from claims it might otherwise have made to regulate speech and press in America.”⁶³

II. THE AIRWAVES: UNIQUELY SCARCE, PERVASIVE, ACCESSIBLE, AND CONTROLLABLE

The FCC, for all of its many functions and fancy website, is at its core a licensing agency of the sort which the Framers feared: “The free press clause . . . was designed to eliminate the threat of federal censorship.”⁶⁴ This fear grew from England’s Licensing Act of 1643, which prohibited any publication unless the Secretary of State had granted his approval prior to publishing.⁶⁵ With the First Amendment, the Framers strove to prevent the new government of the United States from ever exercising a similar “odious jurisdiction.”⁶⁶ Thus, from the inception of the Constitution, prior restraints such as licensing agencies have been viewed as “the most serious and the least tolerable infringement on First Amendment rights.”⁶⁷ Yet there exists an agency, the FCC, which does exactly what the Framers feared: It grants licenses before speech is allowed, provided that applicants meet a vast list of conditions,⁶⁸ and it regulates and enforces limitations on the content of that speech. The FCC is, in this way, “a modern example of exactly the kind of licensing system . . . the first amendment forbids.”⁶⁹ This unique power over speech is possible because of the characteristics of what the FCC regulates — the broadcast airwaves.⁷⁰ The scarcity of the airwaves justifies the FCC’s existence, and their pervasiveness and accessibility justify the FCC’s power. The airwaves receive the “most limited First

⁶³ William W. Van Alstyne, *Congressional Power and Free Speech: Levy’s Legacy Revisited*, 99 HARV. L. REV. 1089, 1100 (1986) (reviewing LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985)). See also *id.* at 1096 n.20 (“On Friday, Sept. 14, 1787, in convention, ‘Mr. Pinkney & Mr. Gerry, moved to insert a declaration “that the liberty of the Press should be inviolably observed.””).

⁶⁴ GEO. L.J., *MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY* 6 (1973) [hereinafter *MEDIA AND THE FIRST AMENDMENT*].

⁶⁵ *Id.* at 7.

⁶⁶ 4 WILLIAM BLACKSTONE, *COMMENTARIES* *151–52; see also *MEDIA AND THE FIRST AMENDMENT*, *supra* note 64, at 6–8.

⁶⁷ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

⁶⁸ See 47 U.S.C.S. § 308(b) (2002). These conditions include the “character . . . and other qualifications” of the applicant, “the purposes for which the station is to be used; and such other information as [the FCC] may require.” *Id.* The licensing procedures themselves, one scholar argues, tend “to make broadcasters more conservative, out of fear of jeopardizing their licenses.” *MEDIA AND THE FIRST AMENDMENT*, *supra* note 64, at 116.

⁶⁹ WILLIAM W. VAN ALSTYNE, *THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY* 16 n.22 (2002).

⁷⁰ See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees.”).

Amendment protection.”⁷¹ This is true despite the undeniable influence that speech broadcast over the airwaves has on politics, both in choice of candidates⁷² and topics of political rhetoric.⁷³ Nonetheless, speech which is broadcast over the airwaves is not as revered as political speech yelled through a bullhorn on the street corner.⁷⁴

A. The Airwaves as a Scarce Resource

Before the FCC existed, “the broadcast industry had virtually no rules.”⁷⁵ It was a chaotic world, “an unruly game of chance.”⁷⁶ Because of overlapping signals and the predatory behavior of entrepreneurial broadcasters, the government’s regulation was necessary to ensure that the airwaves remained a usable resource.⁷⁷ Thus, Congress created the FCC “to make [communication over the airwaves] available, so far as possible, to all the people of the United States.”⁷⁸

While Congress has stated its intent to ensure the broadest availability of over-the-air communications, the Court has not provided it with the same degree of First Amendment protection as communication through other means. Although subject to “must-carry” rules, which are obligations imposed by federal law upon cable companies to make available to local broadcasters the use of some of their channels,⁷⁹ cable television companies, as private entities, are allowed greater editorial autonomy, and the content is, for the time being at least, immune from the reach of the FCC.⁸⁰

⁷¹ FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

⁷² It is often posited, for example, that “the paramount factor” in John F. Kennedy’s victory over Richard Nixon in the 1960 presidential race was his performance in the televised debates: “[I]f there had been no debates on television, Nixon would have been elected President.” Earl Mazzo, *The Great Debates*, at http://www.museum.tv/debateweb/html/great_debate/e_mazzo.htm (last visited Aug. 21, 2005).

⁷³ Dan Quayle’s 1992 attack on Murphy Brown, a television character, for “mocking the importance of fathers by bearing a child alone” focused the nation’s attention on single mothers. Andrew Rosenthal, *After the Riots; Quayle Says Riots Sprang From Lack of Family Values*, N.Y. TIMES, May 20, 1992, at A1.

⁷⁴ See *R.A.V. v. St. Paul*, 505 U.S. 377, 429 (1992) (holding that the First Amendment protection “is at its zenith” when the government attempts to regulate political speech). Even commercial speech, which fills seemingly hours of airtime, enjoys a distinct and well-defined standard of protection. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

⁷⁵ *McSweeney*, *supra* note 15, at 618.

⁷⁶ *Id.* at 619.

⁷⁷ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It would be strange if the First Amendment . . . prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.”).

⁷⁸ 47 U.S.C. § 151 (2002) (creating the Federal Communications Commission).

⁷⁹ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

⁸⁰ See *infra* notes 225–29 and accompanying text.

Similarly, while newspapers' editorial autonomy receives vigorous protection,⁸¹ that of broadcasters is subject to government regulation, even though broadcasters are, and historically have been, a conduit for the news which the FCC itself has described as equivalent to the printed press.⁸² The crucial difference between the two media is the scarcity that justified the government's initial intrusion: when the government grants a license to one party for access to the airwaves, it is in effect barring another person's access, as there is limited access available. While there are nationwide but a few markets large enough to support multiple newspapers, the fact that one person publishes a newspaper in Richmond, Virginia does not legally or physically bar another person from doing the same.⁸³ In contrast, when the government allocates the use of a portion of the airwaves to one broadcaster by granting him a license, the government is giving him a legal and physical "monopoly" over that portion with "virtual *carte blanche* power to admit or deny anyone else the privilege to speak in that 'forum.'"⁸⁴

The scarcity of the airwaves inspired the Fairness Doctrine, which required that broadcast licensees provide individuals with a reasonable opportunity to respond on air to attacks against them.⁸⁵ This doctrine was upheld in *Red Lion Broadcasting Co. v. FCC*.⁸⁶ "It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress."⁸⁷ Nonetheless, scarcity as a justification for the regulation of broadcasting "was developed in a long-gone era when broadcasting was the only form of electronic mass media."⁸⁸ It is now, as one scholar argues, an outdated justification that "has ceased to exist."⁸⁹ The FCC, for its part, agrees: its 1985 Fairness Report

⁸¹ See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.").

⁸² See, e.g., *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5057 (1987) ("We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint.").

⁸³ See VAN ALSTYNE, *supra* note 69, at 481 ("Any cost barriers to starting up a newspaper . . . [do] not result from state action.").

⁸⁴ *Id.*

⁸⁵ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

⁸⁶ *Id.*

⁸⁷ *Id.* at 399.

⁸⁸ Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 HARV. J.L. & PUB. POL'Y 503, 517 (2001).

⁸⁹ *Id.* The FCC "found that the explosive growth of information sources — in both traditional broadcasting sources (radio and television) and new substitutes for broadcasting such as cable TV, SMATV, VCRs, and LPTV — made the fairness doctrine no longer necessary to assure that the public has access to a variety of viewpoints." *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1019 (1990).

“found that the ‘scarcity rationale’ . . . [was] no longer valid,”⁹⁰ and two years later, it abandoned the Fairness Doctrine.⁹¹

Scarcity, while justifying the government’s regulatory presence on the airwaves, has never been proffered as a validation for censorship or content-regulation.⁹² Yet it justified the inception of the very same agency which now is acting in the capacity of a censor.

B. Pervasiveness and Accessibility

Because of the airwaves’ “uniquely pervasive presence”⁹³ and because they are so “uniquely accessible to children,”⁹⁴ the FCC’s power to enforce statutes regarding the content of the airwaves has been routinely upheld, expanded, and encouraged.⁹⁵ Broadcasters are not permitted to air obscene material at any time,⁹⁶ or indecent material from 6 a.m. to 10 p.m.,⁹⁷ where there is a “reasonable risk” children might be watching.⁹⁸ From 10 p.m. to 6 a.m., broadcasters may air indecent material if they so choose because children are “less likely” to be watching.⁹⁹ As a result, all

⁹⁰ *Meredith Corp.*, 809 F.2d at 867 (citations omitted).

⁹¹ The Fairness Doctrine was also criticized for chilling broadcasters by making them less likely to address divisive issues. See Tom Shales, *The FCC, On the Attack Against Fairness*, WASH. POST, Aug. 5, 1987, at C1.

⁹² See *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 157 (1985).

While it is true that the limited availability of the electromagnetic spectrum may constitute a *per se* justification for certain types of government regulation, such as licensing, it does not follow that all other types of governmental regulation, particularly rules which affect the constitutionally sensitive area of content regulation, are similarly justified.

Id. See also *Pacifica Found. v. FCC*, 556 F.2d 9, 29 (D.C. Cir. 1977), *rev’d*. 438 U.S. 726 (1978).

⁹³ *Pacifica*, 438 U.S. at 748.

⁹⁴ *Id.* at 749.

⁹⁵ Super Bowl Notice, *supra* note 2, at 19234.

⁹⁶ “No licensee of a radio or television broadcast station shall broadcast any material which is obscene.” FCC Enforcement of 18 U.S.C. § 1464, 47 C.F.R. 73.3999(a) (2005). The FCC can enforce a complete ban on the broadcast of obscene material as such material receives no First Amendment protection. See *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358 n. 1 (1989); see also *infra* Part III.A.1.

⁹⁷ “No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.” Enforcement of 18 U.S.C. § 1464, 47 C.F.R. 73.3999(b).

⁹⁸ *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987).

⁹⁹ Kathleen Q. Abernathy, Remarks at Real Women: Digital World (Apr. 29, 2004), at 2004 FCC LEXIS 2365, at *10 [hereinafter Abernathy Remarks].

adults viewing television during the hours of 6 a.m. to 10 p.m. are “limited to receiving only broadcast material fit for children,”¹⁰⁰ even though only 36 percent of the nation’s households have children under the age of eighteen.¹⁰¹ Furthermore, foreknowledge of the presence of children in the viewing audience can serve as an aggravating factor in determining the amounts of fines levied for airing indecent material. For instance, the \$1.2 million fine imposed on Fox for airing the *Married by America* episode was augmented by the fact that 388,000 children under the age of eleven could have been watching the episode at the time.¹⁰²

Federal law also criminalizes the broadcast of any obscene, indecent, or profane utterance, making it punishable by a fine and/or two years imprisonment.¹⁰³ The FCC is empowered to enforce this statute.¹⁰⁴ Although the airwaves were dedicated by Congress to be held in the public trust,¹⁰⁵ it is a trust distinct from that in which traditional public fora such as streets, parks, or sidewalks are held. These forums have been “immemorially held in trust for the use of the public” from “time out of mind.”¹⁰⁶ If the Court treated the airwaves in the same manner as a public park, for example, any regulation concerning speech would be subject to the test set forth in *Ward v. Rock Against Racism*.¹⁰⁷ Thus, a statute criminalizing the broadcast of obscene, indecent, or profane speech would be upheld only if it were content-neutral, narrowly tailored to serve a significant governmental interest, and left open ample alternative channels for communication.¹⁰⁸

Accordingly, the statute barring the broadcast of indecent material would fail at step one, as it relies upon an analysis of the content of the speech and imposes sanctions based on a determination that the content is indecent.¹⁰⁹ That the statute is clearly a content-based regulation would typically require heightened scrutiny from a court: The statute would be presumed invalid, and the government would have the burden of proving its constitutionality.¹¹⁰

¹⁰⁰ Viktor Pohorelsky, Note, *FCC May Regulate Broadcast of Non-Obscene Speech*, 53 TUL. L. REV. 273, 282 (1978).

¹⁰¹ Poniewozik, *supra* note 23.

¹⁰² Frank Ahrens & Lisa de Moraes, *FCC Proposes Indecency Fine Against Fox TV*, WASH. POST, Oct. 13, 2004, at A1.

¹⁰³ See 18 U.S.C. § 1464 (1994).

¹⁰⁴ Super Bowl Notice, *supra* note 2, at 19233.

¹⁰⁵ Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399 n. 26 (1969).

¹⁰⁶ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). “The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.” *Id.* at 515–16.

¹⁰⁷ 491 U.S. 781 (1989).

¹⁰⁸ *Id.* at 791.

¹⁰⁹ FCC Enforcement of 18 U.S.C. § 1464, 47 C.F.R. 73.3999(b).

¹¹⁰ *Ashcroft v. ACLU*, 542 U.S. 656, 698 (2004).

In the seminal case, *FCC v. Pacifica Foundation*,¹¹¹ the Court relieved the FCC of such a burden, concluding that the “special treatment of indecent broadcasting” was “amply” justified:¹¹²

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

Second, broadcasting is uniquely accessible to children [T]he government’s interest in the “well-being of its youth” . . . justify[es] the regulation of otherwise protected expression.¹¹³

The Court also concluded that the FCC’s ability to punish such language was not limited by the anticensorship provision of the 1934 Communications Act,¹¹⁴ noting that the legislative history of the Act “makes it perfectly clear that it was not intended to limit the Commission’s power to regulate the broadcast of obscene, indecent, or profane language.”¹¹⁵ Yet that legislative history also reveals “a deep hostility to censorship”¹¹⁶ by the FCC: one could easily imagine that the drafters of the Act which created the FCC would be equally hostile to any self-censorship compelled by its actions. Either inspired by or directly imposed by the government, the end result of censorship is the same and is impermissible.

III. WHY THE INDECENCY EVALUATION IS CONSTITUTIONALLY IMPERMISSIBLE

The possible chilling effects of the FCC’s activity regulating indecency are supposed to be balanced by its “restrained enforcement policy.”¹¹⁷ For many years, the FCC was maligned for such restraint — its so-called “anything-goes, devil-may-care, public-be-damned deregulation” attitude.¹¹⁸ Chairman Mark Fowler, who served during the 1980s, promoted a marketplace approach that treated the airwaves in the

¹¹¹ 438 U.S. 726, 748–50 (1978).

¹¹² *Id.* at 750.

¹¹³ *Id.* at 748–749.

¹¹⁴ *Id.* at 738. See 47 U.S.C. § 326 (2002):

Nothing in this Act 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.

¹¹⁵ *Pacifica*, 438 U.S. at 737.

¹¹⁶ *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 528 (1959).

¹¹⁷ Super Bowl Notice, *supra* note 2, at 19234 n. 31.

¹¹⁸ Shales, *supra* note 7.

same way as newspapers. During his tenure, the FCC aimed to simplify regulations and reduce “governmental intrusion into the editorial decisions of broadcasters.”¹¹⁹ Critics routinely chastised such efforts for favoring the interests of broadcasting executives at the cost to the public of plummeting broadcasting standards.¹²⁰

Michael Powell, appointed by President Clinton to the FCC in 1997 and promoted to Chairman by President Bush in 2001,¹²¹ did not at first seem to be concerned with changing the course of the FCC’s dealings with the content of the airwaves. He entered office with a distinctly hands-off, free-market attitude: “It’s better to tolerate the abuses on the margins than to invite the government to interfere with the cherished First Amendment.”¹²² During the first years of his term as Chairman, until the Jackson/Timberlake incident, Powell managed to attract scathing criticism from both liberals and conservatives, not for interfering with the First Amendment, but for new media ownership rules.¹²³ The FCC’s inactivity in the indecency area disappointed and infuriated activists and scholars: “The laws are in place to penalize indecency, but they are rarely enforced. The sheriff left town long ago. . . . Only the public suffers.”¹²⁴ The spate of activity in 2004 showed that the sheriff has made a noisy return and, in turn, revealed how the FCC’s control over indecent speech is constitutionally inadequate.

A. The Test Itself: Vague and Far-Reaching

The FCC’s test for indecency is both impermissibly vague and more inclusive than that set forth by the Supreme Court for determining obscenity, and consequently, the test increases the danger of self-censorship.

1. Proscribing Obscenity

Had Justice Black’s all-encompassing view of the First Amendment¹²⁵ ever been embraced by the Supreme Court, the FCC, a creation of Congress, would not be able to exercise any control over speech on the airwaves. Neither Congress nor the FCC

¹¹⁹ John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344 (1989).

¹²⁰ Shales, *supra* note 7.

¹²¹ Biography of Michael K. Powell, <http://www.fcc.gov/commissioners/previous/powell/biography.html> (last visited Sept. 9, 2005).

¹²² Boehlert, *supra* note 9.

¹²³ Ira Teinowitz, *Powell’s Exit Marks End of ‘Bold’ FCC Era*, ADVER. AGE, Jan. 24, 2005, at 1.

¹²⁴ McSweeney, *supra* note 15, at 653–54.

¹²⁵ “[T]he First Amendment’s unequivocal command [is] that there shall be no abridgement of the rights of free speech . . . [I]t certainly cannot be denied that the very object of adopting the First Amendment . . . was to put the freedoms protected there completely out of the area of . . . congressional control . . .” *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1960) (Black, J., dissenting).

would have constitutional power to enact or enforce laws that abridged the freedom of speech or press: “i.e. not just ‘not many laws,’ not just ‘laws unreasonably’ abridging the freedom of speech, but NO laws at all, absolutely, positively, NONE.”¹²⁶

Yet such an absolute, literalist view — that “the First Amendment strips Congress of *all* power over speech and press”¹²⁷ — has never been accepted by the Court. Rather, Congress is allowed to regulate, prevent, and punish certain well-defined categories of speech without offending the First Amendment.¹²⁸ Those types of speech include “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”¹²⁹ speech which is “no essential part of any exposition of ideas and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”¹³⁰

Through the years, the Court has expanded the protective cover of the First Amendment over some of those areas it once deemed worthless,¹³¹ including libel.¹³² Yet the Court has steadfastly refused to be as welcoming to obscene material, “categorically” finding it to be “unprotected by the First Amendment.”¹³³ Thus, in the interest of guaranteeing a public debate that is “uninhibited, robust, and wide-open,”¹³⁴ newspaper publishers are granted broad protection from the chilling effects of massive civil penalties for printing criticism of a public official. Yet protecting those who publish or sell obscene materials has no such important social benefit, for obscenity has been rejected as being “utterly without redeeming social importance.”¹³⁵ Obscenity’s “debasement and corrupting effect” endangers social institutions, individuals, “civilized life,” even “the freedom of democracies.”¹³⁶

Regardless of whether this dire description of obscenity’s effect is accurate,¹³⁷ obscenity remains almost wholly proscribable.¹³⁸ A state can regulate obscene

¹²⁶ VAN ALSTYNE, *supra* note 69, at 6.

¹²⁷ LOWENTHAL, *supra* note 24, at 8.

¹²⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

¹²⁹ *Id.* at 572.

¹³⁰ *Id.*

¹³¹ *See, e.g., VAN ALSTYNE, supra* note 69, at 729 (“Eventually the first amendment becomes systematically applied, i.e. applied to the once-orphaned field, albeit with a particular contour of doctrine somewhat formulaically shaped.”).

¹³² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a showing of absolute malice was necessary before a public figure could recover damages for defamatory falsehoods).

¹³³ *Miller v. California*, 413 U.S. 15, 23 (1973).

¹³⁴ *N.Y. Times*, 376 U.S. at 270.

¹³⁵ *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹³⁶ LOWENTHAL, *supra* note 24, at 143.

¹³⁷ The evidence is inconclusive. *See* Christopher D. Hunter, *The Dangers of Pornography? A Review of the Effects Literature* (2000) (unpublished Ph.D. dissertation, University of Pennsylvania), available at http://www.asc.upenn.edu/usr/chunter/porn_effects.html (last visited Aug. 21, 2005) (“[T]he best conclusion one can reach about the effect of pornography is that it ‘does not serve as a necessary and sufficient cause of audience effects.’”).

¹³⁸ While obscenity, along with other orphaned types of speech such as fighting words,

materials without judicial interference if the regulation meets the standards set forth in *Miller v. California*:¹³⁹

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴⁰

Applying the above test to the Super Bowl incident, it is apparent that the momentary baring of Ms. Jackson's breast should not qualify as an obscene and proscribable event. First, the work in question, taken as a whole, was a musical performance in which clothed individuals sang and danced. It was not designed to appeal to or to arouse an inordinate or unwholesome interest in sex.¹⁴¹ Second, while it may have offended the musical sensibilities of some viewers, it did not depict sexual conduct in any patently offensive way. The performance was far tamer than one would find, for example, on Bourbon Street. Third, there is an artistic value, subject to one's tastes, of Super Bowl halftime shows, which are designed to entertain and delight.

Therefore, under the current formulation of the Court's obscenity test, a state could not constitutionally ban the publication of a book in which Janet Jackson's breast was revealed, nor could the exhibition of a movie containing the same image bring criminal sanctions, nor could it punish a radio disc jockey for composing a song describing the incident. Materials that are found obscene after a review of the *Miller* factors include books with "patently offensive representations or descriptions of ultimate sexual acts, normal and perverted, and . . . masturbation, excretory

can be banned categorically, the government cannot proscribe it for a reason other than that which makes it proscribable. See *R.A.V. v. St. Paul*, 505 U.S. 375, 388 (1992) ("[I]t may not prohibit, for example, only that obscenity which includes offensive *political* messages."). Accordingly, Congress could not enable the FCC to levy fines specifically for the broadcast of anything that portrayed political figures in an obscene manner.

¹³⁹ 413 U.S. 15 (1973).

¹⁴⁰ *Id.* at 24 (citations omitted). The decision effectively halted the Court's expansion of the First Amendment's protection of obscenity seen in the 1960s, most notably with *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 418 (1966), which held that a work must be found "utterly without redeeming social value" before a state could proscribe it.

¹⁴¹ "Prurient" is defined as "marked by or arousing an immoderate or unwholesome interest or desire." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 941 (10th ed. 1993).

functions, and the genitals."¹⁴² The film *Deep Throat*, for example, was found to be obscene due to the "scenes of explicit heterosexual intercourse, including group sex, and . . . explicit penetration, fellatio, cunnilingus, female masturbation, anal sodomy, and seminal ejaculation" that "dominate the film."¹⁴³

Conversely, nudity alone is never obscene under the *Miller* standards.¹⁴⁴ Accordingly, the glimpse of a woman's bare midriff was insufficient to justify penalizing the screening of *Carnal Knowledge*.¹⁴⁵

2. The FCC's Indecency Test: More Far-Reaching than the *Miller* Test

While the flash of a breast in a movie, because not legally obscene, could not be prohibited or punished, the very same image might so be treated if broadcast over the airwaves. The government is allowed to prohibit and punish that broadcast using a test much less exacting, for an image much less crude, than those found to be obscene and proscribable under the *Miller* test. This is true even though indecent speech, unlike obscenity, is protected by the First Amendment.¹⁴⁶

Protected, perhaps, but it is not immune. Under the FCC's test, speech is indecent if it "depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."¹⁴⁷ The image or word in question does not have to fully satisfy every prong of the test in order to be found indecent, as one factor may outweigh the others.¹⁴⁸

The indecency determination must be judged in light of "the *full context* in which the material appeared."¹⁴⁹ The full context is evaluated by its explicitness, if it "dwells on" sexual organs or activities, and if it "pander[s,] . . . titillate[s,] or shock[s]."¹⁵⁰ While partially mirroring the language of the *Miller* test,¹⁵¹ the FCC test is notable for what it does not contain: a consideration of the merit or value of the material. In *Action for Children's Television v. FCC*,¹⁵² the court rejected arguments that the merit prong should be essential to a determination of indecency. Since indecent speech is not wholly suppressed under the current regime, only

¹⁴² *Village Books, Inc. v. Maryland*, 323 A.2d 698, 704 (Md. Ct. Spec. App. 1974).

¹⁴³ *United States v. One Reel of Film*, 481 F.2d 206, 208 (1st Cir. 1973).

¹⁴⁴ *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that "sexual expression which is indecent but not obscene is protected by the First Amendment" (quoting *Sable Comm. v. FCC*, 492 U.S. 115, 126 (1989))).

¹⁴⁷ Fox Notice, *supra* note 13, at 20193.

¹⁴⁸ Abernathy Remarks, *supra* note 99, at *10.

¹⁴⁹ Super Bowl Notice, *supra* note 2, at 19235.

¹⁵⁰ *Id.*

¹⁵¹ *See supra* note 140 and accompanying text.

¹⁵² 852 F.2d 1332, 1339-40 (D.C. Cir. 1988).

corralled into child-free viewing hours,¹⁵³ the FCC's interests were different from that of a state banning obscenity outright. Merit is "relevant" but cannot "immunize a work from the charge of indecency."¹⁵⁴ As a result, "film[s] or literary classics or even news broadcasts" can be found indecent.¹⁵⁵ The lack of the merit prong could perhaps explain the FCC's investigation of the opening ceremonies of the 2004 Summer Olympic Games in Greece. Nine viewers complained that the ceremonies, which featured actors representing famous Greek statues and figures of ancient mythology and civilization, were indecent, and an investigation was launched.¹⁵⁶ Because the FCC conceivably could fine the broadcast of something that had serious literary, artistic, political, or scientific value, broadcasters might hesitate to air a program whose content, though of indisputable value, might be deemed indecent.

Applying its indecency test, the FCC found the brief baring of Ms. Jackson's breast to be clearly indecent:

[T]hroughout the Jackson/Timberlake segment, the performances, song lyrics and choreography discussed or simulated sexual activities In particular, we note that Mr. Timberlake pulled off part of Ms. Jackson's clothing to reveal her breast after he sang, ("gonna have you naked by the end of this song.") Therefore, we find the nudity here was designed to pander to, titillate and shock the viewing audience.¹⁵⁷

The fact that the shocking moment of nudity was so fleeting was not dispositive.¹⁵⁸

The FCC's treatment of the Jackson/Timberlake incident recalls a test adopted and quickly discarded by the Supreme Court in *Redrup v. New York*.¹⁵⁹ The Court found that states could not bring obscenity charges if there was no suggestion of a concern for juveniles, no assault on individual privacy so obtrusive so as to be avoidable, and no evidence of pandering.¹⁶⁰ Under this standard, it might be easier to understand fining the flash of the breast: as much as twenty percent of the nation's children between the ages of two and eleven watched the show¹⁶¹ both for the game and the performances of their favorite stars. No warning was given of the imminent nudity by which parents might have sheltered their children's eyes, turned the channel, or

¹⁵³ See *supra* note 100 and accompanying text.

¹⁵⁴ Crigler & Byrnes, *supra* note 119, at 350.

¹⁵⁵ Helene T. Schrier, Comment, *A Solution to Indecency on the Airwaves*, 41 FED. COMM. L.J. 69, 98 (1988).

¹⁵⁶ Lisa de Moraes, *A Controversy of Olympic Proportions? Well, Not Exactly*, WASH. POST, Dec. 16, 2004, at C7.

¹⁵⁷ Super Bowl Notice, *supra* note 2, at 19236 (citations omitted).

¹⁵⁸ *Id.*

¹⁵⁹ 386 U.S. 767 (1967).

¹⁶⁰ *Id.* at 769.

¹⁶¹ Super Bowl Notice, *supra* note 2, at 19240 n. 66.

at least explained by “tak[ing] an incident that is both unexpected and jarring and turn[ing] it into a valuable learning experience.”¹⁶² Furthermore, despite the network’s repeated assertions that the breast-baring was a wardrobe malfunction, the evidence hints that the segment was “calculated and deliberate”¹⁶³ to exploit the massive audience for commercial rewards. For Ms. Jackson, with an album about to be released, for instance, a show without controversy might have resulted in a year with less publicity and fewer record sales.

Shortly after announcing that Viacom owed \$550,000 in fines for the flash of breast, the FCC announced another finding of indecency — this one against Fox for an episode of *Married by America*. The content in question included people licking whipped cream from strippers’ bodies, a man being playfully spanked, and two strippers kissing each other.¹⁶⁴ While not rising to the level of obscenity, the material was easily and succinctly found to be indecent: it was “graphic and explicit[,] . . . gratuitous, vulgar and clearly intended to pander to and titillate.”¹⁶⁵ The fines for so willfully violating prohibitions against broadcast indecency: a record-breaking \$1.2 million.

A broadcaster could employ a statistician to develop a formula to determine what will be fined and for how much. A few seconds of female flesh seen by most of the country might bring half a million dollars in fines, six minutes of whipped cream and strippers seen by a smaller audience might double the amount. Yet such a formula is complicated by what the FCC has recently said is not indecent. In January 2005, the FCC announced that it had rejected complaints about thirty-six supposed incidents of indecency brought by the Parents Television Council,¹⁶⁶ including a woman moaning in orgasmic pleasure while being given a pelvic exam by a female doctor¹⁶⁷ and, in another program, a woman sighing and writhing as a man ties her to a bed and applies ice to her abdomen.¹⁶⁸ Broadcasters could likely spend much time and money attempting to determine how the FCC applies the vague contours of its test to find that a glimpse of a breast is indecent, but an orgasm is not. Or they could opt for the more inexpensive route and air only that which is suitable for a child’s viewing, thus altogether avoiding uncertainty and the possibility of an indecency fine.

¹⁶² Calvert, *supra* note 17, at 95.

¹⁶³ Super Bowl Notice, *supra* note 2, at 19240.

¹⁶⁴ Fox Notice, *supra* note 13, at 20194.

¹⁶⁵ *Id.* at 20194–95.

¹⁶⁶ *See infra* Part III.B.2.

¹⁶⁷ *In re* Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, 20 F.C.C.R. 1931, 1937 (2005) [hereinafter PTC Complaint I].

¹⁶⁸ *In re* Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing Of Allegedly Indecent Material, 20 F.C.C.R. 1920, 1924 (2005) [hereinafter PTC Complaint II].

3. The Vagueness of the Test Exacerbates the Self-Censorship¹⁶⁹

Even though a requirement of prior approval before publishing, speaking, or broadcasting is a thought abhorrent to the First Amendment,¹⁷⁰ such prior approval has, because of the vagueness of the indecency test, been demanded by broadcasters.¹⁷¹ Vagueness is a procedural due process objection: a person must have a particularized reason to understand that that which he does is illegal or prohibited. “[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.”¹⁷² In order to have standing, a person usually must be able to show that the vice of vagueness is applicable to his circumstances and to present the constitutional question “in the context of a specific live grievance.”¹⁷³ With the First Amendment, in contrast, even a person to whom the law can be validly applied can have a vague or overbroad statute stricken on its face if that statute deals with speech.¹⁷⁴ Therefore, any broadcaster could theoretically challenge the FCC’s indecency test for its vagueness.

Such a challenger would claim that having to guess how the indecency test will be interpreted and applied violates both due process of law and, since the application is to speech, the First Amendment. Ample evidence exists to support such a claim. It is unclear, for instance, what is the “contemporary community.” The FCC defines it as the “average” member of the audience, not from any particular geographic area.¹⁷⁵ The use of the contemporary community standard is an attempt to safeguard the decision-making process from the imposition of personal opinions.¹⁷⁶ The language of the standard mirrors that in the *Miller* test, which allows a jury to assess the obscenity of material by the standards of the community in which charges

¹⁶⁹ Professor Calvert notes that the FCC’s definition of profanity is also problematically vague: “Given the profoundly vague nature of terms like ‘vulgar’ and ‘coarse,’ the FCC has the latitude to broadly define those terms in future cases so as to censor far more content than mere indecency.” Calvert, *supra* note 17, at 87. The FCC itself suffers from confusion brought on the vague definition: in October, 2003, the word “fucking” as uttered by the singer Bono was not profane. In March 2004, it was. *Id.* at 62.

¹⁷⁰ See *supra* note 67 and accompanying text.

¹⁷¹ See *supra* Part I.

¹⁷² *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

¹⁷³ *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

¹⁷⁴ See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (“In the First Amendment context, the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected.”).

¹⁷⁵ Fox Notice, *supra* note 13, at 20194 n.20.

¹⁷⁶ Industry Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, Policy Statement, 16 F.C.C.R. 7999, 8002 (2001) [hereinafter FCC Policy Statement].

against the defendant are brought.¹⁷⁷ The *Miller* procedure, though, is remarkably different and much less troubling, than that of the FCC, in which a panel of five political appointees attempts to assess the contemporary community standards of a community the size of the United States. In obscenity prosecutions, “the jury and the local judge [are] the inherent repositories of insight into community standards.”¹⁷⁸ Without the benefits of a judge, a jury or expert witnesses, “[t]he FCC . . . possesses no such inherent capacity.”¹⁷⁹ Broadcasters are left with only the vaguest notion of the community standards by which their programming will be judged.¹⁸⁰ Given the enormity of the fines, it is conceivable, even likely, that a broadcaster would envision an “average” viewer to be more akin to the most sensitive member of the community and opt not to broadcast edgier material.¹⁸¹

The Supreme Court has long been concerned by vague regulations that have a similar chilling effect on speech, even of the sort held in lesser esteem than the venerated political discourse. The *Miller* test, for example, was an attempt to counteract vagueness concerns in anti-obscenity statutes and to lay out the framework for “precisely limited statute[s]” so to minimize “the danger of infringement on constitutional rights.”¹⁸² In *Reno v. ACLU*,¹⁸³ the court held that the “vague contours” of a statute criminalizing the transmission of obscene or indecent materials would “unquestionably silence[] some speakers whose messages would be entitled to constitutional protection,”¹⁸⁴ including sexually-explicit indecent speech. Thus, even if a certain type of speech is entitled to less muscular First Amendment protection, a statute regulating that speech may not be so vague as to cause a person to censor himself. In other words, even “lesser” speech is protected from such a chilling effect.

Worries about broadcasters censoring themselves because of vague regulations might seem misguided here among discussions of sitcoms, pop stars, and strippers. Yet broadcasters are not solely in the business of entertaining. Despite the proliferation of all day, everyday cable news coverage and the always-open and ready-to-inform internet, network television remains the primary source of news for a significant portion of the population.¹⁸⁵ The networks continue to devote many hours

¹⁷⁷ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁷⁸ Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV 579, 636 (1975).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 638.

¹⁸¹ Schrier, *supra* note 155, at 98.

¹⁸² Note, *supra* note 178, at 584.

¹⁸³ 521 U.S. 844 (1997).

¹⁸⁴ *Id.* at 874.

¹⁸⁵ Pew Research Center, *Media: More Voices, Less Credibility*, TRENDS 2005, at 42, available at <http://people-press.org/commentary/pdf/105.pdf> (last visited Aug. 21, 2005). In 2004, 34 percent of the population regularly watched nightly network news, and 59 percent regularly watched the local news coverage. In January 2004, 35 percent of the population learned about the presidential candidates from nightly network news coverage, compared to

of airtime each week to news coverage. In Spring 2005, CBS, for example, filled its weekly schedule with thirty minutes of national news nightly, in addition to local news and three-hour-long, news-oriented shows a week.¹⁸⁶ The self-censorship motivated by the FCC's sharply increased fines and exacerbated by its vague standards will surely seep into the decisions broadcasters make in this area as well. Those standards thus violate the broadcasters' rights both "under procedural due process and freedom of speech or press."¹⁸⁷

B. The Structure: Easily Hijacked, Highly Subjective

The *Pacifica* case began with one complaint from one individual who happened to overhear George Carlin's monologue¹⁸⁸ about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever,"¹⁸⁹ resulting in a Supreme Court decision that, almost thirty years later, continues to justify the FCC's regulatory authority over the content of speech.¹⁹⁰ Three people complained to the FCC about the *Married by America* episode, resulting in a seven digit fine.¹⁹¹ That the offended sensibilities of a few people can have such amplified influence is an unavoidable effect inherent in the structure of the FCC. The FCC does not monitor the airwaves watching for indecency. Rather, an indecency investigation is initiated only upon the receipt of a documented complaint from the public.¹⁹² If the complaint contains evidence that suggests that a violation did occur, a full investigation is launched, and an indecency determination is made by the Commission.¹⁹³

While this structure does prevent the FCC from becoming an omnipresent regulator over the airwaves and allows it to be extremely responsive to the public, it is flawed in two key ways, which adds to the uncertainty, vagueness, and confusion confronting broadcasters. First, the structure grants the five Commissioners, who are unelected political appointees, an uncomfortable amount of discretion that is exacerbated by the lack of definitive guidelines. Furthermore, evidence recently released by the FCC reveals that the process has essentially been commandeered by one group, which is in business to bring indecency complaints to the FCC. Not only

38 percent who learned from cable news. *Id.* at 42, 46.

¹⁸⁶ CBS aired *48 Hours* on Saturdays, as well as *60 Minutes* on Sundays and on Wednesdays. See CBS Prime Time 2004–2005, http://www.cbs.com/primetime/fall_preview_2004/fall_preview.shtml (last visited Sept. 9, 2005).

¹⁸⁷ *Winters v. New York*, 333 U.S. 507, 510 (1948).

¹⁸⁸ Gayoso, *supra* note 33, at 888.

¹⁸⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

¹⁹⁰ Super Bowl Notice, *supra* note 2, at 19234 n.30.

¹⁹¹ Poniewozik, *supra* note 23.

¹⁹² See, e.g., FCC Policy Statement, *supra* note 176, at 8015.

¹⁹³ See Enforcement Bureau—Obscene, Profane & Indecent Broadcasts, <http://www.fcc.gov/eb/broadcast/opi.html>. (last visited Sept. 8, 2005).

must broadcasters predict if a program will offend the sensibilities of five individuals, they must be ever mindful of what might offend the Parent's Television Council.

1. Unprecedented Influence of Five Political Appointees

Five Commissioners, all appointed by the President, head the FCC and make its indecency decisions.¹⁹⁴ Because the FCC does not issue advisory opinions, and because the standards are so subjective, vague, and nebulous, broadcasters must guess if what they plan to air will indeed be deemed indecent by these individuals. When station owners asked the FCC for an advance waiver before airing *Saving Private Ryan*, the FCC refused, advising the owners to use instead their "own good faith judgment."¹⁹⁵

In other areas of First Amendment jurisprudence, government activities restricting speech receive stricter scrutiny if there is a broad grant of discretionary authority to a decision-maker, creating "an impermissible risk of suppression of ideas."¹⁹⁶ For this reason, the Court struck down a county ordinance that allowed one local official to gauge how much a party applying for a parade license would have to pay for it. The fees were tied both to the content of the speech and to how the official believed the speech would be received by the public. Without "narrow, objective, and definite standards . . . the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted."¹⁹⁷ Similarly, the Court's adoption of the *Miller* test was in part an effort to remove itself from the role as a "board of censorship for the 50 states, subjectively judging each piece of material brought before [it]."¹⁹⁸ That decision demonstrated clear discomfort with allowing the government to make individualized, subjective determinations when a person's First Amendment freedoms are at stake. Such discomfort was also evident in decisions concerning the free exercise of religion. An unemployment compensation provision was called into question in *Sherbert v. Verner*,¹⁹⁹ as it "lent itself to individualized governmental assessment."²⁰⁰

The FCC, in making indecency determinations, is effectively a governmental board which makes individualized assessments about the content of speech. Five unelected individuals assess the validity of the complaint and, using their subjective

¹⁹⁴ About the FCC, <http://www.fcc.gov/aboutus.html> (last visited Sept. 8, 2005). No more than three Commissioners can belong to the same political party. *Id.*

¹⁹⁵ de Moraes, *supra* note 46.

¹⁹⁶ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

¹⁹⁷ *Id.* at 131 (citations omitted).

¹⁹⁸ *Miller v. California*, 413 U.S. 15, 22, n.3 (1973).

¹⁹⁹ 374 U.S. 398 (1963). *Sherbert's* holding was limited by *Employment Division Department of Human Resources of Oregon v. Smith* to the "unemployment compensation field." 494 U.S. 872, 884 (1990).

²⁰⁰ *Smith*, 494 U.S. at 884.

judgments and vague standards, determine if the speech in question is indecent. What is indecent to one person may not be to another: the determination is “particularly linked with personal preferences.”²⁰¹ As Bob Wright, CEO of NBC, said, the FCC’s discretionary power results in the “high cost of sacrific[ed] creative integrity.”²⁰² Just as uncertainties regarding the definitions of the terms of the indecency test chill speech, so do uncertainties regarding the discretionary preferences of the five Commissioners who apply it.

2. Unprecedented Influence of One Group

Because the FCC is a reactive body, it is vulnerable to being “hijacked” by activist groups pursuing an anti-indecency agenda.²⁰³ In December 2004, the FCC released documents in response to a Freedom of Information Act request by television critic Jeff Jarvis, which revealed that 99 percent of the indecency complaints received that year — with the exception of the complaints caused by the sight of Ms. Jackson’s breast — were filed by one single activist group, The Parents Television Council (PTC). Jarvis found that, of the 159 letters complaining about *Married by America*, all but three were almost “identical,” as if “produced by an ‘automated complaint factory.’”²⁰⁴

The non-profit, nonpartisan PTC bills itself as “the only organization dedicated solely to improving the quality of entertainment programming, with emphasis on television.”²⁰⁵ It is a division of the Media Research Center, a group established by L. Brent Bozell III in 1987 in order to “prove the existence of a pervasive liberal bias that ‘undermines traditional American values.’”²⁰⁶ The PTC employs several individuals, so-called “entertainment analysts,” who spend their days watching television and recording “questionable material” into the organization’s databases.²⁰⁷ With one click of the mouse, the web site’s visitors may lodge a complaint with the FCC.

Has the PTC, as one writer claims, “hijacked” the complaint process?²⁰⁸ The group’s members are certainly protected by the First Amendment, and no law does

²⁰¹ Gayoso, *supra* note 33, at 918.

²⁰² Drew Clark, *It’s a Dirty Job*, NAT’L J. CONGRESSDAILY, Jan. 25, 2005.

²⁰³ Tim Goodman, *Couch potatoes, it’s time to drop the remote. E-mail the FCC. Stop the Parents Television Council before it gets beyond the TV*, S.F. CHRON., Dec. 13, 2004, at E1.

²⁰⁴ Tom Shales, *Michael Powell Exposed! The FCC Chairman Has No Clothes*, WASH. POST, Nov. 21, 2004, at N1.

²⁰⁵ About the Parents Television Council, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Sept. 6, 2005).

²⁰⁶ Bob Thompson, *Fighting Indecency, One Bleep at a Time: Only Popular Culture and Big Media Stand in the Parents Television Council’s Way*, WASH. POST, Dec. 9, 2004, at C1.

²⁰⁷ *Id.*

²⁰⁸ Goodman, *supra* note 203.

or could prevent them from voicing their concerns about anything, be it MTV or Social Security reform. Nor is the PTC revolutionary in its intent. Groups have been fighting against indecency, obscenity, and other “alarming trends” in popular culture for decades. In the 1980s, a group known as “Morality in Media” encouraged citizens to bring more complaints to the FCC,²⁰⁹ and the Parents Music Resource Center fought a zealous campaign against explicit song lyrics. After convincing Congress to hold hearings to discuss the supposed pornographic content of rock music, the group’s pressure eventually forced the Recording Industry Association of America (RIAA) to affix warning labels on records if they contain “explicit content.”²¹⁰

Despite concerns about the impropriety of Congress spending many amusing hours investigating the content of music,²¹¹ the RIAA’s ultimate decision to affix warning labels was not mandated by the government. Nor do the labels inspire confusion or censorship on the part of artists or their producers. If anything, the labels can actually inspire creativity, as artists aspire to create parental-advisory-worthy content for the street credibility, attention, and record sales it brings.

Getting a FCC fine, or even surviving a PTC complaint, can indeed benefit the broadcaster the same way. It is, of course, free advertising. Complaints about Nicolette Sheridan’s naked back in a Monday Night Football promotion on ABC drew attention, most likely welcomed, to all parties involved. Although ultimately cleared by the FCC of any indecent wrongdoing,²¹² the network was able to recoup the advertisement’s production costs several times over: it was played repeatedly on the news, discussed on talk shows, and written about in-depth on the Internet.²¹³ As Chairman Powell astutely pointed out, “[W]hile we get a lot of broadcasting companies complaining about indecency enforcement, they seem to be continuing to be willing to keep the issue at the forefront, keep it hot and steamy in order to get financial gains.”²¹⁴ Only a person whose television viewing has not ventured beyond PBS in the past twenty-five years would be shocked to learn that broadcasters make programming decisions with commercial motives in mind. But it is neither the role of our government nor the tradition of our society to punish those who seek

²⁰⁹ Crigler & Byrnes, *supra* note 119, at 344.

²¹⁰ *Record Albums to Get Explicit Lyric Warnings*, CHI. TRIB., Nov. 2, 1985, at C1.

²¹¹ See Colman McCarthy, *Lyrics: On the Wrong Track*, WASH. POST, Sept. 29, 1985, at H2 (“On the idea of Congress’ involving itself, the ACLU said, ‘The government has absolutely no business conducting an inquiry into the content of published materials. Any legislation that would impose a consumer rating on records would be swiftly struck down as unconstitutional.’”).

²¹² Lisa de Moraes, *Dropped-Towel Skit Earns Scolding but No Penalty for ABC*, WASH. POST, Mar. 15, 2005, at C1.

²¹³ Marlon Manuel, *Racy Promo Scores, Big Time*, ATLANTA J.-CONST., Nov. 18, 2004, at F1.

²¹⁴ Leonard Shapiro, *FCC Chairman Rebukes ABC for ‘MNF’ Clip*, WASH. POST, Nov. 18, 2004, at D3.

financial gain. To complain that a broadcaster may reap some benefit from suggestions that its material is indecent — that the broadcaster might somehow game the system — begs the real matter of concern. The fundamental First Amendment problem is a system of government fines levied in punishment for speech which in other settings would be protected from such fines; moreover, the standards by which a select few determine who shall be fined are so vague and differing in their results that potential recipients of fines must guess at them. Further yet, the system may be set in motion against one or another broadcaster by a private faction; lastly, the overall effect of this system is pervasively chilling.

IV. ATOP A SLIPPERY SLOPE: MORE FINES OR MORE FREEDOM?

Determining the proper way to deal with indecency on the airwaves is as difficult a task as is defining it. It is undeniable that, with each fall season, television has grown less restrained, less “decent.” In 1990, for example, the new programs were criticized for including words like “freckle-butt,” an insult tame and silly measured by today’s standards. Saying something “sucks” on a prime-time television show fifteen years ago was a newsworthy event.²¹⁵ Today, the adjective is banal, especially when compared with the vocabulary that today frequents the airwaves, such as “power dicks,” “dickhead,” “man loaf” and “nutsack.”²¹⁶

A. Increased Penalties and Powers Lead to Purer Speech?

If one is of the mindset that the increased tolerance of bawdy speech and behavior on the broadcast airwaves should be curtailed, the increased fines and regulations are an efficient tool. They both halt the expansion of what is acceptable and place a limit on broadcasters’ ability to allegedly “profit-maximize every minute of every hour of every broadcast day.”²¹⁷

This is likely the path that will be taken by Kevin Martin, the new Chairman of the FCC, who is thought to be more a more aggressive opponent of indecency than his predecessor, Chairman Powell.²¹⁸ Chairman Martin’s intentions might be evidenced by his August 2005 hiring of Penny Nance as special advisor to the FCC’s office of strategic planning and policy analysis.²¹⁹ Nance is a conservative activist and long-time foot soldier in the war for the nation’s morality: she founded the Kids

²¹⁵ Tom Shales, *Fall’s Off-Color: Ruder, Cruder Talk for the New Season*, WASH. POST, Sept. 4, 1990, at C1.

²¹⁶ The FCC held that the utterances of these words were not indecent. *See* PTC Complaint I, *supra* note 167, at 1938; PTC Complaint II, *supra* note 168, at 1926.

²¹⁷ Tom Shales, *Reinventing TV for The ’80s*, WASH. POST, May 27, 1979, at C1.

²¹⁸ Stephen Labaton, *Knowing Indecency Wherever He Sees It*, N.Y. TIMES, Mar. 28, 2005, at C1.

²¹⁹ *Id.*

First Coalition, which campaigns against online pornography, and served as a board member of a group that attempts to suffuse public policy with Biblical principles.²²⁰ Although Chairman Martin did not act in the indecency arena in the first six months after his appointment, the hiring of Ms. Nance is seen by some as a harbinger of enforcement action on as many as fifty pending indecency complaints.²²¹

Chairman Martin's activities will likely be supported by the House of Representatives, which in February 2005 passed a bill by a vote of 389 to 38 that provided for dramatically greater fines.²²² The Broadcast Indecency Enforcement Act of 2005 hikes maximum fines from \$32,500 to \$500,000 per indecency infraction, allows the fining of individual performers for a first offense, and calls for the revocation of licenses of repeat offenders.²²³ Among the few dissenting votes were Henry Waxman (D-CA), who voiced concerns about "self-censorship," and Janice Schakowsky (D-Ill.), who "decried [the] 'chilling effect' the first offense fines against performers would have on artistic expression."²²⁴

Nor are lawmakers content with limiting the FCC's power to the broadcast airwaves. Some congressmen have suggested, and the PTC has urged,²²⁵ that indecency regulations should be expanded to satellite and cable, as it "makes little sense" to treat cable, which reaches 85 percent of the country's homes, differently than broadcast television.²²⁶ Explains Senator Ted Stevens (R-Alaska), chairman of the Senate Commerce Committee: "There has to be a level playing field."²²⁷ In March 2005, the Disney Company became the first major media company to announce its support for such expansion of the FCC's regulatory powers.²²⁸ The thought is frightening for those performers and viewers who find refuge in the artistic freedom available on cable and satellite radio/television, yet conceivably such expansion could be attempted. While the FCC is limited, by law and purpose, to

²²⁰ *New Crackdown?*, FIN. TIMES (London), Aug. 10, 2005, at 10.

²²¹ Todd Shields, *FCC Hires Conservative Indecency Critic*, MEDIaweek, Aug. 8, 2005, available at http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=100101563.

²²² Frank Ahrens, *House Raises Penalties for Airing Indecency*, WASH. POST, Feb. 17, 2005, at E1.

²²³ William Triplett, *House Backs Tough Fines for Indecency*, DAILY VARIETY, Feb. 10, 2005, at 8.

²²⁴ *Id.*

²²⁵ See, e.g., Letter from L. Brent Bozell III, Founder and Pres., Parents Television Council, to John McCain, U.S. Senator (Mar. 4, 2004), available at <http://www.parentstv.org/PTC/publications/release/2004/lettertomccain.asp> (last visited Sept. 6, 2005) (urging the Senator to levy the power of the Commerce Committee to stop "the rising tide of vulgar and violent programming on cable").

²²⁶ Davidson, *supra* note 58. See also *USF, DTV Top Congressional Agenda, But Timetable Unclear*, COMM. DAILY, Jan. 18, 2005.

²²⁷ Davidson, *supra* note 58.

²²⁸ Poniewozik, *supra* note 23.

the broadcast airwaves, the Supreme Court has in the past forced cable companies, privately owned, to forego some of their editorial autonomy in order to create a level playing field by providing channel access to local news and community channels.²²⁹

B. Defining Indecency?

It is clear that increasing the amount of fines allowed and expanding the power of the FCC will continue to result in impermissible self-censorship in the absence of any other systemic or structural changes. As an alternative, some argue that the FCC should provide specific examples of the types of programming that would and would not deem indecent.²³⁰ Although this might provide valuable guidance and insight to broadcasters wishing to avoid fines as well as the negative publicity promised by the PTC, allowing the FCC to provide examples of indecency invites it to be an arbiter, prognosticator, and designator of the public's taste.²³¹ In October 2005, the FCC took a step in this direction when it launched an online tutorial for viewers that explains the difference between obscene, profane, and indecent speech.²³² Although the site refrains from providing specific examples, it attempts to make the complaint process more user-friendly.²³³

Another change often advocated is the assessment of indecency under the same "rigorous standard" as obscenity.²³⁴ This would likely protect more speech than does the FCC's current formulation, yet it would equate speech that is protected by the First Amendment with speech that is not. Nor does it address the problems inherent with the test, such as the impossibility of finding an average American citizen in an average community.²³⁵

²²⁹ See *supra* note 79 and accompanying text.

²³⁰ Schrier, *supra* note 155, at 105.

²³¹ The National Association of Broadcasters (NAB) is attempting to provide guidance to broadcasters without asking the government to define indecency by issuing a guide to provide "best practices." *Mondaq Business Briefing*, COMM. L. BULL., May 6, 2005.

²³² Obscenity, Indecency & Profanity, <http://www.fcc.gov/eb/oip/welcome.html> (last visited Sept. 9, 2005).

²³³ Frank Ahrens, *Sex and Dirty Words*, WASH. POST, Oct. 9, 2005, at F7.

²³⁴ Gayoso, *supra* note 33, at 919 ("At a minimum, indecency should receive as rigorous a standard as that used to regulate obscenity.").

²³⁵ Schrier, *supra* note 155, at 105 (suggesting that the FCC consider the nature of the market in which the material in question aired when evaluating contemporary community standards, as "a New York audience will react quite differently, say, from a Louisville audience.").

C. *The People's Power*

It might appear, then, that we are “at the top of a dangerously slippery slope”²³⁶ with the courts as the only option and “last hope” left for broadcasters, who have filed papers seeking rehearings of the major indecency decisions of 2004.²³⁷

Yet there exist two solutions to the indecency dilemma that are more than adequate, immediately and widely available, and that achieve the goal of protecting the nation’s children without infringing on or monitoring speech. The solutions are content-neutral, which “undercuts significantly” the justification for the FCC indecency regulations.²³⁸ The first is the V-Chip, which allows parents to use their remote control to block programs depending on the rating — an option that is available in every television manufactured after 2000.²³⁹

The second is even more universally available and even more within the power of any parent or person concerned with the onslaught of indecent material on the airwaves. The choice not to watch a program is well within the autonomy of anyone with a remote control or the energy to get off the couch to switch off the television set. As President Bush has recently said: “As a free speech advocate, I often told parents who were complaining about content, you’re the first line of responsibility; they put an off button the [*sic*] TV for a reason. Turn it off.”²⁴⁰

Allowing viewers to make their own decisions about what they do or do not watch achieves the same effect as the fines, for the content that is broadcast is determined ultimately by the viewers and the commercial advertisers that seek their attention. When the viewers become bored, horrified, or repulsed, they turn the channel. When enough do so, the broadcaster gets the hint and alters the content in an effort to keep both the viewers and the advertisers. Accordingly, it is the marketplace, not the government, that controls the content and the individual, not the government, who chooses what to watch.

Protecting the editorial autonomy of the viewer will not ensure a broadcast spectrum filled only with shows that educate and enlighten in a highly tasteful manner, for when the door of free speech is wide open, the tasteless and the terrible trip through in hordes. Yet the “flow of ideas and opinions on matters of public

²³⁶ Shales, *supra* note 217.

²³⁷ Labaton, *supra* note 218. The three challenged decisions are the Super Bowl, the *Married by America*, and the Bono findings.

²³⁸ *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)).

²³⁹ See Poniewozik, *supra* note 23; FCC Parents’ Place, http://www.fcc.gov/parents/channel_blocking.html (last visited Sept. 9, 2005).

²⁴⁰ Interview by Brian Lamb with George W. Bush, U.S. President, in Washington, D.C. (Jan. 30, 2005), available at <http://www.q-and-a.org/Transcript/?ProgramID=1008> (last visited Aug. 28, 2005).

interest and concern”²⁴¹ so fundamental to the First Amendment, runs more freely when all expression is allowed to stream unhindered by government regulation. *The New Yorker* and *Penthouse* are able to coincide peacefully in the same mailbox without the guiding hand of the government to shield our eyes from that which it decides is too indecent.

Reducing the adult population to viewing only that which is fit for children²⁴² not only infringes upon parents’ rights and responsibilities to monitor their children’s exposure to mass media,²⁴³ but also limits, to our detriment, the nation’s dialogue to only family-friendly, inoffensive topics. There is little intellectual value, admittedly, in watching a sexually-explicit program. But there is value in the underlying sexual frankness that allows it.²⁴⁴ That an idea, image, or word *may* offend someone is not and cannot be sufficient grounds for its suppression.²⁴⁵ “It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”²⁴⁶ A pluralistic and democratic society that wishes to continue as such must accept that political, social, and cultural heterogeneity cannot well continue without at least a few, and ideally many, people being offended. Those people are well within their rights to prevent or halt any affront to their sensibilities. Not by clicking a convenient button on a website to ask for the help of the government, but by clicking the “off” button on their television remote, thereby leaving the words of others, be they obnoxious, base, or indecent, nevertheless unaffected, unhindered, and free.

²⁴¹ *Hustler Mag. v. Falwell*, 485 U.S. 46, 50 (1988).

²⁴² *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 807 (1996).

²⁴³ See, e.g., Ahrens & de Moraes, *supra* note 102 (“[The FCC] should recognize that as adults we can be responsible for our children.”).

²⁴⁴ See, e.g., Dan Savage, *First They Came for Howard*, SALON, Apr. 14, 2004, <http://archive.salon.com/ent/feature/2004/04/14/savage> (last visited Aug. 21, 2005) (arguing that “frank and explicit talk about human sexuality [is] a virtue.”).

²⁴⁵ See *Street v. New York*, 394 U.S. 576, 592 (1969).

²⁴⁶ *Id.*