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## The Law and Economics of Wardrobe Malfunction

*Keith Brown and Adam Candeub\**

### I. INTRODUCTION

Michael Powell, Chairman of the Federal Communications Commission (FCC) from 2001 to 2005, will likely be most remembered for his controversial indecency enforcement actions against Howard Stern's radio show and Janet Jackson's Super Bowl "wardrobe malfunction."<sup>1</sup> This legacy is probably deserved. In addition to these high-profile enforcement actions, Michael Powell imposed a higher total fine amount in 2004 for broadcast indecency than the amount imposed during the previous ten years combined.<sup>2</sup>

Many have alleged that Powell's enforcement actions were politically motivated stunts made on behalf of powerful special interests.<sup>3</sup> Some have argued that the enforcement actions have had a chilling effect on free speech in broadcasting.<sup>4</sup> A few have even maintained that the FCC has used its licensure power to discourage owners of television and radio stations from challenging its indecency

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1. According to one trade newspaper, "'The top issue [that Powell will be remembered for] will be indecency, much to his chagrin,' one industry insider, who requested his name be withheld, told Satellite News." Editorial, *FCC Chairman Michael Powell Resigns*, SATELLITE NEWS, Jan. 31, 2005, at 1; see also Editorial, *Another Powell Departs*, N.Y. TIMES, Jan. 24, 2005, at A16 ("Mr. Powell's disappointing reign will be remembered for the extremes to which he went to punish what he called indecency . . .").

2. John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains "King of All Fines"*, CENTER FOR PUB. INTEGRITY, Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200>.

3. See, e.g., Peter Johnson, *Stern Says He'll Push for Kerry*, USA TODAY, July 1, 2004, at D3; Editorial, *Powell Overreacting to Indecency Issue*, TELEVISION WEEK, Jan. 26, 2004, at 9.

4. See, e.g., Daniel Rubin, *Bad Words for Bono and Stern*, PHILA. INQUIRER, Mar. 19, 2004, at A5 ("The American Civil Liberties Union said the measure would 'turn down the thermostat in an already chilly atmosphere, deterring speech that is constitutionally protected.'"); see also Mark Jurkowitz, *Targeting Free Speech as Journalists Face the Courts, the FCC Clamps Down, and Secrecy Grows, Is the First Amendment Under Attack?*, BOSTON GLOBE, Dec. 7, 2004, at D1; Editorial, *Committed to the First Amendment*, BROADCASTING & CABLE, Oct. 24, 2005, at 12.

actions in court<sup>5</sup>—a Byzantine maneuver that allows congressmen and FCC Commissioners to continue using the indecency enforcement publicity that courts might otherwise stop.

The FCC's enforcement process itself creates these problems and suspicions. First, because the FCC does not monitor the airwaves but instead relies upon citizen complaints to initiate enforcement,<sup>6</sup> particular interest groups can dominate enforcement even though indecency regulations are supposed to reflect "contemporary community standards."<sup>7</sup> According to a recent FCC estimate obtained by Mediaweek, 99.9% of indecency complaints in 2003 were filed by the Parents Television Council, an activist group with links to conservative

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5. See Jeff Jarvis, *Can the FCC Shut Howard Up?*, NATION, May 17, 2004, at 11 (explaining that according to "Robert Corn-Revere—the First Amendment attorney who recently got Lenny Bruce pardoned and who litigated against the Communications Decency Act . . . . 'The FCC has done its best to prolong the longevity of this doctrine by keeping it out of court'").

Howard Stern has often claimed that the FCC uses its power over licensure to prevent licensees from seeking judicial review of indecency actions. He recently repeated the claim as a caller on a radio show featuring Michael Powell as a guest.

Stern: Fine after fine came and we tried to go to court with you to find out about obscenity and what your line was and whether our show was indecent, which I don't think it is. And you do something really sneaky behind the scenes. You continue to block Viacom from buying new stations until we pay those fines.

You are afraid to go [sic] court. You are afraid to get a ruling time and time again.

When will you allow this to go to court and stop practicing your form of racketeering that you do by making stations pay up or you hold up their license renewal?

Powell: First of all, that's flatly false.

. . . .

Stern: You're lying.

*Ronn Owens* (KGO radio broadcast Oct. 26, 2004), [http://www.buzzmachine.com/archives/2004\\_10\\_26.html#008280](http://www.buzzmachine.com/archives/2004_10_26.html#008280).

In addition, many claim that the FCC sits on agency reconsideration orders for the purpose of delaying judicial appeal. See Stephen Labaton, *Knowing Indecency Wherever He Sees It*, N.Y. TIMES, Mar. 28, 2005, at C1 ("The networks and affiliates have filed papers with the commission seeking a rehearing on the three major indecency cases: the Janet Jackson incident at the Super Bowl, Bono's use of a profanity at the Golden Globe Awards and a racy episode of 'Married by America.' But the agency has sat on those appeals, and may not issue rulings for months or longer. As a practical matter, the inaction by the commission has prevented the networks from taking the matter to court.").

6. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8015 (2001) [hereinafter *Industry Guidance*] ("The Commission does not independently monitor broadcasts for indecent material. Its enforcement actions are based on documented complaints of indecent broadcasting received from the public.").

7. Whether speech is indecent depends, in part, on whether it is patently offensive according to contemporary community standards. See *infra* Part II.

political and religious organizations.<sup>8</sup> As this Article demonstrates, increases in the number of FCC indecency actions have almost always been in response to political pressures emanating from interest groups.

When coupled with the inherent vagueness of the indecency standard, the manipulatable enforcement process inevitably leads to claims of selective or arbitrary enforcement. It also leads to public choice speculation that indecency enforcement is simply a vehicle to allow politicians to further their own agendas.<sup>9</sup> Or, even more darkly, the complaint process can be used simply as a signaling exercise whereby certain political groups indicate to politicians their political clout in order to influence issues unrelated to broadcast indecency.<sup>10</sup> Further, the complaint process takes the FCC away from its stated purpose—clarifying and rendering consistent the “community standards” that underlie the indecency determination. Instead, the FCC’s complaint process has confused the standard. After nearly a generation of modern indecency enforcement, the standard is muddier than it was thirty years ago.

This Article sets forth a new, market-based approach to indecency regulation designed to avoid many of these problems and to permit the emergence of decency standards that more accurately reflect those of the community. Drawing on recent economic theory involving two-sided markets, we propose a new market-based mechanism for indecency regulation that avoids the pitfalls of the FCC’s current politicized approach. Instead of focusing regulations on the broadcaster, this Article advocates shifting the current regulatory scheme to market-based regulation of the viewer-advertiser relationship. Specifically, this Article proposes that the FCC require all programs to explicitly state the entities that advertise with them and make that information easily accessible to

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8. Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK, Dec. 6, 2004, at 4. (“Through early October, 99.9% of indecency complaints—aside from those concerning the Janet Jackson ‘wardrobe malfunction’ during the Super Bowl halftime show broadcast on CBS—were brought by the PTC, according to the FCC analysis dated Oct. 1.”).

9. Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, in 6 SUPREME COURT ECONOMIC REVIEW 173, 176 (Ernest Gellhorn & Nelson Lund eds., 1998). (“The theory of public choice, also known as the economic theory of legislation, makes the same basic assumptions about self-interest for politicians and bureaucrats that standard economic analysis makes for private sector actors. . . . [M]arket forces provide strong incentives for self-interested politicians to enact laws that serve private rather than public interests because . . . these private groups can provide politicians and bureaucrats with the political support they need to serve their objectives of achieving re-election, or of maximizing their bureaucratic turf.”).

10. See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 777 (1998).

consumers. This approach would allow consumers to directly pressure advertisers—who, in turn, could pressure broadcasters to air acceptable programming. This mechanism would better reflect community standards and encourage viewers to engage in a meaningful civic dialogue. The proposed regulation would also enhance economic efficiency, a new justification for media regulation not before considered by scholars.<sup>11</sup>

This Article's analysis questions the completeness of the currently dominant legal justification for indecency regulation, the public trustee doctrine. As set forth by both the Supreme Court and the FCC over approximately the last seventy years, "the People" own the airways, and they, through their elected officials and delegated agencies, condition the granting of licenses to use the airways.<sup>12</sup> Consequently, broadcasters are public trustees of the people's airways. In exchange for the right to use the airways, broadcasters must adhere to the obscenity and indecency standards the FCC promulgates.<sup>13</sup>

We argue instead that regulation must focus on advertisers because they drive media markets. Broadcasters make their money from advertising: the more viewers or listeners (a.k.a. "eyeballs") they deliver to advertisers, the more broadcasters can charge advertisers. The real economic transaction is *not* between broadcasters and consumers as the traditional regulatory framework assumes. Rather, consumers trade the value of their time watching commercials in exchange for programming. If FCC regulation takes into account *both* transactions, "eyeball owners" will be able to better bargain with their advertisers in order to gain a

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11. See, e.g., Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989) (setting forth the scarcity, public trustee, and industry structure justifications for media regulation).

12. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969) ("Licenses to broadcast do not confer ownership of designated frequencies . . ."); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 157 n.54 (1994) ("[S]tatements operating under Government license are trustees of property, this property to be used for the benefit of the public." (quoting Federal Radio Commission, *THIRD ANNUAL REP.* 31 (1929))). Or, as Senator Clarence Dill, a sponsor of the epochal 1927 Radio Act stated, "Of one thing I am absolutely certain. Uncle Sam should not only police this 'new beat'; he should see to it that no one uses it who does not promise to be good and well-behaved." C.C. Dill, *A Traffic Cop for the Air*, 75 AM. REV. REVS. 181, 181 (1927).

The "public trustee" basis for broadcast regulation is certainly not the only one used by the Supreme Court and the FCC over the years; they have used others—most notably scarcity—but also industry structure, access, and the protection of children. See Spitzer, *supra* note 11. Nonetheless, the public trustee justification is one of the earliest justifications, and it has never been abandoned.

13. For discussion of the development and history of the quid pro quo, see *infra* Part II.A.

more direct voice in determining programming content in return for listening to their commercials.

By collecting and furnishing information in an easily accessible way about what programs advertisers support, the FCC could lower the transaction costs for viewers to communicate with or possibly put pressure on firms that advertise on indecent programming. This viewer-based mechanism would better reflect “community standards” than the FCC’s one-size-fits-all approach, which attempts to impose a national indecency standard based on interest-group complaints. A market approach also allows for localized determinations of indecency. Finally, by gathering information on advertisers and making it public, the FCC’s role would be analogous to that of the Food and Drug Administration (FDA) in ensuring the accuracy of food labeling for the purpose of informing public debate. Both programs have demonstrated efficiency gains by providing information to consumers.

Section II of this Article introduces the current state of the law and regulation on broadcast indecency. Section III examines the statutory history of indecency regulation and its judicial interpretation in an effort to understand why enforcement has always concentrated on the viewer-broadcaster relationship. Section IV examines the modern history of indecency enforcement and argues that indecency regulations, as currently designed, are an invitation for arbitrary, partisan enforcement. The basic structure of indecency enforcement and its focus on the viewer-broadcaster relationship, with the FCC purporting to act on behalf of the viewer, is arguably the cause for this faulty enforcement. Section V introduces the theory of the two-sided market and explains its application to broadcasting regulation. The Section goes on to examine the FCC’s authority for imposing a viewer-advertiser regulation regime. It argues that, due to the nature of media markets, the market acting alone may not provide an optimal level of information. It also explains how this proposal might work with or without the current regulatory regime. Section V concludes by arguing that this new approach builds civil society because it provides information for public discussion about matters of interest to society as a whole.

## II. CURRENT LEGAL STANDARDS AND THE COMPLAINT PROCESS

The following summarizes the existing legal standards for broadcast decency established in statute, Supreme Court precedent, agency regulations, and the FCC’s enforcement process.

The FCC derives the authority to assess civil forfeitures (fines) against broadcasters from § 1464 of Title 18 of United States Criminal Code, pursuant to its own complaint process for indecent material.<sup>14</sup> In relevant part, this statute states, “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned . . . or both.”<sup>15</sup>

The FCC’s regulation of indecent broadcast was upheld despite a First Amendment challenge in *FCC v. Pacifica*.<sup>16</sup> This famous case arose after a radio station’s daytime broadcast of comedian George Carlin’s “Seven Filthy Words” monologue.<sup>17</sup> The Court concluded that speech transmitted over broadcast media, like television and radio, has only limited First Amendment protection. Therefore, the FCC could constitutionally regulate indecent speech in the broadcast context even though indecent speech is not obscene and thus devoid of constitutional protections.<sup>18</sup> The Court described indecency as “nonconformance with accepted standards of morality,”<sup>19</sup> involving “patently offensive reference to excretory and sexual organs and activities.”<sup>20</sup> The Court did concede, however, that the concept of indecency “requires consideration of a host of variables.”<sup>21</sup> The Court permitted this lower level of First Amendment protection to speech uttered on broadcast for two reasons: the uniquely pervasive presence that radio and television occupy in the lives of people and the unique ability of children to access radio and television broadcasts.<sup>22</sup>

Section 73.3999 of the Code of Federal Regulations states, “No licensee of a radio or television broadcast station shall broadcast . . . any material which is indecent.”<sup>23</sup> The FCC currently defines indecency as “language or material that, in context, depicts or describes, in terms

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14. *See* Action for Children’s Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (holding that the FCC has authority to sanction licensees for broadcast of indecent material).

15. 18 U.S.C. § 1464 (2000). Obscene material is prohibited from being broadcast as it has no constitutional protection. The U.S. Department of Justice prosecutes transmission of obscene materials. *See* Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989); *Miller v. California*, 413 U.S. 15 (1973).

16. 438 U.S. 726, 727–28 (1978).

17. *Id.* at 728–29.

18. *Id.* at 739–41.

19. *Id.* at 740.

20. *Id.* at 743.

21. *Id.* at 750.

22. *Id.* at 748–50.

23. 47 C.F.R. § 73.3999 (2004).

patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”<sup>24</sup> The FCC uses a community standard that is not region-specific but rather one that reflects the views of “an average broadcast viewer or listener” in the United States. The FCC considers the allegedly indecent utterance in context.<sup>25</sup> In making its indecency determinations, the Commission relies on three factors:

- (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material dwells on or repeats at length descriptions or 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>26</sup>

The FCC does not monitor broadcasts for indecent material. There are no bureaucrats on the federal payroll watching television all day looking for “sexual or excretory organs.” Rather, the FCC relies on complaints received from members of the public. These complaints must include a tape of the offending program, the date and time of the broadcast, and the call sign of the station involved.<sup>27</sup> Generally, the Enforcement Bureau of the FCC will make a recommendation and decide on an appropriate disposition, which might include denial of the complaint, issuance of a Letter of Inquiry seeking further information, issuance of a Notice of Apparent Liability (NAL) for monetary forfeiture, or a formal referral to the FCC Commissioners.<sup>28</sup> If the Enforcement Bureau issues an NAL, the licensee is allowed to respond. The FCC may then impose a monetary penalty by issuing a forfeiture order.<sup>29</sup> If a forfeiture order is issued, a licensee may seek

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24. Industry Guidance, *supra* note 6, at 7999, 8000 (citing Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 n.10 (1993)).

25. *Id.* at 8002–03.

26. *Id.*

27. *Id.* at 8015.

28. *Id.* This procedure purports to be driven by the action of the Enforcement Bureau, which is staffed by career bureaucrats, although political appointees sometimes commandeer the procedure. *See, e.g.*, Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4980 (2004) (overriding career staff’s decision). There are currently five FCC Commissioners. Typically, three of these belong to the party of the President; the other two belong to the opposing party. *See* Federal Communications Commission, *About the FCC*, <http://www.fcc.gov/aboutus.html> (last visited Oct. 24, 2005).

29. Industry Guidance, *supra* note 6, at 8016.

reconsideration from the FCC or refuse to pay the fine and challenge the order directly in district court.<sup>30</sup>

### III. HISTORY OF THE INDECENCY PROHIBITION AND ITS UNDERLYING ASSUMPTIONS ABOUT MEDIA MARKETS AND PUBLIC OWNERSHIP

This Section recounts the history of indecency regulation and enforcement to show how and why the assumptions upon which indecency regulation was based naturally focused the regulator on the broadcaster-viewer relationship. As the preceding discussion suggests, the FCC has been unable to create a coherent standard for enforcing indecency. This failure stems from the public trustee assumption in the enforcement of indecency standards: acting at the behest of the viewer, the FCC attempts to determine what indecency is and then applies these standards against the broadcaster. As a result, the FCC's effort to define indecency is easily politicized. This Section attempts to understand why the FCC's enforcement of indecency regulations fixed its gaze only on the viewer and broadcaster.

#### A. *The Radio Act of 1912*

The Radio Act of 1912<sup>31</sup> represented Congress's first foray into federal broadcast regulation. It was passed to satisfy America's obligations under international treaty regarding ship, marine ship-to-shore, and ship-to-ship radios<sup>32</sup>—an issue that became particularly pressing due to the role that radio signaling confusion played in the sinking of the *Titanic*.<sup>33</sup> The Act established federal authority to regulate the airways.<sup>34</sup> Although the Act did not declare federal "ownership" of the airways, it established that broadcasting was a privilege requiring

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30. *Id.*

31. Pub. L. No. 62-264, 37 Stat. 302.

32. *Id.* The International Wireless Telegraph Convention required the United States "to apply the provisions of the present Convention to all wireless telegraph stations open to public service between the coast and vessels at sea." Art. 1, 27 Stat. 1565. *See* DOCUMENTS OF AMERICAN BROADCASTING 14 (Frank J. Kahn ed., 4th ed. 1984) (1969).

33. *See* KRATTENMAKER & POWE, *supra* note 12, at 5–7 (detailing the *Titanic* disaster and the subsequent genesis of broadcast regulation).

34. *See* THOMAS STREETER, *SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES* 78 (1996) (noting that the 1912 Act first asserted the principle of federal limitations on spectrum access and characterized radio transmissions as a privilege sanctioned by the government).

federal permission.<sup>35</sup> Anyone with a radio transmitter—from commercial stations to high school physics club members—could transmit provided she sent a postcard to the Secretary of Commerce.<sup>36</sup> The Secretary lacked discretionary authority and had to issue a license to anyone who met the statutory standards, which were minimal.<sup>37</sup> As Thomas Hazlett wrote, “The federal government was asserting ownership of the electromagnetic resource, but in a rather peculiar way: the secretary took no payment and issued no exclusive frequency rights.”<sup>38</sup>

Strikingly, despite the almost commons management of the radio spectrum under the Radio Act of 1912, the government still required that users of the radio spectrum uphold decency standards. Thus, even at the very infancy of federal ownership of the airwaves, the government demanded decency standards, quid pro quo. In 1914, the Department of Commerce published a pamphlet entitled “Radio Communication Laws of the United States.”<sup>39</sup> Regulation 210 stated, “No person shall transmit or make a signal containing profane or obscene words or language.”<sup>40</sup> According to historian Rivera-Sánchez, “It is not clear where this regulation came from.”<sup>41</sup>

Apparently this regulation was enforced, although the extent of enforcement is unclear.<sup>42</sup> By the standards of the Howard Stern Show, these complaints were generally tame. For instance, in 1920, amateur licensee Edgar Ferguson received a warning that his license would be suspended for three months if he continued to use the profane phrase “go

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35. 37 Stat. 302.

36. Mark Goodman, *Radio Act of 1927 as a Product of Progressivism*, 2 MEDIA HIST. MONOGRAPHS 2 (1999), available at <http://www.scripps.ohiou.edu/mediahistory/mhmjour2-2.htm>. According to the New York Times, there were 733 public entertainment stations and 18,119 amateur radio sending stations in operation in 1927. *Hoover To Maintain Radio Status Quo*, N.Y. TIMES, Feb. 25, 1927, at 2.

37. *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (D.C. Cir. 1925) (“It logically follows that the duty of issuing licenses to persons or corporations coming within the classification designated in the act reposes no discretion whatever in the Secretary of Commerce. The duty is mandatory; hence the courts will not hesitate to require its performance.”).

38. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 135 (1990).

39. Milagros Rivera-Sánchez, *The Origins of the Ban on Obscene, Indecent or Profane Language of the Radio Act of 1927*, 149 JOURNALISM & MASS COMM. MONOGRAPHS 1, 7 (1995).

40. *Id.*

41. *Id.*

42. *Id.* at 8.

to hell” on the air.<sup>43</sup> On the other hand, a transmission between two sailors discussing the comparative services available from prostitutes at several ports would be racy by twenty-first century standards.<sup>44</sup> It should be noted that all recorded examples of enforcement involved point-to-point communications, as opposed to broadcast content intended for a mass audience.<sup>45</sup> Rivera-Sánchez speculated that “[t]he scarcity of documented complaints about the use of offensive speech in radio broadcasting may have been the result of broadcasters’ respect for their heterogeneous audience.”<sup>46</sup>

*B. Passage of the 1927 Radio Act and the Federal Radio Commission*

*1. Broadcast regulation prior to the 1927 Radio Act*

Throughout the 1920s, the country experienced the rapid growth of radio broadcasts. By 1922 there were 576 broadcast stations, and the numbers increased throughout the decade.<sup>47</sup> Of course, when price is zero, demand is infinite. In industry and Washington policy circles, the fear became rampant that the airways had become a Tower of Babel.<sup>48</sup> For instance, a commentator in the industry magazine *Radio Broadcast* wrote, “Freedom of the air does not require that everyone who wishes to impress himself on the radio audience need have his private microphone to do so.”<sup>49</sup> He added, “Radio waves cannot be freely used by everyone. Unlimited use will lead to its destruction.”<sup>50</sup>

Herbert Hoover, already an internationally known figure due to his relief work in Europe after the First World War, was serving as Secretary of Commerce at the time. An engineer by training, he realized the importance, power, and potential of commercial broadcasting. He “remolded the Radio Act from its origins and emphasis on wireless point-to-point telegraphy to one that fostered a wider use of the newly emerging technology.”<sup>51</sup> His problem was that the 1912 Act did not give

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43. *Id.*

44. *Id.*

45. *Id.* at 10.

46. *Id.*

47. Hazlett, *supra* note 38, at 139.

48. See ERIK BARNOUW, A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES (1966).

49. J.H. Morecraft, *The March of Radio*, RADIO BROADCAST, Apr. 1926, at 555.

50. *Id.* at 475.

51. KRATTENMAKER & POWE, *supra* note 12, at 7.

him sufficient power to impose restrictions on broadcasts or even reallocate the spectrum.

Hoover initiated radio conferences in 1922, 1923, 1924, and 1925 for the purpose of creating consensus on the technical and policy aspects of radio regulation.<sup>52</sup> Attracting industry leaders, political figures, and technical experts, each of these conferences set forth plans for more comprehensive regulation of the airwaves and proposed draft legislation to enact these plans.<sup>53</sup> Unfortunately, these well-considered plans did not prompt Congress to act.

Perhaps sensing that mere conferencing would not bring congressional action, Hoover precipitated events. Several federal court decisions also helped push the need for broadcast regulation to Congress's attention. In 1923, the D.C. Court of Appeals, in *Hoover v. Intercity Radio Co.*, made clear that the Secretary of Commerce did not have the authority to withhold a license from a qualified applicant but could only select times and wavelengths to minimize broadcast interference.<sup>54</sup> Despite the ruling, Hoover continued to refuse certain applications for radio licenses.<sup>55</sup> In a 1926 decision, *United States v. Zenith Radio Corp.*,<sup>56</sup> a United States district court further limited the Secretary of Commerce's power, ruling that he lacked the authority both to refuse to issue licenses and to select times when broadcasters could broadcast.

In reaction to *Zenith*, Hoover refused to regulate broadcast and essentially ended all licensing by the Department of Commerce.<sup>57</sup> This inaction produced a crisis.<sup>58</sup> No new licenses were issued, and no regulations were issued to address interference concerns. This forced Congress to act, which is what Hoover and the radio industry wanted.<sup>59</sup> As a result, President Calvin Coolidge signed the Radio Act of 1927, which gave the newly established Federal Radio Commission (FRC) the authority to assign and revoke radio licenses.<sup>60</sup>

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52. *Id.* at 8–11.

53. *Id.*

54. 286 F. 1003 (D.C. Cir. 1923).

55. KRATTENMAKER & POWE, *supra* note 12, at 11.

56. 12 F.2d 614 (N.D. Ill. 1926).

57. KRATTENMAKER & POWE, *supra* note 12, at 11.

58. *Id.* at 12.

59. *Id.* at 7–16; Hazlett, *supra* note 38, at 159.

60. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

## 2. *Ownership assumptions underlying the Radio Act of 1927*

With the Radio Act of 1927, Congress made clear that use of spectrum was quid pro quo: Broadcasters could use their assigned spectrum in exchange for fulfilling their “public interest” obligation. The contemporary meaning of public interest was rather vague. Senator Dill, the author of the Act, said perhaps hyperbolically, that the public interest “covers just about everything.”<sup>61</sup> Regardless of the exact parameters of public interest, it was clear that Congress expected something in return for the privilege of broadcasting.

The notion that government owned the air and had a right to demand a quid pro quo for usage was well established in the Act itself and in the discussion surrounding it. At the November 1925 Radio Conference, Hoover stated,

Some of our major decisions of policy have been of far-reaching importance and have justified themselves a thousand-fold. The decision that the public, through the Government, must retain the ownership of the channels through the air with just as zealous a care for open competition as we retain public ownership of our navigation channels has given freedom and development in service that would have otherwise been lost in private monopolies.<sup>62</sup>

Fundamentally, the Act “bluntly declared that there could be no private ownership of the airwaves; they were public and use could occur only with the government’s permission.”<sup>63</sup> Maine Congressman Wallace White, a sponsor of the 1927 Act, expressed the typical view that

[w]e have reached the definite conclusion that the right of all of our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual to use the ether.<sup>64</sup>

Senator Dill stated, “The one principle regarding radio that must be adhered to, as basic and fundamental, is that the Government must

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61. KRATTENMAKER & POWE, *supra* note 12, at 20.

62. C.M. Jansky, Jr., *The Contribution of Herbert Hoover to Broadcasting*, 1 J. BROAD. 241, 248 (1957).

63. KRATTENMAKER & POWE, *supra* note 12, at 12 (citing 44 Stat. 1162 (1927)).

64. 69 CONG. REC. H5479 (1926).

always retain complete and absolute control of the right to use the air.”<sup>65</sup> A contemporary commentator asserted that the idea that the government “owns the ether” was an *idée fixe* in the congressional debate.<sup>66</sup> According to Powe and Krattenmaker,

Although the 1912 Act had required a license to use the air, it had been silent on the issue of ownership of the airwaves. The 1927 Act was not. It bluntly declared that there could be no private ownership of the airwaves; they were public and use could occur only with the government’s permission.<sup>67</sup>

Interestingly, prior to passage of the Act, Congress enacted a measure designed to ensure that no private entity could claim private ownership over any portion of the airwaves. Senate Joint Resolution 125, signed by President Coolidge, required that any applicant for a license or license renewal had to “execute in writing a waiver of any right or any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof.”<sup>68</sup>

As Powe and Krattenmaker highlight, broadcasters were involved in a quid-pro-quo exchange. Hoover understood that in exchange for a license, the government would want something in return: “[I]t becomes of primary public interest to say who is to do the broadcasting, under what circumstances, and with what type of material.”<sup>69</sup> Congressman White stated that the Radio Act of 1912 allowed an individual to “demand a license whether he will render service to the public there under or not.”<sup>70</sup> The 1927 Act, however, created a requirement of public service in exchange for a license.<sup>71</sup>

Finally, in 1928, the Federal Radio Commission concisely characterized the right to broadcast as a quid pro quo. Its second annual report stated that “the Commission must determine from among the applicants before it which of them will, if licensed, best serve the public.

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65. Dill, *supra* note 12, at 184.

66. Note, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 245, 250 (1929).

67. KRATTENMAKER & POWE, *supra* note 12, at 12 (citing 44 Stat. 1162).

68. S.J. Res. 125, 69th Cong., 44 Stat. 917 (1926).

69. KRATTENMAKER & POWE, *supra* note 12, at 19 (citing Daniel E. Garvey, *Secretary Hoover and the Quest for Broadcast Regulation*, 3 JOURNALISM HIST. 66, 67 (1976)).

70. Wallace H. White, *Unscrambling the Ether*, LITERARY DIGEST, Mar. 5, 1927, at 7.

71. *Id.*

. . . Those who give the least, however, must be sacrificed for those who give the most.”<sup>72</sup>

*C. Obscenity, Indecency, and the Public Interest Standard*

Section 28 of the 1927 Act included prohibitions against the broadcast of obscene, indecent, and profane speech. Congress empowered the newly formed FRC to prosecute “whoever utters any obscene, indecent, or profane language by means of radio communication.”<sup>73</sup> Adopting the recommendations of the Fourth National Radio Conference in 1925, the Act further stated that

[n]othing in this Act shall be understood or construed to give the licensing authority 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 licensing authority which shall interfere with the right of free speech by means of radio communications.<sup>74</sup>

This statutory juxtaposition between prohibitions on certain types of speech next to sections prohibiting censorship seems jarring. Arguably, the language simply reflects a different historical mindset. At the time, censorship had a more proscribed meaning that focused on government review of political speech.<sup>75</sup> That the statute’s framers did not view restrictions on obscenity, indecency, and profanity as censorship probably reflected an unstated societal consensus that constitutional protections should be exercised only within the confines of public propriety. Indeed, in the 1910s and 1920s, only the minority view—often expressed in Supreme Court dissents—held that the First Amendment barred censorship of expression.<sup>76</sup>

To those involved in the Act’s passage, the obscenity, indecency, and profanity language probably seemed like a natural extension of the public-interest standard. Senate sponsor Senator Dill stated, “Of one

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72. Statement of the Commission, Aug. 23, 1928, reprinted in FEDERAL RADIO COMMISSION, SECOND ANN. REP. 166, 170 app. F (1928).

73. 47 U.S.C. §§ 81–83 (repealed 1934).

74. Pub. L. No. 69-632, § 29, 44 Stat. 1162 (1927).

75. David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 55–67 (1992).

76. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919) (upholding conviction for distributing leaflets critical of the United States and its war policies). Justice Holmes dissented, arguing that the First Amendment rendered unconstitutional the statute under which the defendants were convicted and urged a “free trade in ideas.” *Id.* at 630.

thing I am absolutely certain. Uncle Sam should not only police this ‘new beat’; he should see to it that no one uses it who does not promise to be good and well-behaved.”<sup>77</sup> This position was clear to those who first supported radio regulation. For instance, in Herbert Hoover’s address to the Third Radio Conference of 1924, he stated:

Through the policies we have established the Government and therefore the people, have today the control of the channels through the ether just as we have control of our channels of navigation . . . . We will maintain them free . . . but we must also maintain them free of malice and unwholesomeness.<sup>78</sup>

Perhaps due to the unstated societal consensus that free speech over broadcast had to exist within standards of propriety, the indecency sections were mentioned only in passing in the legislative history.<sup>79</sup> For instance, in *Pacifica*, the Supreme Court made much of the legislative silence on section 28 of the 1927 Act, stating that the obscenity and decency provision “was discussed only in generalities when it was first enacted.”<sup>80</sup> To some degree, this legislative silence justified the *Pacifica* Court’s willingness to craft its own definition of indecency as a concept separate and distinct from “obscenity.”

An analysis of contemporaneous statutes and draft legislation suggests that the *Pacifica* Court was incorrect when it defined indecency and obscenity differently. Statutes on the books contemporaneously with the Act use obscenity and indecency synonymously. For instance, the Comstock Act of 1872 prohibited the mailing of obscene materials.<sup>81</sup> It read, “[N]o obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character . . . shall be carried in the mail . . . .”<sup>82</sup> Early court decisions interpreting the Comstock Act did not distinguish obscenity from indecency.<sup>83</sup> For example, a federal court in Indiana stated that indecency was a general category encompassing obscenity.<sup>84</sup> Further, the 1912 Act and the 1914 Commerce Department regulations

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77. Dill, *supra* note 12, at 181.

78. Jansky, *supra* note 62, at 248.

79. FCC v. *Pacifica Found.*, 438 U.S. 726, 738 (1978).

80. *Id.*

81. 17 Stat. 283 § 148 (Jun. 8, 1872).

82. *Id.*

83. See, e.g., *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930); *Parmelee v. United States*, 113 F.2d 729 (D.C. Cir. 1940).

84. *United States v. Males*, 51 F. 41 (D. Ind. 1892).

prohibited “obscene and profane” utterances without distinguishing between the two.<sup>85</sup>

Milagros Rivera-Sánchez suggests that the 1927 Radio Act language was largely lifted from the Commerce Department pamphlet of 1914, Regulation 210 discussed above.<sup>86</sup> The First Radio Conference produced a draft radio bill dated April 18, 1922; section 3(E)(e) of the document states that an operator’s license shall be suspended if he “has transmitted superfluous signals, or signals containing profane or obscene words or language.”<sup>87</sup> This language exactly matches the Commerce Department pamphlet. When Senator Clarence Dill introduced H.R. 9971, however, he “inverted the order of the terms profane and obscene and added the word ‘indecent.’”<sup>88</sup> There is no stated reason why Senator Dill did this and thus very little one can conclude about the significance of the revision. This version with slight changes was adopted into the 1927 Act.

This interesting historical footnote suggests that the *Pacifica* opinion was probably incorrect in claiming that indecency and obscenity referred to different concepts. Certainly, there is no evidence that the statute’s drafters thought the two words had distinct meanings. Rather, the evidence, slim as it is, suggests that the congressmen envisioned prohibitions on one unitary category of inappropriate speech.

#### *D. The 1934 Act and the Federal Communications Commission*

Dissatisfied with the FRC, President Roosevelt sought to create a federal agency with power over both wire and radio companies. After considerable wrangling over whether spectrum would be allocated to nonprofit and special interest groups, Congress passed the 1934 Communications Act.<sup>89</sup> It established the Federal Communications Commission (FCC) and transferred authority over spectrum decisions from the FRC to the FCC. The radio provisions in Title III of the new Act were essentially the same as those in the 1927 Act, thus affirming the government ownership of all broadcasting rights and the public trustee concept.<sup>90</sup>

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85. Rivera-Sánchez, *supra* note 39, at 19.

86. *Id.*

87. *Id.*

88. *Id.* at 20.

89. Robert D. Richards, *Resurrecting the Fairness Doctrine: The Quandary of Enforcement Continues*, 37 CLEV. ST. L. REV. 557, 660 (1989).

90. *Id.*

The 1934 Act also adopted the 1927 Act's obscenity, indecency, and profanity language, largely verbatim.<sup>91</sup> There was little legislative history discussing the incorporation of such language into the new legislation. The ban on obscene, indecent, and profane language was amended in 1948 and replaced with criminal penalties for using such language over the airwaves. The modified clause was struck from the Communications Act and incorporated into the Criminal Code where it is found today.<sup>92</sup> Despite the recodifications, the language remains largely identical today.<sup>93</sup>

#### *E. Conclusion*

The obscenity and indecency prohibitions emerge from a legal paradigm that sees the broadcaster and the government involved in an exchange. The broadcaster gets, from the people through the FCC, a right to use or license; in exchange, the people receive from the broadcaster the promise to act as a trustee in the public interest. The FCC enforces the agreement. From the very inception of radio, the trustee responsibilities included the obligation to adhere to indecency and obscenity prohibitions. In this way, the broadcasters became part of the *quid pro quo*.

Thus, the entire thrust of the regulatory system has focused on the broadcaster and its obligations towards the listener/viewer with the FCC as enforcer. This analysis ignores the relationship between the viewer and the advertiser and the ways this relationship can be included in the regulatory structure. The next Section analyzes the skewed outcomes that arise, in part, because regulatory focus is on the broadcaster-viewer relationship.

#### IV. ENFORCEMENT ACTION

The existing legal structure for regulating indecency leads to politicized enforcement, which blurs legal standards and chills free expression. In general, FCC action against broadcast indecency has been sporadic, intensifying during the administrations of Republican

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91. Section 29 of the 1927 Radio Act was incorporated to the 1934 Communications Act at section 326.

92. *See* 18 U.S.C. § 1464 (1948).

93. 18 U.S.C. § 1464 (2000) ("Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined under this title or imprisoned not more than two years, or both.").

Presidents, particularly Richard Nixon and George W. Bush, who typically acted in response to pressure from social conservative groups. This politicized pattern of enforcement has had little to do with defining or clarifying either community standards of indecency or the constitutional standard in *Pacifica*, which should control the FCC's indecency enforcement actions.

#### A. Early Enforcement Under the 1934 Act

The first notable FCC indecency action under the 1934 Communications Act<sup>94</sup> followed a pattern that seems remarkably contemporary: a famous entertainer gave a performance that pushed the envelope of accepted morality. Politicians fulminated, and the FCC reacted.

In a 1937 NBC radio broadcast, the famous Mae West, playing a rather provocative Eve, gave a slightly salacious radio performance spoofing the Garden of Eden.<sup>95</sup> Responding to a significant public

94. See 47 U.S.C. §§ 151-614 (2000). The 1934 Act created the FCC and gave it enforcement authority over broadcast. *Id.* § 151.

95. *The Chase and Sanbourn Hour: Adam & Eve* (NBC radio broadcast Dec. 12, 1937). The program described West approaching a "palpitatin' python," (played by Edgar Bergman—although some sources credit Ted Osborn with the role) and sending the snake to get an apple for her, leading to this exchange:

SNAKE: I'll—I'll do it (hissing laugh)

EVE: Now you're talking. Here—right between those pickets.

SNAKE: I'm—I'm stuck.

EVE: Oh, shake your hips. There, there now, you're through.

SNAKE: I shouldn't be doing this.

EVE: Yeah, but you're doing all right now. Get me a big one . . . *I feel like doin' a big apple* . . . Mmm-oh . . . nice goin', swivel hips.

Forty million people tuned into the show. According to historical reports, many found the dialogue to be highly amusing, but there were also several thousand complaints.

Oddly, a feature appearing a few minutes later on the program, introduced by Don Ameche as "the romantic battle of the century between Siren Mae West and Casanova Charlie McCarthy," featured West and Charlie McCarty engaged in a steamy dialogue—but did not elicit the same outrage.

MAE: Nothin' I like better than the smell of burnin' wood!

CHARLIE: Wonder if she means me?

DON: Better watch out, Charlie!

BERGEN: Say, Charlie—do you smell that perfume? Isn't it ravishing?

CHARLIE: Yeah! Yes it is—it's ravishing! It's weakening! So help me—I'm swooooooning! Wooo wooo woooo! What is it?

MAE: Whyyyyy, it's my favorite perfume: "Ashes of Men."

CHARLIE: Uh-oh! "Ashes of Men?" Holy smoke! She's not gonna make a . . . cinder . . . outa me!"

Or:

outcry, Representative Lawrence Connery (D-MA) complained on the House floor of “the ravishing of the American home” by West’s “foul, sensuous, indecent, and blasphemous radio program,” which “reduced the Garden of Eden episode to the very lowest level of bawdy-house stuff.”<sup>96</sup> The FCC responded with a stern warning to NBC, and NBC banned West and even the mention of her name.<sup>97</sup>

Excepting the Mae West incident, FCC power to regulate broadcast content was largely unused from the 1930s to the 1960s, with no notable

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MAE: Listen, Charlie—are these your keys?

CHARLIE: Oh, uhhhh, thanks Mae—did I leave them in the car?

MAE: No—you left ‘em in my apartment!

(Bergen is outraged to learn of Charlie’s nocturnal activities—but Mae rises to his defense.)

MAE: If you wanna know, he did come up to see me.

BERGEN: Oh, he did? And what was he doing up there?

MAE: Wellll . . . Charlie came up, and I showed him my . . . etchings. And he showed me his . . . stamp collection.

BERGEN: Oh, so that’s all there was to it—etchings and a stamp collection!

CHARLIE: Heh, heh, heh—he’s so naive!

And more:

MAE: I thought we were going to have a nice long talk Tuesday night at my apartment!

Where did you go when the doorbell rang?

CHARLIE: I was gonna hide in your clothes closet—but two guys kicked me out!

And, of course:

BERGEN: Tell me, Miss West—have you ever found the one man you could love?

MAE: Sure . . . lotsa times!

As the dialogue proceeds, recordings of the program show a certain nervousness in the response of the audience—there is a marked edginess to the laughter, which only becomes more pronounced as the routine nears its climax:

MAE: You ain’t afraid that I’d do ya wrong? Orrrr . . . are ya afraid that I’ll do ya right?

CHARLIE: Well, I’m slightly confused. I need time for that one.

MAE: That’s all right—I like a man what takes his . . . time! Why doncha come up home with me now, honey? I’ll let ya play in my . . . woodpile. (A very nervous laugh from the audience is audible on this line.)

But Charlie won’t give in, and Mae finally gives him the brush-off:

MAE: I don’t need you! I got men for every mood—men for every day in the week—Monday, Tuesday, Wednesday, Thursday, Friday—I change my men like I change my clothes!

CHARLIE: Mae! Mae! You’re not walking out on me, are you?

MAE: I got a reputation at stake! No man walks out on me—they might carry them out, but they never walk out!

Mae West ended up taking most of the heat, earning a ban from NBC that lasted for nearly twenty years; her name was not even mentioned for over a decade. Standard Brands, the radio program’s sponsor, issued a formal apology on the following week’s program. In a rather sexist result, Edgar Bergen and Charlie McCarthy escaped unscathed and went on to star in the most popular act on radio.

96. 83 CONG. REC. H561 (daily ed. Jan. 26, 1938) (statements of Rep. Connery).

97. EMILY W. LEIDER, *BECOMING MAE WEST* 342 (1997).

actions for broadcast indecency during this time. Marjorie Heins stated that “[FCC] power lay largely dormant in the 1950s.”<sup>98</sup> A legal commentator wrote in a 1959 *Harvard Law Review* article that “[t]he federal statutes which make it criminal to broadcast obscenity . . . have . . . been almost completely ignored.”<sup>99</sup>

This temporary abeyance stemmed from social and political, as well as legal, causes. Many believe that the 1950s were a time of tremendous conformity and cultural conservatism, and the broadcast media simply responded to these strong cultural conventions.<sup>100</sup> Indeed, the few indecency complaints filed and acted upon during this period appear remarkably tame by current standards. For instance, the FCC initiated action against Mile High Radio (KIMN) in 1958 for an announcer’s comments, which included such inflammatory phrases as “flushing pajamas down the toilet,” “inflating ‘cheaters’ with helium,” and “the guy who goosed the ghost and got a handful of sheet.”<sup>101</sup> The Broadcast Bureau (the office in the FCC that handled indecency complaints at that time) and FCC chairman sought to revoke KIMN’s license, but the majority of the Commission simply issued a cease and desist order.<sup>102</sup> Importantly, the Commission did not rely on section 1464’s explicit obscenity and indecency prohibition in its KIMN indecency inquiry, but rather on a more general public-interest standard.<sup>103</sup>

Encouraging conservative approaches in broadcast, the National Association of Broadcasters (NAB), the umbrella trade group of television and radio stations, promulgated private industry censorship codes for radio and television. These codes were in effect during the 1950s and 1960s. The private code prohibited broadcast of “offensive language, vulgarity, illicit sexual relations, sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience.”<sup>104</sup>

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98. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH 92 (2001).

99. Note, *State Regulation of Radio and Television*, 73 HARV. L. REV. 386, 390 (1959).

100. See HEINS, *supra* note 98, at 98; see also DAVID HALBESTROM, THE FIFTIES (1993).

101. HEINS, *supra* note 98, at 92; see also Mile High Stations, Inc., 28 F.C.C. 795, 798 (1960).

102. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 166–67 (1987).

103. Mile High Stations, Inc., 28 F.C.C. at 797.

104. See BRUCE A. LINTON, SELF-REGULATION IN BROADCASTING 11–15 (1967).

*B. Changing Times*

Just as the 1960s marked a turning point in the political and legal underpinnings of American society, the period marked a shift in broadcast enforcement as well. The FCC's action against "Uncle Charlie," host of the *Charlie Walker Show*, was a harbinger of things to come.<sup>105</sup> "Uncle Charlie" used suggestive puns during his on-air program, changing names of local places from "Andrews" to "Ann's Drawers" and "Bloomville" to "Bloomersville" and using phrases such as "let it all hang out."<sup>106</sup> In response, the FCC issued its first modern denial of a license renewal on the basis of immoral broadcasting.<sup>107</sup> The FCC ruled that WDKD subjected housewives, teenagers, and young children to offensive remarks.<sup>108</sup> As with the Mile High enforcement several years earlier, the Commission did not rely on section 1464's explicit obscenity and indecency prohibition but applied a more general public-interest standard.<sup>109</sup>

When Richard Nixon's appointees assumed dominant positions at the FCC in the late 1960s and early 1970s, indecency enforcement accelerated. A January 1970 interview with Jerry Garcia provided the FCC an opportunity to apply the obscenity and indecency prohibitions of section 1464 directly. In an interview with Eastern Education Radio in Philadelphia, Garcia used the words "s——" and "f——", mostly as adjectives, introductory phrases, or "substitutes for 'et cetera.'"<sup>110</sup> The Commission fined Eastern Education one hundred dollars.<sup>111</sup>

Between June 1972 and June 1973, there was a flood of complaints, many in response to a new broadcast format sweeping the country called "topless radio."<sup>112</sup> Initially appearing in California, it typically featured an announcer and a female call-in guest discussing sexual matters.<sup>113</sup> The FCC took action against WGLD-FM, owned by Sonderling Broadcasting in Oak Park, Illinois, for a discussion of oral sex that

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105. See HEINS, *supra* note 98, at 92–93.

106. *Id.* at 92

107. *Id.*

108. Palmetto Broad. Co., 33 F.C.C. 250 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964).

109. *Id.* at 258.

110. POWE, *supra* note 102, at 175.

111. *Id.* at 176

112. *Id.* at 182–83.

113. *Id.* at 182.

included a recommendation for performing it “when you’re driving” to take “the monotony out of things.”<sup>114</sup> At the time, the Commission had no explicit regulatory standard for either obscenity or indecency. It only had the statutory mandate in § 1464 prohibiting broadcast of “obscene, indecent, or profane” material.<sup>115</sup>

The Commission declared the program obscene and fined the station \$2,000.<sup>116</sup> To reach this conclusion, it relied on the Supreme Court’s three-prong test for obscenity first expressed in *Roth v. United States*<sup>117</sup> and later refined in *Memoirs v. Massachusetts*.<sup>118</sup> Following the Court’s standard, the Commission found the broadcast obscene because (1) the dominant theme of the material appealed to the prurient interest, (2) the material was patently offensive by contemporary community standards; and (3) the material was without redeeming social value.<sup>119</sup> The D.C. Circuit affirmed the decision in *Illinois Citizens Committee for Broadcasting v. FCC*.<sup>120</sup>

While *Illinois Citizens* was on appeal, New York City’s WBAI aired a monologue that was destined to shape broadcast content regulation to this day. On Tuesday, October 30, 1973, WBAI played a twelve-minute sequence from George Carlin’s album “Occupation: Foole,” about four-letter words and the seven words “you couldn’t say on the public . . . airwaves.”<sup>121</sup> The program was originally produced by Pacifica Radio.<sup>122</sup>

The Commission received a complaint from a man, who, in the words of the Supreme Court:

stated that he had heard the broadcast while driving with his young son [and] wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the “record’s being sold for private use, I certainly cannot understand the broadcast of [the] same over the air that, supposedly, you control.”<sup>123</sup>

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114. *Id.*

115. 18 U.S.C. § 1464 (2000).

116. *Sonderling Broad. Corp.*, 41 F.C.C.2d 919, 920 (1973).

117. *Id.* (quoting *Roth*, 354 U.S. 476, 489 (1957)).

118. *Id.* (quoting *Memoirs*, 383 U.S. 413, 418 (1966)).

119. *Id.*

120. 515 F.2d 397 (D.C. Cir. 1975).

121. POWE, *supra* note 102, at 185–86; *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

122. *Pacifica*, 438 U.S. at 729–30.

123. *Id.* at 730.

In fact, the complainant was John R. Douglas, a member of the national planning board of Morality in Media, a conservative organization founded by a Jesuit priest in 1962.<sup>124</sup> As Lucas Powe argues, Douglas was not the typical Pacifica listener, and his complaint appears to have been a calculated effort to achieve certain legal and political aims.<sup>125</sup> Powe points to Douglas's six-week delay in submitting his complaint and his description of his fifteen-year-old son as his "young son" as evidence that Douglas probably did not even hear the broadcast.<sup>126</sup>

Regardless of the facts, Douglas's efforts had their policy effects: ever since the Douglas complaint, the use of the complaint process by special interest groups to achieve political aims has been a constant in broadcast content regulation. Reacting to the Pacifica complaint, FCC Chairman Richard "Dick" Wiley prophesied threateningly about further regulation unless broadcasters showed "taste discretion and decency."<sup>127</sup> Congress made noises urging further FCC action against indecency. These looming threats of regulation resulted in a 1975 TV agreement among the FCC and broadcasters for a family viewing hour.<sup>128</sup>

Legally, the complaint had an even greater effect. The FCC's decision was reversed by the D.C. Circuit, and the FCC then appealed to the Supreme Court. The Court issued the famous *FCC v. Pacifica Foundation* decision that continues to form the basis of broadcast regulation to the present day.<sup>129</sup> The decision articulated the difference between indecency and obscenity, giving the FCC the power to regulate indecency.<sup>130</sup>

### *C. Post-Pacifica and the Brief Reign of the Seven Dirty Words*

After *Pacifica*, the FCC did not rush to enunciate a standard of indecency based upon the broad definitions set forth in the Supreme Court opinion. Rather, it simply enforced the rule—never explicitly

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124. POWE, *supra* note 102, at 186; *see also* Morality in Media, Inc., <http://www.moralityinmedia.org> (last visited Nov. 3, 2005).

125. POWE, *supra* note 102, at 186.

126. *Id.*

127. *Id.* at 187.

128. *Pacifica Found.*, 56 F.C.C.2d 94, 99 (1975), *rev'd sub nom.* *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd sub nom.* *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

129. *See Pacifica*, 438 U.S. 726; Kevin J. Martin, *Family-Friendly Programming: Providing More Tools for Parents*, 55 FED. COMM. L.J. 553, 558 (2003).

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

stated in *Pacifica* but certainly proceeding from a conservative reading of it—that seven dirty words (and a few others) were prohibited from being spoken on the air before 10:00 p.m.<sup>131</sup> The FCC narrowly construed *Pacifica* to mean that indecency did not extend beyond the seven dirty words (and a few others).

This hands-off regulation continued during the chairmanship of Reagan appointee Mark Fowler.<sup>132</sup> He was a deregulation crusader and was personally loath to involve the Commission in any sort of broadcast-content regulation. At one time he stated, “[I]f you don’t like it, just don’t let your kids watch it.”<sup>133</sup> Although in the years preceding 1986, the FCC annually received approximately 20,000 complaints alleging obscenity or indecency, it failed to act on any of them.<sup>134</sup>

However, Fowler’s hands-off strategy did not sit well with numerous conservative groups, including Morality in Media—the catalyst in the *Pacifica* case. Shortly after Fowler’s renomination in June 1986, Morality in Media initiated a picketing campaign at the FCC. Along with groups like the National Decency Forum, it also wrote hundreds of letters to the Senate Committee on Commerce, Science, and Transportation opposing Mr. Fowler’s renomination.<sup>135</sup> The Reverend Donald Wildmon, Executive Director of the National Federation of Decency, called upon his supporters “to oppose Mr. Fowler’s renomination because he had done ‘nothing, zero, zilch’ about indecency during his tenure.”<sup>136</sup>

These groups applied direct pressure to the FCC as well. In early July 1986, Chairman Fowler met with Brad Curl of the National Decency Forum, who met thereafter with the FCC’s General Counsel, Jack

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131. HEINS, *supra* note 98, at 104; *see also* Infinity Broad. Corp. of Pa., 3 F.C.C.R. 930, 930–31 (1987).

132. Mark Conrad, *Constitutionality of FCC’s New Indecency Rules*, N.Y.L.J., Aug. 17, 1990, at 5 (“[F]rom 1975 to 1987, peace reigned on the airwaves as a policy of ‘benign neglect’ occurred.”); Alex S. Jones, *F.C.C. Studies ‘Indecency’ on Radio*, N.Y. TIMES, Nov. 22, 1986, at A1 (“The commission has not sent such [inquiries about indecency] since 1978 . . . . Under Presidents Carter and Reagan, the commission has strongly advocated a hands-off attitude regarding broadcast programming of all kinds.”).

133. HEINS, *supra* note 98, at 109 (*quoting* ROBERT LIEBERT & JOYCE SPRAFKIN, *THE EARLY WINDOW: EFFECTS OF TELEVISION ON CHILDREN AND YOUTH* 50 (3d ed. 1988)).

134. John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344–45 (1989).

135. *Id.* at 344.

136. *Id.*; *see also* HEINS, *supra* note 98, at 112; Bob Davis, *FCC Chief Shifts Obscenity View as He Seeks Job Reappointment*, WALL ST. J., Dec. 1, 1986, at 44.

Smith.<sup>137</sup> In a letter dated July 9, 1986, Mr. Curl advised the Chairman that, on the basis of their discussion, his organization would discontinue the planned picketing for the following week.<sup>138</sup> The letter stated that the FCC General Counsel had agreed to “cooperate on some decency actions and some further investigations of our point of view.”<sup>139</sup> Curl declared, “I agree that the citizens have not been bringing you enough complaints, and I will take action to publicize the need for more documented citizen complaints.”<sup>140</sup> In the letter, Curl acknowledged Mr. Smith’s willingness “to cooperate on a few ‘send a message’ cases.”<sup>141</sup> On July 21, 1986, Curl, this time joined by Paul McGeady of Morality in Media, had another meeting with Chairman Fowler.<sup>142</sup> A couple of days later, Morality in Media sent the FCC a memorandum outlining a legal campaign to censure “indecent” programming.<sup>143</sup> Application of this pressure soon brought positive results for groups such as Morality in the Media and the National Federation of Decency.

*D. The End of the Reign of the Seven Dirty Words and  
the Broadening of the FCC’s Indecency Approach*

Under pressure from socially conservative groups, the FCC responded with three indecency actions in the course of four months. First, Morality in Media gave the FCC General Counsel tapes of a Howard Stern show aired on WYSP-FM in Philadelphia.<sup>144</sup> In response, the FCC sent an indecency inquiry to Infinity Broadcasting Corporation, licensee of WYSP-FM.<sup>145</sup> The FCC’s inquiry focused on Howard Stern’s morning show and its sexual banter.<sup>146</sup>

Second, Nathan Post complained to the FCC about the song *Makin’ Bacon* played over the University of California station, KCSB-FM Santa

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137. Davis, *supra* note 136, at 44.

138. HEINS, *supra* note 98, at 112 (citing Letter from Brad Curl, National Director, Morality in Media, to Mark Fowler, Chairman, FCC (July 9, 1986)).

139. Crigler & Byrnes, *supra* note 134, at 345.

140. *Id.*

141. *Id.*

142. *Id.* at 345.

143. *Id.* (citing Letter from Paul J. McGeady, General Counsel, Morality in Media, to John B. Smith, General Counsel, FCC (July 23, 1986)).

144. See Davis, *supra* note 136, at 44.

145. See Regents of the Univ. of Cal., 2 F.C.C.R. 2703 (1987); Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705 (1987).

146. Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705.

Barbara.<sup>147</sup> He then wrote to the Parents Music Resource Center,<sup>148</sup> an action that led to direct White House involvement.<sup>149</sup> He said in a newspaper interview, “It shocked me when, kaboom! they took my letter to the White House and sent Patrick Buchanan to the FCC where he read them the riot act.”<sup>150</sup> Responding to Post’s and other listeners’ complaints, the FCC sent an inquiry to KCSB-FM, Santa Barbara on September 22, 1986.<sup>151</sup>

Third, on September 1, 1986, Larry Poland lodged a complaint against Pacifica station KPFK<sup>152</sup> for a post-10:00 p.m. broadcast of excerpts from a sexually graphic play, *Jerker*.<sup>153</sup> A short while later, the FCC’s General Counsel called to tell Mr. Poland that the FCC had decided to “take this one all the way to the Supreme Court” and that Poland was “going to be famous.”<sup>154</sup> That fall, the FCC advised KPFK-FM radio, Los Angeles, that it had received complaints about “obscene or indecent programming broadcast during the evening hours on Station KPFK-FM.”<sup>155</sup> The FCC directed the Chairman of Pacifica to comment on the attached complaints within thirty days.<sup>156</sup>

These actions were not simply cosmetic political maneuverings. Particularly after Chairman Fowler’s departure from office in the spring of 1987, they represented a real shift in indecency policy away from the minimalist “seven dirty words” approach to a more general standard of indecency.<sup>157</sup> On April 29, 1987, the FCC promulgated orders against

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147. Dennis McDougal, *He’s a Crusader Against Indecency*, L.A. TIMES, Aug. 20, 1987, § 6, at 1.

148. The Parents Music Resource Center was made prominent by Tipper Gore’s campaign to label albums on the basis of the explicitness of their lyrics. *Id.*

149. McDougal, *supra* note 147, at 1.

150. *Id.*

151. See Infinity Broad. Corp., 2 F.C.C.R. 2705; Regents of the Univ. of Cal., 2 F.C.C.R. 2703.

152. See Crigler & Byrnes, *supra* note 134, at 348 (citing Letter from Larry W. Poland, President, Mastermedia International, Inc., to Mark Fowler, Chairman, FCC (Sept. 1, 1986)).

153. Dennis McDougal, *How ‘Jerker’ Helped Ignite Obscenity Debate*, L.A. TIMES, Aug. 18, 1987, at 1.

154. Mr. Poland also repeated the story in a television interview broadcast nationwide. See Crigler & Byrnes, *supra* note 134, at 346 (citing *McNeil Lehrer News Hour: Expletive Deleted* (PBS television broadcast Nov. 24, 1987)).

155. Crigler & Byrnes, *supra* note 134, at 346.

156. *Id.*

157. The irony of Fowler’s departure coinciding with a reemergence of aggressive broadcast regulation was not lost by contemporary commentators:

When the Federal Communications Commission declared last week that it was going to crack down on sexually explicit language in broadcasting, it was slapping itself on the

these three licensees,<sup>158</sup> as well as a Public Notice announcing that the indecency policies articulated in the orders were declaratory rulings with binding precedential effect on all licensees.<sup>159</sup> Incoming FCC Chairman Dennis Patrick stated explicitly that these rulings represented a sea change in regulation. He said, “[W]hat we are doing today is to correct an altogether too narrow interpretation of indecency.”<sup>160</sup>

The Public Notice, as well as the three indecency orders, stated that the FCC would abandon the limited definition of indecency as Carlin’s seven dirty words and thereafter apply the generic definition of indecency set forth in *Pacifica*. The FCC defined indecency as “language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”<sup>161</sup> The FCC announced a policy of channeling indecent broadcasting to times when “there is not a reasonable risk that children may be in the audience.”<sup>162</sup>

On June 1, 1987, the National Association of Broadcasters filed a Petition for Clarification, and fourteen broadcasters and media representatives jointly filed a Petition for Reconsideration of the April 29, 1987 Public Notice.<sup>163</sup> These groups did not question the constitutional basis for the Public Notice. Instead, they sought numerous revisions that would:

- (1) provide more precise guidance as to the elements pertinent to whether material is “patently offensive” and violates “contemporary community standards for the broadcast medium”;
- (2) consider the literary, artistic, political and scientific value of programming in judging whether it is patently offensive and, thus, indecent; (3) exempt news and informational programming

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wrist. Or shooting itself in the foot . . . . In an ironic way, the dirty-words decision last week is like the first coat of farewell tar-and-feathers for Fowler, who officially left office on Friday.

*Id.* at 335 n.34 (citing Tom Shales, *Fowler’s Way: Foul is Fair*, WASH. POST, April 20, 1987, at B1).

158. New Indecency Enforcement Standards To Be Applied to All Broad. and Amateur Radio Licensees, 2 F.C.C.R. 2726, 2727 (1987) [hereinafter New Enforcement Standards].

159. *Id.* at 2727.

160. Neil Borowski, *FCC Targets ‘Indecent’ Broadcasts*, PHILA. INQUIRER, Apr. 17, 1987, at A1.

161. New Enforcement Standards, *supra* note 158, at 2726 (citing *Pacifica Found.*, 56 F.C.C.2d 94, 99 (1975), *rev’d sub nom. Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev’d sub nom. FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

161. *Pacifica*, 438 U.S. 726.

162. New Enforcement Standards, *supra* note 158, at 2726.

163. *Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 930, 935 n.1 (1987).

from a finding of indecency; (4) defer to reasonable good faith judgments made by licensees applying the requirements set forth by the Commission; (5) apply rulings prospectively, not sanctioning licensees until they have notice that particular material has been judged to be indecent; and (6) adopt a fixed time of day after which non-obscene, adult oriented programming may be aired, or articulate a similar “bright line” test.<sup>164</sup>

The Commission’s Reconsideration Order did a few of these things. It established a definite time, 12:00 a.m., after which the indecency regulations would not apply.<sup>165</sup> It also identified numerous factors that would enter into an indecency judgment, such as the vulgar or shocking nature of the words or depictions, the manner in which the language or depictions were presented, the isolated or fleeting nature of the offensive material, the medium’s ability to separate adults from children, the likely presence of children in the audience, and the material’s artistic or literary merit.<sup>166</sup> It also stated that “contemporary community standards” looked to the national community, not the local broadcaster.<sup>167</sup>

In *Action for Children’s Television v. FCC* (“ACT I”), a group of petitioners, including Infinity Broadcasting and the American Civil Liberties Union (ACLU), challenged the Reconsideration Order as overly broad and unconstitutionally vague.<sup>168</sup> The D.C. Court of Appeals rejected this challenge but found that the safe harbor times, which prohibited broadcast of indecent materials between the hours of 6:00 a.m. and 12:00 a.m., were not sufficiently supported; thus, the court remanded them for further reconsideration.<sup>169</sup>

Congress did not like this result. In 1988, Senator Jesse Helms introduced an appropriations rider requiring the FCC to set forth regulations enforcing its indecency rules on a twenty-four-hour basis.<sup>170</sup> The D.C. Court of Appeals, in *Action for Children’s Television v. FCC*

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164. Infinity Broad. Corp. of Pa., 3 F.C.C.R. 930, 931 (1987), *aff’d in part, vacated in part sub nom.* *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

165. *Id.* at 934 (“[W]hereas previously we indicated that 10:00 p.m. was a reasonable delineation point, we now indicate that 12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized . . .”).

166. *Id.* at 932.

167. *Id.* at 933.

168. 852 F.2d 1332 (D.C. Cir. 1988), *superseded in part*, 58 F.3d 654 (D.C. Cir. 1995).

169. *Id.* at 1342, 1344.

170. Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

(“ACT II”), ruled that the amendment completely prohibiting indecent speech was not sufficiently tailored to satisfy First Amendment standards.<sup>171</sup> It rejected the FCC rule written to enforce the rider and remanded the safe harbor issue to the FCC.<sup>172</sup>

Congress again stepped in and passed the Public Telecommunications Act of 1992.<sup>173</sup> The Act required the FCC to reestablish a safe harbor for indecent speech from 12:00 a.m. to 6:00 a.m., with an exception for public broadcasters who could broadcast indecent materials after 10:00 p.m.<sup>174</sup> In 1995, the D.C. Circuit in *Action for Children’s Television v. FCC* (“ACT III”), found that, standing alone, the 12:00 a.m. to 6:00 a.m. prohibition was narrowly tailored to meet a compelling public interest.<sup>175</sup> However, since the preferential treatment for public television stations was not justified by a compelling state interest, the court set aside the more restrictive 12:00 a.m. to 6:00 a.m. prohibition.<sup>176</sup> This safe harbor provision is still in place in the FCC’s regulations.<sup>177</sup>

#### *E. The FCC in the 1990s and the Powell Chairmanship*

After *ACT III* finally clarified the extent of the FCC jurisdiction over broadcast indecency, the FCC assumed a middle course in regulation. Perhaps reflecting the more conservative, “Sister Souljah”<sup>178</sup> tendency of the Clinton administration, the FCC leadership pursued indecency complaints with notable, but limited, vigor, directing the lion’s share of the total amount of fines to Howard Stern.<sup>179</sup> During the 1990s, the FCC

171. 932 F.2d 1504 (D.C. Cir. 1991), *superseded in part*, 58 F.3d 654 (D.C. Cir. 1995).

172. *Id.*

173. Pub. L. No. 102-356, § 16, 106 Stat. 949 (1992).

174. *Id.*

175. 58 F.3d 654, 667 (D.C. Cir. 1995) (en banc).

176. *Id.* at 669.

177. *See* 47 C.F.R. § 73.3999 (2004).

178. *See* Ronald A. Taylor, *Clinton Raps Sister Souljah’s Remarks*, WASH. TIMES, June 14, 1992, at A4. Clinton lambasted rapper Sister Souljah for encouraging violence against whites. His remarks increased his appeal to moderate voters, but alienated some political allies. The term has since entered the political lexicon.

179. Kristen A. Finch, Comment, *Lights, Camera, and Actino for Children’s Television v. FCC: The Story of Broadcast Indecency, Starring Howard Stern*, 63 U. CIN. L. REV. 1275, 1326 (1995) (“In response to public demand for tougher standards of indecency, the Clinton administration has taken a regulatory point of view.”); *The FCC Crackdown: Stern Show, Bono Cited for Indecency*, NEWSDAY, Mar. 19, 2004, at A06 (“The Center for Responsive Politics, a watchdog group, said fines against Stern accounted for almost half of the \$4 million in penalties proposed by the FCC since 1990.”)

issued relatively few indecency fines. From 1987 until 1997, the FCC issued thirty-six fines<sup>180</sup> and from 1997 until the inauguration of George W. Bush in 2001, the FCC issued sixteen fines.<sup>181</sup> Since 1990, only three fines have been levied against television broadcasters, representing about four percent of the total number of indecency fines.<sup>182</sup> During the Clinton administration, FCC Chairmen Reed Hundt and William Kennard oversaw some indecency fines, most notably those against Howard Stern, who settled numerous indecency actions with the FCC for \$1.7 million in 1995.<sup>183</sup> The total amounts of indecency fines remained relatively constant, however, with total yearly NALs<sup>184</sup> ranging between \$25,500 and \$49,000 during the second Clinton administration.<sup>185</sup>

With the election of George W. Bush and his subsequent appointment of Michael Powell as FCC Commissioner, fines levied for broadcast indecency rose in dramatic fashion. From the beginning of his term, Powell increased the fine amount in his first year from \$48,000 to \$91,000.<sup>186</sup> In 2004, the last full year of his service, the FCC fined broadcasters an astounding \$7,928,080—more than in the ten prior years combined.<sup>187</sup>

This might seem surprising based on Powell's public statements prior to becoming chairman. Michael Powell had served as one of the five FCC Commissioners for four years before President George W. Bush appointed him chairman.<sup>188</sup> As Commissioner, he expressed a disinclination to vigorously enforce the indecency prohibitions. In 2001, he publicly stated that “[i]t is better to tolerate the abuses on the margins than to invite the government to interfere with the cherished First

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180. Milagros Rivera-Sánchez & Michelle Ballard, *A Decade of Indecency Enforcement: A Study of How the Federal Communications Commission Assesses Indecency Fines (1987–1997)*, 75 JOURNALISM & MASS COMM. Q. 143, 146 (1998). According to the FCC data, there were fewer than sixteen NALs between 1998 and 2000. Between 2001 and 2003, there were seventeen NALs. In 2004, however, there were twelve. Federal Communications Commission, *Indecency Complaints and NALs: 1993–2005*, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Dec. 31, 2005) [hereinafter *Indecency Complaints*].

181. See *Indecency Complaints*, *supra* note 180.

182. Dunbar, *supra* note 2.

183. *Id.*

184. See *supra* note 28 and accompanying text.

185. See Federal Communications Commission, *Notices of Apparent Liability*, <http://www.fcc.gov/eb/broadcast/NAL.html> (last visited Dec. 20, 2005).

186. *Indecency Complaints*, *supra* note 180.

187. *Id.*; Dunbar, *supra* note 2.

188. See Federal Communications Commission, *Previous FCC Commissioners*, [www.fcc.gov/commissioners/previouscommish.html](http://www.fcc.gov/commissioners/previouscommish.html) (last visited Dec. 20, 2005).

Amendment.”<sup>189</sup> In 1999, he accepted the Media Institute’s Freedom of Speech Award with a stirring defense of the First Amendment: “We should think twice before allowing the government the discretion to filter information to us as they see fit.”<sup>190</sup> As an FCC Commissioner, he said, “[G]overnment has been engaged for too long in willful denial in order to subvert the Constitution so that it can impose its speech preferences on the public—exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent.”<sup>191</sup> Even after he became Chairman, he said, “I don’t know that I want the government as my nanny.”<sup>192</sup>

But later, Chairman Powell changed his tune.<sup>193</sup> He overcame his hesitance and compunction about exercising power and eventually presided over the largest indecency crackdown in FCC history, stating, “I do not have the luxury of ignoring my duty to enforce the statute because owners might react with excessive conservatism.”<sup>194</sup>

The infamous 2004 Super Bowl halftime wardrobe malfunction—when Justin Timberlake ripped open Janet Jackson’s bustier to reveal her right breast—brought indecency to the center of the national political discussion. The FCC reacted with promises of a thorough investigation—which resulted in a hefty fine—and more promises of vigilance.<sup>195</sup> Reacting to the public outcry, Congress considered, and is still considering, numerous bills to significantly stiffen indecency penalties.<sup>196</sup> Indeed, there is some talk, particularly from Senator Ted Stevens (R-AK) and FCC Commissioner Kevin Martin, to apply indecency rules to cable and satellite television as well.<sup>197</sup>

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189. *Powell’s Legacy*, KANSAS CITY STAR, Feb. 12, 2004, at H1.

190. Jarvis, *supra* note 5, at 11.

191. *Id.*

192. *Id.*

193. See Paul Sweeting, *Keeping it Clean*, VIDEO BUS., Feb. 11, 2005, <http://www.videobusiness.com/article/CA612072.html> (“Although Powell got with the program, he was always something of a reluctant cultural warrior, having previously expressed uneasiness over the FCC’s role as censor.”).

194. Jarvis, *supra* note 5, at 11.

195. Ahrens & Moraes, *supra* note 179.

196. Communications Daily, *Brownback Shipping Indecency Legislation to Senators*, (Jan. 26, 2005) 2005 WL 2777507.

197. David Kaplan, *Comcast’s Jack of All Trades*, Broadcasting and Cable (Apr. 4, 2005) 2005 WLNR 5356069.

Powell, however, had been pursuing an aggressive stance towards indecency even before the wardrobe malfunction.<sup>198</sup> One commenter stated that the incident merely “provided a well-timed boost to the FCC’s ongoing attempts to enforce indecency regulations more stringently.”<sup>199</sup> A week before the 2004 Super Bowl, the FCC issued a NAL against Clear Channel Communications for \$755,000 because of statements made by Bubba the Love Sponge, a colorful radio personality.<sup>200</sup> Additionally, on October 2, 2003, the FCC proposed a \$357,000 fine against Infinity Broadcasting Operations, Inc. for an Opie and Anthony radio show broadcast that included a contest encouraging couples to engage in sex in public places, like the St. Patrick’s Cathedral.<sup>201</sup> The Janet Jackson incident, however, led to a tremendous intensification of enforcement.

Once again, the role of social conservative groups proved central. The number of complaints skyrocketed from 13,992 in 2002, to 166,683 in 2003, to an astounding 1,405,419 through October 2004, largely due to the Janet Jackson incident.<sup>202</sup> Some analysts claim that over ninety-nine percent of 2004 complaints—barring those involving Jackson—were sent by the Parents Television Council, a conservative political group with connections to the Republican Party.<sup>203</sup>

Beyond the sheer number and size of Powell’s indecency enforcements, his administration saw an unprecedented expansion of the FCC’s authority under § 1464. For instance, during the Golden Globe award ceremony, which was televised live on January 19, 2003, the singer Bono used the phrase “f—ing brilliant” when accepting an award for his song *The Hands That Built America*.<sup>204</sup> Based on FCC regulations that define indecency as depicting sexual or excretory organs

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198. See Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW., Spring 2004, at 1, 25.

199. *Id.*

200. Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 1768 (2004).

201. Infinity Broad. Operations, Inc., 18 F.C.C.R. 19,954 (2003).

202. Federal Communications Commission, Notices of Apparent Liability, <http://www.fcc.gov/eb/broadcast/NAL.html> (last visited Dec. 20, 2005); see Indecency Complaints, *supra* note 180.

203. Shields, *supra* note 8, at 4; see also <http://www.fcc.gov/eb/broadcast/NAL.html> Indecency Complaints, *supra* note 180. This figure is disputed; some claim the figure is only twenty percent. See *FCC Complaints Filed by PTC Members*, CNSNews.com Information Services, Jan. 10 2005, <http://www.cnsnews.com/Culture/archive/200501/CUL20050110g.html>.

204. See Susan Crabtree, *Congloms to pol pack: Not a f*, DAILY VARIETY, Apr. 20, 2004, available at 2004 WLNR 12542619.

and dwelling on sexual matters,<sup>205</sup> the FCC's Enforcement Bureau initially rejected the resulting indecency complaints on the ground that one fleeting word could not be indecent.<sup>206</sup> Further, it is hardly clear from the context that Bono used the work "f—ing" to refer to anything sexual. Rather, as he used the word, it was probably synonymous with "very" or "extremely." The FCC Commissioners, however, rejected the Enforcement Bureau's ruling.<sup>207</sup> The Commission ruled that, contrary to its own precedent, one fleeting use of the word is indecent. It argued that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation."<sup>208</sup> Thus, the Commission simply disregarded the factor requiring that indecent programming dwell on sexual or excretory functions.

Even more remarkable, the Commission determined that the broadcast was profane, which specifically means blasphemous speech in legal contexts, at least in prior legal pronouncements.<sup>209</sup> The FCC had rarely, if ever, found licensees liable for profane language. To find another successful sanction based on profane speech, one has to go to the FCC's predecessor, the Federal Radio Commission, and its 1931 action in *Duncan v. United States*.<sup>210</sup>

The FCC attempted to distinguish this strong precedent in two ways. First, it muddied the difference between profane and profanity, glibly stating that "the use of the phrase at issue here in the context and at the time of day here constitutes 'profane' language under 18 U.S.C. §

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205. See *supra* note 24 and accompanying text.

206. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859 (2003).

207. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (2004).

208. *Id.* at 4978; see also 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, 64–75 (2004).

209. See BLACK'S LAW DICTIONARY 1226 (7th ed. 1999) (defining profane as "(Of speech or conduct) irreverent to something held sacred"). The only FCC precedent on the matter reflects this understanding. See *Raycom Am., Inc.*, 18 F.C.C.R. 4186 (2003) (calling God a "sonofabitch" is not profane under § 1464) (citing *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966) (holding that "God damn it" is not profane under § 1464); *Warren B. Appleton*, 28 F.C.C.2d 36 (1971) (deciding that "damn" is not profane under § 1464)).

210. 48 F.2d 128, 134 (9th Cir. 1931) (upholding conviction under § 1464 for using profane language where "the defendant . . . referred to an individual as 'damned,' . . . used the expression 'By God' irreverently, and . . . announced his intention to call down the curse of God upon certain individuals").

1464.”<sup>211</sup> The word “profanity” is commonly defined as “vulgar, irreverent, or coarse language”,<sup>212</sup> however, the word does not appear in the statute. As weak support for its position, the FCC relied on a thirty-year-old opinion, discussing the constitutionality of § 1464’s use of the terms “indecent and profane.”<sup>213</sup> Second, the FCC relied on an old precedent defining profanity as a nuisance. In dicta in *Tallman v. United States*, the court stated *without citation* that profane is “construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”<sup>214</sup> Relying on this precedent, the Commission concluded that Bono’s phrase was profane “under the Seventh Circuit nuisance rationale. Use of the ‘F-Word’ in the context at issue here is also clearly the kind of vulgar and coarse language that is commonly understood to fall within the definition of ‘profanity.’”<sup>215</sup> This analysis by the agency constitutes aggressive statutory interpretation to say the least.

Furthermore, this aggressive interpretation may not be lawful. The NAL indecency procedure is probably classified as an informal adjudication and, therefore, the strong rules of precedent applying to formal adjudication do not apply. An agency is free to ignore its own precedent, provided it explains its change of policy.<sup>216</sup> As Richard Pierce states, “The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them.”<sup>217</sup>

To the extent that informal adjudication does include justifications for actions, the agency must provide justifications for departures.<sup>218</sup>

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211. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. at 4981.

212. *Id.* (citing BLACK’S LAW DICTIONARY 1210 (6th ed. 1990)).

213. *Id.*

214. 465 F.2d 282, 286 (7th Cir. 1972). This definition only had persuasive weight because, as the court noted, the indictment at issue was for obscenity. *Id.*

215. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. at 4981.

216. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–08 (1973) (asserting adjudicatory decisions “may serve as precedents” and that the agency’s “duty to explain its departure from prior norms” flows from that presumption).

217. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.5 at 817 (2002); *see also Atchison*, 412 U.S. at 807–08; *Kelley ex rel. Mich. Dep’t of Natural Res. v. FERC*, 96 F.3d 1482, 1489 (D.C. Cir. 1996) (“It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.”).

218. 2 PIERCE, *supra* note 217, at 820.

Arguably, the FCC's decision constitutes a change in the FCC's understanding of the words "indecent" and "profane" as established in its informal adjudication and its informal rulemaking.<sup>219</sup> Such a change most likely requires further notice and comment.<sup>220</sup>

#### V. A DIFFERENT LOOK AT MEDIA MARKETS

As argued in Part III, the FCC's regulatory focus stems from almost a century-old set of assumptions concerning the licensee and the viewer. What if these assumptions completely miss the mark? What if they misrepresent or distort the true economic nature of the broadcast market? This Part sets forth an economic argument that the current set of regulatory assumptions *does* miss the mark, failing to account for a key relationship in broadcast markets between the viewer and the advertiser. This Part suggests a regulatory regime based upon a more complete understanding of media markets.

##### *A. Broadcasting: A Two-Sided Market*

Many markets, such as advertiser-supported media (like radio and broadcast television) or credit-card markets, display what economists term "two-sidedness." Firms in two-sided markets face two different sets of consumers, and each set of consumers affects the desirability of the product for the other set of consumers. For example, consider retailers. They function within a two-sided market. On one side, they sell goods to consumers. On the other, they furnish business to credit card companies by providing a place where consumers use credit cards.<sup>221</sup>

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219. See *supra* note 216 and accompanying text.

220. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements [of informal rulemaking under section 555 of the APA].").

221. The number of stores willing to accept a certain bank's credit card affects the desirability of that bank's credit card for shoppers. For example, many shoppers prefer VISA to the Discover card because of its higher acceptance rate in retail stores. The more stores that accept a bank's credit card, the more shoppers want to use that bank's credit card. On the other side of the market, the credit card company will seek the greatest number of retailers to honor its card, and the larger the retailer, the better. A retailer that wishes to maximize its profits will aim to pay a credit-card fee (the remission a retailer pays to the credit card company) that maximizes profits by balancing both sides of its market. In other words, firms that face two-sided markets set two different prices, one for each set of consumers. A decrease in the price to one set of consumers might increase the price to the other set.

Radio and broadcast firms must optimize over two markets as well. The number of viewers that watch a television program affects advertisers' demand for commercial time on that program. Clearly, during its heyday, "Friends" commanded a higher per-minute price for advertising than the mercifully short-lived "Joey" spin-off. If the broadcaster sells too much commercial time, however, fewer viewers will watch even if the show is "Friends." In other words, a broadcaster of a popular program must strike a balance between advertisers, who are anxious to purchase valuable commercial time, and viewers, who may be driven away if there are too many commercials.

To strike this balance and optimize both sides of the market, the broadcaster generally charges advertisers an explicit price for commercial time—i.e., a price for a minute of commercial on a given show. A television broadcaster also charges viewers an implicit price for watching—that is, the amount of commercial time that viewers endure. This amount can be priced relative to each viewer's opportunity costs. In other words, the value of the opportunities the viewer foregoes in order to watch a given commercial is the price he or she pays for a television show.<sup>222</sup>

Simply put, the economics of broadcast television require that advertisers pay for programming and bundle commercials with the programming. Viewers pay advertisers for the programming through their willingness to watch the commercials. In this sense, the broadcaster is simply a conduit for the exchange between advertisers and viewers.<sup>223</sup>

Understanding this relationship between broadcasters, viewers, and advertisers illustrates that indecency regulation must not focus solely on the relationship between viewers and programmers, but should also include the relationship between viewers and advertisers. After all, broadcasters act as the conduit of exchange between advertisers and viewers. Involving advertisers in indecency regulation may be just as important as, if not more important than, involving broadcasters. In addition, advertisers want viewers who are receptive to their advertisements. To the extent that advertisers learn which content makes

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222. See Stephen Coate & Simon Anderson, *Market Provision of Public Goods: The Case of Broadcasting* (Nat'l Bureau of Econ. Research, Working Paper No. 7513, 2000), available at <http://papers.nber.org/papers/w7513.pdf>.

223. See generally Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q.J. ECON. 941 (1993) (demonstrating that this understanding of advertising fits nicely within neoclassical economics).

viewers less receptive to their advertisements, advertisers obtain value from being involved with indecency regulation.

*B. Applying a Two-Sided Market Paradigm to Indecency Regulation*

As established in Part IV, FCC broadcast regulations have concentrated on one side of the market: the viewer-broadcaster relationship. What would the regulations look like if they concentrated on the other side of the market as well?

Compare broadcast to other two-sided markets like retail and credit cards. Clearly, there is a functioning competitive market for both retail and credit cards, and consumers benefit from competition in both markets. Consumers, to some degree, will make decisions about what retail firms to patronize based on which credit cards they accept or whether they accept credit cards at all. For instance, one might not go to a restaurant that accepts only cash, or might go to a restaurant *because* it honors a certain credit card—say one for which the consumer has a particularly good frequent flyer program.

Does the same thing occur in the broadcast markets? Do individuals, in fact, make viewing decisions based on which firms advertise on such programming? Do viewers get anything from advertisers for the value of their “eyeballs” as consumers do for using particular credit cards?

In other words, if this advertiser information were supplied inexpensively, would consumers change their viewing (and purchasing) behavior to “punish” advertisers who support indecent programming in a way analogous to consumers refusing to patronize certain restaurants that fail to accept certain credit cards? True, the mere existence of indecent programming suggests that some segment of the population likes it. Howard Stern does have a loyal listening audience. However, if there are enough people who are so offended by Stern that they will boycott his advertisers, then the viewer-advertiser side of the market is at work.

There are some notable examples of viewer backlash against advertisers even without a regulatory provision of information. For instance, Terri Rakolta led a public campaign against the Fox network television sitcom *Married . . . with Children*.<sup>224</sup> She viewed an episode entitled “Her Cups Runneth Over” with her family and found it particularly objectionable. In response, she pressured the producers of the show and the Fox network into dropping a few particularly offensive

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224. *A Mother Is Heard as Sponsors Abandon a TV Hit*, N.Y. TIMES, Mar. 2, 1989, at A1.

shows. She also targeted the advertisers of the show and was successful in getting one advertiser to withdraw its support.<sup>225</sup>

On her own, Rakolta conducted the research necessary to discover the firms that advertised on *Married . . . with Children*. If the FCC provided viewers with advertiser information in an easily accessible format—either on the Internet or during the show itself on a digital television guide—viewers with preferences weaker than Rokalta’s could communicate their concerns. Advertisers and broadcast programmers could use this information in selecting desirable programming.

### *C. The Legality of a Disclosure Regime*

The FCC has the authority to mandate that broadcasters provide information about advertisers who buy commercial time from them. The broad authority of § 303(j) of the Communications Act of 1934 empowers the Commission to promulgate general rules for broadcasters and require recordkeeping.<sup>226</sup>

Since virtually the beginning of broadcast regulation, the Commission has required broadcasters to keep information about its advertisers pursuant to its program log requirements.<sup>227</sup> Broadcasters maintained detailed records, available for inspection by the public and the FCC, indicating commercials’ “sponsors . . . along with the time devoted to the commercial matter in question.”<sup>228</sup>

While the program log requirements were largely lifted in the early 1980s,<sup>229</sup> the FCC still has authority, pursuant to the above-mentioned statutory sections and the broad public trustee obligation, to require broadcasters to submit advertiser information. The FCC could provide

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225. *Id.*

226. 47 U.S.C. § 303(j) (2000) (stating that the Commission shall “[h]ave authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable”).

227. *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 94 F.C.C.2d 678, 687–88 (1983) (citing General Order No. 106, 5 FRC Ann. Report 96 (1931)).

228. *Petition for Rulemaking To Require Broad. Licensee To Maintain Certain Program Records*, 44 F.C.C.2d 845, 847, ¶ 8 (1974). The programming log rules are found at 47 C.F.R. §§ 73.670, 73.674 (2004) (broadcast); *id.* §§ 73.112, 73.116 (radio AM specific rules); *id.* §§ 73.282, 73.286 (radio FM specific rules).

229. *See The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076 (1984); *Deregulation of Radio*, 84 F.C.C.2d 968 (1981) (eliminating program log requirements for radio).

this information to consumers in a variety of low-cost ways. For example, the FCC could collect this information and provide it in a useful form on the Internet, suitable for easy computer search.<sup>230</sup>

As discussed in the following Section, in order for mandated information disclosure to be efficient, the costs of providing the information must be sufficiently low. Requiring the FCC to provide advertiser information on the Internet would satisfy this requirement. Both the FCC's costs in providing this information and consumers' costs in accessing it would be low. Consumers could visit the FCC website and, with a relatively simple search, discover which advertisers buy time on which programs across the country. Such information would empower consumers to support those programs and advertisers they find acceptable and punish those advertisers who support programs they find objectionable.

Posting the information during airtime would likely be too expensive, but with the widespread adoption of digital television in the next decade, many viewers will have access to digital, real-time television guides, known as electronic program guides. These guides allow viewers, with a few remote-control clicks, to access information about the programs they are watching. The FCC could certainly require inclusion of advertiser information on these guides.

#### *D. Specifics of Disclosure Regime*

The general proposal to include advertisers in the FCC's indecency enforcement can be implemented in a variety of specific ways. This Article does not advocate one specific implementation method over another. Instead, it considers two different ways the FCC could acknowledge the two-sided nature of media markets and leaves the implementation method to policy makers: replacement or supplementary.

First, the information regime could completely replace the current enforcement regime. The FCC would get out of the business of issuing notices of apparent liability and leave the job completely to the market. The FCC would simply have an informational-regulatory role, mandating disclosure and providing the data about each program's advertisers.

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230. The FCC has proven its ability to provide the public with large amounts of information in useful formats. The Taubman Center for Public Policy at Brown University and a team of researchers examined 1265 state and federal websites and found the FCC's to be the best. Press Release, Fed. Comm'n's Comm'n, FCC Website Ranked First in Federal Government (Sept. 18, 2002).

Given that broadcasters make their money from selling airtime, broadcasters' records of commercial sales would be relatively easy to produce. The FCC could provide this information on the Internet or possibly mandate its inclusion on electronic program guides so that it could be available at the push of a remote control button. The high costs of tracking advertisers on the thousands of television channels and radio stations continuously broadcasting in the United States would be prohibitive to most individuals. Mandated disclosure would clearly lower information costs.

Second, rather than replacing the FCC's enforcement regime, the informational regime could simply supplement the current regime, allowing both economic and political approaches to indecency regulation. The FCC would then continue its enforcement regime while simultaneously providing and disseminating information.

How a policy maker would implement the proposal would turn upon his or her willingness to embrace market forces and the value he or she placed on regulatory enforcements. Indeed, market forces would not necessarily be a panacea. Even though the mandatory disclosure regime would no doubt reduce transaction and information costs, the regime would still face considerable collective action problems and challenges. Further, just as the political process can be captured by particular special interests, advertisers could be similarly captured or, at least, intimidated.<sup>231</sup>

On the other hand, advertisers are perhaps more resistant to cooption by a small group than politicians. Advertisers seek to reach the greatest number of people who might be interested in their product. If this involves advertising on programs potentially offensive to some individuals, the firm may not advertise, particularly if those individuals are well organized. However, the firm may still advertise if its target audience is greater than those consumers it offends. In the end, the market limits the effectiveness of any one interest group because the costs of ignoring the median preferences are too great. Politicians, on the other hand, can respond to small interest groups almost exclusively because, if the median preference is sufficiently indifferent to small interest groups' concerns, there is no cost. Neither a regulatory enforcement nor mandated information disclosure regime is perfect. This

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231. See Mike Moffatt, *The Logic of Collective Action*, ABOUT.COM, [http://economics.about.com/cs/macroeconomics/a/logic\\_of\\_action.htm](http://economics.about.com/cs/macroeconomics/a/logic_of_action.htm) (quoting MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 3 (1971)).

Article does not maintain that an information regime will perfectly mirror community standards. At the very least, however, it will improve the process by making it more responsive to consumers and less responsive to special interest groups.

#### *E. Efficiency and Mandated Disclosure*

There are three generally accepted legal rationales behind FCC broadcast regulation.<sup>232</sup> First, courts rationalized government regulation because of the scarcity of broadcast spectra. For instance, the Supreme Court has stated that “[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”<sup>233</sup> Second, academics and the FCC have claimed that broadcast inherently tends towards monopoly or oligopoly.<sup>234</sup> Third, academics and the FCC have argued that broadcast regulation promotes First Amendment values through widespread access to media outlets.<sup>235</sup>

Another benefit of broadcast regulation that the courts, the FCC, and legal scholars have overlooked is the possibility that regulation could be efficiency *enhancing* by reducing transaction costs. The proposed regulation would reduce the costs to individuals of discovering and contacting the firms that advertise on objectionable programs. This general principle is fairly straightforward. Economic efficiency improves with increased information; in other words, people will receive more utility if they have greater knowledge about their purchases and actions.

In this situation, disclosure requirements have the potential to increase efficiency by increasing the amount of information consumers have when making viewing decisions. To the degree that individuals would *not* watch a show if it were supported by advertisers that supported objectionable programming, individuals’ choices will be better with more information. The more individuals know about what programs advertisers support, the closer their viewing (and buying) behavior will match their preferences—the standard definition of efficiency. Thus, in the same way that government-mandated labeling improves efficient

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232. MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST 28, 43–45 (1986).

233. *NBC v. United States*, 319 U.S. 190, 226 (1943).

234. *See* SPITZER, *supra* note 232, at 28.

235. *See id.* at 43–45 (citing Lee Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976)).

purchases in salad dressing,<sup>236</sup> or that disclosure under the securities laws encourages efficient investment,<sup>237</sup> labeling and disclosure of advertisers will encourage efficient media markets. Information disclosure avoids the difficulty faced by the current regime of trying to discern a “community standard” based only on preferences of who filed complaints. The market also has the advantage of more constant monitoring, as individuals have the incentive to evaluate quality on a continuing basis.

Theoretical and empirical studies have demonstrated that disclosure improves efficiency.<sup>238</sup> For instance, government-mandated labeling has been shown to decrease fat levels in salad dressing.<sup>239</sup> Arguably, once consumers *knew* more about what they were buying, they used their collective bargaining power to get more of what they wanted—salad dressing that still tastes good, but has less fat.<sup>240</sup>

On the other hand, one may wonder why, if the efficiency gains of disclosure are so manifest, the market does not already provide this information. Economists have pointed out that consumers have strong economic incentives to gather information and, conversely, “sellers have a substantial economic incentive to disseminate information to consumers.”<sup>241</sup> Given the generally accepted definition of efficiency in the information market as requiring equality between the expected marginal social benefits and the marginal cost of information gathering or information provision—where the marginal social benefit of the information includes the increment to consumer surplus plus the gain in sellers’ net revenues—then mandated disclosure runs the risk of being inefficient on two grounds: (1) government mandates may provide *more* than the optimal amount of information or (2) the cost of government-

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236. See Alan D. Mathios, *The Impact of Mandatory Disclosure on Product Choices: An Analysis of the Salad Dressing Market*, 43 J.L. & ECON. 651, 672 (2000) (demonstrating how mandatory labeling affects consumer choice and leads to the purchase of more low-fat salad dressing).

237. Steven L. Schwarcz, *Temporal Perspectives: Resolving the Conflict Between Temporal and Future Investors*, 89 MINN. L. REV. 1044, 1044 (2005) (“The fundamental goal of securities law is to make markets more efficient by providing transparency to investors, thereby reducing asymmetric information.”).

238. See THOMAS E. COPLAND & J. FRED WESTON, *FINANCIAL THEORY AND CORPORATE POLICY* 196–215 (1st ed. 1976).

239. Mathios, *supra* note 236, at 665.

240. See *id.*

241. Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 25 J.L. & ECON. 491, 502 (1981).

mandated information may exceed the efficiency gains the information induces.<sup>242</sup>

Beales, Craswell, and Salop identify features in markets that might result in a sub-optimal amount of information.<sup>243</sup> First, they point to the “public good” property of information: while information helps everyone, its benefits are difficult to capture, at least entirely, by the firm that expended the cost to produce it.<sup>244</sup> This suggests that information will be under-produced generally in an otherwise competitive information market.<sup>245</sup>

The public-good property of advertising is an example of this problem. Precisely *how* would a broadcaster provide information about all advertisers? To be effective, the broadcaster would have to use broadcast airtime otherwise devoted to advertising—a clear monetary loss. Whatever gains it would have, however, would go to *all* broadcasters. Thus, any one broadcaster would have a decreased incentive to provide such information in a competitive environment. Further, even if a broadcaster did provide information, it would also experience free-rider problems, as other broadcasters would no longer have an incentive to provide information, thus leaving one broadcaster with all the cost and only some of the benefit.

Media markets tend to encourage producer output that caters to average tastes. Consider the following. Assume there are three available programs—a baseball game, an opera, and a play—and three types of viewers. Further assume that 1,000 viewers like the baseball game, 200 viewers like the opera, and 100 viewers like the play. Finally, assume there are three channels. Peter Steiner famously indicated that producers cater to the average taste.<sup>246</sup> For example, three competitors would all duplicate the baseball game, because the baseball game could attract 333 viewers for each of the three channels, which is more than the 200 viewers that would watch an opera or the 100 viewers that would watch a play.<sup>247</sup>

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242. *Id.*

243. *Id.* at 503–13.

244. *Id.* at 503.

245. Steve Salop, *Information and Monopolistic Competition*, 66 AM. ECON. REV. 240 (1976).

246. Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952).

247. *Id.* at 217. Steiner’s discussion of listener maximization formed the basis for the baseball analogy in the text.

Mandating disclosure of additional information about advertising would create smaller audiences for any given program. For example, it is possible that 1,000 viewers would watch the baseball game, ignorant of its advertisers. Suppose, however, that 990 viewers would watch the baseball game if they knew that an advertising sponsor of the baseball game, say Gillette, also advertised on the Howard Stern Show. A monopolistic firm would have to put on two baseball games—one sponsored by Gillette and the other sponsored by advertisers acceptable to the offended ten viewers—in order to capture these viewers. Thus, the added information simply adds cost to the firm without necessarily increasing viewership.

Indeed, this same mechanism might also prevent the industry as a whole, through trade associations like the National Association of Broadcasters, from providing such information. Advertising information would have the tendency to decrease viewership for any particular program. In order to retain viewership, broadcasters would need to show two baseball games with acceptable advertisers to two groups of viewers—rather than one baseball game which *would have been acceptable to all without the advertiser information*. Thus, industry-wide advertising would likely simply raise costs without increasing viewership. Clearly, there would be no incentive for industry groups to engage in such a campaign. Given the market incentive to produce too little information about advertisers, government mandated disclosure—particularly the low cost one advocated for here—would be appropriate.

#### *F. Better Reflection of Community Standards and Preferences*

Further, a market-based approach would better reflect a regional community's standards in comparison to the FCC's single national standard. The Commission uses a community standard that is not region-specific but reflects "an average broadcast viewer or listener" in the United States.<sup>248</sup> It is not clear why the FCC adopts a national standard when the Supreme Court accepts a regional approach for obscenity;<sup>249</sup> certainly, the FCC would be constitutionally permitted to adopt a regional approach. Further, the current FCC's attempts to define a national community standard are confounded by this country's large geographical and cultural diversity.

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248. 2001 Policy Statement, 16 F.C.C.R. 8002 (2001).

249. *Ashcroft v. ACLU*, 535 U.S. 564, 573–75 (2002) (discussing the "community standard," which seems to imply a regional approach).

Of course, a regional approach to indecency regulation would be a tremendous administrative burden. While it is fairly uncontroversial that community standards are quite different in the Castro district of San Francisco than in suburban Salt Lake City, defining these differences in a useful way for workable administrative standards would require a massive sociological inquiry and legal effort. Given the vagueness of the indecency standard itself, such an inquiry might be impossible. It is certainly beyond the resources of the FCC.

On the other hand, a market-based approach to indecency regulation could easily enforce more localized standards. Given that radio and television spectrums are locally licensed, advertisements on many broadcasts are locally bought and sold.<sup>250</sup> Advertisers, therefore, could withhold support for programs that would be indecent or otherwise objectionable in suburban Salt Lake City, but hardly risqué in San Francisco. Further, nationally purchased advertising could be tailored to different localities.

Unlike the current, centralized FCC approach that dictates “community standards” from inside the Beltway, which often reflects political compromise or signaling between politicians and special interests, a market-based approach would more likely reflect communities’ tastes and preferences. Also, unlike bureaucrats and FCC political appointees, who have a clear incentive to cater to political and industry interests, advertisers would have a clear economic incentive to avoid sponsoring programs that would offend a significant portion of their community’s viewing audience. Such a result enhances efficiency because advertisers would have the incentive to respond to *real* preferences, not simply bureaucratic approximated guesses or political compromises purporting to reflect community preferences.

#### *G. Civic Society and Community Standards*

The current FCC regulatory approach deters civic involvement in important community decisions. Numerous political scientists and legal scholars, often identified as civic republicans, evaluate laws and political systems for the extent to which they encourage or discourage discussion of important issues and widespread, broad-based involvement in political

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250. Advertisers contract, therefore, in large part with the local broadcast stations, or at the very least, on a regional level.

dialogue.<sup>251</sup> It is thought that such a dialogue will help clarify the basic principles of society, improve those principles, and, perhaps more importantly, produce better citizens. In other words, through continued meaningful involvement in politics, we graduate, so to speak, from the sordid squabbles of high school student government into the organic, profound political reflection that elevates both the state and the individual.

Regardless of one's views on civic republicanism, it is clear that the current regulatory approach towards obscenity retards the development of civic society and civic republican virtues. What is particularly striking about the decency standards is that although they purport to reflect community standards, they are more often about Beltway politics and legal arguments. Individuals and individual communities have little input into decency standards in their communities. Rather, communities tend to sit back and simply wait and see whether the FCC will take action against a particular shock jock or enjoy the spectacle of politicians falling over each other to denounce Janet Jackson in the most vociferous manner.

A market-based approach, on the other hand, would encourage and empower a discussion about what community standards *should be* for broadcast. It would lower the costs for the would-be Terry Rakolta. More people would be able to pressure producers and present arguments to their fellow citizens about the benefits and costs of more restrictive broadcast indecency rules. Those who enjoy *Married . . . with Children* could present their arguments about why the show is worthy of advertiser support and those who oppose it could do the same. This is precisely the type of discussion about indecency that our civic discourse lacks.

#### H. Cost of Disclosure

Finally, any benefits of this regime must be balanced against its costs. Regulation that is so costly that it outweighs its benefits generally cannot be defended. Here, the cost is minimal. As discussed above, broadcasters already keep track of program advertisers.<sup>252</sup> The FCC would merely have to require that this information be made available on

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251. See Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17–19 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

252. See *supra* notes 226–30 and accompanying text.

the Internet and perhaps provide a master webpage to assist people in finding particular local broadcasters.

### *I. Beyond Indecency*

Currently, the FCC indecency regulation prohibits only indecent material (i.e., material that involves sexual or excretory organs).<sup>253</sup> Many believe that other types of programming, particularly violent programming, has a negative effect on children, yet the FCC has no authority to directly regulate violent content.<sup>254</sup>

The closest the FCC has come to regulating violence is the 1996 Telecommunications Act mandate that V-chips be installed in all television sets “shipped in interstate commerce or manufactured in the United States.”<sup>255</sup> These chips can read ratings embedded in programming content and screen out programs with ratings viewers do not want to see. Thus, if a program identifies itself as having more violence than the amount set by the viewer, it will be blocked. Due to First Amendment concerns, the Act did not mandate that broadcasters label their programming; rather, Congress encouraged them to do so.<sup>256</sup>

The V-chip’s effectiveness has been questionable. As Thomas Hazlett wrote, “[T]he joke has always been that mom and dad will be unable to deploy any filtering device that requires programming skills without persuading their 10-year old to show them how.”<sup>257</sup> Moreover, a recent study by the Annenberg Center suggests that the overwhelming majority of families would not use the V-chip even if given extensive technical support.<sup>258</sup>

This Article’s approach provides another mechanism for advocates of violence regulation—a mechanism that allows consumers to put

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253. See *supra* note 23 and accompanying text.

254. See KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 146–63 (2003).

255. 47 U.S.C. § 303(x) (2000). (requiring that an apparatus designed to receive television signals should be equipped with a feature “designed to enable viewers to block display of all programs with a common rating”).

256. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1490, 1544 n.294 (2005).

257. Thomas Hazlett, *Requiem for the V-Chip: A Relic of the Last Battle over Indecency on TV*, SLATE, Feb. 13, 2004, <http://slate.msn.com/id/2095396>.

258. AMY JORDAN & EMORY WOODARD, *PARENTS’ USE OF THE V-CHIP TO SUPERVISE CHILDREN’S TELEVISION USE* (The Annenberg Public Policy Center, 2003), available at [http://www.annenbergpublicpolicycenter.org/05\\_media\\_developing\\_child/childrensprogramming/2003\\_Parentsuseofvchip.pdf](http://www.annenbergpublicpolicycenter.org/05_media_developing_child/childrensprogramming/2003_Parentsuseofvchip.pdf).

pressure directly on content producers and does not rely on individuals' abilities to program their VCRs and TIVOs.

### *J. Response to Objection*

An objection immediately arises from this Article's proposal. Civil libertarians might object because it gives *too* much power to specific groups of consumers. Particular groups, say armies of Terry Rakoltas and organizations like Morality in Media, might be empowered to limit or eliminate types of programming enjoyed by minorities of the viewing public. Thus, the proposal would decrease media diversity and arguably censor speech.

This criticism rings hollow, however, because the market *already* censors speech. As A.J. Liebling quipped, "[F]reedom of the press is guaranteed only to those who own one."<sup>259</sup> A basic truth in our society is that those who own a media outlet determine the content of broadcast programming. Conversely, to the degree that the media properties are valuable assets, their owners will generally select programming that maximizes profits derived from such assets.

As discussed in Section V, broadcasters that wish to maximize profit often have an incentive to cater to average tastes. Presumably, this does not violate civil libertarian principles. Indeed, the civil libertarian objection goes too far because, taken to its logical extension, it would prohibit private ownership of media. Rather, this Article's proposal merely advances more efficient functioning in the media market, which civil libertarians generally accept, despite its potential to reduce programming diversity.

## VI. CONCLUSION

The history of recent indecency enforcement is the story of politicization of legal standards. The FCC has not only failed to promulgate clear standards, it has muddied the waters with haphazard interpretations and enforcements. Delegating authority to administrative agencies always carries risk of politicization and slanted enforcement, but these risks are particularly undesirable when First Amendment values are on the line. Moreover, when the law is unclear, broadcasters will err on the side of caution, self-censoring perfectly legal speech.

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259. Abbott Joseph Liebling, *Do You Belong in Journalism?*, NEW YORKER, May 4, 1960.

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*The Law and Economics of Wardrobe Malfunction*

This Article suggests a new approach to indecency regulation that seeks to enhance efficiency on a side of the media market that regulators have previously ignored—the viewer-advertiser relationship—by lowering information costs for viewers. Such information-based regulation holds the promise of providing decency standards that are more genuinely reflective of local community standards than the FCC's national community standard. Further, the proposed regime could be responsive to other objectionable, potentially damaging material, such as violent programming, that present FCC regulations largely ignore. The proposed regulation has minimal costs and would simply involve a wider dissemination of information about advertisers and programming—information that broadcasters already record and track. Dissemination of this information could be made on the Internet easily and cheaply. Finally, this proposal would return the debate about community standards to the people, empowering them to carry on the public discussion, rather than enabling an agency with its too often politicized discretion.

