

POLITICS, TECHNOLOGY, & INDECENCY: RETHINKING BROADCAST REGULATION IN THE 21ST CENTURY

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The Federal Communications Commission (FCC or “Commission”) has been extremely active in the field of indecency regulation since early 2004. The Commission has driven popular radio hosts off the air, issued several record-breaking fines, and reached highly structured settlements with a number of large media conglomerates. While there have been a handful of significant controversial broadcasts over the past two years, a closer inspection of the circumstances surrounding the FCC’s “crack-down” suggests that the Commission has been motivated by politics and unduly influenced by private media watchdog groups, rather than responding to a significant social problem with neutrally-applied legal principles. The visibility of the FCC’s activities during 2004 has raised serious questions as to whether the Commission is effectively working in the public interest, and whether indecency on the air should be regulated at all. This Note will discuss recent significant events and FCC rulings in the indecency area, address the motivations behind the FCC’s flurry of activity, and critique the current state of indecency law.

Part I provides a brief overview of indecency law, including First Amendment issues and FCC procedures, before moving on to a survey of the year’s significant events in Part II. Part III analyzes several key decisions from 2004 and demonstrates that the FCC has been uneven in its application of indecency standards. Part IV questions the true impetus behind the current “crackdown,” concluding that politics are perhaps playing an inflated role in broadcast regulation. Finally, Part V critiques the current indecency regime, finding fault in particular with the influence and activities of the Parents Television Council, and concludes that technological advances have rendered existing indecency law obsolete and unjustifiable. Because these problems with indecency law are partially rooted in the flawed doctrine of reduced First Amendment protection for broadcasters, the ultimate conclusion is that indecent broadcasting should be fully protected by the First Amendment.

I. INDECENCY LAW

A. Broadcast Media and the First Amendment

Given the central role of broadcast media in disseminating information and viewpoints, one might expect the First Amendment's protection of free speech to apply with special force to regulations implicating broadcasters. However, the opposite is true. In fact, "[o]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."¹ This reduced protection enables the government to exercise certain forms of editorial control over broadcasters, as well as to regulate protected speech in ways that would be forbidden in other media.

Reduced First Amendment protection for the broadcast media dates back to the United States Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*.² In *Red Lion*, the Court held that, because broadcast frequencies are a scarce resource, the government may impose certain restrictions on license holders as required by the public interest.³ Thus, while free expression is generally considered to be a fundamental right of the speaker, in the case of broadcasters, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁴

Building on its decision in *Red Lion*, the Court later held that "special treatment of indecent broadcasting" was justified given the unique qualities of the broadcast media.⁵ In *FCC v. Pacifica Foundation*, the Court held that the FCC had the power to regulate broadcast material that was indecent but not obscene, despite the fact that non-obscene speech is protected by the First Amendment.⁶ Specifically, the Court upheld FCC action against a radio station that had broadcast a monologue by comedian George Carlin entitled "Filthy Words" which, while indecent and profane, was not obscene.⁷

The Court justified its holding in *Pacifica* on two principal grounds. First, the broadcast media are "uniquely pervasive" in the lives of all Americans, present not only in public but in the privacy of the home.⁸

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

2. 395 U.S. 367 (1969).

3. *Id.* at 389.

4. *Id.* at 390.

5. *Pacifica*, 438 U.S. at 750.

6. *Id.*

7. *Id.* at 729.

8. *Id.* at 748.

Second, "broadcasting is uniquely accessible to children."⁹ Because certain forms of protected speech may nonetheless be withheld from children, special restrictions on indecent broadcasting were justified in light of this unique accessibility.¹⁰ The *Pacifica* decision thus enabled the FCC to regulate indecent and profane broadcasts despite Supreme Court precedent holding these forms of speech to be constitutionally protected.

B. The FCC Indecency Standard

Congress created the FCC via the Communications Act of 1934, empowering the agency to regulate interstate and international communications by various electronic means.¹¹ The FCC's statutory authority to regulate indecent speech, upheld in *Pacifica*, is found at 18 U.S.C. § 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."¹² Consistent with this statutory authority, the FCC has adopted a rule prohibiting the broadcast of indecent material on radio and television between 6:00 a.m. and 10:00 p.m.¹³

Notably absent from § 1464 is a definition of indecency, a matter largely left to the FCC. For several years after *Pacifica*, the FCC limited its definition to the specific list of objectionable words in George Carlin's monologue.¹⁴ However, in 1988 the FCC's definition of indecency changed abruptly from this clearly defined list of banned words to the more obtuse definition currently in effect.¹⁵ The FCC currently defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community stan-

9. *Id.* at 749.

10. *Id.*

11. *About the FCC*, Fed. Communications Comm'n, at <http://www.fcc.gov/aboutus.html> (last visited Feb. 22, 2005).

12. 18 U.S.C. § 1464 (2000).

13. 47 C.F.R. § 73.3999 (2004).

14. John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 336 (1989).

15. *Id.* According to Crigler and Byrnes, "the Commission announced that it would no longer limit the definition of indecency to Carlin's 'seven dirty words,' but would thereafter apply the 'generic' definition of indecency set forth in *Pacifica*." *Id.* (quoting New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licenses, 2 F.C.C.R. 2726 (1987)).

dards for the broadcast medium, sexual or excretory activities or organs.”¹⁶

For the purposes of indecency analysis, the FCC breaks the rule into a two-step process.¹⁷ First the Commission determines whether the material falls within the “subject matter scope” of the indecency definition, that is, whether the material is “language or material” that “depicts or describes . . . sexual or excretory activities or organs.”¹⁸ Once the FCC determines that the material falls within this scope, it then determines whether the broadcast was “*patently offensive* as measured by contemporary community standards for the broadcast medium.”¹⁹

The Commission maintains that the full context in which the material appears is “critically important” to the latter determination and has established three factors to be used in the analysis:

(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*²⁰

While no single factor is meant to be more significant than any other, the FCC has emphasized the “graphic nature” factor at the expense of other factors.²¹

C. FCC Procedures

Although the FCC is empowered by Congress to regulate indecency, the FCC does not actively monitor broadcasts. Rather, “[e]nforcement actions in this area are based on documented complaints received from the public about indecent, profane, or obscene broadcasting.”²² While the FCC

16. *In re* 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, 8000 (2001) [hereinafter Industry Guidance].

17. *Id.* at 8002.

18. *Id.* at 8000, 8002.

19. *Id.* at 8002 (emphasis in original).

20. *Id.* at 8002-03 (emphasis in original).

21. *See infra* Part III.

22. *Obscene, Profane & Indecent Broadcasts: FCC Consumer Facts*, Fed. Communications Comm’n, at <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Mar. 14, 2005). Complaints may be submitted via U.S. mail, e-mail, phone, and fax. *Filing a Complaint*, Fed. Communications Comm’n, at <http://www.fcc.gov/cgb/complaints.html> (last visited Feb. 22, 2005).

itself investigates viewer complaints to make indecency determinations, the detection function has been delegated entirely to the public. As discussed in Section V.B, *infra*, this delegation has created the opportunity for special interest groups to manipulate FCC indecency enforcement.

When the FCC receives a viewer complaint, the FCC Enforcement Bureau conducts an investigation to determine whether a violation occurred.²³ The Enforcement Bureau recommends appropriate action depending on whether a violation appears to have occurred.²⁴ If the FCC determines that no violation has occurred, the complaint is dismissed.²⁵ If the FCC determines that a violation has occurred, the Commission issues a "Notice of Apparent Liability" ("NAL").²⁶ The NAL includes a description of the alleged violation, an explanation of the Commission's indecency analysis, and (often) a proposed fine.²⁷ Upon receipt of an NAL, the accused broadcaster may either pay the fine, contest liability, or negotiate a settlement with the Commission.²⁸

II. THE YEAR IN REVIEW: A CRACKDOWN ON INDECENCY

Indecency was essentially a nonissue for the first three years of former FCC Chairman Michael Powell's tenure, as the Commission worked to relax ownership restrictions in the broadcast industry.²⁹ Until 2004, the

23. See *The FCC Enforcement Bureau: A Broadcaster's Guide*, Fed. Communications Comm'n, at <http://www.fcc.gov/eb/broadcast/bcenf.html> (last visited Feb. 22, 2005).

24. *Id.* The Bureau makes recommendations to the Commission as a whole, which has ultimate authority as to whether actionable violations have occurred and whether to impose fines. See *The FCC Enforcement Bureau: A Broadcaster's Guide*, Fed. Communications Comm'n, at <http://www.fcc.gov/eb/broadcast/bcenf.html> (last visited Feb. 22, 2005).

25. *Obscene, Profane, & Indecent Broadcasts: FCC Consumer Facts*, *supra* note 22.

26. See *Action for Childrens Television v. FCC*, 827 F. Supp. 4, 6-7 (D.D.C. 1993).

27. See *infra* Part III for an analysis of several recent NALs.

28. See *infra* Part II for examples of consent decrees and legal challenges arising from NALs.

29. The new ownership rules that the Commission ultimately released were highly controversial. Passed by a 3-2 Commission vote along party lines, the rules were immediately challenged in federal court by numerous small media companies and consumer groups. The Third Circuit ultimately ordered the FCC to reconsider the rules in June of 2004, two days after the U.S. Senate had voted to restore the pre-existing media limits. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004); Stephen Labaton, *Court Orders F.C.C. to Rethink New Rules on Growth of Media*, N.Y. TIMES, June 25,

FCC's agenda under Powell focused on deregulating the communications industry. The Commission's controversial revisions to media ownership restrictions were ultimately reversed by the U.S. Senate.³⁰

The FCC's inattention to indecency during its deregulation campaign was not for lack of controversial programming. According to data collected by the FCC, the Commission received complaints regarding 389 programs in 2002, and 375 programs in 2003.³¹ The Commission issued no NALs regarding television broadcasts during either of these years, fining only a total of ten radio broadcasts (seven in 2002 and three in 2003).³² The FCC refrained from acting against television broadcasters despite controversial programming such as the Victoria's Secret Fashion Show, which aired on CBS in 2002 and which drew criticism from women's organizations and media watchdog groups alike.³³ In addition, the airing of the Golden Globe Awards on NBC in January of 2003 contained an uncensored use of the word "fucking" by singer Bono.³⁴ While this offense would later jump-start the 2004 indecency crackdown, the Commission said nothing about the incident for nearly a year.³⁵ CBS aired a second Victoria's Secret Fashion Show in November 2003, and again the FCC took no action.

Even after the FCC Enforcement Bureau issued a decision in October 2003, in which it declined to fine NBC for the Golden Globes incident,³⁶ then-Chairman Powell had nothing to say on the subject until three months later. In January of 2004, Powell gave a speech at the National Press Club at which he publicly criticized on-air indecency, apparently for the first

2004, at A1; Stephen Labaton, *Senate Votes to Restore Media Limits*, N.Y. TIMES, June 23, 2004, at C5 [hereinafter Labaton, *Senate Votes to Restore Media Limits*].

30. Labaton, *Senate Votes to Restore Media Limits*, *supra* note 29.

31. *Indecency Complaints and NALs: 1993 - 2004*, available at <http://www.fcc.gov/eb/broadcast/ichart.pdf> (last visited Feb. 22, 2005).

32. *Id.*

33. See Parents Television Council, *Dereliction of Duty: How the Federal Communications Commission Has Failed the Public* [hereinafter PTC, *Dereliction of Duty*], at <http://www.parentstv.org/PTC/publications/reports/fccwhitepaper/main.asp> (last visited Mar. 14, 2005) (reporting that members of the Parents Television Council filed more than 4,000 complaints against the broadcast of the fashion show); see also Lisa Bennett, *NOW Foundation Criticizes TV's Distorted Image of Women*, at <http://www.now.org/nnt/fall 2002/wolu.html> (last visited Feb. 22, 2005).

34. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) [hereinafter *Complaints Against Golden Globe Awards*].

35. By comparison, then FCC Chairman Powell released a public statement within hours of the broadcast of Super Bowl incident, described *infra*.

36. *Complaints Against Golden Globe Awards*, *supra* note 34, at 4975.

time.³⁷ Specifically, he called upon Congress to increase maximum indecency fines by a factor of ten to augment their deterrent effects and allow the FCC to pursue tougher enforcement actions against offenders.³⁸ Thus, as the election year began, Powell's focus shifted abruptly from controversial and divisive media deregulation to combating indecency on the airwaves.

Although Powell announced his anti-indecency stance in January, the FCC's "crackdown" did not begin in earnest until the following month. On February 1, during the Super Bowl halftime show on CBS, performer Janet Jackson's breast was exposed briefly on the air.³⁹ As viewer complaints poured in, Powell sprang into action almost immediately, condemning the incident as a "classless, crass, and deplorable stunt" and personally calling for an FCC investigation into the program.⁴⁰ Thus, while it took Powell a year to comment on the Golden Globes, he commented on Jackson's breast exposure within hours of the incident.

Even as the Super Bowl controversy was unfolding, the Parents Television Council (PTC), a powerful media watchdog group with over 800,000 members, released a scathing report taking the FCC to task for ignoring indecency rules in pursuit of its ownership deregulation agenda.⁴¹ The report was released two days after the Super Bowl incident, though it did not mention the Super Bowl itself. Rather, it focused on a handful of specific broadcasts (including the Victoria's Secret Fashion Show) which the PTC considered particularly offensive and which the FCC had ignored.

The Super Bowl was truly a turning point for federal indecency regulation, both at the FCC and congressional levels. On February 11, the Senate held hearings on broadcast indecency. Notably, the hearings did not address the *effects* of indecency, but rather the state of affairs with respect to enforcement. Shortly after the Senate hearings, Powell gave a speech at the Dole Institute on Politics at which he discussed the growing problem

37. *FCC Chief Wants Crackdown on Obscenity over the Airwaves*, CNN.COM, Jan. 14, 2004, at <http://www.cnn.com/2004/LAW/01/14/fcc.obscenity/index.html>.

38. *Id.*

39. Bill Carter & Richard Sandomir, *Halftime-Show Fallout Includes F.C.C. Inquiry*, N.Y. TIMES, Feb. 3, 2004, at D1. It is unclear whether the exposure was planned or accidental.

40. *Id.*

41. See PTC, *Dereliction of Duty*, *supra* note 33.

of indecent material on the air and called for a study into the effects of indecent programming on children.⁴²

As the Super Bowl fallout continued and the federal government began to actively address indecency, the focus shifted quickly from television to radio as media companies began to self-regulate for fear of FCC attention. Two weeks after the Senate hearings, Clear Channel Communications announced its "Responsible Broadcasting Initiative," intended "to make sure the material aired by its radio stations conforms to the standards and sensibilities of the local communities they serve."⁴³ In a separate release issued the same day, Clear Channel announced what appeared to be the first step in its new initiative: the company suspended controversial radio personality Howard Stern from all of its stations, removing Stern from six major markets.⁴⁴ Clear Channel claimed that the Stern suspension was prompted by unspecified material aired on Stern's show the day before, attacking the broadcast as "vulgar, offensive, and insulting" to women, African Americans, and "anyone with a sense of common decency."⁴⁵

As Stern left the air, the following months saw a flurry of activity from Congress, the FCC, and the broadcasting industry. On March 11, the House passed a sweeping increase in the FCC's power, enabling the Commission to fine offenders up to \$500,000 per offense (up from the previous maximum of \$27,500) and authorizing license revocation for serious or repeated offenses.⁴⁶ The bill passed overwhelmingly, by a vote of 391-22.⁴⁷ A similar bill began moving through the Senate, though the Senate bill was stalled by disagreement over certain provisions relating to media ownership rules.⁴⁸

42. Chad Lawhorn, *FCC Leader Wants Study of Effects of Indecent TV*, LAWRENCE JOURNAL-WORLD, Feb. 21, 2004, at <http://www.ljworld.com/section/kudole/story/161965>.

43. Press Release, Clear Channel, *Clear Channel Imposes Strict New Standards For Broadcast Decency* (Feb. 25, 2004), available at http://www.clearchannel.com/Radio/PressReleases/2004/2004_02_25_CC_RBI.pdf.

44. Press Release, Clear Channel, *Howard Stern Taken Off Clear Channel Stations* (Feb. 25, 2004), available at http://www.clearchannel.com/Radio/PressReleases/2004/20040226_Rad_Stern.pdf; see also Preston Turegano, *S.D. Clear Channel Station Suspends Stern Show*, SAN DIEGO UNION-TRIB., Feb. 27, 2004, at E2.

45. Press Release, Clear Channel, *Howard Stern Taken Off Clear Channel Stations*, *supra* note 44.

46. Frank James, *House Bill Increases Fine for Indecent Broadcasts*, CHI. TRIB., Mar. 12, 2004, at C1.

47. *Id.*

48. Bill McConnel, *Indecency Battle Rocks The House and Senate*, BROAD. & CABLE, Mar. 15, 2004, at 12.

A week after the House bill passed, the FCC issued its first significant post-Super Bowl decision, reversing the Enforcement Bureau's Golden Globes decision and altering a long-standing indecency rule. Prior to the Commission's Golden Globes ruling, a single or fleeting use of a profane word was not grounds for enforcement.⁴⁹ The FCC overturned this precedent and held that Bono's use of the word "fucking" was indecent.⁵⁰ However, since the Commission acknowledged that it was altering its rule, it declined to impose a fine for the violation.⁵¹ The new standard would be applied prospectively only.

The following month, the FCC issued an NAL to Clear Channel threatening a fine of \$495,000.⁵² The fine was directed at material that had aired on the Howard Stern Show in April of 2003, including dialogue regarding sexual practices of cast members and a sexual personal hygiene product.⁵³ Significantly, the fine marked the first time that separate utterances within a single program were treated as separate violations (and thus separately fined).⁵⁴ Clear Channel responded to the NAL immediately. The day after the FCC threatened its fine, the media giant permanently pulled the Howard Stern Show from all of its affiliates.⁵⁵ The power and ambition of the FCC was now clear. One day after the Commission threatened a huge media conglomerate with a nearly half-million dollar fine, the most popular radio host in America was silenced in six major markets.

The Stern cancellation had a significant impact on the entertainment industry. Broadcasters across the country began to self-regulate to avoid being targeted by the FCC. Notably, CBS and Limited Brands, Inc., announced in mid-April that the Victoria's Secret fashion show would not return to CBS that year.⁵⁶ Other media outlets began to consider toning down popular yet racy programming in order to avoid the attention of the FCC.⁵⁷

49. *Complaints Against Golden Globe Awards*, *supra* note 34, at 4980.

50. *Id.* at 4979.

51. *Id.* at 4981-82.

52. *In re Clear Channel Broadcasting Licenses*, 19 F.C.C.R. 6773, 2004 FCC LEXIS 1795, at *1 (2004).

53. *Id.* at *2-*3.

54. *Id.* at *30.

55. Jube Shiver, Jr., *Radio Chain Boots Stern Off Stations*, L.A. TIMES, Apr. 9, 2004, at C1.

56. Shelly Branch, *Limited Brands Decides to Cancel Lingerie TV Show*, WALL ST. J., Apr. 12, 2004, at B2.

57. *See Broom Sweeps Clean at U.S. Networks*, EDMONTON SUN, Apr. 13, 2004, at 45.

As the broadcast media struggled to avoid fines, the FCC was busy working toward a settlement with Clear Channel arising out of the \$495,000 NAL issued in April. In early June, the Commission announced that Clear Channel had settled all pending FCC actions for a fine of \$1.75 million, the largest such settlement in FCC history.⁵⁸ In addition to the fine, Clear Channel agreed to implement a comprehensive compliance plan, which included training for employees as well as possible disciplinary actions against them for violations, including termination if necessary.⁵⁹ In exchange, the FCC granted Clear Channel a clean slate. Not only did it drop the NAL issued in April, but it agreed to terminate all pending indecency investigations involving Clear Channel and dismiss all pending complaints against the media company, including those not involving Howard Stern.⁶⁰

As the summer progressed, the entertainment industry finally showed signs of resistance against the FCC's anti-indecency crusade. At the end of June, *The Howard Stern Show* reappeared in several Clear Channel markets, having been picked up in those areas by Infinity Broadcasting.⁶¹ In July, Les Moonves, a top executive at Viacom (the owner of CBS), announced that he would fight against any FCC fines arising from the Super Bowl incident.⁶² In addition, as the broadcast networks announced their Fall schedules, it became clear that television programmers were still willing to push the limits.⁶³

The entertainment industry's resistance did not deter the FCC, however. In October, the Commission finally released an NAL regarding the Super Bowl incident, threatening Viacom with a \$550,000 fine.⁶⁴ This fine represented the statutory maximum fine of \$27,500 for each of the twenty Viacom stations that aired the incident.⁶⁵ The following month Viacom made good on Les Moonves' promise by filing a 78-page challenge to the

58. *In re* Clear Channel Communications, Inc., 19 F.C.C.R. 10880, 10887 (2004) [hereinafter Clear Channel Settlement].

59. *Id.* at 10883, 10890.

60. *Id.*

61. David Carr, *Howard Stern, Silenced in Some Cities, Gains Some Others*, N.Y. TIMES, July 1, 2004, at E1.

62. Jay Woodruff, *See No Evil?*, ENT. WKLY., Aug. 6, 2004, at 40.

63. *Id.*

64. *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII, 19 F.C.C.R. 19230, 2004 FCC LEXIS 5444, at *1 (2004) [hereinafter Complaints Against Super Bowl].

65. *Id.* at *1-*2.

fine, attacking not only the FCC's ruling but the constitutionality of the entire broadcast regulatory regime.⁶⁶

As the FCC continued to push for strong indecency fines, support from Congress collapsed at the end of the congressional session. Failing to reach an agreement on competing provisions, the House and Senate dropped legislation that would have enabled the FCC to levy increased indecency fines.⁶⁷ Still undaunted, however, the FCC issued a record-breaking NAL just as the legislation failed, assessing a \$1,183,000 fine against Fox Television for material included in an April 2003 episode of *Married by America*.⁶⁸ Like Viacom, Fox has filed a challenge to this fine.⁶⁹

The force of the FCC continued to affect broadcasters as well. For example, in November, several ABC affiliates announced that they would not air the award-winning film *Saving Private Ryan* on Veteran's Day because of indecency concerns.⁷⁰ In a more significant development, the FCC announced in late November that it had reached a clean slate settlement with Viacom similar to the controversial Clear Channel settlement

66. *CBS Challenges Fine Over Jackson Incident*, CHI. TRIB., Nov. 9, 2004, at C5; see Opposition to Notice of Apparent Liability for Forfeiture, *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (Fed. Communications Comm'n Nov. 4, 2004) [hereinafter Viacom Opposition], available at <http://www.fcc.gov/eb/broadcast/Pleadings/Viacom.pdf>.

67. Broadcast Decency Enforcement Act of 2005, H.R. 310, 109th Cong. (2005); Frank Ahrens, *Legislation Increasing Indecency Fines Dropped*, WASH. POST, Oct. 8, 2004, at E01. Although indecency legislation failed to pass in 2004, the House revisited the issue in February 2005. Once again, the House voted to increase maximum indecency fines. Under the new bill, broadcasters and individual performers can be fined up to \$500,000 for each violation. *House Votes to Raise Fines for Indecency*, N.Y. TIMES, Feb. 17, 2005, at C5.

68. *In re Complaints Against Various Licensees Regarding Their Broadcast of The Fox Television Network Program "Married By America" on April 7, 2003*, 19 F.C.C.R. 20191, 2004 FCC LEXIS 5791, at *1 (2004) [hereinafter *Married by America*].

69. Opposition to Notice of Apparent Liability for Forfeiture, *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, File No. EB-03-IH-0162 (Fed. Communications Comm'n Dec. 3, 2004) [hereinafter *Fox Opposition*], available at http://www.fcc.gov/eb/broadcast/Pleadings/Fox_Broadcasting_Company.pdf.

70. *Some Stations Won't Show "Private Ryan"*, N.Y. TIMES, Nov. 11, 2004, at C6. The FCC later found that the broadcast of *Saving Private Ryan* did not violate any applicable indecency rules. *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, No. EB-04-IH-0589, 2005 FCC LEXIS 1268, at *1 (Fed. Communications Comm'n Feb. 28, 2005)

earlier in the year.⁷¹ Like Clear Channel, Viacom agreed to implement an indecency compliance plan, including training, suspension, and termination of offending employees.⁷² Under the terms of the agreement Viacom agreed to pay \$3.5 million, doubling Clear Channel's record-breaking settlement in June.⁷³ Significantly, the settlement does *not* cover the Super Bowl fine, which Viacom is still challenging.

As of November 23, the FCC had received complaints regarding 279 programs in 2004, and issued eleven NALs totaling over \$7.7 million. Over half of this amount consists of the two large settlements reached with Viacom and Clear Channel, and another \$550,000 is the Super Bowl fine. Thus, the FCC indecency crackdown was not simply a matter of tougher case-by-case enforcement (indeed, the overwhelming majority of broadcasts were found not indecent), but rather targeted efforts to censure high-profile infractions (such as the Golden Globes and the Super Bowl) and to regulate large, powerful media conglomerates (such as Viacom and Clear Channel).

III. IN SEARCH OF A STANDARD: ANALYZING RECENT FCC DECISIONS

As described in Part I.B, *supra*, the FCC uses a three-factor test in determining whether a given piece of material is offensive enough to be indecent. The three factors are: explicitness or graphic nature; dwelling on or repeating; and titillation or shock value.⁷⁴ Despite the Commission's claim that "[n]o single factor generally provides the basis for an indecency finding," numerous FCC decisions issued during the crackdown indicate that the current Commission is placing excessive emphasis on the first, "explicitness or graphic nature" factor. The resulting doctrine is one in which arguably minor violations are deemed indecent while more developed sexual and excretory themes are given a pass.

An example of this doctrinal development is the Golden Globe Awards case, in which the Commission held that any use of the word "fuck" falls within the FCC definition of indecency.⁷⁵ The Commission reached this determination based on "the core meaning" of the word, identifying "fuck" as "one of the most vulgar, graphic and explicit descriptions of

71. *Viacom Fined \$3.5 Million for Indecency*, N.Y. TIMES, Nov. 24, 2004, at C5.

72. *In re Viacom Inc.*, 19 F.C.C.R. 23100, 2004 FCC LEXIS 6631 (2004) [hereinafter *Viacom Settlement*].

73. *Id.*

74. Industry Guidance, *supra* note 16, at 8003.

75. Complaints Against Golden Globe Awards, *supra* note 34, at 4978-79.

sexual activity in the English language.”⁷⁶ The assignment of an inherently sexual meaning to Bono’s statement runs contrary to the FCC’s purported emphasis on context. There is nothing remotely sexual about the phrase, “This is really, really fucking brilliant,” and yet the FCC deemed this statement indecent by isolating a single word and attaching an inflammatory meaning to it. A more contextual analysis reveals that the word “fucking” in this context was, as NBC claimed, a modifier, and had nothing to do with explicit or graphic sex.

The FCC engaged in similarly simplistic analysis in the *Super Bowl* case, in which the FCC found indecent the exposure of Janet Jackson’s breast for 19/32 of a second.⁷⁷ The Commission concluded that, although the exposure was brief, there was “no doubt that the Jackson/Timberlake segment is both explicit and graphic.”⁷⁸ In addition, because the exposure came at the end of a performance involving sexual song lyrics and choreography, the Commission concluded that the exposure “was designed to pander to, titillate and shock the viewing audience.”⁷⁹ This conclusion is difficult to justify in light of the fact that (1) there was substantial evidence that the exposure was accidental and (2) the station cut away almost immediately once the breast was exposed. Given these two considerations, it is unlikely that the exposure was *designed* to do anything at all, let alone to “pander to, titillate and shock the viewing audience.”⁸⁰ Nonetheless, the explicitness and graphicness of an exposed breast seems to have swayed the Commission’s view so strongly that they failed to engage in a thorough analysis of all relevant circumstances.

The paramount significance of the “explicit and graphic nature” factor was also apparent in a number of FCC declining to impose indecency fines against material that was arguably more sexual or excretory than the Golden Globe Awards or Super Bowl incidents. In cases involving episodes of the television programs *Off Centre* and *Coupling*, the Commission found “sustained and repeated references to [sexual or excretory] activities,” the cumulative effect of which was to “render the material shocking, titillating, or pandering,” but held that the material was not indecent because these considerations were “outweighed” by the “lack of explicit or

76. *Id.*

77. Complaints Against Super Bowl, *supra* note 64, at *17.

78. *Id.* Viacom denies that the exposure was explicit or graphic based on the fact that “the unscripted moment . . . involved a long shot of the stage that lasted just over half a second.” Viacom Opposition, *supra* note 66, at 21.

79. Complaints Against Super Bowl, *supra* note 64, at *18.

80. Viacom raised a similar argument in its Opposition Brief, claiming that “[o]ne cannot pander by accident.” Viacom Opposition, *supra* note 66, at 30.

graphic depiction or description.”⁸¹ In one of these cases Commissioner Michael Copps dissented on the grounds that, had the dialogue been broadcast on a radio station, the Commission would have found it indecent.⁸²

In addition to denying enforcement against these verbal discussions of sexual acts and excretory functions, the FCC in at least two decisions has declined enforcement against programming depicting sexual *acts* based on lack of explicitness or graphic nature. In August, the Commission issued an opinion dismissing complaints against the airing of an episode of the NBC sitcom *Will & Grace* which “included a scene in which ‘[a] woman photographer passionately kissed [a] woman author and then humped her (what she called a ‘dry hump.’)”⁸³ The Commission (somewhat conclusorily) determined that the material was “not sufficiently explicit or graphic to be indecent.”⁸⁴ The same day, the Commission dismissed complaints involving the airing of an episode of *Buffy the Vampire Slayer* which depicted two characters “fighting one another before engaging in what is alleged in the complaint to be sexual intercourse.”⁸⁵ In an even more conclusory opinion, the Commission stated that “[b]ased upon our review of the scene, we did not find that it is sufficiently graphic or explicit to be deemed indecent. Given the non-explicit nature of the scene, we cannot conclude that it was calculated to pander to, titillate or shock the audience.”⁸⁶

An analysis of these decisions reveals that the FCC appears to be ignoring the words “explicitness” and “activities” in its indecency analysis.

81. *In re* WBDC Broadcasting, Inc., 19 F.C.C.R. 23014, 2004 FCC LEXIS 6626, at *8 (2004) [hereinafter *Off Centre*]; *In re* NBC Telemundo License Co., 19 F.C.C.R. 23025, 2004 FCC LEXIS 6627; at *8 (2004) [hereinafter *Coupling*]. The *Off Centre* episodes in question included “sustained and repeated references to excretory activities, with bowel movements the constant theme of the program” and “sustained and repeated references to [a] young man’s sexual organ.” *Off Centre*, 2004 FCC LEXIS 6626, at *8-9. The *Coupling* episodes at issue included “sustained and repeated use of sexual innuendo and double entendre, with sex the constant theme of the program episodes.” *Coupling*, 2004 FCC LEXIS 6627, at *8.

82. *Off Centre*, *supra* note 81, at *12.

83. *In re* KSAZ License, Inc., 19 F.C.C.R. 15999, 2004 FCC LEXIS 4508, at *1 (2004).

84. *Id.* at *8.

85. *In re* Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program “Buffy the Vampire Slayer” on November 20, 2001, 19 F.C.C.R. 15995, 2004 FCC LEXIS 4507, at *1-2 (2004).

86. *Id.* at *7. Viacom has argued that the Super Bowl incident “cannot be reasonably distinguished from the sexual situations described in *Will and Grace* and *Buffy the Vampire Slayer*.” Viacom Opposition, *supra* note 66, at 25.

Discussions about excretory activities, and depictions of sexual acts, were found not to be indecent because they did not involve nudity or specific references to organs. Clearly, a discussion about excretory activities can be explicit (and therefore legally indecent) without being graphic, and sexual intercourse can be explicitly conveyed without depicting organs. If such depictions in fact “pander to, titillate, or shock” viewers they are at least as harmful, if not more harmful, than fleeting expletives or briefly exposed breasts.⁸⁷ The FCC has essentially rewritten the rule so that a sufficiently graphic depiction or description is *per se* indecent, while an explicit, titillating description or depiction cannot be indecent without graphic content.⁸⁸ This approach removes the much-touted contextual analysis from the process. It is not a surprise, then, that numerous television stations refused to air *Saving Private Ryan* on Veteran’s Day fearing that the film’s use of profane words would lead to indecency fines.

Although the FCC’s manipulation of the indecency standard is problematic, the issue goes beyond FCC enforcement actions. As noted above, the FCC produced only eleven NALs in 2004, despite receiving complaints about 279 programs. Given that two large settlements accounted for over half of the 2004 indecency fines, a complete analysis of the indecency crackdown must account for this non-doctrinal development as well.

The large FCC settlements add a number of new dimensions to the indecency crackdown. To begin with, numerous indecency complaints were summarily dismissed without full adjudication, raising concerns as to whether the settlement amounts accurately reflected the extent to which the broadcasters violated regulations. In addition, the fact that revised corporate policies were built into the settlements suggests that private media companies are surrendering a certain degree of editorial control to the government in exchange for dismissals. But perhaps most problematically, the fact that indecency standards are subject to manipulation by the FCC enables the Commission to obtain these large cash settlements and policy

87. This is not to say that any of these depictions are in fact harmful enough to warrant legal action. As discussed in Part V.B, *infra*, there is substantial support for the proposition that indecent broadcasting should not be legally regulated at all. The comparison is drawn here to illustrate the FCC’s unprincipled application of existing indecency standards.

88. This standard is illustrated by the FCC’s decision to levy a \$1,183,000 fine against Fox for airing an episode of *Married by America*. The episode depicted numerous sexual acts, including men licking whipped cream from strippers’ bodies and being spanked. The Commission emphasized the significance of the nudity in the program, stating that “[a]lthough the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown.” *Married by America*, *supra* note 68, at *11.

capitulations without a sense that legal standards are being meaningfully applied.

IV. EXPLAINING THE INDECENCY CRACKDOWN

While the airing of the Super Bowl halftime show on February 1 is a tidy starting point for analyzing the FCC's increased indecency activity, such an approach cannot fully account for the Commission's motivation in targeting indecency. As noted above, then-FCC Chairman Michael Powell began calling for increased indecency fines over two weeks *before* the Super Bowl. Given that the FCC was likely organizing an anti-indecency crusade before the nation's attention turned to Janet Jackson's breast, something else must account for the Commission's timing. The question, then, is why did the FCC decide to make 2004 into the Year of Decency. The answer, as will be shown, appears to be a combination of increased pressure from media watchdog groups to rein in risqué broadcasters, and increased social conservatism among the American public.

A. The Last Straw?

The Bureau's Golden Globe Awards decision regarding Bono's unbleeped "F-word" came at a time when controversial programming was increasingly popular and, for the most part, ignored by the FCC. As cable programs such as *The Sopranos* and *Sex and the City* enjoyed great success, broadcasters attempted to capitalize on the nation's renewed interest in sex and violence by pushing the limits of propriety further and further.⁸⁹ Because the FCC was chiefly concerned with restructuring media ownership rules during the first three years of Michael Powell's chairmanship, this trend toward the racy was largely disregarded by the FCC.

The Bureau's Golden Globe Awards decision brought the FCC's apparent inaction into the public eye. Although the decision was limited to the incident at hand, the reasoning (as quoted throughout the media) appeared to suggest that profanity was *always* permissible on the air as long as it was used as "an adjective or expletive to emphasize an exclamation."⁹⁰ The decision was seen by one lawmaker as the latest in a string of FCC decisions establishing a permissive standard for vulgarity on the air.⁹¹ In addition, pressure was mounting from media decency groups such as the Parents Television Council, who objected not only to the FCC's lax stance on indecency but also to the erosion of localism and community

89. *Broom Sweeps Clean at U.S. Networks*, *supra* note 57.

90. *FCC Chief Wants Crackdown on Obscenity over the Airwaves*, *supra* note 37.

91. *Id.*

programming embodied in the Commission's relaxation of media ownership restrictions.⁹²

While this explanation accounts for the inception of the indecency crackdown, it leaves a few key questions unanswered. It does not explain why the focus of the FCC abruptly shifted from television to radio as the Super Bowl fallout led the FCC to target Clear Channel and Howard Stern. In addition, it fails to explain why the Commission passed over programming that was arguably more explicit than many of the FCC's other high-profile targets.⁹³ This focus on high-profile and publicly recognizable cases suggests that the FCC's crackdown is partially political in nature.

B. The Politics of Decency

The sudden backlash against indecency may have been a lagging by-product of the nation's recent rise in conservatism. As demonstrated by the 2004 election, conservative politics have become increasingly dominant in the United States.⁹⁴ There is a long-standing link between decency campaigns and conservatism. According to Margaret Blanchard, movements to "clean up" artwork, literature, film, and music have traditionally coincided with broader campaigns to squelch radical political and economic movements.⁹⁵ For example, the "social, political, and economic unrest" of the late nineteenth century gave rise to a movement to clean up literature and artwork.⁹⁶ A similar movement arose amid the highly conservative atmosphere during the early stages of the Cold War.⁹⁷ President Nixon also targeted controversial entertainment in response to the countercultural movements of the 1960s.⁹⁸

A final example, and one which closely mirrors the current indecency crackdown, is the campaign against offensive music lyrics in the 1980s,

92. See PTC, *Dereliction of Duty*, *supra* note 33; see *infra* Part V.A for a detailed account of the actions and influence of the PTC.

93. See *supra* Part III.

94. In addition to President Bush's reelection, the 2004 election saw eleven states overwhelmingly pass constitutional amendments outlawing gay marriage. This has led many to assume that social conservatism is currently a dominant force in American politics. See James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P5.

95. See generally Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992).

96. *Id.* at 744-46.

97. *Id.* at 788.

98. *Id.* at 801-02. The anti-indecency activity under President Nixon ultimately gave rise to the U.S. Supreme Court's seminal *Pacifica* decision. See *id.* at 810-13.

headed by Tipper Gore and Susan Baker.⁹⁹ The campaign ultimately resulted in the “voluntary” placement by the RIAA of parental advisory labels on music merchandise containing explicit lyrics.¹⁰⁰ In a parallel to the direction the current indecency crackdown is taking, the music campaign of the 1980s focused (at least in theory) on self-regulation.¹⁰¹ As noted above, the FCC’s relatively small number of NALs are arguably not the most significant aspect of the current crackdown. Rather, negotiated settlements and self-regulation by the entertainment industry (such as the decision not to air *Saving Private Ryan*) comprise the core of today’s anti-indecency campaign. As in the 1980s, the threat of severe government enforcement is enough to exact content regulation in the media, creating a sense that the government is not directly restricting speech.

Another key aspect of the indecency crackdown of the 1980s also present today is the bi-partisan nature of the movement. A generally conservative atmosphere can drive anti-indecency sentiments across party lines, and participating in campaigns to “clean up” the airwaves allows Democratic politicians to gain political capital in conservative climates. The principal leaders of the advisory label campaign in the 1980s were a prominent Democrat and a prominent Republican. Similarly, the current indecency crackdown has enjoyed broad bi-partisan support both in Congress and the FCC. The House indecency bill initially passed by a very large margin, and the two Democrats sitting on the FCC are even more enthusiastic about indecency regulation than the three Republicans.¹⁰²

While none of the factors described above singularly accounts for the indecency crackdown during 2004, the fact remains that the attack against controversial entertainment programming appears to be at least partially, if

99. *Id.* at 822. Tipper Gore is the wife of then-prominent Democratic Senator and future Vice President Al Gore, and Susan Baker is the wife of then-Treasury Secretary James Baker III. *Id.*

100. *Id.* at 822-27.

101. *Id.* at 827. Discussing the advisory label solution, Tipper Gore insisted that the campaign had “never been for anything but the voluntary system allowing people to make their own decisions. . . . We do not support any restrictions on sales or performances or anything.” *Id.*

102. For example, Democratic Commissioner Michael J. Copps agreed with the more strict profanity rule announced in the Commission’s Golden Globe Awards decision, but dissented in part on the grounds that the broadcasters should have been fined. *Complaints Against Golden Globe Awards*, *supra* note 34, at 4983. Commissioner Copps also dissented to the Commission’s determination that the material in the Off Centre case was not indecent. *Off Centre*, *supra* note 81, at *12. In addition, Democratic Commissioner Jonathan S. Adelstein dissented in part to the Commission’s settlement with Clear Channel, objecting to the dismissal of “pending but uninvestigated complaints.” *Clear Channel Settlement*, *supra* note 58, at 10,890.

not significantly, motivated by political considerations. This explains both the FCC's bright-line rule and its decision to focus on large media conglomerates and high-profile cases. By reacting strongly to clearly objectionable content (like the word "fucking" or an exposed breast), the FCC projects the image of being tough on indecency even as a large amount of sexual broadcasting goes unpunished. In addition, the enormous settlements with highly visible media giants such as Viacom and Clear Channel suggest to the public that the Commission is actively working with the entertainment industry to address the problem of indecency on the air. Politics also explain the sudden shift in focus to Howard Stern after the Super Bowl broadcast. A popular radio personality known for his crude humor, Stern was an easy target for a Commission wishing to establish itself as an enemy of indecency.

Given that indecency regulation involves the restriction of protected speech, it is problematic to leave enforcement subject to the political whims of the electorate and special interest groups. Indeed, the purpose of the First Amendment is to protect politically unpopular speech. Notably absent from the power structure controlling the indecency crackdown, however, is any sincere interest in fully promoting free expression. The Commission is not split between punishing indecency and permitting free expression; it is split between punishing indecency and *severely* punishing indecency. Accordingly, it once again falls to the courts to defend politically unpopular (though socially popular) speech from government regulation.

V. A CRITIQUE OF INDECENCY REGULATION

Given the political nature of indecency crackdowns like the one currently ongoing, indecency regulation is not simply a matter of balancing "the interests of the First Amendment with the need to protect our children," as former Chairman Powell claims.¹⁰³ Rather, it is a complex political process subject to interests of FCC Commissioners and pressure from outside interest groups. Given the fundamental expressive rights affected by this political posturing, the system must be closely scrutinized to ensure that legitimate public interests are being served by the government's heightened regulation of the broadcast media.

103. Clear Channel Settlement, *supra* note 58, at 10,887.

A. Parents Television Council: Overstating the Problem

By far the most significant defect in the regulation of indecency is the disproportionate influence of media watchdog groups such as the PTC¹⁰⁴ and Morality in Media (“MIM”)¹⁰⁵ over broadcast regulators. As noted above, the FCC relies entirely on viewer complaints to detect violations. Accordingly, groups such as the PTC can exercise substantial control over FCC enforcement by organizing large-scale complaint campaigns among their members. A recent estimate by the FCC shows that the PTC was responsible for 99.8% of indecency complaints in 2003, and 99.9% of indecency complaints unrelated to the Super Bowl through October of 2004.¹⁰⁶ This ability leads both to an overstatement of the problem of indecency and selective enforcement of indecency standards.

The PTC has capitalized on the ease of Internet communication to generate hundreds of thousands of FCC complaints. The front page of the PTC website features a prominent “File an FCC Complaint” link, leading to an online form which can be filled out on the website and transmitted directly to the FCC by clicking on a second link at the bottom of the page.¹⁰⁷ Thus, what once required paper, ink, and postage can now be accomplished with two clicks and less than a minute of typing.

In many cases, PTC members do not even have to visit the website to file a complaint. The PTC issues “e-alerts” to its 860,000 members via e-mail advising them of material which the PTC deems objectionable.¹⁰⁸ The alerts contain a description of the material (written by the PTC) along with a link to the online FCC complaint form described above.¹⁰⁹ Significantly, this creates an opportunity for hundreds of thousands of individuals to file detailed complaints with the FCC regarding programming they may not have seen or heard. In addition, because the members proceed based

104. See Parents Television Council, at <http://www.parentstv.org> (last visited Mar. 14, 2005).

105. See Morality In Media, at <http://www.moralityinmedia.org> (last visited Mar. 14, 2005).

106. Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK, Dec. 6, 2004, at http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1000731656.

107. *File an FCC Broadcast Indecency Complaint*, Parents Television Council, at <https://www.parentstv.org/ptc/fcc/fcccomplaint2.asp> (last visited Feb. 22, 2005).

108. Chris Baker, *TV Complaints to FCC Soar as Parents Lead the Way*, WASH. TIMES, May 24, 2004, at A01.

109. *Id.* Examples of e-alert headlines include “Graphic Depiction of Male Rape on The Shield. Take Action Now!”, “File a Complaint with the FCC about Sex-filled episode of ‘That ‘70s Show’”, and “CBS’s ‘Without a Trace’ features scenes of teen group sex during prime time—FILE YOUR COMPLAINT NOW.” *Id.*

on descriptions provided by the PTC, they may file complaints based on distorted or exaggerated characterizations of the actual broadcasts at issue. Accordingly, while a substantial portion of the U.S. population may feel strongly about regulating broadcast indecency, the PTC is able to convince these people that the problem is worse than it is.

Recent statistics indicate that the PTC is responsible for the overwhelming majority of FCC complaints, and that the complaints are rising dramatically. The FCC received 111 complaints in 2000.¹¹⁰ In 2002, the Commission received approximately 14,000 complaints.¹¹¹ The number continued to climb in 2003, with the FCC receiving more than 240,000 complaints that year.¹¹² Significantly, in both 2002 and 2003 only a few hundred complaints pertained to shows that the PTC was not actively targeting through its e-alerts.¹¹³ The success of the PTC's Internet campaign has led its founder and president, L. Brent Bozell III, to claim that "[PTC] members pay Mr. Powell's paycheck."¹¹⁴

The problem with the PTC's influence is not just that it overstates the indecency problem. The PTC's influence, coupled with the FCC's reactive approach to detecting violations, allows the PTC to channel the FCC's immense enforcement power toward programming that the PTC itself finds objectionable. This creates a strong possibility of selective prosecution, exacerbated by the PTC's political ties.¹¹⁵

The Howard Stern cancellation illustrates the problem of selective prosecution. A long-time adversary of Howard Stern, the PTC has consistently fought against the radio host and recently identified Howard Stern's upcoming move to satellite radio as "a serious victory for the defenders of decency on the public airwaves."¹¹⁶ Meanwhile, Stern has identified an episode of *The Oprah Winfrey Show* that contained material comparable to

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Although indecency determinations are theoretically governed solely by the FCC's implementation of the *Pacifica* standard, in certain cases the number of complaints appears to have factored into the analysis. For example, the Super Bowl decision explicitly states that the Commission received over 542,000 complaints regarding Janet Jackson's performance. Complaints Against Super Bowl, *supra* note 64, at *3 n.6.

114. Baker, *supra* note 108.

115. See Woodruff, *supra* note 62. Bozell is closely tied to the Republican party, having served as Pat Buchanan's national finance chairman during his 1992 Presidential campaign. *Id.*

116. L. Brent Bozell III, *Stern Sleaze in Space*, Parents Television Council, Oct. 7, 2004, at <http://www.parentstv.org/PTC/publications/lbbcolumns/2004/1007.asp>.

the Stern broadcast that produced the \$495,000 NAL against Clear Channel.¹¹⁷ The PTC apparently filed no complaints regarding the frank discussion of “oral anal sex” on *Oprah*. Whether the differential treatment was politically motivated is unclear, but the fact remains that the PTC’s selectivity translates directly into uneven enforcement by the FCC.

Influence over the FCC by family-oriented media groups is not a new phenomenon. The indecency crackdown in the 1980s was largely the result of concerted efforts by MIM, the National Federation of Decency, and the National Decency Forum.¹¹⁸ In addition, the *Pacifica* decision establishing the FCC’s authority to regulate indecency and profanity arose from an FCC complaint by a high-ranking member of MIM.¹¹⁹ However, while the participants in early movements engaged in complex negotiations with FCC commissioners and other political leaders, the PTC’s approach is to use the Internet to bombard the FCC with complaints every time its leaders find something objectionable on the air. This less measured approach increases the problem of allowing a politically unaccountable special interest group to have such control over a government enforcement agency.

Requiring the FCC to actively police the airwaves rather than relying on viewer complaints is not a practical solution to this problem. In addition, the PTC cannot (and should not) be prevented from making its voice heard. Nonetheless, the broadcast regulatory structure is clearly problematic, and therefore it becomes necessary to rethink the doctrinal underpinnings of indecency regulation.

B. Children and Indecency: The Role of Actual Harm

Government regulation of the broadcast media is most often justified by the need to protect children from indecent material. The broadcast media’s unique accessibility to children was one of the two factors that led the Court to uphold indecency restrictions in *Pacifica*.¹²⁰ Former FCC Chairman Michael Powell characterized the role of the FCC as balancing the First Amendment against the need to protect children.¹²¹ PTC presi-

117. *Oprah & Howard Transcripts: Oral, Anal & Balloon Knots*, HOWARDSTERN.COM, at <http://www.howardstern.com/oprah.php> (last visited Mar. 4, 2005).

118. Crigler & Byrnes, *supra* note 14, at 344-45. The role of these groups included “outlin[ing] the steps the FCC should take to crack down on ‘indecent’ programming and provid[ing] a legal analysis of the basis for proceeding.” *Id.* at 345.

119. Blanchard, *supra* note 95, at 809-10. The complaint was filed six weeks after the broadcast of the Carlin monologue, raising questions as to whether the complainant actually heard the monologue. *Id.* at 810.

120. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

121. *Clear Channel Settlement*, *supra* note 58, at 10887.

dent L. Brent Bozell III identifies the need to preserve childhood innocence as a key motivator behind his organization's activities.¹²²

This line of reasoning is supported by a line of Supreme Court cases allowing the government to prohibit the sale of certain materials to minors, even where the sale of such materials to adults is protected by the First Amendment.¹²³ In *Ginsberg v. New York*, the Court upheld a statute prohibiting the sale of pornography to minors, despite the fact that pornography is protected speech. Acknowledging that "the supervision of children's reading may best be left to their parents," the Court nonetheless determined that "the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them."¹²⁴ Significantly, the Court couched its approval of the state's regulation of protected speech in terms of "society's transcendent interest in protecting the welfare of children."¹²⁵ Accordingly, elsewhere in the opinion the Court explicitly conditioned the validity of such regulations on the conclusion that "it was rational for the legislature to find that the minors' exposure to such material might be harmful."¹²⁶ The Court in *Ginsberg* did not reach the issue of whether the material at issue was in fact harmful to minors since the defendant did not claim that it was not.¹²⁷ Given the arguably incomplete analysis of the harm issue in *Ginsberg*, a showing that there is no rational link between access to indecent material and harm to children would undermine the rule in *Ginsberg*.

The holding in *Ginsberg* that protected speech may be restricted to make it inaccessible to children was the principal support for the "unique accessibility" justification in *Pacifica*.¹²⁸ In explaining this justification, the *Pacifica* Court characterized *Ginsberg* as holding that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."¹²⁹ The Court said nothing about the additional language in *Ginsberg* suggesting that these justifications are prem-

122. Woodruff, *supra* note 62.

123. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

124. *Id.*

125. *Id.*

126. *Id.* at 639.

127. *Id.* at 635.

128. *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978)

129. *Id.* (quoting *Ginsberg*, 390 U.S. at 639-40).

ised on the legislature rationally determining that the restricted speech is actually harmful to children.¹³⁰

Since *Pacifica*, content regulation of broadcast media has proceeded on the assumption that indecent material is harmful to children without requiring factual support. Recent decisions, however, have emphasized the significance of showing actual harm to children in justifying restrictions on expression.

A dramatic example of this is *Ashcroft v. Free Speech Coalition*, in which the Supreme Court held that a statute prohibiting "virtual child pornography" was an unconstitutional infringement on free speech.¹³¹ Finding the causal link between virtual child pornography and actual child abuse to be "contingent and indirect," the Court struck down the statute for lack of a compelling interest justifying the speech restriction.¹³² While the *Free Speech Coalition* case did not address the sale or accessibility of virtual child pornography to minors, it is notable that the Court resisted the presumption that thematic depictions of child abuse were necessarily harmful.¹³³

Similarly, in *Denver Area Educational Telecommunications Consortium Inc. v. FCC*, the Court struck down an FCC provision imposing special regulations on indecent programming on public access stations.¹³⁴ Finding the factual findings in the legislative history inadequate to justify added restrictions aimed at protecting children from offensive programming, the Court held that "[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it."¹³⁵

The Court struck down another indecency-based FCC regulation in *Sable Communications of California, Inc., v. FCC*, which involved a

130. Ironically, the stated purpose of the controversial monologue in *Pacifica* was precisely to show that the objectionable words in question were "harmless," and that society's attitudes toward them were "essentially silly." *Id.* at 730. The Court addressed this argument in a cryptic footnote without identifying any harm beyond offensiveness. *Id.* at 746 n.22.

131. 535 U.S. 234 (2002).

132. *Id.* at 250.

133. For Fox's analysis of this case with regard to the harm requirement for speech restrictions, see Fox Opposition, *supra* note 69, at 21.

134. 518 U.S. 727, 766 (1996).

135. *Id.* Although the "harm" that the Court envisioned was the accessibility of indecent programming to children rather than any substantive harm arising out of that exposure, the Court's requirement of a factual record suggests a move toward requiring a more concrete basis for indecency regulation.

criminal ban on pornographic telephone services.¹³⁶ The Court found that Congress's "conclusory" consideration of the failures of less restrictive regulations to protect minors from pornographic phone messages was insufficient to justify an outright criminal ban.¹³⁷ Joining that part of the judgment but dissenting on other grounds, Justice Brennan stated that while "the Government has a strong interest in protecting children against exposure to pornographic material *that might be harmful to them* . . . a complete criminal ban on obscene telephonic messages for profit is 'unconstitutionally overbroad, and therefore invalid on its face, as a means for achieving this end.'"¹³⁸

A final example is *Interactive Digital Software Ass'n v. St. Louis County*.¹³⁹ There, the Eighth Circuit struck down a county ordinance prohibiting the sale of violent video games to minors. The court held that for such a restriction to be upheld based on psychological harm to children, the county "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."¹⁴⁰ The court held that the violent video game law was an unconstitutional restriction on free speech, finding that the asserted harms to minors were "unsupported in the record."¹⁴¹ Thus, courts have grown suspicious of content-based regulations that are premised on factually unsupported claims of harm to minors.

While FCC regulations are premised in large part on harm to children, none of the institutions leading the anti-indecency crusade have identified any actual harm caused by objectionable programming. Although numerous studies have addressed the effects of violent programming on children, the effects of indecency have not been seriously assessed.¹⁴² The need to make such an assessment was recognized by former Chairman Powell himself in his remarks to the Dole Institute in early 2004.¹⁴³ The fact that Powell called for such a study *after* announcing his strong anti-indecency stance highlights his somewhat backwards approach to policymaking.

136. 492 U.S. 115, 131 (1989).

137. *Id.* at 130-31.

138. *Id.* at 134-35 (Brennan, J., dissenting) (emphasis added).

139. 329 F.3d 954 (8th Cir. 2003).

140. *Id.* at 958.

141. *Id.* at 958-59.

142. A search of the Morality in Media website revealed numerous studies about violence and children, but none about indecency. A similar search of the Parents Television Council website returned a single news article describing a possible link between sexual television programming and increased sexual activity among minors. See Marilyn Elias, *TV Might Rush Teens into Sex*, USA TODAY, Sep. 7, 2004, at 9D.

143. See Lawhorn, *supra* note 42.

Rather than studying the facts and adjusting his course accordingly, Powell announced an agenda of protecting children from indecency before determining whether such a course was factually justified. Although Powell was able to launch the crackdown with popular support even without a factual basis, the FCC may have difficulty defending its activities against constitutional attacks going forward.

C. Reconsidering *Pacifica* in Light of Technological and Market Shifts

The FCC's authority over indecent broadcasting has come under fire by judges, commentators, and even the FCC itself. Critics have recognized that a significant defect in the Supreme Court's treatment of indecency regulation is the fact that much of the FCC's authority in this area traces back to decades-old technological evaluations that do not apply today.¹⁴⁴ Because technological developments have blurred the distinction between broadcast and non-broadcast electronic media, differing treatment of these forms of communication is no longer legally defensible.

The *Pacifica* rationale was called into question by Chief Judge Edwards of the D.C. Circuit in the 1995 case of *Action for Children's Television v. FCC*.¹⁴⁵ In that case, an *en banc* panel of the D.C. Circuit upheld the FCC's daytime ban on indecent material. In a scathing dissent, Chief Judge Edwards questioned both the legitimacy of restricting indecency without a finding of actual harm to children and the reduced First Amendment protection of broadcasters. Chief Judge Edwards noted that "[f]or years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a 'unique characteristic' that should make any difference in terms of First Amendment protection."¹⁴⁶ Chief Judge Edwards also noted that broadcast is no more pervasive than cable, especially considering the fact that an increasing majority of American homes subscribe to cable television.¹⁴⁷ Finding no legally defensible distinction between broadcast and cable, Chief Judge Edwards concluded that *Pacifica* is a "flawed decision" and

144. Viacom argues this point as well in their general constitutional challenge to the FCC's indecency regulations. Viacom Opposition, *supra* note 66, at 58-61.

145. 58 F.3d 654 (D.C. Cir. 1995) (*en banc*).

146. *Id.* at 675 (Edwards, C.J., dissenting).

147. *Id.* at 676 (Edwards, C.J., dissenting).

that broadcasters should be entitled to the full First Amendment protection enjoyed by cable.¹⁴⁸

The technological underpinnings of the *Pacifica* decision have also been questioned by the FCC itself. As early as 1987 the FCC determined that “the standard [of reduced First Amendment protection for broadcasters] applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.”¹⁴⁹ In particular, the FCC found that the “constitutional principles” promulgated in *Red Lion* and *Pacifica* “were developed for a telecommunications market that is markedly different from today’s [1987] market.”¹⁵⁰ While the Supreme Court has yet to accept the prior FCC invitation to change the law, the technological developments that rendered the *Pacifica* standard obsolete in 1987 are certainly more compelling today.

This sentiment persisted within the FCC through its 2001 release of *Industry Guidance*, when then-Commissioner Harold Furchtgott-Roth filed a concurrence in which he too questioned the validity of the FCC’s indecency authority.¹⁵¹ While acknowledging that the Commission’s policy statement “establishes necessary boundaries for this elusive and highly subjective area of law,” Furchtgott-Roth suggested that “Commission action to enforce the indecency guidelines would set the stage for a new constitutional challenge regarding [the FCC’s] authority to regulate content.”¹⁵² Like Chief Judge Edwards in *Action for Children’s Television*, Furchtgott-Roth claimed that technological developments have rendered the current broadcast restrictions archaic and obsolete. In particular, Furchtgott-Roth cited the decreasing dominance of broadcast media in light of the video marketplace’s “abundance of programming, distributed by several types of content providers,” along with the evolution of a “competitive radio marketplace.”¹⁵³ In light of these “market transformations,” Furchtgott-Roth concluded that “broadcast content restrictions must be eliminated.”¹⁵⁴

148. *Id.* at 676-77 (Edwards, C.J., dissenting). The Supreme Court has held that cable television, unlike broadcast television, is entitled to full First Amendment protection. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 639 (1994).

149. *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5053 (1987).

150. *Id.*

151. *Industry Guidance*, *supra* note 16, at 8017.

152. *Id.*

153. *Id.*

154. *Id.*

As recognized by Chief Judge Edwards and past FCC Commissioners, the rise of cable and satellite television has rendered greater restrictions for television broadcasters obsolete. A similar market shift appears imminent in radio. Embattled radio host Howard Stern has announced that he is leaving broadcast and joining Sirius satellite radio in 2006, a move that many believe will transform the fledgling satellite radio industry into an equal (if not dominant) competitor with broadcasters.¹⁵⁵ Thus, the “competitive radio marketplace” that Furchgott-Roth identified in 2001 continues to evolve today.

As non-broadcast stations increase in number and popularity, the *Pacifica* rules give broadcasters a severe competitive disadvantage. Indeed, cable and satellite stations appear to be making the most of the broadcast crackdown. For example, the highly sexual HBO series *Sex and the City* can now be seen weekday evenings on TBS, a basic cable network. While much of the original graphic sexuality is edited out of the TBS version, the sexual themes remain largely intact, as does some of the profane language. In addition, XM Radio (a Sirius competitor) has signed controversial radio duo Opie and Anthony, who were driven from their New York broadcast station after allegedly broadcasting the sounds of two people having sex in St. Patrick’s Cathedral.¹⁵⁶ The satellite radio industry is already benefiting from these recent developments. Sirius announced in late November that it had topped 800,000 subscribers, and its stock has nearly doubled since the announcement that Howard Stern will be joining Sirius in 2006.¹⁵⁷ Given the likely future success of these programs, tying the hands of broadcasters as cable programmers enjoy comparable freedom is hardly justifiable.

VI. CONCLUSION

The technological underpinnings of the *Pacifica* decision have been rendered more or less obsolete by advances in communication technology and other changes in the way media programming is transmitted. These technological shifts, coupled with the dearth of evidence that indecent programming is actually harmful to children, calls into question the viability of decreased protection for broadcasters in the indecency realm. The FCC’s enforcement procedures are incompatible with current communica-

155. Scott Collins, *Stern Vows He’ll Rise Above FCC*, L.A. TIMES, Oct. 7, 2004, at A1.

156. Sabrina Tavernise, *The Broad Reach of Satellite Radio*, N.Y. TIMES, Oct. 4, 2004, at C8.

157. *Sirius Says Its Subscribers Top 800,000*, N.Y. TIMES, Nov. 24, 2004, at C7.

tions technology and have been severely manipulated by the Parents Television Council, a situation which has produced unprincipled enforcement of indecency laws and an atmosphere of chilled expression in the broadcast industry. Vesting so much power in an agency which has little accountability and is easily manipulated by political pressure cannot be justified in the context of expressive rights. This abuse, along with the waning justification for decreased First Amendment protection on the air, calls into question the validity of the entire broadcast regulatory regime as applied to constitutionally protected speech. Because cable television and satellite radio enjoy comparable freedom with respect to indecent content, and because these forms of media have become increasingly competitive in the entertainment industry, the time has come to revisit the *Pacifica* rationale and restore full First Amendment protection to radio and television broadcasters.

