HEAR AN [EXPLETIVE], THERE AN [EXPLETIVE], BUT[T] . . . THE FEDERAL COMMUNICATIONS COMMISSION WILL NOT LET YOU SAY AN [EXPLETIVE]

COURTNEY LIVINGSTON QUALE*

I. AN OVERVIEW

Broadcast television and broadcast radio[2] are integral parts of American society. So integral, in fact, that often these mediums are taken for granted. To many Americans, broadcast television and broadcast radio are one of the few free things left in life. Anyone

broadcast content over the public airwaves. Too many Americans have forgotten the maxim reminding people that free things usually come at a price.

Although many broadcast television viewers, broadcast radio listeners, and broadcast organizations may not directly perceive the price associated with "free" broadcasting, the indirect effects of a governmental agency's adoption of numerous rules and regulations have most definitely affected broadcast television's and radio's content.[3] This affect has resulted in many individuals and broadcasters alike questioning whether the regulatory practices implemented by a certain governmental agency have effectively—although indirectly—resulted in the censorship, if not the self-censorship, of broadcast television and broadcast radio programming. However, referring back to the U.S. Constitution, the U.S. government is not allowed to outright censor broadcast television's and broadcast radio's content.[4]

Thus, the ultimate price that both broadcasters and broadcast audiences alike pay for the use of the public airwaves is that of having to enjoy government filtered broadcast programming. But the ultimate follow up question is why? What is so special about broadcast television and broadcast radio that allows a governmental body to control what would seemingly qualify as First Amendment speech? The answer is the electromagnetic spectrum. It is over this spectrum that broadcast signals are transmitted and ultimately received by radios and antennae televisions across the United States. It is also because of this electromagnetic spectrum that Congress established the Federal Communications Commission ("FCC" or "Commission"),[5] providing the government with a means to protect the spectrum and monitor the content transmitted over its airwaves.

Simply put, it is part of the everyday American lifestyle to listen to broadcast radio and watch broadcast television. These two modes of communication have been around since the turn of the last century, resulting in almost everyone now taking them for granted; everyone, that is, except the United States government and the FCC. And perhaps it is because these two modes of communication are so

3. Milagros Rivera-Sanchez,

present in everyday American society that everyday American society has, as a result, unknowingly automatically conferred constitutionally protected First Amendment status to the speech that is transmitted over the electromagnetic spectrum. However, the FCC has made it clear to broadcast licensees—the holders of FCC licenses, with which broadcasters are allowed to use the public airwaves for broadcasting purposes—that broadcasting television and radio programs over the (public) electromagnetic spectrum is a privilege, not a right.[6] Like driving, with this privilege comes certain obligations and responsibilities, namely complying with the FCC or facing the risk of paying hundreds of thousands of dollars in fines and the revocation of one's broadcasting license.[7]

Today, broadcasting networks such as the American Broadcasting Company ("ABC"), the network formerly known as the Columbia Broadcasting System ("CBS"), the National Broadcasting Company ("NBC"), the Fox Broadcasting Company ("FOX"), and the Public Broadcasting Service ("PBS") live in constant fear that they will be assessed a Forfeiture Penalty, a monetary fine imposed by the FCC for failing to meet the Commission's broadcasting standards.[8] And these broadcasters' fears are real because recently the Commission has been overturning FCC precedent and more aggressively assessing Forfeiture Penalties and issuing Notices of Apparent Liability ("NAL") against broadcasters.

In early 2004, the Commission found that NBC's airing of the 2003 Golden Globe Awards Program violated the FCC's indecency standards.[9] During the show, the Foreign Press Association presented the band U2 with the Golden Globe award for "Best Popular Song."[10] Bono accepted the award and said, "This is really, really fucking brilliant."[11] Although the Commission concluded that NBC violated FCC's indecency standards, it did not assess a Forfeiture Penalty against NBC because it also found that NBC lacked sufficient notice

6. *See* Red Lion Broad. v. FCC, 395 U.S. 367, 377 n.5 (1969).

7. *See* 47 C.F.R. § 1.80 (2007) (imposing forfeiture penalties for failing to comply with the Communications Act of 1934).

8. *See* discussion *infra* Part IV (detailing specific accounts of broadcasters engaging in self-censorship to avoid potential FCC penalties).

9. *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the 005 Tc0.24532 TDpn3 also f.s Bhfe.5Amply with

of the FCC's new "fleeting expletive" policy.[12] Shortly after the Golden Globes incident, the FCC issued a $550,000 NAL against Viacom, Inc., the owner of CBS and MTV,[13] for its airing of the 2004 Super Bowl Halftime Show in which Janet Jackson's bare breast was revealed for a fraction of a second—to be specific, 19/32 of a second.[14]

Additionally, a few months later, the Commission found that FOX's April 2003 airing of the *Married by America* program violated the FCC's indecency standards and subsequently imposed a $1,183,000 NAL against FOX.[15] *Married by America* was FOX's latest reality television show, through which the public selected potential spouses for the show's contestants.[16] As part of the program,[17] FOX gave the final two contestant couples bachelor and bachelorette parties,[18] which included strippers attempting to "lure participants into sexual activities."[19] Aware that the display of the strippers' sexual organs would violate FCC obscenity standards, FOX used pixilation to blur out images of the strippers' exposed breasts

12. *Id.* at 4982. *See also* Lindsay LaVine, *The Lion, the Witch (Hunt), and the Wardrobe Malfunction: Congress's Crackdown on Television Indecency*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 385, 388 (2005) (finding that the network received little more than "a slap on the wrist" because the Commission in the end did not levy fines against the network). The Commission's fleeting expletive policy derives itself from Justice Powell's concurrence in the *Pacifica* case. There he stated that the *Pacifica* holding did not "speak to cases involving the isolated use of a potentially offensive word during the course of a radio broadcast," as compared to Carlin's monologue, which included the continued and extended use of various expletives over its twelve-minute broadcast. Justice's Powell's concurrence distinguished "verbal shock treatment" from the isolated—or fleeting—use of expletives during a broadcast. This differentiation established which protected, but otherwise indecent, speech the

and genitals.[20] However, the Commission found that such actions did not take away from the suggestive nature of the program, which it found rose to the level of indecency.[21] The Commission concluded:

> [P]ixilation does little to obscure the overtly sexual and gratuitous nature of the bachelor/bachelorette party scenes. These scenes show, for example, partially clothed strippers, such as a topless woman with her breasts pixilated, straddling a man in a sexually suggestive manner; two partially clothed female strippers kissing each other above a male; two partially clothed strippers rubbing a man's stomach; a male stripper about to put a women's hand down the front of his pants; and a man in his underwear on all fours being spanked by two topless strippers. The scenes also show one of the bachelorettes straddling and touching a topless female stripper and then licking whipped cream off the stripper's stomach and bare chest while the stripper holds her own breasts. Although the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown.[22]

More recently, during the September 2007 airing of the 59th Primetime Emmy Awards, FOX "aired [sic] on the side of caution . . . when it came to the questionable language of presenters and winners alike."[23] Because FOX thought that "some language during the live broadcast may have been considered inappropriate by some viewers. . . . [FOX]'s broadcast-standards executives determined it appropriate to drop sound during those portions of the show."[24] To protect sensitive viewers, FOX also cut away to an image of a "Disco Censor-Ball" hovering high above the stage whenever presenters or winners ventured into questionable statements.[25]

---

20. *Id.*

21. *Id.*

22. *Id.* Pixilation has been used in the past to protect broadcasters from FCC obscenity and indecency violations, so the question becomes, why now? What was so different about this particular broadcast and its use of pixilation that made it rise to the level of a FCC indecency violation? *See* discussion *infra* Part III.B.2.

23. Cristina Kinon, *Fox's Censor Sensibility: Curses Foiled Again at Emmys*, N.Y. DAILY NEWS, Sept. 18, 2007, *available at* http://www.nydailynews.com/entertainment/tv/2007/09/18/2007-09-18_foxs_censor_sensibility_curses_foiled_ag.html.

24. *Id.* Note that here the sensitivities of the few dictated the content of what the many were able to watch. *See* discussion *infra* Part III.B.2.

25. *Id.*; Lisa de Moraes, *Emmy Awards: The Stars Showed Up. The Viewers Didn't.*, WASH. POST, Sept. 18, 2007, at C07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/17/AR2007091701806.html (last visited Nov. 25, 2008).

Specifically, FOX muted the sound and cut away to the "Disco Censor-Ball" when Ray Romano recalled how television had changed since he had last been on the air, specifically noting that "Frasier is screwing my wife?'"[26] Although the joke brought laughs to the live Shrine Auditorium audience, the television viewers only heard "Frasier is—."[27] When Katherine Heigl accepted her award for "Outstanding Supporting Actress in a Drama Series," she only mouthed an expletive, yet FOX once again muted its audio and cut away to its pre-recorded shot

broadcast—leaving the entirety of Canadian and international simulcasts uncensored and without time delays.[33]

With the Commission taking such aggressive actions against

whether the Federal Communications Commission has overstepped its regulatory authority and, in laymen's terms, determine whether the Federal Communications Commission continues to make sense.

II. A QUICK GLIMPSE AT THE HISTORY OF BROADCAST

Dr. Frank Conrad, Westinghouse established a regularly transmitting radio station—KDKA.[43] On November 2, 1920, KDKA achieved the nation's first commercial "broadcast."[44] Soon after this broadcast KDKA became a huge hit and within four years, over six hundred commercial radio stations were transmitting programming across the United States.[45] Shortly after individual radio stations adopted programming, broadcast networks—consisting of local stations—began to develop shared radio programming.[46] In 1926, the Radio Corporation of America ("RCA") formed the first national, as opposed to regional, network—the National Broadcasting Company.[47] The National Broadcasting Company's first nationwide, transcontinental broadcast was the 1927 Rose Bowl football game between Stanford and Alabama.[48] Due to radio's new-found audience reach and revenue potential, it was quickly recognized as a significant, influential, and highly profitable business.[49]

However, this burgeoning nationwide radio industry quickly became too popular. The spectrum over which radio signals were broadcasted was simply not large enough to accommodate everyone who wanted to use it because there was a "fixed natural limitation

43. *Id.*

44. *Id.* Coincidentally, not only did Dr. Conrad help create the nation's first commercial broadcast, but he also coined the term "broadcast" itself. *Id.* The nation's first commercial broadcast took place on election day and was used to prove the power of radio, in that people could hear KDKA's results of the Harding-Cox presidential race before they could read the results in the newspaper. *Id.*; KDKA Newsradio 1020, KDKA History, http:// www.kdkaradio .com/pages/15486.php (last visited Oct. 14, 2008).

45. *KDKA Begins to Broadcast*, *supra* note 36.

46. *Id.*

47. *Id.*

48. *Id.* Both teams entered the 1927 Rose Bowl game with undefeated seasons, and both

upon the number of stations [which could] operate without interfering with one another."[50] The world of radio, which was once silent and barren, was becoming a chaotic cacophony full of confusion.[51] Initially, stations could broadcast over any frequency they so chose, regardless of the interference it caused other broadcasting stations.[52] To overcome this resulting interference, the adversely affected stations would increase the power to their own broadcast frequencies, thereby overpowering the original interfering radio station's signal.[53] This situation became so bad that "nobody [on the air] could be heard."[54] To combat the chaos, Congress passed the Radio Act of 1927.[55] The Radio Act of 1927 created the Federal Radio Commission, which was composed of five members who had wide regulatory powers and distributed broadcasting licenses.[56]

But as soon as radio became popular, it also became mundane, inspiring scientists to move on to the next new mode of communication and electromagnetic spectrum utilizing technology—television. In 1923, a man by the name of Vladimir Zworykin, nicknamed the "father of television," applied for a television-esque patent; specifically, Zworykin applied for a patent for a television camera that could convert optical images into electrical pulses.[57] By 1930, Zworykin had developed a receiver for his television camera and demonstrated his system to RCA.[58]

By the 1930s electronic television broadcasts were occurring all over the world. In 1932, the British Broadcasting Company ("BBC") created the first regularly broadcasted television programs.[59] In 1935, while Germany built the first special-purpose television station in preparation for the 1936 Berlin Olympic Games, NBC experimented

50. Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 299 (1998) (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 213 (1943)).

51. *See id.* at 298–99 (citing *Nat'l Broad. Co.*, 319 U.S. at 212).

52. *Nat'l Broad. Co.*, 319 U.S. at 212.

53. *Id.*

54. *Id.*

55. 47 U.S.C. § 81 (2000), *repealed by* 47 U.S.C. § 151 (2000).

56. *Nat'l Broad. Co.*, 319 U.S. at 213.

57. *See generally A Science Odyssey: People and Discoveries—Television Is Developed*, PUB. BROAD. SERV., http://www.pbs.org/wgbh/aso/databank/entries/dt26tv.html (last visited Nov. 25, 2008).

58. *Id.*

59. *Id.*

with electronic broadcasts from atop the Empire State Building.[60] Additionally, in 1937, BBC broadcasted the first live journalistic event covered by television—the coronation of King George VI.[61] It was also in the 1930s that America first experienced the influence television could have over society, through the emergence of mass media and a unified mass culture.[62] As a result of broadcast television's initial development and rapid growth, the U.S. government eventually stepped in, and by passing the Communications Act of 1934, it expanded the Radio Act of 1927 to encompass the new and emerging television technology.[63]

WLR45-2_Q

1912, which gave the U.S. Secretary of Commerce the authority to award broadcasting licenses and assign spectrum frequencies to licensees.[75] U.S. governmental regulation over the electromagnetic spectrum expanded with the adoption of the Radio Act of 1927, in which Congress recognized the importance of radio and realized the need to control the use of the electromagnetic spectrum—control that the Radio Act of 1912 did not allow.[76] The Radio Act of 1927 also led to the creation of the Federal Radio Commission ("Radio Commission") and transferred the power to regulate the electromagnetic spectrum from the U.S. Secretary of Commerce to the Radio Commission.[77] U.S. governmental regulation over the electromagnetic spectrum peaked with the passage of the forward-thinking Communications Act of 1934.[78] In the Communications Act, Congress transferred the power to regulate the electromagnetic spectrum and broadcast media from the Radio Commission to the Federal Communications Commission.[79]

History shows that the U.S. government has attempted to regulate the electromagnetic spectrum since the turn of the twentieth century.[80] However, the regulatory authority Congress has granted to the Federal Communications Commission remains decidedly ambiguous.[81] Attempting to combat this ambiguity, Congress and the United States Supreme Court have, over the years, struggled to provide rationale and reasoning for the Commission's content-based regulation of broadcast media transmissions.[82] Thus far, Congress and the courts have used a combination of two arguments to establish the Commission's authority to regulate the electromagnetic spectrum and broadcast media: the limited spectrum argument and the public interest argument.[83] In the first subsection, the article presents these two arguments and how they support the FCC's regulatory authority

75. *Id.* at 182.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* at 181.

81. *See id.* at 181–83.

82. *See* 47 U.S.C. § 151 (2000); *see, e.g.*, Red Lion Broad. v. FCC, 395 U.S. 367 (1969); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

83. Rivera-Sanchez, *supra* note 3, at 183–85 (citing *Red Lion Broad.*, 395 U.S. 367; *Nat'l Broad. Co.*, 319 U.S. 190).

over broadcast media. In the second subsection, the article will discuss criticisms of these two arguments.

1. Regulatory Authority Arising from the Scarce Nature of the

went on to concede substantial deference to the Commission's public interest mandate—effectively giving the Commission unrestrained power—when it stated that the Court's "duty [wa]s at an end when [the Court found] that [the Commission's actions were] based upon findings supported by evidence, and [were] made pursuant to authority granted by Congress," i.e., made pursuant to the public interest mandate.[98] The Court concluded by stating that "it [wa]s not for [the Court] to say that the 'public interest' [would] be furthered or retarded by [the Commission's regulations]," even though it was and

general reference to public welfare" when making its determinations as to whether a broadcaster was serving the public interest.[104]

The Supreme Court gave life to the Commission's regulatory authority over broadcast media through a combination of the Communication Act's public interest mandate and the notion that the electromagnetic spectrum is a limited and scare public resource. Therefore, because radio frequencies are scarce, the U.S. government is permitted to regulate broadcasters so as to ensure that broadcasters' use of the frequencies serve the public interest.[105] In *National Broadcasting*, the Court attempted to explain its rationale for supporting the content-based regulation of the broadcast media when it declared, "Freedom of utterance is abridged to many who wish to use the limited facilities of [broadcast]."[106] The Court continued, "Unlike other modes of expression, [broadcast] inherently is not available to all."[107] Recognizing this "unique characteristic," the Court explained, "[T]hat is why, unlike other modes of expression, [broadcast] is subject to governmental regulation."[108] Coalescing all of its arguments, the Court concluded by holding that because broadcast cannot be used by all, the Commission is empowered to regulate those who do use the electromagnetic spectrum through leased radio frequencies, so long as the Commission's regulations fall within the "statutory criterion of 'public interest.'"[109]

After

media, the Court took up *FCC v. Pacifica Foundation*.[110] In *Pacifica*, the Court yet again faced challenges to the Commission's authority to subject broadcast media to content-based regulation.[111] The Court responded to these challenges by recognizing that "each medium of expression present[ed] special First Amendment problems" and that although the reasons for these distinctions were complex, the end result was that broadcasting received the most limited First Amendment protection.[112] Taking into account this limited First Amendment protection, the Court further explained its support for the FCC's (content-based) regulation over broadcast media:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program

By applying the aforementioned rationales, the Court concluded that "the FCC could, consistent with the First Amendment, regulate indecent material like the Carlin monologue."[114] However, the *Pacifica* Court emphasized that its holding was narrow: "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the

> scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Id. at 731 n.2 (internal citations omitted). Although the Court's concerns over the ease with which children could obtain access to potentially indecent broadcast material were found to be compelling in 1978, in 2008, children not only have relatively easy access to potentially indecent programs aired on broadcast television and radio, but also those aired on cable and satellite television and found on the Internet, whose mediums are not regulated by the FCC. *See* Adam Liptak, *Must It Always Be About Sex?*, N.Y. TIMES, Nov. 2, 2008, at WK4.

114. Fox Television Stations v. FCC, 489 F.3d 444, 448 (2d Cir. 2007) (explaining, concisely, the *Pacifica* holding). A partial transcript of comedian George Carlin's infamous monologue is as follows:

> Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, ... and it came down to seven but the list is open to amendment, ... The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. . . . Then you have the four letter words from the old Angle-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude,

pig is obscene."[115] Further narrowing its holding, Justice Powell's concurrence emphasized the fact that the expletive language at issue in Pacifica's broadcast of Carlin's speech had been "repeated over and over as a sort of verbal shock treatment" and that this "verbal shock treatment" was distinguishable from "the isolated use of a potentially offensive word in the course of a . . . broadcast."[116]

When forced to confront the potential negative side effects associated with regulating speech based upon its content, i.e., the possible "chilling effect of broadcasters' exercise of their rights" resulting from the FCC's "indecent"[117] definition being too vague,[118] the Court quickly dismissed the idea, mostly because it felt that any chilling effect would be "tempered by the Commission's restrained enforcement policy."[119] The Court, perhaps naively, reasoned:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. . . . The danger dismissed so summarily in *Red Lion*, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort."[120]

By refusing to acknowledge the possibility of broadcasters' self-censorship directly resulting from the potentially vague and discretionary enforcement of the FCC's indecency regulations, the Court failed to foresee the problems that could arise when, and if, the FCC no longer maintained its prescribed "restrained enforcement policy."[121]

---

115. *Pacifica*, 438 U.S. at 750–51.

116. *Id.* at 757–61 (Powell, J., concurring).

117. *Id.* at 761 n.4; *see* discussion *infra* Part III.B (defining "indecent," providing examples of the Commission's enforcement practices with regard to its indecency policy, and offering critiques of the Commission's indecency enforcement practices).

118. *Pacifica*, 438 U.S. at 761 n.4.

119. *Fox Television Stations*, 489 F.3d at 450 (quoting Action for Children's Television v. FCC, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) (citing *Pacifica*, 438 U.S. at 761 (Powell, J., concurring)), *superseded in part by* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1988)).

120. *Pacifica*, 438 U.S. at 743 (majority opinion) (internal citations omitted).

121. *Fox Television Stations*, 489 F.3d at 450 (quoting *Action for Children's Television*, 852 F.2d at 1340 n.14 (citing *Pacifica*, 438 U.S. at 761 (Powell, J., concurring)); *see*

Moving on to the public interest argument, when determining whether a broadcast qualifies as indecent, the Commission asks whether "in context, [the material] depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium."[136] The Commission defines "contemporary community standards" as the standards "of an average broadcast viewer or listener and not the sensibilities of any individual complainant."[137] However, it is the through the individual complainant—or single public interest group—that the Commission commences its obscenity, indecency, and profanity inquiries.[138] Initially, members of the general public submit complaints about broadcast material they find offensive, then FCC staffers review the complaints to see if a violation of FCC regulations has taken place.[139] The problem with this complainant initiated process is that at no point in time are the sensibilities of the average broadcast viewer or listener ascertained or applied.[140] Instead, "contemporary community standards" become solely what organized interest groups, FCC staffers, and FCC Commissioners find patently offensive.[141] As a result, the FCC appears to have created a system that effectively disregards the average broadcast viewer's or listener's opinion of what it would consider to be obscene, indecent, or profane.[142] By doing this, the FCC has distanced itself from its public interest mandate and authorization to regulate the broadcast media.

Although the Court has recognized that the arguments supporting the Commission's authority to regulate the broadcast media have been problematic, the Court has been unwilling to abandon or weaken the public interest and scarcity of the spectrum arguments that, in combination, give life to the FCC's content-based regulation of the broadcast media. The reason for this unwillingness most likely arises from the fact that without either of these two arguments, the Court

136. FCC v. Pacifica Found., 438 U.S. 726, 731–32 (1978); Kurt Hunt, Note, *The FCC Complaint Process and "Increasing Public UnenoLour3d5 or*

would be unable to support the Commission's authority to regulate the broadcast media; and without this authority, the Commission's content-based regulations over broadcasters' speech would be in violation of the First Amendment.

While challenging both the Court's and Congress' limited spectrum rationale is an important step in determining whether the Federal Communications Commission continues to make sense, a more noteworthy challenge to the FCC and its content-based regulation of the broadcast media is through questioning whether the Commission's regulations truly comply with the Commission's public interest mandate. Upon a closer inspection of the Commission's regulations and enforcement practices, one may observe that it is the select public interest groups, and rarely the general public, who truly benefit from the FCC's regulations over broadcast media.

B. The Federal Communications Commission's Regulatory Enforcement Practices

Congress established the Federal Communications Commission to "make such rules and regulations and prescribe such regulations and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act]."[143] The only caveat in this grant of authority was that the Commission's regulations were required to serve the public interest.[144] In this regard, the Supreme Court has given great deference to the regulations that the Commission uses to regulate the broadcast media.[145]

Over the years, the Commission has created many regulations;[146] however, this article will not discuss each and every one. Instead, the focus of this article is to question the legitimacy of the Commission's obscenity, indecency, and profanity regulations—specifically, regulations highlighted in *FCC v. Pacifica Foundation* and recent Commission rulings, i.e., those associated with the *Golden Globes* and *Married by America* broadcasts. In the first subsection, this

143. 47 U.S.C. § 303(r) (2000).

144. 47 U.S.C. § 303.

145. *See* discussion *supra* Part III.A (discussing the Commission's authority to regulate the broadcast media); *see, e.g.*, Fox Television Stations v. FCC, 489 F.3d 444, 454–62 (2d Cir. 2007).

146. *See, e.g.*, Red Lion Broad. v. FCC, 395 U.S. 367 (1969) (the Commission's fairness doctrine regulation); Nat'l Broad. Co. v. U.S., 319 U.S. 190 (1943) (the Commission's chain broadcasting regulations).

article will present the Commission's obscenity, indecency, and profanity regulations. Then, in the second subsection, the article will present and discuss case studies detailing the Commission's enforcement practices related to its obscenity, indecency, and profanity regulations. Specifically, the second subsection will examine the subjectiveness of the Commission's obscenity, indecency, and profanity regulations when compared to other, more objective, obscenity tests, i.e., *Miller v. California*,[147] the influenceability of the Commission with regard to its issuance of Notices of Apparent Liability, and how the Commission's complaint process has, to some extent, become a heckler's veto, which the Supreme Court has held in other contexts to be a violation of the First Amendment.[148]

1. Obscenity, Indecency, and Profanity Regulations Adopted by the Federal Communications Commission

The Federal Communications Commission has found that it has

out the provision of this chapter.[150]

Section 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[151] Combining these statutes, the Commission has found that it is a "violation of federal law to air obscene programming at any time."[152] In addition, the Commission has found that it is a "violation of federal law to air indecent programming or profane language during certain hours."[153] Although many broadcasters have challenged the Commission's definition of obscene, indecent, and profane language, claiming that the definitions are overly broad,[154] the Court has continued to uphold the Commission's obscenity, indecency, and profanity regulations.[155] A more detailed review of the Commission's obscenity, indecency, and profanity regulations is as follows.

Because the First Amendment does not protect obscene speech,

by contemporary community standards for the broadcast medium."[165] The Supreme Court has supported the Commission's indecency definition, agreeing that indecent speech includes patently offensive language, though not necessarily obscene language, which violates the contemporary community standards for the broadcast medium

Commission's Enforcement Bureau, explained how the Commission examines an indecency complaint once it has been determined that the program in question was aired neither on cable or satellite, nor during the safe harbor period of 10:00 p.m. to 6:00 a.m.:

> The first thing we look at is: does the broadcast involve "sexual or excretory organs or activities?" This is what we call, essentially, the subject matter scope of our indecency analysis. Usually, before we even get started we pretty much know that without even going into it.
>
> But the second part is really the heart of the indecency analysis, and that is: was the broadcast "patently offensive based on contemporary community standards?" This is an area where I think much of the debate about whether broadcasts are indecent or not actually occurs.
>
> The "patently offensive" analysis is really broken up into three parts. It is a balancing test. Three factors: first, was the broadcast

ever met before.[201] The April 7th broadcast focused on the two remaining couples' bachelor and bachelorette parties in Las Vegas, Nevada.[202] During this episode, FOX showed scenes of partially clothed strippers, with pixilated breasts, and a bachelorette straddling and touching a topless female stripper, while licking whipped cream off the stripper's stomach and bare chest, all while the stripper was holding her own breasts.[203] When *Married by America* aired, it had a viewing audience of approximately 7,500,000 viewers.[204] Out of the more than seven million viewers, the FCC received only 159 public complaints claiming the broadcast showed indecent material.[205]

Upon review, the Commission found that even though FOX pixilated exposed sexual organs, the pixilation did little to "obscure the overtly sexual and gratuitous nature" of the scenes.[206] In the end, the Commission concluded that although the "nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown."[207] This decision—the finding that pixilated nudity could still violate FCC indecency regulations if the sexual meaning was inescapable—was the first time the Commission had found the pixilation of nudity indecent.[208] Because the Commission found the sexual nature of the broadcast inescapable, it disregarded the fact that the bachelor and bachelorette scenes comprised only six minutes of a one hundred and twenty minute long broadcast and concluded that the "material plainly dwell[ed] on matters of a sexual nature," and therefore, the broadcast was "intended to pander to and titillate the audience."[209] Considering all factors of the Commission's indecency test, the Commission found

201. *Married by America*, *supra* note 15, at 20191.

202. *Id.*

203. *Id.* at 20194.

204. trivialTV, http://trivialtv.blogspot.com/ (last visited Nov. 25, 2008) (search "04/07/2003" in the "Find TV Schedule" box, which will lead to a schedule showing the Nielson ratings for *Married by America*).

205. *Married by America*, *supra* note 15, at 20191.

206. *Id.* at 20194.

207. *Id.* The more pertinent question, though, is when bare breasts are pixilated, does anyone, at any time, believe that the woman is not topless? A slightly more interesting question is whether pixilated bare breasts are truly any different from barely-there string bikini covered breasts? Applying FCC logic, barely covered breasts must not have an inescapable sexual nature because these types of breasts do not appear to violate the FCC's indecency regulations, whereas pixilated bare breasts do violate the FCC's indecency regulations, because of their inescapable sexual nature.

208. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1094.

209. *Married by America*, *supra* note 15, at 20191.

the broadcast to be "patently offensive as measured by contemporary community standards for the broadcast medium, and [wa]s therefore indecent."[210] In the Commission's Notice of Apparent Liability, the Commission proposed a $7,000 Forfeiture Penalty against each FOX

Michael Powell "told Congress the agency was about to embark on an aggressive enforcement campaign."[218]

In addition to the Commission's departure from precedent and lack of objective tests to determine when material rises to the level of indecency, the Commission's decisions illustrate how its enforcement practices have been influenced by the sensibilities of individual complainants instead of the sensibilities of the contemporary community.[219] More specifically, the Commission has allowed the Parents Television Council to influence its indecency decisions instead of applying its obligatory higher standard of review[220] that requires the Commission to employ contemporary community standards for the broadcast medium when making indecency findings.[221] Furthermore, these standards are to be comprised of the average broadcast viewer or listener, not of five Federal Communications Commission Commissioners, nor members of the Parents Television Council.

In *Married by America*, even though the FCC received 159 complaints, all but four of the complaints were identical, i.e., generated from the same web site, and only one complainant had professed to have actually watched the program.[222] In fact, the Commission was able to confirm that twenty-three people, from thirteen states, filed ninety of the total 159 complaints.[223] FOX eventually discovered that the Parents Television Council had posted

218. Symposium, *Panel III: Indecent Exposure?*, *supra* note 170, at 1116. *See also* Gibeaut, *supra* note 114, at 29.

219. *See* discussion *supra* Part II.A.2 (discussing the complaint process 0.00u(risedc]itanhp(5/TTss)-7.o4 Tc0.0h(ure?)]527 Tw2

directions on its web site that instructed members how to send complaints about the *Married by America* episode to the FCC.[224] Also, in *Golden Globes I*, over ninety percent of the public complaints received by the FCC were from individuals associated with the PTC.[225]

What the Parents Television Council appears to have been able to do is to use a heckler's—or hostile audience—veto tactic to shut down otherwise FCC protected speech. In this regard, undisputable evidence shows that it takes only a few complaints, from only a couple of organized complainants, to rock the Commission's precedent boat. Administrative agencies should be better insulated so as not to allow an agency with as much power as the FCC has to regulate the content of nationwide broadcasts to be influenced by the sensibilities of so few upset, and non-representative, broadcast viewers and listeners.

Although it is generally accepted that broadcast media does not receive the same First Amendment protection as street speakers and newspaper writers,[226] just because the Commission has the authority to regulate indecent or profane speech, does not allow it to run away with this authority. In fact, although the United States Supreme Court has supported the Commission's expansive content-based regulatory authority, it supports the Commission's authority based upon the notion that the Commission would apply a restrained enforcement policy.[227] However, from the *Golden Globes II* ruling, it has become obvious that the Commission has switched tactics and no longer relies on years of precedent, including Supreme Court precedent that requires the Commission to observe a restrained enforcement policy, i.e., not regulating fleeting expletives. Instead of reasoned precedent, the Commission relies on the biased complaints of the tens, out of the millions of average viewers, to determine what it should find obscene, indecent, and profane. In this regard, the Commission has turned away from its seemingly objective indecency test and has revealed the Commission's inherent subjective and influenceable nature. Perhaps more important is the fact that by listening to so few complainants and no longer applying the contemporary community standards for

original congressional public interest mandate, and by consequence, the Commission has also single-handedly weakened the support for its regulatory authority over the electromagnetic spectrum and broadcast media.

In 1973, the Supreme Court adopted the *Miller* test to determine whether speech was obscene.[228] In this test, the Court included both subjective and objective elements.[229] The Court selected both elements to help eliminate the ability of one small and isolated group's opinions from overriding another's right to engage in protected free speech, and in effect, invoke a heckler's veto. However, with *Golden Globes* and *Married by America*, the Commission reveals that its indecency test no longer takes into account the objective nationwide contemporary community standards for the broadcast medium. Instead, when determining whether the word "fuck" qualifies as indecent, the Commission applies the subjective contemporary broadcast medium standards of (1) the few individuals who send in multiple public complaints and (2) the five FCC Commissioners.

C. A Précis of Fox Television Stations v. Federal Communications Commission

Fox Television Stations v. FCC is a case involving multiple television networks and local affiliates challenging the FCC's departure from its fleeting expletive exception policy.[230] The main complaint arises from two distinct broadcast occurrences. The first is NBC's January 19, 2003 live broadcast of the Golden Globe Awards where musician Bono stated in his acceptance speech, "[T]his is really, really, fucking brilliant. Really, really, great."[231] The second arises from a FCC order issued on February 21, 2006, concerning various television broadcasts, including:

> • *2002 Billboard Music Awards*: In her acceptance speech, Cher said, "People have been telling me I'm on the way out every year, right? So fuck 'em."
>
> • *2003 Billboard Music Awards*: Nicole Richie, an award show presenter, said, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

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

229. *Id.*

230. *See* Fox Television Stations v. FCC, 489 F.3d 444, 444, 454 (2d Cir. 2007).

231. *Id.* at 451.

> • *NYPD Blue*: In various episodes, character Detective Andy Sipowitz and others used certain expletives, including: "bullshit," "dick," and "dickhead."
>
> • *The Early Show*: During a live interview of a contestant on CBS's reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a "bullshitter."[232]

In reaching decisions on the above-mentioned broadcasts, the Commission overturned years of precedent and found that the single use of the words "fuck" and "shit" were now presumptively indecent and profane; thus, programs that contained these words, even once, automatically became "patently offensive."49(ceT03(( )]TJ)6.)5(s, ek(2.0s9-0.5.52 0(4tea-0.nY1

question of whether the two [FOX] broadcasts of the Billboard Music Awards were indecent and/or profane," but that its review also

the *Golden Globes II* decision, the Commission had changed its policy:

> While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the "F-Word" such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law. . . . The staff has since found that the isolated or fleeting use of the "F-Word" is not indecent in situations arguably similar to that here. We now depart from this portion of the Commission's 1978 [sic] *Pacifica* decision as well as all of the cases cited . . . and any similar cases holding that isolated or fleeting use of the "F-Word" or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent.[247]

Although the court recognized that agencies were free to revise their rules and policies, it also recalled that if an agency changed its course, it must give "sound reasons for the change" and show "that the [new] rule is consistent with the law that gives the agency its authority to act."[248] These requirements do not mandate a "heightened standard of scrutiny," instead the agency is only required to "explain why the original reasons for adopting the rule or policy are no longer dispositive."[249]

Relying on the FCC's own reasons for the policy change, the "first blow" theory,[250]

"profane" speech and that the Commission had even taken the view that a "separate ban on profane speech was unconstitutional."[258] The court then found that the Commission failed to provide a "reasoned analysis of why it [had] undertaken this separate regulation of speech."[259]

After reviewing the Commission's rationale for its policy change, the court concluded that "the FCC's new policy regarding 'fleeting expletives' fail[ed] to provide a reasoned analysis justifying its departure from the agency's established practice."[260] As such, the court granted the Networks' petition for review, vacated the FCC's findings, and because the court found that the FCC's new indecency "regime" was invalid under the Administrative Procedure Act, the court granted a stay of enforcement of the FCC's earlier findings.[261]

The court then proceeded to review the constitutionality of the Commission's "fleeting expletive regime" and overall regulatory authority, although this discussion amounted to dicta because the court never reached the First Amendment issue on the merits.[262] The court concluded this discussion by stating that it was "doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission could adequately respond to the constitutional and statutory challenges raised by the Networks."[263]

On November 1, 2007, the Federal Communications Commission filed a petition for a writ of certiorari and on March 17, 2008, the United States Supreme Court granted it.[264] During the November 4, 2008 oral arguments, the United States Supreme Court will determine "whether the court of appeals erred in striking down the Federal Communications Commission's determination that theFCC'fq005 Tc03 Tw[(Cbroad

the expletives are not repeated,"[265] or in other words, "whether the [C]ommission had given a sound reason for changing its approach to the treatment of isolated, as opposed to repeated, swearing."[266]

On November 4, 2008 at 10:05 a.m., while the rest of nation was voting for the next President of the United States of America, nine U.S. Supreme Court Justices heard Solicitor General Gregory G. Garre, representing the Commission, and Mr. Carter G. Phillips, representing the Networks, discuss the Federal Communications Commission, its authority to regulate the broadcast media, the F- and S-words, and expletives' proper usage on the public airwaves.[267] Although it was nearly impossible to determine from the Justices' questions what outcome they were leaning towards, some, more than others, appeared to enjoy the subject matter of the morning's oral arguments.[268] Specifically, the gallery erupted into a mild laughter when Justice Breyer recognized that certain cross-sections of humanity are more apt to swearing than others and also when Justices Stevens and Scalia pondered whether a particular remark, which includes potentially indecent language, could still be considered indecent if it was "really hilarious, very, very funny," meaning that "bawdy jokes are okay if they are really good."[269]

Moving to the parties' arguments, the Solicitor General petitioned that the Commission's "enforcement action may be appropriate in the case of indecent language that is isolated as well as repeated."[270] To support this claim, Mr. Garre claimed that the Commission's policy change was not arbitrary and capricious—an Administrative Procedures Act ("APA") requirement discussed in detail by the Second Court—as the Commission's decision was based upon three factors: (1) the Commission had directly acknowledged its change in position, i.e., its departure from the Commission's prior fleeting expletive exception policy, (2) the Commission had provided a concrete and rational explanation for its policy change, i.e., the Commission now believed that the F-word and S-word were clearly

265. United States Supreme Court, Questions Presented, http://origin.www.supremecourtus.gov/qp/07-00582qp.pdf (last visited Nov. 25, 2008).

266. Adam Liptak, *Justices Ponder TV's 'Fleeting Expletives'*, N.Y. TIMES, NOV. 5, 2008, at A26.

267. Transcript of Oral Argument at 1, Fox Television Stations v. FCC, No. 07-582 (U.S. Nov. 4, 2008) [hereinafter Oral Argument].

268. *See* Liptak, *Justices Ponder TV's 'Fleeting* Expletives', supra note 266; *see generally* Oral Argument, *supra* note 267.

269. Oral Argument, *supra* note 267, at 18–19, 24–25.

270. *Id.* at 3.

patently offensive, because, for example, the F-word "is one of the most graphic, explicit, and vulgar words in the English language," and (3) the Commission's concrete explanation was "at a minimum plausible and consistent with the Commission's statutory mandate."[271]

However, neither the Justices, nor the Networks, found the Commission's three-factored justification to be without contention. Immediately upon Mr. Garre's proffering of the Commission's concrete and rational policy, Justice Ginsburg noted inconsistencies with regard the Commission's implementation of its "rational policy:"

> [T]here seems to be no rhyme or reason for some of the decisions that the Commission has made. I mean, the "Saving Private Ryan" case was filled with expletives, and yet the film about jazz history, the words were considered a violation of the Commission's policies. So that there seems to be very little rhyme or reason to when the Commission says that one of these words is okay and when it says it isn't.[272]

Additionally, although Chief Justice Roberts and Justice Scalia agreed with Mr. Garre's second factor, finding the F- and S-words to have an inherent shock value because of these words' "associate[ion] with sexual or excretory activity," Mr. Phillips countered, reminding the Justices that there was nothing on the record that remotely suggested this conclusion.[273] Also questioning Chief Justice Roberts' and Justice Scalia's from the gut conclusions is Mr. Jesse Sheidlower, editor-at-large of the Oxford English Dictionary.[274] Mr. Sheidlower found, while revising the Dictionary's entry on the word "fuck," that the word's power to shock was in the decline, largely because the word's core meaning had been blurred throughout its 600 year history.[275] Mr. Sheidlower further indicated that as far as inherent offensiveness went, "fuck" was not even the most offensive word around; historically, sociiol1

Another topic the Justices and Mr. Phillips quickly broached was the notion of contemporary community standards for the broadcast medium and whether a heckler's veto existed due to the Commission's use of the complaints it receives—from a small and potentially non-representative fraction of society—to satisfy the average American viewer element of its contemporary community standard for the broadcast medium patently offensive analysis.[278] In oral argument, the Commission indicated that only broadcasts found to be "patently offensive as measured by contemporary community standards for the broadcast medium" were indecent.[279] In attempting to discover the Commission's process for determining the contemporary community standards for the broadcast medium, the standard by which the FCC judges material to be patently offensive, Justice Ginsburg asked, "How are the contemporary community standards determined in this context? Does the FCC survey any particular audience to find out what their standards are?"[280] Mr. Garre responded by informing Justice Ginsburg that the Commission looked to contemporary community standards of the average listener "to ensure that material [was] judged neither on the basis of a decision-maker's personal opinion nor by its effect on a particularly sensitive or insensitive person or group."[281] However, Mr. Garre's reponse sidestepped Justice Ginsburg's question; he never informed the Court of how the FCC determined these standards, except by stating that the Commission applied a "collective experience," compiled from statements of lawmakers, courts, broadcasters, public interest groups, and citizens.00andards, esit8(s)-1.7(, es ofh60.00u5 Tc)4eta002 Tc0.099t4rv7lTc0

First Amendment analysis.[283] In this regard, Mr. Powell argued that the Commission should not be bound by the APA's arbitrary and capricious change in administrative policy standard, but instead the Court should impose upon the Commission a higher standard, mainly due to the Commission's unique ability to impose content-based regulations against the broadcast media.[284]

Allowing the Commission to overturn well established precedent because it received 159 complaints about a program that aired potentially indecent material when the viewing audience was comprised of 7,500,000 viewers is worse than allowing a crowd to shut down a single speaker because the speaker's words upset—yet did not incite—the crowd. Such action is tantamount to a heckler's veto, an act that the Supreme Court has found in other mediums to unconstitutionally infringe on a speaker's First Amendment rights.[294] As such, allowing the Commission to enforce decisions analogous to hecklers' vetoes not only infringes on the First Amendment rights of the broadcast speakers, but also on the rights of the broadcast viewer

Table 1. *A Sampling of Broadcast Network Self-Censorship*

improper broadcast media regulation, the artful medium that was once broadcast media no longer exists; and though this is perhaps crudely stated, right now, the Federal Communications Commission is kicking broadcast media's ass.[300]

300. Schneider, *supra* note 161, at 891, 891 n.1 (citing *Studio 60 on the Sunset Strip: Pilot* (NBC television broadcast Sept. 18, 2006)); *see generally* Tad Friend, *Backstage Angst*, THE NEW YORKER, Sept. 25, 2006, at On Television. Mr. Schneider is referring to a portion of character Wes Mendell's opening monologue performed during *Studio 60 on the Sunset Strip*'s pilot episode. A partial transcript of the monologue is as follows:

> This isn't gonna be a very good show tonight and I think you [should] change the channel./ . . . This show used to be cutting edge political and social satire, but it's gotten lobotomized by a candy-ass broadcast network hell-bent on doing *nothing* that might challenge [its] audience. . . . We're all being lobotomized by the country's most influential industry which has thrown in the towel to any endeavor that does not include the courting of 12-year-old boys. . . . So change the channel, turn off the TV. Do it right now./ . . . and there's always been a struggle between art and commerce, but now I'm telling you art ising t.str l.](ch]TJa.str l.s k06 0.i)udekrig7(but comm)-6.J0 -1.169 TTD-0.000