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Flaws in the Federal Communications Commission

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by

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1. Abstract

Freedom of speech was one of the most important and revolutionary ideas that dictated the formation of the United States of America. The founding fathers had endured decades of suppression from their leaders, not only in speech but also in religion. The freedom of speech has been an integral factor in the development of media over the centuries, allowing it to grow and flourish. As technology has advanced, freedom of the press and freedom of speech have had to evolve as well. Once contained only to print, the press has expanded, first to radio then to television and now to the Internet. Similarly, speech has gone from public speaking or published essays to radio talk shows, television programs and even the blogosphere. Free and controversial speech is no longer a luxury but an almost constant presence in the lives of most Americans. People are constantly barraged by advertisements.

The Federal Communications Commission was a body that was founded to regulate broadcasts in America for indecent and obscene materials. The recent development in media and surrounding technologies, however, calls into question the necessity for such a governing body. In this day and age, media is almost entirely user-controlled and no longer “uniquely accessible to children” like in days past. This developing media warrant the adaptation of the archaic governing styles of the FCC to uphold not only First Amendment rights but also to protect the dwindling amount of terrestrial radio and television stations from arbitrary and exorbitant fines.

2. History of the Federal Communications Commission

It is difficult to pinpoint an exact time when regulation of media began— as it is almost impossible to divine when media began. The original regulatory actions were mainly concerned with proper allocation of frequencies, like the Radio Act of 1912. This act formed as a result of investigations into the sinking of the Titanic and addressed the necessity of seafaring vessels to keep 24-hour radio watch and for all amateur radio operators to receive a license from the Federal Government.[1] As radio grew, the act was replaced. Senator Clarence Dill and Representative W. H. White worked together to draft an updated version of the bill, wherein five committee members each regulated radio for a designated time zone. The Dill-White Bill, as it was called, was eventually brought before the House and the Senate and passed as the Radio Act of 1927.[2]

The Radio Act created the direct predecessor to the FCC—the Federal Radio Commission (FRC)—that held the power to designate call letters, assign frequencies and other various housekeeping duties. There were no official censorship responsibilities given to the FRC, however, Herbert Hoover was another key participant in the act's creation, and he made it clear the importance of regulation. In his address to the National Radio Conference in 1924, he expressed his wishes to regulate radio saying, "We will maintain them free--free of monopoly, free in program, and free in speech—but we must also maintain them free of malice and unwholesomeness." He went on to state, "[h]ere is an agency that has reached deep into the family life. We can protect the home by preventing the entry of printed matter destructive to its

[1] MARVIN R. BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY (McFarland 2000).
[2] *Ibid.*

ideals, but we must double-guard the radio."[3] While the Radio Act did not specifically address concerns for content regulation in its text, the ideals and power to do so were clearly in place.

With the media growing at such a fast pace and due to its intrusive nature, it was eventually decided that some sort of official regulatory entity was needed to oversee the content of the airwaves and ensure that all of said content was appropriate for listeners or viewers of all ages. As a result, the Communications Act of 1934 established the Federal Communications Commission, or FCC, an organization that would monitor and regulate the content broadcast by all media to ensure that the content being published was moral and appropriate. They describe themselves as a "responsive, efficient and effective agency capable of facing the technological and economic opportunities of the new millennium."[4]

The Communications Act does not specifically empower the FCC to regulate content. It does allow the FCC to utilize and enforce any Federal regulation relating to its field. The most important Federal regulation that relates to the FCC's content control is United States Code 18 Section 1464, which states, "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."[5] Essentially, the only power that the FCC has relates back to this code, part of the Title 18 code that outlines any and all federal crimes and their implications.

This code identifies two matters that directly concern the FCC: obscenity and indecency. The former has a more extensive definition and a more concrete consequence, and was the catalyst for the development of all further definitions. Obscenity was not much of a concern in early publications, but eventually the Supreme Court was called to rule on a case directly related

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[3] Opening Address of the National Radio Conference by Herbert Hoover, Secretary of Commerce, United States of America (Oct. 6, 1924)

[4] Federal Communications Commission, *Strategic Plan of the FCC*, *at* http://www.fcc.gov/encyclopedia/strategic-plan-fcc

[5] Broadcasting Obscene Language, U.S.C. § 1464 (2006)

to indecency. In observing landmark cases pertinent to the formation of the definition of indecency today, this paper will show that the FCC's policy is at a constant risk of infringing upon First Amendment rights.

First, in order to establish the grounds for indecent materials, the standard for obscene materials must be outlined. Originally, the only test for defining obscenity came from Regina v. Hicklin, a case from England in the 1800s. This case decided that any material that had any content that could impact the most vulnerable members of society—like children or the mentally ill—should be banned in its entirety.[6] Even materials intended for and distributed to competent adults were not permitted. Clearly this definition was overbroad and would have significantly hindered free speech, but for a time it was the only precedent that could be referenced; as attitudes toward free speech and sex matured, the need to adjust this definition became apparent. It wasn't until the 1950s that a more moderate definition was outlined, and that definition has continued to evolve in the 60 years since its conception.

There were many cases that attempted to modernize the definition of obscenity, such as Roth v. United States in 1957. The Supreme Court acknowledged that its definition of obscenity was shaky and expressed its desire to create a more acceptable standard, which the court eventually did in Miller v. California in 1966. In this case, Marvin Miller had been sending out advertisements for his adult novels and illustrated books. While containing some printed information, the majority of the brochures were covered in pictures or drawings of two or more adults engaging in sexual acts. Specifically, five such brochures were sent to a restaurant in California where the manager and his mother were exposed to the content. The advertisements were unsolicited. He was convicted of a misdemeanor for knowingly distributing obscene materials. The Supreme Court upheld this conviction. The Court went on to discuss the

[6] Regina v. Hicklin, L.R. 3 Q.B. 360 (1868)

development of the definition of obscenity and noted that the slight changes made in Memoirs v. Massachusetts were unsatisfactory due to the wording. Justice Burger, who delivered the opinion, explained, saying

> *Memoirs* required [p22] that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth,* the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i.e.,* that the material was "*utterly* without redeeming social value" -- a burden virtually impossible to discharge under our criminal standards of proof.[7]

The court then issued a new test for potentially obscene materials. Justice Burger noted that in the decade since the Roth ruling, no majority within the Supreme Court was ever able to agree on a new outline for obscenity. Berger explained that this was understandable, for "in the area [p23] of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."[8] Burger outlined the new test as follows:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra,* at 230, quoting *Roth v. United States, supra,* at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[9]

They believed that a national standard took away too much power from the state, which is of the utmost importance to the writers of the Constitution and by extension the Supreme Court Justices who seek to uphold it. This wording allowed for each state to define its own version of what is or

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[7] Miller v. California, 413 U.S. 15, 32 (1973).
[8] *Ibid*.
[9] *Ibid*.

is not obscene. But as both Justices Burger and Stewart noted, defining standards for obscenity is difficult if not impossible. [10]

While obscenity is afforded no protection from the First Amendment, indecency does get an amount of protection heavily depending on the medium in which it is published—and the majority of this paper is focused on the definition of indecency. According to the FCC's website, "Indecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity."[11] Internet and print are afforded the most protection because they require affirmative action on the part of the consumer, whereas television and radio are afforded less because they are more accessible to children.

The Federal Communications Commission "regulates the broadcast, cable, satellite and telephone industries"[12] as an administrative agency. Decisions made by the FCC are known as administrative law. Administrative agencies were founded as independent groups of experts in a certain field that could make well-informed decisions regarding the practices within the area of their expertise.[13] Unfortunately, these agencies are susceptible to political pressure and influence. Both the executive and legislative branches have power over the FCC. The president appoints the commissioners of the FCC, and Congress controls both the breadth of their authority and the amount of money they receive from the budget every year. This provides a flawed foundation for the decisions of the FCC; the political atmosphere detracts from the ability to make informed and unbiased decisions.

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[10] *Ibid*.
[11] Obscene, Indecent and Profane Broadcasts, Federal Communications Commission, (Nov. 1, 2013), http://www.fcc.gov/guides/obscenity-indecency-and-profanity
[12] What We Do, Federal Communications Commission, (Nov. 1, 2013), http://www.fcc.gov/what-we-do
[13] KENT R. MIDDLETON, WILLIAM E. LEE & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION (6th ed. 2005 Edition, Pearson Education, Inc. 2005). p. 4

The first fine levied for indecency was in 1970 to WUHY-FM, which broadcast an interview with Jerry Garcia in which he used numerous expletives.[14] However, the most iconic case in defining indecency was decided in 1978. A New York City radio station licensed by the Pacifica Foundation broadcast a George Carlin monologue that included and repeated the following words: s***, piss, f***, c***, c***sucker, motherf***er and tits. The monologue was aired in the afternoon. The FCC issued a warning after a man who was driving in the car with his son filed a complaint. Pacifica appealed the complaint, noting that the program broadcast a warning regarding the sensitive language that would be broadcast and that the order constituted censorship, which is not allowed. An appellate court reversed the decision, but the Supreme Court reinstated it. The court cited the wording of the Radio Act of 1927, Section 29 in which it is stated:

> Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.[15]

The Court maintained that as the Radio Act noted the illegality of censorship in the same section that barred the use of indecency, it is implied that penalizing indecency is completely distinct from censorship; stated another way, it is not possible for indecent language to be censored because it is shown in the Radio Act that such language is considered entirely separate from protected free speech.[16]

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[14] In Re WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408 (1970).
[15] Radio Act of 1927, 47 U.S.C. § § 81-83 (repealed 1934)
[16] FCC v. Pacifica Found., 438 U.S. 726 (1978)[hereinafter *Pacifica*]

Pacifica also alleged that the term indecent required involving prurient interest, which would thereby eliminate the First Amendment rights related to the broadcast. The Court disagreed on this point as well, citing several cases that disproved the claim.[17]

The Court then set out to define indecency. Pacifica stated that the wording of the FCC statute regarding indecency was overbroad. The statute claimed that indecency rulings were based less on the actual content and more on language "that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[18] The court disagreed, noting that the definition of indecency is heavily based on context by the very nature of the term. The Court went on to state, "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."[19] In other words, if a broadcaster was questioning the decency of content based of the statute, it is probably because the content is indecent and therefore should not be broadcast in the first place.

The Court then addressed the claim that the First Amendment inherently prohibited governmental restriction of language in public broadcasts. Again the Court cited the importance of context. If Carlin's monologue had a greater social commentary, they reasoned, or discussed the use or value of such words, the First Amendment would serve as protection. They reasoned that Carlin's commentary used those words for the sole reason that they were offensive. While offensive words are not obscene, they reason that, "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*

same in every context."[20] Therefore the decision about whether the FCC ruling was acceptable or not is based primarily on context.

Broadcasting has traditionally been afforded the least amount of protection due to its ability to be heard and understood by children in a way that print is not. Additionally, the Supreme Court reasons, broadcasting is "a uniquely pervasive presence in the lives of all Americans." Because audiences are not necessarily listening to broadcasts from start to finish but more likely tuning in and out, prior warnings are not necessarily a protection. In addition, the court disagreed with the notion of turning off the radio of offensive language was heard, likening it to "saying that the remedy for an assault is to run away after the first blow." In perhaps the most quoted section of the decision, the Court summarized their decision as follows:

> As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard." Euclid v. Ambler Realty Co., 272 U.S. 365, 388 . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise [438 U.S. 726, 751] of its regulatory power does not depend on proof that the pig is obscene.[21]

Middleton and Lee summarize the FCCs consideration into three factors the FCC balances to make decisions on indecency: the program's explicit or graphic nature, the persistent repetition of sexual or excretory words, and whether or not a program is intentionally pandering to the audience or seeking to shock viewers.[22] In 2001 it issued guidelines that encompassed the three factors but used language specifying the indecency of content that was patently offensive to an average viewer or listener, using a national standard in lieu of a state or local community standard.

Following the *Pacifica* ruling, the FCC largely stuck to reprimanding material that specifically related to the words Carlin addressed in his speech. In 1987 the FCC released a

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[20] *Ibid.*
[21] *Ibid.*
[22] Supra note 12 at p. 407

statement in regards to the *Infinity Broadcasting Corporation of Pennsylvania* announcing that it now found its former standard to be "unduly narrow" and that "although enforcement was clearly easier under the former standard, it could lead to anomalous results that could not be justified."[23] They further justified the change saying the old method of defining indecency "ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency." Thereafter, the FCC used the more general definition of indecency laid out in *Pacifica*, quoted again as material "that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."

The recent rulings of the FCC, published in 2004 and 2006, have added new regulations naming content previously deemed decent to now be indecent. Specifically, the FCC's new policies deemed that the words f*** and s*** were both inherently indecent and profane, in 2004 and 2006 respectively. This contradicted a former precedence regarding what became known as fleeting expletives (Middleton and Lee use the example "Oops, f***ed that one up,")[24]; until that point fleeting expletives were not considered to be indecent. This policy came into controversy when the FCC challenged and overturned a decision from its own enforcement bureau.

When Cher accepted an award at the 2002 Billboard Music Awards, she commented on those critics who repeatedly predicted Cher's impending decline, saying "f*** 'em." The FCC decided that all of its precedence in the matter was now invalid because it was no longer considered to be good law. They cited the ease with which broadcasters can delay live productions and bleep the "F-word" as a part of their decision, saying "Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure

[23] In re Infinity Broad. Corp. of Pa., 3 F.C.C. Rcd. 930 (1987)
[24] Supra note 9

that all offending words were blocked." They levied a similar judgment against Fox in regards to the 2003 Billboard Music Awards wherein award presenter Nicole Richie used the F-word and the S-word. They again ruled that those words were inherently indecent.[25]

Fox contested the decision of the FCC, however, citing the FCC's change in policy. The Second Circuit Court of Appeals found the change in policy arbitrary and capricious, but the Supreme Court disagreed. It then remanded the case back to the Second Circuit to address the constitutionality of the policy itself. The Second Circuit then stated that because the policy was vague, it was unconstitutional. The Supreme Court ruled that the regulations at the time concerning fleeting expletives were vague but was careful to note that the FCC still held the authority to interpret what materials were indecent or obscene and that their authority was necessary and constitutional.[26]

In a similar case, the 2004 Super Bowl caused a huge controversy when during the course of the halftime show performer Janet Jackson's breast was exposed for 19/32 of a second. The FCC received mass amounts of complaints and levied a $550,000 fine against CBS. The FCC claimed that the sexual nature of the entire performance was purely for shock value, not artistic expression. CBS argued against the sanction because in the 25 years preceding the 2004 event, brief nudity was not considered indecent. The appellate court sided with CBS, citing the lack of notification and again lamented the lack of a reasoned explanation for the departure from precedent. When the case was brought to the Supreme Court, it chose to remand and vacate the case in light of the above decision on *Fox*, which sent it back to the Third Circuit Court of Appeals. The Third Circuit upheld its original opinion 2-1. The Circuit Court states succinctly in

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[25] Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005, Notices of Apparent Liability & Mem. Op. & Order, FCC 06-17 (rel. Mar. 15, 2006) [herein referred to as Omnibus Notice]
[26] Fed. Communications Commission, Et Al., Petitioners v. Fox Television Stations, Inc., 567 U.S. (U.S. 2012). [herein referred to as *Fox*]

its opinion that because there was no precedent, any fines were unlawful. The Supreme Court chose not to pursue the case any further due to its recent judgment in *Fox*.[27] These cases will be discussed in greater detail later in the paper.

Commissioner Ajit Pai released the following statement on June 21, 2012, following the Court's decision: "Today's narrow decision by the U.S. Supreme Court does not call into question the Commission's overall indecency enforcement authority or the constitutionality of the Commission's current indecency policy. Rather, it highlights the need for the Commission to make its policy clear. I look forward to working with my colleagues to provide the clarity that both parents and broadcasters deserve. At this point, the best way for us to proceed is to get to work resolving the multitude of indecency complaints that have piled up during this litigation."[28]

Subsequently, the FCC has only issued one Notice of Apparent Liability. The NAL was issued to Fox after it failed to respond to a letter of inquiry from the FCC, and it was fined $25,000.[29]

The Federal Communications Commission has grown and developed over the past century in a rather halting and peculiar manner. Throughout its development, it has proved to be inconsistent and troublesome in its decisions. The next section of this paper will discuss the problems caused by the FCC as well as its proposed role in the future of mass media.

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[27] *CBS Corp. v. Federal Communications Commission*, No. 06-375 (3rd Cir. Nov. 2, 2011)

[28] FCC Commissioner Ajit Pai On The U.S. Supreme Court's Decision, FEDERAL COMMUNICATIONS COMMISSION, (Dec. 1, 2013), http://www.fcc.gov/document/fcc-commissioner-ajit-pai-us-supreme-courts-decision

[29] In re Fox Television Stations, Inc., 25 F.C.C. (2010).

3. Problems and Concerns with the FCC

The Federal Communications Commission is, in theory, a sound idea; protection of the innocence of the vulnerable is laudable. In practice, however, many issues render the FCC ineffectual and rather problematic. These problems are linked intrinsically to the way the FCC functions and are growing increasingly obvious in today's society. It is vital to the development of society, therefore, to carefully observe and properly react to the problems that plague the FCC because as the arbiters of content in the mass media, the FCC plays a hugely significant role in the development of culture and community. Therefore, this section of my paper will address specifically and outline the reasoning behind concerns and issues of the Federal Communications Commission, specifically in its regulation of indecency.

3.1 Reporting Policies

One problem in the FCC's indecency fines and procedures is in the very nature by which indecent material is found. Because of the mass quantities of media streamed daily by American households, it is understandably impossible for the Commission to view each program that airs. As a result, the FCC only responds to complaints that are filed by viewers; these complaints are then reviewed by the FCC to see if any further action should be taken. This, already, skews the opinion and interpretation of the FCC. Clearly, if a complaint has been filed then someone, i.e. a member of the "contemporary community," has felt that it is not appropriate by his or her own "standards." Those who have a particularly stringent set of standards are more inclined to observe scrupulously the content of programs and frequently report what they deem unacceptable to the FCC. Advocacy groups and lobbyists who favor a more conservative standard bombard the FCC with complaints. The most notable of these advocacy groups is known as the Parents Television Council (PTC), founded by the Media Research Council (MRC) in the mid-90s.

The MRC was an organization founded in 1987 by L. Brent Bozell III, a conservative activist, as a tool to research and combat the perceived liberal media bias. Bozell and his associates use "thorough, comprehensive, and ongoing analysis based on quantitative and qualitative research can one document liberal bias in the media."[30] The organization has grown from its humble beginnings to have several offshoots, including News Analysis Division, the Business & Media Institute, and the Culture and Media Institute. The Culture and Media Institute, in particular, seeks to "to preserve and help restore America's culture, character, traditional values, and morals against the assault of the liberal media elite, and to promote fair portrayal of social conservatives and religious believers in the media."[31]

In 1995, Bozell founded the PTC as a tool to "provide parents with the tools they need to make informed television viewing decisions."[32] The PTC's self-professed mission is "to promote and restore responsibility and decency to the entertainment industry in answer to America's demand for positive, family-oriented television programming."[33] The PTC asserts that at its formation, television was a medium that was geared toward a family viewing experience and that, as a result, all programming should be geared toward this ideal. Herein lies the flaw of the PTC; it rests on an archaic interpretation of the purpose of television. As tempting as it is to delve more deeply into the PTC's intrinsically fallacious interpretation of the purpose of television, for the sake of brevity the paper will solely focus on the group's practices and policies.

The website of the PTC is extremely user-friendly and even has a built-in tool to report an indecency complaint to the FCC— a tool that is accessible even before the organization takes

[30] *About the Media Research Center*, Business & Media Institute, (2013) at http://archive.mrc.org/cmi/about/about.aspx
[31] *Ibid*.
[32] About the PTC, PARENTS TELEVISION COUNCIL, (2013) at http://w2.parentstv.org/Main/About/Newtoptc.aspx
[33] *Ibid.*

the time to actually explain the parameters of indecency set out by the Pacifica ruling. The website also has a timeline that tracks the development of indecency and the PTC's involvement therein. The PTC notes on several occasion the numbers of complaints about broadcasts aired by PTC members including (but by no means limited to) 18,000 complaints for the use of the "f-word" at the Golden Globe Awards and 25,000 complaints for an "f-word" at the Billboard Music Awards in 2003.[34]

The PTC website offers a multitude of information and tools that make it easy for parents to decide what programs are and are not suitable for their family to watch, most notably a drop-down list of television shows that gives a red, yellow, or green light rating for the appropriateness of family viewing. Not surprisingly, none of the shows broadcast on major networks (specifically ABC, CBS, CW, FOX and NBC) during prime time (8:00-10:30 p.m.) are given a green light rating, even such innocuous shows like America's Funniest Home Videos. In its description of the show, the PTC notes frequent sexual innuendo and many men frequently being hit in the groin, advising "due to the questionable taste of some of the videos, this program may not be appropriate for family viewing."[35]

The PTC responds to criticism and frequently asked questions on its website as well, offering a multitude of explanations for its actions. When confronted with the idea that television content for children should be monitored by the parents of the children in question, the PTC responds by saying, "The assertion that the sole responsibility lies with parents is a self-justifying claim usually made by people who wish to evade accountability."[36] The PTC goes on to make the analogy of a town pumping sewage into the water supply of its own town—surely

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[34] Ibid.
[35] Family Guide to Primetime Television: America's Funniest Home Videos , PARENTS TELEVISION COUNCIL, (2013) at https://www.parentstv.org/ptc/shows/main.asp?shwid=50
[36] Frequently Asked Questions, PARENTS TELEVISION COUNCIL, (2013) at http://w2.parentstv.org/main/About/FAQ.aspx

the parents of children should be accountable for their children's health and safety but with a polluted source, they argue, how is it possible? They also claim that today's programming is often "directly hostile to [the family's] values."

The PTC is also asked why viewers do not just change the channel and responds in a similarly interesting fashion. The PTC asserts that this, too, is an entirely unacceptable course of action. It states that television "drives changes in social customs, speech, and attitudes, especially among youth," but then goes on in the same response to say, "to change the channel is to accept the loss of additional stations to unhealthy content and to expect similar material to one day appear on the next channel."[37] In the opinion of the author, this mentality seems contradictory; the admission by the PTC that television drives social change seems to contrast dramatically with its desire to fight the changes of television from its former family-oriented nature to the present day "edgier" content. The PTC asserts in another response that it does not wish to stop adult viewers from viewing edgier content. It merely objects to the time and venue of said content.[38]

In order to establish the assertion that the PTC poses a problem to the functioning of the FCC, it is necessary to briefly identify the flaws of the organization. The PTC fails to recognize that societal views are changing. When television first started broadcasting, homosexuality was classed as a mental illness, Jim Crow laws were in effect and the word "pregnancy" was considered inappropriate and was censored from broadcasts. The members of the PTC are clinging to an archaic interpretation of television as a medium and fail to see the advancements of technology that allow entirely user-controlled media. They argue that their objection is to the timing of programs targeting adult viewers; however, they fail to acknowledge that adults often work. Why should an adult who must wake up at 6:30 a.m. be forced to stay up until 11:00 p.m.

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[37] *Ibid*.
[38] *Ibid.*

to watch his or her favorite program? Television programming was initially broadcast to be viewed by the entire family because most homes that could afford a television could afford one; now more than 98 percent of homes have at least one television, negating the need for television to appeal only to families. Some programs ,are created solely for children and some programs are created for adults; television programs should no longer be forced to cater to the lowest common denominator.

The PTC boasts more than 1 million members, which represent an overwhelmingly small amount of the American public. Despite this and despite the organization's many shortcomings, the PTC accounted for 99.8 percent of the complaints filed to the FCC in 2003 and 99.9 percent of the complaints filed in 2004. According to an article written by Blake Lawrence, the PTC even "encouraged members to file complaints over programs they had not seen, perhaps shows not even in their viewing area."[39] This is a demonstration of the ways the FCC's policies can be manipulated and abused by a minority in a way that affects the majority. Clearly the idea of a contemporary community standard is not being applied in this instance; the opinion of the community cannot be gauged by inaction—must the majority assert its acceptance of the content in response to complaints by the minority? Stated another way, the silent acceptance of the majority of the community is drowned out by the complaints of a minority who seeks to further its own cause without regard for the ideals or "standards" of the contemporary community. The very backbone of the American government is the concept that the majority rules; in something as crucial and influential as mainstream media, it seems preposterous that the overwhelming minority regulates the content available to the American public.

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[39] Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age,* 18 UCLA ENT. L. REV. (2011).

The concept of the minority affecting the majority is not exclusive to media; the concept of the heckler's veto has caused many problems in the exercising of freedom of speech. The idea of heckler's veto came to greater attention from Supreme Court case *Fiener v. New York* in 1950. In the case, Irving Feiner was giving a speech on a street corner in Syracuse, New York. He was attempting to encourage people to attend a meeting later that evening but due to some of the comments he made while giving the speech, some members of the crowd were angered. The police, who had originally been called to monitor the crowd's effect on traffic, realized the rising tension of the situation and asked the speaker to step down. He refused and continued to speak. Eventually the police arrested Fiener and charged him with disorderly conduct[40], set out in New York Penal code as follows:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
> 1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
> 3. Congregates with others on a public street and refuses to move on when ordered by the police.[41]

The Supreme Court upheld the idea that Feiner's arrest was constitutional citing the precedence of *Cantwell v. Connecticut* (1940) in which Justice Roberts delivered the opinion, saying:

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public

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[40] Feiner v. New York, 340 US 315 - Supreme Court 1951
[41] New York Penal - Article 240 - § 240.20 Disorderly Conduct

> streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.[42]

Cantwell v. Connecticut was ruling on a separate matter that involved Cantwell's freedom to express his opinion on religion; Cantwell was attempting to distribute pamphlets condemning the Roman Catholic church in a predominantly Roman Catholic neighborhood and his arrest and the statute allowing it was subsequently ruled unconstitutional. The difference in rulings is more based on Connecticut's law regarding obtaining a license to distribute religious material and not on the idea of language-incited violence, but the underlying concern was the same. In the majority opinion of *Feiner*, written by Justice Vinson, he states:

> We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. [...] But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn [...] the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.[43]

Put simply, the Court ruled that because of the anticipation of violence perceived in the crowd, the police acted constitutionally in their decision to arrest Feiner. It was not, they ruled, a matter of free speech because they were not arresting Feiner because of the content of his speech but because Feiner passed the realm of free speech and was, in essence, inciting a riot with his actions. Subsequent rulings have fallen on both sides of the debate.

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[42] Cantwell v. Connecticut, 310 U.S. 296

[43] Supra, note 37

In 1969 the case of *Gregory v. The City of Chicago* came before the court. In this case, a peaceful march was held in support of the desegregation of schools in Chicago. The march was peaceful, ended on time and was completely within the parameters of a legal peaceful protest. However, when the crowds on both sides of the debate began to grow restless after the march, police eventually arrested the demonstrators for disorderly conduct. The Supreme Court ruled that this was unconstitutional because the demonstration had been conducted lawfully and was afforded full protection under the First Amendment. In a concurring opinion, Justice Black stated:

> Indeed, in the face of jeers, insults, and assaults with rocks and eggs, Gregory and his group maintained a decorum that speaks well for their determination simply to tell their side of their grievances and complaints. Even the "snake" and "snake pit" invectives used by Gregory and his demonstrators, unlike some used by their hecklers, remained within the general give-and-take of heated political argument. [...] but they were nevertheless unable to restrain the hostile hecklers within decent and orderly bounds. These facts disclosed by the record point unerringly to one conclusion, namely, that when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protestors of their grievances.[44]

This is a distressing idea. Justice Black essentially says that there is no way to maintain order when there are two opposing groups attempting to exercise their First Amendment rights in the same place; he goes on to express his desire that rules regulating conduct not specific to speech be enacted and enforced, though he notes his inability to do so as it is not within his authority. Clearly in this matter, the Court agreed that the party demonstrating their cause was not to be stopped because of *hecklers* who were causing the violence and unrest-- seemingly a departure from their ruling with Feiner. More accurately, the difference lies in the difference between the natures of the parties. Feiner was using offensive language to incite the crowd; the

[44] *Gregory v. Chicago*, 394 U.S. 111 (1969)

demonstrators were only causing unrest after the conclusion of their protest and were responding to offensive language from onlookers.[45]

The concept of the heckler's veto was recently discussed in *Hill v. Colorado* (2000). The case involved a 1993 Colorado statute that "regulated speech-related conduct" around health-care facilities. The statute made it illegal to approach a person within 100 feet of a health-care facility with the intent to deliver leaflets without the consent of the person being approached. It did not regulate the speech of a person who did not approach an individual. Petitioners protested the ruling, stating that they had been practicing "sidewalk counseling" outside of abortion clinics in an attempt to dissuade women with verbal and written information about the effects and the alternatives.[46] Despite their innocent claims, it became apparent throughout the course of the investigation that the petitioners were not as non-violent as they seemed; patrons of the clinic often required escorts to enter and the petitioners significantly impeded entrance to and from the clinic. The Supreme Court held that the law was constitutional and took care to differentiate this ruling from previous rulings by noting in the majority opinion written by Justice Stevens that, "While we have in prior cases found governmental grants of power to private actors constitutionally problematic, those cases are distinguishable. In those cases, the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners."

The Court rejects the idea of the heckler's veto in this judgment by differentiating this situation from others; in the Court's opinion, the speech of the protestors outside of the abortion clinic was being specifically directed at the persons coming in and out of the clinics, i.e., individuals, who were unwilling listeners. In contrast, issues that were problematic were focused

[45] Supra, see notes 37 and 41
[46] *Hill v. Colorado*, 530 U.S. 703 (2000)

on a small group affecting the ability of a large group to willingly listen to a speech or presentation.[47]

With a hefty legal precedence that clearly denounces the idea of a small group of dissatisfied individuals affecting the ability of a larger audience to absorb content in a real-life setting, it seems illogical that the same standard has not been transferred to the mass media; the majority of content accessed by the public is through radio and television, therefore it should only follow that these mediums are afforded the same rights as public speeches and demonstrations.

In essence, the Parent's Television Council is a glorified heckler of modern media. As the Court has supported the rights of individuals in this matter, it is important that the same rights be afforded in the media; the Federal Communications Commission's policies in regards to monitoring the media do not afford such protection.

[47] Supra, note 43

3.2 Inconsistency in Rulings

The second major issue of the FCC is their inconsistency in rulings. This problem has been in the spotlight recently as the cases against Fox and CBS Corporation have been running the gambit for the last few years through the federal courts system. A brief synopsis of the cases was given in section two of the papers, but the implications and reasoning of the decisions was left largely unanalyzed; they will be the main focus of this section.

To establish the inconsistencies, the original precedence must first be established. The first fine levied against a station for indecency, mentioned briefly in section two, was in 1970 against WUHY-FM when it broadcasted a pre-taped interview with Jerry Garcia that contained several profanities. The FCC, noting the lack of precedence, fined the station lightly and also was careful to point out the distinction between a pre-recorded interview and a "on-the-spot coverage of a bona fide news event."[48] Though not stated by name, this is the first mention of the concept of a fleeting expletive. The FCC reasoned that because the interview was recorded and could have been edited to exclude the profanities, unlike a live broadcast in which such fleeting expletives could not be predicted, the fines imposed on the station were warranted.

A few years later in *Pacifica*, the Supreme Court ruled that Carlin's monologue was indecent and supported the statements of the FCC, saying, "The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent."[49] By agreeing with the ruling of the FCC,

[48] WUHY-FM, Eastern Education Radio 24 F.C.C.2d 408

[49] FCC v. Pacifica Foundation, 438 U.S. 726 (1978)

the Supreme Court set a precedent for indecency that was contingent upon repetitive and deliberate use of profanity.

This precedent was further upheld in 1992 and 1993 in two separate instances. On WYBB(FM) in Folly Beach, South Carolina, a statement including the f-word was deemed not indecent because the ""broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction."[50] This seemingly falls in line with the statements made by the FCC in *Pacifica*, as this was a live broadcast. Again in 1993, during a broadcast on KPRL(AM) in Paso Robles, California, a news announcer swore on air and again the FCC stated that because of the "accidental nature of the broadcast" and due to the single use of the expletive, the statement did not require any further consideration of the FCC.[51]

In 2000, the FCC addressed the issue of fleeting nudity. In March of 1997, Thomas B. North filed a complaint regarding the broadcast of *Schindler's List,* which contained nudity. The FCC found that the movie did not meet the standards for indecency and that nudity in and of itself was not necessarily indecent.[52] This precedent, too, would come into question in the coming decades.

In a similar vein, in 2004, the FCC did not find ABC Network's broadcast of the film *Saving Private Ryan*, broadcasted fully and unedited in honor of Veteran's Day, indecent. A World War II veteran, Dr. Harold Baumgarten, and Senator John McCain, a Navy veteran, introduced the broadcast, and they indicated that the film contained material not suitable for children. At the end of every commercial break during the film, a warning was also shown

[50] 7 FCC Rcd. At 1595
[51] 8 FCC Rcd 2582, 2585 (ASD, MMB 1993)
[52] In re WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838 (2000).

indicating that the broadcast contained material not suitable for children. The FCC noted the importance of context in making its decision, saying:

> Thus, in light of the overall context of the film, including the fact that it is designed to show the horrors of war, its presentation to honor American veterans on the national holiday specifically designated for that purpose, the introduction, which articulated the importance of presenting the film in its unedited form, and the clear and repeated warnings provided by ABC, not only in the introduction but also at each commercial break, we find that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium, and, therefore, not indecent. For the same reasons, and based on the same contextual analysis, we conclude that the language referred to above is not profane in context here.[53]

Despite the use of multiple profanities in the film, the FCC valued highly the context of the film and deemed the profanities integral to the artistry of the piece. What makes the decision in 2004 interesting, however, is the simultaneous nature of this decision with the aforementioned Fox and CBS cases.

During the January 2003 Golden Globes, artist Bono received an award and, during his acceptance speech, used profanity, saying either "f***ing brilliant," or something of that nature. In its original decision, the FCC ruled that Bono's statement was not indecent, citing its previous rulings, saying:

> As a threshold matter, the material aired during the "Golden Globe Awards" program does not describe or depict sexual and excretory activities and organs. The word "fucking" may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word "fucking" as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult … is not within the scope of the Commission's prohibition of indecent program content…Moreover, we have previously found that fleeting and isolated remarks of this nature do not warrant Commission action. [footnote excluded] Thus, because the complained-of material does not fall

[53] 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," 20 F.C.C.R. 4507 (2005)

> within the scope of the Commission's indecency prohibition, we reject the claims that this program content is indecent.[54]

However, the Parent's Television Council filed an Application for Review of the decision and sought to have the decision reversed. Upon reviewing the matter further, the FCC seemed to change its opinion on the matter entirely. In its Memorandum and Order issued March 18, 2004, the FCC stated:

> The "F-Word" is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the "F-Word" here, on a nationally telecast awards ceremony, was shocking and gratuitous…If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the audience, this would likely lead to more widespread use of the offensive language. [footnote excluded] Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language. [footnote excluded] The fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language. Our action today furthers our responsibility to safeguard the well-being of the nation's children from the most objectionable, most offensive language… By our action today, broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the "F-Word" or a variation thereof in situations such as that here.[55]

This complete departure from standard FCC procedure warranted concern. Not only did it change its policy completely but, as Clay Calvert noted, "the FCC has given itself two separate avenues—indecency *and* profanity—for censoring offensive speech where it previously only used the former for this task."[56] This order allowed the FCC to flex its muscles and assert its authority by establishing an entirely new category under which broadcasters could be fined.

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[54] In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 1, 18 F.C.C.R. 19,859, 19,860–61 (2003).

[55] In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, FCC 04-43, File No. EB-03-IH-0110 (Mar. 18, 2004) [herein referred to as *Golden Globes Order*]

[56] Clay Calvert, Bono, the Culture Wars,and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity, 28 SEATTLE U. L. REV. (2004) at p. 63

In March 2006, the FCC issued an Omnibus Order addressing several broadcasts between 2002 and 2005. It contained a section that included broadcasts that were found indecent but did not require forfeiture of license. These broadcasts included the 2002 Billboard Music Awards, the 2003 Billboard Music Awards, an episode of NYPD Blue and an episode of The Early Show.

At the 2002 Billboard Awards, Cher noted that many had said that her career was ending but in response she said "f*** 'em." The FCC ruled that Cher's language, pursuant to their recently issued *Golden Globes Order,* was both profane and indecent. "The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the Golden Globe Awards Order. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives." As a result, they noted that no forfeiture would be ordered.[57]

At the 2003 Billboard Awards, Nichole Richie used both f*** and s*** during her presentation. The FCC again cited their *Golden Globes Order* and also noted the ability of Fox to have a delay and prevent such profanity from entering innocent viewer's homes. Again they noted the lack of precedent in the case and declined to impose fines or forfeiture.

On various episodes of "NYPD Blue" the FCC found that, while the words "dick" or "dickhead" are not vulgar enough to warrant action, the word bulls***, as it is derived from the S-word was patently offensive, saying "we find the "S-Word" to be one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language. Its use invariably invokes a coarse excretory image. We conclude that the broadcast of the "S-Word," under the

[57] *Omnibus Notice*, supra note 24

circumstances presented here, is vulgar, graphic and explicit."[58] Again they did not impose a fine or forfeiture.

Finally, the Omnibus Notice addressed an episode of "The Early Show" that broadcast an interview with "Survivor: Vanuatu" cast member that contained the word "bulls***ter." The FCC re-emphasized its new opinion on the S-word and again found the broadcast to be offensive. The FCC insisted that, as there were likely to be children in the audience, the use of profane language was indecent, though it again noted lack of precedence and did not impose a fine.[59]

The response to this Omnibus Notice was immediate. Noted First Amendment advocate Robert Corn-Revere said; "It appears the FCC has declared war on the First Amendment."[60] The broadcasting networks concerned with these orders filed petitions for review that resulted in the case *Fox vs. FCC*. This case was addressed briefly in section two. In its initial ruling in the case in 2007, the Second Circuit Court of Appeals held that the change in policy of the FCC was arbitrary and capricious under the Administrative Procedure Act. Because of this, they did not explore any of the other issues posed by the petitioners in regards to the FCC's policies.[61]

The FCC repealed the decision and the Supreme Court overturned it, disagreeing with the Second Circuit and asserting that, "the FCC's new policy and its order finding the broadcasts at issue actionably indecent were neither arbitrary nor capricious… The FCC's decision not to impose sanctions precludes any argument that it is arbitrarily punishing parties without notice of their actions' potential consequences."[62] The Supreme Court further stated that the Second Circuit had declined to look into the constitutionality of the case and therefore remanded the case

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[58] *Omnibus Notice*, supra note 24
[59] *Omnibus Notice*, supra note 24
[60] John Eggerton, FCC's Got a Brand-New Bad, BROAD. & CABLE, Mar. 22, 2004, at 6.
[61] Fox Television Stations, Inc., 489 F.3d
[62] FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800 (2009)

back to the Second Circuit for further proceedings regarding the constitutionality of the FCC's new policies.

The Second Circuit then upheld its decision against the FCC in 2010, stating that, "We now hold that the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here."[63] In its opinion, the court discussed the many factors that warranted a re-evaluation of the Supreme Court's former precedence set in *Pacifica*. They state, "The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast – almost 87 percent of households subscribe to a cable or satellite service – and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control."[64] They also note the advancement in technology that permits user-controlled exposure to media, noting "Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system."[65] Despite these valid points that question the precedent set by the Supreme Court, the precedent nevertheless exists and the Second Circuit notes that its decision must be based upon that precedent.

The court begins its discussion by stating that "The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague."[66] The court then asserts that the FCC's policy is unconstitutionally vague and therefore broadcasters often steer clear of any potentially indecent broadcasts to avoid being fined. They discuss the effect of the vague FCC guidelines, stating:

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[63] Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010)
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*

> the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.[67]

They concluded their opinion by striking down the FCC's policy on indecency, stating that the FCC may be able to create a constitutional policy, but that the current one failed to suffice.

The Supreme Court ruled again on the case in 2012. Justice agreed in a unanimous decision (excluding Justice Sotomayor who recused herself) that the FCC's policies were vague, but they declined to address the First Amendment issues at hand. They discussed their reasoning, saying:

> [T]he Court rules that Fox and ABC lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies. Given this disposition, it is unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications. The Court adheres to its normal practice of declining to decide cases not before it.

Additionally the Court decided that it was unnecessary to review the standard set by *Pacifica* as the FCC's position was already deemed unconstitutional because of the lack of fair notice. Finally, the Supreme Court asserted the FCC's ability to rule on indecency, noting that it was important for the community.

A second case that was making the rounds through the courts system at the same time was in response to the FCC fine imposed on CBS for the Janet Jackson wardrobe malfunction.

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[67] *Ibid.*

The FCC issued a Notice of Apparent Liability for Forfeiture in September of 2004. They outlined that in the days following the broadcast that the FCC received an unprecedented number of complaints. They issued a letter of inquiry and were supplied with tapes of both the rehearsal and of the halftime show by CBS and in March CBS submitted a response in which they claimed to have no prior knowledge of the intentions of Jackson and Timberlake and that the incident was planned by the artists alone. Despite this, the FCC stated, "we find the nudity here was designed to pander to, titillate and shock the viewing audience."[68] They ordered an aggregate fine of $550,000. CBS appealed the decision to the FCC and when that appeal was denied, the network took it to the court system.

In July of 2008, the Third Circuit Court of Appeals ruled in favor of the FCC. The court discuss at length the FCC's previous policy of treating fleeting expletives and fleeting nudity alike and noting that the policy for fleeting expletives at the time of the offense did not warrant fines for fleeting nudity. The court also discussed the ongoing *Fox* case, citing some of the same issues that existed in this case. Stated succinctly,

> As detailed, the Commission's entire regulatory scheme treated broadcasted images and words interchangeably for purposes of determining indecency. Therefore, it follows that the Commission's exception for fleeting material under that regulatory scheme likewise treated images and words alike. Three decades of FCC action support this conclusion. Accordingly, we find the FCC's conclusion on this issue, even as an interpretation of its own policies and precedent, "counter to the evidence before the agency" and "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." State Farm, 463 U.S. at 43.[69]

The Third Circuit echoed many of these statements and added in its final decision. "In finding CBS liable for a forfeiture penalty, the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency.

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[68] In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230, 19240 (2004)
[69] CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008)

Moreover, the FCC cannot impose liability on CBS for the acts of Janet Jackson and Justin Timberlake, independent contractors hired for the limited purposes of the Halftime Show, under a proper application of vicarious liability and in light of the First Amendment requirement that the content of speech or expression not be penalized absent a showing of scienter."[70]

In May of 2009, the Supreme Court remanded the case back to the Third Circuit in light of the recent decision on *Fox*, and it again found the FCC at fault, saying "In finding CBS liable for a forfeiture penalty, the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency. Therefore, we will grant CBS's petition for review and will vacate the Commission's order in its entirety."[71]

The case was finally put to rest in 2012 when the Supreme Court issued a denial to the petition of writ of certiorari. They explained their reason with Chief Justice Roberts issuing the opinion saying:

> Even if the Third Circuit is wrong that sanctioning the Super Bowl broadcast constituted an unexplained departure from the FCC's prior indecency policy, that error has been rendered moot going forward. The FCC has made clear that it has abandoned its exception for fleeting expletive ... it makes no difference as a matter of administrative law whether the FCC's fleeting expletive policy applies to allegedly fleeting images, because the FCC no longer adheres to the fleeting expletive policy. It is now clear that the brevity of an indecent …cannot immunize it from FCC censure. … Any future "wardrobe malfunctions" will not be protected on the ground relied on by the court below.[72]

Whether or not the FCC's decision was arbitrary and capricious, the Supreme Court decided, the hefty precedence set by *Fox* now negates the need for any further clarification by the Supreme Court.

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[70] *Ibid.*

[71] Fox Television Stations, Inc. v. Fed. Communications Comm'n, F.2d (3d Cir. 2011).

[72] CBS Corp. v. FCC, cert. denied, 132 S. Ct. 2677 (U.S.June 29, 2012)

The implications of these decisions cannot be overstated. Many scholars have noted the FCC's lack of consistency and its chilling effect on broadcasters. Clay Calvert discusses this concept at length. He discusses several bills that have been passed in the wake of the infamous Janet Jackson halftime show, including the Broadcast Decency Enforcement Act that significantly increases the fines able to be levied on broadcasters. He goes on to note that, "Broadcasters may well kowtow and surrender content in order to prevent further FCC incursions into the realm of content and to avoid the loss of advertisers who shun association with radio chains and television owners that carry allegedly offensive expression."[73]

The FCC even noted the growing suspense of broadcasters in its statement deeming *Saving Private Ryan* decent, saying, "According to news reports, approximately 66 of a total of 225 stations affiliated with ABC declined to air the film, citing their uncertainty as to whether it contained indecent material, reportedly based, in part, on Commission indecency rulings subsequent to these previous broadcasts of the film."[74] Clearly, despite the FCC finding merit in this program previously, many stations were so uncertain about the future actions of the FCC that they declined to broadcast a critically-acclaimed and appropriate film.

Many echo the dissatisfaction of the Calvert. Stephen Weiswasser and Robert Sherman discussed many more examples of the inconsistencies in FCC rulings in the Spring 2006 edition of Communications Lawyer. They open the article commenting, "It is hard to imagine a government agency imposing massive fines on broadcast outlets simply for offering programming that expresses ideas in ways in which the agency does not approve. Yet there is no other way to describe the current state of the Federal Communications Commission's (FCC) enforcement of its broadcast indecency policies." They noted many inconsistencies in FCC

[73] Clay Calvert, Bono, the Culture Wars,and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity, 28 SEATTLE U. L. REV. (2004) at p. 65
[74] *Saving Private Ryan*, supra, note 52

rulings, noting especially the comparison between a minute-long flashback scene in the hour long program *Without a Trace* that depicted short flashes of teen partying including a girl in underwear with a scene in *Alias* that involved "passionately kissing, caressing, and rubbing up against each other." The FCC ruled the first scene indecent and the second scene not indecent. They also compared the former scene to an episode of Oprah that discussed extensively and sometimes graphically the habits and practices of teen partygoers. The FCC ruled that Oprah's programming was made to educate viewers about a topic that was extremely relevant—the hazards of teen partying. Weiswasser and Sherman pointed out that in the context of the entire show, the scene in *Without a Trace* was essentially demonstrating the same point, albeit in a more artistic and less direct manner. They conclude their article by stating the ardent need for a change in the FCC's policy regarding indecency, saying:

> At the least, the Commission needs to start from scratch with a much more limited approach to indecency, one that avoids the strictures of *Reno.* That approach, as a content-based regulation of First Amendment speech, should appropriately place a heavy burden on complainants and the Commission to demonstrate through the use of quantifiable and verifiable measures that a broadcaster violated, within its community of license, not some imaginary community of the broadcast medium, but specific, predefined standards. It is only in a regime of measurable and verifiable standards that broadcasters can accommodate any form of indecency policy and at the same time fully serve the diverse needs of their communities.[75]

In exploring in-depth the recent about-face in the FCC's policies, this paper has proven that the inconsistencies of the FCC propose a very real problem for broadcasters today. As Robert D. Richards and David J. Weinert so aptly noted in Albany Law Review, "The resulting quagmire for broadcasters is trying to determine just what programming is acceptable and which shows, if aired, could place their licenses in jeopardy. No business should face such a daily

[75] Stephen A. Weiswasser and Robert M. Sherman, *Oprah and Spielberg vs. Without a Trace and Scorsese: Indecent Inconsistency at the FCC*, 24 COMM. LAWYER (2006) at p. 6

dilemma—yet alone one whose product enjoys First Amendment protection."[76] Broadcasters have an obligation to inform and entertain the public, and the erratic behavior of the FCC deprives the public from thought provoking and potentially valuable information is scaring broadcasters into submission. Essentially, the FCC is no longer a useful government expenditure. There are several ways for children and innocent members of society to be protected from indecency and profanity, thanks to recent advances in technology. Some of these proposed solutions are discussed in the next section.

[76] Richards, R. D., & Weinert, D. J. (2013). PUNTING IN THE FIRST AMENDMENT'S RED ZONE: THE SUPREME COURT'S "INDECISION" ON THE FCC'S INDECENCY REGULATIONS LEAVES BROADCASTERS STILL SEARCHING FOR ANSWERS. *Albany Law Review*, *76*(1), 631-664.

4. Proposed Solution

In this portion, this paper will provide its own proposed solution to the problem at hand. Michael Powell, FCC commissioner, expressed the opinion that, in terms of creating a set standard for indecency, "There are simply too many subtleties and too many contexts in which a given form of speech might occur to generalize a set of rules. The individual facts and the context are critical to separating protected speech from unlawful speech."[77] That is simply not true—at least, not to the extent the FCC believes it to be.

Due to the advent of entirely new methods of media, including the v-chip mentioned by the Second Circuit, along with the fact that television is moving over to Internet, it seems that the world of mass media is changing to be almost entirely user-controlled. John P. Gardner and Brett West initially developed the concept for the V-chip, a tool that allowed parents to set regulations using personal identification numbers that tailor program availability for each member of a family.[78]

The Telecommunications Act, passed in 1996, began the process of integrating the V-chip into home televisions. The Telecommunications Act, the first to modernize regulations in the field of media since 1936, addressed a broad range of topics, including Congress' first attempt to regulate Internet content. Title V of the act, known as the Communications Decency Act (CDA), specifically addressed obscenity and violence in various forms of mass media. Congress found that children are exposed to approximately 25 hours of television a week and because of the "pervasiveness and casual treatment of sexual material on television," it was in

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[77] Michael K. Powell, *Statement of Chairman Michael K. Powell Regarding Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, FEDERAL COMMUNICATIONS COMMISSION (2004) at http://transition.fcc.gov/eb/Orders/2004/FCC-04-209A2.html

[78] Teresa Riordan, *Two Inventors Contend that the V-chip Is an Idea They've Seen Before -- in Their Own Patent.,* 1996 New York Times (1996).

the best interest of the country if personal regulation of home television was allowed.[79] It also noted a correlation between the exposure of children to violence and a proclivity for violent behavior. The act proposed that television programs be subjected to a similar rating system as the film industry. This was enacted with the V-chip in mind as the act specifically states, "rules requiring distributors of such video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children."[80] The act also described the body that would be created to rate these programs specifying:

> **(A)** ensure that such committee is composed of parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee;**(B)** provide to the committee such staff and resources as may be necessary to permit it to perform its functions efficiently and promptly; and**(C)** require the committee to submit a final report of its recommendations within one year after the date of the appointment of the initial members.[81]

Finally, the CDA stated that all televisions greater than 13 inches in size must be "be equipped with a feature designed to enable viewers to block display of all programs with a common rating."[82]

The implementation of this act should have essentially ended the FCC's involvement in the regulation of television. The power to control what kind of material was viewable was now in the hands of the parents of the child in question, not anyone else. There was some lag in the

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[79] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, § 551 (1996)
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*

public perception or knowledge of the technology available to them, admittedly. A study in 2004 by the Henry J. Kaiser Family Foundation saw that while 63% of parents were very concerned about their children's exposure to inappropriate content in entertainment media, only 15% of those surveyed have used the V-chip. Over half of the parents who knew about the V-chip but didn't use it said they chose to do so because an adult was usually nearby when the child was watching television.[83]

While clearly there is some discrepancy between parents concern and their willingness to do something about it, it is surely the responsibility of the parent to monitor a child's exposure (or lack of exposure) to violence and sexual materials, and not the government's—especially not the Parent's Television Council, an advocacy group with a very plain agenda. According to a survey conducted by Kelton Research of February 26, 2007, of the parents surveyed, 75% believed that it was the responsibility of the parent to monitor children's television intake.[84] With this overwhelming majority seeming to want control of their own access to television, and with technology readily advancing to allow greater extent of user control, it seems counterintuitive that the government continues to interfere in the regulation of mass media through the Federal Communications Commission.

In addition, the presence of multiple channels with very specific brand identities renders the problems that were present in the times of *Pacifica* essentially moot. Parents know what channels contain material suitable for children and what channels do not; when televisions only had three channels to choose from, the matter was exponentially more serious.

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[83] (2004) Parents, Media and Public Policy: A Kaiser Family Foundation Survey. Program for the Study of Media and Health, Publication No. 7156, September 23

[84] "Parents Want Control of TVPoll Shows Americans Think Government Shouldn't Determine Content." *Parents Want Control of TV: Poll Shows Americans Think Government Shouldn't Determine Content*. TV Watch, n.d. Web. 20 Dec. 2013.

An argument could then be made that the entire basis of the FCC's policies in regards to indecency need to be revamped, as noted in the cases surrounding *Fox* and *CBS*, but the Supreme Court chose not to address the changes in technology and media in general since its initial ruling over three decades ago. While it seems probable that such an event looms in the near future, in the meantime the FCC's heavily skewed bias to the vocal minority and its inconsistencies in policy pose a threat to any and all broadcasters who wish to broadcast live interviews, award shows and even films celebrating American Veterans; these potentially beneficial broadcasts are all being halted for fear of exorbitant indecency fines.

While the Radio Act of 1927 states that "no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech" could be interpreted to mean that the FCC is not permitted to give explicit guidelines specifying what words can and cannot be used by broadcasters, the arbitrary enforcement of policies that are already vague at best warrants the need for a more stringent guideline that affords more protection for both broadcasters and consumers.

If the FCC chooses to uphold their ruling that the "F-word" and "S-word" are inherently indecent, they may choose to do so, but it must be published and provided to all broadcasters. After reading the policy, broadcasters must sign an agreement saying that they understand the definition and consequences of indecency in a broadcast. The policy should be reviewed and updated yearly or every two years to reflect the contemporary national standards. The fines imposed on broadcasters should be based first on the budget of the broadcaster and then on the severity of their breach. To say it another way, fines should be based on percentages of budgets rather than a specific set-in-stone number.

Finally, the concept of safe harbor, the idea of outlining a time when children are not likely to be watching or listening to public broadcast, has been discussed, proposed and has still remained largely unsettled.[85] A safe harbor time must be established and made known to all broadcasters. In those times, content that is considered indecent is permissible, but obscenity, as always, is not. With the technology available today, it is possible to block certain channels from television sets. This tool can be used to protect children from material deemed indecent, one of the primary concerns of the FCC in its former indecency policies. Paternalism should never threaten the freedom of expression.

In terms of obscenity, the development of a national standard seems imminent. As the Internet and social media become more and more prevalent, the idea of community has expanded much farther than the judges in *Pacifica* could have anticipated. Community standards are therefore difficult to pin down as the concept of a community is slowly becoming larger and could potentially cease to exist as it is known today. In addition, a national standard for obscenity, and by extension indecency, would allow broadcasters to know fully the parameters of what they can and cannot broadcast. As Mark Cenite stated in his article, "A single national obscenity standard would limit burdens on content providers to know multiple local standards and limit the influence of the least tolerant community, but would raise objections that it would remove some police power traditionally granted to the states, which would be barred from imposing different standards."[86]

Justice O'Conner had a similar idea in her concurring opinion in *Ashcroft v. ACLU*, saying, "I agree … that, given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their

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[85] *Supra note 9*

[86] Mark Cenite (2004) Federalizing Or Eliminating Online Obscenity Law As An Alternative To Contemporary Community Standards, Communication Law and Policy, 9:1, 25-71

speech… may be entirely too much to ask, and would potentially suppress an inordinate amount of expression…For these reasons, adoption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity."[87]

The Ninth Circuit Court of Appeals noted the importance of O'Conner's words in its decision on *United States v. Kilbride* that recalled the decision made by the Supreme Court in the split decision of Ashcroft v. ACLU in which "five Justices concurring in the judgment, as well as the dissenting Justice, viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns. At the same time, five justices concurring in the judgment viewed the application of a national community standard as not or likely not posing the same concerns by itself."[88] These recent acknowledgements, compounded with the ever increasing role the Internet plays in the lives of both consumers and broadcasters nationwide, make the development of a national standard of contemporary community in the coming years a necessity.

From there, it is not too difficult to begin applying the national standard to other means of broadcast as well. It is worth noting that the Internet now has the ability to stream formerly local stations to nationwide audiences. In addition, television stations broadcast the same programming from coast to coast—it seems logical that if a national standard is being considered for the Internet, the same should be true for television and radio. Though the states would lose the ability to define their own standards for obscenity, a national standard of contemporary community would protect the broadcasters nationwide of unintentionally stripping themselves of the protection of the First Amendment. Therefore, this paper proposes

[87] Ashcroft v ACLU, 535 US at 587 (O'Connor, J., concurring in part and concurring in the judgment).
[88] United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009).

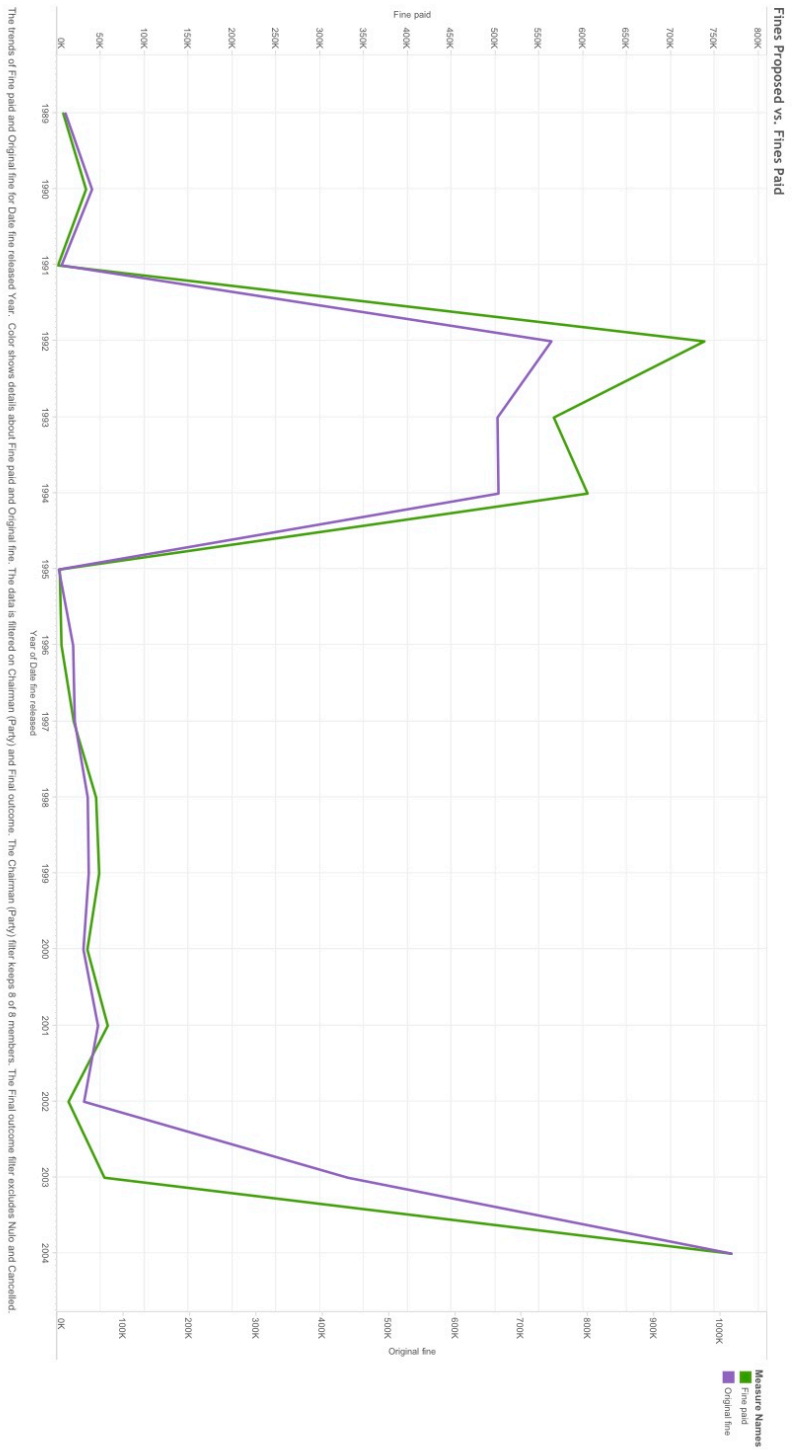
that Congress and Senate should create and vote on a legislation that defines the national standard in conjunction with the Federal Communications Commission. The standard should be reviewed annually or biennially to maintain the contemporary aspect of the standard. This standard would then be provided to juries who are chosen to judge obscenity cases in all courts. This national standard would provide information detailing the average American's opinion on materials like nudity, explicit language, et cetera. It would be necessary to do some external research, wherein a random sample was asked by researchers their opinions on such materials. This, in a way, reflects the same concept that a jury provided for the contemporary community standard; a random representation of the community in question. This research would aid the writers of the national standard in the true feelings of the American public in regards to what actually constitutes obscenity.

The FCC performs many functions that are integral to the functioning of our nation. The regulation and documentation of our airwaves are integral to the safety and security of our nation. However, it is important to remember that old ways are not always the best ways—while there are many areas in which the FCC is integral, regulation of indecency is quickly becoming user-controlled and user-regulated. With the unprecedented amount of control that people have over the types of media they are exposed to, this large, costly and unnecessary faction of the FCC needs to begin the process of extricating itself from the position it holds now. While it may be too soon at the moment, in the near future there will be no need for the FCC to regulate indecency. In the mean time, however, it must find a way to exert its power in a constitutional and appropriate manner.

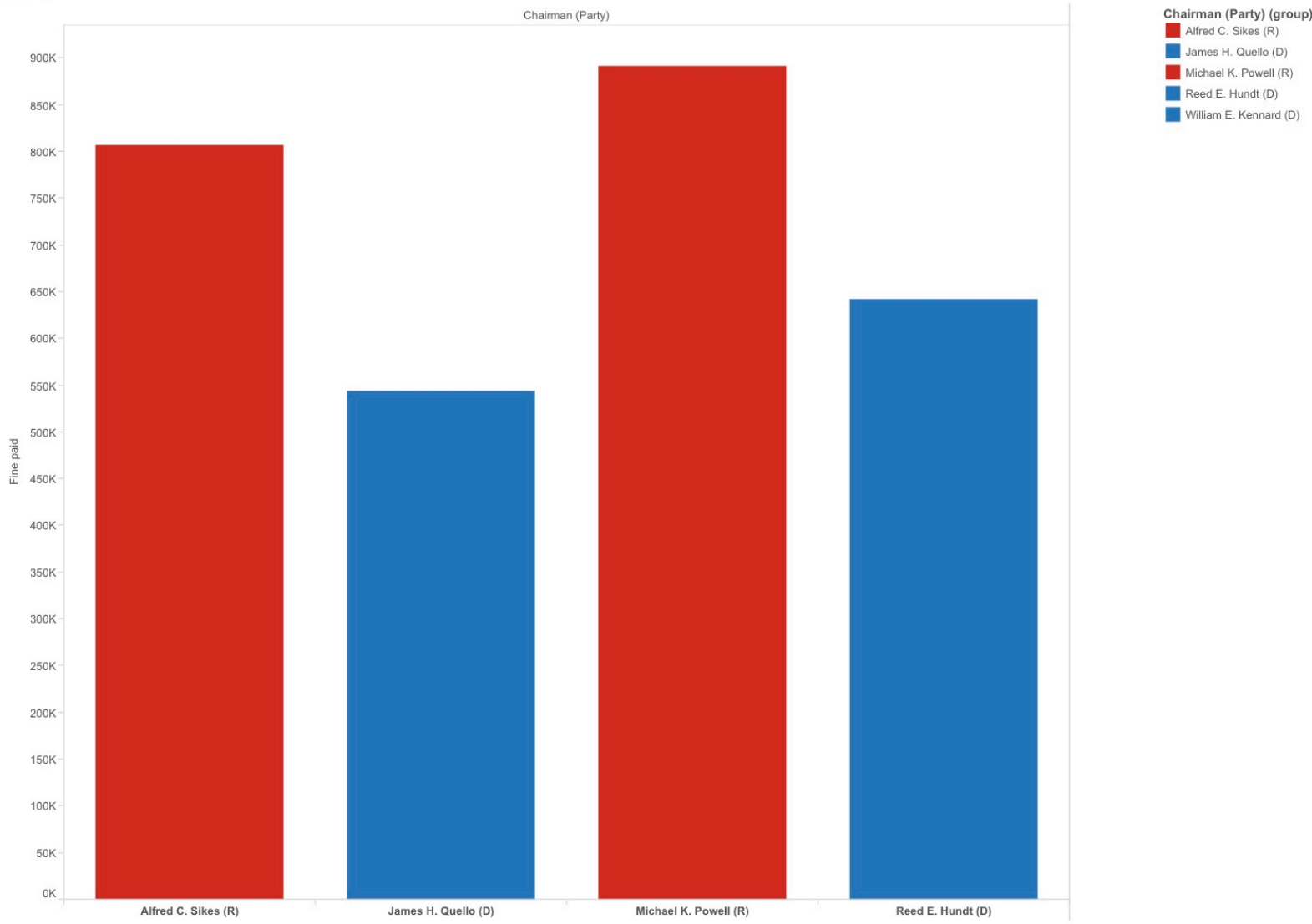
While the proposals made in this paper provide a new and effective ways to address policies that have troubled the government for years, the fact of the matter is that obscenity and

indecency are not easily definable. America prides itself on its diversity and for good reason. The rich and diverse citizens who make up the United States make our culture unlike any other. However, it also means that the values and morals are varied as well. As consequence of the range of ideas and values in our society, it is inevitable that definitions of obscenity and indecency will be difficult to pinpoint. A perfect definition is impossible. But by creating a definition that is as accurate as possible, citizens will be able to continue to enjoy the opportunities and freedoms that the First Amendment was created to protect.

5. Supplementary Charts

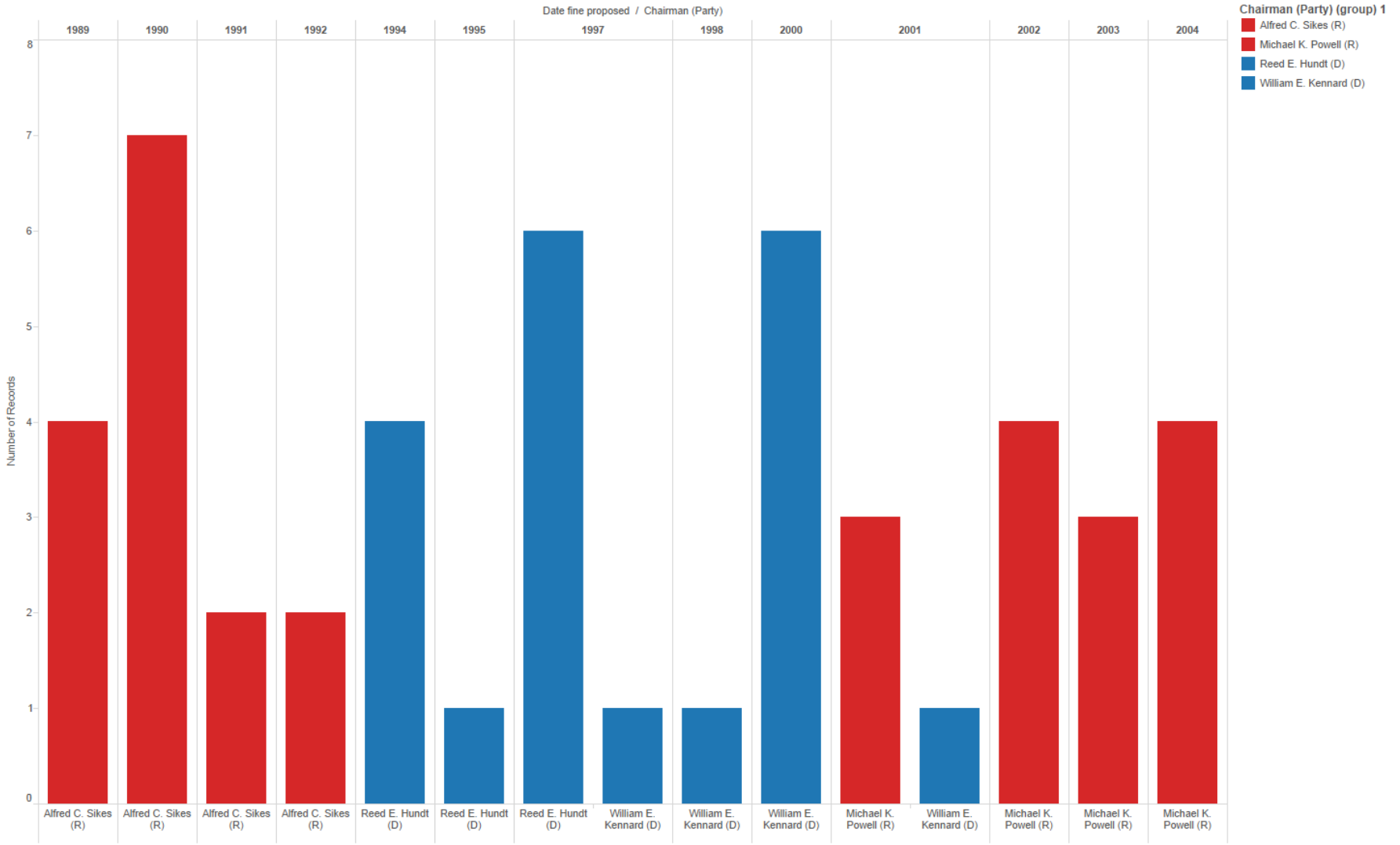


Sheet 2



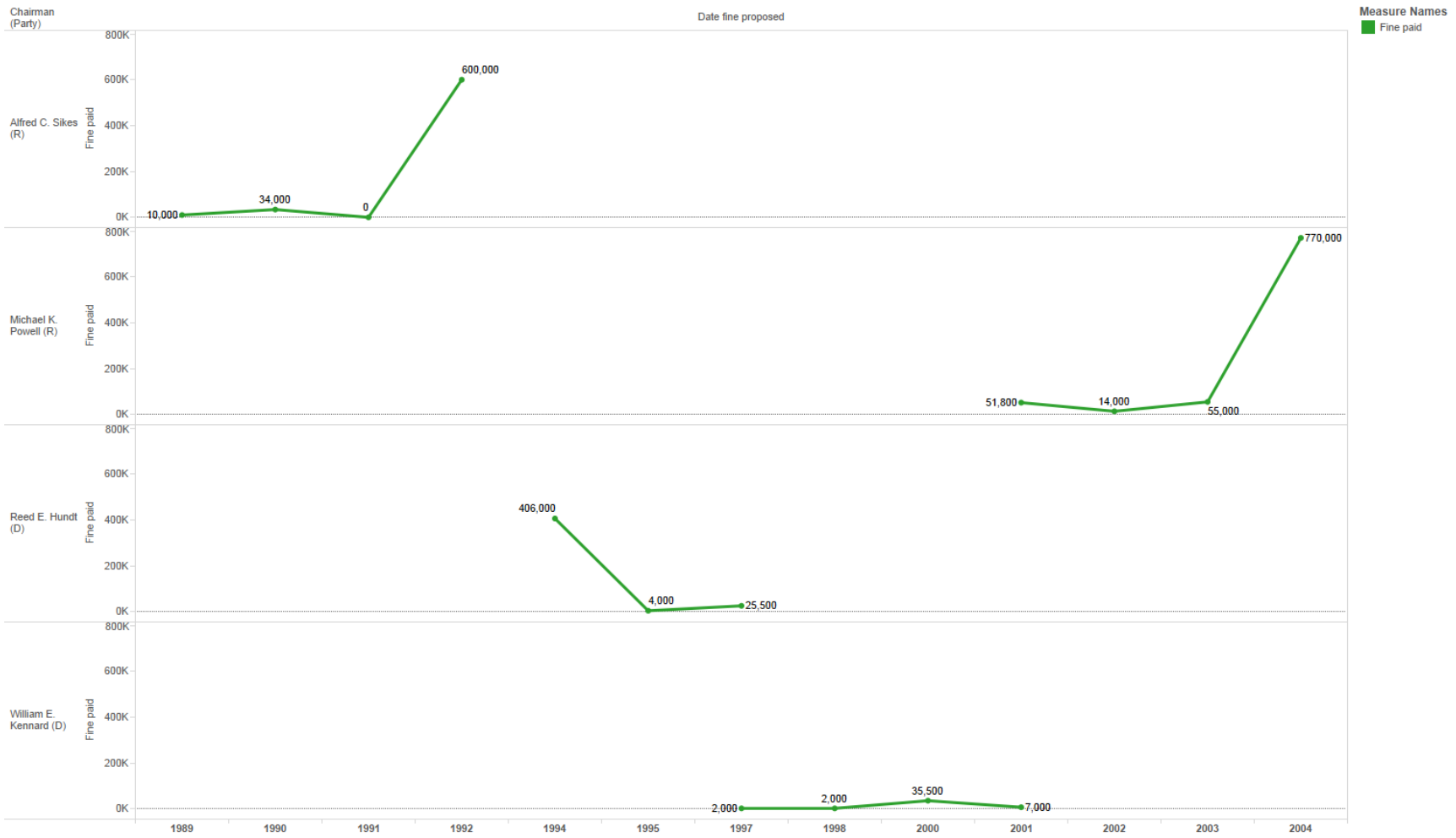
Sum of Fine paid for each Chairman (Party). Color shows details about Chairman (Party) (group). The data is filtered on Final outcome, which excludes Null and Cancelled. The view is filtered on Chairman (Party), which keeps 8 of 8 members.

Number of complaints addressed by political party



Sum of Number of Records for each Chairman (Party) broken down by Date fine proposed Year. Color shows details about Chairman (Party) (group) 1. The data is filtered on Final outcome, which excludes Null and Cancelled. The view is filtered on Chairman (Party) and Date fine proposed Year. The Chairman (Party) filter keeps 8 of 8 members. The Date fine proposed Year filter excludes Null.

Sheet 1



The trend of Fine paid for Date fine proposed Year broken down by Chairman (Party). Color shows details about Fine paid. The marks are labeled by Fine paid. The data is filtered on Final outcome, which excludes Nulo and Cancelled. The view is filtered on Chairman (Party) and Date fine proposed Year. The Chairman (Party) filter keeps 8 of 8 members. The Date fine proposed Year filter excludes Nulo.