
WHY REGULATE BROADCASTING? TOWARD A CONSISTENT FIRST AMENDMENT STANDARD FOR THE INFORMATION AGE

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I. INTRODUCTION

On June 15, 2006, President George W. Bush signed “The Broadcast Decency Enforcement Act,”¹ which increased the maximum fine that the Federal Communications Commission (“FCC” or “Commission”) can impose on broadcast TV and radio licensees for violations of the agency’s indecency regulations.² Under this law, the FCC now has the authority to levy fines of \$325,000 per violation with a \$3 million cap per violator,³ representing a ten-fold increase in fines above the previous \$32,500 limit.⁴

The measure received widespread, bipartisan support in Congress, passing in the U.S. House of Representatives by a vote of 379–35 after it cleared the Senate unanimously.⁵ Proponents of the legislation claimed that it would “protect American families”⁶ specifically by shielding children’s eyes and ears from potentially objectionable or “indecent” content.

Despite these proclamations, it remains unclear that boosting fines will do much to change the complexion of modern broadcasting, or protect children from potentially objectionable content. Indeed, in deliberations about the pending legislation, there was almost no discussion of the many

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¹ Broadcast Decency Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (amending 47 U.S.C. § 503(b)(2)).

² Press Release, The White House, President Signs the Broadcast Indecency Enforcement Act of 2005 (June 15, 2006) [hereinafter President Signs the Broadcast Decency Enforcement Act], available at <http://www.whitehouse.gov/news/releases/2006/06/20060615-1.html>.

³ Broadcast Decency Act, 47 U.S.C. § 503(b)(2)(C)(ii) (2006).

⁴ See 47 C.F.R. § 1.80(b)(1) (2004).

⁵ See Frank Aherns, *The Price for On-Air Indecency Goes Up; Congress Approves Tenfold Increase in Fines FCC Can Assess*, WASH. POST, June 8, 2006, at D01.

⁶ President Signs the Broadcast Decency Enforcement Act of 2005, *supra* note 2.

factors that have changed in the seven decades since broadcast regulation was established under the Radio Act of 1927 and the subsequent Communications Act of 1934. For example, at no point during the public debates leading up to passage of the Broadcast Decency Act of 2005 were the following questions seriously debated either in Congress or at the FCC:

(1) Has the traditional “scarcity-based” rationale⁷ for regulating broadcast uniquely been eroded by the rise of media abundance?

(2) Does increasing media/technological convergence and cross-platform competition undermine the logic behind, and effectiveness of, broadcast-specific regulation?

(3) Has the “pervasiveness” rationale (i.e., the *FCC v. Pacifica Foundation* standard)⁸ for broadcast regulation been rendered moot by new marketplace/technological realities?

(4) Has the FCC’s broadcast indecency process become arbitrary and overly susceptible to special interest influence?

(5) Have parents been empowered to make household content determinations for themselves? If so, is parental control a less-restrictive alternative to which the government is now constitutionally compelled to yield?

(6) Finally, for the above reasons, have we reached the limits of the “it’s-for-the-children” rationale for broadcast regulation, especially since parents have been empowered and children are increasingly flocking to alternative media sources beyond over-the-air broadcasting anyway?

If any one of these questions could be answered in the affirmative, it would call into question the continued sensibility of asymmetrical regulation of the broadcast industry. As this article will illustrate, however, *each of these questions can be answered in the affirmative*. Broadcasting is no longer scarce or “uniquely pervasive.”⁹ Citizens—especially children—get their information and entertainment from a wide variety of sources. And there now exists multiple layers of parental control tools and methods which families can use to establish their own “household standard” as opposed to the one-size-fits-all “community standard” that regulators have tried to apply for decades.

Consequently, the recent imposition of stiff financial penalties on broadcasters, which are just one segment of our modern, multichannel, multimedia universe, is both radically unfair and an almost completely ineffective method of shielding children from potentially objectionable content. In the aggregate, therefore, these fines are largely meaningless—except to the broadcast entities that will be forced to pay large sums to the government while competitors air whatever they please.

⁷ See discussion *infra* Part II.A.

⁸ See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978); see also discussion *infra* Part IV.

⁹ See *Pacifica*, 438 U.S. at 748.

What makes this situation particularly insulting to broadcasters is that the industry today stands at a crucial crossroads. The marketplace hegemony that radio and television broadcast networks and stations once enjoyed has eroded rapidly in recent years. Decades of dominance has been undone by the rise of countless new competitors and technologies, including: cable and satellite television; satellite radio; VCRs and DVDs; the Internet and the World Wide Web; blogging; social networking; podcasting; portable digital music and video; gaming platforms; and the many other multimedia information and entertainment services.

Thus, the broadcast industry's dilemma can be succinctly stated: How does it compete in this new environment with one arm tied behind its back? Each of the competing media technologies and providers listed above share one common trait: they are left (largely) free to conduct their business affairs as they wish. Generally speaking, there is no "public interest" regulation of the Internet, Web sites, cable and satellite networks or programs, or other new media outlets. Thus, broadcasters face many operating restraints that are solely applicable to them, including a hodge-podge of media ownership restrictions, local and public affairs programming requirements, educational and children's programming mandates, political air time regulations, and so on.¹⁰

It is the unique set of speech controls that broadcasters face which are of the most concern in light of the serious First Amendment issues¹¹ that such asymmetrical regulation raises. Indeed, America's media policy is now stuck in what might be described as a jurisprudential "Twilight Zone." Speakers using the Internet or print outlets (i.e., newspapers and magazines) are guaranteed the utmost First Amendment protection, while those using broadcast radio and television to speak are accorded the equivalent of "second-class" free speech rights.¹² Meanwhile, cable and satellite speakers are caught somewhere in the middle with the courts generally granting them much more freedom than broadcasters receive, but not quite as much as speakers using the Internet or newspapers. And while it remains to be seen how emerging media technologies and outlets will be treated, they have largely evaded regulation to this point. Table 1 depicts the resulting legal confusion.

¹⁰ See Media Bureau Info. Res. Materials, <http://www.fcc.gov/mb/facts/> (last visited Apr. 14, 2007) (providing a collection of the FCC's Media Bureau fact sheets on various broadcast regulations).

¹¹ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

¹² For an excellent overview of the ways in which broadcasters are treated differently than other media, see Drew Clark, *Just Another Toaster*, NAT'L J. CONGRESS DAILY, October 3, 2005, available at <http://www.drewclark.com/wiredinwashington/20051003.htm>; see also Drew Clark, *Digital Convergence: Different Media 'Decency' Rules Spur Thorny Debate*, 10 NAT'L J. TECH. DAILY 9 (2006).

Table 1: America's First Amendment Jurisprudential Twilight Zone

Broadcasting Model	<ul style="list-style-type: none"> ▪ Indecency Regulations ▪ Political Airtime/ Access Rules ▪ Educational TV Mandates ▪ "Payola" Restrictions ▪ Extensive Ownership Limitations
Cable Model	<ul style="list-style-type: none"> ▪ "Must-Carry" Regulations ▪ "PEG" Access Mandates ▪ Some Educational TV Rules ▪ Some Ownership Limitations
Internet, Cinema, DVD & Print Model	<ul style="list-style-type: none"> ▪ Completely free, outside of libel law and some ownership limitations for newspapers
New Converged Media Model	???

This article will examine the legal and philosophical foundations of the broadcast industry's unusual regulatory regime and argue that the rationales for treating broadcast differently have always been weak. Even if those rationales for the unique regulation of broadcasting were once valid, modern marketplace realities and technological changes have undermined whatever remaining credibility they had.

Furthermore, parents have been empowered to create and enforce their own "household standard" to determine acceptable media content in the home. Families now use many alternative technologies and methods to filter or block unwanted programming from entering the home. This undermines the "media-as-invader" logic made famous in *Pacifica* and makes unnecessary traditional "community standard"-based forms of regulation.¹³

Finally, and perhaps most importantly, it is vital that the rationales undergirding the broadcast regulatory regime be debunked and discarded, not only to save broadcasters from unfair, asymmetrical speech restrictions, but also to ensure that this contorted vision of the First Amendment is not extended to other media platforms. Some policymakers and media critics propose extending the regulatory coverage of the broadcast sector—the regulation of speech, in particular—to include new media outlets and digital technologies.¹⁴ If America is to have a consistent First Amendment in

¹³ *Pacifica*, 438 U.S. at 727–28.

¹⁴ See Adam Thierer, *Thinking Seriously About Cable and Satellite Censorship: An Informal Analysis of S. 616, The Rockefeller-Hutchison Bill* (Progress & Freedom Found.,

the Information Age, efforts to extend the broadcast regulatory regime must be halted and that regime must be relegated to the ash heap of history.

II. THE TRADITIONAL REGULATORY RATIONALES: SCARCITY AND LICENSING

To understand how we arrived where we are today, it is necessary to step back and examine the legal and philosophical underpinnings of broadcast television and radio regulation. This is vital because the debate over content regulation relies heavily on the use of functional comparisons.¹⁵ If policymakers can make that case that new media services or technologies are “just like broadcasting,” it increases the likelihood that they will be able to apply traditional content controls to those media outlets as well.

Broadcast regulation, however, has always stood on shaky constitutional footing.¹⁶ Today these foundations are crumbling rapidly as legal and technological changes render moot the old regulatory assumptions and rationales. Extending the old regulatory regime to new technologies and media outlets would be a serious mistake. But it would also be a mistake to simply let broadcasters languish under the old regulatory regime, which unfairly penalizes them with lesser First Amendment protection while essentially giving their competitors a free pass.

A. The Scarcity Rationale: Illogical Then, Illogical Now

Spectrum “scarcity” has long been held out as the *sine qua non* for broadcast radio and television regulation in America. Spectrum scarcity was used to justify the broadcast licensing scheme enshrined in the Radio Act of 1927¹⁷ and the Communications Act of 1934.¹⁸ Supreme Court deci-

2005), <http://www.pff.org/issues-pubs/pops/pop12.6CableCensorship.pdf>; Robert Corn-Revere, Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio? (Progress & Freedom Found., 2005), <http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf>; Adam Thierer, “Kid-Friendly” Tiering Mandates: More Government Nannyism for Cable TV (Progress & Freedom Found., 2005), <http://www.pff.org/issues-pubs/ps/ps1.2familyfriendlytiering.pdf>.

¹⁵ For instance, are podcasting and Internet video “like TV”? Is satellite radio “like broadcast radio”? The Supreme Court has historically struggled with these issues, such as when it dealt with deciding the appropriate First Amendment protection of cable programming. “In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis.” *City of L.A. v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring).

¹⁶ See *Pacifica*, 438 U.S. at 762–77 (Brennan, J., dissenting); *id.* at 777–80 (Stewart, J., dissenting).

¹⁷ Radio Act of 1927, 47 U.S.C. §§ 81–83 (superseded by the Communications Act of 1934, 47 U.S.C. §§ 151–399 (2000)).

sions such as *NBC v. United States*¹⁹ and *Red Lion Broadcasting Co. v. FCC*²⁰ later made the scarcity rationale sacrosanct, and legitimized government licensing of broadcasters in the process.

The Court explained the essence of the scarcity rationale in *NBC*, where it rejected a First Amendment challenge to FCC broadcasting regulations on the theory that, “[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”²¹ In *Red Lion*, the Court upheld the so-called “Fairness Doctrine,” which required that broadcasters grant others access to their stations to present opposing viewpoints.²² The Court once again employed the scarcity rationale in holding that, because “there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”²³

Thus, *NBC* and *Red Lion* created a two-tiered theory of First Amendment scrutiny for broadcast versus print media: because print media are unlicensed and supposedly plentiful, they receive strict First Amendment protections. Electronic media, by contrast, are accorded less protection from government regulation or censorship because they are licensed and scarce. But, for the reasons stated below, licensing and scarcity are wholly deficient rationales for differential treatment of broadcasting.

1. Should Scarcity Make a Difference?

While scarcity is the primary rationale for regulation of the broadcast spectrum and corresponding content controls, it is a very weak one. Even if spectrum is scarce, that fact hardly makes the case for government control. Every natural resource is inherently scarce in some sense: there is only so much coal, timber, or oil on the planet, but that does not mean the government should own or license those resources.²⁴

While some resources are more abundant or scarce in nature than others, property rights, pricing mechanisms, contracts, and free markets provide the most effective way to determine who values resources most highly and

¹⁸ Communications Act of 1934, as amended, 47 U.S.C. §§151–399 (2000).

¹⁹ *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226–27 (1943).

²⁰ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

²¹ *Nat'l Broad. Co.*, 319 U.S. at 226.

²² *See Red Lion*, 395 U.S. at 367.

²³ *Id.* at 388.

²⁴ In the 1986 D.C. Circuit case overturning the FCC's “Fairness Doctrine,” Judge Robert Bork argued that “[a]ll economic goods are scarce Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle leads to analytical confusion.” *Telecomm. Res. & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

allocate them efficiently.²⁵ With broadcast spectrum, however, the government created artificial scarcity by exempting spectrum from market trading and the pricing system.²⁶ Simply stated, government ownership and control of spectrum exacerbates, rather than solves, the scarcity problem.²⁷

Markets and property rights, by contrast, would encourage the maximum amount of spectrum use and innovation, diminishing the effect of any inherent scarcities within the medium. Ironically, compared with tangible natural resources, electromagnetic spectrum may actually be *less* scarce since engineers continue to find new ways to expand the boundaries of usable spectrum and develop applications for spectrum frequencies previously thought to be uninhabitable.²⁸ Many scholars have argued that in an

²⁵ See Walter E. Williams, *The Argument for Free Markets: Morality v. Efficiency*, 15 CATO J. 179, 181 (1995–96), available at <http://www.cato.org/pubs/journal/cj15n2-3/cj15n2-3-3.pdf>.

²⁶

[I]t can be argued that the spectrum was scarce because demand exceeded supply. This is almost invariably the case when a good with value is given away for free. If a market price had been assigned to spectrum from the start (which in effect is done when licenses are bought and sold later on), then it would be no more or less scarce than are pencils, VCRs or Lexus automobiles. Moreover, it may have been put to better uses initially if those who obtained it had to pay for it.

Benjamin M. Compaine, *Distinguishing Between Concentration and Competition*, in WHO OWNS THE MEDIA? COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 537, 557 (Benjamin M. Compaine & Douglas Gomery, eds., 2000).

²⁷ “The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity.” ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 141 (1983). “Clearly it was policy, not physics, that led to the scarcity of frequencies. Those who believed otherwise fell into a simple error in economics.” *Id.* And, as spectrum engineer Charles L. Jackson noted during a 1982 Senate Commerce Committee hearing, “[i]f there ever was any scarcity of electronic communications outlets that scarcity was artificial and legalistic. It grew out of policy constraints and not out of fundamental technological limitations.” *Freedom of Expression: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 97th Cong. 50 (1982) (statement of Dr. Charles L. Jackson, Shooshan & Jackson). Furthermore, almost fifty years ago, Nobel Prize-winning economist Ronald Coase argued that:

[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1, 14 (1959).

²⁸

[F]requencies are divisible (or expandable) in ways that [physical goods] are not. The spectrum can be mined more intensively, using less separation between frequencies with more (or higher quality) broadcast transmitters and better receivers, or more ex-

absolute sense, therefore, newsprint is actually scarcer than electromagnetic spectrum, yet policy makers have never considered applying similar content controls to newspapers or magazines.²⁹

2. Scarcity Has Given Way to Abundance

Even if scarcity was once a legitimate concern within the broadcast sector, it certainly is not today, considering the cornucopia of media choices at the public's disposal.³⁰ The number of broadcast TV stations in America has doubled since *Red Lion* was decided in 1969, while daily newspapers have been in a steady state of decline.³¹ Daily newspapers are now more "scarce" than broadcast television stations. The number of radio stations in America has also roughly doubled since 1970.³² Meanwhile, other media technologies and outlets have proliferated, including cable and satellite television,³³ satellite radio,³⁴ the Internet,³⁵ blogs,³⁶ and others.³⁷

tensively, deploying more sophisticated sending and receiving equipment so as to exploit progressively higher or lower wavelengths.

Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 926 (1997).

²⁹ The Supreme Court has ruled against content controls applicable to print materials. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241(1974).

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

³⁰ "[T]here simply exists no true scarcity of outlets for mass communication." JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 282 (1991). "[I]t is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment." *Id.* at 284.

³¹ In 1970 there were 875 broadcast television stations and 1,748 daily newspapers. In 2005 there were 1,750 broadcast television stations and 1,452 daily newspapers. See THE SOURCE: NEWSPAPERS BY THE NUMBERS 18 (2005), available at http://www.naa.org/thesource/2005/the_source_newspapers_by_the_numbers.pdf; Press Release, Fed. Commc'ns Comm'n, Broadcast Station Totals for January 1970, (Feb. 10, 1970) available at <http://www.fcc.gov/mb/audio/totals/pdf/19700131.pdf>; Press Release, Fed. Commc'ns Comm'n, Broadcast Station Totals for December 31, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263922A1.pdf.

³² As of December 2006, there were 13,837 radio stations in America, up from 6,751 in January 1970. Compare News Release, Fed. Commc'ns Comm'n, Broadcast Station Totals as of December 31, 2006 (Jan. 26, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.pdf, with News Release, Fed. Commc'ns Comm'n, Broadcast Station Totals for January 1970 (Feb. 10, 1970), available at <http://www.fcc.gov/mb/audio/totals/pdf/19700131.pdf>.

³³ Over 86 percent of U.S. households subscribe to cable or satellite TV today. *In re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

Thanks to such technological advances, Americans now have access to an unprecedented amount of news, information, and entertainment.³⁸ In short, we have witnessed the death of scarcity; we now live in a world of information abundance. In this new environment, media is becoming hyper-ubiquitous—an all-consuming and tremendously pervasive presence in our daily lives. Speaking to a group of graduating college students in May 2005, *Christian Science Monitor* managing publisher Stephen T. Gray put it this way: “The media saturate your lives far more than any previous generation Today’s information environment [is] omnipresent, like the air we breathe.”³⁹

Programming, *Twelfth Annual Report*, 21 F.C.C.R. 2503, 2620 (Feb. 10, 2006) [hereinafter *Twelfth Annual Report*].

FCC data reveals that, “[i]n 1979, the vast majority of households had six or fewer local television stations to choose from, three of which were typically affiliated with a broadcast network. [In 2002] the average U.S. household receives seven broadcast television networks and an average of 102 channels per home” from cable and satellite sources of the more than 300 non-broadcast television networks available to them. *In re: 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620, 13,634 (June 2, 2003) [hereinafter *Media Ownership Proceeding*].

³⁴ Satellite radio, an industry that did not even exist prior to December 2001, boasted over 13 million subscribers nationwide between the two providers, Sirius and XM, by the end of 2006. Sarah McBride, *What a Difference a Year Has Made for Once-Highflying Satellite Radio*, WALL ST. J., Dec. 8, 2006, at B1.

³⁵ Roughly three-quarters of Americans are now online and spend an average of nine hours weekly on the Internet. *Media Ownership Proceeding, supra* note 33, at 13765. The consulting firm IDC estimates that 84 billion *daily* e-mail messages were sent during 2006. Press Release, IDC, IDC Examines the Future of Email As It Navigates Security Threats (Dec. 22, 2005), available at <http://www.idc.com/getdoc.jsp?containerId=prUS20033705>.

³⁶ The blog tracking service Technorati said that over 63 million blogs existed at the end of 2006, with over 175,000 new blogs created every day. “Bloggers update their blogs regularly to the tune of over 1.6 million posts per day, or over 18 updates a second.” See Technorati, *About Technorati*, <http://www.technorati.com/about/> (last visited Apr. 14, 2007).

³⁷ There were 18,267 magazines produced in 2005, up from 14,302 in 1993. The Magazine Handbook: A Comprehensive Guide for Advertisers, Advertising Agencies and Consumer Magazine Marketers 2004/2005, 6 (2004) http://www.magazine.org/content/Files/MPA_handbook_04.pdf; The Magazine Handbook: A Comprehensive Guide 2006/2007, 6 (2006) <http://www.magazine.org/content/Files/MPAHandbook06.pdf>.

³⁸ Steve Chapman, *You Will Watch the Debates*, CHI. TRIB., Oct. 15, 2000, at C19 (“Scarcity is the last word that would come to mind in regard to the vast array of communications outlets available today.”).

³⁹ Stephen T. Gray, Managing Publisher, *Christian Sci. Monitor*, Graduation Address at Adrian College (May 1, 2005), excerpted in Opinion, *Where the Media End and You Begin*, CHRISTIAN SCI. MONITOR, May 9, 2005, at 9, available at <http://www.csmonitor.com/2005/0509/p09s01-coop.html>. Similarly, Roy Greenslade of the

Even the FCC has acknowledged these arguments in a report from the agency's Media Bureau ("*Berresford Scarcity Report*").⁴⁰ In the report, John Berresford, a staff attorney with the FCC's Media Bureau, refers to the scarcity rationale as "outmoded," "based on fundamental misunderstandings of physics and economics," and "no longer valid."⁴¹ All that is left now is for the right case to come before the Supreme Court to drive the final stake through the heart of *Red Lion* and the scarcity rationale. Alternatively, the FCC and the courts might just let this regulatory rationale wither away gradually and never again cite it as a defense for unique regulatory treatment of broadcasters.

B. Licensing and "Public Ownership": An Excuse for Second-Class Speech Rights?

Although the scarcity doctrine is no longer valid, its regulatory legacy lives on through the government's licensing powers⁴² and so-called "public interest" regulatory requirements. The phrase is derived from various sections of the Radio Act of 1927,⁴³ the Communications Act of 1934,⁴⁴ and subsequent laws and regulations that grant licenses to radio and television broadcast frequencies to operators who are commanded to satisfy "the public interest, convenience, and necessity."⁴⁵ As discussed in Section V below, many practical problems arise from government efforts to interpret and enforce this amorphous "public interest" standard.

U.K. *Business Telegraph* argues that "[i]ndeed, it's fair to say that news is ambient nowadays. It can be transmitted so quickly and so comprehensively by a variety of media that everyone seems to hear about major events in no time at all. Whether they understand all the complexities, or even care to, is another matter." Roy Greenslade, *Make Way for the Internet Revolution*, DAILY TELEGRAPH, Oct. 25, 2005, at 6.

⁴⁰ John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Fed. Commc'ns Comm'n Media Bureau Staff Research Paper No. 2005-2, Mar. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf [hereinafter Berresford Scarcity Report].

⁴¹ *Id.* at 8–9.

⁴² See 47 U.S.C. § 301 (2000) ("It is the purpose of this Act . . . to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. . . .").

⁴³ Pub. L. No. 69-632, 44 Stat. 1162, 1166 (1927) (superseded by the Communications Act of 1934) ("The licensing authority, if public convenience, interest, or necessity will be served thereby . . . shall grant to any applicant therefor a station license provided for by this Act.").

⁴⁴ 47 U.S.C. §§ 151–399, §§ 307–08 (2000).

⁴⁵ § 309(a).

In general, the fundamental problem with the “public interest” standard is that it “is whatever the people who enforce it want it to be.”⁴⁶ Quite often it is interpreted to mean lesser speech protection for broadcasters. Moreover, the continued existence of the FCC’s licensing regime leads to oft-repeated claims that broadcast spectrum is “owned by” or “belongs to” the American people. For example, Senator Sam Brownback issued a press release stating that, “Radio and television waves are public property and the companies who profit from using the public airwaves should face meaningful fines for broadcasting indecent material.”⁴⁷ Therefore—or so this line of reasoning continues—any set of rules can be adopted for broadcasting (for both economic and content-related purposes) that Congress or the FCC deem appropriate since it is licensed or “belongs to the people.”⁴⁸

But this logic does not hold in other licensing situations. Government licensure does not diminish speech rights for citizens when they obtain driver’s licenses, or the rights of doctors when they obtain licenses to practice medicine. Similarly, “[a] lawyer needs a license to practice law, yet the government does not force a lawyer to spend equal time defending clients of opposite views,” notes Bruce Fein, a former general counsel at the FCC.⁴⁹ “It is patently absurd to suggest that a license requirement in an industry is enough to allow the taking away of First Amendment rights”⁵⁰

Nor does government ownership of an asset confer unbounded powers of speech suppression. Governments own parks, libraries, public buildings, and other property, but that does not lessen the speech rights of those who reside on or use that government property.⁵¹ Indeed, the very act of licensing broadcasters in general is unconstitutional. Matthew Spitzer, Robert C. Packard Trustee Chair in Law and Professor of Political Science at the University of Southern California Gould School of Law, has argued that, “the First Amendment must be read so as to prevent the government from

⁴⁶ THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 144 (1994).

⁴⁷ Press Release, U. S. Sen. Sam Brownback, *Brownback Applauds Broadcast Decency Bill Passage* (May 18, 2006), *available at* <http://brownback.senate.gov/pressapp/record.cfm?id=255842&&days=365&>.

⁴⁸ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969).

⁴⁹ Bruce Fein, *First Class First Amendment Rights for Broadcasters*, 10 HARV. J.L. & PUB. POL’Y 81, 84 (1987).

⁵⁰ *Id.*

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When dealing with streets, parks, or other traditional [public] fora, the First Amendment precludes the government from doing as it pleases with its property. Instead, the government may ‘own’ the streets and parks in the sense that it can regulate traffic, control hours of parking, and so forth, but it may not, in general, control the content of what is expressed there or impose unreasonable time, place, or manner regulations on such expression.

Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1033 (1989) (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96, 98 (1972)).

owning all of the spectrum” since absolute government ownership of spectrum gives the government far too much control over private electronic communication.⁵² Spitzer likens the situation to a hypothetical “Federal Paper Commission” that has been given control over all uses of paper and ink and the ability to license newspapers “in the public interest.”⁵³ Such an enactment would clearly offend the First Amendment as an unjust government encroachment upon the rights of the press. But that is essentially the system that governs broadcasting in America today.

Moreover, broadcast spectrum is nothing like a public park or a town square. Broadcast licenses are owned by private entities and are traded on the open market for significant sums of money. Many broadcasters also sell shares in their companies on the stock market and have private shareholders.⁵⁴ These characteristics distinguish broadcasting from public property.

The “people’s airwaves” argument was also thoroughly discredited by the *Berresford Scarcity Report*.⁵⁵

Most likely, some newspapers and musical instruments are made from trees that grew on government land. No one would claim that they are therefore made of The People’s Wood and that the federal government may regulate the content of those newspapers or require that the music played on the instruments address controversial public issues and express differing views. . . . Finally, even if the airwaves did belong to the people, the same cannot be said of traditional broadcasters’ land, transmitters, buildings, studio equipment, personnel, and audiences gained through years of sending out popular content. Those things belong exclusively to the broadcasters and their shareholders.⁵⁶

For these reasons, the “people’s airwaves” argument is not a valid excuse for differential treatment of the broadcast spectrum or broadcast speech.

III. HOW CONVERGENCE CHANGES EVERYTHING

A. Rise of the “Digital Zoo” and the Birth of the “Pro-Sumer”

Media content and outlets are blurring together today thanks to the rise of myriad new technologies and competitors.⁵⁷ These new media technolo-

⁵² *Id.* at 1042.

⁵³ *Id.*

⁵⁴ See, e.g., Seth Sutel, *Breakup Completed at CBS and Viacom; Media Marriage Ends as Stocks Begin to Trade in Two Companies*, HOUSTON CHRON., Jan. 4, 2006, at B4.

⁵⁵ Berresford Scarcity Report, *supra* note 40, at 19.

⁵⁶ *Id.*

⁵⁷ Henry Jenkins, founder and director of the MIT Comparative Media Studies Program, defines convergence as “the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behavior of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want.” HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 2* (2006). Michael Totty of *The Wall Street Journal* notes that “[t]his convergence of computing, communications and entertainment has been promised before, only to evaporate because of

gies and competitors generally ignore or reject the distribution-based distinctions and limitations of the past. In other words, convergence means that media content is increasingly being “unbundled” from its traditional distribution platforms and finding many paths to the consumer.⁵⁸

As a result of such developments, it is now possible to consume the same piece of content via a broadcast TV or radio station, a cable channel, a satellite system, on a DVD player, on a cell phone or other mobile media device, on a portable gaming system, or over the Internet. A 2005 *New York Times Magazine* cover story described the modern American home as “a digital zoo” and noted that the way people receive or consume media has been completely upended: “[R]adio is going on the Web, TV is going on cellphones, the Web is going on TV and everything, it seems, is moving to video-on-demand (VOD) and (quite possibly) the iPod and the PlayStation Portable.”⁵⁹

In this “multiplatform”⁶⁰ environment, consumers can increasingly dictate when, where and how they consume media content. Thus, contrary to the famous assertion of media analyst Marshall McLuhan that “the medium is the message,”⁶¹ today the medium is just another distribution path;⁶² the message—or content in general—is now truly king.⁶³

consumer indifference and technology that wasn’t ready for prime-time. But now the pieces are finally coming together. And corporations are scrambling to make sure they aren’t left behind.” Michael Totty, *Who’s Going to Win the Living-Room Wars?*, WALL ST. J., Apr. 25, 2005, at R1.

⁵⁸ *Unbundled Media Content Poses a Challenge*, FORBES.COM, Apr. 3, 2006, http://www.forbes.com/home/technology/2006/03/31/media-content-tech-cx_0403oxford.html.

⁵⁹ Jon Gertner, *Our Ratings, Ourselves*, N.Y. TIMES MAG., Apr. 10, 2005, at 34.

⁶⁰ Anne Becker, *The Multiplatform Buzz*, BROAD. & CABLE, Apr. 3, 2006, <http://www.broadcastingcable.com/article/CA6321200.html?display=News> (“For us, multiplatform is more than the buzzword of the day, it is the way this audience lives.” (quoting MTV President Christina Norman).

⁶¹ See generally, MARSHALL MCLUHAN, UNDERSTANDING THE MEDIA: THE EXTENSIONS OF MAN 7–8 (1965).

⁶² Manuel Castells argues that:

[B]ecause of the diversity of media and the possibility of targeting the audience, we can say that in the new media system, the message is the medium. That is, the characteristics of the message will share the characteristics of the medium. . . . This is indeed the present and future of television: decentralization, diversification, and customization. Within the broader parameters of the McLuhanian language, the message of the medium (still operating as such) is shaping different media for different messages.

MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 368 (2d. ed. 2000). Nicholas Negroponte agrees, arguing that, “[t]he medium is no longer the message.” NICHOLAS NEGROPONTE, BEING DIGITAL 61 (1995).

⁶³ See, e.g., Jeremy Warner, *Grade Puts ITV Back on Viable Growth Course with his Vital Message that Content is King*, INDEP., Mar. 7, 2007, at 46.

Content is king. So says Michael Grade, the new chairman at ITV. After a lifetime in broadcasting, he’s as well qualified as any to reaffirm this ancient media truism. New technologies and distribution platforms come and go but, in the end, it is the ability to tell a good story in a compelling way that is the only thing that really matters in com-

This is especially true as citizens increasingly become “pro-sumers”—both producers and consumers of news and entertainment.⁶⁴ Younger Americans are especially attracted to this new “do-it-yourself” brand of citizen journalism⁶⁵ that some refer to as “we-dia.”⁶⁶ Journalism is becoming far more participatory and user-driven as a result.⁶⁷ This same prosumer tendency is on vivid display in the entertainment and social networking realms, in which millions of Americans create and trade user-generated content.⁶⁸

B. The Challenge Convergence Poses to the Old Regime

Convergence will make it increasingly complicated and intrusive for lawmakers to apply old media standards and regulations to newer technologies and outlets, rendering the old regime obsolete.⁶⁹ In March 2006, for example, following an FCC decision to impose steep indecency fines on certain broadcast television shows,⁷⁰ the WB Network self-censored

mercial entertainment and news. This basic principle hasn’t changed for hundreds of years, and there is no reason to think that digital technology will change it either.

Id.

⁶⁴ PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM 1* (2004).

⁶⁵ See Ariana Eunjung Cha, *Do-It-Yourself Journalism Spreads*, WASH. POST, July 17, 2005, at A1.

⁶⁶ Glenn Harlan Reynolds, *We the (Media) People*, WALL ST. J., May 31, 2005, at A16.

⁶⁷ See generally, SHAYNE BOWMAN & CHRIS WILLIS, *WE MEDIA: HOW AUDIENCES ARE SHAPING THE FUTURE OF NEWS AND INFORMATION 9* (2003), http://www.hypergene.net/wemedia/download/we_media.pdf.

⁶⁸ See, e.g., Dan Fost & Ellen Lee, *Cool Web 2.0 Sites*, S.F. CHRON., Aug. 28, 2006, at C1 (“Flickr founders Stewart Butterfield and Caterina Fake made the cover of Newsweek for their popular photo-sharing site. Digg founder Kevin Rose made the cover of BusinessWeek after his news-ranking site took off. Online video hub YouTube is ubiquitous, while social networking giants MySpace and Facebook are in everyone’s faces.”); Alex Williams, *The Future President, On Your Friends List*, N.Y. TIMES, Mar. 18, 2007, at § 9, 1 (noting that myspace.com, a social networking site, has over 60 million American users per month).

⁶⁹ *In re Public Interest Obligations of TV Broadcast Licenses, Comments of the Progress & Freedom Foundation*, MM Docket No. 99-360, at iii (Mar. 27, 2000) (accessible via FCC Electronic Comment Filing System) (“The phenomenon of convergence has . . . rendered obsolete a regime in which differential content regulation is applied based on the technology used to deliver the content.”).

⁷⁰ See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (Feb. 21, 2006); *In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” Notice of Apparent Liability for Forfeiture*, 21 F.C.C.R. 2732 (Feb. 21, 2006) (proposing, between the two orders, over \$4 million in fines for broadcast of indecent material); see also John Eggerton, *FCC’s Full-Frontal Assault on TV*, BROAD. & CABLE, Mar. 20, 2006, <http://www.broadcastingcable.com/article/CA6317038.html?display=Feature> [hereinafter *FCC’s Assault on TV*].

several scenes from a new drama that was about to air on its broadcast television affiliates.⁷¹ But, before airing the edited pilot episode on WB broadcast television outlets, the network released the unedited version on its Internet Web site. This, according to the *New York Times*, marked “the first time a network has offered on another outlet an uncut version of a program it has been forced to censor.”⁷²

But this won’t be the last time this happens in a world of proliferating media platforms and delivery options. Indeed, just a few months after WB took this step, CBS television network affiliates came under pressure from regulatory activist groups to self-censor or not air an award-winning documentary about the “9/11” terrorist attacks because it contained profanities uttered by firefighters and citizen under great duress. Several local CBS affiliates bowed to the pressure and decided not to air the documentary.⁷³ But CBS Corporation responded by airing the entire unedited version of the documentary on its Web site so that viewers could see it in areas where it had been blacked out.⁷⁴

Such cross-platform marketing opportunities are multiplying rapidly.⁷⁵ Disney is making the ABC broadcast television shows it owns available on the web for free streaming.⁷⁶ NBC has struck a deal with online video giant YouTube.com to make its television programming available online.⁷⁷ In fact, in March 2005, NBC debuted its new sitcom *The Office* on the Internet a week before it premiered on broadcast network television.⁷⁸ In the summer of 2005, CBS News announced that it “will move from a primarily television and radio news-based operation to a 24-hour, on-demand news service, available across many platforms”⁷⁹ CBS announced in 2006 it

⁷¹ Bill Carter, *WB Censors Its Own Drama for Fear of FCC Fines*, N.Y. TIMES, Mar. 23, 2006, at E1.

⁷² *Id.*

⁷³ John Eggerton, *Pappas Won't Air CBS' 9-11 Doc*, BROAD. & CABLE, Sept. 7, 2006, <http://www.broadcastingcable.com/article/CA6369682.html> (following proposed fines of \$3.6 million on CBS’ “Without a Trace”); *FCC's Assault on TV*, *supra* note 70.

⁷⁴ Jeremy Pelofsky, *Profanity Concerns Prompt CBS to Show '9/11' on Web*, REUTERS, Sept. 10, 2006, <http://www.ibtimes.com/articles/20060909/profanity-cbs-911-web.htm>.

⁷⁵ See Emily Steel, *A Guide to Watching Network TV Online*, WALL ST. J., Jan. 11, 2007, at D1.

⁷⁶ *Disney to Make TV Shows Available Free on Web*, REUTERS, Apr. 10, 2006, <http://migs.wordpress.com/2006/04/10/disney-t-make-tv-shows-available-free-on-web/>.

⁷⁷ Sara Kehaulani Goo, *NBC Taps Popularity of Online Video Site*, WASH. POST, June 28, 2006, at D01.

⁷⁸ Anne Becker, *NBC's Office Gets Web Broadcast*, BROAD. & CABLE, Mar. 16, 2005, <http://www.broadcastingcable.com/article/CA511340.html>.

⁷⁹ Press Release, CBS News, CBS Digital Media and CBS News Announce Broadband 24-Hour News Network (July 12, 2005), *available at* http://www.cbsnews.com/htdocs/pdf/Web_announcement_logo_new.pdf.

will make most of its new network shows available online with a subscription to TiVo.⁸⁰

Meanwhile, Web-based operators now offer a stunning array of video services. Google and Apple have popular online video stores, and countless sites exist where consumers can download television programs or amateur video clips, including: YouTube.com, AOL's "In2TV," Brightcove.com, and JumpTV.com.⁸¹ Further, owners of the Microsoft Xbox 360 gaming platform can now download popular movies and network television shows via Microsoft's "Xbox Live" service.⁸²

No event better epitomizes the radical changes taking place in the modern media marketplace than the broadcast of the global "Live 8" concerts online on July 2, 2005.⁸³ All of the Live 8 concert performances were shown on AOL's Web site at no charge, while portions of the show were also broadcast on MTV's cable network and then later rebroadcast on ABC's network television stations. The ABC broadcast of the concert netted 2.9 million viewers, while the MTV broadcast drew 1.5 million. But the AOL Webcast of the event attracted a far more impressive 5 million unique visitors.⁸⁴ This led media analyst Tom Wolzien to predict that "[h]istory may well say," that this was the day that the Internet truly "became a mass distribution medium."⁸⁵ Likewise, the *New York Times* referred to it as "a watershed event in the development of Internet video."⁸⁶

Interestingly, although it was on a tape delay, the rebroadcast of the concert on the ABC television network featured a performance by the rock group The Who that included a profanity that the network and its stations failed to edit out of the broadcast. The Parents Television Council ("PTC"), a regulatory activist group, immediately filed a complaint with the FCC requesting that ABC be fined for the incident, but nothing was said by the PTC about the Internet broadcast that fetched far more view-

⁸⁰ Press Release, CBS Corporation, CBS Television & TiVo Make History with First-Ever Exclusive Debut of New Fall Show on TiVo Before Its Network Premiere (Sept. 5, 2006), available at <http://www.cbscorporation.com/news/prdetails.php?id=863>.

⁸¹ See John R. Quain, *Online Video Gets Real*, PC MAG., Feb. 6, 2007, at 56, available at <http://www.keepmedia.com/pubs/PCMagazine/2007/01/10/2440234>; Spencer Reiss, *Here Comes Trouble*, WIRED, Feb. 2007, at 94.

⁸² Eric Bangeman, *TV Shows and Movies Arrive on Xbox Live*, ARS TECHNICA, Nov. 22, 2006, <http://arstechnica.com/news.ars/post/20061122-8270.html>; Daniel Terdiman, *Xbox Live Cues Up TV, Movie Downloads*, CNET NEWS.COM, Nov. 6, 2006, http://news.com.com/2100-1043_3-6133048.html.

⁸³ "Live 8" was a series of concerts in 2005 "aimed at spotlighting the problem of poverty in developing African countries. . . ." Richard Harrington, *Live 8 Concerts to Amplify Problem of Global Poverty*, WASH. POST, June 1, 2005, at C1.

⁸⁴ Annys Shin, *Entertainment Company Created by AOL, XM Radio*, WASH. POST, July 13, 2005, at D5.

⁸⁵ Christopher Lawton, *Questions for Jim Bankoff*, WALL ST. J., July 20, 2004, at B4.

⁸⁶ Saul Hansell, *Logging On to Tune in TV: More People are Watching Their Programming on the Web*, N.Y. TIMES, Aug. 1, 2005, at C4.

ers.⁸⁷ What is particularly strange about the PTC's request for sanctions against ABC is that—to the extent they are seeking those sanctions to “protect children”—it almost certainly would miss the target. Far more people viewed the performance on AOL and MTV than on ABC and (although concrete demographic numbers are not available) it is likely that the audience demographics for the AOL and MTV audience skew heavily toward younger users.

C. Leveling the Playing Field in a Multiplatform, Multichannel World

Because convergence is shattering the distribution-based business and regulatory distinctions of the past, media regulation in general, and broadcast speech controls in particular, will be severely strained.⁸⁸ The convergence is turning all media, including previously distinct media outlets, into what might best be thought of as one big “bucket of bits”—digitized bits of information, that is.

Nicholas Negroponte, in his eloquent 1995 paean to the digital age, *Being Digital*, coined the phrase “bits are bits.”⁸⁹ Negroponte revealed that, even in the mid-1990s, digitized bits of information were commingling and becoming more outlet-agnostic.⁹⁰ With the rise of the Internet, new digital transmission and delivery options, improving compression techniques, speedy fiber optic lines, and plenty of computing power everywhere in between, Negroponte predicted that it would only be a matter of time before everyone understood and accepted the inevitability of bit convergence.⁹¹ Old industry-, sector-, or outlet-based media distinctions would gradually wither away and be replaced by endless streams of digital bits of information flowing across multiple transmission paths and through countless delivery mechanisms.⁹²

That day is upon us: bit convergence is now a reality.⁹³ As a result, the current broadcast industry regulatory regime becomes not only radically

⁸⁷ Press Release, Parents Television Council, PTC Files Indecency Complaint Against ABC's Live 8 Concert (July 14, 2005), available at <http://www.parentstv.org/PTC/publications/release/2005/0714.asp>.

⁸⁸ See Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. J. 247, 248 (2003) (“This technologically balkanized approach to regulation remained coherent only so long as each type of communications was available solely through a distinct means of transmission.”).

⁸⁹ NEGROPONTE, *supra* note 62, at 9.

⁹⁰ See *id.* at 6–7.

⁹¹ *Id.*

⁹² See *id.* at 20. Technology writer George Gilder made similar predictions in the early and mid-1990s. See GEORGE GILDER, *LIFE AFTER TELEVISION: THE COMING TRANSFORMATION OF MEDIA AND AMERICAN LIFE* 78 (1994).

⁹³ DELOITTE, *THE TRILLION DOLLAR CHALLENGE: PRINCIPLES FOR PROFITABLE CONVERGENCE* 2 (2005), available at http://www.deloitte.com/dtt/cda/doc/content/UK_TMT_TrillionDollarChallenge_05.pdf.

unfair, but also increasingly illogical and unworkable. At some point—likely very soon—the “public interest” regulatory edifice that has governed broadcast television and radio for the past seven decades will begin to crumble. For reasons eloquently articulated by technological visionary Ithiel de Sola Pool more than 20 years ago, “the industries of print and the industries of telecommunications will no longer be kept apart by a fundamental difference in their technologies. The economic and regulatory problems of the electronic media will thus become the problems of the print media too.”⁹⁴ The danger here is obvious: if analog-era, broadcast-oriented media controls live on, at some point they will start to spill over into the digital realm and impact those bits, too. In other words, technological and market convergence could lead to regulatory convergence and the imposition of the broadcast model on all other industries and outlets.

The question therefore becomes: Will Congress treat these developments as a threat to be countered (by imposing the broadcast model on all players and content) or an opportunity to be embraced (by granting everyone the freedom that print and the Internet speakers currently enjoy)? Stated differently, will lawmakers seek to “regulate up” or “deregulate down” to achieve a level playing field? While policy harmonization could be accomplished by granting greater freedom to all speech and speakers, it is more likely that lawmakers will attempt to expand *Pacifica*’s “pervasiveness” rationale to cover new media technologies and outlets. The next section explains why that would be a mistake.

IV. DOES *PACIFICA*’S “PERVASIVENESS” STANDARD MAKE SENSE IN THE NEW ENVIRONMENT?

A. Replacing One Misguided Regulatory Rationale with Another

Long before most of the new media technologies discussed above came along, many lawmakers, regulators, and jurists already realized they stood on shaky constitutional ground in their reliance on scarcity and licensing as justifications for unique broadcast industry regulation and content controls. By the mid-1980s, many legal theorists and jurists had begun to publicly question whether *Red Lion*’s assumptions continued to make sense. In 1986, for example, Judge Bork referred to scarcity as a “universal fact” that could not justify asymmetrical regulation of broadcasting.⁹⁵ And the Supreme Court openly questioned the continuing validity of the scarcity

⁹⁴ POOL, *supra* note 27, at 42.

⁹⁵ *Telecomm. Res. & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

rationale in several decisions in the 1990s, including *Turner Broadcasting Systems, Inc. v. FCC*,⁹⁶ and *Reno v. ACLU*.⁹⁷

Yet, by the mid-1970s, the scarcity rationale was no longer the only justification for asymmetrical treatment of broadcasting; policymakers were presented with “pervasiveness” as an alternative excuse for government regulation. In *Pacifica*, the famous “seven dirty words” case, the Supreme Court distinguished broadcasting from other media in the First Amendment context, focusing on two reasons in particular: “its uniquely pervasive presence in the lives of all Americans” and its accessibility by young children.⁹⁸

Critics have long pointed out the fundamental problem with pervasiveness as the linchpin of modern broadcast regulation: it is far too inclusive and could be applied to any media outlet that is determined by regulators to be particularly pervasive in our lives or “uniquely accessible to children.”⁹⁹ Nonetheless, the staying power of this rationale has proven formidable. After *Pacifica*, the courts moved to adopt a “channeling” or “safe harbor”

⁹⁶ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994). In *Turner* the Court held that the scarcity rationale did not apply to cable television the same way it did to broadcast television because:

[C]able television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* . . . is inapt when determining the First Amendment validity of cable regulation.

Id. at 639.

⁹⁷ *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997). In *Reno* the Court argued that the scarcity rationale had no applicability within the realm of cyberspace because the Internet “provides relatively unlimited, low-cost capacity for communications of all kinds,” and, therefore, it “can hardly be considered a ‘scarce’ expressive commodity.” *Id.*

⁹⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978). This case is referred to as the “seven dirty words” case because it dealt with a New York radio station broadcast comedian George Carlin’s 12-minute routine about the seven dirty words you could not say on public airwaves. *Id.* at 729.

⁹⁹ Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 41 (1995) (“[B]roadcast signals may even be less intrusive than printed expression which may be perceived while blowing by as litter on a street, laying on a coffee table, or being displayed in a newsrack.”). Author Jonathan Wallace warned of this “specter of pervasiveness” in a 1998 Cato Institute report on the subject, stating “the logic of pervasiveness could apply to cable television, the Internet, and even the print media. If such logic applies to any medium, it could apply to all media. In this way, the pervasiveness doctrine threatens to curtail severely the First Amendment’s protection of freedom of speech.” Jonathan D. Wallace, *The Specter of Pervasiveness: Pacifica, New Media, and Freedom of Speech*, (Cato Institute Briefing Paper, No. 35, 1998), available at <http://www.cato.org/pubs/briefs/bp-035.pdf>. Similarly, Pool noted of *Pacifica* that, “This aberrant approach . . . could be used to justify quite radical censorship.” POOL, *supra* note 27, at 134.

approach to indecency regulation, requiring that broadcasters wait until after 10:00 p.m. to air potentially objectionable content. In *Action for Children's Television v. FCC*, the U.S. Court of Appeals for the D.C. Circuit upheld the FCC's ability to impose restrictions on broadcast indecency between certain hours.¹⁰⁰

Regardless of the sensibility, effectiveness, or fairness of channeling as a regulatory scheme for the broadcast medium, it would seem that this approach is ill-suited for the new digital media world. It is difficult to imagine how channeling would work in the Internet or mobile content, for example. It is slightly easier to image how it might be applied to cable or satellite television networks, but many subscribers would likely be outraged at the prospect of being forced to wait to view programs, especially after they paid to subscribe to those services. Moreover, the rise of personal video recorders, on-demand services, and Internet downloading also challenge the effectiveness of regulatory time-channeling.

B. What Happens When *Everything* is Pervasive?

Whatever legitimacy *Pacifica's* "pervasiveness" logic might have once had, it has been completely undercut by modern media developments. As NBC noted in a filing before the U.S. Court of Appeals for the Second Circuit in late 2006, "[t]he nearly 30 years since *Pacifica* have similarly eviscerated the notion that broadcast content is 'uniquely accessible to children' when compared to other media. The availability of alternative media sources is even more pronounced with respect to younger generations than with adults. . . ." ¹⁰¹

Like all media content, broadcast programming is accessible by children to some degree, but certainly it is no longer *uniquely* available when compared to the countless other avenues through which children receive information. These technological developments have doctrinal significance. Now that *Pacifica's* underpinnings have been undermined, there is no reasoned basis for treating content-based restrictions on the speech of broadcasters differently than content-based restrictions on other speakers.¹⁰²

¹⁰⁰ 59 F.3d 1249, 1260–62 (D.C. Cir. 1995).

¹⁰¹ Brief for NBC Universal, Inc. and NBC Telemundo License Co. as Intervenors, at 55–6, *Fox Tel. Stations, Inc., v. FCC*, No. 06-1760-AG (2d Cir. Nov. 22, 2006).

¹⁰² See Berresford Scarcity Report, *supra* note 40, at 29 (agreeing with this finding).

If new media are now as pervasive and invasive as only traditional broadcasters once were, should the new media's content be supervised as only the latter have been? To expand such supervision to the new media would risk reducing adults to only content fit for children—a failing of potentially Constitutional dimensions. It may be, on the contrary, that the spread of new media, with hundreds of new channels, should cause regulation of indecency in traditional broadcasting to end. If what is pervasive today is hundreds of channels and billions of web pages, no one channel, show, or page is as

In sum, in a world of technological convergence and media abundance, *everything* is pervasive. Consequently, it is illogical to claim that broadcasting holds a unique status among all the competing media outlets and technologies in the marketplace. Even if it remains the case that broadcast stations and programs continue to fetch a large number of viewers/listeners, this cannot be the standard by which lawmakers determine a medium's First Amendment treatment. The danger with such a "popularity equals pervasiveness" doctrine is that it contains no limiting principles. If Congress can censor speech on a given media platform whenever 51 percent of the public bring it into their homes, then the First Amendment will become an empty vessel. Thus far there has been no support from the courts for extending regulation using this rationale when Congress and the FCC have attempted to do so. Early attempts to regulate content on cable television have been uniformly rejected by the courts.¹⁰³

V. "PUBLIC INTEREST" REGULATION IN PRACTICE: HOPELESSLY ARBITRARY AND OPEN TO UNDUE SPECIAL INTEREST INFLUENCE

A. The Meaninglessness of the "Public Interest"

The cases and regulatory rationales outlined above¹⁰⁴ generally provide the intellectual and legal foundation for what is commonly known as the "public interest" paradigm for broadcast regulation. Under this theory, regulatory advocates claim that special obligations may be imposed on broadcast television and radio operators, including: public service announcements; expanded coverage of political campaigns, debates, and developments; free (or lower-cost) campaign advertising time; expanded

pervasive as the Big Networks' shows were in the heyday of their three-member oligopoly.

Id. (footnote omitted).

¹⁰³ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (holding that a statute requiring cable providers to fully scramble or block transmission of sexually-oriented channels was unconstitutional because it was not the least-restrictive means); see also *Denver Area Edu. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Cmty. Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D.C. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.* 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985). Attempts to regulate Internet content over the past decade have also been struck down as unconstitutional. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

¹⁰⁴ See discussion *supra* Parts III-IV.

educational or cultural programming (especially aimed at children); and expanded coverage of community affairs.¹⁰⁵

Ironically, broadcast speech controls can cut in two seemingly contradictory directions—content restraint versus content promotion. Media historian Paul Starr labels these different groups the “advocates of repression” (in favor of content restraint) versus the “advocates of uplift” (those in favor of promoting specific types of content).¹⁰⁶ Typically, conservatives and Republicans have dominated the “advocates of repression” camp, while most liberals and Democrats fall in the “advocates of uplift” category. Author Ford Rowan noted, “[m]any liberals want regulation to make broadcasting do wonderful things; many conservatives want regulation to restrain broadcasting from doing terrible things.”¹⁰⁷ Increasingly, however, the ideological divide is narrowing, if not disappearing, between these two camps. Congressional lawmakers on the political Left such as Sen. Hillary Clinton (D-N.Y.) and Sen. Robert Byrd (D-W. Va.) often favor the same content controls and mandates as those on the political Right, such as Sen. John McCain (R-Ariz.) and Sen. Sam Brownback (R-Kan.).¹⁰⁸

Regardless, the public interest charade lives on because it has advocates of all political stripes using any excuse they can to control media outputs. And public interest regulation *is* a charade because it is the very essence of arbitrary governance. It has no meaning other than what those in power say it means.¹⁰⁹ During his famous 1961 speech to the National Association of Broadcasters in which he referred to television as a “vast wasteland,” former FCC Chairman Newton Minow said: “I am here to uphold and protect the public interest. What do we mean by ‘the public interest?’ Some say the public interest is merely what interests the public. I disagree.”¹¹⁰ Minow’s statement was a rare admission by a policymaker that what really lies behind public interest regulation of media in this country is a series of

¹⁰⁵ See DAVID BOLLIER, IN SEARCH OF THE PUBLIC INTEREST IN THE NEW MEDIA ENVIRONMENT 6 (ASPEN INST. FORUM ON COMM. & SOC’Y, 2002), available at <http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/PUBLICINTEREST.PDF>; DAVID CROTEAU & WILLIAM HOYNES, THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST 224 (2001).

¹⁰⁶ PAUL STARR, THE CREATION OF THE MEDIA 306 (2004).

¹⁰⁷ FORD ROWAN, BROADCAST FAIRNESS 39 (1984).

¹⁰⁸ See, e.g., Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187, 188 (1995) (citing examples in which Sen. Hillary Rodham Clinton claimed that television news coverage has led to exaggerated fears of violence); Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI & TECH. 1, 50 (2004) (noting that Senators Byrd, Brownback, Lieberman, and McCain expressed their concerns about broadcast television content in a letter to then-FCC Chairman William Kennard).

¹⁰⁹ KRATTENMAKER & POWE, *supra* note 46, at 144.

¹¹⁰ Newton Minow, *Television and the Public Interest*, Speech to the National Association of Broadcasters (May 9, 1961), available at <http://www.americanrhetoric.com/speeches/newtonminow.htm>.

elitist assumptions by policymakers—legislators in Congress and regulators at the FCC—about the way the world should work.¹¹¹ Citizens have had very little to say about it and have not benefited from Washington-led, top-down interpretations of what supposedly lies in “the public interest” because, more often than not, public interest regulation has been used to limit, not expand media choices and competition.¹¹²

Nonetheless, many policymakers continue to prop up public interest notions and regulations in the belief that they are directing the content or character of media (and broadcasting in particular) toward a nobler end—a sort of *noblesse oblige* for the Information Age. At times, the rhetoric takes on a fairytale-like quality as lawmakers and regulators speak of the public interest in reverential and fantastic terms, all the while deftly evading any attempt to define the term, and therefore providing no practical guidance.¹¹³ Public interest proponents assume that their values or objectives—which, in their opinion, are consistent with the needs and desires of the general public—should ultimately triumph within the public policy arena. Not surprisingly, therefore, volumes of government rules and speeches have been penned advocating a large and expanding role for government in terms of promoting the public interest.¹¹⁴ But while public interest regulation has been the cornerstone of communications and media policy since the 1930s, enabling regulators to control industry structures and outcomes, at no time during these seven decades of public interest regulation has the term been defined.¹¹⁵

¹¹¹ *Id.* (“We all know that people would more often prefer to be entertained than stimulated or informed . . . It is not enough to cater to the nation’s whims; you must also serve the nation’s needs.”).

¹¹² See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 *FED. COMM. L.J.*, 427–68 (2001).

¹¹³ See, e.g., Michael J. Copps, Comm’r, Fed. Commc’ns Comm’n, Statement Before the Senate Comm. On Commerce, Science, and Transp. 2 (Jan. 14, 2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A4.pdf.

At all times, I strive to maintain my commitment to the public interest. As public servants, we must put the public interest front and center. It is at the core of my own philosophy of government The public interest is the prism through which we should always look as we make our decisions. My question to visitors to my office who are advocating for specific policy changes is always: how does what you want the Commission to do serve the public interest? It is my lodestar.

Id.

¹¹⁴ See, e.g., 47 U.S.C. § 303(f)–(g) (2000) (providing that the FCC Commission can make regulations to promote the public interest); Jonathan S. Adelstein, Comm’r, Fed. Commc’ns Comm’n, Statement Before the Children NOW Digital TV Conference (June 9, 2004) (“I firmly believe that new horizons in broadcasting should correspond to new horizons in serving the public interest.”).

¹¹⁵ Even today, efforts are made to read new powers or responsibilities into the term in order to provide regulators with the flexibility to control modern electronic media (i.e., broadcasting, cable) in ways they could not control older print media (i.e., newspaper, magazines). For example, during the late 1990s, the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters was formed by an executive order of Presi-

The problem with all this “public interest” thinking is that, “[i]n democracies, there is no universal ‘public interest.’ Rather there are numerous and changing ‘interested publics.’”¹¹⁶ Former FCC Commissioner Glen O. Robinson argues that the public interest standard “is vague to the point of vacuousness, providing neither guidance nor constraint on the agency’s action.”¹¹⁷ And Ronald Coase has argued that “[t]his phrase . . . lacks any definite meaning. Furthermore, the many inconsistencies in Commission decisions have made it impossible for the phrase to acquire a definite meaning in the process of regulation.”¹¹⁸ This is all still true today. The public interest standard is not really a “standard” at all because it has no fixed meaning; the definition of the phrase has shifted with the political winds to suit the whims of those in power at any given time.¹¹⁹

The viewing public is likely to have a broad array of interests and desires, however, which cannot be adequately gauged by five unelected FCC commissioners.¹²⁰ And while the public has very little say in the construction of the public interest policy standard, they have made it clear what

dent Clinton to investigate expanding public interest obligations for television broadcasters. The group came up with numerous recommendations to impose new burdens on broadcasters, even as broadcasters struggle to remain competitive with other media outlets which are not burdened with similar public interest regulatory requirements. See generally ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMM. ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS (1998), available at <http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf>.

¹¹⁶ Benjamin M. Compaine, *The Myths of Encroaching Global Media Ownership*, OPEN DEMOCRACY.NET, Nov. 6, 2001, at 5, <http://www.opendemocracy.net/content/articles/PDF/87.pdf>.

¹¹⁷ Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 14 (Max D. Paglin ed., 1989).

¹¹⁸ Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1, 8–9 (1959). Even supporters of broadcast regulation such as Paul Taylor and Norman Ornstein admit that, “neither in the 1927 [Radio] Act nor in the 1934 [Communications] Act, nor subsequently, did Congress define clearly what actions by broadcasters would represent managing their stations in the public interest.” Paul Taylor & Norman Ornstein, *A Broadcast Spectrum Fee for Campaign Finance Reform*, 6 (New Am. Found., Spectrum Series Working Paper No. 4, 2002).

¹¹⁹ See Adam D. Thierer, *Is the Public Served by the Public Interest Standard?*, 46 THE FREEMAN 618–20 (1996), available at <http://www.fee.org/publications/the-freeman/article.asp?aid=4341>. Likewise, Lawrence J. White has noted that, “The ‘public interest’ is a vague, ill-defined concept. Under the ‘public interest’ banner the Congress and the FCC have established far too many protectionist, anticompetitive, anti-innovative, inflexible, output-limiting regulatory regimes and have unnecessarily infringed on the First Amendment rights of broadcasters.” Lawrence J. White, *Spectrum for Sale*, THE MILKEN INST. REV. 38 (June 2001); see also William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L. J. 715, 716 (1989).

¹²⁰ See 47 U.S.C. § 154(a) (2000) (providing that the five FCC commissioners are appointed by the President and confirmed by the Senate).

they demand in the actual media marketplace.¹²¹ Generally speaking, broadcast commercial television and radio *do* reflect what the public really wants to see and hear. Viewers are being offered, and they consume, the programming they genuinely desire whether policymakers care to admit it.

Perhaps what “public interest” proponents are afraid to ask is this: Does the public really want to watch what politicians consider to be more “culturally enriching” or “civic-minded” programming, or would they rather tune into a rerun of *American Idol*, *Fear Factor*, or *Survivor*? Given the choice, many viewers will opt for what many public interest regulatory supporters would consider to be “low-brow” entertainment offerings over the programming that policymakers feel the masses should be consuming. Public interest supporters may bemoan the lack of civic spirit, or claim that this represents the end of our culture as we know it. But these are voluntary choices made by the citizenry that must be respected by government officials. More specifically, government should not censor Americans’ choice of content through open-ended “public interest” regulatory rationales.¹²²

B. The Indecency (Non-) Standard

The arbitrary nature of the broadcast industry’s asymmetrical regulatory regime is most vividly on display when the FCC acts to regulate what it regards as indecent programming on broadcast radio and television. What exactly counts as “indecent” programming for purposes of public interest regulation? Again, the practical answer is that it is whatever five political appointees at the FCC say it is.¹²³

The FCC, of course, disagrees. The agency relies on 18 U.S.C. § 1464 to enforce its indecency rules.¹²⁴ Under section 1464 of the criminal code, “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more

¹²¹ “Communications policy should be directed toward maximizing the services the public desires. Instead of defining public demand and specifying categories of programming to serve this demand, the [FCC] should rely on the broadcasters’ ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public’s interest, then, defines the public interest.” Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209–10 (1982).

¹²² See Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, J. L. & ECON. 15, 19 (1967) (“The mandate to grant licenses that serve the public [interest] . . . does not constitute the FCC the moral proctor of the public or the den mother of the audience.”).

¹²³ “In effect, then, broadcast indecency is simply whatever a majority of the five FCC commissioners says it is on a case-by-case basis within the broad parameters of the official definition. In this way a few bureaucrats in Washington determine what the entire country, children and adults, is allowed to see and hear on television and radio.” Lawrence H. Winer, *Children Are Not a Constitutional Blank Check*, in RATIONALES AND RATIONALIZATIONS 78 (Robert Corn-Revere, ed., 1997).

¹²⁴ 18 U.S.C. § 1464 (2000).

than two years, or both.”¹²⁵ The indecency “standard” that the FCC has relied on to enforce this provision was enunciated in the FCC’s finding of indecency against the Pacifica Foundation and upheld by the Supreme Court in *Pacifica*: “language that describes in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities and organs.”¹²⁶

In practice, this definition has proven notoriously difficult to interpret. “The problem is the indecency standard is not a standard. It’s basically a test for what people find distasteful and that is entirely in the eyes and ears of the beholder,” argues First Amendment attorney Robert Corn-Revere.¹²⁷ In the wake of *Pacifica*, the agency simplified matters somewhat by relying on the infamous “seven dirty words” at issue in that case.¹²⁸ Whether or not one thought those words should be allowed on broadcast radio or television, the FCC’s post-*Pacifica* approach of classifying them as verboten at least provided speakers and media operators with a bright-line test for what constituted “indecent” speech.¹²⁹

But as American culture evolved to find some of those words more acceptable, this bright line seemed to make less sense to some. Cutting in the opposite direction, other critics felt the “seven dirty words” standard provided too much leeway. Religious groups, in particular, lobbied the FCC to do more than just police the airwaves for a few dirty words; they wanted other types of speech or expression that they found objectionable to be subject to FCC scrutiny and fines.¹³⁰

As a result, the old, seven specific words approach gave way to a more generic enforcement strategy. In 1987, the FCC announced its new, more open-ended approach to indecency interpretation and enforcement.¹³¹ The new policy was immediately criticized by several concerned First Amend-

¹²⁵ *Id.* Congress has also codified enforcement powers for the FCC. See 47 U.S.C. § 501 (2000).

¹²⁶ *In re Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York, Declaratory Order*, 56 F.C.C. 2d 94 ¶ 12 (Feb. 12, 1975) [hereinafter *Pacifica Declaratory Order*], *aff’d*, 438 U.S. 726 (1978).

¹²⁷ Frank Ahrens, *Nasty Language on Live TV Renews Old Debate*, WASH. POST, Dec. 13, 2003, at A1.

¹²⁸ Those seven words were: shit, fuck, piss, cunt, cocksucker, motherfucker, and tits. *Pacifica Declaratory Order*, *supra* note 129, at ¶ 14.

¹²⁹ See John Crigler & William J. Byrnes, *The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 330 n.9 (1989) (noting that between 1975 and 1987 the FCC did not pursue any indecency actions against broadcasters).

¹³⁰ *Id.* at 344–47.

¹³¹ This new, post-*Pacifica* strategy was first laid out in *In re New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, Public Notice*, 2 F.C.C.R. 2726 (Apr. 27, 1987). This release announced the change in the indecency standard from the “seven dirty words” to the open-ended approach of “language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.” *Id.*

ment scholars. At the time, John Crigler and William J. Byrnes, counsels to the Pacifica Foundation, warned that the FCC had made a dangerous sea-change in its approach to content regulation. They argued that the FCC's new enforcement policy "shift[ed] the balance of power between the regulator and the regulated" in the following fashion:

The Commission abandoned a limited, clearly understood restriction on protected speech and replaced it with a more expansive, less precise policy and that appeared far more vulnerable to abuse and enforcement. "Indecency" was transformed from a known set of verbal taboos which any broadcaster could identify and easily avoid, into an elaborate set of guidelines, involving a host of variables, that yielded widely disparate results depending on the subjective judgments of the interpreter. The new standard allowed the broadcaster no discretion. It was constantly at risk in determining whether material was or was not indecent. The Commission, by contrast, acquired enormous discretion under the new standard. It could act on selected complaints or warehouse them until it chose to act. It could dismiss complaints when it wished to appear reasonable, or threaten license revocation when it wished to appear stern. At all times, it reserved for itself the final judgment as to what the nation as a whole would find offensive. Editorial authority that had once resided in the individual broadcaster now resided in five politically appointed Commissioners charged with enforcing a standard that they could manipulate to obtain virtually any result desired.¹³²

This generally captures how the FCC's indecency enforcement regime has worked since the late 1980s. And although the FCC has attempted to clarify its interpretation of indecency in various rulings over the past two decades, its indecency enforcement policy remains about as clear as mud. For example, seven years after promising a set of detailed guidelines regarding how it defined indecency, in 2001, the FCC finally produced a policy statement.¹³³ The guidelines, however, really did not provide much real guidance to the industry. In practice, language and behavior that the agency found to be indecent in one context was often found not to be indecent in others. The agency also struggled with double entendres and other types of sexual innuendo pervasive in many radio "shock jock" talk shows. Thus, the agency's indecency standard remained quite arbitrary and offered broadcasters little certainty.

¹³² Crigler & Byrnes, *supra* note 129, at 359–60.

¹³³ *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*, 16 F.C.C.R. 7999, ¶ 1 (Mar. 14, 2001).

This Policy Statement addresses the February 22, 1994, Agreement for Settlement and Dismissal with Prejudice between the United States of America, by and through the Department of Justice and Federal Communications Commission, and Evergreen Media Corporation of Chicago, AM, Licensee of Radio Station WLUP(AM). Specifically, in paragraph 2(b) of the settlement agreement, the Commission agreed to 'publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency.'

Id. at n.23 (citing *United States v. Evergreen Media Corp.*, Civ. No. 92 C 5600 (N.D. Ill. 1994)).

In recent years, the FCC has continued to struggle to clarify its indecency standard for traditional broadcast outlets, but not done a very good job of it. The FCC's guidance has remained unclear as it, through Orders and Notices of Apparent Liability, seemingly sets new indecency standards only to reverse course later on, leaving no clear definition as to what actually constitutes a violation.¹³⁴ While such decisions make FCC indecency interpretations difficult to decipher, at least the public is able to review these particular cases and judge for themselves what the standard might mean. Many other agency decisions are hidden from public view as they are not made available but instead merely deposited into a file for the broadcast licensee in question. Also, complaint dismissals are almost never made public, leaving open questions about why the FCC did not rule against media operators in those circumstances. For such reasons, the indecency process often constitutes "a body of secret law."¹³⁵

The FCC's recent indecency enforcement efforts have become so arbitrary that even a sitting member of the Commission has spoken out. In August 2006, Commissioner Jonathan Adelstein took Chairman Kevin Martin and the rest of the agency to task for their over-zealous enforcement of indecency regulations, saying: "I don't believe the Commission has provided broadcasters a coherent and principled framework that is rooted in commonsense and sound constitutional grounds."¹³⁶ He went on to detail some of the problems with the agency's recent indecency rulings, concluding that "the Commission's last batch of decisions dangerously expands the scope of indecency and profanity law."¹³⁷

¹³⁴ For detailed examples of how the agency has continually shifted course in defining indecent broadcasts see Adam Thierer, *The FCC's Indecency Bomb: Why it Might Be the Beginning of the End of All Broadcast Content Regulation*, (Progress & Freedom Found., Mar. 2006), available at http://blog.pff.org/archives/2006/03/the_fccs_indece_1.html.

¹³⁵ *Can You Say That on TV?: An Examination of the FCC's Enforcement with Respect to Broadcast Indecency: Hearing Before the Subcomm. On Telecomm. and the Internet and the H. Comm. On Energy and Commerce*, 108th Cong. (2004) (statement of Robert Corn-Revere, Partner, Davis Wright Tremaine LLP), available at <http://energycommerce.house.gov/reparchives/108/Hearings/01282004hearing1165/Corn-Revere1845.htm>.

¹³⁶ Jonathan S. Adelstein, Comm'r, Fed. Commc'ns Comm'n, Keynote Address at the Progress & Freedom Foundation 12th Annual Aspen Summit 6 (Aug. 20, 2006) (transcript available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267047A1.pdf).

¹³⁷ *Id.* at 5.

C. Corruption of the Complaint Process: The “Heckler’s Veto” is Now Real¹³⁸

The FCC regularly reports on the number of complaints it receives from the public on various matters under its jurisdiction, including broadcast indecency. These complaint numbers are frequently cited as the driving force behind federal efforts to “crack down” on unseemly broadcast content.¹³⁹ Given the importance of these figures, one would hope that the FCC’s statistic collection methods were accurate and transparent. Unfortunately, they are neither. Indeed, the FCC now measures indecency complaints differently than all other types of consumer complaints. In so doing, it permits a process whereby indecency complaints appear to be artificially inflated relative to other types of complaints.

Even if the figures reported by the FCC were accurate, however, those tallies show that the purported increases in complaints do not reflect heightened outrage among members of the public about what they see on TV or hear on the radio. Instead, the FCC’s figures confirm that the vast majority of complaints are duplicate emails that are generated against a relative handful of programs disfavored by activist groups. Indeed, while the reported number of complaints between 2002 and 2004 grew by nearly 10,000 percent, the number of programs that were the subject of complaints *declined* by 20% over the same two-year period.¹⁴⁰

Recent reports of a significant decline in broadcast indecency complaints underscore the opaque nature of the FCC’s statistical analysis. A report issued in September 2005, revealed that the number of complaints dropped from 157,016 in the first quarter of 2005 to 6,161 in the second quarter.¹⁴¹ In an effort to explain the 96% drop in the number of complaints, the media sought out expert opinion to explain the phenomenon. A spokeswoman for the PTC,¹⁴² was quick to note that the decline in the numbers could be explained by the PTC’s lack of second quarter complaint crusades against specific programs. Melissa Caldwell, research director of the PTC, also

¹³⁸ This section is largely excerpted from the author’s previous work. See Adam Thierer, *Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process*, (Progress & Freedom Found., Progress on Point rel. 12.22, Nov. 2005), available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>.

¹³⁹ See, e.g., President Signs the Broadcast Decency Enforcement Act, *supra* note 2 (“Since 2000, the number of indecency complaints received by the FCC has increased from just hundreds per year to hundreds of thousands. In other words, people are saying, we’re tired of it, and we expect the government to do something about it.”).

¹⁴⁰ See Table 2, *infra* Part V.C.1.

¹⁴¹ See Brian Blackstone, *Indecency Complaints Down Sharply In 2Q: FCC Says*, DOW JONES NEWSWIRE, Sept. 28, 2005, available at <http://www.kintera.org/site/apps/nl/content2.asp?c=hrLQKWPGLuF&b=1368219&ct=1804851>.

¹⁴² See Parents Television Council, About Us, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Apr. 14, 2007).

stated that PTC “has orchestrated fewer complaint campaigns this year than it has in previous years.”¹⁴³

The PTC’s reduction in complaint campaigns probably best explains the 2005 temporary decrease in the number of complaints received by the FCC, since FCC data shows that this organization has been the primary generator of indecency correspondence in recent years. Of all complaints filed in 2003, 99.8 percent originated with the PTC, according to Freedom of Information Act (“FOIA”) requests filed with the FCC.¹⁴⁴ In 2004, the trend remained the same. Exempting the complaints associated with the Janet Jackson Super Bowl episode, 99.9 percent of all other FCC indecency complaints were generated by the PTC.¹⁴⁵ One particular investigation involved a short-lived Fox Television reality show called “Married by America.” In that case, the FCC originally reported that it received 159 complaints related to one specific episode. As a result, the agency fined Fox and its affiliates \$1.2 million for indecency violations.¹⁴⁶ But after blogger and former *TV Guide* critic Jeff Jarvis submitted a FOIA request to the FCC about the case, the agency’s Enforcement Bureau was forced to reveal that there were actually only ninety total complaints from twenty-three unique individuals. The majority of these complaints were essentially the same PTC form letter.¹⁴⁷

The PTC’s increasingly effective use of computer-generated campaigns against specific TV programs is a leading factor in explaining the large jump in indecency complaints in recent years. But methodological changes not fully explained by the FCC also appear to have played an important role in creating artificially high, and thus unreliable, numbers.

1. *The FCC and the Indecency Complaint Process*

As the federal agency responsible for regulating broadcast programming, the FCC does not monitor what programs are on the air. Rather, it takes action to enforce its rules against broadcast “indecency” in response to complaints filed by the public.¹⁴⁸ This is a delicate task because governing

¹⁴³ Blackstone, *supra* note 141.

¹⁴⁴ Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK.COM, Dec. 6, 2004, available at http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm.

¹⁴⁵ *Id.*

¹⁴⁶ See *FCC Fines Fox \$1.2M for Indecency*, CNNMONEY.COM, Oct. 12, 2004, http://money.cnn.com/2004/10/12/news/international/newscorp_fine; Frank Aherns & Lisa de Moraes, *FCC Proposes Indecency Fine Against Fox TV*, WASH. POST, Oct. 13, 2004, at A01.

¹⁴⁷ *Id.* See also Jake Tapper, *Is Popular Will Behind FCC Crackdowns?*, ABC NEWS.COM, Dec. 4, 2004, <http://abcnews.go.com/WNT/story?id=299631&page=1>.

¹⁴⁸ See Fed. Comm’n’s Comm’n, *Complaint Process*, <http://www.fcc.gov/eb/oip/process.html> (last visited Apr. 14, 2007) (explaining the process for filing a complaint at the Commission).

law provides that “no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”¹⁴⁹ In years past, the FCC has attempted to balance its conflicting duties by enforcing its rules “cautiously” and with “restraint.”¹⁵⁰ This reticence ended in 2004.

In 2004, the Commission embarked on a well-publicized campaign to strengthen its enforcement efforts. Following the infamous “wardrobe malfunction” of the 2004 Super Bowl halftime show, the official line has been that the American public demands more federal control over broadcast content.¹⁵¹ After the Super Bowl, then-FCC Chairman Michael Powell testified before Congress that his agency was taking steps “to sharpen our enforcement blade” in response to the “rise in the number of complaints at the Commission.”¹⁵² At a National Association of Broadcasters convention Chairman Powell said, “I think what you’ve seen in terms of the increase in the [FCC’s] enforcement efforts in this area is a direct response to the increase of public complaints” filed with the agency.¹⁵³ His fellow commissioners later reinforced this message.¹⁵⁴ A professed concern over the rising number of complaints is also reflected in various recent legislative proposals that have been introduced to greatly expand FCC authority over broadcast programming.¹⁵⁵

Since 2002, the FCC has issued quarterly reports summarizing complaints submitted to the agency.¹⁵⁶ But after the 2004 Super Bowl, as congressional pressure for FCC action mounted, the Commission compiled

¹⁴⁹ 47 U.S.C. § 326 (2000).

¹⁵⁰ The Commission continues to use this language in its indecency actions. *See, e.g., In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664, ¶ 11 (Feb. 21, 2006) (“[I]n making indecency determinations the Commission proceeds cautiously and with appropriate restraint.”).

¹⁵¹ *See, e.g., Hearing Before the Subcomm. on Telecomm. and the Internet and the H. Comm. on Energy and Commerce*, 108th Cong. (2004) (statement of Michael K. Powell, Chairman, Fed. Commc’ns Comm’n), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A3.pdf.

¹⁵² *Id.*

¹⁵³ Michael K. Powell, Chairman, Fed. Commc’ns Comm’n, Remarks at the National Association of Broadcasters Convention (Apr. 20, 2004) at 1, 3, 13–14, <http://www.fcc.gov/commissioners/previous/powell/speeches.html>.

¹⁵⁴ *See In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII, Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 19,230, ¶ 2, n.6 (Aug. 31, 2004). *See also id.* at 19,258–62 (Statements of Chairman Michael K. Powell, Comm’r Michael J. Copps, Comm’r Kevin J. Martin, and Comm’r Jonathan S. Adelstein).

¹⁵⁵ *See, e.g., Broadcast Decency Act of 2005*, Pub. L. No. 109-235, 120 Stat. 491 (amending 47 U.S.C. § 503(b)(2)).

¹⁵⁶ Fed. Commc’ns Comm’n, Quarterly Inquiries and Complaints Reports, <http://www.fcc.gov/cgb/quarter> (last visited Apr. 14, 2007) [hereinafter FCC Quarterly Reports].

reports that singled out indecency complaints. The first such report was revealed in a post-oversight hearing letter from Chairman Powell to Congressman John Dingell.¹⁵⁷ In response to Rep. Dingell's specific questions on the matter, the FCC reported that the number of indecency complaints alone increased from 111 in 2000 and 346 in 2001, to 13,922 in 2002 and 240,350 in 2003.¹⁵⁸ As of March 2, 2004, the date of the letter to Dingell, the number of complaints for that year totaled 530,885, mostly in response to the Super Bowl.¹⁵⁹

While the FCC data appear to support the claim of a vast increase in complaints, a closer look suggests that the raw numbers are not a measure of broad public discontent with broadcasting. Embedded in the footnotes to a chart at the back of Chairman Powell's letter was a notation indicating that more than 97 percent of the 13,992 complaints filed in 2002 targeted "four specific programs," and that, in 2003, 99.8 percent of the 240,350 complaints were filed against "nine specific programs."¹⁶⁰ There is also an indication that the significant increase in complaints reported in 2002 and 2003 resulted from a change in tactics by certain groups who waged email campaigns against specific shows they dislike.¹⁶¹

Today, the FCC's Enforcement Bureau ("EB") maintains a special "Obscenity, Indecency & Profanity" Web site,¹⁶² through which it makes available statistics on the number of indecency complaints and resulting enforcement actions from 1993–2006.¹⁶³ Table 2 is a modified reproduction of the data shown in the current EB chart.¹⁶⁴

¹⁵⁷ Letter from Michael K. Powell, Chairman, Fed. Commc'ns Comm'n, to Rep. John D. Dingell (Mar. 2, 2004) at 8, *available at* http://energycommerce.house.gov/press/030204_FCC_rsp.pdf.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ The FCC informed Congress that, between November 2003 and February 2004, it had experienced "numerous high volume email events" that "overloaded FCC systems to the point where email to and from the Internet was disrupted and incoming mail from the Internet was not deliverable." *Id.* at 3.

¹⁶² Fed. Commc'ns Comm'n, Obscenity, Indecency & Profanity, <http://www.fcc.gov/eb/oip/> (last visited Feb. 12, 2007).

¹⁶³ Fed. Commc'ns Comm'n, Obscenity, Indecency & Profanity, Complaint & Enforcement Statistics, <http://www.fcc.gov/eb/oip/Stats.html> (last visited Feb. 12, 2007).

¹⁶⁴ Fed. Commc'ns Comm'n, Obscenity, Indecency & Profanity - Complaint & Enforcement Statistics, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Feb. 12, 2007).

Table 2: FCC Indecency Complaint Data (1993–2004)

Year	Complaints	Programs	Notices of Apparent Liability	Amount Fined
2006 (Jan.–June)	327,198	1191	7	\$3,962,500
2005	233,531	1550	0	\$0
2004	1,405,419	314	12	\$7,928,080
2003	166,683	375	3	\$440,000
2002	13,922	389	7	\$99,400
2001	346	152	7	\$91,000
2000	111	111	7	\$48,000
1999	5,853	N/A	3	\$49,000
1998	32,300	N/A	6	\$40,000
1997	828	N/A	7	\$35,500
1996	950	N/A	3	\$25,500
1995	947	N/A	1	\$4,000
1994	12,817	N/A	7	\$674,500
1993	N/A	N/A	5	\$665,000

The figures beg the question: are the sizeable jumps in recent years due to a sudden explosion in “indecent” content on the airwaves and a resulting outpouring of complaints by average Americans? Or is something else going on?

2. What Counts as “A Complaint”?

The complaint process has been altered in recent years. Since the beginning of 2002, FCC indecency complaint data is reported on a quarterly basis by the Consumer & Governmental Affairs Bureau (“CGB”) in the *Quarterly Report on Informal Consumer Inquiries and Complaints*.¹⁶⁵ Importantly, the EB’s tallies of annual indecency actions have changed in recent years due to methodological changes and adjustments. But because of these changes and adjustments, the EB’s annualized chart and the numbers contained in the CGB’s *Quarterly Reports* do not match prior to 2003. This is due to a change in what the Commission considers “a complaint.”

What counts as “a complaint” might seem like a relatively simple matter, but it is not. Some letters to the agency detail why a particular listener or viewer thought a certain program was indecent while others contain little

¹⁶⁵ See FCC Quarterly Reports, *supra* note 156. Data from previous years are not publicly available on a quarterly basis, but annual numbers are reported in a chart available on the Enforcement Bureau’s Web site. See Fed. Commc’ns Comm’n, *supra* note 164.

more than a few incoherent words strung together complaining about a particular show. Increasingly, others are simply computer-generated form letters that only required the complainant to punch his name into an online Web site petition.

a. Change #1: Computer-Generated Form Letters Counted as Individual Complaints

This category of complaints has created special problems for the FCC in recent years because of the increasing use of computer-generated complaint campaigns by groups such as the PTC. If the PTC or other activist groups generate the bulk of most of the complaints about a specific program, and all those complaints are the exact same form letter sent from their Web sites, should they be counted as a single complaint or multiple complaints?

Prior to the summer of 2003, the Commission aggregated identically-worded form letters or computer-generated electronic complaints such that they counted as a single complaint. But at some point during the summer of 2003, the FCC quietly changed its methodology to count group complaints as individual complaints. Although the agency did not release any public notices or press releases to explain its methodological switch, the change can be verified by examining FCC data and statements by the PTC from that time.

In a July 1, 2003 press release entitled, "FCC Reacting to PTC Demands," the PTC noted that it had "outlined . . . five specific steps that the FCC must take to ensure the decency standards are enforced" and called on the agency to take those steps by June 30, 2003.¹⁶⁶ The fourth of the five PTC demands to the FCC stated, "[t]he Commission needs to direct the Enforcement Bureau to count multiple complaints about a single broadcast as multiple complaints."¹⁶⁷ The press release goes on to note that "the PTC has engaged in discussions with several FCC Commissioners and/or their staffers concerning the review and enforcement of commonsense decency standards. . . . *The PTC has been told to expect results on these fronts before the end of July.*"¹⁶⁸

¹⁶⁶ Press Release, Parents Television Council, FCC Reacting to PTC Demands (July 1, 2003), available at <http://www.parentstv.org/ptc/publications/release/2003/0701.asp>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (emphasis added). Then-PTC President Brent Bozell further stated that "[t]he PTC has received indications from several Commissioners that the FCC is serious about resolving this issue to our mutual satisfaction. Given the environment of productive talk and fruitful dialogue, the coalition has agreed to work with FCC officials through the month of July to resolve this issue." *Id.* It is likely PTC picked the June 30, 2003 date as the cut-off for its demands because that is the last day of the FCC's data collection period for second quarter complaints.

An examination of the FCC's indecency-complaint tallies from the second and third quarters of 2003 confirms the change. Before June 2003, indecency complaint tallies rarely broke double-digital totals on a monthly basis. Beginning with the third quarter report that year and coinciding precisely with PTC's "deadline" and "indications" it received from several FCC commissioners, however, the numbers skyrocketed into quadruple figures and then suddenly into the tens of thousands.¹⁶⁹

As further verification of this methodological change, a recent revision of the EB's annualized indecency complaint chart now includes the following footnote: "The number of complaints received may vary significantly from month to month depending on whether there have been mass e-mail or letter campaigns about particular programs."¹⁷⁰ It is clear that this change has likely had a great inflationary effect on the number of indecency complaints the FCC reports on a monthly and annual basis.

b. Change #2: Complaints to Multiple Offices Counted Multiple Times

In early 2004, the agency again quietly changed its method of counting indecency complaints. In its *Quarterly Report on Informal Consumer Inquiries and Complaints* for the first quarter of 2004, the FCC reported a significant jump in indecency complaints in January and February following the Janet Jackson Super Bowl incident. On its own, the jump in indecency complaints was not surprising. However, buried in the fine print of the footnotes of that FCC *Quarterly Report* was the following note regarding indecency tallies:

Commencing with this report, the reported counts reflect complaints received directly by CGB, complaints forwarded to EB, complaints received separately by EB, and complaints emailed directly to the FCC's Commissioner's offices and FCCINFO. The reported counts may also include duplicate complaints or contacts that subsequently are determined insufficient to constitute actionable complaints.¹⁷¹

¹⁶⁹ News Release, Fed. Commc'ns Comm'n, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 9 (May 30, 2003) <http://www.fcc.gov/cgb/quarter/welcome.html> (follow "Year 2003 1st Qtr." hyperlink); News Release, Fed. Commc'ns Comm'n, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 9 (Sept. 12, 2003) <http://www.fcc.gov/cgb/quarter/welcome.html> (follow "Year 2003 2nd Qtr" hyperlink); News Release, Fed. Commc'ns Comm'n, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 9 (Nov. 20, 2003) <http://www.fcc.gov/cgb/quarter/welcome.html> (follow "Year 2003 3rd Qtr" hyperlink); News Release, Fed. Commc'ns Comm'n, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 11 (June 10, 2004) <http://www.fcc.gov/cgb/quarter/welcome.html> (follow "Year 2003 4th Qtr" hyperlink).

¹⁷⁰ This sentence has been deleted from the FCC's latest revision of this chart, which it updates and alters periodically. The version of the chart cited is on file with the author.

¹⁷¹ News Release, Fed. Commc'ns Comm'n, Quarterly Report on Informal Consumer Inquiries and Complaints Released, at 9 n.** (Feb. 11, 2004)

In other words, since the first quarter of 2004, the FCC has been counting *identical* indecency complaints multiple times according to how many Commissioner's offices and other divisions receive the complaints. Consequently, some indecency complaints could be inflated by a factor of six or seven, while others are counted singly.¹⁷² In an age of computer-generated petitions, bombarding multiple FCC offices with complaints literally is as simple as the click of a button. As a result, it is impossible to determine exactly how much indecency "complaint inflation" is taking place today at the FCC, but there seems to be little doubt that it *is* taking place.

The FCC's quiet statistical changes are troubling for three reasons. First, the FCC failed to provide the public official notice of the changes outside of some limited and quite confusing fine print in the footnotes of quarterly reports. The EB and CGB Web sites do not include any press releases or summaries of these changes. And there does not appear to be any mention of these changes in any speeches by FCC Commissioners or bureau chiefs.

Second, it appears that the FCC adopted these methodological changes for indecency complaints but not for any other category of complaints that the agency receives. In other words, a complaint sent to the FCC regarding poor broadcast signal quality or some other "program quality" aspect of television or radio programming is classified as a "general criticism" or "other programming issue" complaint *and only counted once*. The same goes for complaints about cable rates, phone service, or anything else.¹⁷³ Thus, the standard for all other subjects of consumer complaint is: "one complaint, one vote." But when it comes to the issue of indecency, the new standard is: "one complaint, (potentially) multiple votes." This represents a significant change in how the agency conducts its business and yet, again, it has garnered little more than a few footnotes in FCC quarterly reports or charts. Very few people likely read such footnote fine print in close enough detail to realize the dramatic shift in statistical methodology.

Third, policymakers have relied on the FCC statistics documenting an apparent increase in indecency complaints without acknowledging that much of the change may be explained by the hidden changes in methodology. Moreover, these changes coincided with the efforts of one advocacy group—the PTC—to change the indecency complaint process and to promote the "increase" in complaints as a mandate to tighten the indecency standard itself. For many years, the PTC has pressured the FCC to change

<http://www.fcc.gov/cgb/quarter/welcome.html> (follow "Year 2004 1st Qtr" hyperlink) [hereinafter FCC Q1 2004 News Release].

¹⁷² Assuming, *arguendo*, that a single complaint is sent in identical copies to each of the four Commissioners' offices, the Chairman's office, and to the Enforcement Bureau's Investigations and Hearing Division (the proper place for such complaints), the minimum number of inflation factors would be five: one original complaint, plus five copies counted as distinct complaints.

¹⁷³ See FCC Q1 2004 News Release, *supra* note 171, at 9, n.** (only indicating that indecency/obscenity complaints are subject to the new complaint counting system).

its methodology to give greater weight to the group's computer-generated e-mail complaint campaigns. It appears the PTC's efforts have paid off: now the PTC and other groups are essentially able to "stuff the ballot box" in terms of inflating indecency complaints at the FCC and potentially spurring increased regulatory activism as a result.

3. Reflections on the Complaint Process

It was not always the case that indecency data drew such scrutiny. Indeed, before 2000, the FCC didn't even compile quarterly data on indecency complaints. The fact that indecency complaints are subjected to such tabulation today is a sign of just how politicized the entire process has become. In the past, the filing of a complaint meant very little; it was only when action was taken on that complaint that true news was made. Today, by contrast, the numbers *are* the news.¹⁷⁴

The influence of single-interest advocacy groups on the complaint process also deserves greater scrutiny. As mentioned above, only a small handful of shows generate the majority of complaints. This is likely a function of the PTC's targeted complaint crusades against specific programs. But should the PTC's tastes and desires dictate which shows appear on television? The danger here is that policymakers are granting a small, but vocal, group of regulatory proponents a "heckler's veto" over all content determinations. Their views and values end up trumping what the public at large actually demands.

The Supreme Court recognized over half a century ago that allowing such a "heckler's veto" to develop would be antithetical to the First Amendment. In *Feiner v. New York*, the Court stated that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."¹⁷⁵ More recently, the Supreme Court struck down the Communications Decency Act, which sought to impose indecency regulations on Internet communications, finding that the statute "would confer broad powers of censorship, in the form of a heckler's veto, upon any opponent of indecent speech"¹⁷⁶

In the case of modern broadcast television and radio indecency complaints, a single vocal advocacy organization is now largely driving the

¹⁷⁴ See Amy Schatz, *Networks Fight Rising Number of FCC Fines*, WALL ST. J., May 19, 2006, at B1 (stating the FCC has cracked down on broadcasters because of increased complaints); see also Frank Rich, *The Year of Living Indecently*, N.Y. TIMES, Feb. 6, 2005, at Sec. 2, p. 1 (citing over one million indecency complaints in 2004).

¹⁷⁵ 340 U.S. 315, 320 (1951).

¹⁷⁶ *Reno v. ACLU*, 521 U.S. 844, 880 (1997). The First Amendment also shields against tyranny of the majority. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

FCC's regulatory efforts, and the Commission is enabling the organization to assert a "heckler's veto" over broadcast content. To be sure, PTC has every right to pepper the FCC with its complaints. Indeed, PTC's successes speak to the power of its political methods and influence. The irony, of course, is that PTC's muscular use of its First Amendment right to petition the government is in the service of squelching the speech rights of others.

Importantly, as program ratings data, awards, and critical praise make clear, the PTC's values or desires are not congruent with those of the general viewing public. Many of the television programs frequently appearing on PTC's ongoing list of "Worst Television Shows"¹⁷⁷—shows which presumably the PTC would like the FCC to censor—are among the most popular and critically praised on television today. Table 3 highlights the discrepancy between PTC's views and those of the general public. Whereas the millions of Americans who watch these programs never bother sending letters to the FCC to say how much they enjoy these shows, the PTC does make its voice heard and appears to achieve results, even though PTC's voice represents only a small fraction of the overall viewing audience.¹⁷⁸

¹⁷⁷ Best and Worst TV Shows of the Week, <http://www.parentstv.org/PTC/publications/bw/welcome.asp> (last visited Apr. 14, 2007).

¹⁷⁸ PTC's membership is estimated at approximately one million. ANNUAL REPORT, PARENT'S TELEVISION COUNCIL, 2005 ANNUAL REPORT 4 (2005) <http://www.parentstv.org/welcome.asp> (follow "About the PTC" hyperlink; then follow "Annual Report" hyperlink). As of June 2006, there were approximately 110,900,000 U.S. households with televisions. Media InfoCenter.org, Media Management News and Data, <http://www.mediainfocenter.org/television/cable/size.asp> (last visited Apr. 14, 2007).

Table 3: *Who Decides? The PTC or the Public?—Programs Frequently Appearing on the PTC's "Worst TV Shows" Lists*

Program	Nielsen Rating & Rank			Notable Awards and Nominations
	2004–05	2003–04	2002–03	
C.S.I. (Crime Scene Investigation)	23.0 million viewers Rank: 3rd	25.6 million viewers Rank: 2nd	26.2 million viewers Rank: 1st	Winner, People's Choice Award "Favorite Television Dramatic Series" (2003, 2004, 2005); Nominee, Emmy Awards "Outstanding Drama Series" (2002, 2003, 2004); Nominee, Golden Globes "Best Television (Drama) Series" (2001, 2002, 2004)
Desperate Housewives	19.0 million viewers Rank: 4th	N/A	N/A	Winner, Golden Globes "Best Television (Comedy) Series" (2005); Winner, People's Choice Award "Favorite New Television Drama" (2005); Nominee, Emmy Award "Outstanding Comedy Series" (2005)
C.S.I. Miami	19.0 million viewers Rank: 6th	18.1 million viewers Rank: 9th	16.6 million viewers Rank: 15th	Winner, People's Choice Award "Favorite New Dramatic Series" (2003)
Friends	N/A	21.4 million viewers Rank: 5th	21.8 million viewers Rank: 4th	Winner, Emmy Awards "Outstanding Comedy Series" (2002); Nominee, Emmy Awards "Outstanding Comedy Series" (1995, 1996, 1999, 2000, 2003);
Two and a Half Men	15.0 million viewers Rank: 13th	15.3 million viewers Rank: 16th	N/A	Winner, People's Choice Award, "Favorite New Comedy Series" (2004)
Will & Grace	N/A	15.6 million viewers Rank: 15th	16.8 million viewers Rank: 12th	Winner, Emmy Award "Outstanding Comedy Series" (2000); Nominee, Emmy Award "Outstanding Comedy Series" (2001, 2002, 2003, 2004); Winner, People's Choice Award, "Favorite Comedy Series" (2000, 2001, 2002, 2003, 2004)

VI. PARENTS HAVE BEEN EMPOWERED TO MAKE HOUSEHOLD CONTENT DETERMINATIONS FOR THEMSELVES

A. Whose “Community Standard”?

Decisions about acceptable media content are extraordinarily personal; no two people or families will have the same set of values, especially in a nation as diverse as America. For example, what is the relevant “community standard” when the counties that constitute the greater Atlanta television market, nearly 58 percent of which voted for President Bush in the last election, make ABC’s controversial drama-comedy “Desperate Housewives” the top-rated show in their communities?¹⁷⁹ Similarly, in the traditionally conservative Salt Lake City market, where President Bush captured over 72 percent of the vote, the top four shows in 2004 were “C.S.I.,” “C.S.I. Miami,” “E.R.,” and “Desperate Housewives.”¹⁸⁰ “Desperate Housewives” “is even a bigger hit in Oklahoma City than it is in Los Angeles, bigger in Kansas City than it is in New York.”¹⁸¹

It is unclear how the FCC should determine the relevant “community standard” for purposes of regulation when some of the most conservative communities in America are watching controversial programs that some groups, like the PTC, want censored. Therefore, it would be optimal if public policy decisions in this field took into account the extraordinary diversity of citizen/household tastes and left the ultimate decision about acceptable programming to them. Such an approach is all the more necessary in light of the fact that most U.S. households are made up entirely of adults; only one third of U.S. households include children under 18.¹⁸²

It is true that, in the past, it was quite difficult for individual households to tailor programming to their specific needs or values. In essence, the “On/Off” button was the only parental control at our collective disposal (absent the extreme step of removing TVs and radios from the home altogether). In that context, it was thought that the Commission needed to act as surrogate for parents given the lack of control families had over their viewing decisions/encounters. The FCC’s oversight and regulatory diligence, it was argued, would help prevent uninvited programming from intruding into the home.¹⁸³ The agency would establish a baseline “com-

¹⁷⁹ See Bill Carter, Many Who Voted for ‘Values’ Still Like Their Television Sin, N.Y. TIMES, Nov. 22, 2004, at A1.

¹⁸⁰ *Id.*

¹⁸¹ Frank Rich, *The Great Indecency Hoax*, N.Y. TIMES, Nov. 28, 2004, at Sec. 2, 1.

¹⁸² U.S. Census Bureau—USA Statistics in Brief—Households and Housing, <http://www.census.gov> (follow “Special Topics: Statistical Abstract” hyperlink; then follow “Summary Statistics: USA Statistics in Brief” hyperlink; then follow “Households.Housing.HTML” hyperlink) (last revised Dec. 20, 2006).

¹⁸³ FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

munity standard” for the entire nation in the absence of effective, household-level controls to restrict potentially objectionable content.

But if it is the case that families now have the ability to effectively do this on their own, then the regulatory equation must change. Regulation can no longer be premised upon the supposed helplessness of households to deal with content flows if families have been empowered and educated to make content determinations for themselves.

Importantly, household-level controls need not be perfect to be preferable to government controls. This is especially the case in light of the First Amendment values at stake here. Absent the removal of all media devices from a home, it would be impossible to eliminate all unwanted or unexpected encounters from life.¹⁸⁴ Moreover, other media sectors offer far fewer parental controls but receive the maximum protection of the First Amendment. In many ways, it is easier for parents today to control broadcast television flows than to control the myriad other types of media that come into the home.

B. New Empowerment Tools and Technologies

There exist today a multitude of screening and filtering technologies that parents can tap to limit their children’s access to content. The market for these parental empowerment tools and technological controls is broad and growing. The existence of these many tools and controls is important because it has a bearing on the legal issues at stake here. In striking down the Communications Decency Act’s effort to regulate underage access to adult-oriented Web sites, the Supreme Court declared in *Reno v. ACLU* that a law that places a “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving” the same goal.¹⁸⁵ Within the realm of television, many such “less restrictive alternatives” are available to parents today to help them shield their children’s eyes and ears from objectionable content.

1. *The V-Chip*

As a standard feature in all televisions thirteen inches and larger built after January 2000, the V-Chip gives households the ability to screen televised content by ratings that are affixed to almost all programs.¹⁸⁶ The V-

¹⁸⁴ Of course, this is the case outside the home as well. Consider ballgames, shopping malls, and even parks and playgrounds.

¹⁸⁵ *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

¹⁸⁶ 47 U.S.C. § 303(x) (2000); *In re Technical Requirements to Enable Blocking of Video Programming based on Program Ratings; Implementation of Sections 551(c), (d), and (e) of the Telecommunications Act of 1996*, *Report and Order*, 13 F.C.C.R. 11,248, ¶ 1 (Mar. 13, 1998).

Chip can be accessed through the setup menus on televisions, or often is just one click away using a button on the TV's remote. Households can then use password-protected blocking to filter programs by rating.¹⁸⁷

These ratings and labels are usually found at the beginning of programs, via on-screen menus and interactive guides, and in local newspaper or TV Guide listings. This information is also embedded in each TV program so that the V-Chip or other devices can screen and filter by ratings. The FCC also hosts a Web site that provides detailed instruction regarding how to use the V-Chip.¹⁸⁸ "TV Watch," a coalition of media experts and media organizations, provides a Web site with instructions, parental control tutorials, and tips to help parents program the V-Chip and find other tools to control television in the home.¹⁸⁹ And a new industry-sponsored campaign, "The TV Boss," offers easy-to-understand tutorials for programming the V-Chip or cable and satellite set-top box controls.¹⁹⁰ As part of the effort, several PSAs and other advertisements have aired or been published reminding parents that these capabilities are at their disposal.¹⁹¹

Importantly, the relatively low V-Chip usage rates among U.S. households¹⁹² should not be used as an excuse for government regulation of tele-

¹⁸⁷ Understanding the TV Ratings, www.tvguidelines.org/ratings.asp (last visited Feb. 12, 2007); *In re Children's Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking*, 19 F.C.C.R. 22,943, n.107 (Nov. 23, 2004). The ratings system offers the following age-based designations:

"TV-Y" – All Children

"TV-Y7" – Directed to Children Age 7 and Older

"TV-Y7 (FV)" – Directed to Older Children Due to Fantasy Violence

"TV-G" – General Audience

"TV-PG" – Parental Guidance Suggested

"TV-14" – Parents Strongly Cautioned

"TV-MA" – Mature Audience Only

The TV ratings system also uses several specific content descriptors to better inform parents and all viewers about the nature of the content they will be experiencing. These labels include:

"D" – Suggestive Dialogue

"L" – Coarse Language

"S" – Sexual Situations

"V" – Violence

"FV" – Fantasy Violence.

¹⁸⁸ V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip> (last visited Apr. 14, 2007).

¹⁸⁹ TV WATCH, SAFE TV, EASY AS 1-2-3, <http://www.kintera.org/atf/cf/%7B084110DD-FDFD-481D-9E6F-755FD08705F2%7D/SAFE%20TV.PDF> (last visited Apr. 14, 2007).

¹⁹⁰ The TV Boss.org, <http://www.thetvboss.org/> (last visited Apr. 14, 2007).

¹⁹¹ See, e.g., Frank Ahrens, *TV Industry Unites on Viewer Education*, WASH. POST, July 25, 2006, at D5 (noting that broadcast, cable and satellite providers have created public service announcements about using content blocking technology).

¹⁹² See, e.g., Amy Schatz & Joe Flint, *Under Pressure Cable Offers Family Packages*, WALL ST. J., Dec. 13, 2005, at B1 (reporting that only fifteen percent of parents use the V-Chip); c.f. Jim Rutenberg, *Survey Shows Few Parents Use TV V-Chip to Limit Children's*

vision programming. As discussed below, the vast majority of American homes rely on a number of alternative technologies and methods to filter/block unwanted programming. A November 2005 survey by the polling firm Russell Research revealed that “twice as many parents frequently use the parental controls that come with cable and satellite than use the V-Chip.”¹⁹³ In other words, the V-Chip is just one of many tools or strategies that households can use to control television programming in their homes.

2. Cable & Satellite TV Controls

With roughly 86 percent of U.S. households subscribing to cable or satellite television systems today,¹⁹⁴ the tools that these video providers offer to subscribers are a vital part of the parental controls mix today. Parental controls are usually just one button-click away on most cable and satellite remote controls and boxes. Both analog and digital boxes allow parents to block individual channels and lock them using passwords so that children cannot alter the instruction to block. Newer digital boxes offer more extensive filtering capabilities that allow programs to be blocked by ratings, channel, or title.¹⁹⁵

Cable subscribers who do not have set-top boxes can request that their cable company block specific channels for them. A comprehensive survey of the content controls available to cable television subscribers can be found on the National Cable and Telecommunications Association’s “Control Your TV” Web site.¹⁹⁶ Aftermarket solutions are also available that allow parents to block channels. The “TV Channel Blocker” gives households the ability to block any analog cable channel between channels two and eighty-six.¹⁹⁷ The unit can be self-installed by homeowners on the wall where the cable line enters the home. The unit sells online for \$99.99.¹⁹⁸

Viewing, N.Y. TIMES, July 25, 2001, at E1 (reporting that seven percent of all parents use the V-Chip).

¹⁹³ Press Release, TV Watch, Survey: Parents Combine Old-Fashioned TV Rules and Latest Blocking Technologies to Manage Kids’ TV (Nov. 28, 2005), <http://www.televisionwatch.org> (follow “Media Center” hyperlink; then follow “Parental Controls Poll” hyperlink).

¹⁹⁴ *Twelfth Annual Report*, *supra* note 34, at ¶ 8.

¹⁹⁵ Comcast, Parental Controls—Instructions, <http://www.comcast.com> (follow the “Customers” drop-down menu, then follow the “Parental Controls” hyperlink; then follow the “Find Out How Here” hyperlink) (last visited Apr. 14, 2007).

¹⁹⁶ Control Your TV, <http://controlyourtv.org>, (follow the “Control: Learn More” hyperlink; then follow the “Parental Controls” hyperlink) (providing instructions on how to control content with a digital set-top box, an analog set-top box, and the V-Chip) (last visited Apr. 14, 2007).

¹⁹⁷ TV Channel Blocker, <http://www.tvchannelblocker.com> (follow “Take Control” hyperlink) (last visited Apr. 14, 2007).

¹⁹⁸ *Id.*

Satellite providers DirecTV and EchoStar's Dish Network also offer extensive parental control tools via their set-top boxes.¹⁹⁹ Telephone companies such as AT&T and Verizon are also getting into the video distribution business and offering similar tools.²⁰⁰ Many multichannel video distributors also offer subscribers the option of buying a bundle of "family-friendly" channels. For example, Dish Network offers a "Family Pak"²⁰¹ and DirecTV offers a "Family Choice" bundle of channels.²⁰² In addition, a unique satellite service called Sky Angel offers thirty-three channels of what it describes as "Christ-centered and family-friendly choice(s)."²⁰³

3. Other Devices / Technological Control Measures

For families specifically looking to curb offensive language heard on some televised programs, solutions are available. For example, over seven million Americans currently use "TVGuardian" systems, which bill themselves as "The Foul Language Filter."²⁰⁴ TVGuardian's set-top boxes filter out profanity "by monitoring the closed-caption [signal embedded in the broadcast video signal] and comparing each word against a dictionary of more than 150 offensive words and phrases."²⁰⁵ If the device finds a profanity in this broadcast, it temporarily mutes the audio signal and displays a less controversial rewording of the dialog in a closed-captioned box at the bottom of the screen.²⁰⁶ The device also can be tailored to individual family preferences such that references that some might consider religiously offensive could be edited out.²⁰⁷

Or perhaps some households want to block out *all* programming aired during certain hours of the day—technological tools exist that make that possible, too. The Family Safe Media Web site sells a half dozen "TV time management" tools that allow parents to restrict the time of day or aggre-

¹⁹⁹ DirecTV Parental Controls, <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=900007> (last visited Apr. 14, 2007); *see also* Setting Parental Controls, <http://www.directv.com/DTVAPP/equipment/demoInfo.jsp?assetId=1100093> (last visited Apr. 14, 2007); Dish Network, Parental Locks, http://www.dishnetwork.com/content/our_products/Parental_locks/index.shtml (last visited Apr. 14, 2007).

²⁰⁰ *See, e.g.*, Verizon FiOS TV Features, http://newscenter.verizon.com/kit/fiber/factsheet_fios_tv_features.html (last visited Apr. 14, 2007).

²⁰¹ DISH NETWORK FAMILY PAK, <http://www.dishnetworkproducts.com/packages.php> (last visited Feb. 10, 2007).

²⁰² DIRECTV FAMILY, <http://www.directv.com/DTVAPP/packProg/channelChart1.jsp?assetId=1000005> (last visited Apr. 14, 2007).

²⁰³ Sky Angel at a Glance, [http://www.skyangel.com/About/Index.asp?Reference=Overview&~="](http://www.skyangel.com/About/Index.asp?Reference=Overview&~=) (last visited Apr. 14, 2007).

²⁰⁴ TV Guardian, <http://www.tvguardian.com/gshell.php> (last visited Apr. 14, 2007).

²⁰⁵ *Id.* (follow "Learn More" hyperlink).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

gate number of hours that children watch programming.²⁰⁸ Parents can establish a daily or weekly “allowance” of time for TV viewing and then let children determine how to allocate it.²⁰⁹

Another innovative technology to restrict children’s viewing options is the appropriately named the “Weemote.” The Weemote is a remote control made for children that has just a handful of large buttons. Parents can program each button to call up only pre-approved channels. The product has a suggested retail price of \$24.95.²¹⁰

Perhaps the most important development on the parental controls front is the rapid diffusion of VCRs, DVD players, personal video recorders, and personal computers. These technologies give parents the ability to accumulate libraries of preferred programming for their children and determine exactly when it is viewed. Countless programs can be cataloged and archived in this fashion, and further supplemented with VHS tapes, DVDs, and computer software. Needless to say, such content-tailoring was not an option for families in the past.

4. *Formal and Informal Household Media Rules*

The technological tools and controls discussed above allow parents to automate the filtering/blocking process in their homes. While not perfect, they allow households to effectively tailor family viewing to their own unique preferences. Equally important, but quite often overlooked, are the formal and informal household “media rules” implemented by almost all families. A 2003 Kaiser Family Foundation survey found that “[a]lmost all parents say they have some type of rules about their children’s use of media.”²¹¹ For example, parents can place limits on the overall number of hours that children may “consume” various types of media content. Alternatively, parents can demand that other tasks or responsibilities be accomplished before media consumption is permitted, or impose restrictions on the times of the day that children can consume media. Parents can also limit viewing to a single TV in a room where a parent can always have an eye on the screen or listen to the dialogue.²¹²

²⁰⁸ Preserving Family Values in a Media Driven Society, http://www.familysafemedia.com/tv_time_management_tools_-_par.html (last visited Apr. 14, 2007).

²⁰⁹ *Id.* Prices for these devices range from \$39.95–\$110.95. *Id.*

²¹⁰ Weemote, <http://www.weemote.com> (follow “Our Products”) (last visited Feb. 10, 2007).

²¹¹ VICTORIA J. RIDEOUT ET AL., KAISER FAMILY FOUND., ZERO TO SIX: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS AND PRESCHOOLERS 9 (2003), <http://www.kff.org/entmedia/entmedia102803pkg.cfm>.

²¹² According to another Kaiser survey, 68 percent of 8–18 year-olds have televisions in their bedrooms. KAISER FAMILY FOUND., GENERATION M: MEDIA IN THE LIVES OF 8-18 YEAR-OLDS 10 (2005), <http://www.kff.org/entmedia/entmedia030905pkg.cfm>. Parents who

In the extreme, if parents want to take radical steps to limit children's potential access to objectionable programming, they can get rid of their TV sets and other media devices altogether or severely restrict their availability in the home. While impractical for most, some families do reject televisions, for example, and still find plenty of other ways to gain access to important information and entertainment.²¹³

Finally, parents can always sit down with their children, "consume" controversial and provocative media programming with them, and talk to them about what they are seeing or hearing. For those parents willing to accept the reality that children *will* be confronted with many troubling or sensitive topics from peers at school or from other sources outside their control, this option makes a great deal of sense. Indeed, most parents already do this. The Kaiser Family Foundation's survey of media usage by children under six years of age found that 69 percent of parents were in the room when children were watching TV.²¹⁴

Because it is impossible to generalize about the needs of diverse families and parenting choices they make, the government should not impose a one-size-fits-all solution. Once again, the most meaningful measure of community standards is the individual household.

5. Third-Party Pressure, Ratings and Advice for Parents

Parents can also work with other others to influence media content before it comes into the home, or rely on other groups they trust to help them better understand what is in the media they are considering bringing into the home.

Parents can pressure media providers and programmers directly through public campaigns, or indirectly through advertisers.²¹⁵ Groups like the PTC, Morality in Media,²¹⁶ Common Sense Media,²¹⁷ and the National Institute on Media and the Family²¹⁸ can play a constructive role in influ-

allow their children to lock themselves in their rooms with media technologies have surrendered their first line of defense for protecting them from potentially objectionable content.

²¹³ See, e.g., Rich Karlgaard, *Net—One, TV—Zero*, FORBES.COM, Nov. 29, 2004, <http://www.forbes.com/columnists/business/forbes/2004/1129/041.html>.

²¹⁴ RIDEOUT, ET AL., *supra* note 211, at 11.

²¹⁵ Fowler & Brenner, *supra* note 121, at 229 ("There is every reason to believe that the marketplace, speaking through advertisers, critics, and self-selection by viewers, provides an adequate substitute for Commission involvement in protecting children and adults from television's 'captive' quality.")

²¹⁶ Morality in Media Homepage, <http://www.moralityinmedia.org/homepage.htm> (last visited Apr. 14, 2007).

²¹⁷ Common Sense Media, <http://www.common sense media.org> (last visited Apr. 14, 2007).

²¹⁸ National Institute on Media and the Family Homepage, <http://www.mediafamily.org/> (last visited Apr. 14, 2007).

encing content decisions through the pressure they can collectively bring to bear on media providers in the marketplace.

For example, *Morality in Media's* Web site outlines several strategies parents can use to influence advertisers, programming executives, and cable operators before resorting to calls for censorship.²¹⁹ To provide parents the tools to pressure advertisers, the group publishes a book listing the top 100 national advertisers, with addresses, phone and fax numbers, names of key executives, and their products, along with a products list cross-referenced to the manufacturer.²²⁰ The group produces another book listing the names and addresses of the CEOs of leading broadcast and cable companies in America so that complaints may be sent directly to them.²²¹ Similarly, the PTC awards its "parent's seal of approval" to advertisers who only support programs that the PTC classifies as family-friendly.²²² PTC also encourages parents to write letters and send e-mails to advertisers who support programming they find objectionable and encourage those advertisers to end their support of those shows.²²³

Such efforts have been effective at changing corporate behavior in other contexts. For example, in late 2006, after years of pressure from various health groups and parents, ten major food and beverage companies announced new, self-imposed restrictions on advertising to children.²²⁴ These ten companies, which included McDonald's, Coca-Cola, Pepsi, Kraft Foods, and Hershey, account for more than two-thirds of all food and beverage advertising aimed at children.²²⁵ Among the commitments made by the ten companies were promises to: refrain from advertising products in schools; devote half of their advertising to promoting healthier lifestyles and foods; limit the use of popular third-party characters (such as cartoon characters) in ads; and limit ads in interactive video games, or promote healthy alternatives in those ads.²²⁶ The initiative will be monitored by the Council of Better Business Bureaus, which helped craft the agreement.²²⁷ If public pressure can help change corporate attitudes and outputs when it

²¹⁹ Robert Peters, *Morality in Media, The Importance of Making Complaints*, <http://www.moralityinmedia.org/index.htm?fightBadTv.htm> (follow "The Importance of Making Complaints" hyperlink) (last visited Apr. 14, 2007).

²²⁰ *Morality in Media, You Want to Stand Up to TV Indecency, But You Don't Know What You Can Do*, <http://www.moralityinmedia.org/index.htm?fightBadTv.htm> (last visited Apr. 14, 2007).

²²¹ *Id.*

²²² Parents Television Council Seal of Approval, <http://www.parentstv.org/PTC/awards/main.asp> (last visited Apr. 14, 2007).

²²³ Advertiser Campaign, www.parentstv.org/PTC/advertisers/main.asp (last visited Apr. 14, 2007).

²²⁴ Betsy McKay & Janet Adamy, *Food Companies Vow to Tighten Limits on Kids' Ads*, WALL ST. J., Nov. 15, 2007, at B3.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

comes to food and beverage advertising, there's every reason to believe that it can also change other types of media behavior.²²⁸ These types of private consumer campaigns, which influence private business decisions, are preferable to campaigns to influence government policy affecting the public as a whole.

For parents who do not feel the need to directly pressure media producers, but instead simply want better information about the media they bring into the home, there are many different sources for independent advice and third-party ratings of various types of media content.²²⁹ More creative, independent ratings systems are coming to the market or are being developed. For example, in March 2006, TiVo announced a partnership with the PTC, the Parents Choice Foundation and Common Sense Media to jointly

²²⁸ For example, in late 2006, intense public pressure forced News Corp. to abandon the publication of a controversial book by O.J. Simpson in which he described how he might have killed his ex-wife and her friend. See Tim Harper, *O.J. Book, Fox Show Cancelled*, TORONTO STAR, Nov. 21, 2006, at A2. As *Washington Post* columnist Shankar Vedantam noted, the episode "showed that shame remains a powerful tool in America." Shankar Vedantam, *Abandoned O.J. Project Shows Shame Still Packs a Punishing Punch*, WASH. POST, Nov. 27, 2006, at A2.

²²⁹ For example, Common Sense Media offers a comprehensive Web site that allows both parents and children to rate a diverse assortment of media content and classify it all by age group to find what is appropriate for their families. Common Sense Media, <http://www.common sense media.org> (last visited Apr. 14, 2007); see also Joe Garofoli, *Media Guide Offers Reviews for Parents—But No Soapbox*, S.F. CHRON., Dec. 8, 2006, at A1.

Through its "Family Media Guide" Web site, PSV Ratings offers independent information about the content of visual media. Family Media Guide, <http://www.familymediaguide.com> (last visited Apr. 14, 2007); PSV Ratings, <http://www.psvratings.com> (last visited Apr. 14, 2007).

The National Institute on Media and the Family's "MediaWise" Web site offers occasional columns and newsletters for parents that include information they can use to make more informed judgments about the content their children consume. Media Family, What We Do, http://www.mediafamily.org/what_we_do/ (last visited Apr. 14, 2007). In particular, the Institute's Web site offers a free "KidsScore" system that rates thousands of movies, TV shows, and video games. All content is alphabetized and easy to search. Media Family, Kids Score, <http://www.mediafamily.org/kidscore> (last visited Apr. 14, 2007).

Focus on the Family's *Plugged In* magazine and "Plugged In Online" are independent ratings resources "designed to help equip parents, youth leaders, ministers and teens with the essential tools that will enable them to understand, navigate and impact the culture in which they live." Because of the religious focus of the group, their movie, television, and music reviews also probe the spiritual content found in some media titles. *Plugged In Online*, About Us, <http://www.pluggedinonline.com/aboutUs/index.cfm> (last visited Apr. 14, 2007).

The "Parent Previews" Web site reviews new movies, DVDs and video games on an easy-to-understand A-F grading systems. Four primary categories are graded (violence, sexual content, language and drug or alcohol use) to determine the title's overall grade. Parent Previews, <http://www.parentpreviews.com/index.shtml> (last visited Apr. 14, 2007).

develop “TiVo KidZone.”²³⁰ Using ratings and information created by those groups, KidZone will allow parents to filter and record only the content that parents deem appropriate for their children.²³¹

Finally, there are several excellent Web sites supported by media entities or industry trade associations that offer parents advice on media ratings and parental control techniques and technologies, including: “TV Watch,”²³² “Pause-Parent-Play,”²³³ “Control Your TV,”²³⁴ and “Take Parental Control.”²³⁵ All these private, voluntary, education and ratings methods are preferable to the type of pressure that some groups bring to bear in the *political* marketplace when they encourage policymakers to regulate media content.²³⁶ The vast array of tools and choices for parents to make informed decisions and exert control over the media consumed by their children demonstrates that a plethora of less-restrictive means of protecting children from objectionable content are available, further undermining the call for increased government regulation.

VII. CONCLUSION: THE LIMITS OF THE “IT’S FOR THE CHILDREN” RATIONALE FOR MEDIA REGULATION

This article has documented the many doctrinal deficiencies and increasing practical problems associated with the “public interest” regulatory regime that has governed America’s broadcast industry for the last seven decades. In light of these problems, it may be that the asymmetrical regulatory treatment of broadcasting will gradually wither away. These doctrinal deficiencies could be its undoing in the courts; the practical problems could be its undoing in the marketplace.

Lawmakers and regulators, however, will not likely give up so easily. They will likely persist in their efforts to regulate broadcasting for many years to come, while simultaneously laying the groundwork for an extension of the old public interest playbook to new media industries and technologies. But seeking to level the legal playing field by “regulating up” is riddled with still more doctrinal and practical difficulties.

Barring a radical sea-change in how the courts approach First Amendment cases dealing with new media outlets, it seems highly unlikely that Congress or the FCC will be able to push through a broadening of the old regulatory regime. That is especially the case in light of the many new

²³⁰ Saul Hansell, *TiVo to Offer Tighter Rein on Children’s Viewing*, N.Y. TIMES, Mar. 2, 2006, at C9.

²³¹ *Id.*

²³² TV Watch, <http://www.televisionwatch.org> (last visited Apr. 14, 2007).

²³³ Pause Parent Play, <http://www.pauseparentplay.org> (last visited Feb. 8, 2007).

²³⁴ Control Your TV, <http://www.controlyourtv.org> (last visited Apr. 14, 2007).

²³⁵ Take Parental Control, <http://takeparentalcontrol.org> (last visited Apr. 14, 2007).

²³⁶ See generally *Indecency Bomb*, *supra* note 134.

tools and techniques available today that enable families to establish their own “household standard,” as opposed to the one-size-fits-all “community standard” that regulators have tried to apply for decades. As recent Internet speech cases prove, courts will not turn a blind eye to the fact that many “less restrictive means” of dealing with objectionable content are now available to families, and government must yield to those alternatives.²³⁷

Practically speaking, an expansion of public interest regulation to new media outlets and technologies would face formidable enforcement challenges. Because technological and media convergence is now upon us, media can be distributed instantaneously across numerous platforms. Thus, a regulatory attack on one type of media outlet or technology might necessitate an attack on many other media outlets if it had any hope of being effective. This is especially the case given the increasingly global scale of the Internet and modern media networks and digital communications technologies. Once again, this will greatly complicate government efforts to impose “community standards” on one type of content or distribution outlet.

Finally, the sheer volume of media content that exists today will also frustrate efforts to expand the scope of regulation. In simple terms, there is just too much stuff for regulators to police today relative to the past. As a distinguished panel of experts noted in a 2002 National Research Council study, “[t]he volume of information on the Internet is so large—and changes so rapidly—that it is simply impractical for human beings to

²³⁷ See *Reno v. ACLU*, 521 U.S. 844, 846 (1997) (“[A law that places a] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving [the same goal.]”); *United States v. Playboy Entm’t Group*, 529 U.S. 803, 827 (2000) (striking down a law that required cable companies to fully scramble video signals transmitted over their networks if those signals included any sexually explicit content). Echoing its earlier holding in *Reno*, the Court in *Playboy* held that less restrictive means were available to parents looking to block those signals in the home. Specifically, the Court found that:

[T]argeted blocking [by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.

Id. at 815. The Court also held that:

It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Id. at 824. The Court has set an extraordinarily high bar for policymakers wishing to regulate media content. Not only is it clear that the Court is increasingly unlikely to allow the extension of broadcast-era content regulations to new media outlets and technologies, but it appears likely that judges will apply much stricter constitutional scrutiny to *all* efforts to regulate speech/media providers in the future, including for broadcasting itself.

evaluate every discrete piece of information for inappropriateness.”²³⁸ The explosive growth of user-generated content, in particular, has led to the dawn of an “Age of Peer Production.”²³⁹ In this new world in which every man, woman, and child can be a one-person publishing house or self-broadcaster, restrictions on viewing, listening or downloading will become increasingly difficult to devise and enforce.

For these reasons, it appears likely that we are quickly reaching the effective limits of the “it’s-for-the-children” or “children-in-the-audience” rationales for media regulation. Even if nothing had changed in our modern media marketplace, however, it is important to realize that this logic has always been fundamentally misguided, even as applied to broadcasting. Such theories ignore the fact that the Constitution (and the First Amendment) was written for adults and it was assumed adults would monitor their children. Government should not act *in loco parentis*; it should be left to parents to make determinations about how to raise their children.²⁴⁰ But that is essentially what the state is doing when it regulates media programming in the name of protecting children; it is playing the role of surrogate parent.

Clearly, not all parents will do this job as well as others might think they should. But just because some parents fall down on the job, or carry out their parental responsibilities differently, government regulation is not the solution. When parents bring media devices into the home, they should not claim they are powerless to stop what their children see or hear. Nor should the state be able to use poor parental judgment as an excuse to intervene and assume parenting responsibilities.²⁴¹

Consequently, it is impossible to claim that these media technologies are—in the words of the *Pacifica* court—“invaders” in the home. They do

²³⁸ NAT’L RESEARCH COUNCIL COMPUTER SCI. AND TELECOMM. BD., *YOUTH, PORNOGRAPHY, AND THE INTERNET* 187 (2002).

²³⁹ Chris Anderson, *People Power*, WIRED, July 2006, at 132, available at <http://www.wired.com/wired/archive/14.07/people.html> (“The tools of production, from blogging to video-sharing, are fully democratized, and the engine for growth is the spare cycles, talent, and capacity of regular folks, who are, in the aggregate, creating a distributed labor force of unprecedented scale.”).

²⁴⁰ See Lawrence H. Winer, *Children Are Not a Constitutional Blank Check*, in *RATIONALES AND RATIONALIZATIONS* 75 (Robert Corn-Revere, ed., The Media Institute 1997) (“Parents, not the state, are in the best position to know their own children, assess their development on an individual basis, determine the values they wish to transmit to their children, and make appropriate decisions Parental authority cannot be supplanted by government fiat.”).

²⁴¹ Even the so-called “bad neighbor” problem—others letting your kids watch content of which you do not approve—is still a parental responsibility issue. If parents do not like what their children might be seeing or hearing at a neighbor’s house, then they need to talk to those neighbors about it or prevent their children from visiting those homes.

not just walk into the home uninvited.²⁴² This “media-as-invader” logic is particularly faulty considering how much time, effort, and money that adults must expend to bring media devices into the home. Over-the-air broadcast programming may be “free,” but the televisions, radios, and antennas needed to receive those signals most certainly are not free. The same logic applies to newer media technologies. Cable television, for example, requires a monthly subscription that averages almost \$40 per month for expanded basic service.²⁴³ Connecting to the Internet requires the purchase of a computer and a monthly Internet access service. Cell phones, video game consoles, and digital music players and services are also fairly expensive.

Ironically, it is print media (i.e., newspapers, weekly readers, magazines) that are probably the most accessible to average Americans—many at little or no cost—and yet print outlets are accorded the most stringent First Amendment protections. Yet, it seems much more likely that a free, community-based newspaper, delivered to one’s doorstep without even asking for it, is more of an “intruder” than the television set, cable set-top box, video game console, or Internet connection.²⁴⁴

In sum, the traditional rationales for asymmetrical regulation of broadcasting—scarcity, pervasiveness, and the public interest—either no longer make sense or are increasingly impractical to enforce in an age of technological convergence and media abundance. Instead of resisting the inexorable movement toward media parity and a consistent First Amendment standard for the Information Age, policymakers should embrace these changes and focus on responding to the problem of objectionable content through education and empowerment-based strategies that enable families to craft their own household media standards.

²⁴² As Justice Brennan noted in his *Pacifica* dissent, the problem with this argument is that “it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home.” *FCC v. Pacifica Found.*, 438 U.S. 726, 764 (1978) (Brennan, J., dissenting).

²⁴³ Nat’l Cable & Telecomm. Ass’n, Industry Overview, <http://www.ncta.com/Docs/PageContent.cfm?pageID=86> (last visited Apr. 14, 2007).

²⁴⁴ “The TV set attached to rabbit ears is no more an intruder into the home than cable, DBS, or newspapers for that matter. Most Americans are willing [to] bring TVs into their living rooms with no illusion as to what they will get when they turn them on.” Michael K. Powell, Comm’r, Fed. Commc’ns Comm’n, Remarks Before the Media Institute: Willful Denial and First Amendment Jurisprudence (Apr. 22, 1998) (transcript available at <http://www.fcc.gov/Speeches/Powell/spmkp808.html>).