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CONSTITUTIONAL LAW—ACTION FOR CHILDREN'S TELEVISION v. FCC: INDECENCY FINES AND THE BROADCAST MEDIUM — WHEN SUBSEQUENT PUNISHMENTS BECOME PRIOR RESTRAINTS; A SUBSEQUENT RESTRAINT REVIEW

Christine C. Peaslee

CONSTITUTIONAL LAW—*ACTION FOR CHILDREN'S TELEVISION V. FCC*: INDECENCY FINES AND THE BROADCAST MEDIUM—WHEN SUBSEQUENT PUNISHMENTS BECOME PRIOR RESTRAINTS; A SUBSEQUENT RESTRAINT REVIEW

INTRODUCTION

Consider the following scenario: Broadcasting, Inc.[1] is the owner and operator of WFUN, a radio station located in Hartford, Connecticut. It is popular among young adults throughout New England because of its hard, rock and roll edge and its ability to tackle important social issues with flair on its morning talk shows. Wanting to help educate its young listeners about the dangers of unprotected sex, Broadcasting, Inc. dedicates a morning talk show to the discussion of issues relating to sexually transmitted diseases and methods of contraception. Because the Federal Communications Commission ("FCC" or the "Commission") has no set guidelines delineating the material it considers "indecent,"[2] Broadcasting, Inc. is uncertain of the status of the material being broadcast. Nevertheless, it decides to air the program each weekday morning because of the social importance of the subject matter.

A little more than one year later, Broadcasting, Inc. receives a certified letter from the FCC stating that the talk show is under investigation because of its "indecent"[3] content. The letter invites Broadcasting, Inc. to respond to these allegations of indecency. The company responds, and in doing so sets in motion a lengthy

1. "Broadcasting, Inc." is a fictional entity created solely for the purpose of relating an example of the Federal Communications Commission's power and autonomy.

2. The FCC recommends that broadcasters look to past forfeiture fines and actions against other stations in order to determine which material the FCC regards as indecent. See *infra* note 207 and accompanying text for a discussion of this FCC recommendation, *infra* note 4 for the definition and discussion of the term "forfeiture," and *infra* note 25 and accompanying text for the definition of "indecency." However, the material the FCC determined to be "indecent" in these past forfeiture actions has never been *judicially* determined "indecent." Therefore, the FCC is asking the broadcasters to refrain from broadcasting speech which the courts may view as protected. See *infra* Part I.A-C for a discussion of the FCC's forfeiture enforcement scheme and how a disgruntled broadcaster may obtain judicial review of disputed material.

3. See *infra* note 25 and accompanying text for the FCC's definition of "indecency."

and intricate forfeiture enforcement process.[4] By challenging the indecency determination of the FCC and its forfeiture process, it will inevitably take Broadcasting, Inc. in excess of five years to obtain a judicial determination of the status of the challenged material.[5]

While WFUN's case is pending at the Commission's offices, Broadcasting, Inc. is still unsure of the legal status of the challenged material. It maintains that the material is not at all indecent and, therefore, the FCC cannot impose penalties for the broadcast of the speech consistent with the First Amendment of the United States Constitution.[6] Because of its belief that the material will eventually be adjudicated by the courts as non-indecent, and thus protected speech, Broadcasting, Inc. feels secure in allowing the material to be regularly broadcast, hoping that the availability of this material will assist its young listeners.

Unfortunately, and unbeknownst to Broadcasting, Inc., each time similar material is broadcast the FCC imposes another fine upon the radio station. By the time WFUN is afforded its opportunity for judicial review, it will have incurred in excess of one million dollars in forfeiture fines. Further, the FCC will have prevented Broadcasting, Inc. from transacting several proposed corporate acquisitions. Finally, Broadcasting, Inc. will have been rendered insolvent and on the brink of bankruptcy due to its inability to raise capital as a result of the FCC's actions against it.[7]

Broadcasters argue that the FCC's forfeiture enforcement scheme lacks adequate provisions for judicial review and thus infringes upon First Amendment rights of freedom of speech.[8] When

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4. The term "forfeiture" is simply the FCC's word for "fine." The forfeiture enforcement scheme is the process whereby the FCC determines which broadcasts it believes are "indecent" and warrant the imposition of such forfeitures and other enforcement penalties. When this determination is contested by the broadcasters, the scheme sets forth the procedures which the broadcaster and Commission must follow in order to eventually obtain a judicial determination of the material's "indecency." See *infra* Part I for a detailed description of this scheme.

5. See *infra* Part I.A-B for a detailed description of the enforcement scheme and the length of time a broadcaster is forced to wait until a judicial review of the "indecent material" is available.

6. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

7. See *infra* Part I.C for a discussion of the potential consequences of the delays inherent in the forfeiture enforcement scheme.

8. See *infra* note 139 for a list of broadcasters and organizations arguing the un-

judicial review is unreasonably delayed, broadcasters are forced to "self-censor." This self-censoring effectively "chills"[9] speech which might ultimately be determined, upon review by the courts, to be protected by the First Amendment.

This issue arose in a case recently decided by the United States Court of Appeals for the District of Columbia Circuit. In *Action for Children's Television v. FCC*,[10] the D.C. Circuit held that in spite of a lengthy delay for the provision of judicial review of the "indecent" material, the FCC's forfeiture enforcement scheme did not violate the broadcaster's First Amendment rights.[11] The court relied on Supreme Court precedent to support its holding that the broadcast medium of expression was afforded less First Amendment protection than the printed word.[12]

This Note will discuss generally the FCC, its authorized powers, and its forfeiture enforcement scheme. It will demonstrate the breadth of the FCC's power over the broadcast medium and the "chilling" effect its enforcement scheme has over nonindecent, and thus protected, speech. Part I will provide a description of the mechanisms within the FCC's forfeiture enforcement scheme and their effects upon broadcasters. Further, this Part will briefly discuss *FCC v. Pacifica Foundation*,[13] the only Supreme Court case, to date, to consider the FCC's forfeiture enforcement scheme. Part II

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constitutionality of the FCC's forfeiture enforcement scheme in *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995).

9. For a definition of the "chilling of protected speech," and detailed discussion thereof, see Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 906 (1989) ("The First Amendment protects against 'abridg[ment]' of the freedom of speech, and a government action that prohibits someone from speaking . . . is plainly an abridgment. Government action may, however, deter someone from engaging in First Amendment activity without actually prohibiting it. This deterrence is a 'chilling effect.'"). *See also* Michael N. Dolich, *Alleging a First Amendment "Chilling Effect" to Create a Plaintiff's Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 175-76 (1994) (defining the "chilling effect" as when an individual refrains from either attending a public meeting or speaking outright for fear of repercussions, however subtle); Jill M. Ryan, *Freedom to Speak Unintelligibly: The First Amendment Implications of Government-Controlled Encryption*, 4 WM. & MARY BILL RTS. J. 1165, 1215 (1996) (stating that the "chilling effect" occurs when people are deterred from participating in a particular activity, and deterred from expressing themselves as they otherwise might); Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 947 (1987) (stating that the "chilling effect" is the degree to which speech is deterred).

10. 59 F.3d 1249 (D.C. Cir. 1995).

11. *Id.* at 1262.

12. *See id.* (noting and affirming the district court's reliance on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). See *infra* Part I.D and accompanying text for a complete discussion of *Pacifica*.

13. 438 U.S. 726 (1978).

will discuss the Supreme Court's creation of an approach to First Amendment issues that focuses on the adequacy of procedural devices, such as prior restraints on speech, used to regulate speech. I have termed this approach First Amendment Procedural Review. Further, this Part will briefly discuss the two foundation cases upon which this approach is premised: *Bantam Books, Inc. v. Sullivan*[14] and *Freedman v. Maryland*.[15]

Part III will describe the factual and procedural history of the United States Court of Appeals for the District of Columbia Circuit's decision in *Action for Children's Television*,[16] and then evaluate that decision with respect to First Amendment Procedural Review.[17] Part IV will discuss the determination by the majority in *Action for Children's Television* that the FCC forfeiture scheme was not technically a prior restraint on speech, but was instead a constitutionally permissible subsequent punishment. This Part will then argue that when the dangers that exist in a typical prior restraint case are found to exist in a case where a prior restraint does not "technically" exist, a new analysis similar to the one the courts use in First Amendment Procedural Review should be applied—a Subsequent Restraint Review. Subsequent Restraint Review ensures that there are rigorous procedural safeguards in place to prevent the infringement of First Amendment protections; namely, prompt judicial review.

I. FCC Forfeiture Enforcement Scheme: Curbing Broadcast Indecency

The FCC's power is quite broad, and derived explicitly from Congress under the Federal Communications Act of 1934 (the "Act").[18] Under the authority granted by the Act, the FCC has

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14. 372 U.S. 58 (1963).

15. 380 U.S. 51 (1965).

16. 59 F.3d at 1250.

17. See *infra* notes 133-36 and accompanying text for a discussion of this standard of review.

18. *See* 47 U.S.C. §§ 151-613 (1994); Donald J. Jung, Federal Communications Commission, the Broadcast Industry, and the Fairness Doctrine: 1981-1987 7-8 (1996) (discussing the history and development of the FCC through the promulgation of the Federal Communications Act); Jeremy H. Lipschultz, Broadcast Indecency: F.C.C. Regulation and the First Amendment 25 (1997) (discussing the FCC's power to regulate obscene and indecent broadcasts under the authority of the Act); 1 A. Walter Socolow, The Law of Radio Broadcasting 54-56 (1939) (discussing the purposes of the Act and the powers it vests within the FCC).

developed a forfeiture enforcement scheme which can be described as both cumbersome and confusing.

A. *Brief Overview of FCC Authority to Proscribe Broadcast Indecency*

Congress enacted the Federal Communications Act pursuant to its authority under the Commerce Clause of the United States Constitution.[19] This Act gave the FCC exclusive jurisdiction to regulate all radio transmissions.[20] Pursuant to the Act, the FCC is charged with enforcing violations of 18 U.S.C. § 1464, which prohibits the broadcasting of obscene, indecent and profane material.[21] Further, the FCC has the authority not only to determine the guidelines and definition of what is "obscene or indecent"[22] language,

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19. *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). The general purpose for the Act was to "make available . . . to all the people of the United States, a rapid, efficient, nationwide, and worldwide wire and communication service with adequate facilities at reasonable charges." ROBERT SEARS MCMAHON, FEDERAL REGULATION OF THE RADIO AND TELEVISION BROADCAST INDUSTRY IN THE UNITED STATES 1927-1958 93 (1979) (citation omitted). The Commission now exercises its regulatory authority over all mediums of broadcasting, including television. *See id.*; *see also* JUNG, *supra* note 18, at 7-8; LIPSCHULTZ, *supra* note 18, at 25; SOCOLOW, *supra* note 18, at 54-56.

20. Under the Act, Congress provided that the FCC be operated as an independent regulatory commission under the discretion of seven commissioners, each appointed by the President of the United States and approved by the Senate. *See* DON R. PEMBER, MASS MEDIA LAW 427 (2d ed. 1982). In 1982 Congress voted to modify the Act by reducing the number of commissioners from seven to five members. *See* 47 U.S.C. §§ 154-155 (1994). The President designates one of these commissioners as Chairman of the FCC. *See* 47 U.S.C. § 154. The Commission, through these commissioners acting in concert, has the power to make rules and regulations within the broad framework of the Commerce Clause. These regulations carry the force of law. *See* WALTER B. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS 55 (1971).

21. *See* 47 U.S.C. § 151 ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereafter provided, and which shall execute and enforce the provisions of this chapter."). *See also* 18 U.S.C. § 1464 (1994) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

22. Traditionally, most indecent, nonobscene speech is fully protected under the First Amendment and may not be restricted unless the government has a sufficiently important justification. The Supreme Court, however, has permitted governmental regulation of indecent expression. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (finding a zoning ordinance regulating the location of adult theaters consistent with the First Amendment). *See generally* Robert E. Riggs, *Indecency on the Cable: Can it be Regulated?*, 26 ARIZ. L. REV. 269 (1984) (discussing different standards of review traditionally applied to indecent speech depending on its content and intended

but to impose forfeiture penalties upon broadcasters for any violations.[23]

B. *FCC's Forfeiture Enforcement Scheme—In Theory*

FCC review of a broadcaster's possible violation of Section 1464 begins when a disgruntled listener complains that the broadcaster has aired indecent material.[24] "Indecent" is defined by the FCC as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."[25] This complaint is sent directly to the Mass Media Bu-

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aim). *See also* Richard C. Turkington, *Introduction—Safe Harbors and Stern Warnings: FCC Regulation of Indecent Broadcasting*, 3 VILL. SPORTS & ENT. L.J. 1 (1996). See also *infra* note 25 and accompanying text for the FCC's definition of indecency. The Court gives much greater deference to the FCC in regulating the content of the broadcast medium. *See* Riggs, *supra*, at 279.

Obscenity, by contrast, is not now, and never has been protected by the United States Constitution. *See* Roth v. United States, 354 U.S. 476, 481 (1957). In order to determine whether material is legally obscene, the Supreme Court uses the "Miller test" derived from *Miller v. California*, 413 U.S. 15, 24 (1973). Under this test, the Court must determine:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

In the broadcast medium, however, the traditional obscenity-indecency analysis is not followed in the Federal Communications Act of 1934. This Act "lumps together obscene, indecent, and profane language." LIPSCHULTZ, *supra* note 18, at 27. Because the FCC's definition of broadcast indecency is any "[l]anguage or material that depicts or describes . . . sexual or excretory activities or organs," indecency can be merely sexual discussions. *Id.* at 27-28.

23. *See* 47 U.S.C. § 503(b)(1)(D) (1994) ("Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have . . . violated any provision of section 1304, 1343, or 1464 of Title 18; shall be liable to the United States for a forfeiture penalty."). Of the three statutory provisions cited by § 503(b)(1)(D), only section 1464 of Title 18 is relevant to the FCC's indecency fines as discussed herein. This section provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

24. *See* Action for Childrens Television v. FCC, 827 F. Supp. 4, 6 (D.D.C. 1993), *aff'd*, 59 F.3d 1249 (D.C. Cir. 1995).

25. The FCC offered this definition in its complaint against Pacifica Foundation in *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978). This definition was then adopted by the Supreme Court in *Pacifica*. *See id.* at 743. The FCC has affirmed its adherence

reau ("MMB"),[26] where its staff members review the material to make a recommendation as to whether the material falls within the parameters of this definition.[27]

If the MMB staff decides that the complaint does not warrant investigation, the complaint is dismissed.[28] Alternatively, if a determination is made to investigate the complaint further, the MMB sends a Letter of Inquiry ("LOI")[29] to the broadcaster of the disputed material.[30] The LOI is a simple request for additional information about the disputed broadcast and does not represent a final determination of an indecency violation.[31] After the broadcaster responds to the LOI, the MMB staff presents both its findings and the broadcaster's response thereto to the Chief of the MMB, who then determines whether a violation has in fact occurred.[32] If the Chief determines that indeed there was a violation, the MMB forwards a Notice of Apparent Liability ("NAL") to the broadcaster.[33]

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to this definition. *See* Enforcement of Prohibitions Against Broad. Obscenity and Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 457, 457 (Dec. 21, 1988).

26. The FCC, through its appointed commissioners, divided the agency into four bureaus: Common Carrier Bureau; Private Radio Bureau; Field Operations Bureau; and Mass Media Bureau. *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE 501, 697 (3d ed. 1985). The Mass Media Bureau receives and processes all applications for licenses, renewals and transfers, as well as listener complaints of violations of 18 U.S.C. § 1464. *See id.* at 501.

27. *See Action for Childrens Television*, 827 F. Supp. at 6; *see also* CARTER, *supra* note 26, at 501-02; Liability of Sagittarius Broad. Corp., 7 F.C.C.R. 6873 (Oct. 23, 1992).

28. *See Action for Childrens Television*, 827 F. Supp. at 6.

29. The LOI is a form letter the agency routinely sends to broadcasters accused of broadcasting indecent material, which in relevant part states:

> The broadcast of obscene, indecent or profane language is prohibited by a federal criminal statute. Although the Department of Justice is responsible for prosecution of federal law violations, the commission is authorized to impose sanctions on broadcast licensees for violation of this statute, including revocation of the license or the imposition of a monetary forfeiture. However, both the commission and the Department of Justice are governed by past decisions of the courts as to what constitutes obscenity, and the broadcast of material which may be offensive to many persons would not necessarily be held by the courts to violate the statute.

PEMBER, *supra* note 20, at 447.

30. *See* 47 U.S.C. § 154(l) (1994) ("All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any . . . licensee that may have been complained of."); *see also Liability of Sagittarius Broad. Corp.*, 7 F.C.C.R. at 6873.

31. *See Action for Childrens Television*, 827 F. Supp. at 6. See also *supra* note 29 for the text of the LOI.

32. *See Liability of Sagittarius Broad. Corp.*, 7 F.C.C.R. at 6873; Letter to Mr. Mel Karmazin, President, Sagittarius Broad. Corp., 5 F.C.C.R. 7291 (Dec. 7, 1990).

33. *See Liability of Sagittarius Broad. Corp.*, 7 F.C.C.R. at 6873; *see also* 47 U.S.C. § 503(b)(4) (1992) ("[No] forfeiture penalty shall be imposed under this subsection

No formal evidentiary hearing is required before the issuance of the NAL.

Upon receipt of an NAL, the broadcaster has two options: pay the forfeiture,[34] or submit an opposition to the NAL within 30 days.[35] If the broadcaster chooses to oppose the forfeiture it must explain why a forfeiture should either not be imposed, or be reduced.[36] Once the FCC receives the broadcaster's opposition to the NAL, both the MMB's evaluation of the subject material as well as the broadcaster's response is forwarded to the five commissioners for their review.[37]

In reviewing this material, the Commission members attempt to determine whether a forfeiture is appropriate.[38] In making this determination, the Commission must consider "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses,

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against any person unless and until . . . (A) . . . the Commission issues a notice of apparent liability, in writing, with respect to such person.").

34. The NAL sets forth an amount which the broadcaster must pay in order to have the complaint dismissed. This amount is typically $2,000-5,000 per NAL. *See Liability of Sagittarius Broad. Corp.*, 7 F.C.C.R. at 6873. However, the amount of any forfeiture penalty could be as high as $25,000 for each violation. *See* 47 U.S.C. § 503(b)(2)(A) ("The amount of any forfeiture penalty determined under this section shall not exceed a total of $25,000 for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act."). "Each day during which such violation occurs shall constitute a separate offense." 47 U.S.C. § 503(b)(1)(E). Because such fines can be imposed for each day of a subsequent airing of the disputed material, a broadcaster's forfeiture fines could feasibly amount to millions of dollars. See *infra* Part III for a discussion of the *Action for Children's Television* decision and the forfeiture fines imposed upon Infinity Broadcasting, Inc.

35. *See* 47 U.S.C. § 402(e) (1994); *see also* Letter to Mr. Mel Karmazin, President, Infinity Broad. Corp., 8 F.C.C.R. 2688 (Dec. 18, 1992) (wherein the FCC informed Infinity that "[i]n regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter 'to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture.'").

36. *See* 47 U.S.C. § 503(b)(4)(C). A broadcaster who disputes the forfeiture "is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes . . . why no such forfeiture penalty should be imposed." *Id.*; *see also Action for Childrens Television*, 827 F. Supp. at 7; *Letter to Mr. Mel Karmazin, President, Infinity Broad. Corp.*, 8 F.C.C.R. at 2688 ("Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent.").

37. *See* EMERY, *supra* note 20, at 55.

38. *See id.* ("[C]ommissioners function as a unit, . . . [with] the Chairman serving as the chief executive officer . . . . Four members of the commission constitute a quorum for the transaction of business.").

ability to pay, and such other matters as justice may require."[39] The Commission further considers the broadcaster's past history in broadcasting "indecent" material, as well as past forfeitures imposed, as factors in making this determination.[40] If the commissioners vote for imposition of a forfeiture order, such order represents the final determination that the broadcaster has violated 18 U.S.C. § 1464.[41] If the broadcaster refuses to pay the forfeiture within 60 days and seeks no other action, the FCC proceeds to send three progressively stronger "dunning letters"[42] at 30 day intervals in order to secure payment.[43] If the broadcaster, after receipt of these three "dunning letters," still refuses to pay the forfeiture, the FCC refers the matter to a United States Attorney for collection in a United States District Court.[44] This is the broadcaster's first opportunity[45] for judicial review of the subject material.[46]

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39. *Action for Childrens Television*, 827 F. Supp. at 7 (quoting 47 U.S.C. § 503(b)(2) (D) (1992)).

40. *See id.* at 7; *see also* Notice of Apparent Liab. to Evergreen Media Corp., 8 F.C.C.R. 1266, n.5 (Feb. 25, 1993); *Letter to Mr. Mel Karmazin, President, Infinity Broad. Corp.*, 8 F.C.C.R. at 2688 (Separate Statement of Commissioner James H. Quello) ("In supporting the imposition of a $600,000 fine against Infinity Broadcasting . . . I find the magnitude of this fine amply warranted in view of an apparent *pattern of indecent broadcasts on this show*.") (emphasis added).

41. *See Action for Childrens Television*, 827 F. Supp. at 7.

42. "Dunning letters" is a slang term used by the FCC to describe the collection letters it sends to broadcasters.

43. *See Action for Childrens Television*, 827 F. Supp. at 7.

44. 47 U.S.C. § 504(a) (1996). In relevant part, § 504(a) states:

> The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable . . . in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office . . . . It shall be the duty of the various United States attorneys . . . to prosecute for the recovery of forfeitures under this chapter.

Id. Therefore, forfeitures imposed by the Commission are recoverable only in a civil proceeding brought by the United States Attorneys in the district courts, unless payment is voluntarily made. *See* Pleasant Broad. Co. v. FCC, 564 F.2d 496, 498 (D.C. Cir. 1977).

45. Although the FCC, as a regulatory agency, does have executive, legislative and judicial functions, it does not provide broadcasters with an administrative adjudicative process with review before an administrative law judge of forfeiture fines for allegedly "indecent" material. *See* Seth T. Goldsamt, *"Crucified by the FCC?" Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 204 (1995). *See generally* PETER L. STRAUSS, ET AL., ADMINISTRATIVE LAW 45 (9th ed. 1995). To the contrary, these fines are determined solely by the Commission members. See *supra* notes 38-41 and accompanying text for a discussion of the Commissioners' forfeiture determination process. Broadcasters' appeals to this point are limited to the opportunity to submit an opposition to the NAL, thereby attempting to persuade the FCC to drop its indecency charges. See *supra* notes 33-37 and accompanying text for a discussion of the NAL procedure. The FCC does, however, offer adjudicatory hearings

C. *Forfeiture Enforcement Scheme—In Practice*

Although the forfeiture enforcement scheme may seem quite arduous, in practice most broadcasters that are assessed forfeitures for indecency violations pay the forfeitures shortly after the issuance of an NAL.[47] To date, no broadcaster has gone to trial on the merits of an FCC indecency determination.[48] Of the thirty-six FCC indecency forfeiture orders issued since 1987, not one has been reviewed by a court.[49] The incentive for the broadcaster to pay the fine quickly and release itself from review by the FCC is evidenced by the time delays inherent in the FCC's forfeiture enforcement scheme. The FCC takes between six and twenty-three months to issue the final forfeiture order, with the average wait for a final order being eleven months.[50] Once the forfeiture order becomes final, the broadcaster waits another period of time, no longer than five years from the date the claim accrued,[51] before a United States Attorney files suit to enforce the order, precipitating judicial review.[52]

Further, if the broadcaster refuses to pay the fine and instead allows the FCC to file a collection action against it, the FCC can

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before an administrative law judge for nonconstitutional issues, such as licensing and licensing renewal disputes. *See* CARTER, *supra* note 26, at 501; STRAUSS, *supra* at 45.

46. In *Action for Children's Television*, Infinity Broadcasting, Inc. was able to challenge the forfeiture in federal court more quickly because it was challenging the *constitutionality* of the forfeiture enforcement scheme as applied to individual broadcasters, and not the *indecency* of the speech. It was therefore not required to exhaust the entire FCC forfeiture scheme prior to the institution of an action in court. See *infra* Part III for a detailed description of the *Action for Children's Television* case.

47. *See Action for Childrens Television*, 827 F. Supp. at 7.

48. *See* Action for Children's Television v. FCC, 59 F.3d 1249, 1254 (D.C. Cir. 1995).

49. *See id.* at 1264. "To date, only two broadcasters have refused to pay [the] forfeitures imposed for indecent broadcasts after the FCC has exhausted its dunning letter[s] procedures." *Action for Childrens Television*, 827 F. Supp. at 7. The FCC has asked the United States Attorney to file collection proceedings against them. *See id.* at 8.

50. *See Action for Childrens Television*, 827 F. Supp. at 8. During that time, the broadcaster must refrain from any further re-broadcasts of the disputed material or subject itself to increased forfeiture amounts. See *infra*, notes 143-49 and accompanying text for a discussion of the repercussions a broadcaster must face for subsequent airings of the material.

51. The United States Attorney must file the collection proceeding against the broadcaster within five years from the date the claim accrued. *See Action for Children's Television*, 827 F. Supp. at 8.

52. *See id.* This lengthy delay is the product of the FCC's administrative process. See *supra* notes 50-51 for a discussion of the delays inherent in the FCC's forfeiture enforcement scheme. See also *infra* notes 244-48 for a discussion of the FCC's lengthy delays in issuing NALs against broadcasters.

attempt to revoke a broadcaster's license or block a proposed acquisition.[53] A broadcaster is also subject to additional fines for each re-broadcast of the material while the case is pending.[54] These fines are typically as high as $2,000-5,000 for each infraction, but are permitted to be as high as $25,000 for each day of the disputed material's airing.[55]

The forfeiture proceeding has no checks on the duration of the procedure. For instance, there is no regulation that imposes time limits on the FCC's processing of complaints, that requires expediting such processing, or that requires expeditious filing of forfeiture actions by the Commission.[56] Therefore, unless a broadcaster immediately pays its forfeiture and complies with the FCC's indecency determination, it will be subject to a lengthy and cumbersome list of procedures it must follow in order to obtain judicial review of the challenged material.[57] Such a process effectively encourages the broadcasters to pay the forfeiture and lay the matter to rest.

D. *The Enforcement Scheme as Applied*—FCC v. Pacifica Foundation[58]

In 1978, the United States Supreme Court examined the FCC enforcement scheme for the first time.[59] In *Pacifica*, the Court had an opportunity to review both the FCC's enforcement scheme as applied to a broadcaster, as well as whether the FCC could restrict nonobscene speech under its power to proscribe "indecent" material. The facts in *Pacifica* centered around a father who, while driving with his young son,[60] heard the broadcast of George Carlin's

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53. See also *infra* notes 197-200 for a discussion of FCC tactics. Further, the FCC may "revoke any station license or construction permit" for indecency reasons. 47 U.S.C. § 312 (1996).

54. *See* 47 U.S.C. § 503(b)(2)(A); *see also supra* note 34 (detailing the contents of 47 U.S.C. § 503(b)(2)(A) and its application to broadcasters by the FCC).

55. *See* Action for Children's Television v. FCC, 59 F.3d 1249, 1254 (D.C. Cir. 1995). See also *supra* note 34 for a discussion of the permissible forfeiture fine amounts.

56. *See Action for Children's Television*, 59 F.3d at 1254.

57. *See* Pleasant Broad. Corp. v. FCC, 564 F.2d 496, 500 (D.C. Cir. 1977) ("[S]ection 504(a) by its terms makes no provisions for *initiation* of judicial review by persons subjected to forfeiture orders . . . but . . . it clearly provides such persons with an opportunity to obtain full review of the Commission's findings, in a trial *de novo* in the district court, in the proceeding which the Government must bring if it wishes to collect the fine.").

58. 438 U.S. 726 (1978).

59. To date, there has been no subsequent Supreme Court review of the FCC's forfeiture enforcement scheme.

60. There is speculation that the complainant was not riding in his car with his

"Filthy Words" monologue,[61] which listed and repeated a number of words you could not say on the public airwaves.[62] The father filed a complaint with the FCC, who forwarded the complaint to the broadcaster.[63] After receiving a response,[64] the Commission then issued a declaratory order holding that Pacifica[65] "could have been the subject of administrative sanction."[66] Although the FCC did not impose formal sanctions, such as forfeiture fines, it did indicate that the order "would be 'associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress.'"[67]

The broadcaster filed suit in the United States Court of Ap-

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young son, but was rather a member of a conservative advocacy group which monitors the public airwaves in search of material it finds indecent. The complaint was made by a Florida resident who was a member of the national planning board of Morality in the Media. His "young son" who was with him when he heard the monologue was fifteen years old. *See* LIPSCHULTZ, *supra* note 18, at 42.

61. The monologue's full introduction was "Seven Dirty Words That You Definitely Wouldn't Say on the Public Airwaves." Carlin proceeded to repeat continuously these seven dirty words in order to make a statement about contemporary society's attitudes toward language. *See Pacifica*, 438 U.S. at 730; Kristin A. Finch, Comment, *Lights, Camera, and* Action for Children's Television v. FCC*: The Story of Broadcast Indecency, Starring Howard Stern*, 63 U. CINN. L. REV. 1275, 1286 nn.54-55 (1992). The FCC used these seven "dirty words" (shit, piss, fuck, motherfucker, cocksucker, cunt and tits) as its standard for determining indecency in broadcasting after the *Pacifica* case until 1987, when the FCC adopted a more generic standard of indecency. Under this new standard, language is indecent if it describes "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organ[s], when . . . there is a reasonable risk that children may be in the audience." *See* New Indecency Enforcement Standards, 2 F.C.C.R. 2726 (1987); *see also* Jay A. Gayoso, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871 (1989) (discussing the FCC's abrupt change from its narrow "seven dirty words" standard of indecency to its current "broad standard"); Goldsamt, *supra* note 45, at 203 (discussing the evolution of the indecency standard from the "seven dirty words" to the new generic standard); Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992) (discussing and contrasting the narrow "seven dirty words" standard of indecency with the new generic standard and the chilling effect the FCC's new definition has on broadcast speech).

62. *See Pacifica*, 438 U.S. at 729-30.

63. *See id.* at 730.

64. See *supra* Part I.B-C for a discussion of the procedures used by the FCC in issuing forfeitures.

65. Pacifica Foundation was the owner and operator of several radio stations located in New York. *See Pacifica*, 438 U.S. at 729.

66. *Id.* at 730. Since the FCC determined that Pacifica was not subject to formal administrative sanctions, the FCC was not required to follow the administrative procedures mandated in its forfeiture enforcement scheme, as set forth in Part I.B-C.

67. *Id.* (citation omitted).

peals for the District of Columbia, arguing that the Carlin monologue was not obscene because it did not appeal to any prurient interest and because it had literary and political value. Therefore, the broadcaster argued, the material was entitled to constitutional protection.[68] After the Commission's decision was reversed by the United States Court of Appeals for the District of Columbia Circuit, the Commission filed a petition for certiorari, which the Supreme Court granted.[69] In granting review, the Court limited its consideration to two issues: (1) whether the Commission's actions were forbidden "censorship" within the meaning of 47 U.S.C. § 326, and (2) whether speech that concededly was not obscene could be restricted as "indecent" under the authority of 18 U.S.C. § 1464.[70] In its plurality opinion, the Court[71] stated that although it would indeed be "censorship" if the Commission denied the broadcaster permission to air material prior to its release, it is not "censorship" to review completed broadcasts aired by the broadcasters while performing its regulatory duties.[72] As to the second issue for review, the plurality held that no sound basis existed to challenge the FCC's conclusion that the broadcast contained indecent language.[73]

Thereafter, the plurality addressed whether the First Amendment denied the government any power to restrict the public broadcast of indecent language in any circumstances.[74] The plurality stated that both the content and the context of the speech are critical elements when applying a First Amendment analysis.[75] In *Pacifica*, the plurality found the content of the plaintiff's broadcast to be "'vulgar,' 'offensive,' and 'shocking.'"[76] Because of the nature of the speech, the plurality held that such content was not enti-

68. Because Pacifica Foundation was filing a constitutional challenge to the FCC's statutory scheme, claiming a First Amendment violation by the FCC, it was not forced to exhaust the FCC's forfeiture enforcement scheme prior to receiving judicial review.

69. *See id.*

70. *Id.* at 735. See also *supra* note 21 for the text of 18 U.S.C. § 1464.

71. Justice Stevens announced the Court's plurality opinion regarding the central constitutional issue in the case. Justice Powell filed an opinion concurring in part and concurring in the judgment, in which Justice Blackmun joined. See *infra* note 77 for a discussion of Justice Powell's opinion. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. See *infra* note 79 for a discussion of Justice Brennan's opinion. Justice Stewart filed a dissenting opinion in which Justice Brennan and Justice Marshall joined.

72. *Pacifica*, 438 U.S. at 735-36.

73. *See id.* at 741.

74. *See id.* at 744.

75. *See id.*

76. *Id.* at 747.

tled to absolute protection under the Constitution in all circumstances.[77] Thus, the context must be examined to determine whether the Commission's action was permissible under the Constitution.[78] The plurality said that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[79] If the FCC determines that depriving a broadcaster of its license or its forum furthers "the public interest, convenience and necessity," it may do so.[80]

In treating the broadcast medium differently from other mediums of expression, the plurality stressed that

> the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . [I]ndecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[81]

Because the listener is constantly changing stations and tuning in and out, the plurality stated that a system of prior warnings would be ineffective.[82] Turning off the offensive program after already having listened to offensive material being aired is "like saying that the remedy for an assault is to run away after the first blow."[83]

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77. *See id.* at 747-48. Justice Powell, however, in his partial concurrence, did not subscribe to the theory that the Justices are free to generally decide, on the basis of its content, which speech is most valuable and therefore deserving of the most protection, and which is less valuable and hence deserving of less protection. Here, Justice Powell noted, the result should turn not on the value of Carlin's monologue, but instead on the unique characteristics of the broadcast medium, combined with society's right to protect children from speech which may be inappropriate for them. *See id.* at 761-62 (Powell, J., concurring).

78. *See id.* at 748.

79. *Id.* However, Justice Brennan's dissenting opinion argued that the Court's opinion ignored the constitutionally protected interest of both those who wish to transmit and those who desire to receive broadcasts that many find offensive. Because the radio is such a public medium, an individual's actions in turning it on and listening to it should be viewed as a decision to take part in an ongoing public discourse. The listener, having chosen to receive public airwaves, can easily choose to change the channel or turn off the radio if confronted with an offensive program. *See id.* at 765 (Brennan, J., dissenting). For arguments in support of Justice Brennan's opinion, see Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1023 (1989) (arguing that a person must choose to bring a television into their home and turn it on in order to receive a broadcast; similarly, a printed publication will not ordinarily be delivered to the home unless it is first ordered).

80. *Pacifica*, 438 U.S. at 748.

81. *Id.*

82. *See id.*

83. *Id.* at 749.

Therefore, according to *Pacifica*, the broadcast medium receives limited First Amendment protection.[84] Consequently, government agencies such as the FCC have greater discretion in regulating the content of expression in this particular medium.

II. PROCEDURAL DUE PROCESS AS APPLIED TO INFRINGEMENTS OF FIRST AMENDMENT FREEDOMS: A DIFFERENT STANDARD?

Due to the growing impact of governmental agency regulatory and enforcement schemes upon First Amendment freedoms, the courts have constructed "a body of procedural law which defines the manner in which they and other bodies must evaluate and resolve First Amendment claims."[85] In the context of regulatory and enforcement schemes, the protection of the First Amendment freedom of speech, and review of infringements thereof, is no longer limited to "substantive"[86] due process review.[87] Rather, courts have recognized that "procedural"[88] due process plays an equally important role in the protection of First Amendment freedoms.[89]

The Supreme Court has developed a scheme of "procedural safeguards designed to obviate the dangers of a censorship system."[90] These procedural protections only attach to schemes which

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84. *See id.* at 748.

85. Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970).

86. Substantive due process analysis begins by determining whether the possible infringement involves a nonfundamental right *or* a fundamental right. Generally, a nonfundamental right will be reviewed according to a minimum scrutiny test: the regulation will be presumed valid if it bears a rational relationship to the end sought. A possible infringement of a fundamental right, however, will be subject to strict scrutiny review: the possible infringement will be held invalid unless it is necessary to achieve a compelling governmental interest. A "fundamental right" is determined by looking at whether the right is "deeply rooted in this Nation's history and tradition." Washington v. Glucksburg, 117 S. Ct. 2258, 2260 (1997). A right is fundamental when it is "so rooted in the traditions and conscience of our people" that a fair and enlightened system of justice would be impossible without this right. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

87. *See* Monaghan, *supra* note 85, at 518.

88. Procedural due process requires that liberty and property interests not be impaired without some form of notice and hearing or an opportunity to be heard. *See* Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id.* at 570 n.7.

89. *See* Monaghan, *supra* note 85, at 519.

90. *See* Freedman v. Maryland, 380 U.S. 51, 58 (1965).

effect an unconstitutional prior restraint[91] on speech. Prior restraints which do not satisfy strict scrutiny review are considered constitutionally impermissible because of the "chilling"[92] effect they have on speech.[93] Such restraints on speech limit public debate because of the deterrent effect they may have on speakers, who may, as a result of the prior restraint, be inhibited from placing their ideas or speech in the "marketplace of ideas."[94]

Rather than apply the traditional requirements of substantive due process analysis[95] to determinations of obscenity, the Court uses a "different standard" which includes determining whether or not "the [governmental] procedure[s] show 'the necessary sensitivity to freedom of expression'"[96] and do not effect a prior restraint on the First Amendment freedom of expression without adequate procedural protections.[97] The following cases illustrate the devel-

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91. The prior restraint doctrine requires that any government action which has the effect of a prior restraint on speech must be subject to strict judicial scrutiny. *See* Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1 (1989). It was developed to prevent infringements upon First Amendment freedoms by procedures which may effectively "chill" these freedoms before judicial review may be obtained. *Id.* at 2. "[L]aws identif[ying] prior restraints accurately can be characterized as: (1) having a greater chilling effect on potential speech; (2) subjecting a wider spectrum of speech to official scrutiny; (3) suppressing speech at significantly less cost; and (4) encouraging greater speech suppression than laws in the form of subsequent sanctions." *Id.* at 3.

The Supreme Court first coined the phrase "prior restraint" in *Near v. Minnesota*, 283 U.S. 697 (1931). In *Near*, the publisher of a newspaper charged with publishing malicious, scandalous and defamatory articles about local citizens was enjoined by the district court, with the court of appeals affirming, from publishing the newspaper permanently, adjudging it to be a "public nuisance." *Id.* at 706. The Supreme Court reversed, stating that the chief purpose of the First Amendment was to prevent previous restraints on its included freedoms. *See id.* at 713. Subsequent punishments (such as fines) for abuses of the press are the appropriate remedy, not prior restraints. *See id.* at 720.

92. See *supra* note 9 for a brief definition and discussion of "chilling" effects on speech.

93. *See* Edward Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 171, 185 (1981); Scordato, *supra* note 91, at 5. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matters when published." *Id.*

94. *See* Blasi, *supra* note 93, at 185.

95. See *supra* note 86 for a discussion of the requirements of substantive due process analysis.

96. Monaghan, *supra* note 85, at 519 (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

97. Even when the government claims the speech it is regulating is obscene, and therefore outside the protection of the First Amendment, procedural protections are necessary. Unless adequate procedures protect against the possibility that protected

opment of this unusual standard of procedural due process review, referred to herein as First Amendment Procedural Review, within the context of infringements of First Amendment rights.

A. Bantam Books, Inc. v. Sullivan[98]

In *Bantam*, the Rhode Island legislature created a commission dedicated to the eradication within the state of any book containing obscene, indecent or impure language ("book commission").[99] The book commission typically would notify a distributor that certain books that it distributed were "objectionable" for sale, distribution, or display to youths under age eighteen. The book commission's notices requested the "cooperation" of distributors in the cessation of sales of such material.[100] Further, the notices advised the distributors that the book commission sent copies of lists of "objectionable" publications to local police departments with recommendations that sellers of obscenity should be prosecuted.[101]

Four out-of-state publishers of books distributed in Rhode Island sued for a declaratory judgment that the law authorizing the book commission was unconstitutional.[102] The publishers argued that the book commission's activities amounted to a scheme of governmental censorship devoid of any constitutionally required safeguards for state regulation of obscenity.[103] This resulted in an abridgement of the publishers' First Amendment liberties protected by the Fourteenth Amendment[104] from infringement by the states.[105]

The Supreme Court held that under the Fourteenth Amendment, the States, in regulating obscenity, must not arbitrarily suppress protected speech.[106] Rather, the Court concluded that

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speech will be wrongly characterized as obscene, important First Amendment rights will be jeopardized.

98. 372 U.S. 58 (1963).

99. *See id.* at 59-60.

100. *See id.* at 62.

101. *See id.* at 62-63.

102. *See id.* at 61.

103. *See id.* at 64.

104. The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

105. *See Bantam*, 372 U.S. at 64.

106. *See id.* at 65-66.

regulations of obscenity must contain procedures necessary to prevent suppression of constitutionally protected expression.[107] Therefore, regulations of obscenity must include the most rigorous procedural safeguards.[108] Although the book commission argued that it did not regulate or suppress obscenity, but instead advised booksellers of their legal rights, the Court noted that the book commission's acts and practices effectively stopped the circulation of publications in many parts of the state.[109]

While the publisher was free to ignore the book commission's nonbinding notices, the Court stated that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."[110] Although the book commission was limited to informal sanctions which included the threat of invoking legal sanctions and other means of coercion, intimidation, or persuasion, the Court found these actions to constitute informal censorship[111] by inhibiting the circulation of possibly protected publications.[112] What the state had done, the Court concluded, was subject the distributors of these publications to a system of prior restraints.[113]

In evaluating the effect of the censorship, the Court held that the book commission's practices provided no safeguards against the suppression of non-obscene and constitutionally protected material.[114] Rather, Rhode Island subjected the distribution of publications to a system of new administrative restraints.[115] The Court

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107. *See id.* at 66.

108. *See id.*

109. *See id.* at 66-68.

110. *Id.* at 68.

111. Justice Harlan's dissenting opinion noted that the book commission's activities with respect to intimidation and coercion exceeded constitutional limits. However, he stated that the book commission was formed with the admirable intention of combatting juvenile delinquency, a troubling social problem which overrides the majority's considerations of the right of freedom of expression under the First Amendment. Because of this compelling state interest, the dissent argued that people's free speech concerns should give way. *See id.* at 76-78 (Harlan, J., dissenting).

112. *See id.* at 67.

113. *See Bantam*, 372 U.S. at 70-72. Although the Court determined that the book commission's actions constituted a system of prior restraints, these actions were in fact technically subsequent punishments, as they punished the publisher for past conduct and did not expressly bar any future expressive activity. See *infra* Part IV.A.1 for a discussion of subsequent punishments and prior restraints, and Part IV.A.2 for an analysis of the *Bantam* Court's characterization of the book commission's actions as prior restraints on expression.

114. *See id.* at 70.

115. *See id.*

arrived at this conclusion by noting that, since the book commission was not a judicial body, its decisions to list particular publications as objectionable were not the result of judicial determinations that such publications could lawfully be barred.[116] The Court continued, stating that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[117]

The Court stated that the book commission's practices provided no safeguards whatsoever against the suppression of nonobscene, and therefore constitutionally protected material.[118] In order for the book commission practices to be held constitutionally valid, its scheme must have contained a saving feature, such as prompt judicial review of the book commission's determinations of "objectionable" material.[119]

B. Freedman v. Maryland[120]

In *Freedman*, the Supreme Court relied heavily on its *Bantam* decision, effectively broadening the scope of the "prior restraint"[121] doctrine to include the theory that any restraint prior to judicial review must be limited to preservation of the status quo and for the shortest period compatible with sound judicial procedure.[122] In *Freedman*, a theater owner in the state of Maryland challenged the constitutionality of a Maryland motion picture censorship statute that required theaters to submit films for approval and license by the Maryland State Board of Censors prior to exhibition.[123] The theater owner argued that the Maryland statute constituted an invalid prior restraint because it presented "a danger of unduly suppressing protected expression."[124]

The theater owner further argued that the Maryland statute lacked sufficient safeguards for confining the Board of Censor's ac-

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116. *See id.*

117. *Id.*

118. *See id.* at 70-71.

119. *See id.* at 71.

120. 380 U.S. 51 (1965).

121. See *supra* note 91 for a discussion of the prior restraint doctrine.

122. *See Freedman*, 380 U.S. at 59.

123. *See id.* at 52. The statute in dispute provided: "[i]t shall be unlawful to . . . exhibit . . . any motion picture film or view in the State of Maryland unless the said film or view has been submitted . . . and duly approved and licensed by the Maryland State Board of Censors." MD. ANN. CODE art. 66A, § 2 (1957).

124. *Freedman*, 380 U.S. at 54.

tions to judicially determined constitutional limits.[125] The Court agreed, stating that, "under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."[126] The Court then noted that because it is "the Censor's job to censor," there is a risk that he may be less sensitive to the constitutionally protected interests in free expression than a court.[127]

In holding that the prior submission of a film to a censorship board avoids constitutional infirmity only if there are adequate procedural safeguards designed to obviate the dangers of censorship and the imposition of a prior restraint on expression, the Supreme Court set forth three constitutionally required procedural safeguards. First, the censor has the burden of instituting judicial proceedings, because only judicial review ensures the necessary sensitivity to First Amendment concerns.[128] Second, the burden of proving the expression is unprotected must rest on the censor.[129] Third, the procedure must guarantee a prompt final judicial decision.[130] The Court held that "the procedure must also assure a *prompt* final judicial decision, to minimize the deterrent effect of an

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125. *See id.* at 57.

126. *Id.* (quoting Marcus v. Search Warrant, 367 U.S. 717, 731 (1961)).

127. *Id.* at 57-58; *see also* Times Film Corp. v. City of Chicago, 365 U.S. 43, 67-68 (1961) (noting that a censor is beholden to those who sponsor the creation of his office, and will invariably tend toward restraint). *See generally* William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 254-57 (1982) (arguing that the harm of a statute's administrator's insensitivity to First Amendment values is multiplied by the characteristically vague standard that he enforces); Monaghan, *supra* note 85, at 518 (arguing that because the First Amendment due process cases have shown that First Amendment rights are fragile and can be destroyed by insensitive procedures, courts must thoroughly evaluate every aspect of the procedural system that protects those rights); Alison Gail Adolph, Comment, *First Amendment and Licenses to Sell Sexually Oriented Material*—FW/PBS, Inc. v. City of Dallas, 24 SUFFOLK U. L. REV. 828 (1990) (arguing that regulations promulgated by such officials may not circumvent the required procedural safeguards available to businesses engaged in activities protected by the First Amendment); Allan Tananbaum, Note, *"New and Improved": Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1825 (1988) (arguing that governmental agencies empowered to restrain speech tend inexorably toward restraint because the reason for these agencies' existence is to root out violations that they are mandated to enforce).

128. *See Freedman*, 380 U.S. at 58. The *Freedman* Court stated that the government must bear the burden of instituting judicial proceedings and of proving that the material is unprotected. *See id.*

129. *See id.*

130. *See id.* at 59.

interim and possibly erroneous denial of a license."[131] Without these safeguards, the Court noted, those aggrieved may find the procedure too burdensome to seek review of the censor's findings.[132]

Bantam and *Freedman* establish the constitutionally mandated procedures necessary to avoid violations of the First Amendment by governmental agencies and entities administering prior restraint schemes. In *Bantam*, the Supreme Court held that in order to be constitutionally valid, a prior restraint must contain rigorous procedural safeguards, such as prompt judicial review, to ensure against abridgement of First Amendment protections.[133] The *Freedman* Court later refined and expanded this *Bantam* holding, resulting in the creation of three specific requirements for a constitutionally permissible prior restraint. First, a government agency's enforcement scheme must contain the most rigorous procedural safeguards available to ensure against abridgement of First Amendment protections.[134] Second, these procedural safeguards must include prompt judicial review of the challenged material.[135] Lastly, the burden of proving that the expression is unprotected by the Constitution, as well as the burden of instituting proceedings, must be on the censor.[136] With these standards, herein termed First Amendment Procedural Review, as its backdrop, the United States Court of Appeals for the District of Columbia Circuit decided *Action for Children's Television v. FCC*.[137]

III. *ACTION FOR CHILDREN'S TELEVISION V. FCC*[138]

A. *Factual Setting*

Broadcasters and organizations representing the interests of listeners and viewers[139] filed suit against the FCC challenging the

131. *Id.*
132. *See id.*
133. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1962).
134. *See Freedman*, 380 U.S. at 58.
135. *See id.* at 71.
136. *See id.* at 58.
137. 59 F.3d 1249 (D.C. Cir. 1995).
138. *See id.*
139. The parties included: Action for Children's Television; the American Civil Liberties Union; the Association of Independent Television Stations, Inc.; Evergreen Media Corporation; EZ Communications, Inc.; Fox Broadcasting Company, Inc.; Greater Media, Inc.; Infinity Broadcasting Corp.; the Motion Picture Association of America, Inc.; the National Association of Broadcasters; the National Association of College Broadcasters; National Public Radio; People for the American Way; Post-

procedures under which the FCC imposed indecency forfeitures on broadcasters.[140] The complaint by the broadcasters and organizations alleged that the forfeiture scheme imposed by the FCC constituted a system of censorship without prompt judicial review.[141]

Upon challenge by the FCC that the plaintiffs lacked standing, the district court determined that only one of the plaintiffs, Infinity Broadcasting Corp. ("Infinity"), had the proper standing to file suit.[142] Infinity was the employer and producer of notorious radio "Shock-Jock" Howard Stern.[143] Over the past several years, as the result of complaints from the listening public, the FCC fined Infinity a total of $1.7 million for indecency violations by Howard Stern's morning program.[144] Refusing to pay these forfeiture

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Newsweek Stations, Inc.; the Public Broadcasting Service; the Radio-Television News Directors Association; Shamrock Broadcasting, Inc.; the Society of Professional Journalists; South Fork Broadcasting Corporation; and Twentieth Century Fox Film Corporation. *See id.*

140. *See* Action for Childrens Television v. FCC, 827 F. Supp. 4, 9 (D.D.C. 1993).

141. *See id.* at 4, 9.

142. *See id.* at 14. The court found that "the forfeiture procedures could not be 'asserted by the *public* as procedural error.'" *Id.* at 12 (quoting Illinois Citizens Comm. for Broad. v. FCC, 515 F.2d 397 (D.C. Cir. 1975)). Therefore, the organization representing the listeners and viewers lacked standing. The FCC further challenged the broadcasting plaintiffs that had not been involved in a forfeiture proceeding. These plaintiffs, the FCC contended, suffered no injury from these forfeiture proceedings, and therefore lacked standing to request relief. The court agreed. *See id.* at 13. The court determined, however, that Infinity had a forfeiture proceeding still in progress at the time of the suit, and that the FCC had "signaled its willingness to apply its forfeiture regulations to the detriment of Infinity" as it had already imposed a final forfeiture order against Infinity. *Id.* at 15.

143. For a complete analysis and description of Howard Stern's relationship to Infinity and his "indecent broadcast" battle with the FCC, see Finch, *supra* note 61.

144. *See FCC Get New Complaints on Shock Jock, Howard Stern*, ASSOCIATED PRESS, Mar. 17, 1994, *available in* 1994 WL 10128308. Howard Stern was cited for talking about "testicles," "homos," "lesbians," and "sodomy." Infinity Broad., 2 F.C.C.R. 2705, 2706 (Apr. 29, 1987). He was also cited for using the words "penis," "wiener," and "masturbate." Letter to Mr. Mel Karmazin, President, Sagittarius Broad. Corp., 8 F.C.C.R. 2688 (Dec. 18, 1992). "The Stern broadcast . . . made frequent, explicit, patently offensive references to sexual intercourse, orgasm, masturbation, and other sexual conduct, as well as to breasts, nudity, and male and female genitalia." Liability of Sagittarius Broad. Corp., 7 F.C.C.R 6873 (Oct. 23, 1992).

Infinity, in its response to the LOI it had received from the Commission, argued that the Stern material consisted of isolated words and phrases that were "in and of themselves innocuous," and did not fall within the FCC's indecency definition because they were not descriptive of sexual or excretory activities or organs. *Id.* Infinity further cited several other broadcast indecency cases that the Commission had determined were not actionable, arguing that the Stern excerpts were no worse, and even more innocuous than the other broadcasts that had been determined to be not offensive. *See id.*

amounts, Infinity challenged these fines in federal court.[145]

Because of Infinity's refusal to pay these fines, the FCC considered drastic actions in order to force Infinity's compliance. For example, the Commission considered revoking Infinity's broadcasting license.[146] In addition, the Commission notified Infinity that it planned to levy a $600,000 forfeiture on it for allegedly "indecent" broadcasts and based this unusually large fine on "'the apparent pattern of indecent broadcasting exhibited by Infinity over a substantial period since our initial indecency warning.'"[147] The Commission also considered blocking Infinity's acquisition of several stations,[148] but because of Infinity's acquiescence in deciding to cease further broadcasts of the allegedly indecent material, the Commission allowed the acquisition to take place.[149]

Infinity claimed that the indecency forfeiture process violated

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145. *See* Action for Children's Television v. FCC, 59 F.3d 1249, 1249 (D.C. Cir. 1995). Because Infinity, in filing this action, was filing a constitutional challenge to the FCC's statutory scheme claiming First Amendment violations by the FCC, Infinity was not forced to exhaust the FCC's forfeiture enforcement scheme prior to receiving its day in court. Infinity first attempted to challenge the FCC's determinations of "indecency," claiming that the material was not indecent and therefore was protected speech. *See* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (wherein broadcasters argued that the government cannot totally suppress indecent speech because it is protected by First Amendment); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (wherein broadcasters argued that FCC's definition was unconstitutionally vague and overbroad). These "indecency" challenges, however, failed. Therefore, Infinity offered a second challenge to the constitutionality of the FCC's enforcement scheme—it effects a prior restraint on protected speech without prompt judicial review. *See Action for Children's Television*, 59 F.3d at 1250; *Action for Childrens Television*, 827 F. Supp. at 6.

146. *See Action for Children's Television*, 59 F.3d at 1266; *see also* Goldsamt, *supra* note 45, at 204.

147. *See id.* at 1266 (quoting Letter to Mr. Mel Karmazin, President, Sagittarius Broad. Corp., 8 F.C.C.R. at 2689).

148. *See FCC May Not Block Infinity's Acquisition*, BALT. SUN, Jan. 29, 1994, at D10; *see also Action for Children's Television*, 59 F.3d at 1266. FCC Commissioner James H. Quello stated "[t]he position of egregious repeated violations of FCC indecency rules is so flagrantly aggravated by six new complaints against Infinity and Howard Stern that I am impelled to dissent . . . to . . . approving additional stations for Infinity . . . . It is apparent that previous FCC fines have not had a deterrent effect." Statement of FCC Commissioner James H. Quello, 1994 FCC LEXIS 1110 (March 17, 1994).

149. *See Action for Children's Television*, 59 F.3d at 1266. The proposed acquisition included over $275 million in station purchases. Infinity agreed to pay the $1.7 million settlement in order to clear the record. BROADCASTING & CABLE, Sept. 25, 1995, at 11; *see also* LIPSCHULTZ, *supra* note 18 at 2 (noting that Infinity agreed to "'alert all on-air personnel to the federal law prohibiting the broadcast of indecent speech,'" despite its previous stance of vowing to fight the regulation on First Amendment grounds) (citation omitted).

the First and Fifth Amendments because it constituted a system of censorship without prompt judicial review.[150] The district court granted the FCC's motion for summary judgment.[151] Plaintiffs appealed[152] this decision to the United States Court of Appeals for the District of Columbia Circuit.[153]

B. *Opinion of the United States Court of Appeals for the District of Columbia Circuit*

1. Majority Opinion

The court of appeals observed that once an action is timely filed, there is no limit on the amount of time that may pass before the case is actually tried.[154] The broadcaster could feasibly wait as long as five years from the time a program was aired to its first opportunity for judicial review of the Commission's decision that the material was indecent.[155]

Infinity argued that the delay inherent in the FCC's forfeiture scheme allowed the Commission to take action against broadcasters without affording them procedural safeguards necessary to avoid infringement of their First Amendment rights.[156] The forfeiture scheme essentially operated as a system of "informal censorship."[157] To buttress its claim, Infinity relied heavily on *Bantam*.[158] Infinity attempted to draw a parallel between prior restraints on the print medium and the effects on speech resulting from the FCC's enforcement scheme. The FCC, Infinity argued, forced broadcasters to remove both protected and unprotected material from the airwaves because the broadcasters attempted to conform their conduct to perceived FCC standards.[159] This was analogous, Infinity said, to the book commission's scheme in *Bantam*, which forced dis-

150. *See Action for Children's Television*, 827 F. Supp. 4, 9 (D.D.C. 1993).

151. *See id.* at 19-20. The United States Court of Appeals for the District of Columbia Circuit's decision on appeal is substantially similar to that of the district court's decision. Therefore, a detailed discussion of the district court's decision has been omitted.

152. The original plaintiffs appealed both the standing issue as well as the merits. *See id.* at 12-16.

153. *See Action for Children's Television*, 59 F.3d at 1249.

154. *See id.* at 1254.

155. *See id.* See also *supra* notes 50-51 and accompanying text for a discussion of such delays.

156. *See Action for Children's Television*, 59 F.3d at 1255.

157. *Id.*

158. *See id.* See *supra* Part II.A for a discussion of the factual setting and the Court's opinion in *Bantam*.

159. *See Action for Children's Television*, 59 F.3d at 1260-61.

tributors to stop selling "objectionable" books out of fear of possible prosecution.[160]

The court stated that Infinity's attempt to draw a parallel between the FCC's enforcement scheme as applied to Infinity and the book commission's prior restraint scheme in *Bantam* was misguided.[161] In the instant case, the broadcasters were essentially free to air what they wished. Only if what they aired turned out to violate FCC guidelines did a penalty result.[162] The court of appeals noted that here the penalty occurred *after* the fact, not *prior thereto*, and was therefore a permissible subsequent punishment and not a prior restraint.[163] Further, the court stated that in *Bantam*, the Supreme Court recognized that a scheme may also constitute a prior restraint in *effect*, although specific materials are not subject to evaluation prior to publication.[164] Therefore, the court of appeals noted that the proper inquiry is whether or not broadcasters' attempts to conform their conduct to FCC standards are analogous to *Bantam*'s scheme that forced distributors to stop selling "objectionable" publications for fear of possible prosecution.[165]

The court concluded that the two cases were not analogous in this respect. The FCC did nothing to actively discourage a broadcaster from obtaining judicial review of the indecency forfeiture it had imposed.[166] In *Bantam*, however, the book commission attempted to regulate materials that could not be proscribed as obscene.[167] In fact, the FCC enforcement scheme provided for judicial review, whereas the Rhode Island book commission in *Bantam* afforded the aggrieved publishers no such opportunity.[168]

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160. *Id.* at 1261.

161. *See id.*

162. *See id.* at 1260.

163. *See id.* Generally, a "subsequent punishment" is punishment for past conduct, effectively penalizing past speech. It is distinct from a prior restraint which bars speech in the future. *See* Alexander v. United States, 509 U.S. 544, 549 (1993). See also *infra* Part IV.A.1 and accompanying text for a discussion of prior restraints and subsequent punishments.

164. *See Action for Children's Television*, 59 F.3d at 1260-61.

165. *Id.* at 1261.

166. *See id.* "While the prospect of a forfeiture trial may understandably cause some broadcasters to forego judicial review of a Commission determination that a program was indecent, we find no indication in this record that the FCC is taking the opportunity afforded thereby to impose unconstitutional restrictions upon broadcast speech." *Id.*

167. *See id.* (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 62 n.4 (1963)).

168. *See id.* In fact, however, the FCC's enforcement scheme did not technically provide for judicial review. Rather, it provided for a civil collection proceeding in district court where the aggrieved broadcaster would obtain a trial *de novo* on all matters.

Some degree of self-censorship, the court noted, was not only inevitable, but desirable.[169] "'At most [self-censorship] will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.'"[170] Additionally, the court stated that if every determination of indecency must be judicial, the FCC will play no role in developing and enforcing Congress's policy of banning indecency from the airwaves.[171]

Because the enforcement scheme already provided for judicial review, the court reasoned, nothing but the timing of judicial action would be different if Congress were to change the current enforcement scheme to allow a court to review the forfeiture action immediately after the airing of the allegedly indecent broadcast.[172] The delay is "of constitutional significance only if it burdens broadcast speech that is not indecent."[173] Here, Infinity argued that the delay chills protected speech as well as indecent speech.[174] The court, however, stated that Infinity failed to show that protected speech was being "chilled."[175]

The court noted several additional factors which further distinguished the Commission's enforcement scheme from that of *Bantam*:

> (1) that [Bantam] concerned the printed word, which, unlike broadcasting, has historically enjoyed the broadest protection under the First Amendment; (2) the FCC, unlike the Rhode Island Commission, gives a putative violator notice and an opportunity to respond to the charge against it; (3) the decisions of the FCC are subject to judicial review; and (4) the broadcaster that would avoid a dispute with the FCC need only move its arguably indecent material to a different time of day, not refrain from broadcasting it altogether.[176]

The court concluded that a scheme is not unconstitutional ab-

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See *supra* notes 36-46 and accompanying text for a discussion of the remedies the FCC's enforcement scheme provides a broadcaster who chooses to oppose its indecency forfeitures.

169. *See* Action for Children's Television v. FCC, 59 F.3d 1249, 1261 (D.C. Cir. 1995).

170. *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 743 (1978).

171. *See id.*

172. *See id.*

173. *Id.*

174. *See id.*

175. *Id.* at 1261-62.

176. *Id.* at 1262. The *Action for Children's Television* court relied on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), for its statement that broadcasting enjoys limited First Amendment protection. *See id.* at 748.

sent a showing that nonindecent material is being forced off of the air.[177] Here, the court noted, Infinity had failed to make any such showing.[178] However, the court indicated that the delay inherent in the FCC's enforcement scheme was "troubling,"[179] and noted several additional factors which served to exacerbate the effects of the delay. First, a broadcaster who claims that a forfeiture is unconstitutional "runs the risk of incurring an increased forfeiture for any subsequent indecency violation."[180] Second, the individual commissioners in the FCC take an active public role in criticizing the broadcasters who air what they consider indecent material.[181] Lastly, the Commission refused to issue a declaratory ruling on whether or not material is indecent.[182] Therefore, "the only official guidance about the Commission's standards of decency available to a broadcaster is what can be gleaned from published NALs and forfeiture orders."[183]

Nevertheless, the court emphasized that Infinity had two alternative avenues of relief which it could pursue to circumvent these harms. First, the court stated that

> the broadcaster could stipulate the facts giving rise to the Notice of Apparent Liability and state that it will not pay the forfeiture unless ordered to do so in district court; the Commission could then forward the matter to the Department of Justice immediately, so that the broadcaster could get a trial on the merits of the forfeiture relatively quickly.[184]

A second alternative the court offered was that the broadcaster could bring a declaratory judgment action against the United States in district court.[185] The court stated "a broadcaster that refrains from airing material that is not indecent because of a legitimate fear . . . that it would be subject to a forfeiture should in this way be able to promptly dispel any unwarranted chilling effect."[186] Therefore, the court noted, a broadcaster is free to "prove up, in a specific case, the general claim that we adjudge deficient today."[187]

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177. *See Action for Children's Television*, 59 F.3d at 1262.
178. *See id.* at 1261-62.
179. *Id.* at 1260.
180. *Id.* at 1254.
181. *See id.* at 1255.
182. *See id.*
183. *Id.*
184. *Id.* at 1262.
185. *See id.*
186. *Id.*
187. *Id.*

2. Concurrence with Reservations: Judge Edwards

While essentially concurring with the majority opinion, Judge Edwards pointed out that the majority's reliance on *Pacifica* was misplaced.[188] Judge Edwards noted that *Pacifica* distinguished between the broadcast and cable media with respect to the application of the First Amendment.[189] This distinction, he stated, has "no place in our constitutional jurisprudence."[190]

However, Judge Edwards noted that Infinity's claim that the FCC's delay in enforcing the statute allowed action against it with no procedural safeguards to prevent infringement of its First Amendment rights, "implicitly assumes that the regulation itself is constitutionally permissible."[191] Judge Edwards agreed with the majority that Infinity simply could not prevail in this case because it had failed to demonstrate that nonindecent speech was being "chilled."[192]

3. Dissenting Opinion of Judge Tatel

Judge Tatel wrote that "the Commission's actual implementation of the statute is characterized by years of delay and a total lack of judicial review."[193] He noted that not one forfeiture order had ever been reviewed by a court, and the orders typically take between two to seven years before they get to court at all.[194] Judge Tatel further argued that it was unclear "how anyone could show that nonindecent speech is unaffected by the forfeiture scheme, since an impartial, independent Article III court has never evaluated any of the Commission's indecency decisions."[195]

Even so, the dissent noted, the unconstitutionality of the forfeiture scheme turns mainly on the fact that it harbors the same procedural inadequacies as the book commission's censorship scheme in *Bantam*.[196] Here, Judge Tatel observed, the FCC uses coercion and intimidation similar to, if not worse than, that used by the book

188. *See id.* at 1263 (Edwards, J., concurring).
189. *See id.* (Edwards, J., concurring).
190. *Id.* (Edwards, J., concurring).
191. *Id.* (Edwards, J., concurring).
192. *Id.* at 1263-64 (Edwards, J., concurring).
193. *Id.* at 1264 (Tatel, J., dissenting).
194. *See id.* (Tatel, J., dissenting).
195. *Id.* (Tatel, J., dissenting).
196. *See id.* (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963)). The Court in *Bantam* concluded that the Rhode Island book commission's scheme constituted informal censorship because of "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *Bantam*, 372

commission in *Bantam*.[197] "[T]he FCC threatens to increase fines, revoke licenses, and prevent acquisition[s] of additional stations."[198] Unlike the book commission in *Bantam*, Judge Tatel noted, the FCC controls the broadcaster's livelihood and its very existence.[199] He observed that losing a license can have catastrophic effects on a broadcaster, and a threat to revoke its license can affect the broadcaster's capital raising abilities.[200]

Judge Tatel cited *Bantam*, writing that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."[201] Here, Judge Tatel noted, the FCC is engaging in economic and regulatory coercion not because these broadcasts are indecent, but "because [the broadcaster] cannot get judicial review of the Commission's indecency determinations."[202]

Further, the dissent noted that because it is the censor's business to censor, the Supreme Court has consistently warned that administrative agencies tend to be less responsive than a court (which is an independent branch of government) to the constitutionally protected interests in free expression.[203] "When administrators have 'unbridled discretion' to suppress speech, prompt review is all the more critical to minimize 'the danger of censorship and of abridgement of our precious First Amendment freedoms.'"[204]

In addition, Judge Tatel observed that the Commission used and relied on unreviewed indecency determinations in order to impose increased penalties on broadcasters that air materials which the Commission had previously declared indecent.[205] The Commission's justification for such actions was that the past violations "'establish a pattern of apparent misconduct warranting the fine we set

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U.S. at 67. These procedures provided for no judicial guidance or determinations at any stage. *See id.* at 71.

197. *See Action for Children's Television*, 59 F.3d at 1264-65 (Tatel, J., dissenting).

198. *Id.* at 1264 (Tatel, J., dissenting). See *supra* notes 146-49 and accompanying text for a discussion of FCC tactics.

199. *See Action for Children's Television*, 59 F.3d at 1265 (Tatel, J., dissenting).

200. *See id.* at 1265-66 (Tatel, J., dissenting).

201. *Id.* at 1266 (Tatel, J., dissenting) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963)).

202. *Id.* (Tatel, J., dissenting).

203. *See id.* at 1265 (Tatel, J., dissenting) (quoting Freedman v. Maryland, 380 U.S. 51, 57-58 (1965)).

204. *Id.* (Tatel, J., dissenting) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 560 (1975)).

205. *See id.* (Tatel, J., dissenting).

today.'"[206]

Although the Commission told the broadcasters to learn what is "indecent" from the "'actions that are out there,'"[207] Judge Tatel noted that the Commission evaluated indecent material on a case by case basis.[208] Further, he observed that the Commission had also rejected the broadcasters' claims that the material it aired was not indecent because it was similar to material the FCC had previously decided *not* to sanction.[209]

Lastly, the dissent criticized the majority's alternative remedies, most notably its suggestion that the broadcaster could initiate a declaratory judgment action against the FCC in the district court.[210] This remedy, he emphasized, would shift the burden of proof onto the broadcaster. Quoting *Freedman v. Maryland*, Judge Tatel stated that "the government must bear 'the burden of instituting judicial proceedings, and of proving that the material is unprotected."[211]

IV. LEGAL ANALYSIS

In order to determine whether the procedural safeguards of First Amendment Procedural Review[212] are satisfied within the FCC's forfeiture enforcement scheme, the issue of whether or not the forfeiture scheme results in a prior restraint on speech must first be addressed. The majority opinion in *Action for Children's Television* concluded that although the FCC's forfeiture scheme contained many troubling aspects, most notably the lengthy delays before judicial review could be obtained,[213] the forfeiture scheme was not technically a prior restraint. It was instead, the majority

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206. *Id.* (Tatel, J., dissenting) (quoting *Letter to Rusk Corp.*, 8 F.C.C.R. 3228, 3229 n.3 (1993)).

207. *Id.* (Tatel, J., dissenting) (quoting Doug Halonen, *Marshall Defines Stance on Indecency*, ELEC. MEDIA, Jan. 15, 1990, at 136); *see also* LIPSCHULTZ, *supra* note 18, at 3 (arguing that a critical factor in determining indecent or obscene broadcasts is the "emergence of documented audience complaints." This, the author notes, makes it possible for a single listener, "armed with time and taping equipment," to cause broadcasters, such as Howard Stern who consistently "push the envelope," a lot of problems).

208. *See Action for Children's Television*, 59 F.3d at 1265 (Tatel, J., dissenting).

209. *See id.* (Tatel, J., dissenting).

210. *See id.* at 1266 (Tatel, J., dissenting).

211. *Id.* at 1266-67 (Tatel, J., dissenting).

212. See *supra* notes 133-36 and accompanying text for this standard of procedural due process review. See also *supra* Part II for a description of this standard and the cases from which it is derived.

213. See *supra* notes 50-51 and accompanying text for a discussion of these delays.

determined, a subsequent punishment,[214] and therefore constitutionally permissible.

This analysis will discuss the *Action for Children's Television* majority opinion's analysis of the forfeiture scheme with respect to its prior restraint effects, and will assert that the majority opinion was correct in its conclusion that the forfeiture scheme results in a subsequent punishment and not a prior restraint. However, this analysis will further assert that even though these forfeitures technically constituted subsequent punishments for past indecency violations, the dangers produced by the after-effects of these forfeiture orders constitute the functional equivalent of a prior restraint on protected speech, herein referred to as a "subsequent restraint."

After concluding that the FCC's forfeiture scheme, as applied, effects a subsequent restraint on a broadcaster's speech, this analysis asserts that the next step in First Amendment analysis should be taken—once a subsequent restraint has been found, a limited version of First Amendment Procedural Review should be applied.[215] In this context, such a review can be styled a "Subsequent Restraint Review." Because the restraint on expression herein is not technically a prior restraint, but rather a subsequent restraint, this lesser version of First Amendment Procedural Review should be applied, similar to that which the Supreme Court utilized in *Bantam*.[216] Specifically, the forfeiture scheme should be scrutinized under only one First Amendment Procedural Review factor—the enforcement scheme must contain adequate procedural safeguards, such as prompt judicial review, to ensure against the chilling of protected

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214. See *infra* Part IV.A.1 for a discussion of subsequent punishments.

215. The factors that comprise First Amendment Procedural Review are: (1) the governmental agency's procedural enforcement scheme must contain the most rigorous procedural safeguards available to ensure against abridgement of First Amendment rights; (2) these procedural safeguards must include prompt judicial review of the challenged material; and (3) the burden of proving that the expression is unprotected by the Constitution, along with the burden of instituting proceedings, must be on the censor. See *supra* notes 133-36 for a discussion of First Amendment Procedural Review.

216. See *supra* Part II.A for a discussion and analysis of the Supreme Court's plurality decision in *Bantam*. Although the *Bantam* Court characterized the Commission's actions as prior restraints, the device utilized by the Commission was technically a subsequent punishment, with after-effects sufficiently dangerous to constitute the functional equivalent of a prior restraint. Therefore, this analysis argues that the one element of First Amendment Procedural Review mandated by the Supreme Court in *Bantam*, which sufficed to determine the constitutionality of a prior restraint in that case, should be used in *Action for Children's Television* as well; namely, rigorous procedural safeguards must be present to ensure against the suppression of protected speech, such as prompt judicial review. See *infra* Part IV.A.3 for a discussion of the *Bantam* Court's characterization of the Commission's actions.

speech. Additionally, this analysis argues that the court's suggestion that Infinity could pursue two alternative remedies in order to circumvent the harm of the delay in judicial review—stipulate the facts and refuse to pay the forfeiture or bring a declaratory judgment[217]—are not viable alternatives for a broadcaster to pursue.

A. *Prior Restraint or Subsequent Punishment?*

1. The FCC's Forfeiture Orders are Indeed "Subsequent Punishments" and Not "Prior Restraints" On Speech

In order to apply First Amendment Procedural Review[218] to the FCC's forfeiture enforcement scheme, an initial determination that the scheme effects a prior restraint on speech must be made. The forfeiture must not simply be a subsequent punishment for past conduct, but a prior restraint in that it bars speech in the future.[219] The line between subsequent punishments and prior restraints can be difficult to determine and is often blurred.[220] The Supreme Court, however, had an opportunity to more clearly articulate its theory of the distinction between these two devices in *Alexander v. United States*.[221]

a. The Alexander *decision*[222]

The facts of *Alexander* centered around a defendant who owned numerous businesses which dealt with sexually explicit

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217. See *supra* notes 184-87 and accompanying text for a discussion of the two alternative remedies the court discusses.

218. See *supra* notes 133-36 for a discussion of this standard of review.

219. See *infra* notes 230-35 and accompanying text for a discussion of the distinction between prior restraints and subsequent punishments.

220. *See* Scordato, *supra* note 91, at 8.

> The distinction [between prior restraints and subsequent punishments], as developed thus far, fails to provide a means of identifying a category of potentially speech-suppressive government activities that is in any way meaningful for First Amendment purposes . . . . [N]early all laws, by their nature and purpose, are designed to influence human behavior prior to its actual occurrence . . . . After-the-[f]act sanctions are employed in the law largely to restrain members of the regulated community from engaging in that act again in the future.

Id. at 8-9 (citations omitted).

221. 509 U.S. 544 (1993). Although *Alexander* was not cited by any of the opinions in *Action for Children's Television*, it is included here because it is illustrative of the distinction the Supreme Court makes between subsequent punishments and prior restraints.

222. *See id.*

materials.[223] He was convicted of seventeen obscenity counts and three counts of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO").[224] In addition to imposing a prison term and fine, the district court ordered the defendant to forfeit certain assets directly related to his racketeering activity.[225] The defendant appealed the forfeiture order, arguing that this forfeiture violated the First Amendment.[226] The court of appeals affirmed the district court ruling, finding that the forfeiture order was a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities and not a prior restraint on speech.[227]

The defendant appealed to the United States Supreme Court, contending that the forfeiture in this case constituted an unconstitutional prior restraint on speech and not a permissible criminal punishment.[228] The defendant claimed that the "forfeiture of expressive materials and assets of business[es] engaged in expressive activity . . . operate[s] as a prior restraint because it prohibits [future sales of the confiscated materials]."[229]

The Supreme Court disagreed. The Court reasoned that "[t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'"[230] In this case, the Court pointed out that defendant's forfeiture did not forbid him from engaging in any expressive activities in the future, and it did not require him to obtain prior approval for expressive activities.[231] The forfeiture order imposed no legal impediment to defendant's ability to engage in any expressive activity, because he could buy new inventory and resume selling the sexually explicit

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223. *See id.* at 546.

224. *See id.* The obscenity convictions were based upon the jury's findings that four magazines and three videotapes sold at several of defendant's stores were obscene, and served as the predicates for his three RICO convictions. *See id.*

225. The Court ordered the defendant to forfeit his wholesale and retail business, as well as almost $9,000,000 in cash, which he had acquired through racketeering activity. *See id.* at 548.

226. *See id.*

227. *See* Alexander v. Thornburgh, 943 F.2d 825, 834 (8th Cir. 1991).

228. *See Alexander*, 509 U.S. at 549.

229. *Id.*

230. *Id.* at 550 (citations omitted). Classic examples of prior restraints are refusals to issue permits necessary to permit speech or expressive activities, or a pre-publication review where a decision is made to refuse permission to print an article. *See id.*

231. *See id.* at 550-51.

materials.[232]

The forfeiture here was a punishment for past criminal conduct,[233] not a prior restraint on speech.[234] The Court concluded that the defendant's proposed definition of the term prior restraint would "undermine the time-honored distinction between barring speech in the future and penalizing past speech."[235] The defendant cannot, the Court stated, prevail by simply arguing that the forfeiture "chills" free expression by deterring others from engaging in protected speech, because the threat of a forfeiture has no more chilling effect on free expression than the threat of a prison term or a large fine.[236]

b. Alexander *applied to the FCC forfeiture enforcement scheme*

The court of appeals in *Action for Children's Television* noted that Infinity, although excessively fined by the FCC for what it considered to be "indecent" broadcasts, was essentially free to air what it wished.[237] Only if the FCC considered what it aired to be a violation of its indecency standards did a penalty result.[238] According to the Court in *Alexander*, this violation is a subsequent punishment because it occurs after the fact, not prior thereto.[239]

As in *Alexander*, Infinity was being penalized for past expressive actions, not for future speech. A subsequent punishment for the broadcast of speech is constitutionally permissible, whereas a prior restraint on the broadcast of speech is a violation of the First Amendment[240] if it does not contain the procedural safeguards inherent in First Amendment Procedural Review.[241] Therefore, the majority in *Action for Children's Television* reasoned, since no prior restraint on First Amendment freedoms was being utilized, Infinity's claim for relief was denied.[242]

The D.C. Circuit was correct in its determination that the

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232. *See id.* at 551.

233. The defendant had a full criminal trial on the merits of the RICO charge, wherein the government established beyond a reasonable doubt the basis for the forfeiture. *See id.* at 552.

234. *See id.* at 553.

235. *Id.*

236. *See id.* at 556.

237. Action for Children's Television v. FCC, 59 F.3d 1249, 1261 (D.C. Cir. 1995).

238. *See id.*

239. *See id.*

240. *See* Alexander v. United States, 509 U.S. 544, 553 (1993).

241. See *supra* notes 133-36 and accompanying text for details of this standard.

242. *See Action for Children's Television*, 59 F.3d at 1260.

FCC's forfeiture scheme does not technically constitute a prior restraint on speech. The forfeitures were not levied in advance of the broadcasts, thus forbidding the communications from occurring. Rather, the forfeitures punished the broadcaster for past, allegedly indecent broadcasts, and did not technically forbid the broadcaster from engaging in any expressive activities in the future.[243] The forfeitures imposed as punishment for past conduct in *Action for Children's Television* are comparable to the forfeitures imposed in *Alexander* for past criminal conduct. In neither case were the forfeitures an express bar to any future expressive activity.

2. Prior Restraints Can Be Created as a Result of Subsequent Punishments

Although the D.C. Circuit was correct in its finding that the forfeitures imposed upon Infinity by the FCC were subsequent punishments and not prior restraints, the court erred in limiting its focus to the actual punishment imposed at the time the forfeiture was issued, rather than focusing on the after-effects that the punishment imposes upon the broadcaster. For example, while the forfeiture penalty itself may indeed be constitutionally permissible, the length of the delay[244] which the broadcaster must endure in order to ob-

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243. See *supra* notes 144-47 and accompanying text for a discussion of the forfeiture fines levied on Infinity Broadcasting, Inc. in *Action for Children's Television*.

244. According to the *Bantam* and *Freedman* Courts, the period of time between the issuance of the complaint and judicial review should be prompt. *See* Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Exactly what constitutes a reasonably "prompt" period of time has been discussed not only by the United States Supreme Court, but by several courts of appeals as well. Collectively, these cases establish that a wait as lengthy as five years for judicial review is not reasonable. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975), the Supreme Court indicated that a five month wait for effective judicial review on the merits was not reasonable, and could not constitute "prompt" judicial review. In *U.S. v. Thirty-Seven Photographs*, 402 U.S. 363, 372-74 (1971), the Supreme Court held that a three month delay for judicial review was unacceptable, as it was not reasonably "prompt."

Recent courts of appeals cases seem to have agreed with the Supreme Court's determination of permissible length of delay. In *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995), the United States Court of Appeals for the Sixth Circuit stated "[a]lthough the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible." In *11,126 Baltimore Boulevard, Inc. v. Prince George's County*, 32 F.3d 109 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit held that an eight month wait for judicial review was not a reasonably prompt period of time for an adult bookstore to wait after challenging the constitutionality of regulations restraining its operations. The court stated "[w]e do not believe that the length of this delay can be considered the type of brief specified period followed by prompt judicial review required to guard against the abridgement of protected speech." *Id.* at 117.

tain judicial review amounts to a prior restraint on speech.[245] Because the FCC will increase the fine imposed for any subsequent indecency violation, the broadcaster is estopped from airing the challenged material until it receives judicial review or risk increased forfeitures.[246]

In order to receive judicial review under the enforcement scheme as it stands today, however, the broadcaster will likely wait as long as five years from the time a program was aired to its first opportunity for judicial review.[247] As a result, the broadcaster remains unsure of the status of the challenged material for up to seven years, which could certainly result in the "chilling" of protected speech. This creates a risk that nonindecent speech will be suppressed for indefinite periods of time prior to any judicial determination.[248]

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245. See *supra* notes 50-51 and accompanying text for description of the delays inherent in the FCC's enforcement scheme. The FCC forfeiture enforcement scheme, once implemented against a broadcaster, proves so onerous and delay-ridden that broadcasters invariably pay the forfeiture fine rather than submit to such a lengthy, grueling and costly procedure in order to receive a judicial determination of the material. It is inevitable that broadcasters, when faced with such a scheme, choose to err on the side of caution and broadcast only that material which it is certain will not be deemed indecent.

246. See *supra* Part I.A-C for a discussion of the FCC's forfeiture enforcement scheme.

247. *See Action for Children's Television*, 59 F.3d at 1254. See also *supra* notes 50-51 for a discussion of the delays inherent in the FCC forfeiture enforcement scheme. Although, as the majority in *Action for Children's Television* pointed out, the broadcaster could institute a declaratory judgment action in federal district court and thereby receive a full adjudication on the merits, the broadcaster must wait to do so until the FCC issues the actual NAL. See *supra* notes 33-37 and accompanying text for a discussion of the process by which an NAL is issued. The NAL is the Commission's determination that in fact an indecent broadcast has occurred, and can take as long as twenty-three months from the date of the broadcast to issue. *See supra* note 50. Therefore, if the broadcaster chooses to initiate court proceedings by filing a declaratory judgment, it must nevertheless wait up to twenty-three months before doing so, and during that time cannot re-broadcast the disputed material without incurring additional fines. See *supra* notes 39-40 for a discussion of the additional fines which can be placed upon broadcasters for subsequent airings of disputed materials while awaiting judicial adjudication. Furthermore, the filing of a declaratory judgment by the broadcaster will unduly shift the burden of proof onto the broadcaster—a circumstance proscribed by First Amendment Procedural Review, which insists that the burden of proof be on the censor. See *infra* Part IV.C for a discussion of the declaratory judgment remedy for a broadcaster. Because of the likelihood of such a shift in the burden of proof, a broadcaster may be understandably hesitant to pursue the declaratory judgment remedy, in which case it could be forced to wait up to seven years for judicial review.

248. *See* Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005, 1012 (4th Cir. 1995) (holding that an ordinance that lacked specific time limits for judicial decision on the merits did not provide for prompt judicial review and was therefore unconstitutional under *Freedman*); Redner v. Dean, 29 F.3d 1495, 1503 (11th Cir. 1994) (holding

The FCC's enforcement scheme, however, has other, even greater adverse effects on broadcasters which result, collectively, in the functional equivalent of a prior restraint on speech. The FCC, for example, uses threats, intimidation, and coercion in its attempts to collect forfeiture fines by threatening to revoke a broadcaster's license.[249] A broadcaster cannot operate its business without a license to do so, nor can it continue to broadcast even fully protected speech. The impact that the threat of revocation would have upon a broadcaster's ability to not only operate its business, but raise capital as well, would be catastrophic.[250]

Furthermore, the FCC can thwart a broadcaster's attempted economic development by acts such as blocking proposed acquisitions of additional stations.[251] Faced with such threats, the broadcaster inevitably acquiesces and pays the fine in order to free itself from the possibility of such penalties.[252] The *Action for Children's Television* court refused to find that these FCC "tactics" exemplified a system resulting in technical prior restraints on expression. Instead, the court of appeals held that these tactics constituted a constitutionally permissible subsequent punishment.

By contrast, the Supreme Court in *Bantam* acknowledged the existence of tactics used by the book commission that were similar to those used against Infinity by the FCC, and labeled them prior

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that an ordinance regulating nude dancing in adult entertainment establishments was violative of the First Amendment in that it imposed prior restraints without providing for prompt judicial review); *see also* Riley v. National Fed'n of the Blind, 487 U.S. 781, 802 (1988) (holding that a licensing scheme that failed to provide for definite limitations on the time within which the licensor must issue the license was constitutionally repugnant).

249. See *supra* notes 197-202 and accompanying text for a description of the FCC's tactics and the effects they have on broadcasters. *See also* Goldsamt, *supra* note 45, at 205 (arguing that tactics by the FCC—the excessive fining of broadcasters and threats to revoke broadcasters' licenses—suggest the need for a new defense to be used by the broadcaster, similar to selective prosecution defenses recognized by courts in the criminal context).

250. *See Action for Children's Television*, 59 F.3d at 1265-66.

251. See *supra* notes 146-49 and accompanying text for discussion of the FCC's attempt at blocking Infinity's acquisition of another station.

252. *See Action for Children's Television*, 59 F.3d at 1255. The FCC suggests that broadcasters look to previously published NALs and forfeiture orders for guidance to determine its standard of indecency. *See id.* at 1254-55. However, none of these NAL determinations or forfeiture orders have been reviewed by a court of law. The court in *Action for Children's Television* indicated that the plaintiffs had failed to make a showing that the delay in providing judicial review "chills" protected as well as indecent speech. *See id.* at 1261-62. However, because no forfeiture has ever been the subject of a judicial determination, it is impossible for the broadcasters to affirmatively show that protected speech is being chilled. *See id.* at 1254.

restraints on expression.[253] The *Bantam* Court found that the book commission's use of threats, invoking legal sanctions, and other means of coercion, intimidation and persuasion constituted a system of prior restraints.[254] Although the publishers were free to ignore the book commission's notices, the Court stated that their threats constituted informal censorship.[255]

The court of appeals in *Action for Children's Television*, however, declined to follow the Supreme Court's reasoning in *Bantam*, instead arguing that the FCC's actions did not constitute a technical prior restraint on speech.[256] The Supreme Court's holding in *Bantam* appears to be contrary to the doctrine of prior restraint because the penalties imposed upon the publishers did not prohibit them from distributing expressive materials, but instead threatened punishment after the distribution of such materials. Although the *Bantam* holding would seem to be technically inaccurate, especially in the wake of the *Alexander* decision, the holding appears to evidence a desire by the Supreme Court to acknowledge and protect against the dangers of a subsequent punishment when its effects result in a functional prior restraint scheme.[257] While a technical prior restraint did not exist in *Bantam*, the Court acknowledged the need to protect against the dangers that were created as a result of the subsequent punishment imposed upon the distributors. The *Bantam* holding illustrates the fact that "functional" prior restraints, herein termed subsequent restraints, can be created as a result of subsequent punishments.

Although an individual forfeiture order imposed upon a broadcaster may be a subsequent punishment and not a technical prior restraint, the FCC's forfeiture enforcement scheme in its entirety results in a subsequent restraint on speech, as did the book commission's activities in *Bantam*.[258] The delay in judicial review, and its subsequent effects on a broadcaster's behavior during the period of

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253. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1962).

254. *See id.* at 67. See also *supra* Part II.A for a discussion of the *Bantam* Court's holding.

255. *See Bantam*, 372 U.S. at 68.

256. *See Action for Children's Television*, 59 F.3d at 1261.

257. See *supra* Part II.A for a discussion of the *Bantam* Court's holding.

258. *See* Scordato, *supra* note 91, at 33 (arguing that "[i]n those cases in which government conduct violates the First Amendment even if not found to be a prior restraint on speech, the Court's reliance on the prior restraint doctrine to invalidate the conduct leaves open the possibility that the same speech suppressive activity might be found unconstitutional if sufficiently redesigned and recast in the form of a subsequent [punishment].").

time between the imposition of the first forfeiture and the eventual judicial review impermissibly restrains speech that may be protected by the First Amendment. The Supreme Court in *Bantam* recognized that when such a situation is present, protection needs to be offered the person being censored, and a standard of review to determine the constitutionality of the restraint needs to be applied.[259]

3. Alternative Standard for Determining When a Prior Restraint Exists

The majority in the *Action for Children's Television* case was correct in its determination that the FCC's forfeiture enforcement scheme was not technically a prior restraint based upon Supreme Court precedents.[260] However, the dangers inherent in such a scheme, detailed above, are quite serious in nature and yet there is no protection whatsoever offered against them.

According to the current standards for prior restraint review,[261] it is an "all or nothing" situation—if the FCC subjects a broadcaster to a prior restraint, it will receive full First Amendment protection. If, however, there is no "technical" prior restraint affecting the broadcaster's programming, yet the actions being taken against the broadcaster result in the chilling of possibly protected speech, the broadcaster is afforded no constitutional protection.

When the dangers that exist in a typical prior restraint case[262] exist in a case where a prior restraint does not "technically" exist, there should be in place a standard of protection that will ensure that the danger of infringement upon First Amendment rights is not allowed to flourish. A new approach is called for in such situations, an approach that recognizes that in the broadcast medium prior restraints may be effected in ways that would typically be labeled subsequent punishments,[263] yet their results (the chilling of possibly protected speech) are the same as the imposition of a prior restraint. In these cases, instead of offering no protection against the

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259. *See Bantam*, 372 U.S. at 66.

260. *See* Alexander v. United States, 509 U.S. 544 (1993); FCC v. Pacifica Found., 438 U.S. 726 (1978); Freedman v. Maryland, 380 U.S. 51 (1965). Because the *Bantam* Court found a prior restraint where one technically did not exist, the *Action for Children's Television* decision could not have been based upon this Supreme Court precedent.

261. See *supra* note 91 for a discussion of the prior restraint doctrine.

262. See Part IV.A.2 for a description of these dangers.

263. See *supra* notes 229-34 and accompanying text for a description of the term "subsequent punishment."

infringement of First Amendment rights, courts should apply an analysis similar to the one it uses for prior restraint review: a Subsequent Restraint Review.

Under this new standard of review, the court should begin with the determination that, although the broadcaster is technically faced with the imposition of a subsequent punishment for a previously aired program, the effects of the subsequent punishment result in a subsequent restraint on the broadcaster's freedom of speech.[264] Once the court makes this initial determination, it should then examine the forfeiture scheme under a modified version of First Amendment Procedural Review,[265] such as that utilized by the Supreme Court in *Bantam*.[266] Under this modified standard of review, the court must determine whether there are rigorous procedural safeguards in place, such as prompt[267] judicial review, to ensure against the infringement of First Amendment protections.[268] If this factor is satisfied, the subsequent restraint is constitutionally permissible. If, however, this factor is not satisfied,

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264. See *supra* Part IV.A.2 for a discussion of how such a determination is made.

265. See *supra* notes 133-36 and accompanying text for a description of the First Amendment Procedural Review standard.

266. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1962). In *Bantam* the Supreme Court stated that in order for the book commission's enforcement scheme to be constitutionally permissible, it must contain the most rigorous procedural safeguards, such as judicial review, to ensure against the chilling of protected expression. *See id.* Therefore, in *Bantam*, when dealing with a functional prior restraint, the Supreme Court required merely the satisfaction of one of the First Amendment Procedural Review factors—prompt judicial review. The *Freedman* Court later expanded this test, adding the additional two factors to First Amendment Procedural Review, to be utilized when dealing with a technical prior restraint.

Because *Action for Children's Television* deals with a functional prior restraint, as did *Bantam*, solely the factor of "prompt judicial review," derived from the *Bantam* holding, comprises the modified version of First Amendment Procedural Review, to be utilized when dealing with subsequent restraints.

267. Some constitutional theorists advocate permitting *no* restraint whatsoever before judicial review is provided, arguing that the proper construction of the prior restraint doctrine focuses exclusively on the issue of providing a full and fair judicial hearing prior to any abridgement of First Amendment rights. *See, e.g.*, Martin H. Redish, *The Proper Role of Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 79 (1984) (arguing that emphasizing the need for prompt judicial review "totally disregards the harm resulting from the interim invasion of the free speech right caused by an administrative restraint prior to even the promptest judicial review[;] . . . [no] form of administrative prior restraint [ ] should ever be deemed constitutionally valid").

268. *See Bantam*, 372 U.S. at 71. The Supreme Court's test for the constitutionality of a functional prior restraint was solely this factor of First Amendment Procedural Review. The Court in *Freedman* then expanded this test for application when dealing with a technical prior restraint. *See supra* note 266 for a discussion of this "expansion."

such as in *Action for Children's Television*,[269] the subsequent restraint fails Subsequent Restraint Review, and is an unconstitutional restraint on First Amendment freedom of speech.[270]

a. Subsequent Restraint Review standard examined

The choice of prompt judicial review as the crucial requirement for subsequent restraint review is rooted in the important distinctions between administrative agencies and courts of law. In *Freedman*, the Court noted, "[b]ecause the censor's business is to censor, there is the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression."[271] The *Freedman* Court indicated that it was preferable to have First Amendment claims determined by a court of law, rather than a governmental agency,[272] because "only a judicial determination . . . ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."[273]

The reasons behind the *Bantam* and *Freedman* Court's preference for judicial determinations rest on two basic premises. First, federal and many state judges are free from political pressures because of their long judicial tenures.[274] FCC Commissioners, by contrast, are politically motivated and driven.[275] Therefore, an agency

269. The FCC enforcement scheme contained no procedural safeguards to ensure against the suppression of constitutionally protected speech, and did not provide for prompt judicial review. See *supra* Part I.A-C for a discussion of the FCC's forfeiture enforcement scheme.

270. Not all prior restraints on speech are unconstitutional. Only when a prior restraint lacks adequate procedural safeguards to ensure against the suppression of protected speech is the restraint unconstitutional. *See* Freedman v. Maryland, 380 U.S. 51, 60 (1965).

271. *Freedman*, 380 U.S. at 57-58.

272. Due to the fact that the broadcast medium is afforded lesser First Amendment protection than other mediums of expression, the FCC is allowed greater discretion in passing upon the indecency of speech. See *supra* notes 81-84 and accompanying text for a discussion of the First Amendment protection afforded the broadcast medium. Therefore, agency administrators, instead of courts of law, initially pass upon the broadcaster's First Amendment claims. While most administrative agencies provide a claimant with an internal agency adjudicative process before an administrative law judge, the forfeiture enforcement scheme does not provide the broadcaster with such an opportunity. *See* STRAUSS, *supra* note 45, at 45. The determination of the "indecent" content of the broadcast by the FCC is made solely by the Commission members. See *supra* notes 38-41 and accompanying text for a discussion of the procedures utilized by the Commission members in making indecency determinations.

273. *Freedman*, 380 U.S. at 58.

274. *See* Monaghan, *supra* note 85, at 522.

275. *See* Tananbaum, *supra* note 127, at 1825; Redish, *supra* note 267, at 76-77.

censor will adjust the definition of "indecent" broadcasts not only along with the current societal definition of such terms, but along with the politics of the current administration. By contrast, judges take an impartial view, and consider the long term effects their decisions will have on society.[276]

Second, an agency administrator, whose duty it is to root out and dispose of "indecent" or "obscene" material, becomes an "expert" authorized to restrain and prohibit speech, with a tendency to lean invariably toward restraint.[277] "They cannot be relied on to be sensitive to first amendment concerns because their very reason for existence is rooting out violations of the statutory schemes they are mandated to enforce."[278] Therefore, judges are more sympathetic and more impartial than administrative agencies, and thus are more well-suited to protect the constitutional interests of free expression.[279]

b. Application of Subsequent Restraint Review to the FCC forfeiture enforcement scheme

Under the analysis presented in the prior section, the FCC's forfeiture enforcement scheme can only be constitutional if it provides for prompt judicial review, and thus satisfies Subsequent Restraint Review. Although the FCC's forfeiture enforcement scheme does not specifically provide for judicial review in any particular provision of its regulatory scheme,[280] the *Action for Chil-*

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276. *See* Monaghan, *supra* note 85, at 523; *see also*, Tananbaum, *supra* note 127, at 1825 ("[C]ourts take a broader, more sympathetic view [than administrators] . . . . This makes judges, at least presumptively, more impartial.").

277. *See* Monaghan, *supra* note 85, at 523; *see also* Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 659 (1955) ("The function of the censor is to censor. He has a professional interest in finding things to suppress."); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 422 (1983) ("Persons who choose to fill [the role of administrator] may well have psychological tendencies to overstate the need for suppression . . . . [T]here are powerful institutional pressures to justify one's job, and ultimately one's own importance by exaggerating the evils which suppression seeks to avoid."); Scordato, *supra* note 91, at 22-23 (arguing that judges should be the preferred decision makers because they will be relatively more risk-averse in their decision making).

278. Tananbaum, *supra* note 127, at 1825 (discussing Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

279. *See id.* For an in depth treatment of the FCC and both its broad indecency standard and broad powers, see Paul J. Feldman, *The FCC and Regulation of Broadcast Indecency: Is There a National Broadcast Standard in the Audience?*, 41 FED. COMM. L.J. 369 (1989).

280. In fact, the first opportunity for judicial review under the FCC forfeiture enforcement scheme is when the United States Attorney files suit against the broadcaster to enforce a forfeiture order which the broadcaster refuses to pay. The delay

dren's Television majority argued that this review is available through two alternative remedies that a broadcaster may pursue in order to expedite judicial review.[281] First, the broadcaster could stipulate the facts giving rise to the NAL, and refuse to pay the forfeiture unless the district court orders it to do so. The Commission could then immediately forward the case to the Department of Justice so that the broadcaster would quickly receive a trial on the merits of the forfeiture.[282]

While this remedy may satisfy one of the First Amendment Procedural Review factors—that the burden of proof remain on the censor, it fails the one other crucial factor which must be satisfied when utilizing Subsequent Restraint Review—the judicial review must be *prompt*. This remedy depends upon the FCC's ability to "immediately" forward the case to the United States Attorney, and the Department of Justice's willingness to then act quickly. The FCC has shown its inability to expedite such matters, and it would be unwise to believe that it would move more quickly in such an instance than it normally does. As Judge Tatel observed, "I do not think this offers broadcasters much relief since it completely depends on the willingness of two different agencies to expedite their actions."[283]

Second, the court suggested that if the FCC does not cooperate in a broadcaster's attempt at the first remedy, a broadcaster "'suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding . . . could bring a declaratory judgment action against the United States in the district court.'"[284] This approach, the majority reasoned, should promptly dispel any unwarranted "chilling" effects on speech.[285]

There are two distinct problems with the majority's reliance on this remedy. First, although the broadcaster will receive a full adjudication on the merits once the declaratory judgment action is

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between the initial notification by the FCC to the broadcaster of its determination that a broadcast was indecent, and the actual filing by the United States Attorney to enforce the order could be as long as five years. See *supra* notes 50-52 for a discussion of the length of delay inherent in the FCC's forfeiture enforcement scheme.

281. *See* Action for Children's Television v. FCC, 59 F.3d 1249, 1262 (D.C. Cir. 1995). See *supra* notes 184-85 and accompanying text for a discussion of these remedies.

282. *See Action for Children's Television*, 59 F.3d at 1262; *supra* note 184 and accompanying text.

283. *Action for Children's Television*, 59 F.3d at 1266 (Tatel, J., dissenting).

284. *Id.* at 1262 (quoting Pleasant Broad. Co. v. FCC, 564 F.2d 496, 502 (1977)).

285. *See id.*

heard, the broadcaster must wait up to twenty-three months[286] in order to file such an action.[287] Because the FCC is under no technical time constraints within which it must issue a NAL to a broadcaster, the broadcaster must wait an undetermined length of time in order to discover if a NAL will be issued against it. During that period of time, the broadcaster has been put on notice that it has aired a "questionable" broadcast.[288] Although there has been no formal notice issued to the broadcaster that the broadcast indeed contained indecent material, the broadcaster must refrain from any subsequent broadcasts of the disputed material or be subject to additional forfeiture fines.[289] The delay the broadcaster must face in obtaining judicial review of the subject material can potentially be significant (up to five years),[290] and is certainly contrary to the *Bantam* Court's recitation that the judicial review must necessarily be "prompt."[291]

The second problem with the declaratory judgment remedy is that, thus far, it has not been tested as a viable remedy by broadcasters who wish to challenge FCC indecency rulings. Therefore, because this device has not yet been utilized in the courts by broadcasters in relation to the FCC forfeiture enforcement scheme, a broadcaster cannot be certain that a court would allow its declaratory judgment action to proceed. Typically, courts uphold administrative schemes and may likely prevent such an attempt by a broadcaster to circumvent the normal administrative process.[292]

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286. See *supra* note 244 for a discussion of case law defining the parameters of "prompt" judicial review. While neither the Supreme Court nor the circuit courts of appeals have expressly defined "prompt" judicial review, their decisions discussing what constitutes an unreasonable delay have disapproved of delays much shorter than those inherent in the FCC forfeiture scheme, typically ranging from three to eight months in length.

287. See *supra* note 50 and accompanying text for a discussion of the length of time a broadcaster must wait before a NAL is issued from the FCC declaring the broadcast indecent under the FCC indecency standards. See also *supra* note 244 for a discussion of the meaning of the term "prompt."

288. The broadcaster is sent a LOI indicating that the broadcast is under investigation for possible indecency violations. See *supra* Part I.A-B for a discussion of the LOI and NAL process.

289. See *supra* notes 54-55 and accompanying text for a discussion of these additional fines.

290. *See* Action for Childrens Television v. FCC, 827 F. Supp. 4, 8 (D.D.C. 1993).

291. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1962). See also *supra* note 244 for a discussion of what constitutes a reasonably "prompt" period of time to wait for judicial review.

292. See *infra* note 296 for a discussion of the reasons why courts are reluctant to allow plaintiffs to circumvent administrative schemes.

Reasons for the courts' preference for exhaustion of administrative schemes are several. First, upholding the administrative scheme carries out the legislative intent in granting such authority to the agency.[293] Second, it protects the agency's autonomy.[294] Third, it aids judicial review, in that it allows the parties to develop the facts during the agency proceeding.[295] Lastly, it promotes judicial economy.[296] A court could easily prevent this circumvention a number of ways. For example, a court could insist the broadcaster's claim lacks ripeness[297] due to a failure to exhaust administrative remedies. Furthermore, a court could cite other "technicalities," such as jurisdiction, to strike down a broadcaster's attempt at pursuing a declaratory judgment.[298] Because both of these alternative remedies proposed by the *Action for Children's Television* majority contain substantial risk to the broadcaster, these remedies are not viable options for the broadcaster to pursue.

Therefore, the *Action for Children's Television* majority erred in its conclusion that the filing of a declaratory judgment action by a broadcaster would prevent the imposition of prior restraints on the broadcast medium. Scrutinizing the FCC forfeiture enforcement scheme under the sole requirement of Subsequent Restraint Re-

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293. *See* Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

294. *See id.*

295. *See id.*

296. *See id.* In *Andrade*, the United States District Court for the District of Columbia stated that:

> The exhaustion [of administrative remedies] requirement serves four primary purposes. First, it carries out the congressional purpose in granting authority to the agency by discouraging the "frequent and deliberate flouting of administrative processes [that] could . . . encourag[e] people to ignore its procedures." Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the agency proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.

Id. at 1484 (citation omitted); *see also* McCarthy v. Madigan, 503 U.S. 140, 145 (1992) (holding that exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency"); McKart v. United States, 395 U.S. 185, 193-95 (1969) (summarizing functions of exhaustion of administrative remedies doctrine); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 730 (3d ed. 1988).

297. *See* Schlesinger v. Councilman, 420 U.S. 738, 756-57 (1975) (holding that, as a general rule, one must exhaust administrative procedures available before an order is ripe for review by a federal court).

298. See *supra* note 296 for a discussion of the reasons courts will not typically allow this circumvention around administrative schemes.

view, it is clear that unless this scheme can provide for prompt judicial review, and the FCC takes clear steps to ensure that this review is received within a "reasonably prompt" period of time, the scheme itself is unconstitutional.

CONCLUSION

Although the majority in *Action for Children's Television* was correct, as a technical matter, in labeling the forfeiture penalties themselves as subsequent punishments and not prior restraints on speech, the majority erred in refusing to consider the after-effects that the forfeitures and the enforcement scheme in its entirety have upon the broadcaster. When the dangers produced by these after-effects constitute a subsequent restraint on speech, a new, modified version of First Amendment Procedural Review should be applied: a Subsequent Restraint Review.

When analyzing the constitutionality of a prior restraint on expression, the Supreme Court has created a three-part test, herein termed First Amendment Procedural Review. This test requires: (1) a government agency's enforcement scheme must contain the most rigorous procedural safeguards available to ensure against abridgement of First Amendment protections; (2) these procedural safeguards must include prompt judicial review of the challenged material; and (3) the burden of proving that the expression is unprotected by the Constitution, as well as the burden of instituting proceedings, must be on the censor.

However, when analyzing the constitutionality of a subsequent restraint on expression, a modified version of First Amendment Procedural Review, herein termed Subsequent Restraint Review, should be utilized. This review is comprised solely of one First Amendment Procedural Review factor—there must be rigorous procedural safeguards in place to ensure against the infringement of First Amendment protections; namely, prompt judicial review.

Because the FCC forfeiture enforcement scheme effects a subsequent restraint on expression, rather than a technical prior restraint, the scheme should be scrutinized under the sole factor of Subsequent Restraint Review. Specifically, the enforcement scheme will be deemed constitutional if it provides for prompt judicial review.

The FCC forfeiture enforcement scheme does not provide for prompt judicial review. The delay the broadcaster must face in obtaining judicial review can be up to five years. During that period

of time, the broadcaster has been put on notice that it has aired a "questionable" broadcast. The broadcaster must refrain from any subsequent broadcasts of the disputed material, or be subject to additional forfeiture fines. Therefore, the length of the delay, coupled with the chilling effect on possibly protected speech which the forfeiture has upon the broadcaster, constitutes an unconstitutional subsequent restraint on speech.

Christine C. Peaslee