THE DIRTY WORDS YOU CANNOT SAY ON TELEVISION: DOES THE FIRST AMENDMENT PROHIBIT CONGRESS FROM BANNING ALL USE OF CERTAIN WORDS?

STEPHANIE L. REINHART

To counter the indecent and profane language currently being used on television and radio, Representative Doug Ose of California proposed the Clean Airwaves Act which, if enacted, would punish television and radio broadcasters for airing eight specific words and phrases deemed to be profane, regardless of the context used by the speaker. In this note, the author takes issue with this legislation and questions its validity under the First Amendment.

In order for the Clean Airwaves Act to be constitutional under the First Amendment, it must regulate unprotected speech. Both obscene and indecent speech are types of unprotected speech. Indecent speech, on the other hand, receives some First Amendment protection.

The author argues that the Act seeks to regulate protected speech, and thus is unconstitutional.

> [T]he foolish and wicked practice of profane cursing and swearing . . . is a vice so mean and low . . . that every person of sense and character detests and despises it.[1]
>
> In certain trying circumstances . . . profanity furnishes a relief denied even to prayer.[2]

1. General Order from George Washington to the Continental Army (Aug. 3, 1776), *in* 5 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, at 551 (Philander D. Chase ed., 1993).

2. Mark Twain, *quoted in* 1 ALBERT BIGELOW PAINE, MARK TWAIN, A BIOGRAPHY: THE PERSONAL AND LITERARY LIFE OF SAMUEL LANGHORNE CLEMENS 213–14 (1912). Paine wrote:

> A word here about Mark Twain's profanity. . . . [S]omehow his profanity was seldom an offense. It was not mere idle swearing; it seemed always genuine and serious. His selection of epithet was always dignified and stately, from whatever source—and it might be from the Bible or the gutter. . . . When he had blown off he was always calm, gentle, forgiving, and even tender. Once following an outburst he said, placidly, "In certain trying circumstances, urgent circumstances, desperate circumstances, profanity furnishes a relief denied even to prayer."

Id. at 214.

I. INTRODUCTION

Perhaps no invention has so profoundly revolutionized the American way of life as the television. Since its introduction in 1926,[3] the television has found its way into the homes of almost all Americans.[4] Since the 1950s, when the television became popular in American homes,[5] it has changed tremendously, especially over the past few decades. Technological advances aside, the content of television programming has definitely come a long way, but according to some, the changes in content have not been positive.[6] In fact, some argue that the quality of language used in public broadcasting is "rapidly going down the tube."[7]

In 1954, actress Lucille Ball became pregnant. The television network that broadcast her show, "I Love Lucy," decided to allow her character, Lucy Ricardo, to have a baby too.[8] But, because this "was an era in which married couples on television slept in twin beds so far apart that they might have been in separate sitcoms," network officials feared shocking "I Love Lucy" audiences.[9] Finding that the word pregnant was far too provocative for television, the network decreed that "Lucy could be described only as 'expecting.'"[10] That decision may have prevented Ball and her character from being accused of indecency, but other performers were not quite so fortunate. Indeed, while it may be "hard to remember the time when profanity on stage or screen could get [a performer] arrested," such arrests actually happened.[11] In 1964, "famously foul comedian" Lenny Bruce found himself slapped with obscenity charges after a performance at Greenwich Village's Café Au Go Go.[12] Bruce's luck never improved during his lifetime. He had difficulty finding work after his arrest, was ultimately convicted, and died of a drug overdose two years later at the age of forty.[13]

3. John Logie Baird is credited with inventing the television. Baird transmitted the first television picture in 1926 between rooms and he successfully transmitted the first television broadcast across the Atlantic Ocean in 1928. *See* James Reynolds, *Innovation: How Scots Improved Lives*, THE SCOTSMAN, May 29, 2002, at 9.

4. Ninety-eight percent of all homes in the United States have at least one television set, according to the U.S. Census Bureau, and forty percent of those homes contain three or more television sets. *The Pull of TV and the Need to Read*, TAMPA TRIB. (Florida), Apr. 23, 2001, at 10.

5. *See Replaying Old-Time Radio Days*, ST. LOUIS POST-DISPATCH, June 20, 1989, at 4D.

6. *See* Nell Minow, *Standards for TV Language Rapidly Going Down the Tube*, CHI. TRIB., Oct. 7, 2003, at C2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See Foul Language and the FCC*, CHI. TRIB., Jan. 22, 2004, at 22 ("These days, with profanity so prevalent on cable television and in rap and rock music, it's more likely that spewing curses earns you a pile of money.").

12. *Id.*

13. *Id.* In December of 2003, Bruce was posthumously pardoned by New York Governor George Pataki following "a yearlong 1st Amendment-inspired campaign championed by Bruce's daughter and comedians Robin Williams and the Smothers Brothers." *Id.*

Fast forward four decades and one encounters vehement arguments that standards for television broadcast language have worsened dramatically. According to one commentator, "the language used on broadcast television has deteriorated . . . precipitously" in the past few years.[14] A Parents Television Council study found an overall increase in foul language in every timeslot from 1998 to 2002, and an almost ninety-five percent increase in foul language during "Family Hour," which is between 8 p.m. and 9 p.m.[15] As a few well-known incidents surely prove, 2003 and 2004 will be no different in terms of "indecent" on-air speech. In January 2003, Irish rock group U2's lead singer Bono just "couldn't contain his enthusiasm" at the 2003 Golden Globe Awards.[16] While accepting an award for "best original song for a motion picture,"[17] Bono made a comment that went uncensored during Family Hour on NBC:[18] "This is really, really, fucking brilliant."[19] In December 2003, during the Billboard Music Awards, Nicole Richie and Paris Hilton, the two stars of FOX's "The Simple Life," also pushed the language envelope.[20] Hilton admonished Richie to "watch the bad language" since they were on a live show. Richie promptly responded, "Fuck!"[21] That comment was censored, but Richie's later remark, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple" managed to escape censorship.[22] The year of 2004 started with the now infamous "wardrobe malfunction" controversy when, during CBS's broadcast of the MTV Super Bowl halftime show, Justin Timberlake exposed Janet Jackson's breast, with her nipple "covered only by a sun-shaped piece of jewelry attached to her nipple piercing."[23]

14. Minow, *supra* note 6.

15. Parent's Television Network, *The Blue Tube: Foul Language on Prime Time Network TV: A PTC State of the Television Industry Report*, *at* http://www.parentstv.org/PTC/Publications/reports/stateindustrylanguage/main.asp (Sept. 15, 2003).

16. *Lou Dobbs Tonight* (CNN television broadcast, Jan. 12, 2004) (on file with author).

17. *Id.*

18. Parents Television Network, *The Blue Tube: Foul Language on Prime Time Network TV: A PTC State of the Television Industry Report*, *at* http://www.parentstv.org/ptc/publications/reports/stateindustrylanguage/stateoftheindustry-language.pdf (Sept. 15, 2003).

19. *See* Julie Hilden, *Bono, Nicole Richie, and the F-word: Broadcast Indecency Law*, *at* http://www.cnn.com/2003/LAW/12/23/findlaw.analysis.hilden.indecency/index.html (Dec. 23, 2003); *Lou Dobbs Tonight* (CNN television broadcast, Jan. 12, 2004) (on file with author).

20. Hilden, *supra* note 19.

21. *Id.*

22. *Id.*

23. Julie Hilden, *Jackson 'Nipplegate' Illustrates the Danger of Chilling Free Speech*, *at* http://www.cnn.com/2004LAW/02/20/findlaw.analysis.hilden.jackson/index.html (Feb. 20, 2004).

Some viewers of these incidents were furious,[24] with the uncensored comments "creat[ing] and fuel[ing] a furor among Congress and concerned parents."[25] A national parents' group protested the Bono comment; however, the FCC enforcement division ruled in October 2003 that the stations that aired the Golden Globes should not be penalized for allowing the f-word to go uncensored because it was neither indecent nor obscene under the division's analysis.[26] Therefore, the broadcast "did not violate rules prohibiting indecent or obscene speech during broadcasts."[27] The FCC enforcement division found that the word did not describe "sexual or excretory organs or activities"; rather, it was used "as an adjective or expletive to emphasize an exclamation."[28] Moreover, the comment was a "fleeting and isolated" remark.[29]

The FCC may reexamine its ruling and, if the FCC lets the ruling stand, Congress has indicated it may overturn the ruling with legislation.[30] Indeed, Bono's comment, along with the FCC's decision not to fine the stations that aired it, moved one Congressman to action. In December 2003, Representative Doug Ose (R-Calif.) introduced the Clean Airwaves Act, a bill that would punish television and radio broadcasters for airing eight specific words and phrases.[31] "C'mon, give me a break," Ose commented,[32] "I don't think there's a parent in the country who wants to hear this stuff come out of their TV."[33]

Representative Ose's proposed legislation would ban eight particular words and phrases from public broadcasts instead of allowing the FCC to evaluate on a case-by-case basis whether the use of a word or phrase is punishable for being used in an obscene, indecent, or profane manner. This note will examine whether this proposed legislation would

24. Hilden, *supra* note 19 ("Viewers heard [Richie's] expletives loud and clear—and some, especially parents of young children, were furious."); Hilden, *supra* note 23 ("The outrage that followed [the exposure of Jackson's breast] was extraordinary. [CBS] subsequently received numerous viewer calls—with many parents complaining that while they were watching the Super Bowl with their children, the family tradition had been interrupted by unexpected nudity."); *Lou Dobbs Tonight* (CNN television broadcast, Jan. 12, 2004) (on file with author) ("The [Bono] slip outraged many viewers and prompted an FCC inquiry.").

25. Hilden, *supra* note 19.

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

27. Hilden, *supra* note 19.

28. 18 F.C.C.R. at 19,861.

29. *Id.*

30. Hilden, *supra* note 19.

31. *Live from CNN* (CNN television broadcast, Jan. 13, 2004) (on file with author). *See also Lou Dobbs Tonight* (CNN television broadcast, Jan. 12, 2004) (on file with author) (containing a video clip of Representative Ose commenting, "for fifty years, we've been able to communicate on public airwaves without using this language. What's changed that says now that if it's an adjective, you can use it, but if it's a verb, you can't? I mean, this is . . . crazy").

32. Erica Warner, *Bill Would Ban Some Swear Words from Radio, TV*, Associated Press, *at* http://www.house.gov/ose/Press/Selected_Articles/2003/16_dec_03APFCCBill.htm (Dec. 16, 2003). Representative Ose's proposed legislation, H.R. 3687, 108th Cong. (2003), may be found at http://thomas.loc.gov.

33. Warner, *supra* note 32, at 1.

cause the FCC to censor program material, and thus impermissibly interfere with freedom of expression in violation of the First Amendment. Part II surveys the history of the First Amendment and the Supreme Court's struggle with the regulation of obscene and indecent language in public broadcasts.[34] Part III examines the First Amendment implications of requiring the FCC to punish any airing of particular words in public broadcasts.[35] Finally, Parts IV and V conclude that Congress may not ban all use of particular words in public broadcasts without running afoul of the First Amendment.[36]

II. BACKGROUND

> 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.[37]

The First Amendment is the basis for the great American principle of freedom of speech, and the importance of freedom of speech within the tradition of democracy cannot be overstated. Indeed, "[f]reedom of speech is one of the preeminent rights of Western democratic theory, the touchstone of individual liberty."[38] Because "[t]he First Amendment envisions a system of freedom of expression that is difficult, sophisticated, and complex, because it reflects life. . . . it is necessary to examine the historical and philosophical context out of which the concept of free speech emerged."[39]

A. History of the First Amendment

The Framers did not include any provision protecting freedom of speech in the Constitution. They felt that the limited government they envisioned "could not constitutionally enact a law restricting free speech because that was not among the government's enumerated powers."[40] Popular pressure, however, led to the adoption of the First Amendment as "a more articulate expression of the freedom of individuals from governmental interference."[41] The First Amendment, thus makes explicit the sanctity of both the freedom of speech and freedom of the press.[42] Its

34. *See infra* text accompanying notes 37–172.
35. *See infra* text accompanying notes 173–234.
36. *See infra* text accompanying notes 235–45.
37. U.S. CONST. amend. I.
38. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.2 (6th ed. 2000).
39. *Id.*
40. *Id.* § 16.5.
41. *Id.*
42. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press").

importance has been widely recognized, with Justice Hugo L. Black stating, "First in the catalogue of human liberties essential to the life and growth of a government of, for and by the people are those liberties written into the First Amendment to our Constitution."[43]

Today, "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear."[44] Indeed, freedom of speech is considered a fundamental right protected by the Due Process Clause[45] of the Fourteenth Amendment from "arbitrary governmental interference."[46] Although many people believe "the First Amendment is first for a reason . . . speech, though a constitutional right, retains many restrictions."[47] Thus, while the First Amendment seems to set forth its demands in "absolutist terms,"[48] stating that "Congress shall make *no* law . . . abridging the freedom of speech,"[49] it has never been interpreted by the Supreme Court as an absolute right.[50] In *Konigsberg v. State Bar of California*,[51] Justice Harlan wrote for the majority:

> [W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.[52]

Justice Harlan proceeded to note that the Court "has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk." Speech "outside the scope of constitutional protection," and regulatory statutes "not intended to control the content of speech but incidentally limiting its unfet-

43. *Debating Hate Speech and Pornography: Floyd Abrams versus Catharine A. MacKinnon*, *in* DEBATING DEMOCRACY: A READER IN AMERICAN POLITICS 91 (2d ed. 1999).

44. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002).

45. Gitlow v. New York, 268 U.S. 652, 666 (1925).

46. Cohen v. California, 403 U.S. 15, 19 (1971).

47. Paul S. Gutman, *Say What? Blogging and Employment Law in Conflict*, 27 COLUM.-VLA J.L. & ARTS 145, 163 (2003).

48. NOWAK & ROTUNDA, *supra* note 38, § 16.7.

49. U.S. CONST. amend. I (emphasis added). Indeed, the absolutist view was held by Supreme Court Justice Hugo L. Black: "I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process." Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black, J., dissenting). He also stated, "I simply believe that 'Congress shall make no law' means Congress shall make no law." HUGO L. BLACK, A CONSTITUTIONAL FAITH 45 (1969). It has been observed that the First Amendment seems to be "in a preferred position compared with the majority of rights in the Constitution, which like the Fourth Amendment, are not expressed in absolute terms." NOWAK & ROTUNDA, *supra* note 38, § 16.7. While the First Amendment states, "Congress shall make *no* law," U.S. CONST. amend. I (emphasis added), the Fourth Amendment protects people against "*unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added).

50. Jacob T. Rigney, Note, *Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 FED. COMM. L.J. 297, 300 (2003).

51. 366 U.S. 36 (1961).

52. *Id.* at 49.

tered exercise," fall outside "the type of law the First or Fourteenth Amendment forbade Congress or the States to pass."[53]

Indeed, there are several types of speech which the Supreme Court has consistently extended less than absolute protection. Incitement,[54] fighting words,[55] and child pornography[56] are examples of speech-related activities that receive no First Amendment protection. Defamatory speech enjoys limited First Amendment protection, as courts balance First Amendment interests in freedom of speech against the government's interest in protecting people's reputations from false attacks.[57] Commercial speech also receives less than absolute protection,[58] and as will be discussed below,[59] obscene language is not protected by the First Amendment.[60]

B. History of Obscenity and Indecency Regulation

Obscenity is one of the types of speech unprotected by the First Amendment.[61] Indecent speech, in contrast, is protected by the First Amendment, but it is considered a "category of lesser protected speech."[62] "The definitions of and differences between such legal terms of art are not, however, so easily outlined."[63]

1. Obscenity Regulation

As stated above, freedom of speech is not an absolute right, and courts have long assumed obscenity is not protected by the First Amendment.[64] Indeed, the Supreme Court has specifically held that "ob-

53. *Id.* at 50–51.

54. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that government cannot constitutionally forbid the advocacy of force or illegal action unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

55. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (upholding a statute prohibiting "face-to-face words plainly likely to cause a breach of the peace by the addressee" as constitutional under the First Amendment).

56. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that distribution of child pornography is "without the protection of the First Amendment").

57. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

58. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562–63 (1980) (noting that the First Amendment protects commercial speech such that government may lack "complete power to suppress or regulate commercial speech"; nevertheless, the "Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

59. *See infra* text and accompanying notes 61–108.

60. Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

61. Rigney, *supra* note 50, at 301.

62. *Id.*

63. *Id.*

64. *See* Roth v. United States, 354 U.S. 476, 481 (1957).

> [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment

scenity is not within the area of constitutionally protected speech or press."[65] In dicta, the Court initially articulated its belief that obscenity falls out of the protections of the First Amendment's freedom of speech provision.[66]

a. Early Cases

In *Chaplinsky v. New Hampshire*,[67] Justice William Francis Murphy stated, "[i]t is well understood that the right of free speech is not absolute at all times and under all circumstances."[68] He added that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem," including "the lewd and obscene" and other categories of speech.[69] He went on: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[70] In *Beauharnais v. Illinois*,[71] Justice Felix Frankfurter found that libelous statements fell outside "the area of constitutionally protected speech"[72] and likened obscenity to libel as preventable and punishable.[73] Justice Frankfurter also echoed Justice Murphy's earlier language from *Chaplinsky*.[74]

b. *Roth v. United States*

In *Roth v. United States*,[75] the Court went beyond mere dicta, and for the first time reached a decision on the issue of obscenity.[76] Justice William Brennan, writing for the Court, noted that "the obscenity of the material involved" was not an issue in the case;[77] rather, the issue was "whether obscenity is utterance within the area of protected speech and

that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.

Id. at 484–85.

65. *Id.* at 485.

66. Chaplinsky v. New Hampshire, 315 U.S. 568, 570–71 (1942); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

67. 315 U.S. 568 (1942).

68. *Id.* at 571.

69. *Id.* at 571–72.

70. *Id.* at 572.

71. 343 U.S. 250 (1952).

72. *Id.* at 266.

73. *Id.* at 256.

74. *Id.* at 255–57.

75. 354 U.S. 476 (1957).

76. NOWAK & ROTUNDA, *supra* note 38, § 16.57.

77. *Roth*, 354 U.S. at 481 n.8.

press."[78] Acknowledging that "this is the first time the question has been squarely presented to this Court," Justice Brennan noted that "expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press."[79] Reviewing the history of freedom of expression protections among the states that took part in the ratification of the Constitution, Justice Brennan concluded that "it [wa]s apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."[80] He stated:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[81]

The Court proceeded to hold that "obscenity is not within the area of constitutionally protected speech or press."[82]

In its opinion, the *Roth* majority explained that "sex and obscenity are not synonymous."[83] They defined obscene material as "material which deals with sex in a manner appealing to prurient interest."[84] Mere portrayal of sex was not seen as a "sufficient reason to deny material the constitutional protection of freedom of speech and press," because sex "is one of the vital problems of human interest and public concern," meriting freedom of discussion.[85] Prurient was defined as "material having a tendency to excite lustful thoughts."[86] The Court also provided a standard for distinguishing sex from obscenity: material was obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[87] Professors Nowak and Rotunda summarize *Roth* in the following manner:

78. *Id.* at 481.

79. *Id.* Justice Brennan cited several cases to support this proposition, including Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Winters v. New York, 333 U.S. 507, 510 (1948); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota, 283 U.S. 697, 716 (1931); Hoke v. United States, 227 U.S. 308, 322 (1913); Pub. Clearing House v. Coyne, 194 U.S. 497, 508 (1904); Robertson v. Baldwin, 165 U.S. 275, 281 (1897); United States v. Chase, 135 U.S. 255, 261 (1890); *Ex parte* Jackson, 96 U.S. 727, 736–37 (1877). *Roth*, 354 U.S. at 481.

80. *Roth*, 354 U.S. at 482–83.

81. *Id.* at 484.

82. *Id.* at 485.

83. *Id.* at 487.

84. *Id.*

85. *Id.*

86. *Id.* at 487 n.20 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (unabridged, 2d ed. 1949)).

87. *Id.* at 489.

> Thus, when reduced to a formula, *Roth* provides that material may be deemed obscene, and therefore wholly without constitutional protection, if it (a) appeals to a prurient interest in sex, (b) has no redeeming literary, artistic, political, or scientific merit, and (c) is on the whole offensive to the average person under contemporary community standards.[88]

Roth fell short of resolving the tension between governmental regulation of obscenity and constitutional protections of freedom of speech. Instead, "the opinion came perilously close to a loose theoretical exercise in constitutional law."[89] It exemplified the great difficulties the Court has experienced in formulating a workable obscenity doctrine; indeed, "[f]rom its very inception, obscenity jurisprudence in the Supreme Court has had a troubled and 'tortured history.' Nevertheless, the Court has desperately tried to enunciate a constitutional standard for obscenity that is consistent with the First Amendment and that enables communities to safeguard morals," a "quite elusive" goal.[90] In *Jacobellis v. Ohio*,[91] Justice Potter Stewart famously wrote about obscenity, "I know it when I see it," and conceded that he might never be able to successfully define obscenity with any more specificity.[92]

c. Divergence Among the Justices

After *Roth* was decided, the Court seemingly dropped pruriency as "the pivotal element of obscenity under the First Amendment"[93] in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*.[94] The Court splintered in that case, and Justice Brennan, joined only by Chief Justice Warren and Justice Fortas, argued for the plurality that the book at issue was not literature "*utterly* without redeeming social value" and was therefore protected by the First Amendment.[95] The next major obscenity case, *Ginzburg v. United States*,[96] involved three publications devoted solely to sex.[97] Because the publications were "commercial exploitation of erotica solely for the sake of their prurient appeal,"[98] complete with marketing tactics exhibiting

88. NOWAK & ROTUNDA, *supra* note 38, § 16.57.

89. *Id.* § 16.58.

90. John Tehranian, *Sanitizing Cyberspace: Obscenity,* Miller*, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 1–2 (2003) (quoting Miller v. California, 413 U.S. 15, 20 (1973)).

91. 378 U.S. 184 (1964).

92. *Id.* at 197 (Stewart, J., concurring).

93. NOWAK & ROTUNDA, *supra* note 38, § 16.59.

94. 383 U.S. 413 (1966).

95. *Id.* at 419. It has been noted that the Court's emphasis on proving that the material at issue was "*utterly* without redeeming social value" "caused Mr. Justice Harlan to wonder if the '*utterly* without redeeming social value' test had any meaning at all." Miller v. California, 413 U.S. 15, 22 (1973) (citation omitted).

96. 383 U.S. 463 (1966).

97. *Id.* at 466–67.

98. *Id.* at 466.

pure "brazenness,"[99] the Court found them to be obscene without ever discussing the publications' possible social value.[100] "Thus an intent to appeal 'solely' to prurient interests [*could*] outweigh the social value of the materials in question while the prurient appeal of the materials, of itself, [could not]."[101] The Court's obscenity jurisprudence proceeded to splinter even more as "the rationales of the individual members became more, rather than less, divergent."[102]

d. *Miller v. California*

In *Miller v. California*,[103] the Court managed to reach a compromise.[104] "[F]or the first time since *Roth* a majority of the Justices agreed to the proper test for obscenity."[105] Noting that "[t]his much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment," Chief Justice Warren Burger acknowledged "the inherent dangers of undertaking to regulate any form of expression" and restricted the permissible scope of state obscenity statutes "to works which depict or describe sexual conduct."[106] The *Miller* obscenity standard was then established:

> [T]he trier of fact 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.[107]

Thus, if materials are found to be obscene under the *Miller* standard, "the Government can ban them from broadcast or cable channels, because the Government can completely ban any obscene materials."[108]

99. *Id.* at 470. The Court found that "the 'leer of the sensualist' also permeate[d] the advertising for the three publications." *Id.* at 468. The publishers had sought, and been denied, mailing privileges from Intercourse and Blue Ball, Pennsylvania, and sought, and been granted, mailing privileges from Middlesex, New Jersey. The advertisements "stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters." *Id.* at 467–68.

100. *Id.* at 474.

101. NOWAK & ROTUNDA, *supra* note 38, § 16.59.

102. *Id.*

103. 413 U.S. 15 (1973).

104. *See* NOWAK & ROTUNDA, *supra* note 38, § 16.60.

105. *Id.*

106. *Miller*, 413 U.S. at 23–24.

107. *Id.* at 24 (internal quotations and citations omitted).

108. NOWAK & ROTUNDA, *supra* note 38, § 16.61.

2. *Indecency Regulation*

While obscenity is considered completely unprotected speech under the First Amendment, indecent speech receives some First Amendment protection.[109] Indecency regulation for broadcasts is administrative and stems from 18 U.S.C. § 1464, which authorizes the FCC to regulate indecent speech.[110] Regulation of indecent speech was first considered, and upheld as constitutional, by the Supreme Court in *FCC v. Pacifica Foundation*.[111]

a. *FCC v. Pacifica Foundation*

Pacifica involved a recorded version of George Carlin's twelve-minute "Filthy Words" monologue in which he states each word one would never say on public airwaves numerous times.[112] During an early Tuesday afternoon in October, a Pacifica Foundation-owned New York radio station broadcasted Carlin's "Filthy Words" monologue.[113] After a few weeks passed, a man complained to the FCC, claiming that he heard the broadcast while driving with his young son.[114] Pacifica Foundation responded by explaining that it aired the monologue "during a program about contemporary society's attitude toward language" and noted that it had aired a warning before the broadcast stating that the monologue contained "sensitive language which might be regarded as offensive to some."[115] The FCC issued a declaratory order granting the man's complaint and, even though it held that Pacifica Foundation could be subject to administrative sanctions, it declined to impose formal sanctions.[116] "Advancing several reasons for treating broadcast speech differently from other forms of expression," the FCC found power to regulate indecent broadcasting in two separate statutes.[117] The Court of Appeals for the D.C. Circuit, however, reversed, with the panel of three judges splintering and writing three separate opinions.[118]

109. *See* Rigney, *supra* note 50, at 301.

110. "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 (2000).

111. 438 U.S. 726 (1978).

112. *Id.* at 729. The Court, helpfully, included a full-text version of Carlin's "Filthy Words" monologue in an appendix to its decision in *Pacifica*.

113. *Id.* at 729–30.

114. *Id.* at 730.

115. *Id.*

116. *Id.*

117. *Id.* at 731. The two statutes included 18 U.S.C. § 1464, "which forbids the use of 'any obscene, indecent, or profane language by means of radio communications,'" and 47 U.S.C. § 303, "which require[s] the [FCC] to 'encourage the larger and more effective use of radio in the public interest.'" *Id.*

118. *Id.* at 733. Judge Tamm found that the FCC's order constituted censorship and was prohibited by section 326 of the Communications Act; alternatively, the FCC's opinion was the "functional equivalent of a rule and was 'overbroad.'" *Id.* Chief Judge Bazelon, in concurrence, thought section

Reviewing the FCC's decision that the monologue was indecent as broadcast,[119] a majority of the Supreme Court held, without agreeing on a majority opinion, that the FCC could constitutionally regulate "indecent" or "adult speech" that was broadcast over airwaves during the afternoon, when children were most likely to hear it.[120] The Court cautioned that the FCC lacked "power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves."[121] However, the FCC was fully able "to review the content of completed broadcasts in the performance of its regulatory duties."[122] Thus, while the Court said "the FCC could not prohibit entirely the broadcast of indecent material, it could, using principles of nuisance law, regulate the time, place, and manner of indecency by channeling it to what would later be called a 'safe harbor'—hours when children were less likely to be in the audience."[123]

Turning to the issue of whether the broadcast of Carlin's monologue was "indecent" within the meaning of 18 U.S.C. § 1464, the Court addressed Pacifica's argument that the broadcast could not be considered indecent because it lacked prurient appeal.[124] The Court stated that section 1464 gave the FCC statutory authority to regulate "obscene, indecent, or profane" words, which "each ha[ve] a separate meaning."[125] Thus, while the monologue may not have met the *Miller* standard for obscenity because there had been no showing of prurient appeal, such a showing was not necessary for indecency, as "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[126] The Court then concluded that the FCC had correctly found the "Filthy Words" monologue to be indecent.[127]

The Court explained in *Pacifica* why stricter regulation of broadcast media was justified and required:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only

326's prohibition against censorship was inapplicable to broadcasts forbidden by section 1464; however, he thought section 1464 should be "narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment." *Id.* at 733–34. Judge Leventhal, in dissent, "stated that the only issue was whether the [FCC] could regulate the language 'as broadcast.'" *Id.* at 734. Emphasizing the interest in protecting children from exposure to indecent language and from exposure to the idea that such indecent language is granted official approval, Leventhal concluded that the FCC was correct in finding the daytime broadcast of Carlin's monologue as indecent. *Id.*

119. *Id.* at 735.

120. *Id.* at 739.

121. *Id.* at 735.

122. *Id.*

123. Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 40 (2004).

124. *Pacifica*, 438 U.S. at 739.

125. *Id.* at 739–40.

126. *Id.* at 740.

127. *Id.* at 741.

> in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content . . . .
>
> Second, broadcasting is uniquely accessible to children, even those too young to read . . . . Pacifica's broadcast could have enlarged a child's vocabulary in an instant.[128]

The Court also noted that it had previously held "that the government's interest in the 'well-being of its youth' and in supporting 'parents,' claim to authority in their own household justified the regulation of otherwise protected expression."[129] "The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting."[130] The Court also carefully limited its holding, stating that its decision "require[d] consideration of a host of variables," including time of day, program content, audience composition, and the broadcast medium used.[131] This language suggested that *Pacifica* was limited to its facts, and "[a]s a result, the FCC did not bring any indecency enforcement actions for nearly a decade."[132]

b. *Sable Communications of California, Inc. v. FCC*

A little over a decade later, the Court further explained its indecency doctrine in *Sable Communications of California, Inc. v. FCC*.[133] *Sable* involved a challenge to a federal law banning all indecent and obscene interstate commercial telephone messages, "popularly known as 'dial-a-porn.'"[134] Noting that nothing in the Constitution banned Congress from entirely prohibiting obscene speech, the Court stated, "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[135] The government is only allowed to regulate indecent speech "in order to promote a compelling interest if it chooses

128. *Id.* at 748–49 (internal quotations and citations omitted). The Court noted the FCC's reasons for treating broadcast more strictly:

> (1) [C]hildren have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.

Id. at 731 n.2. For a criticism of the rationale employed by the Court in *Pacifica*, see Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 293 (2003).

129. *Pacifica*, 438 U.S. at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 639–40 (1968)).

130. *Id.* at 750.

131. *Id.*

132. Yoo, *supra* note 128, at 302–03.

133. 492 U.S. 115 (1989).

134. *Id.* at 117–18.

135. *Id.* at 125–26.

the least restrictive means to further the articulated interest" without interfering unnecessarily with First Amendment freedoms.[136] "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."[137] This test is commonly known in constitutional law as strict scrutiny.

The Court then distinguished *Pacifica*, noting that *Pacifica*, unlike the law at issue in *Sable*, did not involve a complete ban on the broadcasting of indecent material but merely sought to channel it to times when children were not likely to see or hear it.[138] Moreover, *Pacifica* also relied on the "unique" characteristics of broadcasting.[139]

c. FCC 2001 Policy Statement on Indecency

The FCC released a Policy Statement[140] on April 6, 2001 "to provide guidance to the broadcast industry regarding [FCC] case law interpreting 18 U.S.C. § 1464 and [FCC] enforcement policies with respect to broadcast indecency."[141] As previously noted,[142] § 1464 authorizes the FCC to regulate indecency in broadcasts.[143] According to the Policy Statement, "[i]t is a violation of federal law to broadcast obscene or indecent programming," and "Congress has given the [FCC] the responsibility for administratively enforcing 18 U.S.C. § 1464."[144] The statement notes that obscenity may not be broadcast at any time, given its lack of protection by the First Amendment, while "government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."[145] Thus, the FCC "recognized that all attempts to restrict broadcast indecency were subject to strict scrutiny."[146]

The Policy Statement defines indecency with reference to *Pacifica*: "'language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs'. . . . "[147] The statement notes that this definition has been upheld against constitutional challenges.[148] In addition, it notes that the D.C. Circuit upheld a

136. *Id.* at 126.
137. *Id.*
138. *Id.* at 127.
139. *Id.*
140. *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7,999, at 7,999 (2001).
141. *Id.*
142. *See* Rigney, *supra* note 50, at 301.
143. 18 U.S.C. § 1464 (2000).
144. 16 F.C.C.R. at 7,999.
145. *Id.* at 8,000.
146. Yoo, *supra* note 128, at 303.
147. 16 F.C.C.R. at 8,000.
148. *Id.* (stating that "the definition has been specifically upheld against constitutional challenges in the Action for Children's Television (ACT) cases in the D.C. Circuit Court of Appeals").

safe harbor for the broadcasting of indecent materials from 10 p.m. until 6 a.m.[149] "[O]utside the 10:00 p.m. to 6:00 a.m. safe harbor, the courts have approved regulation of broadcast indecency to further the compelling government interests in supporting parental supervision of children and more generally its concern for children's well being."[150]

The FCC then proceeded to summarize its indecency analysis. Two conditions must be met for a broadcast to be declared indecent under the FCC's analysis. First, the material alleged to be indecent must fall within the FCC's definition of indecency—"the material must describe or depict sexual or excretory organs or activities."[151] Second, the material "must be patently offensive as measured by contemporary community standards for the broadcast medium."[152] The standard used in determining whether the material is patently offensive is not local and does not involve any particular geographic area; instead, "the standard is that of an average broadcast viewer or listener."[153] The FCC also noted that the context surrounding the material is critically important in analyzing whether material is patently offensive.[154] "Explicit language in the context of a bona fide newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be."[155]

The statement then listed factors relevant to a determination of indecency, noting that the presence of no single factor was generally sufficient to support an indecency finding.[156]

> The principal factors that have proved significant in our decisions to date are: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[157]

Again, the FCC stressed context: "In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical."[158] The FCC then provided several illustrations on how these factors had been applied and analyzed in past cases.[159]

149. *Id.* at 8,001.
150. *Id.*
151. *Id.* at 8,002.
152. *Id.*
153. *Id.*
154. *Id.* ("In determining whether the material is patently offensive, the full context in which the material appeared is critically important.").
155. *Id.* at 8,002–03.
156. *Id.* at 8,003.
157. *Id.*
158. *Id.*
159. *Id.* at 8,003–15.

i. Explicit or Graphic Nature of the Description of Sexual or Excretory Organs or Activities

"The more explicit or graphic the description or depiction, the greater the likelihood that the material will be considered patently offensive."[160] However, the use of innuendo or double entendres regarding sexual or excretory organs or activities is not immune from a finding of patent offensiveness, as the FCC might deem such speech indecent "if the sexual or excretory import is unmistakable."[161] Thus, the FCC has deemed quite explicit terms indecent, such as language used in a Howard Stern radio broadcast, because it "consisted of vulgar and lewd references to the male genitals and to masturbation and sodomy broadcast in the context of . . . explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles."[162] The FCC has also found more veiled references indecent, as in the case of a "Stevens and Pruett Show" radio broadcast.[163] Although the broadcast there involved sexual innuendo and double entendre as opposed to direct references to sexual or excretory organs, "unmistakable sexual references remain[ed] that render[ed] the sexual meaning of the innuendo inescapable."[164]

ii. Dwelling on or Repeating Descriptions of Sexual or Excretory Organs or Activities

The FCC noted that "[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts."[165] In contrast, use of such references only once or in a "passing or fleeting" nature "has tended to weigh against a finding of indecency."[166] Thus, material dwelling on excretory activities has been deemed indecent,[167] while a '"broadcast [that] contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, [did] not warrant a Commission sanction.'"[168]

160. *Id.* at 8,003.

161. *Id.* at 8,003–04.

162. *Id.* at 8,004 (quoting the FCC warning issued in response to the broadcast, Infinity Broad. Corp. of Penn. (WYSP(FM)), 3 F.C.C.R. 930, 932 (1987)) (internal quotation marks omitted).

163. *Id.* at 8,005 (quoting the FCC warning issued in response to the broadcast, The Rusk Corp. (RLOL(FM)), 8 F.C.C.R. 3,228, 3,228 (1993)) (internal quotation marks omitted).

164. *Id.*

165. *Id.* at 8,008.

166. *Id.*

167. *Id.* (stating that the activities were "patently offensive").

168. *Id.* at 8,009.

iii. Material Presented in a Pandering or Titillating Manner, or For Shock Value

"The apparent purpose for which material is presented can substantially affect whether it is deemed to be patently offensive as aired."[169] While presenting material in a "pandering or titillating" manner or presenting material "for the shock value of the language" have been considered exacerbating factors, the manner in which material is presented may save a broadcast from being deemed indecent, "even though other factors, such as explicitness, might weigh in favor of an indecency finding."[170] For example, the language in the "Filthy Words" broadcast at issue in *Pacifica* was chosen specifically for its "vulgar and offensive" quality, "and it was repeated over and over as a sort of verbal shock treatment."[171] On the other hand, material "deal[ing] explicitly with sexual issues and includ[ing] the use of very graphic sex organ models" was not considered indecent because it was presented in a "clinical or instructional" manner and not "in a pandering, titillating, or vulgar manner."[172]

III. ANALYSIS

A. The Stimulus Behind the Clean Airwaves Act

According to 18 U.S.C. § 1464, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[173] The law, however, does not define obscene, indecent, or profane. The FCC's own rules provide that "[n]o licensee of a radio or television broadcast station shall broadcast any material which is obscene" and that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."[174] Under these provisions, the Parents Television Council and other individuals filed a complaint alleging that several television stations broadcast material during the January 19, 2003 Golden Globe Awards program that violated federal law regarding the broadcast of obscene and indecent material.[175] They were referring to Bono's statement, "this is

169. *Id.* at 8,010.

170. *Id.*

171. *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 757 (1978) (Powell, J., concurring) (internal quotation marks omitted).

172. *Id.* at 8,011 (internal quotation marks omitted).

173. 18 U.S.C. § 1464 (2000).

174. FCC Rules Applicable to All Broad. Stations, 47 C.F.R. § 73.3999 (2003).

175. *See In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859 (2003).

really, really, fucking brilliant" which escaped censoring.[176] The FCC enforcement bureau, however, rejected the complaints.[177]

In reviewing the complaints, the FCC's enforcement bureau ruled that the broadcasters who aired the episode did not violate any law and declined to take action against them.[178] The FCC found that Bono's comment was neither indecent nor obscene.[179] Beginning with an indecency analysis, the FCC noted, "[a]ny consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment."[180] The opinion proceeded to acknowledge that "federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well [as] the Commission's interpretation and implementation of the governing statute," though the FCC would "proceed cautiously and with appropriate restraint."[181] The use of specific potentially offensive words is not by itself considered indecent.[182] Instead, the FCC defines indecent speech as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[183] The opinion noted that, although "[t]he word 'fucking' may be crude and offensive," Bono's comment "did not describe or depict sexual or excretory organs or activities. Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation."[184] Furthermore, the FCC had "previously found that fleeting and isolated remarks of this nature do not warrant Commission action."[185] Thus, the FCC concluded that Bono's comment did not "fall within the scope of the Commission's indecency prohibition."[186]

The FCC enforcement bureau next turned its attention to its obscenity analysis, beginning with the *Miller* test:

176. *See* Hilden, *supra* note 19.

177. 18 F.C.C.R. at 19,862 ("In view of the foregoing, we conclude that the various licensees that aired the 'Golden Globe Awards' program on January 19, 2003, did not violate the law, and, therefore, no action is warranted.").

178. *Id.*

179. *Id.*

180. *Id.* at 19,860.

181. *Id.*

182. 16 F.C.C.R. at 8,002 ("In determining whether material is patently offensive, the full context in which the material appeared is critically important. It is not sufficient, for example, to know that explicit sexual terms or descriptions were used . . . .").

183. *Id.* at 8,000.

184. *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859, 19,861 (2003) ("Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the [FCC's] prohibition of indecent program content.").

185. *Id.* In one instance, the FCC held that the "fleeting and isolated" statement "the hell I did, I drove the mother-fucker" during live programming was not actionable. L.M. Communications of South Carolina, Inc. (WYBB(FM)), 7 F.C.C.R. 1595 (1992).

186. 18 F.C.C.R. at 19,861. Because the comment was found to fall outside the subject matter scope of the FCC's indecency decision, the FCC opinion did not address whether it was "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.*

> To be obscene, material must meet a three-prong test: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.[187]

Applying the *Miller* test to Bono's comment, the FCC found that the comment was not obscene.[188] The FCC reiterated that the comment was not sexual in nature, and, notably, stated that "[t]he use of specific words, including expletives or other 'four letter words' does not render material obscene."[189] Bono's comment did not satisfy the *Miller* test because it did not "depict or describe sexual conduct."[190]

In addition to protest from FCC Chairman Michael Powell, who immediately began campaigning inside the FCC to get the ruling overturned by the full commission, the FCC enforcement bureau's ruling prompted outrage and protest from several lawmakers and the public.[191] In order to overturn the enforcement bureau's decision, Powell needed the votes of two of the other four commissioners.[192] In a letter to the President of the Parents Television Council, Powell stated that although the FCC must balance its indecency and obscenity rules against the First Amendment right to free speech, "[p]ersonally, I find the use of the 'F word' on programming accessible to children reprehensible."[193] Powell cautioned that the FCC enforcement bureau's decision "should in no way be read to condone or enforce profanity" and stated that "[t]elevision licensees are forewarned not to read governmental acquiescence into our decision."[194]

Several congressmen shared Powell's sentiment and sent him a letter "to express [their] serious concern" regarding the FCC's ruling on the Bono incident.[195] The letter stated, "Regardless of the specific circum-

187. *Id.*

188. *Id.* at 19,861.

189. *Id.* "Offensive language, including expletives, does not fit within the established definition of obscenity." WGBH Educational Foundation (WGBH-TV), 69 FCC 2d 1250, 1253–54 (1978).

190. 18 F.C.C.R. at 19,861.

191. *FCC Chief Wants Crackdown on Obscenity over the Airwaves*, *at* http://www.cnn.com/2004/LAW/01/14/fcc.obscenity/index.html (Jan. 14, 2004); *see also* Paul Davidson, *FCC: OK, Maybe You Shouldn't Say That . . .*, U.S.A. TODAY, Jan. 14, 2004, *at* http://www.usatoday.com/life/television/news/2004-01-14-fcc-swearing_x.htm ("Bowing to public outcry, the Federal Communications Commission is expected to do an about-face in the next few weeks and say it's never OK to use the 'F-word' on TV.").

192. *FCC Chairman Wants to Overturn Decision on Bono's Expletive*, *at* http://www.cnn.com/2004/LAW/01/14/fcc.obscenity.ap/index.html (Jan. 14, 2004).

193. Letter from Michael Powell, Chairman of the Federal Communications Commission, to Brent Bozell III, Founder and President of the Parents' Television Council (Nov. 25, 2003), *available at* www.parentstv.org/ ptc/fcc/Powellletter.pdf.

194. *Id.*

195. Letter from Todd Akin et al., United States Congresspersons, to Michael Powell, Chairman of the Federal Communications Commission (Nov. 21, 2003), *available at* http://www.parentstv.org/

stances surrounding Bono's comments, we believe that the FCC's response to this incident sends a poor message to the entertainment industry about the FCC's willingness to enforce standards of broadcast indecency."[196] They continued, "parents' standards of common decency are repeatedly offended and their parenting is undermined by the onslaught of prurient material on the television and the airwaves" and urged Powell "to review [the FCC] decision on this matter and move aggressively to sanction those individuals and entities that violate indecency standards."[197]

B. Constitutional Analysis of the Clean Airwaves Act

The legislation proposed in December 2003 by Representative Ose with forty-one cosponsors, known as the Clean Airwaves Act (the Act), would modify 18 U.S.C. § 1464 by punishing television and radio broadcasters for airing eight words and phrases deemed to be "profane" regardless of context.[198] The Act's definition of profane includes the following terms and grammatical forms:

> 'shit', 'piss', 'fuck', 'cunt', 'asshole', and the phrases 'cock sucker', 'mother fucker', and 'ass hole', compound use (including hyphenated compounds) of such words and phrases with each other or with other words or phrases, and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms).[199]

Representative Ose intended for the Act to "close a loophole" in broadcast indecency regulation.[200] He stated that "[a] profanity is a profanity, whether it is used as an adjective, verb or for emphasis. Profanities in any form should not be broadcast over America's public airwaves."[201]

The profane words targeted by Congressman Ose's proposed legislation are unquestionably speech within the meaning of the First Amendment; thus, it would be considered a content-based regulation of

PTC/fcc/FCCBono.PDF [hereinafter Congressional Letter to Powell]; *see also* Letter from Chip Pickering, United States Representative, to Michael Powell, Chairman of the Federal Communications Commission (Nov. 21, 2003) *available at* http://www.parentstv.org/PTC/fcc/Pickering/pdf (noting his "deep[] concern[]" over the FCC's Bono decision regarding "language that is utterly profane and indecent as measured by any standard").

196. Congressional Letter to Powell, *supra* note 195.

197. *Id.* The congressmen stated:

> The families we represent are tired of having to cover their children's eyes and ears every time they turn on the television. They are frustrated that the media industry has seemingly been given carte blanche to broadcast any type of behavior or speech that they feel will bring in advertising dollars. Meanwhile, they feel that the federal government has sided with media elites and turned a blind eye to the concerns of ordinary Moms and Dads.

Id.

198. H.R. 3687, 108th Cong. (1st Sess. 2003).

199. *Id.*

200. Press Release, Representative Doug Ose, Ose Votes to Clean Up Public Airwaves (Mar. 11, 2004) (on file with author).

201. *Id.*

speech because it completely bans broadcast statements containing only a particular type of content. The law must be unconstitutional, therefore, if the First Amendment prohibits all government regulation based on the content of speech. As noted before, however, the First Amendment is not considered absolute protection for all forms of speech.[202] Thus, if the legislation simply regulates obscenity, the legislation would suffer no constitutional problems as "the Government can completely ban any obscene materials."[203] If, however, the legislation regulates indecency, it would be regarded as a "content-based" regulation of speech and would thus be subject to strict scrutiny wherein "the regulation must be narrowly tailored to advance a compelling state interest."[204] This section will proceed to analyze whether the Clean Airwaves Act targets obscene speech only, in which case it would therefore presumptively be constitutional, or whether instead it targets indecent speech and therefore must meet the strict scrutiny standard for constitutionality.

1. Obscenity Analysis

The *Miller* test for obscenity governs any analysis of obscenity, and under *Miller*, the trier of fact 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.[205]

Again, if speech is deemed obscene under the *Miller* test, the government may entirely ban the speech because the First Amendment extends no protection to obscene speech.[206]

By its very nature, the *Miller* test precludes a finding that the Clean Airwaves Act targets only obscene speech. Since the trier of fact must evaluate the work taken as a whole under the first and third prongs of the test, the *Miller* test does not allow a trier of fact to focus solely on the use of one word. However, this would be precisely what the Clean Airwaves Act would require, since it does not instruct a trier of fact to consider context. Instead, it dictates that all use of the listed words is deemed profane and in violation of § 1464. In addition, the Act would require a trier of fact to ignore whether or not the material "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" in contravention of *Miller's* second prong.

202. *See supra* text accompanying notes 61–108.

203. NOWAK & ROTUNDA, *supra* note 38, § 16.61.

204. Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671, 671 (2003).

205. Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

206. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

The Act allows for neither the consideration of whether the material describes sexual conduct in a patently offensive way nor the consideration of applicable state law. Thus, since the Clean Airwaves Act does not comport with any of the elements of the *Miller* test, the Clean Airwaves Act targets nonobscene speech.

This conclusion is not unsupported by case law. Indeed, the Supreme Court, in *Pacifica*, assumed that the speech broadcast in Carlin's "Filthy Words" monologue was not obscene[207] and Carlin used a list of words almost identical to the words that would be banned by the Clean Airwaves Act. In his monologue, Carlin stated that the original seven words that could not be said on television included "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits"; he then proceeded to say each of the words numerous times with the response of laughter from the audience.[208] In comparison, the words and phrases that would be banned by the Clean Airwaves Act include "shit," "piss," "fuck," "asshole," "cock sucker," "mother fucker," and "ass hole." With the exception of "tits" and the addition of "asshole" and "ass hole," the lists of words are identical. Thus, if a recitation of these words in a repetitive, deliberate manner was not found to be obscene in *Pacifica*, it is highly unlikely that use of the words banned by the Clean Airwaves Act could be classified as obscene.

2. Indecency Analysis

According to *Pacifica*, the case in which the Supreme Court first recognized that indecent speech could constitutionally be regulated, not all use of offensive words is unprotected by the First Amendment. "Some uses of even the most offensive words are unquestionably protected . . . . Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context."[209] Because the "Filthy Words" monologue was "vulgar," "offensive," and "shocking," and "content of that character is not entitled to absolute constitutional protection under all circumstances," the Court was required to "consider its context" in determining whether it could constitutionally be deemed indecent.[210] Therefore, it is apparent that even the broadcast of vulgar, offensive, and shocking words may not be deemed indecent without taking

207. *See* FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978). In noting that "[o]bscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. . . . These words offend for the same reasons that obscenity offends, . . . " the Court implicitly found that the words in the "Filthy Words" monologue were different from obscene words. *Id.*

208. *Id.* at 751 (Appendix to opinion of the Court). Carlin noted that he had found three additional words one was not allowed to say on television, including "fart, turd, and twat." *Id.* at 755.

209. *Id.* at 746–47.

210. *Id.* at 747–78.

into account the context in which the words were broadcast. This poses constitutional issues for the Clean Airwaves Act, since the Act precludes any consideration of context and instead, deems all use of the words listed as a violation of § 1464.

a. Indecency Analysis Under the FCC's Current Indecency Definition

The Clean Airwaves Act does not comport with the FCC's current definition of indecency, which has been upheld against constitutional challenges.[211] The current definition of indecency is "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[212] This definition requires the FCC to make two determinations. First, the material must fall within the FCC's definition for indecency—"the material must describe or depict sexual or excretory organs or activities."[213] Second, the material "must be patently offensive as measured by contemporary community standards for the broadcast medium."[214]

The Act would ban words that do not meet this definition. Under the first determination, the objected-to speech must describe or depict sexual or excretory organs or activities. Yet the Act would not even allow the FCC to make this initial determination. The words banned by the Act would always be punishable, regardless of the word's actual use. In fact, Carlin demonstrated the myriad phrases in which the banned words could be used, and many of them did not refer at all to sexual or excretory activities or organs.[215]

Under the second determination, the speech must be patently offensive under contemporary community standards for the broadcast medium. The Act, however, would not allow the FCC to make this determination either—all use of the banned words would essentially be considered patently offensive. Even if the FCC was able to determine whether the material was in fact patently offensive, it is clear that the words banned by the Act would not always be indecent when analyzed under the current factors used by the FCC. The three principal factors include:

211. *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7,999, 8,000 (2001).

212. *Id.*

213. *Id.* at 8,002.

214. *Id.*

215. *Pacifica*, 438 U.S. at 751–55. For example, Carlin stated that "cocksucker is a compound word and neither half of that is really dirty . . . . Up, he's up shit's creek . . . . Easy on the clutch Bill, you'll fuck that engine again." *Id.* at 752–54. While all of these words were among those one was not allowed to say on television, Carlin managed to use them in a way that did not actually refer to sexual or excretory activities or organs.

> (1) The explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[216]

The FCC stresses context when analyzing these factors: "In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical."[217]

While the words "shit," "piss," "fuck," "asshole," "cock sucker," "mother fucker," and "ass hole" may be used in a pandering or titillating manner or most certainly solely for shock value as laid out in the third factor, the remaining two factors are less clearly met, if at all. The words do not necessarily describe in an explicit or graphic nature sexual or excretory organs or activities, nor do they necessarily have to be used in a manner that dwells on or repeats at length descriptions of sexual or excretory organs or activities. Again, Carlin aptly demonstrated the multitude of ways in which these very words could be used. While his monologue was found to be indecent, it included so many variations of the words that, as a whole, the FCC's indecency definition was satisfied. It is far less clear that less drastic uses of the words banned by the Act would meet the same fate. For instance, an isolated and fleeting use of one of the banned words would almost undoubtedly fall short of being deemed indecent if it did not involve "sexual activities with children" or "graphic or explicit" references.[218]

b. Indecency Analysis Under a New Definition of Indecency

While the Clean Airwaves Act would ban words that would not be deemed indecent under the FCC's current definition of indecency, it is always possible that the FCC could incorporate the Act's mandate into its definition. While it appears that the Act attempts to avoid altering the definition of indecency by stating that the banned words would be considered profane instead of obscene or indecent under 18 U.S.C. § 1464,[219] it nevertheless would effectively alter the definition of indecency, since the FCC regulates broadcast materials based on the obscenity and indecency prongs of § 1464, not the profanity prong.[220] One can

216. 16 F.C.C.R. at 8,003.

217. *Id.*

218. *See id.* at 8,008–10 (discussing cases in which fleeting and isolated material did not warrant sanction absent "other factors [that] contribute[d] to a finding of patent offensiveness").

219. H.R. 3687, 108th Cong. (2003) ("As used in this section, the term 'profane,' used with respect to language, includes the words 'shit,' 'piss,' 'fuck,' 'cunt,' 'asshole,' and the phrases 'cock sucker,' 'mother fucker,' and 'ass hole'. . . .").

220. 16 F.C.C.R., at 7,999–8,000. Discussing 18 U.S.C. § 1464, the FCC notes:

> [B]ecause the Supreme Court has determined that obscene speech is not entitled to First Amendment protection, obscene speech cannot be broadcast at any time. In contrast, indecent

imagine a new definition of indecency that simply incorporates the Clean Airwaves Act into the current FCC indecency definition:

> language or material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium, except that the words and phrases "shit," "piss," "fuck," "cunt," "asshole," "cock sucker," "mother fucker," and "ass hole" are always indecent when used in any grammatical form.

Any new definition of indecency would have to satisfy strict scrutiny analysis—because indecent speech is protected by the First Amendment, "the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."[221] As will be seen, such a new definition of indecency will almost certainly be declared unconstitutional.

i. Compelling Governmental Interest

The government often seeks to defend indecency regulations by asserting that the protection of children from harmful materials is a compelling interest, "and courts generally have accepted this interest without comment or argument."[222] While it is unclear whether this means the government has "an interest in supporting and facilitating parental supervision over their children's access to sexually explicit speech" or an independent governmental interest in "restricting minors' access to sexually explicit materials,"[223] it is likely that protection of children from indecency is a compelling governmental interest.

> [C]hildren are different. We widely accept that children do not enjoy the same level of autonomy or the same range of 'rights' as adults, and in particular, we accept that others—including parents, legal guardians, and in some circumstances, the State—possess the power to coerce children in ways unimaginable for adults. . . . The

speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest.

Id. Nowhere does the Policy Statement discuss determinations of profanity. Indeed, the FCC's ruling in the Bono case stated that "The [FCC has] the authority to enforce statutory and regulatory provisions restricting indecency and obscenity." *In re* Complaint Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859 (2003). Nowhere did the ruling analyze profanity.

221. 16 F.C.C.R., at 8,000.

222. Bhagwat, *supra* note 204, at 673; *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (noting that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.")

223. *See id.* at 673–74.

State also has a well-recognized interest in protecting children from harm.[224]

That said, this interest is not without its limits. In *Butler v. Michigan*,[225] the Supreme Court stated that Michigan could not entirely prohibit the sale of lewd materials that could harm children because the state could not "reduce the adult population . . . to reading only what is fit for children."[226] However, because broadcast media has "established a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children,"[227] the government can likely regulate indecency in broadcasts to a greater extent than it could regulate indecency in print or other media. Thus, it is entirely possible that in analyzing the constitutionality of the Clean Airwaves Act, the Supreme Court would find that the protection of children from broadcast indecency is a compelling governmental interest.

ii. Least Restrictive Means

Assuming the Supreme Court finds that a compelling governmental interest exists in the protection of children from indecency, it must still find that the indecency regulation represents "the least restrictive means to further that interest."[228] It is under this prong of strict scrutiny analysis that the Clean Airwaves Act will likely fall short, particularly because the Act contains no temporal limitations and instead, applies at all times, day and night. Such an unlimited indecency regulation is undoubtedly not the least restrictive means of protecting children from indecent broadcasts.

This conclusion is not without case support. For example, the D.C. Circuit rejected an FCC decision that it could regulate indecent material as late as 11 p.m. and remanded the case to the FCC to determine an appropriate time during which indecent material could be broadcast—a "safe harbor" period.[229] Congress intervened before the FCC could respond, and ordered the FCC to adopt rules enforcing 18 U.S.C. § 1464 on a "24 per day basis."[230] That rule was subsequently vacated as unconstitutional.[231] Congress then instructed the FCC, in a provision implemented by the FCC in January 1993, to adopt a new safe harbor provi-

224. *Id.* at 689.

225. 352 U.S. 380 (1957).

226. *Id.* at 383.

227. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978). The Court has elsewhere noted the "special justifications for regulation of the broadcast media that are not applicable to other speakers." Reno v. ACLU, 521 U.S. 844, 868 (1997) (citation omitted).

228. *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7,999, 8,000 (2001).

229. Action for Children's Television v. FCC, 852 F.2d 1332, 1334–35 (D.C. Cir. 1988).

230. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act of 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

231. Action for Children's Television v. FCC, 932 F.2d 1504, 1509–10 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992).

sion from midnight until 6 a.m., except for certain noncommercial stations which were subject to a safe harbor period lasting from 10 p.m. until 6 a.m.[232] The D.C. Circuit found the more restrictive safe harbor for commercial stations to be unconstitutional; however, it held that the 10 p.m. to 6 a.m. safe harbor was constitutionally acceptable as a narrowly tailored means by which government could vindicate its compelling interest in children's welfare.[233] Therefore, under this line of cases, the Act would require a safe harbor provision during which indecent material could be broadcast for the benefit of adults. Without a safe harbor, the Clean Airwaves Act would almost certainly fail the strict scrutiny test because it is not the least restrictive means of protecting children.

3. Conclusion of Constitutional Analysis

The Clean Airwaves Act would be constitutional if it banned only obscene words.[234] However, its ban on words and phrases precludes a finding that it regulates only obscene speech. Again, the Act would require a trier of fact to completely ignore the elements of the *Miller* obscenity test. Thus, it targets nonobscene speech and cannot be sustained as constitutional under the Supreme Court's obscenity jurisprudence.

Similarly, the Clean Airwaves Act cannot be upheld as constitutional as an indecency regulation. It would completely ban all use of certain words without regard to whether they describe or depict sexual or excretory organs or activities and without regard to whether they are patently offensive under contemporary community standards for the broadcast medium. Therefore, the Act would prohibit the broadcast of words that would not meet the constitutional test for indecency. Moreover, altering the FCC's current indecency definition to take into account the Act's language would produce a definition that would almost certainly fail strict scrutiny analysis. Therefore, the Clean Airwaves Act will in all likelihood be declared unconstitutional.

IV. RESOLUTION

Although the protection of children from what is regarded as indecency may be laudable, the protection of First Amendment freedoms is also quite laudable. These two interests clash in the context of public broadcasts. Broadcasts rely heavily on the freedom of speech in their attempts to bring creative content to the public, and "[b]usinesses rarely welcome increased regulation, even when it comes with . . . widespread

232. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992); Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report and Order, 8 F.C.C.R. 704 (1993).

233. Action for Children's Television v. FCC, 58 F.3d 654, 669–70 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996).

234. *See* Roth v. United States, 354 U.S. 476, 485 (1957).

and bipartisan applause. The broadcast industry is no exception."[235] At the same time, "[t]he broadcast community is one that spans every conceivable human boundary. It reaches us in our homes, our vehicles, and at work. In a very real sense, from the moment we are born until we die, humans are swimming in a sea of modulated information."[236] The "uniquely pervasive presence in the lives of all Americans"[237] of broadcast media undoubtedly provides the government with a greater interest in protecting against broadcast uses that may harm viewers and listeners, particularly when those viewers and listeners are children. However, the enactment of a complete ban on the use of certain words likely violates the First Amendment. Moreover, such a complete ban is unnecessary given the availability of other mechanisms to protect the public from indecency in broadcasts, including parental controls, industry self-regulation—and if more government regulation is deemed absolutely necessary—steeper fines for violations of current FCC indecency standards.

A. Parental Controls

Even if broadcasters failed to alter the content of their broadcasts, children may still be protected from exposure to indecent language. Under current FCC regulations, indecent material may not be broadcast outside of the safe harbor, between 6 a.m. and 10 p.m.[238] Therefore, parents may entertain a reasonable assumption that their children will not be exposed to the broadcast of indecent language during those hours. However, since indecency regulation is administrative in nature and occurs only after the fact, parents should be on alert that indecent language may occasionally slip through during times outside those of the safe harbor. Therefore, parents should exercise an appropriate degree of control over their children's broadcast-media exposure. One simple way of accomplishing this is removing televisions from children's bedrooms; limiting televisions to family areas allows parents to monitor what their children are watching to a greater degree. Another way of protecting children against indecency is screening what children watch on television. If parents truly believe their children will suffer harm from exposure to indecent speech, they should only allow their children to watch television programs that are highly unlikely to contain such speech. Indecent references and statements which nevertheless are encountered can be countered by the parent with an explanation that such speech is unacceptable and not to be used by a child.

235. *Collision Course on the Airwaves; Critics Caution Rush to Regulation Could Infringe on Freedom of Speech*, CHI. TRIB., Mar. 14, 2004, at 1.

236. Rigney, *supra* note 50, at 319.

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

238. *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7,999, 8,000 (2001).

B. Industry Self-Regulation

Another option less restrictive than the Clean Airwaves Act's limitations is industry self-regulation. Broadcasters have the capability of raising their standards and setting rules prohibiting the use of indecent language. Should an employee violate the rules and use indecent speech during a broadcast, a broadcaster is fully able to take appropriate disciplinary action. For example, Clear Channel Communications took away radio "shock jock" Howard Sterns' microphone in response to his "comments describing graphic sexual activity and his show's broadcast of the 'n' word in an especially offensive context."[239] Broadcasters may remove questionable content from taped broadcast shows that air outside of the safe harbor, as was done recently with the ABC crime drama "NYPD Blue" and NBC's "E.R."[240] Instituting time delays for live broadcasts would allow broadcasters to censor indecent language. In fact, complaints following the more spectacular indecent broadcasts in recent months "could have been fully addressed by increasing the time delays that allow review—and censorship—of live broadcasts."[241] According to the National Association of Broadcasters, "voluntary industry initiatives are far preferable to government regulation when dealing with programming issues."[242] The broadcast industry certainly has plenty of motivation to take such initiatives; if the industry succeeds in creating higher broadcast decency standards for itself, it may stave off legislative attempts to do so for it.

C. Higher Fines for Violations

If increased governmental regulation proves to be absolutely necessary in the end, a complete prohibition on the broadcast of particular words is not absolutely necessary. Instead, the government could simply institute steeper fines for violations of current FCC indecency standards. Such a possibility may soon become a reality, given that the House of Representatives recently voted to approve increasing fines for indecent broadcasts from $27,500 to $500,000 per offense.[243] While such a steep increase may raise its own First Amendment issues, an increase in fines might change the view that paying fines are simply "the cost of doing

239. William Bennett, *The 1st Amendment, Public Pollution and Cultural Air Ducts*, CHI. TRIB., Mar. 18, 2004, at C29.

240. *See Collision Course on the Airwaves; Critics Caution Rush to Regulation Could Infringe on Freedom of Speech*, CHI. TRIB., Mar. 14, 2004, at 1 (noting that since Janet Jackson's "wardrobe malfunction" at the Super Bowl halftime show, ABC "expunged racy scenes" from the show on three occasions); Hilden, *supra* note 23 (describing NBC's airing of an "E.R." episode "only after editing out a scene that would have shown a glimpse of an elderly patient's breast").

241. Hilden, *supra* note 23.

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

243. *Id.*

business"[244] and thus, force broadcasters to pay closer attention to the content of their broadcasts.

V. CONCLUSION

The First Amendment protects the American right of freedom of speech; indeed, it is "one of the preeminent rights of Western democratic theory, the touchstone of individual liberty."[245] Freedom to speak one's mind surely adds to the richness of public discourse, and broadcasts have simply become intertwined with public discourse. While protecting children from indecency is important, both to the government and parents, protecting the freedoms of the First Amendment should be considered important to all Americans. While the two interests can coexist, a peaceful coexistence does not entail complete suppression of particular words from broadcasts. "When speech is silenced, not only the speakers, but the potential listeners—and society as a whole—lose out. Fewer messages are sent; the diversity of views is lessened; and our communications media—in this case, television—are impoverished."[246] Thus, the Clean Airwaves Act should be approached and analyzed carefully.

While the Clean Airwaves Act might be constitutional if it banned only obscene words, it covers words and phrases in such a manner as to preclude a finding that it regulates only obscene speech. Because the Act would require a trier of fact to ignore the elements of the *Miller* obscenity test, it targets nonobscene speech and is thus not constitutional as a mere obscenity regulation. Similarly, the Act cannot be upheld under the Supreme Court's current indecency jurisprudence. It would prohibit entirely all use of certain words without regard to whether they describe or depict sexual or excretory organs or activities and without regard to whether they are patently offensive under contemporary community standards for the broadcast medium. Therefore, the Act would prohibit the broadcast of words that would fail the current test for indecency. Moreover, altering the FCC's current indecency definition to include the Act's language would produce a definition that would almost certainly fail strict scrutiny analysis. Therefore, the Clean Airwaves Act will in all likelihood be declared unconstitutional.

244. *Id.*
245. NOWAK & ROTUNDA, *supra* note 38, § 16.2.
246. Hilden, *supra* note 23.