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The Fear-Causing Commission and Its Reign of Terror: Examining the Constitutionality of the FCC's Authority to Regulate Speech under the First Amendment

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THE FEAR-CAUSING COMMISSION AND ITS REIGN OF TERROR: EXAMINING THE CONSTITUTIONALITY OF THE FCC’S AUTHORITY TO REGULATE SPEECH UNDER THE FIRST AMENDMENT

I. A CONTROVERSY IS BORN

“So the FCC won’t let me be or let me be me so let me see, they tried to shut me down on MTV... Now this looks like a job for me, so everybody just follow me, cuz we need a little controversy, cuz it feels so empty without me,” sings the infamous rapper Eminem.\(^1\) Eminem was neither the first nor the last person to languish under the Federal Communication Commission’s (“FCC”) orders cracking down on indecent speech and obscenity in broadcast.

The FCC has continued to tighten the reigns over the years, indiscriminately attacking the entire spectrum of broadcasters—small and large alike. The agency slapped Infinity Broadcasting and its owner Clear Channel with fines nearing $2,000,000 for indecent speech by radio personalities like Howard Stern for violating its orders.\(^2\) CBS incurred more than $500,000 in fines for what the FCC called Janet Jackson’s “wardrobe malfunction,” when her breast was exposed for less than one second during the live broadcast of the 2004 Super Bowl Half Time show.\(^3\)

The media has provided extensive coverage of these occurrences and keeps the public well-informed about the fines levied against large broadcasters, but there are several lesser-known people and broadcasters that suffer in silence. For example, DJ Host Elliot Segal’s\(^4\) broadcast faced nearly $250,000 in fines for casually using the words “do it” in reference to

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4. Elliot Segal is a radio DJ that hosts the show “Elliot in the Morning” in Washington State.
sexual intercourse. DJ Host, Bubba the Love Sponge, "lost his job after the FCC hit his Tampa radio station with a huge fine for obscenity violations."7

Large broadcasters such as CBS have indicated their intent to challenge the fines levied against them. However, despite these potential challenges, and because of the FCC's growing control, broadcasters have seen no choice but to self-censor. In fact, broadcasters recently toyed with the idea of creating a voluntary code of conduct. Sadly, even media moguls with the financial capacity to challenge these decisions have settled with the FCC, while protesting that some of their broadcasts were not indecent.11

The FCC imposes fines based on regulations enacted in a reactive manner. Currently, the law-making process begins when the agency awakes from its slumber after an individual or a group complains about some type of personally offensive content on the radio or television. Then, a panel of five appointed members usually responds to the complaint by issuing a regulatory order. Subsequently, if a broadcaster or another party is unhappy with the agency's new regulation or decision, that broadcaster or party may challenge the order in federal court and eventually may seek review in the U.S. Supreme Court. If the Supreme Court agrees to review the decision, it should apply the strict scrutiny standard in examining the FCC's regulation, provided this regulation affects First Amendment speech rights.16

6. See Patrick Goldstein, A Parent Who Said 'Enough,' L.A. TIMES, Mar. 16, 2004, at E1 (The FCC charged Clear Channel in excess of $700,000 for indecent sexual speech in response to a single complaint by a father not wanting his teenage son to be exposed to Bubba the Love Sponge's broadcasts).
8. See Ahrens, supra note 2, at C04 (stating that Viacom president "has vowed to fight the pending indecency fines against its stations . . . ").
11. See Ahrens, supra note 2, at C04 (stating that Clear Channel settled for a record 1.75 million dollars over FCC indecency violations though disagreeing with the FCC).
12. See infra Part II.
13. See infra Part II.
15. See generally Sable Commc'n s of Cal., Inc. v. FCC, 492 U.S. 115, 118-19 (1989) (discussing one broadcaster's challenging of an FCC regulation and asking for review by the Supreme Court).
16. Id. at 126 (showing that the Supreme Court applied strict scrutiny to the FCC's regulation of sexually explicit speech because it was protected by the First Amendment).
The FCC seems to issue and review new regulations in an efficient, clock-work-like process. However, its review process defies the principle of separation of powers, and chills society and broadcasters’ sacred constitutional right to free speech. This is because the regulations suppress broadcast programming that is presumably reflective of society’s ideas and thoughts. In the modern world of broadcasting, radio personalities, media moguls, and programmers share common fears about incurring fines and citations for programming content violations. Consequently, they respond to the FCC’s actions by delaying live television, cutting programs, and firing individuals who create the questionable programs. When broadcasters or other harmed individuals attempt to challenge the decision, the courts apply a standard of review that masquerades as strict scrutiny, but instead affords excessive deference to the FCC.

Since the FCC’s inception, broadcasters and third parties have unsuccessfully used traditional First Amendment arguments to challenge the constitutionality of the agency’s broad regulatory power. The constitutional debate was recently revived in response to the FCC’s renewed campaign to punish all broadcasters attempting to skirt its indecency boundaries. Despite the fact that broadcasters have always enjoyed the benefit of strict scrutiny and the opportunities to challenge new fines and regulations, the FCC’s campaign creates a continually darkening cloud over the First Amendment. A reactive law-making process, coupled with the Supreme Court’s deferential standard of review, leaves broadcasters unclear about the type of programming that will keep them off the FCC’s radar.

The FCC’s process of passing regulations that affect First Amendment rights must be reexamined and altered. The current method threatens the checks and balances essential to the governmental system, and stifles the fundamental right of free speech protected by the Constitution. This Comment examines the FCC’s power over First Amendment freedom

17. See U.S. CONST. amend. I.
18. See infra Part II.C.
19. Christian Toto, Tuning Into T.V., WASH. TIMES, Mar. 15, 2005, at B06. Sadly, this defeats the entire concept of live television, as it destroys the spontaneity, energy and excitement of a live broadcast.
20. See Norville, supra note 7.
22. See, e.g., Action for Children’s Television v. FCC, 852 F.2d 1332, 1338 (D.C. Cir. 1988). These traditional challenges generally attack the over-breadth or vagueness of a statute. Id. at 1335.
23. See infra Part II.C.
of speech to emphasize the need to reform the agency's law-making processes to include greater caution and restraint in the creation of regulations affecting constitutional rights. Part II provides a historical analysis of the FCC's creation and its growing authority to regulate broadcasting content. Part III examines the inefficacy of past First Amendment challenges of FCC actions. Part IV proposes both a judicial and a legislative solution. First, the federal courts should allow broadcasters to make a novel constitutional challenge under the Non-Delegation Doctrine. Second, this Comment proposes that Congress amend the Telecommunications Act to institute a bifurcated system of passing new regulations. This system should distinguish between those regulations that affect constitutional rights and those that do not. The former would require more careful consideration than the latter. Part V suggests that the legislative solution is preferable to the judicial one. A new bifurcated legislative process is not only desirable but necessary to preserve both the fundamental right to free speech and the delicate balance of powers upon which our federal government stands.

II. CHILDHOOD AND ADOLESCENCE: THE FCC'S GROWTH OF POWER IN REGULATING INDECENCY AND OBSCENITY

A. The Creation of the FCC and Its Powers to Regulate Broadcast Media

The FCC was previously the Federal Radio Commission, which was created by the Federal Radio Commission Act of 1927 to regulate radio broadcast in the interest of public necessity.24 This Act was passed with the purpose of emphasizing the public's interest in communication instead of focusing on individual interests.25 Within a short period of time, Congress determined that the new agency required broader authority.26 Through the

26. See 47 U.S.C. §151 (2000) (stating the FCC's purpose is "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication . . . ").
Communications Act of 1934,27 Congress renamed and expanded its original creation, calling the successor the Federal Communications Commission.28 Congress granted this agency sweeping powers to regulate radio, interstate telephone, and telegraph communications,29 with the ambiguous guidelines of serving “public convenience, interest, [and] necessity.”30 In addition, section 303(r) of the Communications Act provides that the “Commission from time to time, as public convenience, interest, or necessity requires, shall . . . make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act] . . . .”31

Thus, Congress created the FCC and entrusted it with great law-making power but gave it very few law-making guidelines. This broad power has given the FCC a set of powerful tools to control the entire content of American broadcast media: it can issue an order redirecting the content of broadcasts,32 levy fines or sanctions for violations of these orders,33 suspend broadcasting licenses,34 and deny new licenses for prior indecency violations.35

The FCC is directed by five commissioners who are appointed by the President and approved by the Senate.36 “[N]o more than three Commissioners can be members of the same political party,”37 and “[t]he Commissioners’ terms are staggered.”38 As a federal regulatory agency, Congress gave the FCC broad legislative functions.39 “The FCC enforces the Communications Act, adopts and enforces administrative rules . . . and performs research concerning the broadcast industry.”40 Among other things, the FCC has issued regulations that determine what kind of content can be transmitted during radio broadcasts, and has issued several

27. Id.
28. Id.
32. See id.
33. Id. § 502 (2000).
34. Id. § 303(m)(1).
35. Id. § 309(k).
36. Id. § 154(a).
37. Goldsamt, supra note 29, at 208 (citing 47 U.S.C. § 154(b)(5)).
38. Id. at 207 (discussing 47 CFR § 0.1 (2005).
39. See id.
40. Id.
regulatory decisions governing the broadcast industry, including what time of day indecent shows can be aired.\textsuperscript{41}

The FCC’s procedural manual says that the FCC's duty is to “address concerns of the entire community,”\textsuperscript{42} and it has the power to conduct investigations and inquiries.\textsuperscript{43} Contrary to this directive, the FCC only takes a reactive stance.\textsuperscript{44} The agency responds to individual listener complaints, instead of undertaking its own independent investigations into the public’s desire and tolerance for broadcasting content.\textsuperscript{45} This reactive law-making process is in direct contradiction to the FCC’s original purpose—to protect the interests of society as a whole, rather than those of a disgruntled individual.\textsuperscript{46}

\textbf{B. The Evolution of the FCC’s Regulation of Indecent and Obscene Speech}

The broad power Congress delegated the FCC grants it immense authority to restrict speech. The agency has also capitalized on the ambiguity of modern definitions of obscenity and indecency. In 1948, Congress enacted a statute that outlawed radio broadcasts of obscene language.\textsuperscript{47} This statute enabled the FCC to fine and imprison those who broadcast obscenity.\textsuperscript{48} However, prior to this new legislation, Congress was fully aware of the constitutional limitation on restricting speech. The legislature made it clear that the FCC was not to censor the radio airwaves,\textsuperscript{49} since the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{41}See \textit{In re} Citizen’s Complaint Against Pacific Found. Station WBAI, 56 F.C.C.2d 94, 98 (1975) (declaratory order).
\item \textsuperscript{42}Goldsamt, \textit{supra} note 29, at 208.
\item \textsuperscript{43}47 U.S.C. § 403 (2000) (“The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter.”).
\item \textsuperscript{44}See Goldsamt, \textit{supra} note 29, at 208.
\item \textsuperscript{45}See \textit{id.} at 208–09.
\item \textsuperscript{46}See \textit{Radio Act of 1927}, Pub. L. No. 632, 44 Stat 1162, 1163 (1927) (stating the Commission’s purpose as protecting the “public convenience, interest, or necessity”).
\item \textsuperscript{47}18 U.S.C. § 1464 (2000).
\item \textsuperscript{48}\textit{Id.}
\item \textsuperscript{49}47 U.S.C § 326 (1988) (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).
\item \textsuperscript{50}U.S. CONST. amend. I.
\end{itemize}
The statute presented the oxymoronic dilemma of prohibiting the FCC from censoring speech while simultaneously requiring it to restrict obscenity from broadcasts. A 1973 Supreme Court decision helped to clarify this confusion. The Justices noted that speech could be divided into two categories, and held that indecent speech would receive First Amendment protection while obscene speech would not.\(^5\) The Supreme Court in *Miller v. California* stated that something was obscene if "'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, . . . [or if] it depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . lacks serious literary, artistic, political, or scientific value.'"\(^5\)2

The Court has since held that obscenity does not deserve First Amendment protection because the community should be able to determine its own moral environment.\(^5\)3 Legal author Henry Clor stated that obscenity should be excluded from First Amendment protection because the "ethical convictions of social man do not simply rest upon his explicit opinions. They rest also upon a delicate network of moral and aesthetic feelings . . . Men whose sensibilities are frequently assaulted by prurient and lurid impressions may become desensitized . . . This is what is meant by an erosion of the moral fabric."\(^5\)4

In contrast, indecent speech receives First Amendment protection; therefore, the government cannot suppress it simply because others might find it offensive.\(^5\)5 The Supreme Court held that there is a critical distinction between indecency and obscenity, but Americans remained befuddled as to the distinction. The difference appears to be a matter of degree, and it is precisely within these shades of gray that the FCC dwells, terrorizing the broadcasting community.

The FCC has exploited the ambiguities in the Supreme Court's definitions of both obscenity and indecency, often arbitrarily labeling certain language obscene to justify censoring programming. After a thorough examination of FCC orders, it will become clear that the agency

\(^{51}\) See *Miller v. California*, 413 U.S. 15, 23 (1973) (holding that "obscene material is unprotected by the First Amendment").

\(^{52}\) Id. at 24 (citation omitted).


\(^{54}\) Id. (quoting HENRY CLOR, OBSCENITY AND PUBLIC MORALITY 170–71 (1969)).

\(^{55}\) See Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").
has taken advantage of the holes in the Supreme Court’s decisions. The agency has become more strict and arbitrary in its regulations, and consequently has taken more control over speech than the First Amendment, properly construed, allows.

C. From Then Until Now

Since the Miller decision, the FCC has continued to create inconsistent, reactive regulatory orders that expand the definition of indecency and further restrict the First Amendment rights of broadcasters. In 1972, the FCC issued a regulatory order in response to a single complaint made by a radio listener about a George Carlin broadcast. At about two o’clock in the afternoon, Carlin joked about the “seven dirty words” that are never heard on public radio waves. One displeased dad complained to the FCC about the language, stating that it was inappropriate for his child, who was riding in the car with him during the broadcast. This troublesome incident continues to fuel the current controversy and exemplifies the FCC’s reactive process.

Reacting to this sole complaint, the FCC issued a declaratory order without conducting any independent investigations. In the order, entitled FCC v. Pacifica, the FCC found the language from the broadcast indecent and in violation of 18 U.S.C. § 1464. The order defined indecency as language that “describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience.” Here the FCC began exploiting semantic shades of gray, as the agency never specifically defined the phrase “contemporary community standards,” which it borrowed from the Supreme Court’s decision in Miller.

Not only has the FCC adopted a problematic approach to regulating

56. See Goldsamt, supra note 29, at 211.
57. Id.
58. Citizen’s Complaint, 56 F.C.C.2d at 94.
59. Id.
60. 18 U.S.C. § 1464 (2000) (“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.”).
61. See Citizen’s Complaint, 56 F.C.C.2d at 94.
62. Id. at 98 (This definition was remarkably similar to the Supreme Court’s definition of “obscenity,” appearing to allow the FCC to only impose restrictions on obscene materials.).
63. Id.
64. Id. at 94.
The Federal Communications Commission (FCC) has struggled with defining indecency and obscenity, but it has also failed to adhere to a consistent definition of both terms. For nine years following Pacifica, the FCC slammed broadcasters with indecency violations only when they used the "seven dirty words," or those similar to the cursed seven, because the decision in Pacifica seemed confined to specific facts. However, throughout the 1980s, the conservative Reagan administration incited a regulatory crackdown on indecency. It abolished the "seven dirty words" standard in favor of the generic definition the FCC originally provided in Pacifica, but never applied. From then on, the definition of indecency began to expand, encompassing all questionable language aired on the radio.

Having backpedaled from the "seven dirty words" standard in favor of its more contemporary definition, the FCC released three more orders in 1987 supporting its broader standard of indecency. In Infinity Broadcasting Corp v. FCC, the FCC found portions of Howard Stern's broadcasts indecent, although there was no use of the "seven dirty words." In another example of its inconsistent approach, the FCC declared its intent to regulate excerpts from an on-air theatrical play broadcast between 10:00 P.M. and 11:00 P.M. This was in direct contradiction to its prior rule that broadcasts aired after 10:00 P.M. would not be subject to the indecency regulations. Also in contradiction, the FCC decided to regulate airplay of a song, "Makin' Bacon," on a Saturday night after 9:30 P.M.

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66. President Regan was ultra-conservative and the FCC in turn became more conservative under his term of office.


68. See Infinity II, supra note 65 at 930 (defining indecency as language that "describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience.").

69. Id.


71. Infinity I, supra note 70, at 2705.

72. See Pacifica II, supra note 70, at 2698.

73. Id.

74. In re The Regents, 2 F.C.C.R. at 2703 (The song by the band Pork Dukes was played on a college station, KCSP-FM. The song lyrics were as follows: "Makin' bacon, makin' bacon... A ten-inch cropper with a varicose vein... Come here baby, make it quick, kneel down... Turn around baby, let me take you from behind, Makin' bacon is on my mind.").
Shortly thereafter, the FCC summarized these released orders to inform broadcasters of the new standards and broader definition of indecency.\(^7\) The guidelines did not establish a clear rule, but the agency “suggested” that a “safe harbor” for “dirty” broadcasts might be between midnight and 6:00 A.M., to insure that the material was targeted at adults instead of children.\(^6\)

Infinity Broadcasting fell victim to the FCC’s imprecise summary of the new regulations released in 1987. In 1988, Infinity’s stations were heavily fined for Howard Stern’s programs.\(^7\) Infinity challenged the order, arguing that the FCC must treat similarly situated parties in a similar manner, as a D.C. Court had previously instructed in *Melody Music v. Fed. Communications Commission*.\(^8\) Despite the court’s holding, the FCC did not fine another broadcasting company named Sagittarius under the same standard, even though a complaint was also filed against its television broadcast entitled *Geraldo*.\(^9\) Like Stern, *Geraldo* explicitly discussed various sexual techniques.\(^8\) However, the FCC authorized itself to infer the *Geraldo* show’s purpose—that, unlike the content of Howard Stern’s program, it never intended to “pander or titillate,” and was not “vulgar or lewd.”\(^1\) The FCC’s rationale was simply illogical. Instead of applying a uniform standard, the FCC chose to give the same words or sexual content different meanings. This inconsistency again demonstrates the FCC’s unfettered discretion in defining obscenity in broadcasting content.

More recently, the FCC expanded its authority to regulate speech by redefining indecency to include the broader notion of profanity. Bono, the lead singer of U2, said, “[t]his is really, really fucking brilliant” when receiving an award during the 2003 Golden Globe Awards broadcast.\(^8\) In October of 2003, the FCC Enforcement Bureau decided that this utterance was “unfortunate,” but not indecent, because it was used in an exclamatory fashion, rather than describing sexual or excretory functions.\(^8\) But the following year, after the breast exposure incident with Janet Jackson on

\(^7\) See New Indecency Enforcement Standards to Be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987).
\(^6\) See Infinity II, supra note 65, at 937.
\(^7\) See In re Liab. of Sagittarius Broad., 7 F.C.C.R. 6873, 6873 (1992).
\(^8\) See generally *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).
\(^9\) See Sagittarius, 7 F.C.C.R. at 6874.
\(^8\) Id.
\(^1\) Id.
\(^8\) See id.
CBS, the FCC issued a new order overruling its prior decision about Bono's statement. It also indicated the agency's resolve to embark on a "new approach to profanity" that no longer limited the statutory meaning of the term "profane language" to "blasphemy or divine imprecation," but instead expanded the definition to cover words such as "fuck" and other odious variations. In the end, the FCC essentially granted itself additional means of suppressing the First Amendment—instead of merely patrolling the established road of indecency, it could now explore the new avenue of profanity.

D. Today’s Omniscient FCC

Currently, the law prohibits broadcasting indecent material from 6:00 A.M. to 10:00 P.M., as children are presumably listening at this time. If a station violates this regulation, it can be subject to a fine of $32,500 per utterance. Stations may face multiple fines for repeatedly broadcasting the indecency, with a cap of $325,000. (Impending legislation proposes an increase of up to $250,000 per violation with a $3,000,000 per day cap.).

The FCC maintains a reactive stance because it insists on relying solely upon listener complaints to issue decisions, instead of proactively setting comprehensive standards. By also penalizing both intentional and unintentional violations, the agency essentially prohibits live broadcasting. As a result, stations are understandably more reluctant to broadcast live coverage, and are instituting delays when covering live events. These delays prevent the station from being fined, for example, when a rioter on television yells an expletive at police officers.

84. See supra Part I.
86. See Davis, supra note 82, at 29.
87. Golden Globes, supra note 85, ¶ 15.
88. See 18 U.S.C. § 1464 (2000) (providing that “[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.”).
89. Golden Globes, supra note 85, ¶ 14.
90. See Regents, supra note 70, at 2704.
91. See 47 C.F.R. § 1.80(b) (2004).
92. See Davis, supra note 82, at 28.
94. See Toto, supra note 9.
Shows such as Howard Stern have been pulled, and the FCC attempted to withhold granting further licenses to those responsible for airing the program. The FCC has even tried to deny renewal of broadcasting licenses for other reasons. As though this was not enough, the FCC has also toyed with "the idea of extending its decency standards to cable television."

Several obvious questions arise as a result of the FCC's regulatory practices. First, did Congress intend for the FCC to regulate live television so heavily as to practically require broadcasters to put at least a five-second delay in live broadcasts to prevent mishaps like Ms. Jackson's? Second, did the Supreme Court in Pacifica intend for broadcasters to start pulling or self-censoring programs in fear that they might somehow violate indecency standards? Finally, did the Framers intend for the First Amendment to be so degraded? The simple answer to these questions is no. The FCC must be restrained so that the First Amendment may regain meaning in the broadcast media context.

III. THE OBSEQUIOUS JUDICIAL BRANCH

From the beginning of First Amendment jurisprudence, the Court jumped into bed with the FCC and has since stayed under the covers. This arrangement makes challenging FCC orders practically impossible. Broadcasters have continuously tried to challenge regulatory orders under

95. Frank Ahrens, Deal Erases Pending Charges Against Clear Channel, WASH POST. June 10, 2004 at C04.
99. See Joanne Ostrow, A Lifetime of Debate in Five Seconds: Questions over Indecency Raise Profile of TV Censors, DENV. POST, Apr. 19, 2004, at A–1. (Several broadcasters are so worried about FCC fines that they are using time delays even though the broadcasts are supposed to be live. For example, ABC used an audio delay for the Oscars to cut anything "untoward." MTV plans to use a delay for their MTV Music Awards and CBS plans to use delays for future coverage of NFL events.).
100. See Campanelli, supra note 98, at L1.
101. Tony Mauro, Stern's Raunch is Better than Silence, USA TODAY, May 12, 2004, at 13A ("Public broadcasters told the FCC recently that 'we have been forced, at increased expense, to provide multiple nationwide feeds of programs that would have been unthinkable to edit only weeks ago.' Case in point: deleting strong language in the popular Masterpiece Theatre series from Britain, Prime Suspect. 'I have given up on PBS,' one angry viewer wrote in to protest the self-censorship. When Americans are becoming more prudish than the Brits, we are truly in trouble.")
the First Amendment using the traditional doctrines of over-breadth and vagueness. The courts have adopted a highly deferential version of strict scrutiny review, instead of looking at FCC regulations with a truly critical eye. A thorough examination of case development shows that this type of constitutional challenge has been entirely ineffective due to the judiciary’s excessively deferential approach to the issue.

The Supreme Court has contributed to the ambiguity and confusion by supporting inconsistent and unclear definitions of indecency. The indecency doctrine began its journey through the courts in 1971, when the Supreme Court held in Cohen v. California that profane and offensive language was protected by the First Amendment. In Cohen, the defendant was convicted of violating a “disturbing the peace” statute for entering a Los Angeles County Courthouse in a jacket with the words “Fuck the Draft” printed on the back. Since the words neither appealed to the prurient interest, nor were communicated to people in a captive audience, the speech was held to be protected. Yet Cohen never expounded upon the amount of constitutional protection indecent speech was to be afforded, for the speech in this case was also political in nature. As a result, political speech often receives a very high level of constitutional protection, irrespective of whether indecent in nature or not.


103. Cohen v. California, 403 U.S. 15, 26 (1971). In this case, the defendant walked through the courthouse corridor wearing a jacket bearing the words “Fuck the Draft” to express his thoughts on the Vietnam War. He was convicted of disturbing the peace under a California statute that sought to punish offensive conduct. The state argued that his conduct was his communication on the back of his jacket. The Supreme Court disagreed, holding that undifferentiated fear or apprehension of disturbance is not enough to suppress freedom of speech. The Court also said that Cohen’s speech had an element of “political discourse,” and thus was subject to fewer governmental restraints. “The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.” Id. at 21.

104. Id. at 16 (noting that women and children were present in the courthouse, which evidences the ancient mindset that exposing women and children to bad language was somehow worse than exposing men to the same language).

105. Id. at 21. The terms “captive audience” or “unavoidable exposure” are usually used to describe an audience that cannot escape the speech in some manner. In this case, the audience was not captive because they could avert their eyes, or leave the courthouse.

106. Id. at 26.

The Court became even more aligned with the FCC's position on broadcast regulations. It quickly began chipping away at the First Amendment, making it clear that indecent speech was not to be afforded full First Amendment protection. For example, in Young v. American Mini Theatres, the Court held that sexually explicit films merited less protection than political discourse, and could thus be regulated to a greater extent.\textsuperscript{108} Similarly, the City of Detroit passed an ordinance to reduce the concentration of adult entertainment movie theaters present in any particular zone of the city.\textsuperscript{109} The Court decided that although the ordinance technically regulated speech content, it did not violate the First Amendment because, while the First Amendment safeguards communication in the area of sexually oriented materials from total suppression, "the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."\textsuperscript{110} Here, the Court again shied away from issuing a definition of indecency, instead deferring to another entity in order to make the determination. As a result, broadcasters remained in the dark about the changing standards of indecency.

The Court's willingness to defer to the FCC's judgment was cemented in the 1978 landmark Pacifica decision.\textsuperscript{111} This decision quickly became the shield behind which the Court still hides today whenever it is asked to examine a constitutional challenge to an FCC regulatory order. In Pacifica, the Court upheld the FCC's declaratory order that labeled a George Carlin broadcast indecent.\textsuperscript{112} The Supreme Court stated two central purposes for allowing indecency regulation by the FCC: (1) the regulation furthered the government's purpose of protecting children from indecent programming,\textsuperscript{113} and (2) the broadcast media must be highly regulated because of a limited number of frequencies of airwaves and its "uniquely pervasive" ability to enter into the homes of the public and to reach children.\textsuperscript{114} In addition, the Court noted that the FCC could regulate indecent broadcast material despite concerns about restrictions of the First Amendment because listeners could always access the material through

\begin{footnotesize}
\begin{enumerate}
\item[109.] Id. at 52.
\item[110.] Id. at 70-1.
\item[111.] See Pacifica I, 438 U.S. 726.
\item[112.] Id. at 732.
\item[113.] See id. at 749.
\item[114.] See id. at 748.
\end{enumerate}
\end{footnotesize}
obtaining a written transcript of the show or by attending a live performance. The Court simply looked in the FCC's direction and nodded approvingly. The Court jumped to the conclusion that protecting children is a compelling purpose and felt a more complete review was superfluous.

The problem is that, although the Court found a justifiable compelling purpose, it neglected to thoroughly examine whether the restrictions were narrowly tailored to achieve that purpose, thus brushing past the other requirements of strict scrutiny and relaxing the supposed rigid standard.

Ever since that decision, the Supreme Court's rationale of protecting children has built an impenetrable wall that makes any traditional First Amendment challenge to FCC regulatory orders futile. For example, in Action for Children's Television v. FCC, the American Civil Liberties Union ("ACLU") challenged the definition of indecency as unconstitutionally vague and over-broad. The court upheld the FCC's decision and its new broad standard for indecency, saying the "seven dirty words" standard was too narrow to effectively "shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear." In addition, the Court conceded that the new standard was highly cryptic and vague, attributing this characteristic to the fact that the regulation of indecency itself was inherently ambiguous. The Court discarded the over-breadth argument by stating that it did not foresee the new definition of indecency to have any chilling effect on broadcasters. Though the Supreme Court will typically engage in a thorough discussion of whether a statute or regulation is over-encompassing or too vague to serve its purpose, the Court devoted the bulk of this opinion to justifying why the FCC should be allowed to maintain a vague and over-broad definition. Thus the Supreme Court continued its increasing deference to

115. Id. at 760.
117. See Pacifica I, 438 U.S. at 749–50.
118. 852 F.2d 1332 (D.C. Cir. 1988).
119. Id. at 1334.
120. See id. at 1338 (showing it is hard to keep track, but the indecency standard at this time is the more generic version that was in place after the "seven dirty words" standard was redacted).
121. Id. at 1338.
122. Id. at 1340.
123. Id. at 1338.
124. See Action, 852 F.2d at 1339 n.10 (citing Justice Powell's concurrence in Pacifica I).
the FCC in this area of law.\textsuperscript{125}

Since then, broadcasters have consistently tried to challenge FCC orders claiming that the regulations are an unconstitutional suppression of their First Amendment rights, but the Court today still clings to the idea that the crusade against indecency is in the name of children.

IV. FINDING A WAY OUT OF THE ABYSS

\textit{A. Reviving the Non-Delegation Doctrine: The Judicial Solution}

When a First Amendment right is at issue, a regulatory body must carefully weigh the interest in restricting controversial speech against the value of allowing the controversial speech to be broadcasted. Carefully crafted regulations may restrict radio broadcasters' speech for compelling purposes because of the nature of the medium. However, while speech may be restricted, it should not be devalued to the extent that it has been under the current FCC review system. Whether or not indecency standards are to become looser or stricter, the process by which those regulations are passed must be revised to obliterate the excessive judicial and congressional deference currently afforded to the FCC. A revision of this process will ultimately help to preserve the sanctity of the First Amendment. The question remains as to how to accomplish that goal.

Broadcasters have virtually exhausted all of their traditional First Amendment arguments. They need an innovative approach that both forces more meaningful guidelines upon the FCC while remaining good for children. A novel approach would be to challenge the scope of the FCC orders by arguing that the FCC's actions violate the Non-Delegation Doctrine.\textsuperscript{126} Pursuing this constitutional approach should be more effective in changing the current ambiguous regulations in favor of a more uniform standard by which FCC regulations are reviewed.

An examination of the FCC's actions in light of the Non-Delegation Doctrine will show that Congress must give the agency more direction and guidelines when permitting it to impose restrictions on constitutionally protected freedoms such as the right to free speech. The FCC clearly needs far more "intelligible principles"\textsuperscript{127} from Congress in order to regulate this area effectively within the bounds of the Constitution.

The Supreme Court held that Congress may not completely delegate

\footnotesize{125. \textit{See id.} at 1338–44.}

\footnotesize{126. \textit{See supra} notes 124–126 and accompanying text.}

\footnotesize{127. \textit{See infra} notes 133–135 and accompanying text.
its lawmaking power to another branch of government, because Article I of
the United States Constitution "vests 'all' legislative power in
Congress."128 This concept has been called the Non-Delegation
Doctrine.129 However, this doctrine is partially a legal fiction because the
Court has upheld careless delegations without noting that they may cross
the constitutional line.130

The ease with which Congress began delegating power began in the
early 1930s. During this decade, President Franklin D. Roosevelt focused
his New Deal program on a highly regulated economy to heal the economic
ruin that ravaged the nation after the Great Depression.131 Roosevelt’s plan
gave birth to several federal agencies,132 whose purposes were to regulate
various specialized industries. It created agencies to restore the securities
market, to bolster agriculture, to ensure safety in the workplace, and to
stabilize the banking system.133 Congress justified these delegations of
power to agencies as “necessary and proper” to the successful operation of
a properly functioning government.134 The regulatory state grew, propelled
by increasingly complex societal needs and technological advances. With
this trend, the judicial branch became less and less suspicious of legislation
that supported socially progressive programs.135

Though supportive, the Supreme Court did not approve the delegation
of power to an agency without some constraints on the agency’s power.136
Instead, the Court upheld delegation as long as Congress set forth “an
intelligible principle to which the person or body authorized to [act] is
directed to conform . . . .”137 However, this “intelligible principle” test
proved very easy to meet.138 It has been satisfied, for example, where

128. CHRISTOPHER N. MAY & ALLAN IDES, CONSTITUTIONAL LAW: NATIONAL POWER
129. See id.
130. Reference.com, Definition of Legal Fiction, at
http://www.reference.com/browse/wiki/Legal_fiction (defining legal fictions as “suppositions of
fact taken to be true by the courts of law, but which are not necessarily true. They typically are
done to evade archaic rules of procedure or to extend the jurisdiction of the courts in ways that
were considered useful, but not strictly authorized [sic] by the old rule.”).
131. Sandra B. Zellmer, The Devil, the Details, and the Dawn of the 21st Century
132. See id. at 942.
133. See id. at 955.
134. See U.S. CONST. art. I, § 8, cl. 18.
135. See Zellmer, supra note 131, at 942.
United States, 276 U.S. 394, 409 (1928)).
138. See May, supra note 124, at 273.
Congress's guidance was as minimal as stating that the agency standards must be "fair and equitable," or in the "public interest." The Court's consistent support for delegation of powers seems to reflect a realistic and modern view of the separation of powers in the government. More specifically, Congress itself often "lacks the time and expertise" to issue specified rules for many areas requiring in-depth and tailored legislation. It therefore makes sense for Congress to rely on the assistance of federal agencies. For example, an agency such as the Environmental Protection Agency ("EPA") is better equipped to conduct studies, lab tests, and gather specific scientific data in order to pass environmental laws than is a busy entity like Congress. Meanwhile, Congress can deal with more generalized issues that do not require such particularized knowledge. This is also why Congress granted the FCC such immense power over broadcasting. The FCC has more time and resources to regulate the unique and highly specialized field of broadcast.

At times, courts have taken the stance that Non-Delegation arguments challenging the administrative state were "barely worthy of a footnote." From the New Deal Era until the 1970s, the courts ignored Non-Delegation concerns and upheld even the most ambiguous of provisions on the theory that they could gain meaning "from the statute's overall purpose and general philosophy, as well as its legislative history, factual background or historical and social context." For example, the FCC itself was let loose with the broad and ambiguous, yet nonetheless "intelligible principle" that it could regulate a broadcast as the "public interest, convenience, or necessity" requires.

Although delegation is generally considered an efficient form of government, some courts have shown hesitation in upholding it. Even if the courts have not explicitly struck down laws as violating the Non-Delegation Doctrine, the anti-delegation theme still runs throughout many decisions. For example, in 1935 the Supreme Court struck down two statutory provisions that unlawfully delegated legislative powers. In that

139. Id.
140. Id.
141. Id.
142. Id.
144. Stupak-Thrall v. United States, 89 F.3d 1269, 1284 n.17 (6th Cir. 1996) (Boggs, J., dissenting) (citing United States v. Brown, 552 F.2d 817, 823 n.8 (8th Cir. 1977)).
145. Zellmer, supra note 131, at 962.
147. See, e.g., Touby, supra note 137.
148. See A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (In this case,
same year, the Court struck down another provision of the National Industry Recovery Act ("NIRA") that enabled the President to stop the transportation of petroleum in interstate commerce in excess of amounts dictated by state law.  

More importantly, in recent years some lower federal courts have suggested that the Non-Delegation Doctrine is not entirely toothless. For example in American Trucking Ass'ns v. EPA, the Court of Appeals for the District of Columbia held that the EPA had overstepped its constitutional boundaries and seized legislative powers from Congress when it issued its National Ambient Air Quality Standards ("NAAQS") under the Clean Air Act. The Act required that the EPA set air standards as a "requisite to protect public health" with an "adequate margin of safety." Additionally, the Act required secondary NAAQS to protect the "public welfare," which generally includes effects on the environment as well as "economic values." Even though the EPA consulted studies regarding the air quality level, the court felt these guidelines failed to articulate "intelligible principles," from which the EPA could properly determine air quality standards. The court found that the EPA's newly issued standards did not reflect congressional intent. The court reasoned that, "it [was] as though Congress commanded EPA to select [the] 'big guys,' and EPA announced that it would evaluate candidates based on height and weight, but revealed no cutoff point." The court stated that a

the Supreme Court voided a section of the National Industry Recovery Act ("NIRA") as violative of the Non-Delegation Doctrine. Here, the petitioners were convicted of eighteen counts of violating the Live Poultry Code, which was enforced pursuant to section 3 of the NIRA. Section 3 allowed the President to promulgate "codes of fair competition" and take other measures to effectuate the broad goals set forth in section 1 of the NIRA. The petitioners argued that it was unconstitutional because the President was restrained by no standards in exercising this power. The Court relied on Panama Refining to determine the validity of the legislative delegation. The Court explained that a legislative delegation must operate "within prescribed limits," and emphasized that the statute which delegated power to the President failed to describe its subject, beyond insuring fair competition. It held the delegation was unconstitutional because it failed to set standards to guide the President in creating the codes of fair competition.

149. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (stating that the provision that gave the President unfettered authority to lay down prohibitions on transport on whatever grounds he saw fit was unconstitutional).
151. Id. at 1033.
153. Id. § 7409(b)(2) (2000).
154. See id. § 7602(h) (2000).
155. American Trucking, 175 F.3d at 1034.
156. See generally id.
157. Id. at 1034.
reasonable person would also ask, "How tall? How heavy?" The case shows that Congress upset the delicate balance of powers between the branches of the government when it delegated policy-making power to a federal agency, made up of unelected agency officials. Concurring cases state that Congress sheds its policy-making powers when it provides virtually no guidelines to curtail an agency's discretion in implementing legislation. Thus, instead of working within the law, the EPA usurped Congress' power by creating the standards and policy for the law without regard to the original purposes for which Congress created them: "to protect the public health."" Important choices of social policy are made by Congress, the branch of... Government most responsive to the popular will." However, decisions like this have been sadly unusual in the history of agency regulation.

The lesson learned from American Trucking is that absent clear congressional parameters, an executive agency has enormous interpretive and law-making powers. The FCC's powers lack precise congressional constraints. For example, the FCC has been given unfettered authority to regulate for the "public convenience, interest, or necessity." It is as if Congress told the FCC to weed out the bad elements and regulate broadcast with public sentiment in mind. Then, using regulatory orders, the FCC announced that it will evaluate broadcasting content according to some equally ambiguous indecency standard. However, the FCC has revealed no cut-off point or concrete guidelines. A reasonable person would inquire about the type of language that is appropriate, and ask questions such as, "what words are bad?" and "how explicit?" There is just as much ambiguity in the FCC's regulations as in the EPA's directives. However, the EPA was forced to reissue its regulations while the FCC remains a wild dog unleashed upon society.

Moreover, though this type of judicial deference might be acceptable

158. Id.
159. See generally id.
161. American Trucking, 175 F.3d at 1033.
162. Indus. Union, 448 U.S. at 685.
163. The Supreme Court later overturned the Court of Appeals decision stating that it was not a violation of the Non-Delegation Doctrine because it would be unrealistic to require Congress to determine exact ozone levels that the EPA could regulate under. Instead, it deferred to precedent, allowing the ambiguous language such as regulating for public necessity to stand as an intelligible principle. See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001). But other cases continue to suggest that impermissible delegations of power are taking place. See Michigan v. EPA, 213 F.3d 663, 680 (1999).
at times when technology and culture require specialized agencies to pass intricate laws affecting complex areas, the First Amendment is not a product of the modern day technological boom. The same kind of loose deference accorded to federal agencies should not apply to regulations affecting the First Amendment or other constitutional areas. Arguably, the EPA is truly in a better position than Congress to make environmental regulations because the regulations require complex, scientific research to determine such things as pollution levels in the air. Congress does not have the time or the resources to conduct these research-based studies, while an agency like the EPA exists primarily for its expertise in the environment. Though complex in its own right, the First Amendment does not require the same level of specialization that prompted the creation of the EPA so as to justify Congress delegating its law-making ability in the area of Constitutional law.

The right of free speech is an individual, fundamental right that has existed since the inception of the country. The FCC cannot be given such unconstrained guidelines on the false premise that it is better situated to articulate what can and cannot be said on the air. Instead, Congress, a large body comprised of elected public representatives, rather than the FCC, a body of five appointed individuals, is truly in a better position to know and define the contemporary community standards. Congress, as a representative body, is more likely to be in tune with the issues that affect speech, such as modern trends, morals, and tolerances of the public at large.165

Unlike rights to deplete ozone levels and to control the width of trucks,166 freedom of speech is a constitutional right revered since the inception of the country. It is a right that the Constitution was specially amended to protect through the Bill of Rights.167 The First Amendment was drafted as a reaction to the suppression of speech that existed in English society and in the English press.168 Several purposes have been propOned for the protection of free speech: (1) it is crucial to self-governance and essential in a democratic society; (2) it leads to the

165. See Doe v. McMillian, 412 U.S. 306, 333 n.2 (1973) (Blackmun J., concurring in part and dissenting in part) (stating “It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and the will of its constituents.”).

166. See generally South Carolina v. Barnwell Bros., 303 U.S. 177 (1938) (ruling that a South Carolina statute excluding trucks from operating on South Carolina roads if the trucks exceeded a certain width was within the state legislature’s power and was an acceptable burden on interstate commerce.).

167. U.S. CONST. amend. I.

discovery of truth; (3) it advances personal autonomy such that it allows people to engage in self-definition and expression; and (4) it promotes tolerance. Many have articulated reasons for its importance in American society, but perhaps Justice Brandeis said it best in his concurrence in Whitney v. California, stating among other things that the framers, "[b]elieving in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." Thus it is almost sacrilegious to liken the regulations of speech to simple regulations based on interstate commerce affecting various truck lengths.

Sadly, this is what the current FCC review system does—it likens speech to truck lengths by allowing the agency to regulate speech using the same "intelligible principles" given to federal agencies to regulate interstate commerce. Thus, the Supreme Court should follow the lower courts and previous Non-Delegation decisions and overturn FCC regulations, holding the delegation to the FCC constitutionally impermissible. In addition, the judiciary cannot operate under the current assumption that an agency is truly in a better position than Congress to issue regulations; instead it must take the deference given to the FCC out of the current "strict scrutiny" review. The judiciary must insist that Congress step in to honor the history and tradition of the U.S. Constitution, and protect rights like the First Amendment, rather than delegating authority to the FCC. Broadcasters would be more likely to succeed if they launched a constitutional challenge based on the Non-Delegation Doctrine.

B. Revamping the FCC's Guidelines: The Legislative Solution

Launching an attack on FCC guidelines based on the Non-Delegation Doctrine through the judicial system might be a novel strategy, and may solve the problem by occasionally overturning some FCC regulations. However, this "post-injury" solution seems inadequate, as it will neither solve the underlying ambiguity problem nor ameliorate the chilling effect on broadcasters' rights to free speech. Rather, an attack must aim at the Congressional source, solving the problem proactively instead of reactively.

Broadcasters would likely achieve more by lobbying for a

169. Id. at 898–902.
Congressional amendment to the Telecommunications Act that would provide for a bifurcated law-making process. With such an amendment, Congress could create two methods of reviewing FCC and other agency regulations. Regulations that do not affect constitutional rights would be subject to the existing framework, so as not to disrupt the complex regulatory system on which the modern government relies. However, regulations affecting constitutional rights would be subject to a much more rigorous review process, guided by genuine "intelligible principles."

Under the current system, regulations are passed, enforced, and then challenged. This system creates a long, frustrating process that allows regulations that merit strict scrutiny review to pass via a highly deferential review that resembles the "toothless" rational basis review standard. The FCC was created and given its regulatory authority pursuant to the Telecommunications Act. Thus, its law-making power was simply given rational basis review, because, as a statute affecting Interstate Commerce, the Telecommunications Act only merits this lowest standard. The Supreme Court has made it clear that it will defer to the FCC's judgment in the area of indecency because of indecency's "inherent vagueness." The Court thus effectively permits the FCC to pass regulations affecting speech without properly subjecting those regulations to strict scrutiny. As the cases and language show above, in reality, the Court has elected to apply a looser strict scrutiny approach; one so loose that it resembles the rational basis standard.

The Telecommunications Act is only subject to rational basis review by the courts because Congress is the body most responsible to the public. The courts accord deference to Congress, because members of Congress are elected representatives and presumably make decisions that sit well with the public. The Court makes it clear in Alexander v. Sandoval,

171. The Supreme Court adopted a rational basis review to examine laws passed by Congress pursuant to the Commerce Clause. Under this standard, the Court will uphold any law that Congress passes if the purposes of the law are "rationally related to a legitimate state interest." See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). This is the lowest standard of review the Court can apply when examining statutes. Additionally, the Court has not required that Congress state an actual, specific legislative purpose, but rather has allowed laws to pass constitutional muster merely if the Court can fathom any rational purpose that Congress might have had in mind when making the law. See Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).


175. Alexander v. Sandoval, 532 U.S. 275 (2001) (In this case, the plaintiff challenged the defendant's policy of administering driver's license examinations only in English, arguing that it had a discriminatory impact on Non-English speakers based on national origin. The U.S.
that only Congress may create federal law and implied rights enforced through federal law. In contrast, federal agencies are left to issue administrative interpretations of statutes passed by Congress that are only supposed to "flesh out the contents of those rights." Additionally, the Supreme Court assumes that Congress conducts legislative studies and thus makes informed decisions to author legislation.

In contrast, the courts accord the least deference to Congress and apply a strict scrutiny test to laws that affect constitutional rights, such as the First Amendment. This means that the government must have a compelling governmental purpose for the law, and the law must be narrowly tailored to fit that purpose. Thus, when laws are said to violate fundamental rights, such as the right to free speech, they are subjected to this strict scrutiny examination. Courts exercise extreme caution in allowing Congress or any other body to regulate those rights, because the rights are so highly valued.

The problem occurs when the application of the rational basis test is disguised as the strict scrutiny test. Under the current system, the FCC creates regulations affecting speech that deserve the strictest standard of review. Instead, these regulations receive a highly deferential review that resembles a rational basis review, because the judicial branch has been according the amount of deference by referring to the Act under which the FCC was created. However, the Court should be looking at the type of law affected by the FCC regulation. Unlike Congress, The FCC is not

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176. See Save Our Valley v. Sound Transit, 335 F.3d 932, 937–38 (9th Cir. 2003) (holding that no agency regulation can create an individual right enforceable through 42 U.S.C. § 1983 because only Congress has the power to create private rights of action).
177. Id. at 936 (holding that "because of controlling Supreme Court precedent... an agency regulation cannot create [an] individual right...").
178. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 924–25 (4th Cir. 1999) (en banc) (Motts, J., dissenting) (explaining that the judiciary relies on congressional findings in applying a rational basis review. Motts confirms the notion that the Supreme Court affords rational basis review to laws passed pursuant to the Commerce Clause because the Court has no congressional findings to refer to and thus has no reason to question Congress' purposes in passing the law.); see also Arthur B. Mark, III, United States v. Morrison, The Commerce Clause and the Substantial Effects Test: No Substantial Limit On Federal Power, 34 CREIGHTON L. REV. 675, 686 (2001).
180. Playboy, 529 U.S. at 813.
181. See id.; Sable Commc'ns, 492 U.S. at 126.
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responsible to the public: it is comprised of only five unelected individuals. The FCC also has no restrictive measures in place—such as sunset clauses, which Congress writes into laws to allow for their easy termination. The courts do not accord deference to the agency, but rather to Congress, and in turn, Congress delegates that deference to the agencies it creates. This shift in deference is why agencies like the FCC should be given more guidelines when regulating constitutional rights, and it is the cornerstone argument for implementation of the proposed bifurcated review process.

Meanwhile, broadcasters are left to engage in self-censorship and face enormous fines. This shift in deference may work for truck width legislation, but it cannot be tolerated when it affects individuals’ constitutional rights. Congress has made it clear that the FCC is not to censor broadcast waves.182 Although the FCC may not be engaging in black-letter censorship through prior restraint, what is the difference if the agency’s procedures of review cause the broadcasters to censor themselves in order to avoid fines? Both paths lead in the same direction.

If Congress had stepped in from the beginning and had given the FCC more guidelines about how to regulate this area affecting broadcasters’ First Amendment rights, these problems might have quickly been resolved. At present, however, Congress could require the FCC to take a more proactive stance when issuing regulations, and could give a clear and thorough definition of indecency to broadcasters. Then broadcasters could at least adhere to specific rules instead of guessing what the rules are and paying large fees if they are mistaken.

VI. CONCLUSION

The FCC orders that regulate broadcasting content and speech rights have been controversial since their inception. As the administrative state grows, the validity of the law-making process through which these regulations are passed becomes more and more constitutionally unsound. Because of the judicial branch’s unwillingness to apply a true strict scrutiny standard of review and because of its increasing deference to administrative agencies, the legislative solution is the better one.

Unless broadcasters bring a novel constitutional challenge or Congress imposes a new bifurcated law-making process, the FCC will continue to terrorize the broadcast world with excessive fines and ambiguity.183 A solution to this problem is urgent. Immobility in this area

183. See supra Parts I, II.
may lead to a permanent change in American communication systems and the regrettable loss of important constitutional rights upon which the United States was founded.

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