

WHAT THE [EXPLETIVE DELETED] IS A BROADCASTER TO DO? THE  
CONFLICT BETWEEN POLITICAL ACCESS RULES AND THE BROADCAST  
INDECENCY PROHIBITION

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INTRODUCTION

You are a candidate in an extremely tight race for the United States Senate, running against an opponent who receives the highest public opinion poll ratings for his sensitivity and compassion. Your campaign legally acquires video footage of your opponent hissing a string of obscenities and insults at an elderly homeless person blocking the candidate's exit from an event, and naturally you want the public to see this behavior. Your campaign quickly produces a political advertisement highlighting this footage and contrasting your opponent's shocking behavior with your campaign promise to promote legislation alleviating homelessness and poverty. Your campaign digitally transmits the advertisement to your state's major broadcast network affiliates with instructions to immediately pull your current advertisements and in their place run this new "contrast" advertisement for the remainder of your media buy.

What should a broadcast television station do when a legally qualified federal candidate sends a political advertisement to air during his previously purchased ad campaign and that advertisement contains material the Federal Communications Commission ("FCC") might find to be indecent or profane?<sup>1</sup> Currently, the law contains three conflicting provisions related to this very situation. Under 18 U.S.C. § 1464, a broadcast station is subject to losing its license or criminal penalties for airing any material which is obscene, indecent, or profane.<sup>2</sup> However, the "reasonable access" provision of 47 U.S.C. § 312(a)(7)<sup>3</sup> requires that a broadcast licensee grant federal political candidates access to the airwaves, and 47 U.S.C. § 315(a)<sup>4</sup> requires that a broadcast licensee allow legally qualified candidates for public office uncensored equal opportunities to advertise if another legally qualified candidate in the same race is using that station. Willful and repeated violation of these political access provisions carries potential civil and criminal penalties.<sup>5</sup>

In *Becker v. FCC*,<sup>6</sup> the D.C. Circuit held that when a broadcaster channels a political advertisement to late night "safe-harbor" hours<sup>7</sup> to ensure that potentially

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<sup>1</sup> The FCC currently defines indecency as material that "in context, depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards" and defines profane language as "words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a 'nuisance.'" <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw>.

<sup>2</sup> 18 U.S.C. § 1464 (2000). See discussion of penalties for violation of the indecency prohibition *infra* Part I.B.

<sup>3</sup> 47 U.S.C. § 312(a)(7) (2000).

<sup>4</sup> 47 U.S.C. § 315(a) (2000).

<sup>5</sup> See discussion of penalties for violation of the political access laws *infra* Parts I.A.1, I.A.2.

<sup>6</sup> *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

offensive or upsetting material is aired during a time when fewer children are likely to be watching, that broadcaster engages in prohibited censorship of broadcast political speech. *Becker* did not have to resolve the conflict between the prohibition against broadcasting indecency and the prohibition against censoring political advertisements because the FCC determined that the material in that case—photos of aborted fetuses—was not indecent, but rather just potentially upsetting to children. However, if *Becker* stands, channeling political speech is censorship under Section 315(a), and broadcasters faced with objectionable or indecent political advertisements have no available option to comply with both political advertising requirements and indecency regulations.

What, then, is a station to do when a qualified political candidate sends an indecent advertisement to put on the air? The possible resolutions of this statutory conflict all leave something to be desired. Requiring a station to censor indecent political speech before airing would create a dangerous and confusing environment for broadcasters and political candidates alike. Even worse, restricting political speech based on content would stifle some of the most important voices in our democracy—those who seek to challenge the incumbent government. Resolving the conflict by overturning *Becker* would practically require broadcasters to channel indecent political ads, granting broadcasters a great deal of control over political speech and opening up a new avenue for major battles over the FCC’s constantly evolving definition of indecency.

On the other hand, granting both political candidates and broadcasters immunity from the indecency prohibition for candidate advertisements would allow unregulated offensive campaign material on the airwaves at any time of day, including times when many children might be in the broadcast audience. Perhaps Congresswoman Janice Schakowsky (D-Ill.) best expressed the weighing of values that indecency and speech regulation present when she said that “[p]ersonally, I am much more concerned about protecting my grandchildren’s First Amendment rights than about them seeing Janet Jackson’s nipple.”<sup>8</sup>

Part I of this Comment explains and provides the background of the statutes and cases regulating broadcasters, political speech, and indecency, including the 1996 *Becker* case dealing with the conflict between FCC regulations, a broadcaster’s obligation to protect children from objectionable material, and a political candidate’s right to free speech. Part II analyzes the conflicting statutory regime regulating broadcast political speech and prohibiting indecency and how the D.C. Circuit handled these issues in *Becker*. Finally, Part III presents potential legislative and judicial resolutions to this statutory conflict, and concludes that statutory immunity for broadcast political indecency best resolves the conflicting interests of protecting children from offensive material and protecting our democracy. Specifically, this Comment argues that broadcast political speech should be immune from any form of censorship and criminal penalties because the value that unqualified free political speech provides our democracy outweighs the regulators’ desire to protect children from objectionable content.

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<sup>7</sup> The D.C. Circuit upheld the FCC “safe-harbor” permitting indecent broadcasts between 10:00 p.m. and 6:00 a.m. in *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996). See *infra* note 48.

<sup>8</sup> John Greenya, *Can They Say That on the Air? The FCC and Indecency*, WASH. LAWYER, Nov. 2005, at 26-27.

## I. BACKGROUND

### A. *Political Advertising Statutes*

“[S]peech concerning public affairs is . . . the essence of self-government.”<sup>9</sup>

#### 1. “Reasonable Access”—Section 312(a)(7)<sup>10</sup>

In 1972, Congress amended<sup>11</sup> the administrative sanction portion of the Communications Act of 1934 to include Section 312(a)(7), a requirement that broadcast licensees grant “reasonable access” to legally qualified candidates<sup>12</sup> for Federal elective office seeking to promote their candidacy.<sup>13</sup> Willful or repeated failure to grant reasonable access to *federal* candidates may result in FCC revocation of the violator’s broadcast license,<sup>14</sup> a forfeiture penalty,<sup>15</sup> and even a one-year prison sentence if the violation is willful and knowing.<sup>16</sup>

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<sup>9</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (granting First Amendment protection to speech criticizing public officials even when the speech is motivated by malice or ill-will).

<sup>10</sup> “§ 312. Administrative sanctions. (a) Revocation of station license or construction permit. The Commission may revoke any station license or construction permit-- . . . (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.” 47 U.S.C. § 312(a)(7) (2000).

<sup>11</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103(a)(2)(A), 86 Stat. 3, 4 (1972).

<sup>12</sup> Sections 312(a)(7) and 315(a) only apply to advertisements by “legally qualified candidates for public office” and do not reach political parties, issue advocacy groups, or concerned citizens. A “legally qualified candidate for public office” is defined “as any person who:

- (1) Has publicly announced his or her intention to run for nomination or office;
- (2) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and
- (3) [A person seeking election to any public office not including President or Vice President of the United States,] [h]as met the qualifications set forth in either paragraph (b) [or] (d) . . . of this section.

(b) A person seeking election to any public office . . . by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (a) of this section, that person:

- (1) Has qualified for a place on the ballot; or
- (2) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office. . . .

(d) A person seeking nomination to any public office . . . by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.” Legally Qualified Candidates for Public Office, 47 C.F.R. § 73.1940 (2005).

<sup>13</sup> 47 U.S.C. § 312(a)(7).

<sup>14</sup> 47 U.S.C. § 312(a)(7) (emphasis added). Note that this statute only applies to candidates for Federal office. A broadcast licensee may refuse to sell advertising time to candidates in local and State races. *See, e.g., In Re Foster Furcolo*, 48 F.C.C. 2d 565 (1974); *In Re Melbourne Noel, Jr.*, 66 F.C.C. 2d 1063 (1976).

The Supreme Court addressed Section 312(a)(7) in *CBS Inc. v. FCC*.<sup>17</sup> In October 1979, all three major broadcast networks rejected the Jimmy Carter presidential campaign’s request to purchase thirty minutes of primetime airtime to communicate his campaign message.<sup>18</sup> Upon receiving the campaign committee’s complaint, the FCC ruled that the networks had violated the reasonable access provision of Section 312(a)(7) and gave the networks one week to let the FCC know how they intended to come into compliance with the statute.<sup>19</sup> On appeal the following year, the D.C. Circuit affirmed the FCC’s agency ruling that the networks were not in compliance with the reasonable access provision of Section 312(a)(7).<sup>20</sup> The Supreme Court affirmed the D.C. Circuit ruling.<sup>21</sup> The Court held that Congress enacted Section 312(a)(7) to create for legally qualified federal candidates “an affirmative, promptly enforceable right of reasonable access” to broadcast stations, limited to the period following the beginning of a campaign.<sup>22</sup> Once the campaign has begun, in order to reject a legally qualified federal candidate’s request to purchase broadcast airtime, the broadcast licensee must show a “realistic danger of substantial program disruption . . . or of an excessive number of equal time requests.”<sup>23</sup> In addition to the guarantee of reasonable access for legally qualified federal candidates, all legally qualified candidates for public office are protected by Section 315(a)’s “no censorship” and “equal opportunities” provision.

## 2. “No Censorship” and “Equal Opportunities” Provisions—Section 315(a)<sup>24</sup>

Congress first enacted the “no censorship” and “equal opportunities” provisions of Section 315(a) in the Radio Act of 1927<sup>25</sup> and then included the provisions in the Communications Act of 1934.<sup>26</sup> These two provisions of Section 315(a) remain unchanged more than seventy years later.<sup>27</sup> A broadcast licensee<sup>28</sup> that willfully *or*

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<sup>15</sup> The Communications Act provides for a forfeiture penalty up to \$32,500 if any licensee “willfully or repeatedly fail[s] to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act.” Forfeiture Proceedings, 47 C.F.R. § 1.80(a)(1) & (b)(1) (2005)

<sup>16</sup> The Communications Act provides a general penalty of a fine up to \$10,000 and imprisonment up to one year for “any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure.” 47 U.S.C. § 501 (2000).

<sup>17</sup> *CBS Inc. v. FCC*, 453 U.S. 367 (1981).

<sup>18</sup> *Id.* at 371-72.

<sup>19</sup> *Id.* at 373-74.

<sup>20</sup> *CBS Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980).

<sup>21</sup> *CBS Inc. v. FCC*, 453 U.S. 367, 397 (1981).

<sup>22</sup> *Id.* at 377, 384-87.

<sup>23</sup> *Id.* at 387.

<sup>24</sup> “§ 315(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford *equal opportunities* to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have *no power of censorship* over the material broadcast under the provision of this section. . . .” 47 U.S.C. § 315(a) (2000) (emphasis added).

<sup>25</sup> Radio Act of 1927, Pub L. No. 69-632, § 18, 44 Stat. 1162, 1170.

<sup>26</sup> Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088.

<sup>27</sup> Communications Act of 1934 § 315.

<sup>28</sup> The FCC promulgated a rule which applies to cable television systems similar language requiring equal opportunities and prohibiting censorship as that found in Section 315(a). Origination Cablecasts by Legally

repeatedly violates either of these provisions in Section 315(a) is subject to license revocation,<sup>29</sup> a forfeiture penalty,<sup>30</sup> and in the case of willful and knowing violation, a one-year prison sentence.<sup>31</sup>

The “no censorship” provision prohibits any form of licensee censorship of a legally qualified candidate for public office’s political speech on the broadcast airwaves. The Supreme Court explained the “no censorship” provision of Section 315(a) in *Farmers Education & Cooperative Union of America v. WDAY, Inc.*, when an organization sued broadcast television and radio station WDAY in North Dakota for airing a legally qualified United States Senate candidate’s paid advertisement that contained libelous remarks.<sup>32</sup> The Court held that Section 315(a)’s basic purpose upon enactment was to foster “full and unrestricted discussion of political issues by legally qualified candidates.”<sup>33</sup> Therefore, the Court ruled that Section 315(a) bars a broadcast licensee from removing defamatory statements from a legally qualified candidate’s political speech.<sup>34</sup>

The Supreme Court further held that the “no censorship” provision must grant a broadcast licensee immunity from a libel suit such as that in *WDAY*, because otherwise “the section would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee.”<sup>35</sup> The Court reasoned that the federal law was supreme over an incompatible state common law.<sup>36</sup> The Court held that a licensee engages in prohibited censorship by excising objectionable material from an advertisement<sup>37</sup> and gave a very broad interpretation to Section 315(a)’s censorship prohibition, stating:

“The term censorship. . .as commonly understood, connotes any examination of thought or expression in order to prevent publication of ‘objectionable’ material. We find no clear expression of legislative intent, nor any other convincing reason to indicate Congress meant to give ‘censorship’ a narrower meaning in Section 315.”<sup>38</sup>

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Qualified Candidates for Public Office; Equal Opportunities, 47 C.F.R. § 76.205 (2005). However, no rule exists which applies the “reasonable access” requirements of Section 312(a)(7) to cable providers.

<sup>29</sup> Administrative sanctions provide for license revocation in the event that a licensee engages in “willful *or* repeated violation of, or willful *or* repeated failure to observe any provision of [Title 47, Chapter 5] or any rule or regulation of the [Federal Communications] Commission authorized by this chapter. . .” 47 U.S.C. § 312(a)(4) (2000) (emphasis added). Note that the violation need be only willful *or* repeated, not both, so one willful violation could ostensibly warrant license revocation.

<sup>30</sup> See *supra* note 15.

<sup>31</sup> See *supra* note 16. Generally, courts have held that Section 315 does not create a private right of action for a candidate aggrieved by a broadcast licensee’s refusal to grant equal airtime. E. H. Schopler, Annotation, *Liability of Radio or Television Company for Failure to Afford Equal Time to Political Candidates*, 31 A.L.R.3d 1448 (1999).

<sup>32</sup> *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

<sup>33</sup> *WDAY*, 360 U.S. at 529.

<sup>34</sup> *WDAY*, 360 U.S. at 529-31.

<sup>35</sup> *WDAY*, 360 U.S. at 531.

<sup>36</sup> *WDAY*, 360 U.S. at 535.

<sup>37</sup> *WDAY*, 360 U.S. at 527-28.

<sup>38</sup> *WDAY*, 360 U.S. at 527.

The FCC has cited *WDAY* on numerous occasions for the proposition that a broadcast licensee must refrain from any sort of content-based censorship or control over political candidate advertisements.<sup>39</sup>

The “equal opportunities” provision of Section 315(a) requires licensees to “afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”<sup>40</sup> Numerous FCC and lower court rulings have clarified the bounds of this “equal opportunities” provision. A station is not required to air a candidate’s response advertisement at the exact same time nor on the same program as the opponent’s advertisement aired; rather, the station must provide the opportunity to advertise during time segments comparable in potential audience reach and composition to those used by the original advertiser.<sup>41</sup> A broadcaster must keep a public record of purchased political advertisement airtime, but the station is not required to take any affirmative action to inform a candidate that his opponent is airing advertisements on the station.<sup>42</sup> Furthermore, if one candidate purchases broadcast advertising time and his opponent cannot afford to purchase similar time, the “equal opportunities” provision does not obligate a broadcast licensee to donate time to the less-funded candidate.<sup>43</sup> In summary, the “equal opportunities” provision places a passive but important requirement on broadcasters to allow a legally qualified candidate the opportunity to address his response to an opponent’s advertisement to a similar audience as the opponent originally addressed. In opposition to this requirement is the prohibition against broadcasting indecent material found in 18 U.S.C. §1464.

#### B. *FCC Regulation of Indecent and Obscene Broadcasts—18 U.S.C. § 1464*<sup>44</sup>

Like the “equal opportunity” and “no censorship” provision, Congress also first prohibited obscene, indecent, or profane speech over radio communications in the Radio Act of 1927<sup>45</sup> and then included the same prohibition in the Communications Act of 1934.<sup>46</sup> The sentence prohibiting broadcast indecency enacted in the Communications Act of 1934 followed an opening sentence in the same section stating that “[n]othing in

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<sup>39</sup> See, e.g., *In Re Gray Communications Systems, Inc.*, 19 F.C.C. 2d 532, 534-35 (“[T]he basic objective of Section 315(a) [is] to permit a candidate to present himself to the electorate in a manner wholly unfettered by licensee judgment as to the propriety or content of that presentation.”); *In the Matters of Amendment of Part 73 of the Rules regarding personal attacks, and applicability of the Fairness Doctrine to Section 315(a) “uses.”* 69 F.C.C.2d 1290, 1292 (1978) (“A licensee has no control whatsoever over the content of a use by a candidate. However, it not only has control over other broadcasts, but is responsible for the content of them.”)

<sup>40</sup> 47 U.S.C. § 315(a) (2000).

<sup>41</sup> See, e.g., *In Re Harry Dermer*, 40 F.C.C. 407 (1964); *In Re Senate Committee on Commerce*, 40 F.C.C. 357 (1962); *In Re Major General Harry Johnson*, 40 F.C.C. 323 (1961); *In Re Grace*, 40 F.C.C. 297 (1958); *In Re E.A. Stephens*, 11 F.C.C. 61 (1945).

<sup>42</sup> See, e.g., *In Re Norman William Seemann, Esq.*, 40 F.C.C. 341 (1962).

<sup>43</sup> *Paulsen v. FCC*, 491 F.2d 887, 889 (9th Cir. 1974); *Morrisseau v. Mt. Mansfield Television, Inc.*, 380 F. Supp. 512, 513-14, 516 (D. Vt. 1974); *In Re Request of Carter/Mondale Reelection Committee, Inc., For Declaratory Ruling*, 81 F.C.C.2d 409, 416 (1980).

<sup>44</sup> “Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined under this title or imprisoned not more than two years, or both.” 18 U.S.C. § 1464 (2000).

<sup>45</sup> Radio Act of 1927, Pub L. No. 69-632, § 29, 44 Stat. 1162, 1173.

<sup>46</sup> Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1064, 1091.

this Act shall . . . give the Commission the power of censorship.”<sup>47</sup> In 1948, Congress moved the sentence prohibiting indecent broadcasts from the Communications Act to the Criminal Code, where it was codified at 18 U.S.C. § 1464.<sup>48</sup> Under this provision, any licensee found to have broadcast material in violation of this prohibition may face license revocation and criminal penalties, which include a hefty fine and imprisonment.<sup>49</sup>

A broadcast licensee’s violation of 18 U.S.C. § 1464 could jeopardize property interests (money and license to do business) and liberty interests (imprisonment). First, each utterance broadcast in violation of 18 U.S.C. § 1464 is punishable by a fine and up to two year imprisonment.<sup>50</sup> The FCC may choose to hold a forfeiture proceeding to review the indecent broadcast and fine the licensee up to \$325,000 per violation.<sup>51</sup> If the licensee refuses to pay the forfeiture, the FCC may turn the matter over to the Department of Justice to prosecute a civil collection action against the licensee in federal court.<sup>52</sup> Second, the Communications Act allows license revocation for any violation of the indecency prohibition.<sup>53</sup> The FCC may initiate a license revocation proceeding against the broadcaster or wait and consider the indecent broadcast when the licensee applies for license renewal.<sup>54</sup> Last, the United States may criminally prosecute any person who violates 18 U.S.C. § 1464; conviction carries a jail sentence of up to two years.<sup>55</sup> The prosecutor in a criminal indecency trial must prove the defendant’s *scienter* in violating 18 U.S.C. § 1464.<sup>56</sup>

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<sup>47</sup> Communications Act of 1934 § 326; Radio Act of 1927 § 29.

<sup>48</sup> Crimes and Criminal Procedure, Pub. L. No. 80-772, § 1463, 62 Stat. 683, 769 (1948). The original Radio Act of 1927 language generally prohibiting censorship of broadcast licensees remains in place. 47 U.S.C. § 326 (2000). The Supreme Court and the D.C. Circuit have interpreted Section 326 as allowing a broadcaster to excise indecent material or channel indecent material to the “safe-harbor.” *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995). However, under Section 326, the FCC may not *require* a broadcaster to excise or channel specific indecent content. *Pacifica*, 438 U.S. at 735.

<sup>49</sup> 18 U.S.C. § 1464 (2000).

<sup>50</sup> 18 U.S.C. § 1464.

<sup>51</sup> Forfeiture Proceedings, 47 C.F.R. § 1.80(a)(4) & (b)(1) (2005); Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency, 66 Fed. Reg. 21984 (May 02, 2001). Before 2006, the indecency fine was \$32,500. Forfeiture Proceedings, 47 C.F.R. § 1.80(a)(4) & (b)(1) (2005). In June 2006, Congress increased the fine for “obscene, indecent, or profane” broadcasts to \$325,000. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006), *to be codified at* 47 U.S.C. § 503(b)(2) (2006). The current FCC Chairman, Kevin Martin, would like to fine “per utterance” instead of per violation, so in a single program, if a performer repeats an indecent word five times, the FCC would hold the broadcaster liable for five violations instead of the current practice of assigning just one violation for the program. *See infra* note 90 and accompanying text.

<sup>52</sup> 47 U.S.C. § 504(a) (2000).

<sup>53</sup> 47 U.S.C. 312(a)(6) (2000).

<sup>54</sup> 47 U.S.C. 312(a)(6); *In Re Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 96 n.3 (1975).

<sup>55</sup> 18 U.S.C. § 1464.

<sup>56</sup> *Tallman v. United States*, 465 F.2d 282, 285 (7th Cir. 1972) (applying the rationale of *Morissette v. United States*, 342 U.S. 246 (1952) that the courts should read a requirement of *scienter* or *mens rea* into offenses with common law ancestry, such as the prohibition of obscenity.); *United States v. Smith*, 467 F.2d 1126, 1129 (7th Cir. 1972) (reversing an indecency conviction because the trial court failed to provide a jury instruction on the defendant’s specific intent to disobey the indecency statute); *Gagliardo v. United States*, 366 F.2d 720, 726 (9th Cir. 1966) (“[I]ntent is a very pertinent and necessary element in a conviction [under 18 U.S.C. § 1464].”)

In order to enforce 18 U.S.C. § 1464, the FCC has completely banned obscene material from the broadcast airwaves<sup>57</sup> and only allows indecent and profane material to air between 10 p.m. and 6 a.m. during the “safe-harbor” hours.<sup>58</sup> The FCC defines indecent material as that which “in context, []depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>59</sup> The FCC defines profane language to include “words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a ‘nuisance.’”<sup>60</sup>

In *FCC v. Pacifica*, the Supreme Court upheld an FCC determination that a radio station’s 2:00 p.m. rebroadcast of George Carlin’s “Seven Dirty Words” skit was indecent.<sup>61</sup> The FCC originally resolved the indecency complaint through a declaratory order stating that it would record the indecency incident in the broadcaster’s license file and would consider sanctions if the FCC received any additional complaints about that licensee.<sup>62</sup> The Court held that this action was not forbidden censorship under 47 U.S.C. § 326 (the Communications Act general censorship prohibition) because the FCC’s action was not a prior restraint against a station desiring to air the material.<sup>63</sup> The FCC may revoke or refuse to renew the license of a broadcaster that airs indecent material, but the FCC may not prevent a station from airing the indecent material in the first place.<sup>64</sup>

Turning to *Pacifica*’s First Amendment challenge, the Court noted that the First Amendment does not grant a blanket prohibition against government content-based regulation of speech.<sup>65</sup> While the Court agreed with the FCC that Carlin’s skit lacked “literary, political, or scientific value,” it found that government action regarding indecent speech is reviewable.<sup>66</sup> The standard of review in an indecency case is “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a

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<sup>57</sup> Enforcement of 18 U.S.C. 1464, 47 C.F.R. § 73.3999 (2005). In *Miller v. California*, the Supreme Court ruled that obscenity is not protected by the First Amendment and defined the obscenity test as “(a) [W]hether ‘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.” *Miller v. California*, 413 U.S. 15 (1973) (emphasis added). Since the Supreme Court has ruled that the First Amendment does protect obscene material but does protect indecent material, this Comment focuses on regulation of indecent political speech. It should be noted, however, that it may be impossible to classify political speech as “obscene” because of the “political value” exception set forth in *Miller*’s third prong.

<sup>58</sup> Currently, the FCC does not regulate indecency on cable television, but Senator Ted Stevens (R-Alaska), Chairman of the Senate Commerce Committee, is considering legislation that will bring cable under the same FCC indecency regulation as broadcast television. *PTC Drives Spike in Smut Gripes*, *BROAD. & CABLE*, Nov. 14, 2005 at 12.

<sup>59</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 731-32 (1978); <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw>.

<sup>60</sup> *Infinity Broadcasting Corp. of Penn.*, 2 F.C.C. Rcd. 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)); *see also* <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw>.

<sup>61</sup> *Pacifica*, 438 U.S. 726.

<sup>62</sup> *In Re Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 99 (1975).

<sup>63</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 736 & n.10 (1978).

<sup>64</sup> *Pacifica*, 438 U.S. at 738.

<sup>65</sup> *Pacifica*, 428 U.S. at 744.

<sup>66</sup> *Id.* at 746-47.

right to prevent.”<sup>67</sup> Hinting that the First Amendment might provide more protection to indecent political speech, the Court presented a caveat that “[i]f there were any reason to believe that the Commission’s characterization of the Carlin monologue as offensive could be traced to its *political content* . . . First Amendment protection might be required.”<sup>68</sup> The Court found that the government has the broadest latitude in regulating and prohibiting indecent broadcast content, which the Court justified by broadcast’s “uniquely pervasive presence in the lives of all Americans,” and “[unique accessibility] to children, even those too young to read.”<sup>69</sup>

More than a decade following *Pacifica*, the D.C. Circuit reviewed the FCC’s procedures for regulating broadcast indecency in a series of three cases brought against the FCC by an advocacy group called Action for Children’s Television.<sup>70</sup> In *ACT II*, the court held that the FCC violated the First Amendment by imposing a congressionally mandated complete ban on broadcast indecency.<sup>71</sup> The proposed all-day ban was viewed as an overbroad response to the government’s interest in protecting children from indecent material.<sup>72</sup> In *ACT III*, the court held that since the First Amendment protects indecent speech, any regulation of that speech is subject to strict scrutiny in that the regulation must promote a compelling governmental interest and use the least restrictive means available to further that interest.<sup>73</sup> The court further held that the government has a compelling interest in helping parents protect their children from indecent broadcasts.<sup>74</sup> Since children are in the broadcast audience in much greater number during the daytime hours, a ban on indecent broadcasts between 6 a.m. and 10 p.m. is a narrowly tailored solution and therefore constitutional.<sup>75</sup> The 10 p.m. to 6 a.m. “safe-harbor” *ACT III* approved is the same rule in place today.<sup>76</sup>

Although the general FCC regulatory framework for indecent broadcasts has remained intact since the *ACT III* ruling, recent years have seen a marked increase in the intensity and frequency of indecency rulings. In 2003 and 2004, two events brought national attention to broadcast indecency regulations: Bono of U2’s use of the “f-word” during his gleeful 2003 Grammy Awards acceptance speech and Janet Jackson’s 2004 Super Bowl Halftime Show “wardrobe malfunction” exposing her breast. In the first instance, Bono exclaimed that his Grammy Award was “really, really fucking brilliant” during a live television broadcast. The FCC addressed this incident by first stating that its prior position would not have led to a finding of broadcast indecency on these facts

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<sup>67</sup> Id. at 745 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

<sup>68</sup> Id. at 746 (emphasis added).

<sup>69</sup> Id. at 748-49.

<sup>70</sup> *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter *ACT I*] (finding that the FCC’s definition of indecency was not unconstitutionally vague and directing the FCC to develop “safe-harbor” hours for the broadcast of indecent material); *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) [hereinafter *ACT II*] (invalidating as unconstitutional Congress and the FCC’s attempt to ban indecent content on a 24-hour basis); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) [hereinafter *ACT III*] (holding that the FCC must impose the same time-shifting regulation for all broadcasters and that the FCC should permit indecent broadcasts between 10:00 p.m. and 6:00 a.m.).

<sup>71</sup> *ACT II*, 932 F.2d at 1508-09.

<sup>72</sup> *ACT II*, 932 F.2d at 1508-09.

<sup>73</sup> *ACT III*, 58 F.3d at 659.

<sup>74</sup> *ACT III*, 58 F.3d at 660-61, 664-65.

<sup>75</sup> *ACT III*, 58 F.3d 654, 660-61, 664-45 (D.C. Cir. 1995).

<sup>76</sup> Enforcement of 18 U.S.C. 1464, 47 C.F.R. § 73.3999 (2005).

because the use of “fucking” was isolated and fleeting and did not refer directly to a sexual act.<sup>77</sup> However, the FCC then stated that in the future it would consider any use of “fucking,” even as a fleeting modifier, to be indecent, profane, and therefore punishable.<sup>78</sup> In its *Bono* opinion, the FCC gave a stern warning, reiterating its “recent admonition . . . that serious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings.”<sup>79</sup>

The FCC proved that broadcast stations should take seriously the Commission’s power to regulate indecency when, the year after the Bono incident at the Grammy’s, the FCC fined Viacom \$550,000.000 (the \$27,500 maximum fine applied to all twenty Viacom-owned CBS affiliates involved in the indecent broadcast), the largest indecency fine in history, for airing live Janet Jackson’s 19/32 of a second breast-baring “wardrobe malfunction” during the 2004 Super Bowl Halftime Show.<sup>80</sup>

In 2004, the FCC levied nearly eight million dollars in indecency fines and in the first three months of 2006, the FCC levied nearly four million dollars in indecency fines.<sup>81</sup> From 1993-2003, annual FCC indecency fines averaged \$197,445.<sup>82</sup> Current FCC Chairman Kevin Martin supports finding both performers and broadcasters liable as “utterers” of indecency instead of continuing the current practice of only penalizing the broadcaster.<sup>83</sup> Martin also wants to begin imposing fines “per utterance” within a program instead of the current practice of imposing one fine for the whole program.<sup>84</sup>

In the face of sharply increasing fines and tougher indecency standards and enforcement, broadcasters are fighting back against what they argue are vague and inconsistent rulings and out-dated regulations which use overbroad measures to protect against offensive material when new technologies like the V-chip provide less-restrictive means for limiting children’s exposure to offensive broadcast material.<sup>85</sup> In 2004, NBC petitioned the FCC for review of its order ruling that Bono’s fleeting and unplanned use of “fucking” during the Grammy’s was indecent.<sup>86</sup> Similarly, CBS opposed the FCC order imposing a half million dollar fine for Janet Jackson’s brief breast-baring during the live football halftime program.<sup>87</sup> These appeals remained pending in a FCC backlog of

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<sup>77</sup> In Re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program, 19 F.C.C. Rcd. 4975, 4980-82 (2004).

<sup>78</sup> Id.

<sup>79</sup> Id. at 4982.

<sup>80</sup> In Re Complaints Against Various Television Licensees Concerning their Feb. 1, 2004 Broadcast of the Super Bowl XXVIII, 19 F.C.C. Rcd. 19230, 19235, 19240 (2004).

<sup>81</sup> FCC Indecency Complaints and NALs: 1993 - 2006 (Chart); *available at* <http://www.fcc.gov/eb/oip/ComplStatChart.pdf>.

<sup>82</sup> Id.

<sup>83</sup> Schatz, *supra* note 86, at B1.

<sup>84</sup> The Federal Communications Commission: Hearing Before the H. Comm. on Appropriations Subcomm. on Sci., State, Justice, Commerce and Related Agencies, 109th Cong. (2005) (testimony of Kevin Martin, Chairman, FCC); Schatz, *supra* note 86, at B1.

<sup>85</sup> Frank Ahrens, *Delays, Low Fines Weaken FCC Attack on Indecency*, WASH. POST, Nov. 10, 2005, at A1; Paul Davidson, *Indecent or Not? TV, Radio Walk Fuzzy Line*, U.S.A. TODAY, June 3, 2005, at B1.

<sup>86</sup> Petition for Partial Reconsideration Filed by the National Broadcasting Company, Inc., April 19, 2004, available at <http://www.fcc.gov/eb/broadcast/Pleadings/NBCPet.pdf>; *see also* Davidson, *supra* note 82, at B1.

<sup>87</sup> Opposition to Notice of Apparent Liability for Forfeiture submitted by CBS Broadcasting, Inc., Nov. 5, 2004, available at <http://www.fcc.gov/eb/broadcast/Pleadings/Viacom.pdf>; *see also* Davidson, *supra* note 82, at B1.

more than fifty indecency cases until March 15, 2006, when the FCC issued a comprehensive order meant to establish clearer, more consistent, and stricter guidelines regarding broadcast indecency.<sup>88</sup>

Under the FCC's comprehensive order, the agency will take a two-pronged approach to determining liability for potentially indecent broadcasts.<sup>89</sup> The FCC will first determine whether the material is indecent, and then determine whether the context of the material makes it "patently offensive as measured by contemporary community standards for the broadcast medium."<sup>90</sup> To satisfy the first prong and qualify as indecent material, the speech must "describe or depict sexual or excretory organs or activities."<sup>91</sup> The second prong determines the "full context" of broadcast material by considering three principal factors:

- (1) the explicitness or graphic nature of the description;
- (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and
- (3) whether the material panders to, titillates, or shocks the audience.<sup>92</sup>

The FCC specifically noted the "need for caution" relating to editorial judgment related to news and public affairs programming.<sup>93</sup> After the FCC issued its comprehensive ruling, over 800 stations joined to mount a judicial challenge against the FCC's rulings, which they describe as "growing government control over what viewers should and shouldn't see on television."<sup>94</sup>

The FCC separately dealt with CBS' petition regarding the Janet Jackson episode, rejecting CBS' arguments in opposition to indecency liability and issuing a forfeiture order.<sup>95</sup> After the FCC rejected CBS' petition for reconsideration,<sup>96</sup> CBS petitioned the United States Court of Appeals for the Third Circuit for review of the FCC's decision.<sup>97</sup> CBS challenges the FCC's actions as "unconstitutional, contrary to the Communications Act and FCC rules and generally arbitrary, capricious and contrary to law."<sup>98</sup>

Now that the FCC has worked through its backlog, broadcasters are bringing test cases against FCC indecency rulings in hopes of judicial reconsideration of government

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<sup>88</sup> Notices of Apparent Liability and Memorandum Opinion and Order in the Matter of Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005, FCC 06-17, 21 FCC Rcd. 2664 (March 15, 2006) (Hereinafter "Comprehensive Order"); *see also* John Eggerton, *TV Smut Fines by Christmas*, BROAD. & CABLE, Nov. 27, 2005; Amy Schatz, *Why Indecency, Once Hot at FCC, Cooled*, WALL ST. J., Nov. 16, 2005, at B1; *Michael Copps Unfazed by Lack of Indecency Fines*, *supra* note 86.

<sup>89</sup> Comprehensive Order, 21 FCC Rcd. 2664, at ¶ 14.

<sup>90</sup> *Id.*

<sup>91</sup> Comprehensive Order, 21 FCC Rcd. 2664, at ¶ 12.

<sup>92</sup> Comprehensive Order, 21 FCC Rcd. 2664, at ¶ 13.

<sup>93</sup> Comprehensive Order, 21 FCC Rcd. 2664, at ¶ 15.

<sup>94</sup> *FCC indecency ruling contested Agency 'overstepped its authority,' filings by networks allege*, CHI. TRIB., April 15, 2006, at B3.

<sup>95</sup> Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order, FCC 06-19, 21 FCC Rcd. 2760 (March 15, 2006).

<sup>96</sup> Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Order on Reconsideration, FCC 06-68, 21 FCC Rcd. 6653 (May 31, 2006).

<sup>97</sup> *CBS Appeals Fine Over Janet Jackson Incident*, L.A. TIMES, July 29, 2006, at B4.

<sup>98</sup> *Id.*

regulation of offensive speech. In a 1992 court case, broadcaster uncertainty regarding the requirements and limits of 18 U.S.C. § 1464 emerged in Daniel Becker's congressional campaign in Georgia.

### C. *Objectionable Political Speech and Becker v. FCC*

#### 1. Background

In the 1990's, the FCC and the D.C. Circuit<sup>99</sup> addressed the issue of a broadcaster's rights and responsibilities when presented with a legally qualified candidate's request to air objectionable political speech. In July 1992, a legally qualified candidate for U.S. Congress named Daniel Becker paid Atlanta, Georgia's WAGA-TV to air his campaign advertisement, which contained images of aborted fetuses.<sup>100</sup> After receiving numerous complaints from viewers about the graphic nature of the advertisement, WAGA and other broadcasters requested a declaratory ruling from the FCC whether broadcast licensees could channel to "safe-harbor" hours (10 p.m. to 6 a.m.) political advertisements containing material the station found in good faith to be "indecent or otherwise unsuitable for children."<sup>101</sup>

The FCC ruled against the broadcasters, stating that channeling was inconsistent with Section 312(a)(7)'s "reasonable access" provision because the practice "would deprive federal candidates of their rights to determine how best to conduct their campaigns."<sup>102</sup> Becker then attempted to purchase thirty minutes directly following the broadcast of an NFL game between the Atlanta Falcons and the Los Angeles Rams on WAGA-TV to air a political program in support of his candidacy called "Abortion in America: The Real Story," that contained a four minute depiction of an actual abortion procedure.<sup>103</sup> Becker made his request to purchase time in October 1992, and the advertisement was to air November 1, 1992, just two days before the election.

This time, WAGA-TV refused to air the advertisement, claiming that the content was indecent and would violate 18 U.S.C. § 1464.<sup>104</sup> On October 27, 1992, Becker responded by filing a complaint with the FCC, to which the FCC responded just three

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<sup>99</sup> The D.C. Circuit has exclusive appellate jurisdiction over appeals of FCC regulatory action. 47 U.S.C. § 402(b) (2000).

<sup>100</sup> *Becker v. F.C.C.*, 95 F.3d 75, 76-77 (D.C. Cir. 1996).

<sup>101</sup> *Becker*, 95 F.3d at 77.

<sup>102</sup> Letter Ruling, 7 F.C.C.R. 5599, 5600 (Aug. 21, 1992).

<sup>103</sup> *Becker*, 95 F.3d at 77. In addition to WAGA-TV's petition for an FCC ruling on whether the station was required to air Mr. Becker's political advertisement at the campaign's requested times, the station also sought immediate declaratory and injunctive relief from a federal district court in Georgia. *Gillett Communications of Atlanta v. Becker*, 807 F. Supp 757, 759, 763 (1992) (describing the 30-minute program's contents as containing "graphic depictions and descriptions of female genitalia, the uterus, excreted uterine fluid, dismembered fetal body parts, and aborted fetuses.") The D.C. Circuit did not mention the graphic details of the abortion segment of the Becker advertisement, yet found that the content was not indecent. Had the D.C. Circuit found the content indecent, it would have been required to address the much stickier issue of whether a broadcaster is required to air a political candidate's indecent material at any requested time and therefore violate 18 U.S.C. § 1464. Notably, the district court for the Northern District of Georgia found this advertisement indecent and granted WAGA-TV injunctive relief. *Gillett*, 807 F. Supp at 762.

<sup>104</sup> *Becker*, 95 F.3d at 77.

days later.<sup>105</sup> The FCC ruled that a broadcaster may channel advertisements to the “safe-harbor” when it “reasonably and in good faith believes [the content] is indecent.”<sup>106</sup> The advertisement never aired and Becker lost his congressional bid 59%-41%.<sup>107</sup>

Becker petitioned the FCC for review of its October 1992 ruling.<sup>108</sup> The FCC responded by denying Becker’s application for review in November 1994, two years after the controversial campaign.<sup>109</sup> In this declaratory ruling, the FCC held: (1) that Becker’s advertisement was not indecent;<sup>110</sup> (2) that the content of the advertisement could be “psychologically damaging to children;”<sup>111</sup> (3) that broadcaster discretion in channeling political advertisements potentially damaging to children is not precluded by Section 312(a)(7);<sup>112</sup> and (4) “that channeling would not violate the no-censorship provision of section 315(a).”<sup>113</sup> Becker then petitioned the D.C. Circuit for review of the November 1994 FCC order.<sup>114</sup>

## 2. The D.C. Circuit Decision

The D.C. Circuit agreed with the FCC that the advertisement was not indecent, but otherwise vacated the FCC ruling, finding that channeling to “safe-harbor” hours a political candidate advertisement that was objectionable but not technically indecent violated Sections 312(a)(7) and 315(a).<sup>115</sup> The court held that channeling violated the “reasonable access” provision of Section 312(a)(7) because FCC policy guidelines and Supreme Court precedent have established that Section 312(a)(7) grants political candidates special access rights to all time periods, including prime time, and prohibits a station’s “denial of reasonable access as means to censor or otherwise exercise control over the content of political material.”<sup>116</sup> The court expressed specific concern with granting a broadcaster discretion to subjectively determine whether an advertisement “*might* prove harmful to children,” noting that a broadcaster’s assertion of “good faith” is “of small solace to a losing candidate that an appellate court might eventually find that . . . a licensee’s channeling decision was . . . contrary to law.”<sup>117</sup> The court ultimately held that a political candidate’s reasonable access rights are not to be subjected to a “licensee’s assessment of the public interest.”<sup>118</sup>

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<sup>105</sup> Becker, 95 F.3d at 77.

<sup>106</sup> Letter Ruling, 7 F.C.C.R. 7282 (Oct. 30, 1992).

<sup>107</sup> Available at [http://www.sos.state.ga.us/elections/election\\_results/1992/9thcong.htm](http://www.sos.state.ga.us/elections/election_results/1992/9thcong.htm) (last visited Jan. 27, 2006).

<sup>108</sup> Becker, 95 F.3d at 77.

<sup>109</sup> In Re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. 7638, 7649 (1994).

<sup>110</sup> Id. at 7643.

<sup>111</sup> Id. at 7646.

<sup>112</sup> Id.

<sup>113</sup> Id. at 7649.

<sup>114</sup> Becker v. FCC, 95 F.3d 75, 78 (D.C. Cir. 1996).

<sup>115</sup> Becker, 95 F.3d at 84-85. Since Congress had not spoken directly to the issue of advertisement channeling in the Communications Act, the court reviewed the FCC order to determine whether the FCC’s construction of Sections 312(a)(7) and 315(a) was permissible. Becker, 95 F.3d at 78 (citing *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).)

<sup>116</sup> Becker, 95 F.3d at 79 (citing 1991 Policy Statement, 7 F.C.C.R. 678, 681 (1991)).

<sup>117</sup> Becker, 95 F.3d at 81.

<sup>118</sup> Becker, 95 F.3d at 81-82.

Turning to Section 315(a), the court held that political advertisement channeling constituted a violation of both the “no censorship” and “equal opportunities” provisions of Section 315(a).<sup>119</sup> The court again relied on Supreme Court precedent and prior FCC rulings to support its finding that channeling political speech is censorship and prohibited by Section 315(a).<sup>120</sup> The court analogized the control that channeling would grant broadcasters over political content to the Supreme Court’s ruling in *WDAY*, which prohibited broadcasters from excising libelous material, and broadly defined censorship under Section 315(a) as follows: “[t]he term censorship . . . as commonly understood, connoted *any* examination of thought or expression in order to prevent publication of “objectionable” material.”<sup>121</sup> The court also asserted, agreeing with previous FCC political advertising rulings, that when a political candidate’s self-censorship is a reasonably foreseeable result of broadcaster action such as threatening lawsuit or initially refusing broadcast, that action constitutes a prohibited censorship, as well.<sup>122</sup>

The court further found that channeling violates the “equal opportunities” provision of Section 315(a) by taking away the opportunity for a candidate responding to his opponent’s initial use to address his message to a similarly composed audience as that which heard his opponent’s advertisement.<sup>123</sup> Therefore, requiring a candidate to air his advertisement during the “safe-harbor” by its nature prevents access to the same audience as reached by the daytime advertiser.

In *Becker*, the FCC did not view the objectionable material as indecent, but the court’s ruling that political access rules prohibit broadcasters from channeling material based on content set broadcasters up for a future election-related conflict with the criminal prohibition against indecency.

## II. THE BROADCASTER’S DILEMMA

There are numerous potential *Becker*-like scenarios, where a candidate sends a broadcaster an advertisement containing objectionable material that may not be technically indecent. An anti-war candidate might want to air images of the bodies of American casualties of war to hammer her message home. Recently, a candidate for local office in New York City faced broadcaster opposition to his advertisement containing images of President Bush’s head superimposed on a naked torso followed by a groundbreaking introduction of the candidate’s same-sex partner.<sup>124</sup> One local broadcast affiliate refused to air the advertisement after reviewing the content and the unsuccessful candidate was left to explore his legal remedies only after Election Day.<sup>125</sup> A few years ago, a Kentucky campaign sent a response advertisement to a broadcaster showing his female opponent undressing and getting into bed with someone who was not her

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<sup>119</sup> *Becker*, 95 F.3d at 83-84.

<sup>120</sup> *Becker*, 95 F.3d at 82-83.

<sup>121</sup> *Becker*, 95 F.3d at 82-83 (emphasis in original) (quoting *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 527 (1959)).

<sup>122</sup> *Becker*, 95 F.3d at 83 (citing *In Re Radio Station WPAM*, 81 F.C.C.2d 492 (1980) and *In Re D.J. Leary*, 37 F.C.C.2d 576 (1972)).

<sup>123</sup> *Becker*, 95 F.3d at 84.

<sup>124</sup> Jim Rutenberg, *Campaigning for City Hall: The Media*, NEW YORK TIMES, at B1 (Sept. 6, 2005).

<sup>125</sup> *Id.*

husband.<sup>126</sup> A broadcaster called the FCC inquiring into whether it was required to air the advertisement.<sup>127</sup> The FCC responded by telling the broadcaster that if it did not think the advertisement was technically indecent the broadcaster had to air the advertisement.<sup>128</sup> Even if the FCC would ultimately find that the advertisement was not indecent, the current heightened enforcement environment creates a potential for candidates' advertisements not making it onto the air in time to have its intended impact on the election.<sup>129</sup>

Turning now to the problem of clearly indecent political advertisements, the statutory conflict between free access for political speech and the criminal prohibition of indecency would certainly go beyond the immediate ability of a broadcaster or the FCC to adjudicate. For example, a candidate legally acquires footage of his opponent, who is running on a platform of compassion and helping the weak, cursing at an elderly homeless person. That footage would certainly provide the candidate a valuable message to send all voters, particularly elderly voters who are unlikely to watch television during the 10 p.m. to 6 a.m. "safe-harbor" hours. Channeling would appear to violate the "no censorship" and "equal opportunities" provisions of Section 315(a), similar to *Becker*. Moreover, if a station "bleeped" the curse words, it would violate the *WDAY* principle that excising offensive portions of a political advertisement constitutes censorship in violation of Section 315(a).<sup>130</sup> Additionally, removing the curse words would substantially defeat the message's purpose.

In a world where voters elect actor Ronald Reagan president, popular singer Sonny Bono of "Sonny and Cher" to Congress, action movie star Arnold Schwarzenegger California governor, and professional wrestler Jesse "The Body" Ventura Minnesota governor, there is not much stopping other politically vocal entertainers such as rapper Eminem, rock musician Bono, or radio "shock jock" Howard Stern from running for federal office. These entertainers already have political agendas that would translate easily into potentially indecent political advertisements. If Howard Stern ran for federal office, he would likely focus much of his campaign message at the FCC and push all of the indecency hot-buttons in his political advertisements. Broadcasters could not avoid controversy by refusing all advertisements from Stern's race if he was a legally qualified candidate for federal office protected by Section 312(a)(7). Turning to Section 315(a), if Stern presented his offensive political advertisements in response to his opponent's recent prime time advertisements, under *Becker v. FCC*, a broadcaster would be prohibited from channeling the advertisements to the "safe-harbor" hours and under *WDAY*, the broadcaster could not excise the offensive parts of the advertisement.<sup>131</sup>

In each hypothetical—the cursing opponent and Stern's political advertisement—the broadcaster seemingly must air the indecent advertisements as-is during the requested

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<sup>126</sup> Telephone Interview with Mark Berlin, FCC Political Programming Div., in Wash., D.C. (Oct. 21, 2005). Due to the time-sensitive nature of political campaigns, the FCC handles many political advertising inquiries over the telephone rather than in a formal letter. Id.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Political advertising campaigns are minute-by-minute operations. A candidate might digitally transmit an advertisement to a broadcaster in the morning to air starting during the lunch hour. In many cases, this advertisement will be In Response to something the opponent aired just the evening before.

<sup>130</sup> *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 527-28 (1959).

<sup>131</sup> *WDAY*, 360 U.S. at 527-28.

time of day. However, with no *WDAY*-like immunity or further clarification, that broadcaster would then be subject to civil penalties and criminal liability under the indecency prohibition of 18 U.S.C. § 1464. Much like the defamation at issue in *WDAY*, it would be highly unfair to subject broadcasters to criminal liability for airing something the law required them to air. However, without expressly granted broadcaster immunity for airing indecent political candidate speech, the current legal regime allows the next political candidate who wants to deal with objectionable issues to put the unprotected broadcaster in a dangerous situation.

A. *The Problem—Statutory Conflict and Confusion among Broadcasters*

As interpreted by the FCC and the courts, Communications Act Sections 312(a)(7) and 315(a) are incompatible with the broadcast indecency prohibition found in 18 U.S.C. § 1464, in such a way that the conscientious broadcast licensee will be in a serious bind the next time a political candidate for federal office seeks to air an advertisement that might be considered indecent. Under the current regime, a broadcaster in such a situation must air the indecent political advertisement at the requested time, because the broadcaster is prohibited both from excising (“bleeping” or covering) objectionable material in a political advertisement<sup>132</sup> and from channeling an objectionable political advertisement to “safe-harbor” hours. Further, the broadcaster cannot avoid the censorship issue altogether by rejecting advertisements for a campaign when the race is federal or the station has aired advertisements from the candidate’s opponent. However, if the FCC ultimately rules that the aired advertisement was indecent, the station may be subject to criminal penalties and license revocation hearings. The D.C. Circuit appears to have avoided this issue in *Becker v. FCC* by treating Becker’s advertisement not as indecent but rather just potentially disturbing to children.<sup>133</sup>

This statutory conflict is important because in recent years the battle over content regulation has reached fever pitch, with increased FCC enforcement and efforts by Congress to raise the stakes. The FCC has intensified its policing of broadcast indecency, due to changed agency leadership and advocacy groups like the Parents Television Council’s heightened attention to indecency. The FCC’s indecency enforcement is largely tied to viewer complaints.<sup>134</sup> In 2003, the FCC fined Fox \$1.2 million for a racy reality show episode after the agency received 159 letters of complaint.<sup>135</sup> Notably, only three viewers actually wrote these complaint letters and the rest of the letters simply were filled in as form letters or multiple mailings.<sup>136</sup> In a regulatory environment where three originally written letters of complaint to the FCC resulted in a \$1.2 million fine against Fox for one racy episode of a reality show,<sup>137</sup> and a live halftime show with uncontrollable envelope-pushing performers results in a half-million dollar fine against

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<sup>132</sup> *WDAY*, 360 U.S. at 527-28.

<sup>133</sup> *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

<sup>134</sup> Poniewozik, *supra* note 92, at 24.

<sup>135</sup> In Re Complaints Against Various Licensees Regarding Their Broadcast Of The Fox Television Network Program "Married By America", 19 F.C.C.R. 20,191 (2003).

<sup>136</sup> Poniewozik, *supra* note 92, at 24.

<sup>137</sup> In Re Complaints Against Various Licensees Regarding Their Broadcast Of The Fox Television Network Program "Married By America", 19 F.C.C.R. 20,191 (2003).

Viacom,<sup>138</sup> broadcasters are naturally on high alert. In addition to the FCC's recent willingness to broaden its indecency definition, Congress has increased the penalty for broadcasting indecency.<sup>139</sup> After multiple unsuccessful attempts, in 2006 both houses of Congress passed legislation to increase the penalty for each indecency violation from \$32,500 to \$350,000,<sup>140</sup> which would have led to a fine of \$3.85 million against Viacom for Janet Jackson's "wardrobe malfunction."<sup>141</sup>

Beyond the increased enforcement, the FCC has recently broadened its application of the indecency label, leading to increased uncertainty for broadcasters. For example, in November 2004, sixty-five ABC affiliates decided not to air the movie "Saving Private Ryan" because they were concerned about potential FCC indecency penalties for the violence and profane language the movie contains.<sup>142</sup> Specifically, soldiers in the movie repeatedly use the word "'fuck,' and variations thereof," not generally referring to the sex act.<sup>143</sup> The ABC affiliates were appropriately concerned about their potential liability for this content, considering the FCC's ruling, in response to Bono's Grammy Award acceptance speech, that the "f-word" would henceforth be considered indecent even if not used to refer to sex.<sup>144</sup>

However, in response to complaints against the ABC affiliates that chose to broadcast "Saving Private Ryan" outside of "safe-harbor" hours, the FCC ultimately found that the language in the movie was not indecent, pointing to the "all-important" nature of context in indecency determinations.<sup>145</sup> The FCC noted that "[i]n connection with the [review of context], we consider whether the material has any social, scientific or artistic value, as finding that material has such value may militate against finding that it was intended to pander, titillate or shock."<sup>146</sup> The FCC employed a three-factor test to make its indecency determination.<sup>147</sup> First, the FCC found that the material in the movie was graphic and explicit and therefore patently offensive.<sup>148</sup> Second, the FCC noted that the offensive material was repeated numerous times during the movie.<sup>149</sup> Finally, however, the FCC found that the contextual value of the content outweighed the first two

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<sup>138</sup> In Re Complaints Against Various Television Licensees Concerning their Feb. 1, 2004 Broadcast of the Super Bowl XXVIII, 19 F.C.C.R. 19230, 19235, 19240 (2004).

<sup>139</sup> Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006), *codified at* 47 U.S.C. § 503(b)(2)(C)(ii) (2006).

<sup>140</sup> *Id.* In previous years, Congress attempted to increase the indecency fine to \$500,000. H.R. 310, 109th Cong. (as passed by House of Representatives, Feb. 16, 2005); S. 616, 109th Cong. (2005).

<sup>141</sup> *See* Greenya, *supra* note 8, at 22 (stating that the eleven findings of violation against CBS would result in a \$5.5 million dollar fine if Congress increased the per violation penalty to \$500,000)

<sup>142</sup> Poniewozik, *supra* note 92, at 24.

<sup>143</sup> In Re Complaints Against Various Television Licensees Regarding their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507, 4509 & 4513 n.35 (2005).

<sup>144</sup> In Re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975, 4980-82 (2004).

<sup>145</sup> In Re Complaints Against Various Television Licensees Regarding their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507, 4511 (2005).

<sup>146</sup> *Id.* at 4512.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

factors, because the language was what one might expect to hear from soldiers in the midst of a violent war.<sup>150</sup>

In a previous FCC ruling, the FCC found that when a newscast aired audio from a wiretap where a gangster said “fuck” over and over, that broadcast was *not* indecent because it was not gratuitous use but rather was part of a “bona fide news story.”<sup>151</sup> These FCC rulings do not exactly give the broadcaster a confident understanding of when the “f-word” will be allowed. In fact, one could argue that the more the FCC rules on the “f-word,” the more confusing its standards become to interested parties.

In addition to the FCC’s potentially confusing rulings on particular matters of indecency, there is a further element of indecency determinations that creates uncertainty for broadcasters—reasonable people will disagree as to what is indecent. The best example of this is the “Becker for Congress” abortion advertisement. When WAGA-TV sought immediate declaratory relief from the Northern District of Georgia, in order to avoid airing the thirty-minute political advertisement that showed a live abortion procedure, the district court ruled that the advertisement was indecent.<sup>152</sup> Regarding the exact same advertisement, the FCC ruled that the material was not indecent,<sup>153</sup> and the D.C. Circuit treated the material as not indecent.<sup>154</sup> Ultimately, the FCC’s determination that an advertisement is not indecent is the one that matters since it is responsible for enforcement, but *Becker* demonstrates that an indecency determination with respect to any given content is not a foregone conclusion. Furthermore, television viewing standards are constantly evolving, and today broadcast viewers can watch reality programs with heavy sexual innuendo<sup>155</sup> and surgical procedures, from face lifts to liposuction.<sup>156</sup>

In the face of more enforcement, potentially much stiffer fines, and continued uncertainty about where the FCC will draw the indecency line any given case, broadcasters already face a predicament in their regular programming decisions. With regular objectionable *commercial* material, the broadcaster weighs potential government indecency penalties against the station’s desire to put interesting programming on the air and increase their viewer audience. In the political advertising context, stations face even more pressures and potential conflicts. The broadcaster presented with an objectionable *political* advertisement weighs potential government indecency penalties against potential government penalties for violating the political advertising statutes.

#### B. *Channeling Offensive Political Material*

In *Becker v. FCC*, the D.C. Circuit handed down a conflicting opinion with respect to the censorship prohibition in Section 315(a). The court in *Becker* specifically

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<sup>150</sup> *Id.*

<sup>151</sup> *In Re Peter Branton*, 6 F.C.C.R. 610 (1991).

<sup>152</sup> *Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757 (1992).

<sup>153</sup> Letter Ruling, 7 F.C.C.R. 5599, 5560 (1992).

<sup>154</sup> *See* discussion and case cited *supra* note 98, at 80.

<sup>155</sup> Jube Shiver, Jr., *Television Awash in Sex, Study Says; The report says 70% of shows include sexual content. The number has risen over the years*, L.A. TIMES, Nov. 10, 2005, at C1.

<sup>156</sup> Jill Vejnaska, *Flaws can't hide beauty of 'Nip/Tuck'*, THE ATLANTA JOURNAL-CONSTITUTION, June 22, 2004, at E1; Tracy Correa, *Plastic surgery is booming: Surgeons are wary of rising popularity, reality TV shows*, THE FRESNO BEE, July 25, 2004, at D1.

held that channeling to “safe-harbor” hours is prohibited censorship.<sup>157</sup> However, just a year earlier, the same court held in *ACT III* that creation of the “safe-harbor” for indecency was an appropriate government regulation of broadcasters.<sup>158</sup> Considering that “censorship” is prohibited in all broadcasts by 47 U.S.C. § 326, it is curious how the D.C. Circuit could find that the same practice of channeling is appropriate regulation of regular broadcasts but is prohibited censorship of political speech. While the court did not expressly say as much, the *Becker* court may have interpreted the “no censorship” provision of Section 315(a) as granting content in political speech a higher level of protection against regulator and broadcaster inspection.

Even if the *Becker* court did not intend to take this conflicting approach to channeling as censorship, its ruling regarding the “equal opportunities” provision of Section 315(a) was straightforward and the only possible interpretation. A broadcaster must provide a responding political candidate access to the same type and size of audience as the candidate’s opponent originally reached. By definition, the “safe-harbor” is a time of day when the broadcast audience composition is different from the rest of the day. While the “safe-harbor” was designated because fewer children watch television during the hours of 10:00 p.m. to 6:00 a.m., this time period also receives fewer viewers overall and a different type of viewer. Elderly voters and homemakers, both key political advertising demographics, are unlikely to watch television in the middle of the night. If the broadcaster channels due to content the response advertisement to the late night “safe-harbor” hours when, by definition, fewer voters and a different demographic are watching, the broadcaster is clearly refusing an equal opportunity to the responding candidate.

### C. *Broadcaster “Immunity”*

The Supreme Court resolved the competing interests between the political advertising statutes and the common law prohibition against defamation in *WDAY* by holding that broadcasters are immune from defamation liability for political advertisements.<sup>159</sup> The case of indecent material in political advertising, however, is different from the defamatory material discussed in *WDAY* in ways that do not allow a direct analogy to that case. The case is much stronger for judicially created broadcaster immunity for potentially defamatory political advertisements than for a similar immunity for broadcasting indecent political advertisements.

First, since defamation is a state common law action, it is more reasonable that Congress would have not expressly addressed immunity when it enacted Sections 312(a)(7) and 315(a). Broadcast indecency, on the other hand, was initially prohibited in the same congressional act that prohibited censorship of political advertisements.<sup>160</sup> It is easier to find that Congress would intend immunity from a state tort action than from a law Congress itself enacted. Further, Congress’ original prohibition against broadcast indecency was contained in the same section as Section 326’s general prohibition against

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<sup>157</sup> *Becker v. FCC*, 95 F.3d 75, 79-80 (D.C. Cir. 1996).

<sup>158</sup> *ACT III*, 58 F.3d 654, 664-65 (D.C. Cir. 1995).

<sup>159</sup> *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

<sup>160</sup> Radio Act of 1927, Pub L. No. 69-632, §§ 18, 29, 44 Stat. 1162, 1170, 1173.

broadcast censorship in the Radio Act of 1927.<sup>161</sup> Congress must, therefore, believe that it can consistently prohibit both censorship and indecent content.

Second, a broadcaster cannot subjectively determine, even in good faith, whether allegations in a political ad are false. Whether a statement is defamatory requires external research regarding the truth of the alleged defamatory statement, whereas an indecency determination requires no further inquiry beyond the content on its face.<sup>162</sup>

Thus, while the reasons supporting the *WDAY* Court's creation of broadcaster immunity for defamatory statements have many similarities to the political indecency conflict, there are clear distinguishing traits which may make it difficult for a court to rule that broadcasters should have immunity from airing indecent political advertisements just as they have immunity from airing defamatory political advertisements.

#### D. “Political or Social Value” Exception

The Supreme Court and the FCC have consistently found that context plays a role in indecency determinations, and have alluded to a possible “political or social value” exemption from indecency rules. In *Pacifica*, the Supreme Court held that Carlin’s “seven dirty words,” while indecent, are protected to some degree by the First Amendment even though “these words ordinarily lack literary, political, or scientific value.”<sup>163</sup> In so ruling the Court suggested that, depending on the context and value of the speech in question, the Court might offer varying degrees of First Amendment protection.<sup>164</sup> The Court implied in *Pacifica* that a contextual “social value” measure might afford a higher level of First Amendment protection.<sup>165</sup> Earlier, in *Garrison v. Louisiana*, the Supreme Court stated that political speech is the sort that provides some of the most important social value.<sup>166</sup>

The FCC has placed a great deal of emphasis on context in its indecency determinations regarding the “f-word.”<sup>167</sup> The FCC found that contextual value of the soldiers’ cursing in “Saving Private Ryan” outweighed the offensive and repeated nature of the language.<sup>168</sup> The FCC’s decision regarding Bono’s Grammy speech hinted that the outcome of an indecency determination might be different if the broadcaster alleges

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<sup>161</sup> Radio Act of 1927 § 29.

<sup>162</sup> The FCC is not responsible for determining whether an advertisement is defamatory; such a determination takes place in state courts. The FCC can, however, quickly review an objectionable political advertisement to make an initial indecency determination. Technology makes it possible for a candidate or station to email a digital version of the advertisement to FCC staff and potentially allows for a same-day indecency determination. The question still remains what a station is to do even once it knows the political advertisement is, in fact, considered indecent by FCC staff.

<sup>163</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 746-47 (1978).

<sup>164</sup> *Id.* at 746-47.

<sup>165</sup> *Id.* at 747.

<sup>166</sup> “[S]peech concerning public affairs is . . . the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (granting First Amendment protection to speech criticizing public officials even when the speech is motivated by malice or ill-will).

<sup>167</sup> *See infra* notes 136-45 and accompanying text.

<sup>168</sup> In *Re Complaints Against Various Television Licensees Regarding their Broadcast on Nov. 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,”* 20 F.C.C.R. 4507 (2005).

mitigating “political, scientific or other independent value of use of the word.”<sup>169</sup> In its *Bono* ruling, the FCC said political value alone, however, will not render the use of profane language permissible in every case.<sup>170</sup>

However, the FCC took positions much more protective of political speech in two disputes in the 1970’s over a political candidate’s use of the word “nigger” in his campaign advertisements, stating that “[e]ven if [‘nigger’ was indecent], a candidate may still use it as part of a political announcement as such ‘uses’ are protected from censorship.”<sup>171</sup>

In summary, the Supreme Court and the FCC have stated that there is a contextual exception from the indecency prohibition for speech with “political or social value,” but this exception has never expressly been adopted and the potential definition of the exception is unclear. Several possible resolutions exist which should help resolve this conflict.

### III. ANALYSIS OF POSSIBLE RESOLUTIONS

The question remains: should our laws require broadcasters to air indecent speech in campaign advertisements or should they require broadcasters to censor the advertisements in some manner? Currently, the law imposes potential liability on broadcasters in either case. The most frequently cited driving force behind regulation of indecency and profanity is the public interest in “protecting children.”<sup>172</sup> It may be,

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<sup>169</sup> In *Re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program*, 19 F.C.C.R. 4975, 4979 (2003)

<sup>170</sup> *Id.*

<sup>171</sup> In *Re Complaint by Julian Bond Atlanta NAACP Atlanta, Georgia Concerning Political Broadcasting*, 69 F.C.C.2d 943 (1978). In 1978, J.B. Stoner, candidate in Democrat primary election for Georgia Governor, aired numerous radio and television advertisements where he used the word “nigger.” First, the FCC held that the use of that offensive word was not indecent under FCC precedent and *Pacifica*, and further stated that even if the word was indecent, “in light of Section 315(a) we may not prevent a candidate from utilizing that word during his ‘use’ of a licensee’s broadcast facilities.” *Id.* at 944. The FCC then noted that while the Commission did not support the opinions in Mr. Stoner’s advertisement, “this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect that rights [sic] of others to free speech. If there is to be free speech, it must be free for speech we abhor and hate as well as for speech we find tolerable or congenial.” *Id.* at 945 (quoting *Anti-Defamation League of B'nai B'rith*, 4 F.C.C.2d 190, 191-192 (1966), *aff'd*, *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 16 (D.C. Cir. 1968), *cert. den.* 394 U.S. 930 (1969)). Previously, Mr. Stoner had run for the United States Senate in Georgia in 1972, and had similar advertisements where he made many offensive remarks, such as “The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white.” In *Re Complaint by Atlanta NAACP Concerning Section 315(a) Political Broadcast by J. B. Stoner*, 36 F.C.C. 2d 635, 636 (1972). In this instance, the Atlanta NAACP raised concerns about the potential for violence against broadcast stations which were being forced by Section 315(a) to air the offensive advertisements, but the FCC held that freedom of political speech was more valued by the law since there was no clear and imminent threat of violence against the station. *Id.* at 637.

<sup>172</sup> *FCC v. Pacifica*, 438 U.S. 726, 749-50 (1978). The *Pacifica* court used a broad view of the FCC’s “public interest” regulatory power to approve FCC regulations of indecent speech when the FCC narrowly tailors those regulations to protect children from offensive programming. *Id.* at 748. Two significant Supreme Court cases affirmed the Communications Act of 1934’s broad grant of FCC control over the broadcast spectrum to protect the public interest. In *NBC v. United States*, 319 U.S. 190 (1943), the Court

however, that a political candidate's unqualified free right to speech, of the utmost importance to the longevity and stability of our democracy, is more valuable to today's children over the long term than protection against potentially offensive speech.

Notably, Sections 312(a)(7) and 315(a) provide guaranteed censorship-free access to the airwaves only to legally qualified candidates for public office; these heightened protections do not extend to any political party, issue advocacy group, or other concerned citizen.<sup>173</sup> With respect to a candidate for public office, however, it is at the heart of our democracy that a candidate may freely speak against current leaders and challenge the government in power and the laws as they exist. In our democracy, the voters decide if they find a candidate's speech objectionable and respond at the ballot box.

## A. Valuing Decency Over Democracy: Prohibit Broadcasters from Airing Indecent Political Speech

### 1. Amend the Political Advertising Statutes

If broadcasters are to be *prohibited* from airing indecent political campaign advertisements between 6 a.m. and 10 p.m. (when children are likely to be in the audience), the options are to (1) allow content alteration ("bleeping" and covering), or (2) allow channeling of indecent political advertisements. For these two options to be used, either the courts or Congress would need to decide that one of those practices is not "censorship" within the meaning of Sections 315(a),<sup>174</sup> or Congress would have to create an exception to Section 315(a)'s "no censorship" provision for indecent material.

However, neither option is satisfactory to the proponent of free political speech as an integral part of our democracy. With content alteration, the message is lost. The idea

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reasoned that Congress' public interest mandate to the FCC granted the agency the general power to supervise and determine the content of broadcasts. Later, in *Red Lion Broadcasting v. United States*, 395 U.S. 367 (1969), the Court upheld "public interest" requirements on broadcasters based on the rationale that the public airwaves are a scarce resource. Notably, the increased availability of other means of video communication and the technological advancements alleviating scarcity pressure on the spectrum have prompted debate over whether the "scarcity rationale" for FCC control over the airwaves is still appropriate. See Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 908 (1997) (stating that "the physical scarcity doctrine is internally inconsistent, and cannot form any cogent rationale for public policy"); Jonathan O. Hafen, Comment, *A Distinction Without a Difference -- The Spectrum Scarcity Rationale No Longer Justifies Content-Based Broadcast Regulation*, 1991 BYU L. REV. 1141 (1992); Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1493 (1986).

<sup>173</sup> Between the 1940's and the late 1980's, the FCC also imposed on broadcasters the "Fairness Doctrine," requiring broadcasters to devote time to discussion of important controversial public issues and further requiring broadcasters to grant contrasting viewpoint access to their airwaves. TELECOMM. & CABLE REG. § 3.14 (Matthew Bender & Co. 2004). In 1985, the FCC determined that the Fairness Doctrine was unconstitutional and no longer served the public interest. *Id.* The Commission found that increased outlets for communication resolved the original purpose of the Fairness Doctrine—to require public discourse on limited communications resources. *Id.* In 1987, the FCC abolished the Fairness Doctrine and Congress never enacted legislation to codify the doctrine. *Id.*

<sup>174</sup> Content alteration and channeling both already are accepted practices for regular, non-political broadcasts. Neither is considered to be "censorship" in violation of 47 U.S.C. § 326. See, e.g., ACT III, 58 F.3d 654 (D.C. Cir. 1995).

that broadcasters, the FCC, or the courts could control the message of any campaign for public office goes directly against our core democratic principles. However, content alteration is at least less intrusive than channeling. Channeling also creates a Section 315(a) “equal opportunities” problem, which could be resolved with an exception to all of Section 315(a) for indecent material. When an advertisement is channeled, the candidate may not be able to reach the target audience for his message. With channeling, candidate advertisers might self-censor to avoid a channeling decision. Neither broadcasters nor the government should penalize a candidate’s advertising campaign based on content.

The practical application of channeling or content alteration in the political advertising context would be complicated by the need for real-time indecency determinations. A candidate is very unlikely to submit to censorship if the candidate believes the content is decent, and a broadcast station manager is equally unlikely to risk penalties based on her subjective guess as to how the FCC would ultimately rule. Even with a speedy indecency ruling from the FCC, there is an additional problem if the FCC finds the material indecent and a candidate still disagrees and desires to air the advertisement anyway. An appeal to the D.C. Circuit would not resolve the conflict quickly enough for a fast-moving and time-sensitive political campaign.

## 2. Repeal One or Both of the Political Advertising Statutes

A more drastic approach to preventing indecent political material during the daytime would be to repeal either Section 312(a)(7), Section 315(a), or both.<sup>175</sup> The newest statute, Section 312(a)(7), essentially requires broadcasters to allow advertisements in federal races. A broadcaster could already choose to stay out of a local or state race completely, and in the event that Howard Stern decided to run for city dogcatcher, broadcasters might choose to do just that in order to avoid controversy. Repeal of Section 312(a)(7) would allow broadcasters to make the same judgment if Stern decided instead to run for the U.S. Senate. This resolution, however, ultimately provides broadcasters and the government more control over political speech based on content, and a rogue candidate could single-handedly keep his opponent off the air by threatening indecent advertising.

Repeal of Section 315(a) would allow broadcasters to treat political speech the same way they treat regular broadcasts that might be indecent. A broadcaster could employ channeling, bleeping, covering, and excising, which have not been considered “censorship” in violation of the general “no censorship” provision, 47 U.S.C. § 326. Further, without “equal opportunities” constraints, the broadcaster could leave the potentially indecent advertisement in its unedited form and channel the advertisement to the “safe-harbor” even if the candidate’s opponent is only advertising during primetime programming. If the candidate wanted to use indecent material more than he wanted to

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<sup>175</sup> Debate exists whether government may appropriately require the airing of political advertisement through Sections 312(a)(7) & 315(a). Some argue that the government’s imposition of public interest requirements on broadcasters to a degree beyond that imposed on other communications mediums is inappropriate, especially in light of increased digital convergence and reduced spectrum scarcity. See In re Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry, 14 F.C.C. Rcd. 21660, 21655 (1999) (Separate Statement of Commissioner Harold Furchgott-Roth, concurring in part and dissenting in part); Daniel Graham, *Public Interest Regulation in the Digital Age*, 11 COMMLAW CONSPECTUS 97 (2003). That debate is beyond the scope of this article.

reach a primetime audience, the choice would be available to him. This approach grants the broadcaster and the government a great deal of control over speech content and indecency determinations during a critical and time-sensitive exercise of the ultimate democratic act—the popular election. Because broadcaster and governmental control of political candidate speech raises delicate issues in a democracy, a better solution may be to allow voters’ ballot box responses to sanction candidates who choose to use indecent material in their political advertising campaigns.

B. The More Democratic Solution: Require Broadcasters to Air Indecent Political Speech and Grant them Immunity

In the alternative, if broadcasters are to be *required* to air indecent political advertisements during daylight hours, Congress could statutorily exempt political speech from the strictures of 18 U.S.C. § 1464. The courts or the FCC could rule that otherwise indecent speech when uttered in a political context is per se not indecent. Either approach would create the same result: absolutely protecting political speech, no matter how objectionable, from any form of censorship, while also immunizing broadcasters from liability for airing the speech.

The Supreme Court has addressed the importance of First Amendment protections for free political speech and our democratic system. In *CBS v. FCC*, the Court stressed the importance of communications rules that protect free political speech because these rules “enhanc[e] the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”<sup>176</sup> In one case, the Court stated that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office,”<sup>177</sup> and in another case pointed to a “particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.”<sup>178</sup>

A congressionally granted statutory exemption is the better means to resolve this question of indecency in political speech than resort to the courts or agency rulemaking. A statutory exemption from indecency regulation for political speech could quickly become effective. While the courts could resolve the question of indecency in political speech, it might take years for the appropriate test case to make its way to the Supreme Court. Further, the FCC is a constantly changing body, in commission membership and political values. Any regulation the FCC might promulgate to resolve the question of indecency in political speech could be revised, revoked, or reinterpreted by a subsequent Commission.

If the issue of broadcast indecent political speech reached the Supreme Court, the Court could apply a similar analysis as it used in *WDAY* when it granted broadcasters immunity from libelous political advertisements, stating that otherwise “the section would sanction the unconscionable result of permitting civil and perhaps criminal

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<sup>176</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

<sup>177</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

<sup>178</sup> *Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976).

liability to be imposed for the very conduct the statute demands of the licensee.”<sup>179</sup> The Court’s statement applies just as clearly to the question of indecent political speech, where the FCC and Department of Justice may hold a broadcaster criminally and civilly liable for airing advertisements as required. The *WDAY* court also pointed out that defamation is an intentional tort and that a court would be hard-pressed to conclude that a broadcaster “intentionally” aired a libelous advertisement that Section 315(a) *required* the broadcaster to air.<sup>180</sup> Again, at least as regards the criminal element of broadcast indecency, a court would not likely find *scienter* in a broadcaster doing an act required by another federal law. *WDAY* is distinguishable from the instant scenario because the Court used the supremacy of federal law so that Section 315(a) trumped the state common-law libel action.<sup>181</sup> Here, the conflict is created by separate federal statutes and cannot be alleviated by a supremacy argument. However, the supremacy argument for immunity was not the main or fundamental basis for the Court’s ruling. The Court based its ruling on the inherent unfairness of holding a broadcaster liable for refusing to control political speech when the law requires the broadcaster to do just that.<sup>182</sup> While the Supreme Court might apply an analysis similar to *WDAY* if presented with this issue, the more straightforward and catch-all solution to this statutory conflict is through statutory resolution by granting immunity either in the Section 315(a) “no censorship” provision or in 18 U.S.C. § 1464’s indecency prohibition.

The unfortunate outcome of such an immunity is that an indecent candidate advertisement could pop up onto an unsuspecting family’s television screen virtually without notice.<sup>183</sup> However, this speech protection would only reach legally qualified candidates responding to previously aired opponent advertisements<sup>184</sup> in a federal election or otherwise in a state or local campaign for which the broadcaster has chosen to accept advertisements. Political parties, issue advocacy groups, and individual citizens with an axe to grind will continue to face a separate regime for restriction on their speech.<sup>185</sup> The laws that regulate campaign finance prevent political parties and issue advertisers from directly funding candidates, so those types of organizations do not have the option of funding “puppet candidates” to take advantage of the political candidate indecency exception in order to put the organization’s indecent message on the broadcast airwaves.

The process of becoming a legally qualified candidate for public office is not extremely rigorous. The simplest path to becoming a legally qualified candidate is to

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<sup>179</sup> *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 531 (1959).

<sup>180</sup> *WDAY*, 360 U.S. at 542 (Frankfurter, J., dissenting)(arguing that *WDAY* should not be liable but that state common law was sufficient to reach that result without invoking the Supremacy Clause).

<sup>181</sup> *WDAY*, 360 U.S. at 535.

<sup>182</sup> *WDAY*, 360 U.S. at 531.

<sup>183</sup> Courts have recognized that the standard viewer practice of tuning in and out of various programming renders a warning preceding an indecent broadcast ineffective. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 748, 760 n.2 (1978); *Jones v. Wilkinson*, 800 F.2d 989, 1006 (10th Cir. 1986).

<sup>184</sup> The candidate only triggers the “equal opportunities” provision of Section 315(a) when responding to an opponent’s use of advertising time. If candidates have not yet aired any advertisements in a given race, the candidate may still invoke the “no censorship” provision of Section 315(a) and the “reasonable access” requirement in Section 312(a)(7) in an attempt to demand daytime broadcast of his indecent political advertisement.

<sup>185</sup> *In Re Inquiry Concerning the “Equal Time” Requirements of Section 315(a) of the Communications Act of 1934*, 40 F.C.C. 407 (1964).

seek election as a write-in candidate, which sometimes requires registering with the Secretary of State and gaining nomination signatures on a petition.<sup>186</sup> However, broadcast advertising is one of the most expensive mediums for communicating with potential voters, where one thirty-second television advertisement during primetime might cost a candidate over \$100,000.<sup>187</sup> At such an expense, it is no more likely that a citizen would go through the process of becoming a legally qualified candidate for public office just to spend his money on indecent advertisements than it is that another citizen would become a candidate just to gain access to a soapbox for whatever issue is important to her.

What is more likely to come from this exemption for indecent political speech is that serious political candidates will continue to carefully consider the content of their potentially objectionable political advertisements, weighing potential damage among certain groups against the importance of that particular message to the campaign. If such an indecent political advertisement suddenly airs on a television when children and parents alike are gathered in the family television room, the understandably upset parent's recourse is to withhold her vote from that candidate and to encourage her friends and coworkers to do the same. Voters need a free flow of information for our democracy to work. The ballot box is a far more democratic and appropriate means for a parent to communicate frustration with a politician's poor taste in advertising than the incumbent government at the FCC.

## CONCLUSION

It is likely only a matter of time before the conflict between the statutory protections for political candidate speech and the criminal code prohibiting indecency collide in the midst of a political campaign. It would be wise to address this issue before a conflict arises in the campaign setting, where that specific election is extremely important to the constituents of that office and the two or more candidates seeking voter support. Our history recognizes the importance of free political speech, free from government censorship. The broadcast audience certainly does have a right to be free from obscene broadcast programming that lacks any social value, and the constitution does not protect such material. The broadcast audience may even have an right to government intervention in order to protect their children from indecency. However, the rights of the broadcast audience as voters in a democracy and members of a free society are more important when it comes to political speech. Any censorship of political candidate speech stifles democracy and the freedom upon which our country was founded. Congress should grant political candidates and broadcasters immunity from the criminal indecency prohibition, thereby allowing a truly free exchange of ideas among those who seek to represent United States citizens in our government.

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<sup>186</sup> See, e.g., Cal. Sec'y of State, Summary of Qualifications and Requirements for Write-In Candidates (2004), [http://www.ss.ca.gov/elections/cand\\_qual\\_wi.pdf](http://www.ss.ca.gov/elections/cand_qual_wi.pdf); Md. State Bd. of Elections, Candidacy & Campaign Fin. Laws Summary Guide (2003), [http://www.elections.state.md.us/pdf/summary\\_guide/summary\\_guide.pdf](http://www.elections.state.md.us/pdf/summary_guide/summary_guide.pdf), at 8.

<sup>187</sup> See *Rich candidates may spend their way into history: Viewers, grab your remotes: TV ad blitzes on the way*, N.J. REC., June 12, 2005, at A1.