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Indecent Political Advertisements and the Need for Broadcaster Immunity from Indecency Forfeitures

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Introduction

Television and radio advertisements for years have been effective and popular campaign tools used by political candidates seeking to gain votes. These television and radio political advertisements come in many varieties. Some of the more popular advertisements are positive in tone and content and seek to convince likely voters that the candidate being promoted in the advertisement really is a great candidate and thus worthy of a vote. Other advertisements are more negative and seek to expose the shortcomings of a candidate's opponents. Negative advertisements might highlight a questionable legislative voting record, excessive absences from legislative proceedings, and controversial stances on emotionally charged issues. Many other negative advertisements play to voters' prejudices and fears or call into question a candidate's judgment, character, morals, and values.

In an era of increasingly negative political campaign advertisements, some political figures and candidates in recent years have found themselves the target of negative broadcast advertisements suggesting that an opponent has engaged in some form of sexually immoral or somehow unacceptable conduct. Election seasons in recent years have ushered in a new breed of increasingly vulgar and sexually charged political broadcast advertisements. So extreme are some advertisements in this new genre of political speech, they are even more dangerously close to violating federal law prohibiting the broadcast via television and radio of indecent materials than were their predecessor racist and anti-abortion advertisements. Some even may contend that the line of indecency has already been crossed by these racier more provocative political advertisements.

The newer, more sexually suggestive political advertisement presents the exact dilemma at which lawmakers, courts, and scholars have hinted for years—how to reconcile three seemingly conflicting federal statutes which on the one hand seek to give political candidates greater access to the television and radio media and consequently to the eyes and ears of the electorate. These statutes obligate broadcasters to provide non-discriminatory access to candidates for political office, yet fail to grant immunity to broadcasters forced to air political advertisements which contain at best sexually suggestive, and in the worst case, indecent, profane, or obscene material.[1] The first statute in the trio is 18 U.S.C. § 1464 which prohibits the broadcast of indecent, obscene,

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[1] 18 U.S.C. § 1464 (broadcast indecency prohibition); 47 U.S.C. § 312 (reasonable access for candidates for federal office); 47 U.S.C. § 315 (equal opportunities for candidates for the same office and censorship prohibition).

or profane material over the broadcast airwaves. The second statute is 47 U.S.C. § 312 which requires licensees of broadcast stations to afford reasonable access to its facilities for all candidates for federal elective office. Finally, 47 U.S.C. § 315 requires broadcasters to afford equal opportunities to use broadcast facilities to all legally qualified candidates for the same political office and prohibits broadcasters from censoring political speech. Broadcasters have found themselves in a predicament when a candidate has sought to use a broadcast station to air an advertisement that contains material that could be characterized as indecent, obscene, or profane as these terms have been defined by federal case law and by the Federal Communications Commission (the "FCC" or the "Commission").

In the 1970s broadcasters were faced with the dilemma of what to do when a political candidate requested broadcast time to air a political advertisement in which the candidate spewed white supremacist hate speech and boldly referred to blacks as "niggers." By the early 1990s broadcasters were faced with the dilemma of how to handle requests for airtime by candidates for political office to broadcast advertisements depicting aborted fetuses. At the time, it was argued by broadcasters and some in the public that the advertisements were either indecent, obscene, profane, or all of the above, and therefore should be barred from broadcast television altogether. In the alternative, it was suggested that the advertisements be relegated hours of the viewing day when children were less likely to be in the viewing audience.

The once hypothetical sexually suggestive political advertisement is now a reality, and the truly indecent political advertisement might be on the near horizon. One such television advertisement appeared in 2006 in Tennessee endorsing Republican Bob Corker in his race against Democrat Harold Ford, Jr. for a U.S. Senate seat.[2] The Corker advertisement used sexually suggestive visual images to suggest that Ford frequented wild sex parties and had sexual liaisons with white women.[3] Ford is black. In the advertisement, the bare shoulders and face of an otherwise seemingly unclothed young blonde woman appeared on the screen as the young blonde winked and purred into the camera that she had previously met Ford at a Playboy party. The advertisement closed with another shot of the still questionably clothed young blonde teasing Ford to call her.[4] Ford lost the election.

Another television advertisement broadcast in New York in the same year endorsed Republican Raymond Meier in his U.S. congressional campaign against

[2] The advertisement, sponsored by the Republican National Committee, opens with an African-American woman posing the question "Harold Ford looks good. Isn't that enough?" Then camera captures short sound bites from a series of people who appear to be citizens on a city street making comments about how Ford wants to protect the privacy of terrorists, will increase taxes, favors gun control, is not worried about the threat of North Korea, and has taken money from producers of pornographic movies—"Don't we all?" the citizen chuckles. Available at http://www.youtube.com/watch?v=cWkrwENN5CQ.

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Democrat Michael Arcuri.[5] The advertisement opened with superimposed images of a woman who appeared to be an exotic dancer straddling a chair and seductively dancing while purring "Hi, sexy…" Meanwhile, the target of the advertisement, Arcuri stared in the dancer's direction while lasciviously and seductively licking his lips. The advertisement accused Arcuri of using Oneida County, New York taxpayer dollars to satisfy his sexual desires while on official business by calling an adult fantasy telephone hotline and then charging the call to his hotel room. Despite this advertisement, which ran in the days leading up to the election, Arcuri defeated his opponent to win the congressional seat. Each of these advertisements were broadcast in a news cycle when the public also was bombarded by unrelated broadcast news stories of a congressman engaging in inappropriate sexual e-mail exchanges, and perhaps worse, with underage boys and of an evangelical Christian minister using drugs and having sex with male prostitutes.[6]

Scholars, the FCC, and the courts have flirted with the issue of indecency in political broadcasting for years, focusing to date primarily on the body of cases dealing with political advertisements depicting abortions, aborted fetuses, and racial hate speech.[7] Existing cases have turned on the statutory and regulatory definitions of "indecency" and "obscenity" and suggest that broadcasters might have certain immunities and programming rights with respect to their decision to air political advertisements containing material they deem offensive, inappropriate, and harmful to children. None of the program material in each of these prior cases, however, has been found to squarely fit the Commission's definition of indecency, obscenity, or profanity. Moreover, none of these prior cases clearly answers the question of a broadcaster's liability in the event a broadcaster airs or chooses not to air a political advertisement that actually is determined to be indecent, profane, or obscene as those terms have come to be defined. The recent racy political advertisements go to the heart of the question of how broadcasters may handle requests by political candidates and their supporters to air campaign advertisements that more closely fit the Commission's definition of indecency, and perhaps even the definitions of obscenity or profanity as well.

This article does not assert that either of these two particular political advertisements squarely falls within the subject matter scope of the FCC's definition of indecency, but that they do signal a gradual shift toward the willingness of political candidates and their supporters to pay for campaign advertisements with a sexual tinge. Furthermore, this article asks the question of what is a broadcaster to do in the event it is faced with political material that might fall within the subject matter scope of the FCC's definition of indecency.

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[5] The advertisement titled "Bad Call" was paid for by the National Republican Congressional Committee. It also features fleeting images of a clothed male lower body. Available at http://www.youtube.com/watch?v=DDZ_bPYWjd8.

[6] Since that time, the sordid details of the private lives of countless other politicians have flooded the broadcast and cable airwaves.

[7] Becker and Bailey; NAACP and use of "nigger."

The article also suggests possible resolutions to the possible dilemma facing broadcast licensees which include, first, the suggestion that Congress could clarify or amend the reasonable access and equal opportunity statutes to expressly exclude indecent political advertisements. Second, Congress could repeal the reasonable access, equal opportunities, and anti-censorship provisions. Congress also could expressly create an exception to the anti-censorship provisions of Section 326 and Section 315 of the Communications Act to permit broadcasters to channel indecent political advertisements to the safe harbor hours of 10:00 p.m. to 6:00 a.m. when children are less likely to be in the viewing audience. Fourth, Congress could require all broadcast advertisements to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not. Fifth, Congress could grant broadcasters immunity from suit if they choose to air these advertisements. Finally, Congress could repeal the indecency prohibition entirely taking into consideration the decreasing relevance of the rule in the context of the prevalence of cable and satellite video services and the emergence of the Internet.

I. Statutory Conflict

All FCC broadcast licensees must serve the public, interest, convenience and necessity.[8] That obligation has applied to the daily operations and overall mission of broadcasters since the earliest days of regulation of the industry.[9] In the context of the broadcast media, the FCC achieves this goal through a combination of governmental and citizen action.[10] Congress and the FCC have enacted statutes, rules, and regulations that balance the interests of the various entities that make up this public the FCC and its licensees are charged to serve.

In the area of indecency, obscenity, and profanity regulation, the Commission relies significantly on the general viewing and listening public to assess media content and its appropriateness for children. As discussed herein, the FCC is prohibited from engaging in censorship of all broadcast material, not just that of a political nature.[11] Consequently, the FCC does not monitor the programming of its licensees for the purpose of levying forfeitures for rule violations, but rather regulates in large part by acting upon complaints about media content that are filed with the agency by broadcast viewers and listeners. At the root of indecency, obscenity, and profanity determinations is the contemporary community standard and the context in which the material is presented. Deputizing the entire public the watchdogs or monitors of broadcast material, in theory, results in agency decisions more closely reflecting these community standards than would be possible were those determinations made by a small number of commissioners or FCC staffers.

In the context of political speech, an argument could be made that political advertisements should be a safe haven from presentation of gratuitous, confusing, and

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11 47 U.S.C. §§ 315, 326.

often untrue private, intimate, and sexually suggestive matters. The political broadcast advertisement, it could be argued, simply is an inappropriate venue for the racy content commonplace in other genres of television and radio broadcast programming.

With the amount of information Americans process daily from multiple media sources, it has become more difficult to sift through it all and to find the real truth. This is particularly true of political broadcast material. The political process ideally would seek to highlight truths and inform the electorate, but not pander, titillate, or seduce with misleading and gratuitous sexually suggestive content.

Congress and the Federal Communications Commission have enacted laws and regulations seeking to serve the public interest in protecting children from harmful material aired on broadcast television and radio.[12] Similarly, laws have been enacted to enhance and protect the political process by protecting the rights of candidates for political office to use the public airwaves for purposes of furthering their political campaigns.[13] The conflict lies in the inability of a broadcaster to reject a political advertisement that contains indecent, obscene, or profane material.

A. 18 U.S.C. 1464: Prohibition Against Broadcast Indecency, Obscenity, and Profanity

Section 1464 of title 18 of the United States Code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both."[14] The purpose of this law is to protect children from harmful material broadcast over the public airwaves. In addition to the two-year prison term, violation of this section also subjects a broadcast licensee to license revocation and a fine of up to $325,000 per violation.[15] While these laws do

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[12] 18 U.S.C. § 1464 (prohibition against the broadcast of indecent, profane, or obscene material). See also rules limiting the number of minutes that may be devoted to commercials during programming designed for children.

[13] 47 U.S.C. §§ 313, 315.

[14] 18 U.S.C. § 1464 (2007). Moved from the Communications Act to the Criminal Code in 1948. *See* 14 Geo. Mason L. Rev. 193, n. 52, n. 53. [**While all are subject to the reasonable access, equal opportunity, and censorship rules]**, cable and satellite service providers are not subject to the same rules governing indecency and profanity as are traditional over-the-air television and radio broadcast licensees. Obscenity, however, is prohibited on all services at all times. 47 C.F.R. § 73.3999 (2008).

[15] 47 C.F.R. § 1.80(a)(4), (b)(1)(200_); 47 U.S.C. § 503(b)(2)(C)(2008). "If the violator is….a broadcast station licensee or permittee; … and, is determined…to have broadcast obscene, indecent, or profane language, the amount of any forfeiture penalty…shall not exceed $325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act." In 2006, Congress raised the fine following several years of highly publicized indecent broadcast incidents. Previously, the base monetary sanction for violation of the FCC's indecency, profanity, and/or obscenity restrictions was $7,000 per violation with a maximum fine of $32,500 per violation. The fine may be adjusted based on such factors as the nature, circumstances, extent and gravity of the violation, the degree of culpability of the violator, the violator's history of prior offenses, the violator's ability to pay, and such other factors as justice may require. See also Enforcement Policies Regarding Broadcast Indecency, 66 Fed. Reg. 21984, 21986 (May 2, 2001); and Broadcast Decency Enforcement Act Of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006)(To Be Codified At 47 U.S.C. § 503(b)(2)).

apply to cable and satellite systems, they have only limited applicability in these contexts.[16]

1. Indecent Material

Indecent programming is "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."[17] It is material intended to pander, titillate, vulgar, lewd.[18] The FCC prohibits television and radio broadcasts of indecent material during times of the day when there is a reasonable risk that children will be in the viewing or listening audience.[19] Broadcasters may broadcast indecent and profane material to the safe harbor viewing period of 10:00 p.m. to 6:00 a.m.—those hours of the day when children are less likely to be in the viewing and listening audience.[20] This is called channeling.

In determining liability for the broadcast of indecent material, the FCC applies a two-prong test.[21] First, the Commission will determine whether the speech indeed is indecent under the Commission's definition of the term. Second, it will consider the context in which the speech arises, taking into consideration whether it is "patently offensive as measured by contemporary community standards for the broadcast medium.[22] To determine whether the material broadcast is indecent, the FCC looks at three primary factors: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock.[23] Neither of these three factors alone is determinative, but must be balanced to determine whether the material, taking into consideration the context of the material, is indecent.[24]

2. Profane Material

Profane words and material are those that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a "nuisance."[25] The

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[16] These obligations extend to cable and direct broadcast satellite service ("DBS") channels only to the extent that the relevant programming is carried on a cable television or DBS system channel "subject to the exclusive control" of the cable or DBS provider. 47 C.F.R. § 76.205 (cable); 47 C.F.R. § 25.701 (DBS).

[17] 2 FCC Rcd 2705. Because the FCC is expressly prohibited from censoring broadcast material, and because it does not regulate by monitoring broadcast material, the FCC relies almost exclusively on the viewing and listening public to register complaints regarding offensive and inappropriate broadcast programming. It is this larger community standard by which the FCC regulates and reacts to programming alleged by listeners and viewers to be indecent, obscene, or profane.

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[23] 21 F.C.C.R. at 2668, ¶ 14.

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holding in *Pacifica* is not limited to use of the seven words used by George Carlin in "Seven Dirty Words," the monologue which is the subject of the case.[26] Pursuant to *Pacifica*, indecent speech must involve more than an isolated use of an offensive word.[27] Rather, the Court, and the FCC until recently, have reasoned that it will focus on deliberate and repetitive use of expletives and other such language used in a patently offensive manner.[28] Innuendo and double entendre also may be considered indecent.[29] Depending on the context in which the speech is uttered, innuendo and double entendre could become indecent when coupled with other explicit references.[30] **[INSERT Nuisance principle from *Pacifica*.[31]]** The nuisance principle in *Pacifica* suggests that channeling indecent broadcasts to what amounts for all intent and purpose to the wee hours of the morning, avoids exposing children to material that might be inappropriate for them.[32] Profanity may include material that while harmful to children, may not meet the definition of "indecent."

3. Obscene Material

While indecent and profane material receive some First Amendment protection, obscene material does not, and, therefore, may not be broadcast at any time.[33] The Supreme Court has opined that to be found obscene, material must meet a three-prong test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest (i.e., material having a tendency to excite lustful thoughts); (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.[34] The Supreme Court has indicated that this test is designed to cover hard-core pornography.[35]

The courts and the FCC have interpreted the indecency provisions of § 1464 to be exceptions to the reasonable access, censorship, and equal opportunities provisions of § 312 and § 315.[36] Sections 312(a)(7) and 315 actually override programming discretion ordinarily allowed licensees by the Communications Act.[37] In other words, pursuant to § 312(a)(7) and § 315, broadcasters must provide reasonable access on equal terms without censorship to political candidates for federal office despite the fact that the broadcaster might find the material in the political advertisement indecent, obscene, or profane.

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[26] See In the Matter of Pacifica Foundation, Inc., Memorandum Opinion and Order (1987), 2 F.C.C. R. 2698 (1987).
[27] FCC v. Pacifica Foundation, 438 U.S. 726, 750 (1978).
[28] Matter of Pacifica Foundation, Inc., Memorandum Opinion and Order (1987), 2 F.C.C.R. 2698; FCC v. Pacifica Foundation, 438 U.S. 726, 760 (1978).
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[30] *See, e.g.*, In the Matter of Infinity Broadcasting Corp. of Penn., Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987).
[31] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
[32] FCC v. Pacifica Foundation, 438 U.S. 726, 749-51 (1978); Pacifica Foundation, 56 FCC2d at 98.
[33] **[This restriction applies to cable and satellite services as well.]**
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[37] 95 F.3d at 82.

Unfortunately, the law does not expressly provide that broadcasters may not be found liable for violation of § 1464 for the broadcast of such political advertisement featuring material ultimately found indecent, obscene, or profane.[38] This unfortunate loophole presents the dilemma facing broadcasters.

B. Section 312: Sanctions for Failure to Provide Reasonable Access and for Broadcast of Indecent Material

In recognition of the extraordinarily influential role played by the broadcast media in shaping the public's views and opinions on political matters, Congress enacted 47 U.S.C. § 312(a) seeking to give political candidates for federal office greater access to this influential medium of public communication with potential voters.[39] Congress also sought to contain the cost of this access.[40] Section 312(a) of the Communications Act provides for administrative sanctions for, among other things, the broadcast of indecent material and the failure to allow candidates for *federal* elective office reasonable access to broadcast stations.[41] Paragraph (6) provides that the Federal Communications Commission may revoke any station license or construction permit for violation of 18 U.S.C. § 1464.[42]

Paragraph (7) of section 312(a) affords an affirmative right of reasonable access to a licensee's station, allowing for license revocation for a broadcaster's "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."[43]

The statute does not define reasonable access, nor do FCC regulations offer any one particular definition. The FCC, however, has developed an individualized, case-by-case set of interpretative factors to be considered to effectuate the reasonable access requirements of § 312(a)(7) including the following: (i) a candidate's stated purpose in seeking air time; (ii) the amount of time previously sold to the candidate; (iii) the disruptive impact on the broadcaster's regular program schedule; and (iv) the likelihood of requests for time by rival candidates under federal broadcast equal opportunity requirements.[44] Broadcasters must justify denials of access and many not use any of

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[39] Communications Act of 1934, as amended by the Telecommunications Act of f1996, 47 U.S.C. § 312(a).

[40] See CBS at 379, citing Federal Campaign Act of 1971: Hearings on S.1, S. 382, and S. 956 before the Subcommittee on Communications of the Senate Committee on Commerce, 92nd Cong., 1st Sess. 2 (1971)(remarks of Sen. Pastore); and S. Rep. No. 92-96, p. 20 (1971) U.S. Code Cong. & Admin. News 1972, pp. 1773-1774.

[41] 47 U.S.C. § 312(a)(6); 47 U.S.C. § 312(a)(7). The FCC has further regulated these requirements in 47 C.F.R. § 73.1944. Section 312 also provides for license revocation in the event a licensee broadcasts a lottery or engages in mail fraud.

[42] 47 U.S.C. § 312(a)(6); 18 U.S.C. § 1464 also provides for imprisonment of not more than two years.

[43] 47 U.S.C. § 312 (a)(7) (2007). Added to the Communications Act by the Federal Election Campaign Act of 1971, Pub. L. No. 92-225.

[44] See FCC Policy Guidelines; and see CBS, Inc. v. FCC, 453 U.S. 367, 390 (1981); 7 F.C.C.R. 678, 681 (1991) (1991 Policy Statement); 47 F.C.C. 2d 516, 516-17 (1974); 68 F.C.C.2d 1079, 1089, 1091 and n. 14

these considerations as a pretext for denial of access.[45] Additionally, broadcasters must cite "a realistic danger of substantial program disruption" to justify denial of reasonable access.[46] Generally, broadcasters are accorded deference provided they demonstrate that they have acted reasonably and in good faith.[47] Blanket, across-the-board types of policies denying access to the station will not be accorded such deference upon agency review of a denial and very likely will be found unreasonable.[48]

This statutory provision does not confer upon political candidates any affirmative right of access to a broadcast station during any particular time of the broadcast day, including prime time.[49] Similarly, there is no right to time during any particular program.[50] Nor is there any promise of free air time. Candidates must be willing to pay for the air time.[51]

C. Sections 315 and 326: Equal Opportunities and Prohibition Against Censorship

1. Equal Opportunities for Competing Candidates

While § 312(a)(7) provides candidates for federal office reasonable access to use broadcast stations, § 315 of the Communications Act provides candidates for any public office equal opportunities of access to a licensee's station as are afforded other candidates.[52] The intent of this section is to afford rival candidates a comparable audience reach. Specifically, Section 315 provides

> [i]f 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.[53] (Emphasis added).

Section 315 does not grant candidates an affirmative right of reasonable access to a broadcast station in the way § 312(a)(7) does to federal candidates, but merely provides that once a broadcaster has provided access to one candidate for any political office, it must provide the same access to other candidates for that same political office.

(1978)("there may be circumstances when a licensee might reasonable refuel broadcast time to political candidates during certain parts of the broadcast day." See 95 F.3d 75, 80. These circumstances are not defined.

[45] See CBS, Inc. v. FCC, 453 U.S. 367, 387; and see FCC 1978 Report and Order.

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[47] See 74 F.C.C. 2d at 665, 674; 74 F.C.C. 2d at 642-651; 1978 Report and Order, 68 F.C.C. 2d at 1089-1092, 1094.

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[49] 68 FCC 2d 1079 (1978).

[50] 7 FCC Rcd 678 (1991).

[51] See Kennedy for Preside Comm. V. FCC, 204 U.S. App. D.C. 160, 174-178, 636 F.2d 432, 446-450 (1980); 1978 Primer, at 2288.

[52] 47 U.S.C. § 315(a) (2007).

[53] 47 U.S. C. § 315(a) (2007).

2. Censorship Prohibition

In addition to equal opportunity protection, § 315 also prohibits broadcasters from censoring broadcast material.[54] It provides in relevant part

> such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.[55]

Editing out questionable material constitutes censorship and therefore is not permissible, and so would be content-based discrimination against a candidate's political advertisement.[56] In *Farmers Educational and Cooperative Union of America, North Dakota Division v, WDAY, Inc.*, a broadcast licensee sought to remove defamatory material from speeches made by legally qualified candidates for political office. Presuming that § 315 was interpreted to ban such censorship of political speeches, the broadcaster sought legal immunity from suit for broadcast of the libelous statements. In *WDAY*, the Supreme Court affirmed the equal opportunity mandate of § 315 opining that the basic purpose of § 315 is "full and unrestricted discussion of political issues of legally qualified candidates."[57] Additionally, in holding that § 315 prohibits censorship, the Court in *WDAY* aptly recognized that the broadcaster is faced with a difficult decision in deciding whether to censor political material in violation of § 315 or to risk being found guilty of libel or defamation.[58]

The lack of certainty as to the possible success of defenses to libel and the natural inclination to err on the side of caution thereby either intentionally or unintentionally chills speech.[59] Time also is of the essence in these matters, heightening the angst of broadcasters faced with this choice. Because of the nature of political campaigns and the limited time period of election seasons, a candidate may not resolve the issue or appropriately respond before voters take to the polls.[60]

The Court in *WDAY* relied on legislative history and what it concluded was Congress's intended purpose of fostering public discussion of political issues and of not placing unreasonable burdens on broadcasters which play such an important role in the

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[54] 47 U.S.C. § 315; 7 FCC Rcd 678 (1991).
[55] 47 U.S. C. § 315(a) (2007).
[56] Section 326 of the Communications Act of 1934, as amended, prohibits the FCC itself from censoring broadcast material. 47 U.S.C. § 326 (2007).
[57] Farmers Educational and Cooperative Union of America, North Dakota Division v, WDAY, Inc., 360 U.S. 525, 529 (1959).
[58] Farmers Educational and Cooperative Union of America, North Dakota Division v, WDAY, Inc., 360 U.S. 525, 529-30 (1959).
[59] Farmers Educational and Cooperative Union of America, North Dakota Division v, WDAY, Inc., 360 U.S. 525, 529-30 (1959).
[60] 360 U.S. 525, 530.

political process.[61] The Court, therefore, recognized immunity from defamation suits where a broadcaster airs a political advertisement that defames an opposing candidate.[62] The Court affirmed the conclusion of the North Dakota Supreme Court which said that "since power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers."[63]

The D.C. Circuit in *Becker v. FCC*, on review of an FCC ruling, grappled with two questions—one, whether the portrayals of aborted fetal tissue was indecent, and two, whether such adds could be channeled to the safe harbor hours when children are less likely to be in the viewing audience.[64] The court struggled with the tension between the competing interests of children, broadcast licensees, the voting public, and those of political candidates exercising their right of "access to time periods with the greatest audience potential."[65] The FCC had concluded that the abortion depictions were not indecent but that because of the potential psychological harm to children, § 312(a)(7) did not preclude a broadcaster from exercising its discretion to air the advertisement at a time that would be less detrimental to children.

Furthermore, the FCC concluded that channeling the advertisement did not violate the prohibition against censorship in § 315.[66] Upon review of the FCC's decision, the D.C. Circuit held that the broadcaster could not take into account the content of a political advertisement when determining reasonable access. Broadcasters also could not deny a candidate access to adult audiences just because children might be in the audience.[67] The court concluded that channeling the abortion advertisements to the safe harbor violated both § 312(a)(7) and § 315 by "permitting content-based channeling of non-indecent political advertisements, thus denying qualified candidates the access to the broadcast media envisioned by Congress."[68] Therefore, channeling to the safe harbor period was found to be impermissible pursuant to § 312(a)(7) and impermissible content based discrimination in violation of § 315.[69]

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[61] 360 U.S. 525, 530.
[62] WDAY 89 N.W. 2d 102, 110.
[63] 360 U.S. 525, 529 (1959)(bars broadcaster from removing defamatory content from political advertisements and grants broadcaster immunity from libel suit.); 89 N.W. 2d 102, 110.
[64] 95 F.3d 75 (1996).
[65] 95 F.3d 75, 80 citing Licensee Responsibility, 47 F.C.C. 2d at 517.
[66] In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 9 F.C.C.R. 7638, 7649 (1994).
[67] 95 F.3d 75, 79-80.
[68] 95 F.3d 75, 84-85.
[69] 95 F.3d 75, 84.

II. Recent Indecency Actions

A. Janet Jackson and the Bare Breast: *CBS Corp. v. FCC*

The number of indecency complaints increased exponentially from 1993 when there were no complaints at all to 2006 when there were 327,198, peaking in 2004 with a record 1,405,419 indecency complaints filed with the FCC.[70] The year 2004 marked the now infamous CBS live television broadcast of Super Bowl XXXVIII when during the halftime show featuring musical performers Janet Jackson and Justin Timberlake, an apparent "wardrobe malfunction" resulted in Jackson's bare breast being exposed for a fraction of a second.[71] CBS and its affiliates aired the performance outside the safe harbor. The FCC issued a forfeiture in the amount of $550,000 against all of CBS's twenty locally owned affiliates.[72]

In that case, the FCC first determined that the Super Bowl XXXVIII broadcast fell within the subject matter scope of the FCC's definition of indecency.[73] The broadcast was found to depict "sexual or excretory organs or activities."[74] On the determination of patent offensiveness, the FCC considered the Janet Jackson breast reveal in the context of the entire halftime show and concluded that the entire halftime show was patently offensive as measured by contemporary community standards for the broadcast medium.[75] Besides the duo performance by Jackson and Timberlake, the halftime show included performances by other artists who sang songs with sexual innuendo and who danced suggestively.[76] The depiction of the nude breast was found to be graphic and explicit.[77] While the agency determined that the material did not dwell or repeat at length on the exposure of the nude breast but was merely a fleeting image, the FCC concluded that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."[78]

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[70] These filings represented complaints about programming on television, radio, and cable. According to FCC records no Notices of Apparent Liability have been issued against cable programmers. *See e.g.*, Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230 (2004)("Super Bowl NAL"), affirmed, Forfeiture Order, 21 FCC Rcd 2760 (2006)("Super Bowl Forfeiture Order"), affirmed, Order on Reconsideration, 21 FCC Rcd 6653 (2006), ("Super Bowl Order on Reconsideration"), on appeal sub nom. CBS Corp. v. FCC, No. 06-3575 (3d Cir. 2006).

[71] Jackson's bare breast was on the screen for a mere 9/16 of a second.

[72] At the time, the maximum indecency fine was $27,500. The 20 CBS-owned affiliates were fined the maximum $27,500 for the broadcast.

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[74] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶ 9.

[75] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶ 10.

[76] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶ 13.

[77] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶11.

[78] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶12; Indecency Policy Statement, 16 FCC Rcd at 8009, P19. See also Young Broadcasting; Tempe Radio, Notice of Apparent Liability, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid); LBJS Broadcasting, Notice of Apparent Liability, 13 FCC Rcd. 20956 (Mass Media Bur. 1998) (forfeiture paid).

As for the third factor in the test for patent offensiveness determinations, the FCC concluded that the skillfully choreographed routine of Jackson and Timberlake in the context of the entire halftime show did have the effect of titillating, pandering to, and shocking the viewing audience viewers who had no prior warning of what was to come during this performance.[79] So, even though the depiction of the nude female breast was found to be fleeting in nature, the Commission found the other two factors used to determine whether broadcast material is patently offensive outweighed the lack of dwelling and repetition of the depiction of the nude breast.[80] It was graphic, explicit, tending to titillate, pander, and shock.[81] Thus, the material, which was aired outside the safe harbor, fell within the FCC's definition of indecency and was patently offensive as measured by contemporary community standards for the broadcast medium.[82]

The FCC's decision has been appealed to the Third Circuit where the FCC likely will lose based on what appears to be a growing body of law seriously questioning the FCC's policies regarding incidences of isolated and fleeting indecency and profanity.[83]

B. Fleeting Expletives

1. 2003 "Golden Globe Awards"

In 2003, musician Bono, upon learning that he had been awarded a Golden Globe, exclaimed a on live FOX Television Network broadcast that his recognition was "really, really fucking brilliant. Really, really, great."[84] The FCC's Enforcement Bureau denied the numerous complaints received in response to the broadcast on the grounds that Bono's utterance of the word "fucking" was isolated and fleeting.[85] The Enforcement Bureau concluded that in this case use of the word "fucking" did not refer to a sexual act, but was used more as a modifier similar to using a term like "extremely" or "really."[86] The Enforcement Bureau concluded, therefore, that the speech was not indecent as defined by the Commission and as supported by a long line of FCC policy regarding fleeting uses of such language.[87]

Despite the action by the Enforcement Bureau and the agency's own long established policy reaffirming that fleeting expletives uttered on broadcast stations would

[79] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶¶ 13-14.
[80] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶12.
[81] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶14.
[82] Forfeiture Order, 21 FCC Rcd 2760 (2006), ¶14.
[83] See FOX v. FCC (2nd Cir.) and CBS v. FCC (3rd Cir.).
[84] Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975 (2004).
[85] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, ¶ ¶5-6; Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975 (2004).
[86] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, ¶ ¶5-6;Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975 (2004).
[87] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, ¶ ¶5-6.

not be actionable, the full Commission overturned the ruling of the bureau, concluding that the utterance, while admittedly fleeting was now considered indecent and patently offensive under contemporary community standards.[88] The Commission explained that the word "fuck" and all variations of it, however they are used, have a sexual connotation. It stated further that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language."[89] Declining to sanction FOX in this particular instance because utterances of fleeting expletives were not actionable at the time Bono uttered them, the Commission, nevertheless, warned all broadcast licensees that the Commission would consider any future use of the "F-word" and all variations of it to be indecent and profane and thus actionable.[90]

On appeal to the Second Circuit, the FCC's decision was vacated and remanded to the Commission for further proceedings.[91] The Second Circuit found that the agency's new policy on fleeting expletives "represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry."[92] The court also found that the FCC's new policy was arbitrary and capricious, the agency having failed to provide a reasoned basis for the policy change.[93] The Second Circuit recognized that federal agencies may revise their rules and policies as they find appropriate, but that such agency rule and policy changes must be supported by a "reasoned explanation" of why the new rule or policy is better than the old rule or policy.[94] The court concluded that the Commission failed to offer such a reasoned explanation for its new policies on either fleeting expletives or profanity.[95] Moreover, the Second Circuit rejected the FCC's argument that fleeting expletives must not be exempted from a finding of indecency because to do so would "unfairly force[] viewers (including children) to take 'the first blow'" referred to by the Court in *Pacifica*.[96]

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[88] Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975, at ¶ 9 (2004)("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.")
[89] Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975 (2004), ¶ 9.
[90] Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975 (2004), ¶ ¶15-17. The Enforcement Bureau earlier had reaffirmed the Commission's policy regarding fleeting expletives, concluding that Bono's use of the word did not fall within the scope of the FCC's indecency definition and, therefore, was not prohibited. See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, at ¶¶ 5-6. The full Commission reversed the Enforcement Bureau's decision. See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, at ¶ 8. The Commission did not impose a forfeiture for the Bono incident because the law at the time would have permitted the broadcast of the fleeting use of the "F-Word."
[91] FOX v. FCC, 489 F.3d 444 (2nd Cir. 2007).
[92] 489 F.3d 444, 447 (2007).
[93] 489 F.3d 444, 447 (2007).
[94] FOX v. FCC, 489 F.3d 444, 456-57 (2nd Cir. 2007).
[95] FOX v. FCC, 489 F.3d 444, 460-62 (2nd Cir. 2007).
[96] 438 U.S. at 748, 98 S.Ct. 3026; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006), ¶ 25. The first blow analogy suggests that while a listener or viewer may elect to turn off the television or radio or switch the channel after hearing offensive language, listeners and viewers should not have to be subjected to this proverbial "first blow," but that FCC

The Second Circuit struggled to reconcile the Commission's nearly thirty years of acquiescence to the problem of the "first blow" with its newfound concern about fleeting expletives.[97] The exceptions carved out by the Commission seemed to undercut its concerns about the first blow. The bona fide news exception in the case of "The Early Show" and the exception carved out for expletives that are "integral" to a work such as those that appeared in the movies "Saving Private Ryan" and "Schindler's' List" indeed forced viewers to take the first blow.[98] The Second Circuit found that the FCC failed to support its first blow theory in light of these gaping holes.[99]

The Supreme Court has granted certiorari in the case.[100]

2. Other Broadcasts

In 2006, the FCC consolidated into one order a response to four other complaints against various licensees for broadcasts of the following: (i) FOX's "2002 Billboard Music Awards" in which entertainer Cher stated "People have been telling me I'm on the way out every year, right? So fuck 'em."; (ii) FOX's "2003 Billboard Music Awards" during which a presenter, Nicole Richie, stated "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."; (iii) several episodes of the ABC network's weekly hour-long police drama "NYPD Blue" which contained the words "bullshit," "dick," and "dickhead"; and (iv) the CBS network's "The Early Show" where a guest during a live morning interview used the word "bullshitter."[101]

The FCC found each of these broadcasts indecent and profane under the new policy it adopted in the Bono "Golden Globes" decision.[102] The Commission stated again that any use of "fuck" is presumed indecent and profane.[103] Similarly, any use of "shit" also is presumptively indecent and profane.[104] Additionally, the broadcasts were found explicit, shocking, and gratuitous, thus patently offensive.[105] Again, the Commission declined to issue a forfeiture because the utterances were made when the old rule that isolated fleeting expletives were not indecent or profane was applicable.[106]

FOX, CBS, and ABC filed petitions for review of the order.[107] On voluntary remand, the FCC issued a new order addressing these four incidents.[108] The FCC

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rules may prohibit the utterance or depiction of indecent, profane, or obscene material altogether. In doing so, viewers and listeners are spared suffering the needless first blow.

[97] FOX v. FCC, 489 F.3d 444, 457-58 (2nd Cir. 2007).

[98] FOX v. FCC, 489 F.3d 444, 458-59 (2nd Cir. 2007).

[99] FOX v. FCC, 489 F.3d 444, 458-59 (2nd Cir. 2007).

[100] FCC v. FOX Television Stations, U.S. Supreme Court Order, 07-582 (2008).

[101] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C. R. 2664 (2006), ¶¶ 101, 112 n. 64, 125, 137.

[102] 21 F.C.C.R. 2664 (2006), § III.B.

[103] ¶¶ 102, 107.

[104] ¶¶ 138, 143.

[105] ¶¶ 106, 120, 131, 141.

[106] ¶¶ 111, 124, 136, 145.

[107] FOX and CBS filed a petition in the Second Circuit, and ABC in the D.C. Circuit.

reaffirmed its holding that both of the Billboard Music Award shows contained indecent and profane material.[109] It dismissed the complaint against ABC for its broadcast of "NYPD Blue" and reversed its decision regarding "The Early Show" broadcast. The Commission concluded that the use of the word "bullshitter" on "The Early Show" occurred during a "bona fide news interview" and therefore was not subject to forfeiture.[110] FOX appealed this order to the Second Circuit which granted FOX's motion to consolidate these cases with the earlier case involving Bono's statements at the 2003 Golden Globe Awards as discussed above.

C. Nudity and Other Crass Behavior on Television's "NYPD Blue" and "Married By America"

1. "NYPD Blue"

On February 19, 2008, the Federal Communications Commission issued a *Forfeiture Order* against the ABC Television Network and certain affiliated stations issuing a fine in the amount of $27,500.[111] The *NYPD Blue Forfeiture Order* sanctioned ABC's 9:00 p.m. broadcast of an episode of the police drama which depicted a woman's naked buttocks and a portion of her naked breast. In the scene, the woman's naked body was shown while she was taking a shower and as an eight-year old body looked on. The female's naked body parts were not obscured, blurred, or pixulated.[112] The FCC cited the repeated shots of the woman's naked buttocks and the deliberate panning of the camera down her back "to reveal another full view of her buttocks before panning up again" to create a "voyeuristic" vantage point.[113] The FCC also cited another camera shot in which the young boy's shocked face is depicted from between the naked woman's legs.[114]

In its *NYPD Blue Forfeiture Order* the Commission affirmed its earlier decisions and concluded that the depiction of the naked female buttocks in the "NYPD Blue" episode squarely came within the subject matter scope of its indecency definition in that

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[108] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006).
[109] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006), ¶¶ 22, 60.
[110] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006), ¶ 68.
[111] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶¶ 52-53. The FCC imposed the fine only on those ABC affiliates about which the agency had received complaints resulting from the broadcast of the material outside the safe harbor.
[112] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 13. Pixulation is a popular method used to distort the resolution of an image in order to obscure it.
[113] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 16.
[114] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 16.

it described or depicted sexual or excretory organs or activities.[115] Despite the fact that the buttocks is not necessarily biologically an excretory organ, the FCC has consistently concluded that it is an excretory organ for the purposes of satisfying its indecency definition. The FCC stated in the *NYPD Blue Forfeiture Order* that "the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities."[116]

Reviewing the context of the material in the episode and whether the material was patently offensive as measured by contemporary community standards, the FCC concluded that "notwithstanding any artistic or social merit and the presence of a parental advisory and ration, the material was patently offensive under the community standards for the broadcast medium."[117] In reaching this conclusion, the FCC first determined that the depiction of the naked buttocks in this case was sufficiently graphic and explicit to support a finding of indecency.[118]

Next, the FCC also found that the repeated camera shots of the woman's naked buttocks, while not as egregious as some cases the agency had reviewed, certainly rendered the episode more offensive than many cases the Commission had previously found not of patently offensive.[119] The FCC acknowledged that the depiction in the "NYPD Blue" episode was not as lengthy or as repetitive as some indecency cases where there had been a finding of patent offensiveness, but that it did contain "lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity where the Commission has found that this factor did not weigh in favor of a finding of patent offensiveness."[120] Finally, in applying the third factor in determining whether material is patently offensive, the FCC concluded that the scene was pandering, titillating and shocking because of the voyeuristic camera shots that panned up and down the back of the woman's naked body.[121]

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[115] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 7.
[116] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 8. n. 28 citing Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664, 2681 ¶ 62, 2718 ¶ 225 (2006) (finding buttocks are sexual and excretory organs within the definition of indecency) Entercom Kansas City License, LLC, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 25011 ¶ 7 (2004)(comments about genitals, buttocks, and breasts); Rubber City Radio Group, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 14745, 14747 ¶ 6 (Enf. Bur. 2002)(comments about a "baby's ass").
[117] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 18.
[118] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 13.
[119] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 15.
[120] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 15.
[121] In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue." ("NYPD Blue Forfeiture Order"), ¶ 15.

2. "Married By America"

On February 22, 2008, the Federal Communications Commission issued a *Forfeiture Order* against a number of FOX Television Network affiliated stations for the broadcast of the reality show "Married By America."[122] The forfeiture, in the amount of $7,000 per station, sanctioned FOX's broadcast prior to 10:00 p.m. of the reality show featuring bachelor and bachelorette parties for two couples all of whom prior to the show were strangers, but whom America by vote paired to be married on the show. The bachelor and bachelorette parties for the couples featured "sexually oriented" and suggestive performances by male and female strippers.[123]

The various scenes cited by the FCC in its *Married By America Forfeiture Order* included depictions of nude and semi-nude female and male adult entertainers grinding their crotches with partygoers, smearing and licking whipped cream from various body parts, seductively kissing breasts and other body parts, spanking partygoers with whips and belts, providing suggestive and seductive lap dances, and engaging in other sexually suggestive behavior.[124] The FCC concluded that the depictions, many of which were pixulated to obscure naked body parts such as buttocks, breasts, and genitals, were designed "to stimulate sexual arousal." The Commission found the material "sufficiently graphic to and explicit to support an indecency finding." [125] In the *Forfeiture Order*, the FCC stated that the fact that naked body parts were pixulated "did not obscure the overall graphic character of the depiction" and determined that the material should be assessed "in its full context."[126] Both the "NYPD Blue" and the "Married By America" forfeitures are likely to be appealed in light of the forthcoming Supreme Court action on indecency and profanity.

III. <u>The Ford and Arcuri Advertisements Probably Are Not Indecent</u>

A. The Advertisements While Offensive Do Not Meet the Definition of Indecency

Neither the anti-Ford nor the anti-Arcuri advertisements describes or depicts sexual or excretory organs or activities. The depiction in the anti-Ford advertisement presents a suggestion of nudity but no actual depiction of sexual or excretory organs. Only the bare shoulders of the young blonde woman are shown on camera. While the

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[122] In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003 ("Married By America Forfeiture Order").
[123] In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003, ¶ 2.
[124] In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003, ¶ 7-14.
[125] In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003, ¶¶ 12.
[126] In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003, ¶ 12.

anti-Arcuri advertisement shows a stripper appearing to give a suggestive dance performance, only the woman's silhouette is depicted on camera, and she is not engaged in any actual sex act.

Consequently, they do not fall neatly within the context of the FCC's indecency definition. This article suggests, however, that they very well may be the precursor to political speech that does fall within that definition. Not satisfying the definition of indecency, the FCC could not sanction a licensee who decided to broadcast either of these advertisements. The advertisements admittedly do no present broadcasters the exact legal dilemma contemplated by scholars and courts, but they definitely signal a shift in that direction.

B. Patent Offensiveness in Context and as Measured by the Community Standard

Courts routinely have held that determinations of whether broadcast material is indecent "is largely a function of context."[127] Context was taken into consideration when Bono used the expletive to describe just how happy he was to receive a Golden Globe award**.** Context was considered in the Janet Jackson, Justin Timberlake Super Bowl XXXVIII performance. Therefore, the context in which the anti-Ford and anti-Arcuri advertisements arose also must be considered.

While public opinion of politicians is often less than laudatory, the public's disappointment with the conduct of politicians is grounded in the notion that on a certain level we hold them to a higher standard as administrators of the public trust. While we understand that politics can be dirty business, the mudslinging historically has been contained to casting aspersions on an opponent's character in the form of attacks on their political, social, economic, and moral views and values. Because of technological advances—namely the popularity of 24-hour news programming and the public's greater access to information provided by citizen journalists on Internet websites—what used to be behind-closed-door, private, and personal matters have now become much more public and widely available for considerable public consumption. No matter how inappropriate the political campaign arena is, however, for gratuitous, titillating, and suggestive sexual speech, candidates and politicians do continually seem to be caught up in scandal involving sexual misconduct that in some cases does have some bearing on their suitability for public office.

While the depictions in both the anti-Ford and anti-Arcuri advertisements are gratuitous, they probably were not intended to titillate or arouse the viewers. They were intended instead to taint the image of both Ford and Arcuri, and in the case of the anti-Ford advertisement, to evoke racial images and prejudicial thoughts against Ford.

Television content in general has become much racier as evidenced by the wide array in that programs depicting sexual conduct, and sexually suggestive material is

[127] FCC v. Pacifica Foundation, 438 U.S. 726, 742 (1978).

commonplace on broadcast, cable, and satellite television. The bar has been set very low. Compared to regularly scheduled primetime programming, today's political advertisements still probably would be considered appropriate for general audiences including children, from an indecency perspective. The regular prime time line up on the big four broadcast networks provides a steady diet of sex, violence, and generally base programming. Programming on cable generally is even more permissive particularly when the excessive drinking and sexually suggestive material commonplace in many reality shows is factored in.

The American public in many ways has become immune to the crassness that has invaded American homes and the minds of all viewers, not just children. FCC policy, however, historically has been highly protective of children seeking to shield them from the potentially harmful effects of excessive sexual content in broadcast radio and television programming. The growing availability of and subscription to cable television and satellite service also has blurred the distinctions between those two services and traditional broadcast. When the Internet is factored in, the continued strict regulation of broadcast services seems on its face to no longer be warranted and indeed unfair regulation from an economic perspective. Also, with consolidation in the news industry, there are fewer traditional sources and outlets distributing what historically have been viewed as reliable information based on sound journalistic principles.

While there are no separate standards, one for entertainment programming and another for advertising, in the context of a matter as socially important as voting and the civic function it should serve to all of American society, negative advertisements featuring indecent or sexually suggestive material should arguably be held to a higher standard.

On the other hand, free over-the-air broadcasting has a uniquely special place in the American marketplace of ideas. It is available to everyone regardless of economic status and ideology. Many households have abandoned subscription services altogether due to the questionable content. Preserving at least one venue for balanced, relatively innocuous programming is important to the democracy and its inhabitants.

The race to the bottom with respect to the quality of television programming also might reflect a growing tolerance in American society for the crass, suggestive, and base material streamed into our households every minute of every day. There is, after all, no huge ground swell of public outrage. The majority of indecency complaints received by the FCC in recent years have originated from one watchdog organization, the Parents Television Council.

Americans, in large part, seem to have become desensitized to sexualized material on television. Advertisements for condoms, breast enlargement, erectile dysfunction medications, other products touting the ability to enhance intimate satisfaction can be seen on television all day long, even during times of the day when children are very likely to be in the viewing audience.

The exceptions to the rule prohibiting the broadcast of indecent material threaten to swallow the rule. The huge obscenity exceptions for artistic expression, bona fide news coverage, documentaries, news interviews, and of course political speech are being extended to indecency and profanity.[128] An argument could be made that there is no compelling reason for maintaining the rule. The number of sex scandals involving public figures and the 24-hour news coverage of them has brought the language of sex to a prominent place in contemporary news coverage. This material routinely crawls across the bottom of the television screen on morning news television programs. The details of the alleged sex acts are openly discussed at all times of the day by television newscasters.

IV. Other Offensive Political Speech

To date, offensive political speech has been a centerpiece in the 2008 presidential campaign. At least one prominent candidate and her overzealous supporters have on more than one occasion discarded all sense of decorum and citizenship in an effort to discredit and marginalize the country's first African-American candidate with a true likelihood of winning the U.S. presidency. There are many more opportunities in 2008 for the political speech to slide further down the slippery slope of offensiveness. Additionally, in light of several sordid political scandals in recent years, the opportunities for the broadcast of truly indecent political material are very likely. A broadcast indecency showdown with broadcast licensees in one corner, a political candidate in another, the electorate and viewing audiences in another, and finally the FCC in another is shaping up as the campaign heats up and as election day draws nearer. The field of 2008 presidential candidates alone provides a setting ripe for political speech that pushes the indecency envelope.

The husband of Democratic Party candidate Senator Hillary Clinton (D-NY), former President Bill Clinton, has been linked to countless women while married and was caught in a sordid sex scandal as president that saw him impeached by Congress for lying under oath about the relationship. The candidacy of Democratic candidate Senator Barack Obama, the product of an African father and Caucasian mother from the mid-west but who identifies as African American, invites inevitable plays of the so-called race card and use of age-old racially stereotypical inferences—sexual and otherwise—by opponents or their surrogates determined to undermine and derail his candidacy.[129]

Of the candidates who bowed out of the presidential race relatively early in the campaign, Republican Party candidate Rudolph Giuliani had a history of extramarital affairs and multiple wives— *albeit* not at the same time—the most recent of which was a former mistress who helped break up his previous marriage and whom the former New

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129 References already have been made to the Muslim faith of Obama's ancestors suggesting that he, too, is Muslim and thus unacceptable to fill the presidency. Political talk show hosts also have routinely referred to his middle name "Hussein" designed to invoke comparisons to radical Muslims and terrorists. Photos have circulated showing him in tribal African dress during a ceremonial official visit to the continent. Racially charged statements of Obama's pastor, Reverend Jeremiah Wright, Jr. have been played over and over on news channels in an attempt to "vet" the candidate and rile the white electorate.

York City mayor lived with while still married to said previous wife. Mitt Romney, a Mormon, was subjected to intolerant anti-Mormon rhetoric particularly from fundamentalist Christians and political pundits who spewed rhetoric about Mormon philosophy including its past policy condoning polygamy.

A. Racially Offensive Language in Political Advertisements

The 2006 anti-Harold Ford advertisement in Tennessee arguably is more racist than it is indecent although it contains material clearly sexually suggestive. During the 2006 U.S. Senate race in Virginia, which pitted former Virginia governor George Allen against former naval officer and former Secretary of the Navy Jim Webb, Allen committed a major mistake on during a stump speech before a small gathering of supporters and journalists. During the speech, Allen seemed to have lost his senses when he repeatedly referred to a person in the audience, later determined to be a man of Indian descent, as "macaca."[130] In his free flowing seemingly unscripted speech, Allen seemed to pick on the man and stated the following: "This fellow here, over here with the yellow shirt, macaca, or whatever his name is. He's with my opponent. He's following us around everywhere. And it's just great." "Let's give a welcome to macaca, here. Welcome to America and the real world of Virginia." Later, when asked what the term means, Allen seemed to feign ignorance and offered that the word sounded like "mohawk" which is the style in which the target of his insult wore his hair.[131] Of is "welcome" to America and "the real Virginia," Allen explained that he was simply referring to the real world outside the Washington, D.C. beltway.[132] This type of rhetoric has been the subject of complaints and lawsuits alleging indecent or obscene speech aired over the public airwaves by political candidates.

Misreading the Court's holding in *Pacifica*, the NAACP had asked the FCC to add the word "nigger" to its list of obscene words. In response, the FCC concluded that use of the racial epithet "nigger" is neither indecent nor obscene under its rules. The term describes neither sexual organs, sexual or excretory activity, nor sexual conduct in a patently offensive manner as is required pursuant to the agency's rules. During his U.S. senatorial campaign in Georgia, J. B. Stoner made a political announcement stating:

> I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those

[130] "Macaca" also spelled "maccaca" has multiple meanings. A maccaca is a monkey that inhabits the Eastern Hemisphere. It also could refer to a South African town. Finally, it also is considered a racial slur against African natives in some European cultures. Merriam-Webster dictionary defines "macaca" as follows: "a genus of Old World monkeys including the rhesus monkey (*M. mulatta*) and other macaques."
[131] *See* Washington Post, "Allen Quip Provokes Outrage, Apology, Name Insults Webb Volunteer," Tim Craig and Michael D. Shear, Tuesday, August 15, 2006; Page A01.
[132] *See* Washington Post, "Allen Quip Provokes Outrage, Apology, Name Insults Webb Volunteer," Tim Craig and Michael D. Shear, Tuesday, August 15, 2006; Page A01.

> jobs to the niggers. 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. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.

In response to Stoner's racist tirade, civil rights activists requested that the FCC ban use of the word "nigger" as obscene or indecent in accordance with the U.S. Supreme Court's holding in *FCC v. Pacifica Foundation*.[133] The most important conclusion the FCC reached in rejecting the NAACP's claim was that "even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of Section 315 we may not prevent a candidate from utilizing that word during his 'use' of a licensee's broadcast facilities."[134] This single sentence highlights the broadcaster's dilemma. Use of certain language is certain to be offensive to many of a broadcaster's audience, and indeed to the broadcaster also; however, because of the right of equal opportunity to all candidates for the same public office and the prohibition against censorship of political advertisements by a broadcaster, the broadcaster, must for the sake of the political process and the rights of the candidate put aside common sense and decency and allow even the most rabid racist to use the public airwaves broadcast facilities to spew hate, spread discontent, and generally offend the public.

In cases like this, the voters have the power to decide what type of candidate they want or are willing to tolerate. It is within the power of the voters to judge the character, judgment, and qualification of the candidate based on his or her uncensored speech. Generally, in other contexts not involving political speech, it is the broadcaster's responsibility to the public in furtherance of its public interest obligation to discourage use of the public airwaves to spew speech that that offends or belittles minorities, people of color, women, gays, and other such groups. The federal government has taken a different stance when such defamation is woven into the political process through the political advertisement. The broadcaster has no authority to discourage speech. Many may argue that the public interest is not served when a racist takes to the airwaves under the cover of a political campaign to demean, defame, and disenfranchise an entire race of people. The interest of the victims should tip the scale in favor of prohibiting and in fact sanctioning such speech which is potentially much more harmful to society than the indecent speech the FCC is so willing to sanction.

B. The Abortion Advertisements

In two 1992 U.S. Congressional races, Daniel Becker of Georgia and Michael Bailey of Indiana, attempting to convey their anti-abortion stances, broadcast television campaign advertisements depicting aborted fetuses. The advertisements seemed specifically designed to repulse viewers and voters and to sink the campaigns of their

[133] 46 U.S.L.W. 5018 (1987); 438 U.S. 726 (1978).
[134] In re Complaint by Julian Bond Atlanta NAACP Atlanta, Georgia Concerning Political Broadcasting, 69 F.C.C. 2d 943 (1978).

pro-choice opponents. The broadcast stations in both cases received numerous complaints about the gruesome images depicted over the broadcast airwaves. At least one broadcaster asked the FCC to declare the advertisements indecent and to permit broadcasters to channel those advertisements to hours when children were less likely to be in the viewing audience. Those advertisements were not found to be indecent as they did not fit the FCC's definition. Moreover, broadcasters were found unable to legally channel them to particular hours of the day as such action would offend political broadcasting rules providing political candidates reasonable and equal access to broadcast outlets as well as violate laws prohibiting censorship of political speech.

FCC found that the content of the advertisements was not sexual in nature and did not meet the agency's definition of indecent. The U.S. Court of Appeals for the Northern District of Georgia reversed, finding that the material was indecent as it described excretory activity and material. The U.S. Court of Appeals deferred to the U.S. Supreme Court which dismissed the case without opinion, letting the District Court's decision stand.[135]

The D.C. Circuit stated in *Becker v. FCC* "[w]e are faced, then, with competing interests—the licensee's desire to spare children the sight of images that are not indecent but may nevertheless prove harmful, and the interest of a political candidate in exercising his statutory right of 'access to the time periods with the greatest audience potential.'"[136] In light of this conflict, the FCC has afforded licensees the final say in deciding in favor of children.[137] At the same time, the federal government has hogtied broadcasters when it comes to the authority they have to pick and choose which political advertisements they will air and when they will air them.

V. Congressional Resolutions Are Possible

In her article, Samantha Mortlock correctly characterizes the broadcasters' dilemma. Congress and the FCC have left unresolved the question of whether a broadcaster will be subject to criminal prosecution in "future election-related conflicts" where the political speech is indeed indecent under the FCC's and court's definition of the term.[138] In light of the nearing possibility of a truly indecent political advertisement, a legally sound solution is warranted. Congress could resolve this dilemma by one of at least four possible actions.

First, Congress could amend the reasonable access and equal opportunity statutes to expressly exclude political advertisements that include indecent, obscene, or profane material, effectively banning all broadcast indecency including that in political advertisements. Second, Congress could completely repeal the reasonable access and equal opportunities provisions. Third, Congress could expressly create an exception to the anti-censorship provisions of Section 326 and Section 315 of the Communications

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136 Becker v. FCC, 95 F.3d 75, 80 (D.C. Cir. 1996), citing Licensee Responsibility, 47 F.C.C. 2d at 517.
137 95 F.3d 75, 80; Declaratory Ruling, 9 F.C.C.R. at 7646.
138 14 Geo. Mason L. Rev. at 210.

Act, thus permitting broadcasters to channel indecent political advertisements to the safe harbor. Additionally, Congress could permit all broadcast ads to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not. Finally, an alternative and perhaps overall better solution would be to grant broadcasters immunity from violation and sanction under the indecency provisions in Section 1464 by granting the same type of immunity currently granted broadcasters who broadcast political advertisements that allegedly defame an individual.

A. Amend and/or Clarify the Reasonable Access and Equal Opportunity Statutes

Congress could clarify or amend the reasonable access and equal opportunity statutes to expressly exclude indecent political advertisements. To do so, would close the loophole in the three conflicting statutes and effectively ban all indecent broadcast material. The wisdom of this solution is highly questionable, as currently is not even clear that Congress and the FCC should ban any indecent material on broadcast stations at all. Currently, the overwhelming majority of television viewers have abandoned reliance on traditional over the air broadcast choosing instead to subscribe to either cable or satellite service. That being the case, most consumers today draw little distinction between broadcast and cable television stations as they are consumed via cable and satellite services nearly indistinguishably. As such, the relevance of the different treatment of broadcast services and subscription services, which are not subject to the same prohibitions against airing indecent material, for the purpose of the public interest in protecting children from indecent material has little continued value or relevance since indecent material is not prohibited on cable and satellite channels. Statutory law and agency regulations should reflect this market change.

B. Repeal the Reasonable Access, Equal Opportunities, and Anti-Censorship Provisions Altogether

Repeal of the reasonable access, equal opportunities, and anti-censorship provisions could eliminate the conflict. Were these provisions to be repealed a licensee would be free to reject a candidate seeking to broadcast a message to which the licensee objected or found otherwise undesirable. If a licensee voluntarily were to permit candidates access to its station for the purpose of political speech, then the licensee could be subject to the indecency provisions of § 1464.

The problem with this proposal is obvious. Licensees would be free to discriminate against one candidate in favor of another or others. Licensees would be given too much power over candidates' access to the electorate via the public airwaves. Not only would candidates be harmed by such a policy, but so would the general public and the political process itself.

C. Permit Channeling of Indecent Political Advertisements to the Safe Harbor

Congress could expressly create an exception to the anti-censorship provisions of Section 326 and Section 315 of the Communications Act to permit broadcasters to channel indecent political advertisements to the safe harbor hours of 10:00 p.m. to 6:00 a.m. when children are less likely to be in the viewing audience. Without this exception, such attempts to channel political advertisements to particular hours of the broadcast day would violate express prohibitions against censorship.

If broadcasters are given the authority to so channel indecent political advertisements, the potential harm to children would be diminished *albeit* only to the extent that the underlying assumption that children are less likely to be in the viewing audience actually holds true. Permitting channeling of select advertisements, however, has some other more identifiable problems.

The most obvious problem is associated with the difficulty in actually defining what constitutes indecent material. Because neither the courts, Congress, nor the FCC have been able to provide broadcasters clear guidance as to what material it will sanction, broadcasters might err on the side of caution and channel more material than is necessary. While the definition of what constitutes indecency becomes somewhat clearer with each court decision, few broadcasters necessarily want to put their licenses in jeopardy and incur the huge costs of litigation to defend a decision to air a political broadcast ad in order for a case to work its way through the judicial system. Conversely, broadcasters could find themselves liable for having channeled an ad that the courts ultimately find was not indecent and should not have been relegated to the safe harbor. Either way, the broadcaster loses.

Media should simply be the forum for discussion and distribution of ideas, not the censor of the message. In light of the FCC's current activity in the indecency arena, and the lack of clarity as to what actually constitutes indecent material, broadcasters should not be pushed into a corner. To do so would potentially quell speech as broadcasters, fearful of indecency forfeitures, would become overly cautious and might reject too many requests for political air time.

A related problem is that of discriminatory treatment of indecent advertisements and those that are not. A large segment of the viewing audience might be deprived of the opportunity to view advertisements that might be aired only in the wee hours of the morning. Not only is the candidate harmed in that he or she is not given access to the same audience as might be his or her competitors.

Despite the Court's holding in *WDAY*, channeling and censorship are not exactly the same thing. The government may impose reasonable time, place, and manner restrictions on speech so long as the restrictions are narrowly tailored to achieve a

significant government interest.[139] This is separation of indecent material suitable for adults, but not children, generally is accomplished in broadcasting by channeling indecent programming to the safe harbor of 10:00 p.m. to 6:00 a.m.—hours when children are less likely to be in the audience. The Commission has held that requiring indecent broadcast material to be channeled in this way is a reasonable and narrow time, place, and manner restriction consistent with the First Amendment protections afforded other media.[140]

The Channeling is more like permissible time, place, and manner restrictions and should be permitted. One may argue, however, that granting broadcasters the authority to channel certain advertisements to the safe harbor while permitting others to be broadcast during the hours of 6:00 a.m. to 10:00 p.m. is discriminatory because the time of day the advertisements would be broadcast would be channeled based solely on the content of the message.

Neither Congress nor the FCC should push any policies permitting broadcasters to refuse to air these advertisements. Fostering a free marketplace of ideas political arena free from censorship requires that neither broadcasters nor the government quell political speech. While it is quite another story were the broadcaster itself make hateful, obscene, indecent, or profane comments in other contexts, it could be said convincingly that allowing political candidates to reveal their true selves through their political advertisements, no matter how distasteful, is actually in the public's best interest. A collateral benefit of airing even negative is that the advertisements say as much about the sponsor of the advertisement as they do about the person being attacked. It takes a special person to call someone a "nigger" on television or the radio or to use the public airwaves during prime time to air indecent, obscene, or profane material wholly inappropriate for children. The electorate in many ways is made better off by insight into the character of a sponsor of such advertisement which goes directly to the public's determination as to whether a candidate who sponsors such a negative advertisement is ripe to be entrusted with the public trust that is commensurate with holding public office. The public is better served by having had access to this information prior to the election than to find out after a candidate wins the office and then begins to carry out his or her governmental authority in a manner offensive, oppressive, or discriminatory to the general public he or she has been elected to serve.

Allowing the advertisements to show the true fiber and character of a candidate is better for society in the long run to the extent that the electorate can see past the hype and hysteria to the true message and messenger. Politically correct speech may conceal the true character of a candidate, which is not in society's overall best interest.

[139] Renton v. Playtime Theatres, 106 S.Ct. 925 (1986); Young v. American Mini-Theatres, 427 U.S. 50 (1976).
[140] 2 F.C.C.R. 2698 (1987).

D. Require or Permit Channeling of all Political Advertisements to the Safe Harbor

Congress could require all broadcast advertisements to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not. Such a requirement might be found to be an unconstitutionally overbroad attempt to regulate a very small subset of otherwise permissible speech. Additionally, to do so would potentially harm the entire political process, the political advertisement would take on the same status as late night infomercials. They would be rendered ineffective as the potential audience reach would be significantly reduced. Any such regulation that allowed for broadcaster discretion to channel or not to channel would suffer from the same problems as that of permitting broadcasters to refuse to air indecent advertisements as broadcasters still would have to make the initial determination of indecency which in and of itself if wrought with problems.

E. Grant Immunity to Broadcasters

Congress could grant broadcasters immunity from suit if they choose to air these advertisements. This would be the better solution of all of the options. The effect of this option would be to grant broadcasters immunity from liability under the indecency provisions in Section 1464 by granting the same type of immunity currently granted broadcasters who broadcast defamatory political advertisements.

Currently, there is no statute or case law providing immunity from liability in the event of indecent political speech, but such immunity has been recognized and upheld in the context of defamatory political speech.[141] *Sorensen v. Wood*, the first judicial decision to address the issue of immunity from a libel suit, said that a broadcaster could delete defamatory statements from political speech. Cases since *Sorensen* uniformly have reversed course, instead, recognizing broadcaster immunity from libel suits relating to political advertisements.[142] The FCC has agreed and legislative history supports this conclusion.[143] Immunity similar to the type granted broadcasters after *WDAY*, must be extended to broadcasters in the context of indecent political speech.

This immunity must extend to indecent and profane material as well as racial hate speech and obscene speech, but clearly must be limited to the speech of politicians and not grant any protection to broadcasters who use the public airwaves themselves to slander individuals or groups such as racial minorities. Nor should it open the door for broadcasters to air any more indecent, profane, or obscene speech than is already permitted under § 1464 and the FCC's current regulations.

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[142] 123 Neb. 348, 243 N.W. 82. See, e.g., *WDAY*, etc.

[143] Note 5 and 6, 360 U.S. 525, 528.

F. Repeal the Indecency Rules Altogether

The continued wisdom of the indecency prohibition has been called into question as partly evidenced by the Supreme Courts decision to hear the appeals of the Bono and other fleeting expletive cases. As discussed, herein, the distinction between cable and satellite service on the one hand and traditional broadcast service on the other hand, as it relates to how they are regulated in this context does not make much sense.

A majority of Americans receive television service via a subscription service provided either by a cable company or a satellite service provider. Most consumers of television programming make very little practical distinction between the services when channel surfing or program selection. It makes very little sense that the broadcaster occupying channel 5 on the channel line up is subject to one set of rules when the cable channel on neighboring channel 6 abides by a different set of rules. In this context, it is nonsensical to hold political candidates to one set of rules when broadcasting on cable or satellite and another set when broadcasting on traditional broadcast stations. Perhaps the broadcast indecency rules have seen better days.

Conclusion

Even if the advertisements in the new genre of racy political advertisements do not meet the definition of indecency, they are dangerously close to the tipping point that the courts and the FCC have danced around for many years. They are closer to the realm of broadcast indecency than are the abortion advertisements of the 1990s and the racially offensive advertisements of the 1970s, yet not quite as egregious as the wardrobe malfunction of Superbowl XXXVIII, nudity of "NYPD Blue" or the expletives of the various awards shows that have drawn the ire of the FCC in recent years. Nevertheless, in the context of promoting a democratic society in which voters are adequately informed about candidates' stance on substantive issues, these advertisements lack any serious political merit and add little to nothing of value to the political process.

The appropriate solution to this dilemma, however, is not to revoke reasonable access and equal opportunities for political candidates, for to do so would frustrate the public interest obligations of broadcasters. Nor is the answer to prohibit indecent material from political advertisements because of the risk of censorship and the possibility of undue influence of the media on the political process. Absent a complete repeal of the indecency ban altogether, which could very certainly be on the horizon and legally justifiable, the more appropriate solution to this dilemma is to close the current loophole left open by the three existing statutes and afford broadcasters the same type of immunity from liability that currently is afforded them in the context of defamation suits.[144]

[144] See WDAY.