

SHALL THOSE WHO LIVE BY FCC INDECENCY COMPLAINTS DIE BY FCC INDECENCY COMPLAINTS?†

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INTRODUCTION

The Supreme Court's recent decision, *FCC v. Fox Television Stations, Inc.*, affirmed the power of the Federal Communications Commission ("FCC") to prohibit indecent content on broadcast television and radio.¹ The Court's opinion in *Fox* concerned administrative law questions; specifically, whether the FCC could regulate "fleeting expletives" that its indecency rules did not specifically prohibit.² The Court kept alive the *FCC v. Pacifica Foundation*³ constitutional justifications for the FCC's regulations,⁴ though it remanded the question of their constitutionality to the court of appeals, perhaps to visit the matter at a later time.⁵

The FCC indecency regulations forbid "utter[ing] any obscene, indecent, or profane language by means of radio communication."⁶ As the Court in *Fox* stated, "The Commission first invoked the statutory ban on indecent broadcasts in 1975 [in the *Pacifica Radio* case], declaring a daytime broadcast of George Carlin's 'Filthy Words' monologue actionably indecent."⁷ In the *Pacifica* case, the FCC announced the

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¹ 129 S. Ct. 1800, 1819 (2009).

² *Id.* at 1805, 1810.

³ 438 U.S. 726 (1978).

⁴ *Fox*, 129 S. Ct. at 1805 (citing *Pacifica*, 438 U.S. at 748–49).

⁵ *Id.* at 1819.

⁶ 18 U.S.C. § 1464 (2006).

⁷ *Fox*, 129 S. Ct. at 1806 (citing *Pacifica Found.*, 56 F.C.C.2d 94 (1975)). Not to indulge in pedantry, but the FCC certainly relied upon § 1464 at least implicitly decades before *Pacifica*, contrary to Justice Scalia's claim. While radio (and later television) were largely self-policing until the 1970s, this self-restraint proceeded in part from the clearer social standards of the time but also from the implicit threat of FCC action pursuant to § 1464.

The FCC's reaction to the infamous 1937 *Chase & Sanborn Hour* radio show on the NBC network serves as an example of the pre-*Pacifica* "iron fist in velvet glove" regulatory approach to indecency. The show at issue featured Mae West playing a provocative Eve engaged in sexual banter with the snake in the Garden of Eden. *Chase & Sanborn Hour* (NBC radio broadcast Dec. 12, 1937) (Garden of Eden skit). West's radio skit produced a

indecent test that still guides its policy today, prohibiting “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”⁸ The Supreme Court upheld this regulation against a First Amendment challenge on the grounds of broadcasts’ unique ubiquity and effect on children.⁹

These justifications now seem quaint. Most households receive their broadcast television through cable. Most people therefore click from regulated “decent” broadcast programming to unregulated and perhaps “indecent” cable programming without even noticing it. Radio perhaps still has some of the ubiquitous quality the *Pacifica* case relied upon, but it is a quality that is diminishing with the rise of satellite radio and podcasts. Indeed, Internet delivery deluges us with unregulated media and will only continue to do so. The Supreme Court repeatedly has refused to allow Congress to extend indecency regulation beyond broadcast television and radio.¹⁰ In short, the degree that the broadcast indecency regulations in fact protect children from indecent material is marginal to nonexistent in our current media environment.

public outrage, RADIO CENSORSHIP 27 (Harrison B. Summers ed., Arno Press Inc. 1971) (1939), destroyed her radio career, *id.*, and generated great pressure for a political response. Steve Craig, *Out of Eden: The Legion of Decency, the FCC, and Mae West’s 1937 Appearance on The Chase & Sanborn Hour*, 13 J. RADIO STUD. 232, 239–40 (2006). The FCC was unwilling to take legal action. In light of contradictory provisions in the Communications Act of 1934—prohibiting censorship but allowing indecency regulation, § 326 (codified at 47 U.S.C. § 326 (1934))—the FCC probably did not want to risk a trip to the Supreme Court. Instead, the FCC reacted with an admonishing letter to NBC, primarily warning NBC of its “social, civic, and moral responsibility . . . [to provide] a high standard for programs as would insure against features that are suggestive, vulgar, immoral, or of such other character as may be offensive to the great mass of right-thinking, clean-minded American citizens.” 83 CONG. REC. app. at 357 (1938).

⁸ *Pacifica*, 56 F.C.C.2d at 98. Over a quarter of a century later, the FCC issued guidelines to elucidate the standard’s meaning. These guidelines include:

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

Industry Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8003 (2001) (emphasis added). For a definitive and highly-readable review and analysis of the FCC’s indecency regulation, see generally Lili Levi, *The FCC’s Regulation of Indecency*, FIRST REP., Apr. 2008, <http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.final.pdf>.

⁹ *Pacifica*, 438 U.S. at 748–49.

¹⁰ *E.g.*, *United States v. Playboy Entm’t Group*, 529 U.S. 803, 806, 827 (2000) (refusing to extend indecency regulation to cable television); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (refusing to extend indecency regulation to the Internet).

Complaints and filings before the FCC, as well as political posturing over broadcast regulation, portray an alternate reality. By these lights, our civilization hangs upon indecency regulation. Hundreds of thousands of complaints deluge the FCC, and broadcasters pay millions in forfeiture orders.¹¹ Congressmen and commissioners give endless speeches on the subject.¹² If the effect of indecency regulation is marginal upon children's exposure to indecent materials—and that seems undeniable—why should anyone care? Why is there such a fuss?

The answer is, of course, politics. The complaint process allows political actors to reveal credible information about their political strength and affiliation.¹³ It is a type of public exhibition. By filing complaints, cultural conservatives display their powerful muscles.¹⁴ Politicians—by issuing forfeiture notices to broadcasters—demonstrate their commitment to serve that power.¹⁵ There is certainly nothing wrong with this game. Arguably, much, if not most, political activity is susceptible to such interpretation.

When examined in a broader historical and global perspective, risks emerge. Christians, particularly those outside established denominations, have used radio, and later television, to create a vibrant religious following—a point that need hardly be made in the pages of the *Regent University Law Review*.¹⁶ Yet the history of United States

¹¹ According to the latest available statistics, the FCC received 2,132,831 complaints from 2003 through June 2006 and issued forfeiture orders totaling \$12,330,580. Fed. Comm'n's Comm'n, Complaint and Enforcement Statistics, <http://www.fcc.gov/eb/oip/Stats.html> (last visited Apr. 19, 2010) (follow "Indecency Complaints and NALs: 1993–2006" hyperlink). Many point to the Parents Television Council ("PTC") as the source or impetus for the vast majority of these complaints. See, e.g., Michael Strocko, *Just a Concern for Good Manners: The Second Circuit Strikes Down the FCC's Broadcast Indecency Regime*, 17 U. MIAMI BUS. L. REV. 155, 176 (2008) (explaining that the "overwhelming majority" of complaints about an expletive during the Golden Globes were from those associated with the PTC (citing Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859, 19,859 n.1 (2003))).

¹² See Liza Porteus, *House Passes Broadcast Decency Bill*, FOX NEWS.COM, Mar. 11, 2004, <http://www.foxnews.com/story/0,2933,113951,00.html>.

¹³ See Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1464–65 (citing Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK, Dec. 6, 2004, at 4).

¹⁴ See *id.*

¹⁵ *Id.* at 1465 (citing Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 176 (1998)).

¹⁶ Kimberly A. Neuendorf et al., *The History and Social Impact of Religious Broadcasting* 9–10 (Aug. 1, 1987) (paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication, reproduced by the Educational Resources Information Center ("ERIC")) (citing Michael Doan, *The "Electronic Church" Spreads the Word*, U.S. NEWS & WORLD REP., Apr. 23, 1984, at 68, 68), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3f/

communications regulation shows considerable hostility to religious broadcasting—with deregulation spurring the greatest growth in religious broadcasting.¹⁷ Countries, like those in Western Europe, with completely regulated (that is, nationalized) media for most of the twentieth century provide access largely only to the established and mainstream religious denominations.¹⁸ Interestingly, Christianity seems a spent force in Western Europe, yet it remains vital in the United States.¹⁹ It seems that deregulatory policies have benefitted religious broadcasting (and religion) far more than government regulation.²⁰

This Essay suggests that those interested in fostering media markets that produce the greatest diversity and varieties of religious experiences should not succumb to the temptation of inviting government media regulation, including indecency regulation. This is particularly true because the indecency regulation has such a marginal effect on our media culture—and all that the indecency regulations really enable is a political signaling game.²¹

Then what can those who find the current media environment objectionable do? The media is a mirror of our public selves—a script of permissible fantasies and acceptable moral narratives. If we want better media, tastes must be changed. And that can only be done by continuing to lower barriers to the production of non-mainstream media—programming that offers an alternative to what broadcasters now serve. Lowering these barriers usually involves deregulation, but sometimes, as others in this Symposium point out, it involves regulation as perhaps in the network neutrality debate.²² In sum, for those wishing the greatest quantity, quality, and diversity of religious programming, more openness may be more valuable than more decency.

I. A FEW ILLUSTRATIVE MOMENTS FROM THE HISTORY OF RELIGIOUS BROADCASTING

Given the proliferation of religious programming today, we tend to think that U.S. radio and television always offered extensive religious

53/b1.pdf. Regent University was founded by Pat Robertson (founder of the Christian Broadcasting Network). *Id.* (citing Doan, *supra*).

¹⁷ See *infra* Part I.A.

¹⁸ See *infra* Part II.

¹⁹ PBS.org, American Faith Statistics, <http://www.pbs.org/now/society/faithstats.html> (last visited Apr. 19, 2010).

²⁰ See *infra* Part II.

²¹ See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 766–67 (1998) (explaining the importance of symbols and signals and how they relate to politics); see also Brown & Candeub, *supra* note 13, at 1465 (citing Macey, *supra* note 15) (explaining that politicians signal to stay in power).

²² See, e.g., Marvin Ammori, *Strange Bedfellows: Network Neutrality's Unifying Influence*, 22 REGENT U. L. REV. 335, 341 (2010).

programming. The persistent shadows of such radio pioneers as Aimee Semple McPherson, R.R. Brown, and Robert Schuller reinforce this image.²³ But when examined just a bit more closely, a different picture emerges. Government has, in general, demonstrated a persistent hostility toward religious broadcasting. Religious broadcasting showed its greatest growth—and openness to new comers—in periods of low regulation. While such a claim would require rigorous support, the following simply suggests this claim through an examination of three moments in regulatory history: the original licensing of radio in the late 1920s and early 1930s, the official policy for religious broadcast television that developed in the 1940s and 1950s, and finally, the role of cable deregulation in advancing religious programming.

A. *The Original Radio Licenses Allocation*

Religious broadcasting played a central role in radio from the medium's inception. The first non-experimental radio station in the country, KDKA, included on January 2, 1921, a church service in its first year's programming.²⁴ Some claim this inclusion resulted from the station engineer's position as a church choir member.²⁵ A year later, in 1922, WJBT aired the first regular religious broadcast of *Where Jesus Blesses Thousands* in Chicago.²⁶

The 1920s developed into a type of golden age of religious broadcasting; indeed, there was broadcasting of all kinds. One out of ten radio stations licenses were owned by a religious group, totaling over 600 stations nationwide.²⁷ In general, a tremendous diversity of ownership characterized radio broadcast. There were commercial stations, but there were just as many hobbyists, university and school groups, and other nonprofits taking to the waves in roughly equivalent number as commercial stations.²⁸

The regulatory approach to spectrum allocation no doubt led to this diversity. Specifically, there was hardly any regulation. Pursuant to the Radio Act of 1912, anyone could start broadcasting on radio by simply mailing a postcard to the Department of Commerce.²⁹ This led to supposed "chaos" in which radio stations interfered with one another,

²³ See Neuendorf, et al., *supra* note 16, at 3, 9.

²⁴ JEFFREY K. HADDEN & CHARLES E. SWANN, *PRIME TIME PREACHERS: THE RISING POWER OF TELEVANGELISM* 73 (1981).

²⁵ *Id.*

²⁶ Carol Flake, *The Electronic Kingdom*, *NEW REPUBLIC*, May 19, 1982, at 9, 9.

²⁷ HADDEN & SWANN, *supra* note 24, at 73–74.

²⁸ *Hoover to Maintain Radio Status Quo*, *N.Y. TIMES*, Feb. 25, 1927, at 2 (claiming that out of 18,119 total radio stations, only 733 were public entertainment stations).

²⁹ Pub. L. No. 62-264, ch. 287, 37 Stat. 302, 302–03 (1912) (repealed 1927).

destroying the value of the medium,³⁰ or so the argument went. As a result of these concerns, then-Secretary of Commerce Herbert Hoover sponsored a series of radio conferences to bring the stakeholders together and produce legislative proposals.³¹ While these conferences produced not much but paper, they perhaps contributed to a political momentum “to do something.”³² Hoover attempted to regulate interference matters, but the courts rebuffed him.³³ Hoover eventually refused to regulate radio at all, thereby pressuring Congress to do something.³⁴

With Hoover’s actions (or inaction) as a prompt, Congress passed the Radio Act of 1927,³⁵ the legislation that provides the model for broadcast spectrum allocation still used today. Asserting government ownership of the airwaves, the Radio Act of 1927 now distributed this wealth, granting licenses to those entities that would serve the “public interest.”³⁶ This statutory standard, which survives today in the Radio Act’s successor, the Communications Act of 1934, still governs spectrum allocation.³⁷ Its meaning was vague then and continues to be so. In 1930, a leading communication lawyer stated that “[p]ublic interest, convenience, or necessity’ means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority.”³⁸ The passage of time has not brought legal clarity. Speaking nearly seventy years later, then-FCC Chairman Michael Powell said that the public interest standard “is

³⁰ THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 11–12 (1994) (citing Louis Caldwell, *Clearing the Ether’s Traffic Jam*, NATION’S BUS., Nov. 1929, at 33, 34–35).

³¹ *Id.* at 8.

³² Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 171 (1990).

³³ See, e.g., *Hoover v. Intercity Radio*, 286 F. 1003, 1007 (D.C. Cir. 1923) (ruling that the Secretary of Commerce did not have the authority to withhold a license from a qualified applicant regardless of wavelength interference); *United States v. Zenith Radio*, 12 F.2d 614, 617 (N.D. Ill. 1926) (ruling that the Secretary of Commerce lacked the authority to select times when broadcasters could broadcast).

³⁴ See Brown & Candeub, *supra* note 12, at 1474 (citing KRATTENMAKER & POWE, *supra* note 30, at 7–16; Hazlett, *supra* note 32, at 159).

³⁵ Pub. L. No. 69-632, ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

³⁶ *Id.* § 11, 44 Stat. at 1167.

³⁷ Pub. L. No. 73-416, ch. 652, tit. III, § 309(a), 48 Stat. 1064, 1085 (codified as amended at 47 U.S.C. § 309(a) (2006)).

³⁸ Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

about as empty a vessel as you can accord a regulatory agency and ask it to make meaningful judgments.”³⁹

Bureaucratic and unofficial political power mushrooms in vague statutes’ shady, dank interstices. And, beginning in the 1920s, lobbyists and business groups dominated efforts before the Federal Radio Commission (“FRC”) and its successor agency, the FCC, to obtain licenses.⁴⁰ In this struggle, religious broadcasters fared badly, with the FCC often concluding that religious broadcasting was not in the public interest under the Radio Act of 1927.⁴¹ According to George Douglas, “[B]etween 1927 and 1932 the total number of broadcast stations was reduced . . . from 681 to 604,” with a “drastic cutting back . . . of stations authorized to broadcast at night . . . from 565 to 397.”⁴² The FRC’s actions “wiped out several low-budget, self-serving conservative religious stations.”⁴³

As a result, religious broadcasting became largely the domain of the dominant radio networks. With independently owned and controlled religious broadcasters largely pushed off the air, the network radio stations (1) provided religious programming pursuant to their obligations to provide public interest broadcasting, and (2) generally had policies forbidding sale of airtime for religious programming.⁴⁴ The networks worked with groups of mainline churches, like the Federal Council of Churches, to create programming.⁴⁵ The Federal Council represented mainline churches—and had a clear policy of avoiding “special-interest proselytizing” as well as “doctrine and controversy.”⁴⁶ It also created a cartel by which the Federal Council and other groups recognized by the networks could exclude all but “mainstream” churches.⁴⁷

Interestingly, a handful of religious radio figures who offered more innovative religious programming managed to continue broadcasting,

³⁹ Yochi J. Dreazen, *FCC’s Powell Quickly Marks Agency as His Own*, WALL ST. J., May 1, 2001, at A28.

⁴⁰ See ADVISORY COMM. ON PUB. INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT 18 (1998), available at <http://www.benton.org/sites/benton.org/files/recs.pdf>.

⁴¹ See HAL ERICKSON, RELIGIOUS RADIO AND TELEVISION IN THE UNITED STATES, 1921–1991, at 4 (McFarland Classic ed. 2001).

⁴² GEORGE H. DOUGLAS, THE EARLY DAYS OF RADIO BROADCASTING 96 (McFarland Classic ed. 2001).

⁴³ ERICKSON, *supra* note 41, at 4.

⁴⁴ *Id.* at 4–5; HADDEN & SWANN, *supra* note 24, at 78; Laurence R. Iannaccone et al., *Deregulating Religion: The Economics of Church and State*, 35 ECON. INQUIRY 350, 359 (1997).

⁴⁵ Iannaccone et al., *supra* note 44, at 359.

⁴⁶ ERICKSON, *supra* note 41, at 3.

⁴⁷ *Id.*; HADDEN & SWANN, *supra* note 24, at 77–78.

often facing great difficulties. This included Aimee Semple McPherson and Dr. Walter Maier.⁴⁸ Many gained national stature and drew great followings.⁴⁹ From an economic perspective, these preachers became entrepreneurs, pioneering viewer-supported business models that proved ever more powerful as cable television became a deregulated medium, a point discussed below.⁵⁰

B. Treatment of Religious Programming on Broadcast Television

Unlike radio, television never experienced a period analogous to radio's "wild west" 1920s. Licenses were carefully allocated to leading commercial interests, starting in the 1940s and 1950s.⁵¹ Television adopted an approach to religious programming that, in many ways, mimicked the approach taken by radio: broadcasters relied upon mainstream religious organizations—in particular the National Council of Churches ("NCC"), a successor to the Federal Council—to recommend and create programming, and then broadcasters provided free air time.⁵² While the National Religious Broadcasters ("NRB"), a group representing conservative and evangelical Christian groups, gained some power, the NCC received the most free airtime "while the conservative's NRB functioned with paid time both locally and in syndication."⁵³ According to A. Kenneth Curtis, conservatives "had to purchase time to have a voice and presence in television."⁵⁴

FCC regulations had an interesting provision that encouraged broadcasters to allow mainstream groups to decide which religious programming would air. Under FCC regulations, television stations had to devote a certain percentage of their time for public interest-type programming.⁵⁵ Religious programming counted towards this requirement *only if* it were given away at no cost.⁵⁶ In general, this resulted, as it did in radio, in conventional types of programming, as broadcasters, eager to avoid controversy, relied upon mainstream religious groups to provide general programming.⁵⁷ One scholar concludes that religious television broadcasting could be characterized as

⁴⁸ ERICKSON, *supra* note 41, at 120–21, 126–27.

⁴⁹ *Id.*

⁵⁰ See HADDEN & SWANN, *supra* note 24, at 78.

⁵¹ See Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1557, 1557 nn.32–34 (2008).

⁵² ERICKSON, *supra* note 41, at 8–9.

⁵³ *Id.* at 9.

⁵⁴ A. Kenneth Curtis, *A New Apostasy?*, ETERNITY, Sept. 1978, at 21.

⁵⁵ Iannaccone et al., *supra* note 44, at 359.

⁵⁶ *Id.*

⁵⁷ See *id.* (citing JEFFREY K. HADDEN & ANSON SHUPE, *TELEVANGELISM: POWER AND POLITICS ON GOD'S FRONTIER* 46–47 (1988)).

falling into only four categories: (1) using the camera and microphone as an extended pulpit (for example, Bishop Fulton Sheen); (2) creating a spectacle (for example, Billy Graham specials); (3) teaching (for example, the National Council of Churches' *Lamp Unto My Feet* and the Lutheran Church-Missouri Synod's *This Is the Life*); and (4) provoking earnest thought in "spot" public service announcements.⁵⁸ Further, those with innovative approaches were kept out, even if they were willing to pay for it. As with radio, most television stations had a policy against "commercial religion" and refused to sell those given that label time.⁵⁹

Finally, the threat of FCC applying the Fairness Doctrine⁶⁰ to religious programs no doubt homogenized broadcast content. While the FCC generally declined to apply the Fairness Doctrine to religion,⁶¹ the threat was always there.⁶² Indeed, the *Red Lion Broadcasting v. FCC* landmark Supreme Court case that affirmed the FCC's Fairness Doctrine involved a broadcast by conservative minister Billy James Hargis.⁶³ Complaints and license applications were (and still largely are) "carried out on a case-by-case basis";⁶⁴ therefore, predicting how the FCC might rule could never be a sure thing.

Things did change as conservative religious broadcasters became better at playing the Washington game. In 1960, conservative religious groups not affiliated with the NCC pressured the FCC to rule that local stations must count airtime sold to religious broadcasters (not donated freely) towards satisfying their "public interest" credit.⁶⁵ Before the FCC ruling took effect, only fifty-three percent of all religious broadcasting was paid air-time.⁶⁶ But by 1977, paid-time religious broadcasting had risen to ninety-two percent.⁶⁷ Peter Horsfield has stated that evangelical

⁵⁸ J. HAROLD ELLENS, *MODELS OF RELIGIOUS BROADCASTING* 37–38, 90–91, 102, 105, 120–22, 123 (1974).

⁵⁹ See WILLIAM F. FORE, *TELEVISION AND RELIGION: THE SHAPING OF FAITH, VALUES, AND CULTURE* 78 (1987).

⁶⁰ The Fairness Doctrine was a rule promulgated by the FCC in 1949, pursuant to its congressionally mandated authority. See Communications Act of 1934, Pub. L. 73-416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.); *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1257–58 (1949). The rule stated that a broadcaster must give adequate coverage to public issues and that coverage must be fair in that it accurately reflects the opposing views. *Id.*

⁶¹ See, e.g., *Johnson v. Station KHEP*, 54 F.C.C.2d 923, 923 (1975) (citing Communications Act of 1934 § 326); *Madalyn Murray*, 40 F.C.C. 647, 647–48 (1965).

⁶² Richard H. Gentry, *Broadcast Religion: When Does It Raise Fairness Doctrine Issues?*, 28 J. BROADCASTING 259, 260 (1984).

⁶³ 395 U.S. 367, 370–71, 375 (1969).

⁶⁴ ERICKSON, *supra* note 41, at 12.

⁶⁵ Iannaccone et al., *supra* note 44, at 360.

⁶⁶ PETER G. HORSFIELD, *RELIGIOUS TELEVISION: THE AMERICAN EXPERIENCE* 9 (1984).

⁶⁷ *Id.*

“paid-time programs have virtually eliminated local religious programming.”⁶⁸ It is arguable, however, that conservative religious programming did better with deregulation than with lobbyists.

C. Deregulating Cable Television and the Explosion of Religious Networks

Although the 1960s and 1970s showed a liberalization of restrictions on religious broadcasting and a concurrent increase in diversity, this output of religious broadcasting provided by traditional over-the-air broadcast remained relatively small and constant. The emergence of alternate broadcasting channels, specifically the now almost-defunct UHF channels, allowed for a growth of religious broadcasting.⁶⁹ Indeed, in 1961, Pat Robertson “took charge of a failed UHF station in Portsmouth, Virginia.”⁷⁰

The deregulation of cable television is a long story, ably told elsewhere.⁷¹ It need only be said here that, in an effort to protect local broadcasting, the FCC limited cable television’s ability to provide pay-for-view offering or offerings originating outside of the local broadcast area.⁷² This protection continued, at least nominally, until the early 1980s.⁷³ And, not surprisingly, “[t]he 1980s saw an upsurge in electronic religion’s audience. . . . Conservative broadcasters had taken advantage of the UHF boom in the 1960s and the 1970s, and they were again in the forefront with the fledgling cable industry.”⁷⁴ Indeed, the incredible diversity of religious broadcasting today can be traced in large measure to the opening of cable television in the 1980s.⁷⁵

II. THE SUPPLY-SIDE THEORY OF RELIGION AND REGULATION OF BROADCAST

One of the great puzzles of twentieth century western civilization is why religion continues to thrive in the United States but has largely died out in western Europe during the post-war period. One theory maintains that western Europe suffers from a monopoly in religion.⁷⁶ State-

⁶⁸ *Id.*

⁶⁹ ERICKSON, *supra* note 41, at 12–13.

⁷⁰ *Id.* at 13.

⁷¹ *See generally* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981) (discussing the history of the cable television industry, including deregulation).

⁷² *Id.* at 93 (citing Amendment to Rules & Regulations of Cmty. Antenna Television Systems, 23 F.C.C.2d 825, 828 (1970); Amendment to Rules & Regulations of Subscription Television Serv., 15 F.C.C.2d 466, 468 (1968)).

⁷³ *See id.* at 106–07.

⁷⁴ ERICKSON, *supra* note 41, at 14.

⁷⁵ *Id.*

⁷⁶ *See* Iannaccone et al., *supra* note 44, at 351.

supported national churches dominate in northern Europe,⁷⁷ and the Catholic Church dominates in southern Europe, though drawing more on cultural authority than official government support.⁷⁸ According to this theory, monopoly in religion produces a lower output and quality, just as monopoly tends to do in other areas more traditionally understood as markets.⁷⁹ Conversely, the United States, which has been a haven for myriad sects and denominations from its inception, provides competition for the provision of religion.⁸⁰ This competition leads to a greater supply of religious experiences that better responds to people's spiritual needs.⁸¹ Not surprisingly, European states have media policies that explicitly favor broadcasting of the established church and other mainline denominations.⁸²

This Essay only adds to the insight that lowering barriers to entry and the cost of communications (a central input cost for religion) also encourages supply of religious experience. In addition, lowering communications costs also encourages certain dynamic efficiencies, as suppliers of religious experiences learn and master new technologies to develop new ways to respond to people's religious needs. Government restriction of communication seems to reduce the supply of religious broadcasting—to the detriment of religion in our country.

The history, sketched anecdotally above, illustrates this point; as communications media were deregulated, barriers to entry were eliminated. The supply increased, and those individuals who could best respond to people's spiritual needs prospered and flourished. While religious broadcasters were successful in the 1960s and 1970s in using political pressure to obtain paid-for programming and UHF channels, their greatest success followed deregulation of media.⁸³

Well, what does this set of insights have to do with the initial topic of this Essay: the FCC's indecency regulation? It is only that those interested in promoting religion through mass media should be wary of government involvement and regulation. To mix metaphors, indecency regulation risks letting the camel nose of government into the tent,

⁷⁷ *Id.* at 352.

⁷⁸ *See, e.g.*, Vatican City State, State Departments, http://www.vaticanstate.va/EN/State_and_Government/StateDepartments/index.htm (last visited Apr. 19, 2010) (noting that the Pope is the Vatican City-State's Head of State, located in Rome, Italy).

⁷⁹ *See* Iannaccone et al., *supra* note 44, at 351, 353 (citing FRANCIS GRUND, *THE AMERICANS IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS* (1837), *reprinted in* *THE VOLUNTARY CHURCH* 77, 80 (Milton Powell ed., 1967)).

⁸⁰ *Id.* at 352–53.

⁸¹ *See id.* at 351.

⁸² *See* BURTON PAULU, *BRITISH BROADCASTING: RADIO AND TELEVISION IN THE UNITED KINGDOM 197–98* (1956) (regarding minority religions' exclusion from broadcasting).

⁸³ *See supra* Part I.C.

threatening the religious programming itself—thereby cutting one’s nose off to spite one’s face. This is particularly true given the marginal effect that indecency regulation has on our general cultural atmosphere.

Then what must we do if we want a less vulgar, more uplifting media? The problem is deeper than any indecency regulation, which, after all, can only regulate a very limited type of speech. Our society is deeply coarsened in ways that go beyond the indecency regulation’s prohibition on George Carlin’s *Filthy Words*⁸⁴ or Janet Jackson’s revealed anatomy.⁸⁵

This Symposium offered a wonderful, unplanned illustration of this point. In Professor Corcos’s highly elucidating presentation, she used a clip from the television show, *Two and a Half Men*. The scene involved a young boy, Jake Harper, then-aged ten and played by Angus T. Jones, waking up his hungover uncle, Charlie Harper, played by Charlie Sheen.⁸⁶ The scene is thematically identical to that found in the classic Broadway play, then-movie starring Rosalind Russell, *Auntie Mame*. Indeed, the similarity was so striking and surprising that I felt compelled to mention it during the panel session. A scene from *Two and a Half Men* is reproduced below.

It’s morning. Charlie is asleep. He opens his eyes and a little boy comes into focus in front of him. It is Jake.

Jake: Boy, is your eye red.

Charlie: You should see it from in here. What are you doing here, Jake?

Jake: My mom brought me. Will you take me swimming in the ocean?

Charlie: Can we talk about it after my head stops exploding?

Jake: Why is your head exploding?

Charlie: Well, I drank a little too much wine last night.

Jake: If it makes you feel bad, why do you drink it?

Charlie: Nobody likes a wiseass, Jake.

Jake: You have to put a dollar in the swear jar. You said “ass.”

Charlie: Tell you what, here’s twenty. (*gives Jake the note.*) That should cover me until lunch.⁸⁷

Now compare it to the scene reproduced below from *Auntie Mame*, in which the young Patrick Dennis, also aged ten, confronts a hungover Auntie Mame.

⁸⁴ FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

⁸⁵ CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009).

⁸⁶ Christine Alice Corcos, *Some Thoughts on Chuck Lorre: “Bad Words” and the Raging Paranoia of Network Sensors*, 22 REGENT U. L. REV. 369, 375 (2010).

⁸⁷ *Two and a Half Men: Pilot* (CBS television broadcast Sept. 22, 2003).

Scene 5

The lights come up—faintly—on Auntie Mame’s plush bedroom. She is reclining on a huge bed, with a sleeping mask over her eyes.

Young Pat bursts in the door.

Young Pat: *(Excitedly.)* Auntie Mame! Auntie Mame! *(Auntie Mame is shocked into jangling wakefulness. She sits upright in bed and clutches the mask from her face.)*

Auntie Mame: *(Confused.)* What is it? What happened?

Young Pat: I’ve got something to show you. *(He opens the Venetian blinds and a shaft of bright afternoon sunlight hits Auntie Mame squarely in the face. She reels back against the pillow.)* Look! *(Young Pat spins the airplane. Auntie Mame watches it with fascinated horror.)*

Auntie Mame: My God! Bats!

Young Pat: *(As the airplane circles in descending spirals.)* It’s an actual model of the *Spirit of St. Louis*. *(Auntie Mame recoils from the model airplane, as it crashes into her lap. Young Pat rushes to recover it and explain its mechanism to Auntie Mame.)* See? It’s got a rubber-band motor, and I whittled the body out of balsa wood, and—*(Auntie Mame gestures him away, closing her eyes and holding her aching head.)*

Auntie Mame: Please, darling—your Auntie Mame’s hung. *(Young Pat is deeply hurt by this. It’s Chicago all over again. Quietly he takes the airplane and backs out of the room.)*

Young Pat: *(Softly.)* Oh, sure, Auntie Mame. *(Auntie Mame is left alone with her hangover. She sits for a moment with her hands shielding her eyes from the sunlight. Gradually she realizes what she has done. Peeking through her fingers, she braves the sunlight and calls to the boy who has left her.)*

Auntie Mame: Patrick. Patrick—come back. *(Young Pat reappears in the doorway, uncertainly.)* You know, I really am interested in all your projects. But you’ve got to admit, it’s a bit surprising for Auntie Mame to find Mr. Lindbergh in her bedroom before breakfast. *(She squints at the light.)* Child, how can you see with all that light? *(Obligingly Young Pat crosses to the window and partially closes the Venetian blinds.)* That’s better. Now be a perfect angel and ask Ito to bring me a very light breakfast: black coffee and a sidecar. And you might ask him to fix something for your Aunt Vera; I think I hear her coming to in the guest room. *(Young Pat starts out obediently.)* First—

come and give your Auntie Mame a good-morning kiss. But gently, dear. (*Young Pat approaches timidly and kisses her.*) That was lovely, darling. You'll make some lucky woman very happy someday. (*Gingerly, Auntie Mame takes the airplane model from the boy's hands and winds the propeller tentatively.*) You know, I really am fascinated by aviation. I never knew before they did it all with rubber bands. (*As she hands the airplane back to Patrick, the propeller blows in her face insolently. The telephone rings suddenly. This affects Auntie Mame like a dentist's drill at the nape of her neck. Young Pat picks it up.*)⁸⁸

The unintentional similarities in these two scenes are striking. Both employ, for comic purposes, the spectacle of an authority figure, respectively aunt and uncle, in a morally compromising position—being hungover—and confronted by a ten-year-old boy. (One supposes that for both works, ten years old is the age that best balances understanding with innocence.) The differences, however, are far more telling. In *Auntie Mame*, the compromised authority figure regains her dignity—after some histrionics—and assumes a proper parenting role inquiring about Patrick's model plane. The scene maintains its humor by the amusing dialogue of a sophisticated socialite doing her best to interest herself in model airplanes while nursing a horrible hangover.

In contrast, in *Two and a Half Men*, the authority figure, Uncle Charlie, is unrepentant. Humor is achieved by the spectacle of a young boy using the word “ass.” Uncle Charlie never even attempts to assume the proper parental role of interesting himself in the child's world. Indeed, the child has no “world”; his interests appear limited to attempting to embarrass his uncle.

On a deeper level, *Auntie Mame* examines two very different human beings developing a relationship under unusual circumstances—and relies upon human foible to tell its story. While strict moralists might find the portrayal of a hungover parent figure discovered by a child

⁸⁸ JEROME LAWRENCE & ROBERT E. LEE, *AUNTIE MAME* 23–25 (rev. ed. 1999). This scene is from the play, but the original movie uses the dialogue almost identically. See *AUNTIE MAME* (Warner Bros. Pictures 1958). Though also made into a less-than-memorable musical and movie musical starring Lucille Ball, *MAME* (ABC 1974), the original *Auntie Mame*, starring Rosalind Russell, remains a classic. Indeed, in some critics' estimation, the novel on which it was based qualifies as one of the best post-War American novels ever written. E.g., CAMILLE PAGLIA, *SEXUAL PERSONAE* 220 (Yale Univ. Press 2001) (1990) (“The only character in literature whose theatrical personae rival [Shakespeare's] Cleopatra's is Auntie Mame. Patrick Dennis's [sic] *Auntie Mame* (1955) is the American *Alice in Wonderland* and in my view more interesting and important than any 'serious' novel after World War II.”).

inappropriate, the incident is used to create a vivid, human portrait that explores the limits and possibilities of human affection. Conversely, *Two and a Half Men* seems simply about human foible and relies on portraying embarrassment, shamelessness, and references to human anatomy to create interest.

While literary critics often make the error of seeing the world in a grain of sand, and law review articles rarely offer good literary criticism, comparing these two scenes reveals the state of our culture and limits of the indecency regulation. What seems truly objectionable in *Two and a Half Men* is not the use of the word “ass.” Rather, it is the lack of a compelling normative story. The scene seems to trade on humiliation and embarrassment as ends unto themselves (and trade very well, for that matter). *Two and a Half Men* has been on the air for seven years and is one of the most popular television comedies in the United States.⁸⁹ What an indictment on the overall coarseness of our culture! No amount of regulation will cure this issue; in fact, such regulations could have the unintended effect of hindering the very religious broadcasts that might help society correct its course. Instead of arguing for further indecency regulation, a concerted effort must be undertaken to regain the same cultural sense of decency that tempered the story of *Auntie Mame*. To argue otherwise is to simply ignore what has become of our country’s moral fabric.

CONCLUSION

The FCC indecency regulation exists in an alternate universe, exerting little to no control over most of the media people consume but playing a major role in an elaborate inside-Beltway signaling game. At the same time, the indecency complaint procedure constitutes a dangerous invitation for more government regulation of media. Given government’s historic hostility to religious broadcasting and the innovation in religious communication that unregulated media has prompted, this is an invitation that those who support creative religious programming should decline.

⁸⁹ See Scott Collins, *CBS Skirts Sheen Scrutiny*, L.A. TIMES, Jan. 9, 2010, at D1.