SILENCED: THE SEARCH FOR A LEGALLY ACCOUNTABLE CENSOR AND WHY SANITIZATION OF THE BROADCAST AIRWAVES IS MONOPOLIZATION

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INTRODUCTION

In the battle between art and commerce, "art is getting its ass kicked."[1] Freedom of expression has been chilled on network television.[2] The major broadcast networks (ABC, CBS, FOX, NBC, and the CW) are vitally important to both their media conglomerate parent companies as revenue streams[3] and to the public as a medium for free access to news and diverse communication.[4] Yet no matter how

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[1] *Studio 60 on the Sunset Strip: Pilot* (NBC television broadcast Sept. 18, 2006).

[2] *See* Jonathan Rintels, *Big Chill: How the FCC's Indecency Decisions Stifle Free Expression, Threaten Quality Television, and Harm America's Children*, CENTER FOR CREATIVE VOICES IN MEDIA, Sept. 21, 2006, http://www.creativevoices.us/cgi-upload/news/news_article/CVPaperFINAL092106.pdf (last visited Sept. 29, 2007); *see, e.g.*, note 10 *infra*.

[3] The Walt Disney Company owns the ABC network; CBS Inc. (formerly half of Viacom) owns the CBS network and one-half of The CW network (in a joint partnership with Warner Brothers); News Corporation owns the FOX network; and General Electric owns the NBC network. News and entertainment presidents are in charge of programming content for their networks, therefore, it is their job at stake if at the end of a television season the network does not deliver a profit to their parent companies. Accordingly, these content decisionmakers have a personal incentive to avoid testing the murky indecency waters: they want to be employed at the end of the year.

[4] The Supreme Court has consistently recognized that Americans' exposure to free broadcast television advances the public interest. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, (1994) (upholding "must carry" provisions of the Cable Television Consumer Protection and

large a role the networks play in advancing societal interests, the fact remains that each network is a business with shareholders who desire primarily one result from their directors: an increase in corporate profits.[5] Given this financial reality, network broadcasters are unable to ignore the numerous economic incentives that exist to "play it safe," and are now forced to engage in broad and public self-censorship.[6]

Three constituencies are able to act in unison as censors of network television since upsetting either the Federal Communications Commission (FCC), anti-indecency citizen advocacy groups, or television advertisers with indecent content could result in serious financial consequences to the networks.[7] And because the standard for what content is indecent is either subjective (in the case of what the anti-indecency groups and advertisers find offensive), or "inconsistent and confusing"[8] (when it pertains to what the FCC deems indecent), network executives are left without guidelines as to what content would be financially risk-free, and instead are forced to self-censor.[9] Risks of negative publicity, fines, and advertiser pullouts make creative, diverse,

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Competition Act of 1992 that required cable television systems to devote a portion of their channels, free of charge, to the transmission of local broadcast television stations). The *Turner* Court held the provisions important so "that every individual with a television set can obtain access to free television programming." *Id.* at 647; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984) (holding that the use of VCRs to record programs is a fair use of the copyrighted program since "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits").

5 *See generally* HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, THIS BUSINESS OF TELEVISION (2d ed. 1998).

6 *See* Paul Sweeting, *Redstone Rips Gov't Censors,* DAILY VARIETY, Oct. 18, 2006, at 4 ("Redstone said recently stepped-up enforcement of indecency rules by the FCC, coupled with a steep increase in fines ordered by Congress, has led to dangerous new levels of self-censorship."); Bob Wright, Editorial, *Federal Censorship Commission?*, WALL ST. J., Nov. 3, 2006, at A10 ("[T]he chill in the airwaves is unmistakable, and the viewing public is the biggest loser. The most recent example involves dozens of CBS affiliates who refused to rebroadcast the documentary '9/11' for fear they would be fined for the coarse words uttered by rescuers. This is one of many instances of broadcast licensees altering or canceling worthwhile programming out of concern about finding themselves in the Federal Communications Commission's crosshairs.") Redstone is the Chairman of Viacom and CBS. Wright is the Chairman and CEO of NBC Universal.

7 The financial penalties associated with airing potentially indecent content include fines from the FCC, businesses withdrawing advertising dollars from controversial shows, and immeasurable opportunity costs of executives needing to spend time to cool tensions of angry advocacy groups and upset affiliate stations. During a producer's meeting to "pitch" new show ideas, it is not far-fetched to imagine three questions running through the head of the network executive: i) Would this content anger anti-indecency groups and result in costly bad publicity?; ii) Would this content be deemed indecent by the FCC and result in hefty fines?; and iii) Would this content be unappealing to advertisers and result in their wanting to pull out of sponsorship agreements? If the answer is yes to any one of these questions, then it makes little economic sense to order the creative project.

8 Rintels, *supra* note 2, at 10.

9 *See* Wright, *supra* note 6 ("The threat of fines and license-revocation [has] create[d] a climate of self-censorship among broadcasters.").

and "envelope-pushing" content no longer acceptable on network television.[10] This financial decision by the networks to only broadcast "family-friendly" content is a sanitization of the airwaves celebrated by the Parents Television Council (PTC)[11] and the FCC,[12] and is a result advertisers have no financial incentive to dispute.[13] There are, however, at least two additional constituencies whose legal rights are trampled: producers of network television content ("artists") and viewers. Artists must sacrifice their First Amendment right to free expression for whatever the FCC deems to be in the public's interest.[14] Meanwhile, viewers witness small media watchdog groups hijack the "public

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[10] *See, e.g.*, *O.J. Simpson: If I Did It, Here's How it Happened* (cancelled FOX television broadcast Nov. 2006) (FOX cancelled this interview with the ex-football star and former murder suspect after talk show host Bill O'Reilly and others threatened boycotts of any advertisers who sponsored the program); *Madonna: Confessions Tour* (NBC television broadcast Nov. 22, 2006) (NBC removed a crucifixion scene from the concert recording in order to appease religious groups that threatened to boycott all advertisers during the concert. The edited version of the concert finished last place among the big four networks and performed last with adults aged 18-49); *Politically Incorrect with Bill Maher* (ABC television broadcast 1997-2002) (ABC cancelled the show when the host made anti-military comments after 9/11, not because ratings decreased ,but because advertisers pulled out as a result of conservative advocacy group pressure); *Welcome to the Neighborhood* (cancelled ABC television broadcast July 2005) (ABC summer reality show never aired when both liberal and conservative advocacy groups threatened to boycott advertisers of the show because of its portrayal of a happy gay family and a different homophobic family); *The Reagans* (Showtime television broadcast Nov. 30, 2003) (CBS show banished to Showtime, a premium cable network, for its alleged liberal bias and after advertisers backed out); *Sunday NFL Countdown* (ESPN television broadcast 1998-present) (ESPN football show fired commentator Rush Limbaugh, as a result of advertiser unrest, after he commented on the Sept. 28, 2003 broadcast about ethnicity in football); plus the numerous concepts artists pitch to networks, which get silenced before ever being produced. *But see Survivor* (CBS television broadcast 2000-present) (CBS veteran show experimented with "race battles" by splitting tribes by race, and many advertisers backed out to avoid upsetting racial groups. Only a veteran show with a prolific producer could have sustained the impact of major sponsors like GM and Coca-Cola fleeing from their sponsorship of the show); *Book of Daniel* (NBC television broadcast Jan. 2006) (NBC show mocking Jesus drew criticisms from anti-indecency groups. NBC aired the show and low ratings killed the show after several airings, thus proving the American public is capable of determining when shows are indecent and capable of voicing their opinion by not watching.); *Married with Children* (FOX television broadcast 1987-1997) (FOX show experienced a ratings surge when advocacy groups attacked it for being indecent. FOX, an upstart network at the time of this show's debut, would have relished any publicity good or bad. Today, no network has any incentive to invest in controversial projects and risk upsetting advertisers).

[11] *See* Parents Television Council, http://www.parentstv.org (last visited Jan. 25, 2007) (cataloguing press releases that applaud advertisers who have ceased advertising on shows that the PTC deems offensive).

[12] 47 U.S.C. § 503(b)(2) (2000). The Broadcast Decency Enforcement Act of 2005, signed into law June 15, 2006, increased FCC penalties from $32,500 to $325,000 per "obscene, indecent, or profane" broadcast. *See House OKs New FCC Indecency Fines*, MSNBC.COM, June 7, 2006, http://www.msnbc.msn.com/id/13166836/ (last visited Sept. 29, 2007).

[13] *See infra* Part II.

[14] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969) (holding that reduced First Amendment protection for broadcast media is justified because broadcast frequencies are a scarce resource and the government may impose certain restrictions on license holders as required by the public interest).

interest"[15] at the expense of the right for all consumers to participate in a free and competitive market and of the public's right "to receive suitable access to [diverse] ideas and experiences . . . ."[16]

In this post-"Nipplegate"[17] era, the networks seek to maximize their own economic advantage by appeasing the three censoring forces. Therefore, producers know that the least controversial concepts for shows are most likely to end up with a spot on a network's schedule.[18] Such a climate of severe self-censorship within the artistic community is evidence of a "chilling effect" and ultimately an improper constraint on the First Amendment.[19]

Furthermore, as a result of vast changes in the media landscape, where "the power to inform the American people and shape public opinion" has been put in few hands through concentrated media ownership, the "First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."[20] The Supreme Court already recognized that if the news media is free from constraints of self-censorship then that is a "societal value,"[21] yet with the three censoring forces depriving society of an uninhibited broadcast

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[15] *See* Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 359-60 (2005) (arguing the disproportionate influence of media watchdog groups "leads both to an overstatement of the problem of indecency and selective enforcement of indecency standards").

[16] *Red Lion,* 395 U.S. at 390 ("[T]he people as a whole retain their interest in free speech . . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

[17] This is what the Janet Jackson incident was dubbed after her "wardrobe malfunctioned" during the live 2004 Superbowl telecast and after over 200,000 complaints were filed with the FCC almost overnight. This is widely regarded as the trigger for additional actions by the FCC to curb alleged indecency on the airwaves. *See* Bill Carter & Richard Sandomir, *Halftime-Show Fallout Includes F.C.C. Inquiry*, N.Y. TIMES, Feb. 3, 2004, at D1.

[18] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding a right of reply statute invalid, where the statute allowed candidates to demand space, in the newspaper that criticized them, to respond). The *Tornillo* Court held that when faced with a content-based penalty, "editors might well conclude that the safe course is to avoid controversy [and as a result, the government-enforced] right of access inescapably 'dampens the vigor and limits the variety of public debate . . . .'" *Id.* at 257 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)). Similarly, network executives currently find themselves in a predicament: program controversial content and stake their job on the risk that economic penalties do not follow, or program only that which is safe.

[19] *See* Smith v. California, 361 U.S. 147, 154 (1959) ("The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."); SARAH BETSY FULLER, LANDMARK SUPREME COURT CASES: HAZELWOOD V. KULHMEIER—CENSORSHIP IN SCHOOL NEWSPAPERS 101 (1998) ("Sometimes self-censorship goes further than what could actually be censored. This . . . 'chilling effect,' . . . means that the individual has unnecessarily given up a First Amendment right out of fear of censorship.").

[20] *Tornillo*, 418 U.S. at 250-51.

[21] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

media, the question remains whether sanitizing the networks is a value that now trumps freedom from self-censorship.[22]

The exodus of artists from networks to unregulated cable channels can further demonstrate proof of a chilling effect.[23] While the artists enjoy uninhibited expression, what gets sacrificed is the opportunity for viewers unable to afford premium channels to be exposed to "unsanitized" content.[24] The awkward result is that anti-indecency groups and the FCC do not really monitor network airwaves in the interest of protecting all children in society as they would have the public believe, and instead they act only on behalf of all families who cannot afford cable.[25] The message to viewers that they must pay for premium channels to avoid excessive government intervention and to experience truly free expression is a notion that clashes with the FCC's own statement that all types of free content are a vital service.[26] The message also contradicts the Supreme Court's identification of "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market

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[22] Self-censorship pressure is openly discussed by both entertainment and news media executives. *See* Sweeting, *supra* note 6 ("PBS recently began instructing its producers to self-censor all of its shows, including news programming, after one of its affiliates was slapped with a fine against Martin Scorsese's documentary on the blues [and Phoenix TV stations separately dropped coverage of a live memorial for NFL star Pat Tillman, who was killed in Afghanistan] because of the language used by mourning family members.") (citing Viacom and CBS Chairman Sumner Redstone).

[23] Alan Ball, creator of the HBO show *Six Feet Under* recently agreed to create a new television show for HBO about vampires saying, "I wouldn't consider doing this series with just any network." *See* Denise Martin, *Ball Back in HBO's Court*, DAILY VARIETY, Oct. 28, 2005, at 1 ("HBO has gotten in the habit of locking up key behind-the-scenes talent in mega-overall TV deals.") A well-known example, albeit in a different medium, is Howard Stern. Fed up with FCC censorship, Stern took his controversial radio program to satellite radio. This more expensive medium left many Stern fans unable to afford the opportunity to be exposed to his free expression.

[24] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 F.C.C.R. 2503, 2506-07, 2512, 2551-52 (Mar. 3, 2006) (establishing that out of approximately 108 million television viewing households in the United States, over 94 million receive their television signals from a provider other than over-the-air broadcasters, with 65.4 million subscribing to cable television and 26 million households subscribing instead or in addition to direct broadcast satellite).

[25] Wright, *supra* note 6 (FCC policy intent on ensuring that there will be nothing on broadcast TV that is inappropriate for kids during certain hours is doomed to failure. Do the math: 85% of households have cable and satellite, leaving 15% receiving broadcast TV only. Two-thirds of those households do not have kids under 18. Thus, the FCC appears to be basing its actions on a policy that is relevant to 5% of households.).

[26] *See* Advanced Television Systems, 62 Fed. Reg. 26,966, 26,971 (May 16, 1997) (to be codified at 47 C.F.R. pt. 73) (Broadcast television's universal availability, appeal, and the programs it provides—for example, entertainment, sports, local and national news, election results, weather advisories, access for candidates and public interest programming such as education television for children—have made broadcast television a vital service. . . . We wish to preserve for viewers the public good of free television that is widely available today.)

for television programming"[27] as legitimate government interests.

While the availability of cable soothes the First Amendment harm against artists, such an exodus of controversial content to premium channels does little to alleviate the harm to broadcast viewers.[28] Forcing viewers to seek out niche channels for specific types of content deprives them of shared experiences, resulting in a less informed society, and in a "heterogeneous democracy" with "a fragmented communications market [that] creates considerable dangers."[29]

Aside from contributing to an increasingly polarized society,[30] the problem with dismissing censorship on networks as harmless, as long as cable exists, is that viewers are deprived of the choice to benefit from free programming.[31] Suggesting that fully expressive content is only available on the pay channels is a slippery slope to suggesting that personal wealth is required to enjoy personal freedoms.[32] Viewers

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[27] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

[28] *See* STUART MINOR BENJAMIN, TELECOMMUNICATIONS LAW & POLICY 441-42 (2d ed. 2006) ("Pay television might yield content that better matches viewer preferences but free television distributes mainstream fare more widely and effectively."). Why should the 15% of American households without cable be forced to pay for cable in order to have their viewing preferences catered to and what makes the hundreds of cable channels received by 85% of American households different from the broadcast channels and thus impervious to FCC regulation? "[I]t is not the technology that drives this distinction." *Id.* at 441.

[29] CASS R. SUNSTEIN, REPUBLIC.COM 87 (2001). Sunstein continues:

> [A] well-functioning system of free expression must meet two distinctive requirements.
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> *First*, people should be exposed to materials that they would not have chosen in advance. Unplanned, unanticipated encounters are central to democracy itself. . . . [I]n a democracy deserving the name, people often come across views and topics that they have not specifically selected.
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> *Second*, . . . citizens should have a range of common experiences. Without shared experiences, ... [p]eople may even find it hard to understand one another. Common experiences . . . made possible by the media, provide a form of social glue.
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> . . . .
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> [T]here are serious dangers in a system in which individuals . . . restrict themselves to opinions and topics of their own choosing.

Id. at 8-9, 16.

[30] The continuing growth of the cable audience share reached a turning point in June 2002 when cable networks, for the first time, collectively exceeded a 50% share of all television hours viewed for the month. *See In re* 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620, 13665-13666 (2003). With so many channels available, many viewers gave up caring about broadcast content and instead seek out channels with content that validate their preexisting views.

[31] *See* BENJAMIN, *supra* note 28, at 444 ("While there might be some informational and entertainment value in watching commercials, to some degree the time spent watching commercials is a cost to the viewers."). The implicit agreement is that viewers exchange their attention and time to be exposed to advertisements in return for the free opportunity to watch the given program. Network television is funded solely by advertisers and as a result it enjoys the greatest audience coverage primarily because households need not pay anything extra to view the networks.

[32] If a household can afford cable, then that household need not worry about anti-indecency

should have an unrestrained choice as to what content they will support.[33] And since the networks rely exclusively on advertising to generate revenue[34] and advertisers pay more for shows with higher Nielsen[35] ratings, the business of network television is a free market with individual consumers believing they have the power to decide which programs are ultimately most successful.

Famed economist Milton Friedman defined a free economy as one that "gives people what they want instead of what a particular group thinks they ought to want."[36] And here arises the problem: the current market for network television programs is anything but "free" when anti-indecency groups and the FCC publicly proclaim to know what types of content are too indecent for American families to view.[37] Given that a vocal minority has coerced society to accept its indecency standards, the silent majority[38] are deprived of a political freedom.[39]

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groups controlling network content. Bill Maher's career trajectory is a prime example as Maher was banished from the ABC network after he made controversial comments that upset anti-indecency groups, and by correlation his advertisers, which resulted in his expressive opinions needing to find a home on pay-cable channel HBO.

[33] *See* Ronald Coase, *Why Not Use The Pricing System in the Broadcast Industry?*, Testimony before the FCC (Dec. 1959), *reprinted in* BENJAMIN, *supra* note 28, at 35 ("If programs were supplied in the way which is normal in the American economic system, the programs which would be broadcast would be those which maximize the difference between the amount people would pay to hear or see the programs and the cost of the programs.").

[34] *Id.*

[35] *See* BLUMENTHAL & GOODENOUGH, *supra* note 5, at 403 ("Nielsen Media Research selects a few hundred metered households to represent a population of several million for immediate local ratings . . . . For national rankings, 5,000 households represent nearly 100 million."). Using this sample, all families and children are adequately accounted to the satisfaction of the networks and advertisers who continue to subscribe to the Nielsen service.

[36] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (1962) ("The great advantage of the market . . . is that it permits wide diversity. It is . . . a system of proportional representation. Each man can vote . . . for the color of tie he wants and get it; he does not have to see what color the majority wants and then, if he is in the minority, submit.").

[37] *See* Parents Television Council, *Dereliction of Duty: How the Federal Communications Commission Has Failed the Public*, http://www.parentstv.org/PTC/publications/reports/fccwhitepaper/main.asp (last visited Jan. 25, 2007) ("The FCC has a whopping $278 million annual subsidy . . . yet somehow can't find . . . the resources to monitor what's on broadcast television. It shouldn't be up to the public to point out the violations on the airwaves. It should be up to the FCC to find them."). This report was issued two days after "Nipplegate" and critiqued the FCC for having, up until that time, focused all of its attention on relaxing media ownership rules.

[38] *See* Holohan, *supra* note 15, at 360-61 (revealing that the PTC often provides its 860,000 members with exaggerated descriptions of the actual broadcasts at issue, thus "while a substantial portion of the U.S. population may feel strongly about regulating broadcast indecency, the PTC is able to convince these people that the problem is worse than it is"). Those most angry with the sensitized content on network television have likely given up the fight and turned to cable. With movies like *Saving Private Ryan* edited for "all audiences," there should be little surprise when many Americans now feel the need to subscribe to premium channels.

[39] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 275 ("[T]he censorial power is in the people over the Government, and not in the Government over the people.") (quoting James Madison, 4 Annals of Congress 934 (1794)).

For those satisfied with the notion that society now restricts controversial content for the viewing of only those who can pay a premium, then the forthcoming proposal may seem like a situation of false urgency. Yet the networks believe their content is fast approaching a sanitized point of no return and recently filed suit against the FCC, specifically challenging the agency's power to regulate "fleeting expletives."[40] The television stations argued that the FCC's actions were a gross intrusion into the creative and editorial process and could result in "the end of truly live television,"[41] while the FCC alleged Hollywood was out of touch with "contemporary community standards." [42] In *FOX Television Stations v. FCC*,[43] the court held the "FCC's new policy regarding 'fleeting expletives' [to be] arbitrary and capricious," since the FCC "failed to articulate a reasoned basis for this change in policy."[44] With this case presenting the first significant roadblock to the FCC's expansion of authority in the realm of broadcast television and with new technology making network content available across multiple platforms,[45] soon the arbitrary distinction that exists to justify less protection for broadcast television speech may be abolished.

However, with the FCC's indecency fining power currently secure, and with anti-indecency groups entitled to their own First Amendment right to advocate censorship, this Note's search for a legally accountable censor leaves only one option: the advertisers. This Note therefore proposes that, since the content of what airs on network television is dependent solely upon what advertisers are willing to support financially, the behavior of corporations to boycott their sponsorship of "controversial" shows to gain an economic advantage with anti-indecency groups is an anticompetitive restraint of trade in the market for broadcast television content, and thus warrants regulation to prevent

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40 *See* John Dunbar, *Fox Calls FCC Indecency Rules 'Radical*,*'* ASSOCIATED PRESS, Nov. 22, 2006 ("Fox is challenging what it calls an unprecedented campaign by federal regulators to punish broadcasters for airing unintentional and isolated expletives during broadcasts [while the FCC believes] there should be some limits on what can be shown on television when children are likely to be watching.") (internal quotations omitted).

41 Brief for Federal Communications Commission and United States as Respondents at 76, FOX Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007) (quoting Brief for the Petitioner, No. 06-1760-ag, 2006 WL 3720900, at 72).

42 *Id.* at 78 ("[It is not permissible for] entertainers gratuitously to utter the 'F-Word' and the 'S-Word' in awards shows broadcast on national television at a time when substantial numbers of children are . . . [watching].").

43 489 F.3d 444 (2d Cir. 2007).

44 *Id*. at 447.

45 *See* Julie Hilden, *Four Major Television Networks Challenge the FCC's Regulation of Indecency: Why Modern Technology Has Made This Always-Dicey Area of Law Obsolete*, http://writ.corporate.findlaw.com/hilden/20060425.html (last visited Jan. 25, 2007) ("[W]hen the suing networks must compete with viable (and uncensored) alternatives, it's very hard to argue that network television ought to be a special preserve with its own special rules . . . .").

further silencing on the network airwaves through "sanitization."[46] The collective action of advertisers, anti-indecency groups and television networks to effectively "boycott" the airing of controversial content on broadcast television is anticompetitive conduct in violation of antitrust laws, because the result is that this content gets banished to premium cable channels with higher subscription rates and fewer viewers.[47] Consequently, with the visibility of such content diminished and with viewers required to pay more to access it, ultimately the collective action of eliminating broadcast television as a market for such content represents "[t]he indicia of antitrust harm[:] reduced output and higher prices in a properly defined relevant market . . . ."[48] Preventing advertisers from pulling sponsorship from controversial shows would remove at least one financial threat to truly diverse content and would restore viewers with the power to individually decide for themselves what content is unacceptably indecent.

Part I.A of this Note summarizes challenges to FCC authority to regulate indecency on network television. Part I.B concludes that attempts to regulate advocacy efforts conflict with advocacy groups' First Amendment rights to assemble and speak. Part II of this Note concludes that advertisers, who boycott sponsorships of shows in response to calls from advocacy groups, wrongly limit output and obstruct the free market by boycotting shows to secure an economic advantage, and accordingly violate antitrust laws. Part III justifies authority for preventing the withdrawal of advertising by either exploiting the classification of commercial speech as "low value" speech entitled to less First Amendment protection than that of individual artists, analogizing network television to political elections in order to apply the rationale behind campaign finance laws, or by utilizing existing administrative agency authority to preserve market competition. Finally, this Note concludes that any steps to democratize the indecency-defining process are preferable to minority control of government censorship.

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46 Anti-indecency groups promote "preferred advertisers" lists on their websites. In other words, lists of companies that are willing to submit to the groups' demands when they independently deem a show to be too indecent for families. To avoid the threats and headaches of honoring their contract to supply commercials to the network, the advertiser instead refuses to continue financial support of the show, and thus "boycotts" their sponsorship.

47 *See infra* Part II.

48 Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 308 (2001).

I. FORCES OF CENSORSHIP CURRENTLY IMPERVIOUS TO LEGAL CHALLENGE

A. *The FCC's Expanding Authority to Regulate Broadcast Indecency*

Although there is enough legal scholarship to fill a library criticizing FCC indecency regulation as unnecessary, overly broad, and possibly in violation of the First Amendment,[49] and although prominent figures such as former Supreme Court Justice William O. Douglas believed it was "anathema to the First Amendment to allow government any role of censorship over . . . TV,"[50] the current trend in Congress is to expand the FCC's power and not to retract it.[51] Given this reality, rather than rehash arguments for the right of artists to unfiltered expression, this Note focuses on the individual viewers as market participants and suggests a way to restore fairness and restraint to a government agency intended to serve all citizens equally while promoting the three goals of broadcast regulation: competition, diversity, and localism.[52]

Before the FCC, many sought to air content on the same broadcast signals, and regulation soon became necessary to ensure the airwaves remained a usable resource.[53] *Red Lion Broadcasting Company v. FCC* suggested that the basis for special First Amendment treatment of broadcasters is scarcity of the broadcast spectrum and that FCC-licensed

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[49] *See, e.g.*, Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14-18 (1959) (arguing allocation of limited television frequencies by means of the pricing mechanism is more likely than allocation by administrative action to serve the "public conveniences, interest, or necessity [and that an] administrative agency which attempts to perform the function normally carried out by the pricing mechanism [cannot], by the nature of things, be [fully aware] of the preferences of consumers . . . ."); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 49 (1975) ("[C]ontinuing governmental surveillance over broadcasting content presents truly grave dangers."); Brian J. Rooder, Note, *Broadcast Indecency Regulation in the Era of the 'Wardrobe Malfunction': Has the FCC Grown Too Big For Its Britches?*, 74 FORDHAM L. REV. 871 (2005).

[50] Nat Hentoff, *NBC and the Government's Enforcers*, WASH. POST, Oct. 18, 1997, at A23.

[51] *See supra* note 12. Even the recent action filed by the networks primarily seeks a rollback of the per-incident fine and clear guidelines as to what constitutes indecency and does not challenge FCC authority to regulate indecency.

[52] *See In re* 1998 Biennial Regulatory Review, 13 F.C.C.R. 11276, 11277 (1998) ("For more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity."); *In re* Broad. Localism, 19 F.C.C.R. 12425, 12425 (2004) ("As with competition and diversity, localism has been a cornerstone of broadcast regulation for decades.").

[53] Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) ("It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.").

networks understood they were a "public trust" that must avoid airing indecency.[54] Yet the scarcity rationale associated with broadcast spectrum to justify regulation of network content is increasingly becoming an arbitrary distinction, since content-based regulations over newspapers[55] and cable[56] were both rejected despite both mediums presenting information through no safer means than the regulated networks.[57]

Furthermore, in 1943, the Supreme Court recognized that the FCC's licensing power is broad enough to allow the agency to develop regulation "to 'encourage the larger and more effective use of [communications] in the public interest' . . . ."[58] The Court also assumed that more detailed standards could not have been written at such an early stage of broadcast regulation.[59] Yet a pressing question is why Congress has not now written more specific standards into the statute basing them on the FCC's now lengthy experience in administering the act, so that the "public interest" standard, which is arguably too broad to be constitutional, could be replaced.[60]

The FCC's legislative authority to regulate broadcast content comes from 18 U.S.C. §1464, which prohibits the utterance of "any obscene, indecent, or profane language by means of radio communication" and was judicially upheld in *FCC v. Pacifica Foundation*.[61] In *Pacifica*, the FCC found comedian George Carlin's routine about filthy words indecent and therefore subject to regulation in the form of a limitation on the time of day when these words could be broadcast, specifically, whenever there was a risk "children may be in the audience."[62] Most important is the proclamation made by the *Pacifica* Court that "broadcasting . . . has received the most limited First

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54 *Id.*

55 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

56 Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1978).

57 *See* Hilden, *supra* note 45.

58 Nat'l Broad. Co. v. U.S., 319 U.S. 190, 219 (1943) (construing 47 U.S.C. § 303(g)(i) to uphold delegation to the FCC to regulate broadcast licensing as "public interest, convenience, or necessity" require).

59 *Id.* at 219 (Congress would have frustrated "the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.").

60 *See, e.g.*, Bell Tel. Co. v. Driscoll, 21 A.2d 912, 915 (Pa. 1941) ("[Public interest is not] a proper standard unless . . . limited in its meaning. To hold otherwise would be to reject the rule that the legislature may not delegate its authority to legislate since in any such delegation there is an implication that the power will be exercised in the public interest."); William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715 (1989) (suggesting the Communications Act only intended to give the FCC the powers of a traffic cop).

61 438 U.S. 726, 748-50 (1978).

62 *Id*. at 732.

Amendment protection"[63] of all forms of communication and that a "broadcaster may be deprived of . . . his forum if the [FCC] decides that such an action would serve 'the public interest, convenience, and necessity.'"[64] As a result, the powerful FCC is able to deprive viewers of content without any predictable standard for what is indecent.[65]

The *Pacifica* Court held that an individual's privacy interest outweighs a broadcasters' First Amendment interest in controlling the presentation of its programming.[66] Furthermore, since "broadcasting is uniquely accessible to children," the *Pacifica* Court held that regulating expression to protect the youth is a legitimate government interest.[67] This rationale justifying the regulation of indecency on the networks and not on all channels carries little weight, when in fact a child with a remote control will indiscriminately flip through all channels, with the likely probability of landing on a non-network channel.[68] If the answer is that the FCC should be able to regulate indecency on all channels from HBO down to PBS, then at least the "protect the children" argument would be consistent and hold merit.[69] The fact that the television landscape has changed drastically in the nearly thirty years since *Pacifica*, from hundreds more channels to the emergence of the V-chip,[70] is reason enough for the Court to revisit the issue of whether

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[63] *Id*. at 748.

[64] *Id*. (quoting 47 U.S.C. §§ 309 (a), 312 (a)(2) (2000)).

[65] Absent from 18 U.S.C. §1464 is a definition of indecency, a matter largely left to be defined by the FCC. *See* John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 336-37 (1989) (After Pacifica, the FCC limited its definition of indecency to the specific list of objectionable words in George Carlin's monologue. In 1987, the FCC began applying the generic definition of indecency set forth in *Pacifica*, "[yet because] this generic definition involves numerous subjective judgments as to what, at any given time, is 'patently offensive' according to 'community standards for the broadcast medium,' it necessarily provides licensees with a murky standard of lawful conduct").

[66] *Pacifica*, 438 U.S. at 748 ("[I]ndecent material [on] the airwaves confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

[67] FCC v. Pacifica Found., 438 U.S. 726, 749 ("The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting.").

[68] This is just simple math. Because there are only five networks out of at least one hundred channels means a child indiscriminately playing with a remote control has a 95% chance of landing on and watching an unregulated cable channel.

[69] *See* Coase, *supra* note 33 ("[I]f the object of [regulation] is, in part, directly or indirectly, to influence programming [then this is a] significant shift of position from that which justifies [broadcast regulation] on technological grounds."). Therefore, the debate to regulate content should be had openly, rather than hiding authority for broadcast content regulation under the auspices of the spectrum scarcity rationale.

[70] *See* BENJAMIN, *supra* note 28, at 301-02 ("[T]he Telecommunications Act of 1996 . . . requires that television manufacturers include . . . a feature . . . enabl[ing viewers] to determine whether programming with unattractive ratings will appear on their television."); Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1634 (1995) ("User-control

broadcasted expression still warrants decreased levels of First Amendment protection.[71] Yet, even with the FCC vigorously regulating indecency, the content on network television still upsets many groups like the PTC who bombard the FCC with complaints.[72]

B. *Anti-Indecency Groups Are Entitled to Their Own Freedom of Expression*

After establishing that the FCC's censorship authority has sustained much criticism and is currently impervious to legal challenge, the search for a legally accountable censor continues and turns towards anti-indecency groups; however, they have their own First Amendment protection from any regulation, enabling them to freely advocate any position through boycotts.[73] The most public example of anti-indecency advocacy group behavior to eliminate unwholesome content is calling for an advertiser boycott or merely the threat of one.[74] Such tactics of

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technologies enable customers (in particular, parents) to limit access to certain kinds of material . . . . [Therefore,] the goal of indecency regulations . . . could be achieved without intrusive government restrictions.").

[71] Holohan, *supra* note 15, at 368 ("As non-broadcast stations increase in number and popularity, the Pacifica rules give broadcasters a severe competitive disadvantage [since] tying the hands of broadcasters as cable programmers enjoy comparable freedom is hardly justifiable.")

[72] *See* Chris Baker, *TV Complaints to FCC Soar as Parents Lead the Way*, WASH. TIMES, May 24, 2004, at A01; Todd Shields, *Content Activist: Brent Bozell and His Parents Television Council Continue to Assail the TV Industry for Filling Its Schedules with What He Calls Sewage*, MEDIAWEEK, Feb. 14, 2005, at 20. The Parents Television Council (PTC) issues email alerts to its 860,000 members advising them of material which the PTC deems objectionable and urging their members to individually file separate complaints with the FCC.

[73] *See* NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (holding nonviolent boycott activity as constitutionally protected). Although an attempt to distinguish *Claiborne* is possible since here civil rights organizations were able to boycott white merchants because it was held that the First Amendment prevented states from prohibiting politically motivated advocacy. Anti-indecency groups are unlike the civil rights organizations in *Claiborne* that pursued an agenda for a discrete group of citizens who shared a common cause (fair and equal treatment of African Americans), as opposed to anti-indecency groups who fight on behalf of their vision of what the public wants.

[74] *See* Glenn Garvin, *Bozell Army Channels Energy into Decency Fight,* CHI. TRIB., July 4, 2005, at 7 ("PTC-organized advertiser boycotts drove dozens of sponsors away from risqué cable shows."); Steve Anderson, *Attitude Adjustment,* WRESTLING DIG., Feb. 2001 ("PTC successfully convinced some WWF sponsors to stop advertising or suffer the consequences of a boycott. . . . Coca-Cola [notified the PTC they were abandoning their sponsorship by writing] '*WWF SmackDown!* does not meet our standards' [and] Domino's Pizza asserted, 'We agree that these shows do not, represent the family values our organization strives to uphold.'"). *But see* PTC's Official Website, FAQ Page, http://www.parentstv.org/PTC/faqs/main.asp (last visited Jan. 25, 2007) ("Does the PTC organize or advocate boycotts? No. The PTC aims to work with corporations and believes most of them have a sense of social responsibility."). The PTC claims they never endorse boycotts of advertisers; however, companies that have experienced their wrath would disagree, since PTC's urging of writing letters to "morally reprehensible" companies that appear on their worst advertiser lists is a not-so-subtle hint as to which companies should not be

targeting sponsors, rather than urging the viewing public to stop watching, are attempts to circumvent the free market, since the perfectly capable Nielsen rating system[75] could accurately indicate what type of content Americans deem too indecent to watch. Instead, these groups and corporate boardrooms, eager to avoid bad publicity for their product, make the decision about what is "proper" for Americans to watch.[76] These groups have thus far only been successful in convincing *some* advertisers to refrain from sponsoring certain shows, but the reality is that soon they could convince all advertisers. In such a scenario, a popular show like *Desperate Housewives* would be financially unsustainable on broadcast television.[77]

Boycotts of advertisers organized by advocacy groups like the PTC against supporters of "unacceptable" shows seem like an attempt to preserve a monopoly over what content and ideas networks disseminate; however, they are not an illegal attempt to monopolize the television show production industry because such behavior fails the stringent requirements under section 2 of the Sherman Act.[78] The market could potentially be defined as an advocacy market, and although family values-oriented groups such as the PTC and other religious groups certainly dominate that market, nothing currently stops groups advocating the opposite position from forming.[79] And without anti-indecency groups financially profiting from their actions, it is impossible to allege they are taking advantage of the market at the expense of other market competitors.[80]

Citizen groups do represent the public, and accordingly, it is within the FCC's mandate to consult with these groups when considering what is in the public interest.[81] Nevertheless, many argue regulating

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financially supported.

75 *See supra* note 35.

76 *See* American Family Association ("AFA"), http://www.afa.net/about.asp (last visited Jan. 25, 2007) ("AFA has promoted successful boycotts of several national advertisers because they were leading sponsors of TV sex, violence and profanity. Because of the boycotts, some companies—including Burger King, Clorox and S. C. Johnson—have changed their advertising policies."); Krysten Crawford, *The War Against 'Desperate Housewives*,*'* CNNMONEY.COM, Oct. 21, 2004), http://money.cnn.com/2004/10/21/news/fortune500/tv_decency/index.htm.

77 *See* Hilden, *supra* note 45 (FCC fines and the lack of advertiser support "hurt networks' ability to produce (and stations' ability to show) the very kind of material that the First Amendment protects, by effectively cutting their overall budgets.").

78 *See infra* Part II.B.

79 "Supporters-of-free-expression" groups could similarly adopt practices to boycott all advertisers who pull sponsorships from shows out of fear that such controversial content may upset the religious groups.

80 *See* Holohan, *supra* note 15, at 362 ("PTC cannot (and should not) be prevented from making its voice heard.").

81 *See* Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 1001 (D.C. Cir. 1966) (recognizing the purpose of the Communications Act of 1934 was "to protect the public interest in communications" and holding that a church had the right to intervene before the

indecency has turned into a game of politics and that this consultation is more like a meeting for the PTC to give the FCC its marching orders.[82] Much evidence exists to suggest anti-indecency groups have privately "captured" the FCC's regulatory authority to advance solely their own agenda.[83] Therefore, the only means towards limiting the influence of anti-indecency groups is the same avenue towards lessening the power of the FCC: reform the complaint process.[84] When all it takes is one complaint filed anonymously with the FCC to launch a full-scale investigation of any potentially objectionable content, "capturing" the FCC's indecency-punishment arm is a relatively easy task.[85] Such reforms could include requiring a minimum threshold of independently received complaints to warrant beginning an investigation, or at the very least, proof that the individual complaining actually viewed the program.[86]

FCC in the renewal of a broadcast company's license since the church acted to vindicate the public interest related to a licensee's performance of the public trust inherent in every license).

[82] *See* Seth T. Goldsamt, *Crucified by the FCC? Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203 (1995); Allen S. Hammond, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259 (1996).

[83] *See* Holohan, *supra* note 15, at 360 ("The most significant defect in the regulation of indecency is the disproportionate influence of media watchdog groups such as the PTC . . . over broadcast regulators."); Todd Shields, *FCC Weighs Olympics Indecency Complaints*, MEDIAWEEK, Dec. 10, 2004. ("The procedure has come under increasing scrutiny with the recent disclosure that, aside from those concerning the controversial Super Bowl broadcast, more than 99 percent of recent indecency complaints have come from one group, the Parents Television Council."); Jay Woodruff, *See No Evil?*, ENTM'T WKLY., Aug. 6, 2004, at 40 (suggesting PTC's influence allows it to direct the FCC's immense enforcement power toward content that the PTC itself finds objectionable, thus leading to potentially selective prosecution); *see generally* KIMBERLY ZARKIN, ANTI-INDECENCY GROUPS AND THE FEDERAL COMMUNICATIONS COMMISSION: A STUDY IN THE POLITICS OF BROADCAST REGULATION (2003).

[84] FCC Complaint Process, http://www.fcc.gov/eb/oip/process.html (last visited Jan. 25, 2007) (revealing that the complaint process involves "FCC staff review[ing] each complaint to determine whether it alleges information sufficient to suggest that a violation of the obscenity, profanity or indecency prohibition has occurred").

[85] *See* Holohan, *supra* note 15, at 361 n.113 ("Although indecency determinations are theoretically governed solely by the FCC's implementation of the Pacifica standard, in certain cases the number of complaints appears to have factored into the analysis. For example, the Super Bowl decision explicitly states that the Commission received over 542,000 complaints regarding Janet Jackson's performance.") (citing *In re* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII, 19 F.C.C.R. 19230, 19231 n.6 (2004)). The PTC sends out e-mails with descriptions of "indecent" content along with a link to the online FCC complaint form, creating an opportunity for hundreds of thousands of individuals to file complaints with the FCC regarding programming they may not have seen. "Examples of e-alert headlines include 'Graphic Depiction of Male Rape on The Shield. Take Action Now!' . . . and 'CBS's Without a Trace features scenes of teen group sex during prime time—FILE YOUR COMPLAINT NOW.'" *Id*. at 360 n.109. (citing Chris Baker, *TV Complaints to FCC Soar as Parents Lead the Way*, WASH. TIMES, May 24, 2004, at A1).

[86] Such minimal steps seem obvious, yet the current system enables any one individual in America (quite possibly one member of the PTC over and over again) to sit at their computer and file complaints about endless broadcast programs, regardless of whether they merely received an

II. ENDING THE MONOPOLIZING EFFECT OF CONTENT SANITIZATION THROUGH ANTITRUST LAW

A. *Advertisers Are the Only Censor That the Law Can Realistically Stop*

Part I demonstrated that the FCC and anti-indecency groups have entrenched and ostensibly legally-protected authority to influence what is deemed unfit for network television. It is important to establish just how secure their censoring influences are, since it establishes a vital precondition for the forthcoming proposal. With two forces already adequately compelling the production of only sanitized programming for network airwaves, this Note turns the spotlight on the third faction, and the party least passionate about stamping out indecency: the advertisers.[87] Financial realities dictate that advertisers maintain the greatest influence over what content gets airtime, and this triumph of commerce over art is neither desirable for the companies burdened with the power[88] nor encouraging to artists who witness their freedom of expression stifled by the power.[89] The essential problem is that networks, as a business, must respond to the whim of their direct customers, the advertisers, thus leaving viewers powerless primarily due to the "unequal access that wealth can buy."[90] Long ago, the Supreme Court recognized that the right of free speech of any individual "does not embrace a right to snuff out the free speech of others."[91] Yet in the current environment, the combined threatening voice of the PTC and the

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email from the PTC urging them to complain about the show.

[87] *See* Ian J. Antonoff, Comment, *You Don't Like It . . . Change the (Expletive Deleted) Channel!,* 15 SETON HALL J. SPORTS & ENT. L. 253, 272 (2005) ("Since effective watchdog organizations such as the PTC and the AFA exist, the public can influence those directly responsible for content that they feel is inappropriate. Therefore, it is increasingly unnecessary for the federal government to impose content regulation."). Yet with government imposed content regulation, the need for private censorship (the effect of advertisers withdrawing sponsorship) is overkill.

[88] *See* Linda Moss, *Profitable, Not 'Palatable'; How FX Keeps Advertisers On Board When Its Shows Are Under Attack*, MULTICHANNEL NEWS, Nov. 20, 2006, at 16 ("Advertisers 'do not like' getting letters from the PTC, [since the PTC has] a louder voice than they deserve [and they] shouldn't be dictating [their] values to the rest of society.").

[89] *See id*. (revealing that PTC campaigns are effective since advertisers must "'straddle' their need to reach consumers with their message while also answering to their own shareholders [and no advertiser] really wants to wake up in the morning and see a news release . . . about what was on television last night and see [their] brand in it.").

[90] *See* Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581 (1984) (arguing that wealth and its ability to disproportionately produce access is a critical First Amendment problem).

[91] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387 (1969).

withdrawal of sponsorship by advertisers in response to it, effectively drowns out the opinions of the majority of viewers and the content they desire.[92]

B. *Background to Antitrust Law*

Congress enacted the Sherman Act[93] in 1890 to protect American markets from anticompetitive practices in interstate commerce.[94] Any unreasonable anticompetitive agreements that restrain trade are illegal under section 1 of the Sherman Act.[95] Additionally, conspiracies to monopolize a market by any competitor violate section 2 of the Sherman Act.[96] Proving a monopoly violation under section 2 is more challenging because a plaintiff must prove that the business or association possesses market power within a defined industry,[97] whereas proving a violation of section 1 requires the plaintiff to prove: "1) that there was a contract, combination or conspiracy, i.e., an agreement or concerted action toward 'a common goal,' 2) that the agreement 'unreasonably' restrains trade under either a per se rule of illegality or a rule of reason analysis, and 3) that the restraint affected interstate commerce."[98] Finally, agreements are labeled "horizontal" if they exist between competitors or "vertical" if they exist between non-competitors.[99]

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92 *See* STANLEY M. BESEN ET AL., MISREGULATING TELEVISION 25 (1984) ("Under competitive conditions, the number, quality, content, and cost of programs are determined by impersonal marketplace forces rather than by the desires of a central government agency or a small number of firms.").

93 15 U.S.C. §§1-2 (2000).

94 *See* ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 53 (1985). ("The Sherman Antitrust Act codified common-law principles designed to control monopolistic practices and unfair restraints of trade.").

95 15 U.S.C. §1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

96 15 U.S.C. §2 (2000) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

97 *See* United States v. E.I. Du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377, 389 (1956) ("[A] party has monopoly power if it has . . . a power of controlling prices or unreasonably restricting competition.").

98 T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 632-33 (9th Cir. 1987) (citations omitted).

99 An example of a non-competitor agreement is where two or more entities conspire to fix prices of products, most typically in a situation where one of the parties is in a "higher" level in the chain of distribution than the second. *See, e.g.*, Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

C. *Applying Antitrust Law to the Concerted Effort to Sanitize the Broadcast Airwaves*

The conduct addressed here is the concerted refusal by advertisers and networks to deal with artists producing controversial content, a potentially unreasonable restraint of trade within the content supply industry and a suppression of content that ignores consumer preferences.[100] Section 2, which requires proof of market power,[101] does not reach this behavior for three reasons: advertisers and networks are not competitors;[102] no one advertiser dominates the entire advertising industry;[103] and finally, because the claim that networks have monopoly power over the dissemination of content has been judicially dismissed.[104]

What this Note alleges is that the vertical arrangements between the non-competing advocacy groups, advertisers, and networks should be analyzed as agreements in restraint of trade under section 1. It is important to define narrowly what specific behavior this analysis targets: only agreements between two or more separate entities that refuse to deal with "indecent" content producers.[105] Therefore, advertisers should always be allowed to boycott sponsorship of shows for pure economic advantage if they arrive at such a decision independently and for their own individual reasons.[106] For instance,

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100 The combined acts of advertisers pulling advertising from controversial content that they previously contracted to support, and of networks allowing the advertiser to shift their commercials to other non-controversial content on the network's schedule, constitutes a refusal to deal with the artists producing controversial content.

101 *See* Spectrum Sports v. McQuillan, 506 U.S. 447, 456 (1993) ("[T]he conduct of a single firm, governed by § 2, is unlawful 'only when it threatens actual monopolization.'") (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984)).

102 In defining the relevant market, only products that are effective substitutes for one another in the eyes of consumers count as being in the same market. *See Cellophane*, 351 U.S. at 404 (The "market" analyzed to determine when a producer has monopoly power "is composed of products that have reasonable interchangeability . . . ."). Networks sell advertising and advertisers sell products, and neither compete directly.

103 The only way for a section 2 claim to survive is if horizontal agreements to boycott shows existed between enough large advertisers to constitute market power. Although advertisers often abandon sponsorship of similar shows simultaneously, no circumstantial evidence exists to suggest any such incentive to collusively boycott shows.

104 See Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) ("No longer is it clear that the networks have market power in an antitrust sense, which they could use to whipsaw the independent producers and strangle the independent stations."). But see infra note 158.

105 *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) ("Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between [two or more parties] in order to establish a violation. Independent action is not proscribed.") (citation omitted).

106 *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("[The Sherman Act] does not restrict the long recognized right of [a business owner to freely] exercise his own independent

when the NBC show *Heroes* featured a character mangling her hand by sticking it in an Emerson Electric garbage disposal, in no way is it suggested that Emerson Electric must be forced to continue sponsoring a show that causes it verifiable economic harm.[107] The freedom to pull advertising only becomes an antitrust violation when it is the result of collusive behavior satisfying the three conditions of section 1: (i) concerted action toward a common goal that (ii) unreasonably restrains trade and (iii) affects interstate commerce.[108]

Beginning with the first condition, the common goal between advertisers and networks is disassociating themselves from controversial programs to escape the economic wrath angry anti-indecency groups would otherwise launch. The problem is that there lacks a traditional "contract" between them for section 1 purposes and a "conspiracy" is difficult to prove since there is no evidence of any express agreement. Yet, the Supreme Court has previously allowed circumstantial evidence to establish the existence of an agreement without direct evidence of explicit collusion.[109] When the PTC calls on advertisers to boycott funding controversial programs, and advertisers respond by demanding the networks release them from their agreement to sponsor specific content, and networks then allow the dollars to shift to other non-controversial shows on their schedule, both the advertiser and the network are economic actors acting opportunistically. It is anticompetitive for actors in the marketplace to take advantage of a boycott to suppress competition for their own economic benefit.[110] Even though the Court recently tightened antitrust conspiracy pleading requirements by demanding plaintiffs allege some factual basis beyond "parallel conduct,"[111] the coordinated behavior of the above-mentioned

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discretion as to parties with whom he will deal.").

[107] Besides not advertising on *Heroes*, Emerson Electric is also filing suit against NBC for trademark infringement and unfair competition. *See* Paul R. La Monica, *A mangled hand, a 'Heroes' Suit, and NBC*, CNNMONEY.COM, Oct. 17, 2006, http://money.cnn.com/2006/10/17/commentary/mediabiz/index.htm.

[108] *See supra* note 95.

[109] *See Monsanto Co.*, 465 U.S. at 764 ("[T]he antitrust plaintiff should present direct *or* circumstantial evidence that reasonably tends to prove that the [parties] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'") (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc. 637 F.2d 105, 111 (3d Cir. 1980)) (emphasis added); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984) ("A § 1 agreement may be found when 'the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'") (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)); *see also* Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (*In re Baby Food*), 166 F.3d 112, 124 (3d Cir. 1999) ("A plaintiff in a Section 1 conspiracy can establish a case solely on circumstantial evidence . . . .").

[110] *See infra* Part II.D.

[111] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965-66 (2007) (holding the antitrust plaintiff's complaint must "simply [include] enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. . . . Without more, parallel conduct does not

entities should be sufficient evidence "to exclude the possibility of independent action"[112] and should raise the inference of collusion between them to sanitize the airwaves.[113]

Any conduct by national corporations will easily satisfy the "affects interstate commerce" condition;[114] therefore, only the second condition remains. Establishing whether vertical agreements not to deal with third parties are unreasonable restraints of trade, requires evaluation under the rule of reason.[115] Under such analysis, the plaintiff must prove that the anticompetitive effects of the alleged restraint outweigh any pro-competitive or efficiency benefits achieved, or that the same benefits could have been achieved through a less restrictive alternative.[116] Some possible efficiency benefits include an increase in output or a reduction of price; yet because the behavior to cease financial support for controversial content accomplishes neither, the restraint on competition within the content supply industry should not be tolerated.[117] Finally, as elaborated in Part II.D and Part II.E below, the targeted boycotts for economic advantage result in a limit on output, which is ultimately proof of an actual adverse effect on competition that should be "legally sufficient to support a finding that the challenged restraint [is] unreasonable even in the absence of elaborate market analysis."[118]

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suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

112 Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) (holding that a plaintiff seeking damages for a violation of section 1 must present evidence "that tends to exclude the possibility of independent action . . . .").

113 If advertisers did act independently they would not need the PTC to publicly shame them into boycotting a show.

114 *See* Lorain Journal Co. v. United States, 342 U.S. 143, 151 (1951) ("There can be little doubt today that the immediate dissemination of news . . . is a part of interstate commerce. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale.").

115 *See Monsanto Co.*, 465 U.S. at 761 (Concerted action on nonprice restrictions "are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.").

116 *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) (defining the rule of reason as a "test of legality [to determine] whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.") (quoting Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

117 *See Ind. Fed'n of Dentists*, 476 U.S. at 459:

> A refusal to compete with respect to the package of services offered to customers . . . impairs the ability of the market to advance social welfare . . . . Absent some countervailing procompetitive virtue [like] the creation of efficiencies in the operation of a market . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason.

Id.(citations omitted). Potentially an increase in "quality" could be alleged as a benefit, if sanitized airwaves are better. Yet, there are less restrictive alternatives to accomplish this "quality" like allowing the Nielsen ratings to dictate what constitutes quality.

118 *Id.* at 460-61 ("Since the purpose of the inquiries into market definition and market power

D. *Boycotts for Economic Advantage by Advertisers Violate Antitrust Laws*

NAACP v. Claiborne Hardware held the First Amendment prevents states from prohibiting boycotts launched by citizen groups.[119] However, *FTC v. Superior Court Trial Lawyers Association*[120] carved out an exception to the *Claiborne* holding. In *Trial Lawyers,* attorneys who regularly accepted court appointments to represent indigent defendants agreed that they would not accept new cases unless the District of Columbia increased the statutorily fixed fees for such work.[121] The Federal Trade Commission (FTC) filed a complaint alleging that the lawyers' boycott constituted an illegal conspiracy to fix prices in violation of section 5 of the FTC Act, which prohibits "unfair methods of competition."[122] While the attorneys had an obvious economic interest in their fees, they claimed that their boycott was in pursuit of an underlying political objective: to improve the quality of representation for their indigent clients.[123] In the D.C. Circuit, the court held that the First Amendment did not immunize such conduct from antitrust liability, since under *Claiborne Hardware*, motivation was the "crucial" factor for determining whether the boycott was protected "political" activity and there, the lawyers' boycott was found to be "motivated primarily by economic self-interest."[124]

The Supreme Court further distinguished *Claiborne Hardware*, concluding the civil rights boycotters did not seek a special advantage for themselves, instead "[t]hey sought only the equal respect and equal treatment to which they were constitutionally entitled," whereas for the

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is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power . . . .") (quoting 7 P. AREEDA, ANTITRUST LAW ¶ 1511 (1986)).

119 NAACP v. Claiborne Hardware, 458 U.S. 886, 907 (1982) ("[B]oycott[s] [are] a form of speech or conduct . . . ordinarily entitled to protection under the First and Fourteenth Amendments.").

120 493 U.S. 411 (1990).

121 *Id.* at 415.

122 15 U.S.C. § 45 (2000); *In re* Superior Court Trial Lawyers Ass'n*,* 107 F.T.C. 510, at 5 (1984).

123 In re *Superior Court Trial Lawyers Ass'n,* 107 F.T.C., at 97.

124 Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 246 (D.C. Cir. 1988), s*ee also* Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988) (establishing that only politically motivated boycotts, as distinguished from those purely profit motivated, are protected by the First Amendment). The civil rights boycott in *Claiborne* "was not motivated by any desire to lessen competition or to reap economic benefits . . . and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market." *Id.* at 508.

lawyers' boycott "it [was] undisputed that their immediate objective was to increase the price that they would be paid for their services."[125] All nine justices agreed that the concerted boycott by the lawyers could subject them to antitrust liability.[126] In other words, when the objective of the boycott is to gain an economic advantage for those who agree to participate, then the boycott is no longer immune from antitrust regulation and it then becomes a restraint of trade. Boycotts containing elements of expression are often considered protected "speech," yet boycotts conducted by business competitors for profit-seeking objectives have never been thought to be protected by the First Amendment.[127] Moreover, profit-oriented forms of commercial expression have not warranted the same constitutional protection granted other forms of expression.[128]

Based on these ideas, the claim advanced here is that when advertisers pull sponsorship dollars from controversial shows on which they have previously agreed to advertise,[129] they engage in a "boycott for economic advantage" in violation of antitrust laws if, and only if, they do so in response to any demand or suggestion from anti-indecency groups.[130] Advocacy groups orchestrate such vertical "agreements" by

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125 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426-27 (1990) (distinguishing *Claiborne Hardware* on the ground that First Amendment protection for political boycotts was "not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'") (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 508).

126 *See* Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine,* 41 HASTINGS L.J. 905, 993 (1990) ("Apparently, the Court was convinced that the attempt to exercise power for profit-motivated objectives *even when coupled with political objectives* raised an antitrust concern that justified antitrust regulation of an expressive boycott.").

127 *See infra* Part III.A; Frederick Schauer, *The Aim and Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 563 (1989).

128 *See* Minda, *supra* note 126, at 994 ("This is because profit-oriented forms of commercial expression fail to implicate human values and interests central to the type of liberty interests one normally identifies with first amendment values."); Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival,* 97 YALE L.J. 1539, 1577 (1988) (arguing that profit-oriented expression should be treated less hospitably since regulating this form of expression may be necessary to counteract the distortions caused by wealthy speech).

129 Every May, each of the networks host a "Fall Upfront Presentation" in New York City for advertisers to get a sneak preview of the new and returning shows on the network's fall schedule. *See* BLUMENTHAL & GOODENOUGH, *supra* note 5, at 421 ("In upfront buying, the networks offer advertisers 'avails' (time slots) at a discount months before the season begins. [For advertisers,] the upfront buy assures the best possible commercial position, and saves money, but the prospect of make-goods can [result in] having commercials run on the wrong shows.").

130 What is argued for here is equality in the size of the megaphone each side is using. In the current environment, anti-indecency groups invoke a corporation's fear of backlash to amplify their message. Equal rights to expression therefore can best be achieved not by reining in the anti-indecency groups, but instead by eliminating the opportunity for them to grab the megaphone attached to the corporation. To preserve free expression on network airwaves and to best ensure that Americans ultimately decide what is in their own best interest to watch, corporations should

publicly issuing admonition letters to companies sponsoring shows on their indecency target list, and advertisers then respond by pulling their advertising money from the targeted shows.[131] Advertisers are thus "boycotting" controversial content when they concede to pressure from the PTC. Furthermore, since all actions by corporations reflect their economic self-interest, rather than any political expression, this corporate decision to boycott content brings such behavior within the *Trial Lawyers* definition of a restraint of trade.[132] Such a restraint on competition deserves to be regulated.[133] Moreover, in an environment where viewers are silenced and unable to express what content they value most, then there exists a market failure that justifies such an antitrust remedy.[134]

By leaving advertisers with the ability to back out, the potential boycott of controversial shows effectively chills networks from ever engaging in the production of controversial content from the beginning, since the risk of losing advertiser revenue is too great.[135] Marketing executives make initial sponsoring decisions based on a program's profitability and not its quality.[136] In other words, if the ratings are high or if the network guarantees the rating for a show will be high then

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be banned from being able to remove their commercials from controversial shows.

131 *See* Ira Teinowitz, *Ford Makes Leap from Bad Boy to Family Friend; PTC Takes Automaker off 'Worst-Advertiser' List, Moves it to 'Best' Ranking*, ADVERTISING AGE, Aug. 28, 2006, at 8.

132 *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) (upholding a statute prohibiting corporations from using corporate treasury funds to support any candidate for state office):

> [T]he resources in the treasury of a business [are] not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence [and give them an unfair political advantage], even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 659 (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986)).

133 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.").

134 *See* Cass R. Sunstein, *Pornography and the First Amendment,* 1986 DUKE L.J. 589, 619. ("Legal intervention is required because of a maldistribution of private power that interferes with a well-functioning political marketplace.").

135 James T. Hamilton, *Does Viewer Discretion Prompt Advertiser Discretion? The Impact of Violent Warnings on the Television Advertising Market*, *in* TELEVISION VIOLENCE AND PUBLIC POLICY 213, 219 (James T. Hamilton ed., 1998) ("Robert Iger, president of Capital Cities/ABC, [now CEO of the Walt Disney Company,] estimated that the network loses nearly $20 million in advertising revenues each year because of decisions by sponsors to avoid controversial programs.").

136 Robert Stuart, *Advertisers Must Play a Stronger Role*, AM. ENTERPRISE, Mar./Apr. 1999, at 39.

advertisers are willing to pay a premium to reach a larger audience.[137] Corporations may be justified in their concern about what content their money funds, since advertisements appearing during violent shows might "lose[] customers as well as do[] social harm."[138] Yet corporations can only be held responsible for the content if the freedom to withdraw sponsorship remains, since the act of not boycotting a show, under the current environment, implicitly suggests the company supports the show's message.[139] Corporations focus on the bottom line and achieving the most exposure for their messages and thus the only consideration that should be relevant to them is how many viewers are watching.[140]

E. *Agreements to Limit Output Violate Antitrust Laws*

Protection of competition is the goal behind antitrust laws, and many argue that a competitive market is essential for maximizing consumer welfare.[141] Therefore, as held in *National College Athletic Association v. Board of Regents of University of Oklahoma (NCAA)*,[142] any "restraint that has the effect of reducing the importance of consumer preference in setting price and output"[143] is in violation of antitrust

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[137] *See* BLUMENTHAL & GOODENOUGH, *supra* note 5, at 422 ("Working from estimated ratings, the network guarantees to deliver a certain number of viewers in each demographic group. If the ratings turn out to be lower than . . . promised, the advertiser is entitled to 'make-goods,' or additional commercials in prime-time programs.").

[138] Stuart, *supra* note 136, at 39.

[139] *See* Anne Becker, *Dicey Operations; Advertisers Have Love/Hate Relationship with Nip/Tuck*, BROADCASTING & CABLE, Sept. 19, 2005, at 16 ("[Sony, by advertising on Nip/Tuck is] choosing to identify their corporate brand with everything associated in the program . . . . They're communicating a message about what their corporate values are.") (quoting PTC's Director of Research). Companies like Sony would prefer an environment where they are legally prevented from withdrawing their advertising, since they then could respond to the PTC by saying that although they do not agree with the content of a given show, their only ability to remove sponsorship comes if no one watches the targeted show and the ratings are low. Accordingly, this then requires the PTC to advocate the right constituency: the viewers themselves.

[140] *See* Bart Hinkle, *Smart Sponsors Aren't Interested in Censorship*, RICH. TIMES-DISPATCH, Oct. 24, 2006, at 20 ("[S]mart businessmen care far less about what the newspaper says on a given subject than they do about how many people read the paper—about, that is, how many eyes will view their promotional material. It's in a company's economic interest to disregard what editorials say."). Financially speaking, a company should only be allowed to withdraw its advertising fees when the size of the audience for a given show is less than what had been promised.

[141] *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'") (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

[142] 468 U.S. 85 (1984).

[143] *Id.* at 107 (holding the NCAA's plan for televising college football games was an output limitation that wrongly restrained the market, but since cooperation of the competitors was

law.[144] With "output lower than [it] would otherwise be, and . . . unresponsive to consumer preference" this consequence is significantly anticompetitive.[145] In *NCAA*, the Court determined that forbidding all teams from selling television rights outside of the league's basic plan limited output and impaired the ability of each team to respond to customer preference.[146] Since the NCAA, with its imposed restraint, "restricted rather than enhanced the place of intercollegiate athletics in the Nation's life," such behavior constituted an anticompetitive limitation in violation of section 1 of the Sherman Act.[147]

Some could argue that the parallels of *NCAA* to the present issue are not compelling since agreements to sanitize television shows do not limit output and instead merely affect the content of the output. In other words, in *NCAA*, the restraint resulted in fewer football games being broadcast on television, whereas broadcasters' and advertisers' efforts to cleanse the networks do not result in fewer shows, they just provide different, "sanitized" ones. However, from the audience's perspective, a reduction in the number of shows with content they desire to watch is a meaningful limit on "output" despite the same total amount of shows being offered. Furthermore, the *NCAA* court defined a methodology for analyzing the impact of a sale of broadcast rights and when such agreements "diminish viewership, then they will constitute an unreasonable restraint of trade and thus can be enjoined."[148] The forced transfer of content from widely available networks to more expensive cable television, the result of the aforementioned sanitization, can therefore be deemed anticompetitive, since such restraints on the free market increase costs and decrease the number of potential viewers in a manner unresponsive to consumer preference.

With the broadcast networks now all owned by large media conglomerates, and with large corporations paying the advertising bills that subsidize "free" network television, it becomes increasingly

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necessary for the product to exist at all, the restraint did not warrant a per se analysis).

144 Since viewers do not pay for network television, the unreasonable restraint of trade at issue here is a limitation on output resulting from the understanding between the anti-indecency groups and the compliant advertisers, which takes effect when a network dares to let any controversial programming slip through the cracks.

145 *NCAA*, 468 U.S. at 107.

146 *Id.* at 113 (limiting live television broadcasts "constitute[d] a restraint upon the operation of a free market, and . . . it has operated to raise prices and reduce output. Under the [Sherman Act] Rule of Reason [analysis] these hallmarks of anticompetitive behavior place . . . a heavy burden of [justifying] deviation from the operations of the free market."). Sports fans desired more games to be broadcast and individual teams wanted to comply, but the league limited the amount of live television broadcasts to preserve profitability of live attendance figures and the league brand.

147 *Id.* at 120.

148 *See* WALTER T. CHAMPION, SPORTS LAW IN A NUTSHELL 67 (2d ed. 2000) (discussing *NCAA*).

possible for the interests of these corporations to hijack society's widest means of communication.[149] Since there are very few examples of when a network will incur the cost of airing controversial content without any advertiser support,[150] the suppression of consumer choice present in *NCAA* is similarly at issue in the broadcast industry as opportunistic advertisers in the market boycott content that does not benefit them economically. Similarly, since such conduct "restricts rather than enhances" the importance of network television in the Nation's life,[151] advertiser's boycotts of controversial shows are therefore also anticompetitive limitations on output. This output limit that results in an increasingly sanitized broadcast television environment is a harm to content producers who are unable to secure network production commitments for their controversial ideas and to the viewers who are deprived of a diversity of viewpoints by advertisers wrongly acting as private censors.[152]

F. *Practical Implications of Eliminating Sanitizing Restraints of Trade*

In an environment where Americans flock away from television networks towards cable and the Internet for any informative and entertaining content that they seek, the "public" airwaves have instead turned into a "private" playground for FCC, PTC, and corporate-approved content that will eventually appeal to no one.[153] What is

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[149] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) ("A license permits broadcasting, but the licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens."); DOM CARISTI, EXPANDING FREE EXPRESSION IN THE MARKETPLACE: BROADCASTING AND THE PUBLIC FORUM 142 n.18 (1992) ("As most stations are owned by corporations needing sufficient revenues to support station purchases . . . , the importance of enhancing advertising revenue rather than driving away audience is acute.").

[150] The Center for American Progress Action Fund, a liberal advocacy group, petitioned ABC to either correct or cancel the miniseries *Path to 9/11*. "The miniseries presents an agenda that blames the Clinton administration for the 9/11 attacks while ignoring numerous errors and failures of the Bush administration," the center said in a news release. What resulted is that ABC aired the movie commercial-free.

[151] As evidenced by the fact that networks receive less total viewers each year as more viewers turn towards other mediums to satisfy their desire for unregulated content. *See In re* 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620 (2003). If eliminating indecency truly did enhance the place of network television, would it not be true that more viewers would be flocking back to the networks to support and watch only the "decent" content?

[152] *See Red Lion*, 395 U.S. at 392 ("There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.").

[153] *See* John C. Bonifaz, Gregory G. Luke & Brenda Wright, *Challenging* Buckley v. Valeo*: A Legal Strategy*, 33 AKRON L. REV. 39, 67 (1999) ("If, as the Court stated in *Red Lion*, "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . . may not constitutionally be abridged . . . by Congress," then surely it may not be abridged by a

proposed here may seem radical; yet what should temper that impression is remembering that the current situation of forced self-censorship is even worse and recognizing that restrictions on advertiser withdrawals should apply in only limited scenarios. Most important is stressing that such a proposal is not imposing an eternal commitment on advertisers to forever sponsor shows against their will. Instead, it merely requires that networks refuse to allow the advertisers to amend the terms of their original contract[154] and demands that advertisers honor the usual one year commitment to financially support a specific show.[155]

Other considerations include the argument that advertisers and networks are entitled to the freedom to contract to any terms they deem beneficial; however, where applicable, antitrust law trumps the freedom of contract between parties.[156] An additional concern is that antitrust law most commonly *prevents* parties from engaging in certain conduct and the notion that advertisers will potentially be *forced* to remain as "sponsors" seems harsh. Besides merely requiring advertisers to live up to obligations they previously agreed to, antitrust implications have forced conduct before. Most relevantly, the Supreme Court upheld a requirement that compelled "speech" by cable companies (which like advertisers, are corporations) against their will.[157] Furthermore, forcing such conduct is justified to combat the dominating position of the

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wealthy minority who exercises economic control over the means of mass communication.").

154 Networks now enable advertisers to move around their dollars from one show to another, not eager to upset advertisers and with no financial upside to force them to honor their commitment to the original programming.

155 *See* BLUMENTHAL & GOODENOUGH, *supra* note 5, at 421 ("Immediately after each network's program department announces the prime-time schedule for the fall season (usually in May), the network sales departments start selling commercial time on those programs. They offer advertisers approximately 65 to 75 percent of prime-time [time slots] at a 15 percent discount. . . . The network and advertiser also work out the list of shows, the dates on which the spots will appear, and the probable rating. The advertiser commits to the time, but the degree of commitment can vary. If the client commits to 52 weeks, the deal is likely to be more flexible than a deal for a smaller commitment. A deal might include the option to cancel up to 25 percent of the order for first quarter, for example.")

156 *See* United States v. Loew's, Inc., 371 U.S. 38, 51 (1962) ("[T]he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives."); *see also* Michal S. Gal, *Harmful Remedies: Optimal Reformation of Anticompetitive Contracts*, 22 CARDOZO L. REV. 91, 102 (2000) ("Where anticompetitive contracts are at issue, however, contract law considerations should take a backseat to antitrust law. The freedom to contract is not an absolute freedom but rather a relative one that should be balanced against competing considerations.").

157 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 635 (1994) (summarizing the District court's interpretation of the 1992 Cable Act's must carry requirements as "simply industry-specific antitrust and fair trade practice regulatory legislation [that is] essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices.").

sanitizing forces that diminish the competitiveness in the market for production of television content.[158] The resulting anticompetitive effects are that unobjectionable content producers receive an unfair competitive advantage and the diversity of viewpoints presented suffers.[159]

If such a policy were to be adopted either judicially, as a result of a financially harmed controversial artist bringing suit against the disassociated advertisers and network, or through an administrative agency rulemaking, the impact would be to make advertisers more careful about what shows they invest in beforehand, which still raises the potential for a chilling effect. Yet the appeal of network television is its massive audience reach,[160] and if committing to specific network content was the only way networks and the law allowed business to be done, then advertisers would willingly comply. Ironically, such a constraint on advertisers would actually be welcomed by them, since when groups like the PTC complain, the advertisers could be free from the headache of needing to deal with them and instead could respond: "our hands are tied." Such a requirement preventing advertisers from backing out to avoid controversy would be preferable to them so that essentially the responsibility to respond to advocacy efforts shifts from the corporation to the American viewing public, thus allowing companies to avoid the verbal gymnastics they must engage in to explain their sponsorship withdrawal.[161]

Therefore, not only are advertisers and viewers happy about

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158 *See* Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir. 1992) ("[T]here should be some 'deregulation' of programming . . . [b]ut not too much, because even in their decline the networks may retain some power to extort programs . . . from producers. The networks offer advertisers access to 98 percent of American households; no competing system for the distribution of television programming can offer as much. [The FCC's legitimate concern] is not just with market power in an antitrust sense but with diversity, and diversity is promoted by measures to assure a critical mass of outside producers and independent stations.").

159 *See* CARISTI, *supra* note 149, at 131 ("More commercial speech opportunities still do not ensure all individuals the opportunity to express themselves, especially those with . . . views counter to the capitalistic goals of privately owned, for-profit media. In this age of intense media competition for advertising revenue, politically controversial speakers may be avoided for fear customers may turn to less 'offensive' material.").

160 *See Schurz Commc'ns,* 982 F.2d at 1045 ("The networking of programs intended for . . . 'prime time' . . . gives advertisers access to a huge number of American households simultaneously, which in turn enables the networks to charge the high prices for advertising time that are necessary to defray the cost of obtaining the programming most desired by television viewers.").

161 *See* Scott Collins, *Sponsors Race to Get off 'Survivor*,' L.A. TIMES.COM, http://hollywoodhotline.typepad.com/watcher/2006/09/sponsors_race_t.html ("GM and some other big advertisers have dumped their longtime sponsorship of 'Survivor,' but they insisted . . . that the decision had nothing to do with the CBS show's new 'ethnic' format, where teams [were] divided along racial lines. Instead, GM says it balked because the CBS reality show deposits castaways in remote locations where cars can't easily be incorporated into plotlines. So, it took six years and 12 editions to notice this? Yeah, right.").

individual consumers reclaiming the responsibility for determining what broadcast content does not morally deserve financial support, but artists and networks would also prefer an environment where they can create content to appeal to the American viewing public at large rather than have their creativity constricted by what the PTC, and by correlation, advertisers, might deem offensive. In this new society, where the FCC still retains its power to fine for indecent incidents, the only constituency left unsatisfied would be the anti-indecency advocacy groups, since they would be stripped of the opportunity to utilize advertisers as a megaphone to amplify their message.

III. RESTRICTING THE COMMERCIAL SPEECH OF ADVERTISERS IS JUSTIFIED TO PREVENT MARKET DOMINATION

A. *Sacrificing Commercial Speech for Individual Expression Is a Worthy Trade-off*

Restricting commercial speech to restore full individual freedom of expression is an unfortunate yet desirable trade-off.[162] Currently, the networks and artists must engage in self-censorship in order to avoid upsetting the anti-indecency groups who would then agitate the advertisers. Instead, requiring advertisers to engage in self-censorship is preferable, particularly when a corporation's legal right to free speech is very much in doubt.[163] And since even "the complete curtailment of corporate communications concerning political or ideological questions . . . would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts,"[164] such a restriction on corporate speech would not result in the stifling of true

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[162] *See* CARISTI, *supra* note 149, at 71 ("When the rights of one person to speak freely conflict with the rights of another to speak freely, legal theory [provides for a remedy] to determine which of the two has the more legitimate claim.").

[163] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Here a Massachusetts statute prohibited corporations from making contributions "for the purpose [of] influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768. Corporations, the state explained, "are wealthy and powerful and their views may drown out other points of view." *Id.* at 789. The Court held the proper question "is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question [is whether the statute] abridges expression that the First Amendment was meant to protect." *Id.* at 776. *See also* Nike v. Kasky, 539 U.S. 654 (2003); Brief Amicus Curiae of Reclaimdemocracy.com in Support of Respondent at 23, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 1844818 ("When speech is not the product of individual choice and emanates from a speaker to whom 'individual self-expression' is meaningless, the speech should not receive full First Amendment protection.").

[164] *Belloti*, 435 U.S. at 807.

expression.

Furthermore, preventing all advertisers from withdrawing sponsorship from controversial programming, without regard to the content of their advertisement, is a preferred content-neutral restriction on expression.[165] The Court tests content-neutral restrictions with a balancing approach: the greater the interference with the opportunities for free expression, the greater the burden on government to justify the restriction.[166] When the challenged restriction has a severe effect, it is subjected to strict scrutiny.[167] However, if the purpose and "net effect of the legislation is to [enhance freedom of speech], . . . the exacting review reserved for abridgements of free speech may be inapposite."[168] The sole aim here is enhancing free speech on television.

B. *Background to Equality Arguments in First Amendment Law*

Two theories describe what role government should play in preserving free expression. Either the government should remain entirely neutral and allow people with more money to use their greater resources for access to more speech,[169] or such inequality should not distort societal debate and governmental efforts to equalize resources should be permitted and perhaps even required to promote a more fair public debate.[170] The government is already in the business of

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165 *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (arguing content-based restrictions generally are more dangerous than content-neutral restrictions because they are more likely to distort the "marketplace of ideas"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (arguing content-based restrictions are more dangerous because they are more likely to be enacted for the constitutionally impermissible purpose of suppressing "erroneous," "undesirable," or "unpopular" ideas). *But see* Martin S. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981) ("That governmental regulation impedes all forms of speech, rather than only selected viewpoints or subjects, does not alter the fact that the regulation impairs the free flow of expression. [C]onstitutional protection of speech [is] undermined by any limitation on expression, content-based or not.").

166 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (upholding federal requirements that cable television operators carry the signal of local broadcast stations by determining the requirements to be content-neutral). Speaker-based preferences require strict scrutiny only "when they reflect the Government's preference for the substance of what the favored speakers have to say . . . ." *Id.* at 658.

167 *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding a restriction on speech is unconstitutional unless it is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information").

168 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1135 (2d ed. 1988).

169 *See* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

170 *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an*

promoting "fairness" on the airwaves with the FCC authorized to not only regulate indecency, but also to monitor and restrict media ownership,[171] and thus the option of letting private market forces work unregulated is no longer available.[172] Furthermore, the Supreme Court has recognized as a legitimate interest achieving "the widest possible dissemination of information from diverse and antagonistic sources."[173] Therefore viewers of broadcast television are entitled to be exposed to such sources and have a right to have their opinion carry influence in the determination over whether content is indecent or not.[174]

C. *Embracing the Campaign Finance Law Rationale to End Sanitization's Anticompetitive Effect*

The rationale from the campaign finance case *Buckley v. Valeo*[175] is similarly based on antitrust principles[176] and helps to answer whether the speech of a corporation could be abridged to preserve the First Amendment freedoms of artists and viewers.[177] In *Buckley*, the Court confronted two questions: to what extent was the contribution or expenditure of money "speech" within the meaning of the First Amendment, and to what extent could the government regulate such activities in order to "enhance" the quality of public debate. The D.C. Circuit Court held that campaign finance limitations affirmatively enhanced First Amendment values and "broaden[ed] the choice of

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Obstacle to Political Equality?, 82 COLUM. L. REV. 609, 625 (1982) (arguing many scholars and jurists see political equality as "the cornerstone of American democracy").

171 *See* 47 U.S.C. § 303 (2000) (outlining the powers and duties of the FCC).

172 *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) (arguing for greater regulation of the media to promote free expression).

173 FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

174 *Cf.* THE FEDERALIST NO. 57 (James Madison) ("Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.").

175 424 U.S. 1 (1976).

176 *See* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 957 (1995) ("[S]peech regulation might be modeled on antitrust law. . . . This antitrust analogy [can be applied to] political campaign finance reform. Stopping rich candidates from buying elections and corporations from spending corporate wealth on politics is, in this view, simply the speech equivalent of the Sherman Act . . . .").

177 Daniel D. Polsby, Buckley v. Valeo*: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 5 (discussing that the fundamental question presented in Buckley was "where the speech opportunities of a group in the aggregate . . . could be maximized, enhanced, or even made initially possible only by abridging the speech of an individual, what (if anything) does the First Amendment command to be done?").

candidates and the opportunity to hear a variety of views."[178] In upholding the constitutionality of individual contribution limits and invalidating expenditure limitations, the Supreme Court concluded that the government cannot constitutionally restrict speech in order to simply eliminate imbalance in the marketplace, but held the "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association[179] than do [the] limitations on financial contributions."[180] Despite the Court's statement here, attempts at equalizing speech under circumstances where one party unfairly accumulates influence do exist, most notably with "one person, one vote."[181] If the Court readily accepts "equalizing speech" as consistent with the First Amendment, then viewers could be presented with all types of content and then allowed to "vote" for what they support by watching it and having Nielsen tabulate the results.[182]

However, even under *Buckley's* reasoning, justification exists for restricting advertiser withdrawals. The Court upheld the limitation on political contributions since it serves a "governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[183] The goal of preventing corruption in the political process is so that citizens believe in and

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[178] Buckley v. Valeo, 519 F.2d 821, 841 (D.C. Cir. 1975) ("By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office.").

[179] *Buckley*, 424 U.S. at 19 ("[A limit on expenditures] necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . [Therefore, these limitations] represent substantial . . . restraints on the quantity and diversity of political speech.").

[180] *Id.* at 23; *see id.* at 20-21 ("[A limit on contributions] entails only a marginal restriction upon the contributor's ability to engage in free communication. . . . [I]t permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.").

[181] *See* David A. Strauss, *Corruption, Equality, and Campaign Finance*, 94 COLUM. L. REV. 1369, 1383 (1994) ("'[O]ne person, one vote' is indeed the decisive counterexample to the suggestion [in Buckley] that the aspiration [of equalizing 'speech'] is foreign to the First Amendment. [This principle] reduc[ed] the speech of some to enhance the relative speech of others . . . ."). *But see* L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 268-69 ("[T]o attempt to tone down a debate . . . in the interest[] of enhancing the marketplace . . . . appears wildly at odds with the normal First Amendment belief that more speech is better.").

[182] *See* Bonifaz, *supra* note 153, at 67 ("[T]he value of a given advertisement spot is determined by the proportional share of total households tuned into a broadcast at a given time. Network sales agents and advertisers rely upon the scientific quantification of viewership provided by . . . Nielsen . . . when negotiating the price of different spots.").

[183] Buckley v. Valeo, 424 U.S. 1, 26-27 (holding the contribution limit to be a constitutionally sufficient interference since "[t]o the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined.").

participate in the system; in other words, so that citizens will vote.[184] Voters would lose faith in government if legitimate challengers could not participate and succeed in elections, and this perception similarly applies to viewers of network television.[185] Watching broadcast television may not be *as* important as participation in politics; however, an informed citizenry *is* a legitimate state interest, and participation in both processes helps to keep all citizens informed.[186] Therefore, preventing corruption in the broadcast information market is equally important, so that in the eyes of viewers, the legitimacy of network television as a medium of communication for diverse ideas is not lost. The usual concern that arises upon mention of regulating any form of expression is the antipaternalism principle that the government should not be shielding society from speech.[187] However, here, as in *Buckley*, the motive behind banning a corporation from "speaking" to disassociate themselves from a show deemed controversial is not to protect anyone from hearing expression and is instead to preserve the opportunity for others to have a fair opportunity to express themselves.[188]

D. *Utilizing Already Delegated Agency Authority to End the Monopolizing Effect of Sanitization*

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[184] If incumbent politicians could be bought off with large campaign contributions, then diverse candidates would be silenced without an ability to raise money for an equal platform to have their views noticed by potential voters.

[185] *See* Bonifaz, *supra* note 153, at 67 ("[T]he question is not whether the state can properly limit the amount of spending on campaigns, but rather how can the state preserve the rights of all classes in society to participate in self-government.").

[186] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994). Congress recognized the importance of broadcast television for all citizens by passing the must-carry provisions challenged here. It worried that a "'marked shift in market share' from broadcast to cable [would] continue to erode the advertising revenue base which sustains free local broadcast television, . . . and that, as a consequence, 'the economic viability of free local broadcast television and its ability to originate quality local programming [would] be seriously jeopardized.'" *Id.* at 634 (citations omitted).

[187] Vincent Blasi, *How Campaign Spending Limits Can be Reconciled With the First Amendment*, 7 THE RESPONSIVE COMMUNITY 1, 5-8 (1996-1997) ("Any effort to balance public debate or protect voters from too much campaign speech places government in the role of saving listeners from their own cognitive susceptibilities. Such paternalism in the realm of ideas is [constitutionally disfavored]. When campaign spending is regulated in order to reduce candidate fundraising chores rather than protect audiences, the traditional First Amendment antipaternalism principle is not implicated.").

[188] *See* Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 389 (1969) ("[T]o deny a station license because 'the public interest' requires it 'is not a denial of free speech.'") (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943)); *Turner Broad. Sys., Inc.*, 512 U.S. at 641 ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

The final point is merely to emphasize that besides the Department of Justice's Antitrust Prosecutorial Division, two federal agencies, the FCC and the FTC, already have broad statutory grants of authority that arguably put them in the position to regulate the concerted action of boycotting controversial content.[189] Under the Federal Trade Commission Act,[190] the FTC is permitted to prevent "[u]nfair methods of competition in interstate commerce,"[191] which already empowers them to regulate advertising.[192] Meanwhile, although occupied with its crusade against indecency, the FCC is empowered to achieve competition, diversity, and localism through its broadcast regulation,[193] goals which seem almost forgotten since each suffer if the censoring forces sanitize all content on network television at their discretion.[194] Moreover, since the FCC already has the power to limit media ownership from being in too few hands[195] so as to promote competition and "output diversity,"[196] then it should follow that it is within the FCC's authority to ensure the influence over network content is equally competitive and responsive to consumers with a diversity of broadcast content provided.[197]

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189 Recently the Supreme Court adopted the position that in the heavily regulated securities industry, securities laws implicitly preclude application of antitrust laws to allegedly collusive conduct. *See* Credit Suisse Sec. (USA) v. Billing, 127 S. Ct. 2383, 2396 (2007) (holding the extensive regulatory program enforced by the SEC means that "to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets."). Given that the factors discussed by the Court for determining whether application of antitrust laws is implicitly precluded revolve around the sensitivity of financial market activity, there is no reason to believe that such preclusion would *yet* extend into other regulated industries.

190 15 U.S.C. § 45(a)(1) (2000).

191 *See* FTC v. Royal Milling Co., 288 U.S. 212, 213 (1933).

192 *See* BLUMENTHAL & GOODENOUGH, *supra* note 5, at 429-30 ("Section 5(a)(1) of the Federal Trade Commission Act now prohibits . . . 'unfair or deceptive acts or practices in commerce,' and the Act gives the FTC the power to intervene and prevent them. These phrases have been interpreted to include false, misleading, or deceptive advertising.").

193 *See supra* note 52.

194 *See* Karst, *supra* note 49 (arguing commercial advertisers and broadcasters together contribute to an "editorial blandness" in order to avoid the headaches associated with controversial content); Judith A. Reisman (Bat-Ada), *Freedom of Speech as Mythology or Quill Pen and Parchment Thinking in an Electronic Environment*, 8 N.Y.U. REV. L. & SOC. CHANGE 275, 278-79 (1978-1979) (arguing that when social power is distributed to dominant groups, free speech tends to perpetuate the dominance of such groups, and that in light of widespread social and economic inequality, the notion of a "marketplace of ideas" breaks down).

195 *See* BENJAMIN, *supra* note 28, at 403-05.

196 *See* Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1043, 1054 (7th Cir. 1992) ("[Source diversity] refers to programming sources, that is producers, and [outlet diversity refers to] television stations. The two forms of diversity are related because the station decides what programs to air and therefore affects producers' decisions about what to produce.").

197 *See id*. ("A third . . . form of diversity is diversity in the programming itself; here 'diversity' refers to the variety or heterogeneity of programs. . . . [W]e assume that the Commission thinks of source diversity and outlet diversity as means to the end of programming diversity.").

CONCLUSION

The overreaching conflict addressed here is that three constituencies, serving their own agendas instead of the "public interest," unjustly manipulate all of the content produced and presented to American viewers on the major broadcast television networks. The Federal Communications Commission, anti-indecency advocacy groups, and companies purchasing advertising time during network broadcasts each use hefty fines, threats of boycotts, and sponsorship pull-outs, respectively, to scare network executives from ever putting potentially controversial programming on the air. This attempt to root out undefined "indecency" in the interest of the public not only deprives artists of their right of expression to a broad audience, but also deprives the viewers at home from their right to participate in a free and competitive market, and from allowing their choices as individual consumers to decide what succeeds in the marketplace.

With all three above-mentioned factions serving as checks on indecency, this alone should provide justification that if one faction was removed from the equation, the other two would still serve as sufficient "protectors of children." Either the FCC should stop regulating indecency since the free market can respond to it and limit it on its own, or the FCC should fine networks for airing indecent content and there should be no additional potential financial consequences. In 1927, Justice Louis Brandeis advised that the remedy for messages one disagrees with in entertainment is "more speech, not enforced silence."[198] When market power becomes concentrated in the hands of the few, a little extra regulation is oftentimes necessary to achieve a truly free marketplace with all individuals able to enjoy the intended benefits of unrestrained First Amendment expression.[199]

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198 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

199 *See* Steven H. Shiffrin, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 159 (1990) ("The first amendment speaks to the kind of people we are and the kind of people we aspire to be. . . . It plays an important role in the construction of an appealing story, a story about a nation that promotes an independent people, a nation that affords a place of refuge for peoples all over the globe, a nation that welcomes the iconoclast, a nation that respects, tolerates, and even sponsors dissent.").