The Pennsylvania State University

The Graduate School

Donald P. Bellisario College of Communications

BROADCASTING, THE FCC, AND PROGRAMMING REGULATION:

A NEW DIRECTION IN INDECENCY ENFORCEMENT

A Dissertation in

Mass Communications

by

David J. Weinert

© 2018 David J. Weinert

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Doctor of Philosophy

May 2018

The dissertation of David J. Weinert was reviewed and approved* by the following:

Robert D. Richards
John and Ann Curley Distinguished Professor of First Amendment Studies
Dissertation Advisor and Chair of Committee

Robert M. Frieden
Pioneer Chair and Professor of Telecommunications and Law

Matthew S. Jackson
Head, Department of Telecommunications and Associate Professor

Thomas M. Place
Professor of Law, The Dickinson School of Law at Penn State

Matthew P. McAllister
Chair of Graduate Programs and Professor

*Signatures are on file in the Graduate School

ABSTRACT

The U.S. Supreme Court, in June 2012, left broadcasters in a "holding pattern" by dodging the longstanding question of whether the Federal Communications Commission's broadcast indecency policy can survive constitutional scrutiny today given the vastly changed media landscape. The high court's narrow ruling in *FCC v. Fox Television Stations, Inc.* exonerated broadcasters for the specific on-air improprieties that brought the case to its attention, but did little to resolve the larger and more salient issue of whether such content regulations have become archaic. As a result, the Commission continues to police the broadcast airwaves, recently sanctioning a Roanoke, Virginia television station $325,000 for alleged broadcast indecency.

This dissertation yields an in-depth analysis and synthesis of the legal obstacles the FCC will encounter in attempting to establish any revamped policy governing broadcast indecency. It discusses the insuperable First Amendment considerations that will trouble the Commission in its efforts, including the current exceptions that swallow the rationale for the regulations and the dramatically changed media landscape that render them unsuccessful.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS .... **vii-viii**

CHAPTER 1: INTRODUCTION **1**

Broadcast Indecency Regulatory Recap **3**
Problem, Scope, and Purpose **10**
Roadmap of Chapters **10**
Research Questions **11**
Hypothesis **11**
Methodology **13**

CHAPTER 2: SURVEY OF THE LITERATURE **14**

Broadcast Scholarly Vehicles **15**
Changes in the Media Landscape **16**
Unique Approaches **28**
Academic, Constitutional, and First Amendment Journals **29**
Book Publication **38**
How Children Interact with Media Content **39**
The FCC, Broadcast Indecency, and America's War on Sex **44**
Blasphemy and Profanity **48**

CHAPTER 3: THE EVOLUTION OF BROADCAST REGULATION: A HISTORY OF EVENTS **51**

Early Activity **51**
The 1960s: Licensee Pacifica Foundation Rocks the Boat, But the Government Looks the Other Way **55**
The 1970s: The Jack Straw Memorial Foundation, and Jerry Garcia Push the Envelope: This Time, However, Government Guidance is Far Different **57**
The 1980s and 1990s: More Changes in FCC Enforcement Direction and Howard Stern Has a Target on His Back **68**
Year 2000 Brings with It New FCC Leadership in Michael Powell: Powell, Working in Concert with President George W. Bush, Initiate the Most Aggressive FCC Enforcement to Date **77**
The Commission Seeks Guidance on Direction of Broadcast Indecency Enforcement **96**

CHAPTER 4: SPECIAL INTEREST ACTIVIST GROUPS: TYRANNY OF THE MINORITY? **107**

Parents Television Council **107**
PTC Becomes Especially Visible Shortly After Y2K **108**
Other Special Interest Activist Groups **115**
Does the Threat of FCC Action, Prompted by the PTC, Similar Media Watchdog Organizations, and Advertisers, Chill Free Speech? **118**

CHAPTER 5: OVERVIEW OF THE FIRST AMENDMENT, PREMISES FOR FREE SPEECH, AND CONTENT-BASED RESTRICTIONS **128**

The Holmes Dissent **131**
Free Speech Theories **132**
Alternative Methodology for Free Speech Protection **137**
Vagueness and Overbreadth **143**
Content-Based Regulation and Judicial Review **147**

CHAPTER 6: FIRST AMENDMENT CHALLENGES THE FCC FACES WITH BROADCAST REGULATION IN THE 21ST CENTURY **154**

FCC Regulatory Authority **154**
Distinguishing Obscenity, Indecency, and Profanity **155**
Government Rationales for Broadcast Regulation **164**
Social Science and the "Harm" Theory **182**

CHAPTER 7: A NEW DIRECTION, GOING FORWARD: AFTER FOX II, NOW WHAT? **197**

Debunking Government Rationales for Broadcast Regulation **199**
Overturning Pacifica **202**
The FCC's Current Broadcast Regulatory Regime is Not Authorized by Pacifica **203**
The Second Circuit Finds the FCC's Current Broadcast Indecency Regulatory Regime Unconstitutional **204**
Judicial Review Under Strict Scrutiny **216**
Parity for Broadcasters **217**
Conclusion **220**
Future Research **221**

LIST OF REFERENCES **223**

Primary Sources **223**

Constitutions **223**
Court Cases **223**
Federal Statutes **233**

Secondary Sources **234**

Academic Journals **234**
Administrative Agency Reports **235**
Books **238**
Law Reviews and Legal Journals **242**
Magazines, Print Media, and Trade Publications **262**
Online Sources **263**

ACKNOWLEDGEMENTS

I would like to thank my doctoral committee members, Bob Richards, Rob Frieden, Matt Jackson, and Tom Place for their hard work, counsel, and motivation on this project. I owe deep gratitude to the committee for their patience, as I worked through the Ph.D. program while maintaining a rather rigorous full-time faculty assignment and teaching load within the College of Liberal Arts at Penn State-University Park (hereinafter PSU). Invaluable guidance from all committee members has allowed me to become a better researcher, writer, scholar, and ongoing student of media law and the First Amendment. Next, I would like to also thank Dean John Nichols for playing a significant role in my admittance to the doctoral program in Mass Communications at PSU. Extra special appreciation goes to Jim Dillard for hiring me as a faculty member within the Department of Communication Arts and Sciences, at PSU, in August 2007. Without the same ten-year employment opportunity, this project may have never happened. I would also thank educators from the past that have inspired me to learn, and grow, as a student and individual. They are: Robert Koskodan (Career Prep Center), Ernest Nolan (Madonna University), Chuck Derry (Madonna University), Art Timko (Eastern Michigan University), the late Tom Muth (Michigan State University),

the late Tom Baldwin (Michigan State University), and John Molloy (Michigan State University). Finally, all of the individuals mentioned above are class acts, talented educators, and, most important, good people. Academia, education, and higher learning are better because of them.

The legal scholar now confronts a dizzying array of competing disciplines and approaches. Law has become a sort of meeting ground for academic ideas and trends. And because it has become an interdisciplinary crossroads—affected and infected by so many different influences—law has become, as perhaps never before in American history, one of the most absorbing intellectual subjects.

—J.M. Balkin

CHAPTER 1

INTRODUCTION

The Federal Communications Commission (hereinafter FCC or Commission) has attempted to regulate broadcast programming since the 1930s.[1] Since then, the FCC has witnessed vast changes in societal culture,[2]

---

[1] For a detailed and descriptive chronicle of events, *see generally infra* Chapter 3, *The Evolution of Broadcast Regulation: A History of Events*. Also, it is important for the researcher note here, at the outset, that the focus of this dissertation is on the FCC's regulation of broadcast content (i.e., programming, not technical mandates).

[2] As consumers of electronic media programming content, we have evolved from a cultural period where Elvis Presley had to be shown from the "waist up" on The Ed Sullivan Show, and The Rolling Stones had to change song titles (i.e., on the same television program) in an effort to avoid offending the public at large, to a time where sex on television is almost commonplace and the use of four-letter words does not seem to shock most people. *See, e.g.*, Ed Boland, *F.Y.I.*, N.Y. TIMES, Aug. 11, 2002, at 14-2 ("Sullivan made the infamous decision to film him only from the torso up, so as not to shock the tender sensibilities of his viewers"); Elvis Presley, THE OFFICIAL ED SULLIVAN SITE, *available at* http://www.edsullivan.com/artists/elvis-presley (last visited May 31, 2017) ("Elvis's sexy gyrations had stirred up enough controversy across America that CBS censors demanded he be shot only from the waist up only!"); Fred Bronson, *A Selected Chronology of Musical Controversy*, BILLBOARD, Mar. 26, 1994, at N36 ("Elvis Presley makes his third and final appearance on "The Ed Sullivan Show," but the camera operators are directed not to pan below the waist"); The Rolling Stones, THE OFFICIAL ED SULLIVAN SITE, *available at* http://www.edsullivan.com/artists/the-rolling-stones (last visited May 31, 2017) (noting the original song title, "Let's Spend the Night Together," was changed to "Let's Spend Some Time Together"); THE FLORIDA HISTORICAL SOCIETY, Florida Frontiers, "Elvis Presley in Florida, 1956," *available at* https://myfloridahistory.org/frontiers/article/81 (last visited Aug. 24, 2017) ("Judge Marion Gooding threatened to have Presley arrested for "impairing the morals of minors" if he didn't restrict his "suggestive" movements during the Jacksonville performances." Years later, Presley, during his 1968 "Comeback Special" for NBC, commented on the same live musical performance experience in 1956, positing, "I was down in Florida, and the police decided to come out and film the show. So, I had to stand still. All I could move was this little finger, for the whole show"); ABC, Inc. v. FCC, 404 Fed. Appx. 530, 535 (2d Cir. 2011) ("In Fox, the FCC levied fines for fleeting, unscripted utterances of "fuck" and "shit" during live broadcasts"); Fox Television Stations v. F.C.C, 613 F.3d 317, 323 (2d Cir. 2010) ("For

emergence of celebrated broadcast personalities,[3] and now ultimately finds itself in an era of technological convergence.[4] All of the aforementioned historical changes have made First Amendment jurisprudence, as applied to broadcast regulation, a far more challenging task for the Commission and the courts.[5] The overarching question, now, is whether the constitutional

---

instance, during the 2002 Billboard Music Awards, Cher, in an unscripted moment from her acceptance speech, stated: "People have been telling me I'm on the way out every year, right? So, fuck `em." Similarly, during the 2003 Billboard Music Awards, Nicole Ritchie—on stage to present an award with Paris Hilton—made the following unscripted remark: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." Episodes of NYPD Blue were found indecent based on several instances of the word "bullshit," while the CBS's The Early Show was found indecent on the basis of a guest's use of the word "bullshitter" to describe a fellow contestant on the reality TV show, Survivor: Vanuatu"); Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007) ("During NBC's January 19, 2003, live broadcast of the Golden Globe Awards, musician Bono stated in his acceptance speech "[t]his is really, really, fucking brilliant. Really, really, great"); Sex on TV 4, THE HENRY J. KAISER FAMILY FOUNDATION, *available at* http://www.kff.org/other/event/sex-on-tv-4/ (last visited Aug. 24, 2017) (asserting that the number of televised sexual scenes has increased dramatically in recent years).

[3] *See infra* Chapter 3, nn.127-28 (discussing the success of commercial radio personality Howard Stern). *See also Who Are the Highest Paid Radio Hosts?*, RADIO INK, Oct. 5, 2017, *available at* https://radioink.com/2017/10/05/highest-paid-radio-hosts/?utm_source=ActiveCampaign&utm_medium=email&utm_content=If+You+Like+Being+Mediocre+-+Don (last visited Nov. 3, 2017) ("According to Forbes magazine, Howard Stern leads the pack, making $90 million between June 1, 2016, and June 1, 2017. Forbes says the SiriusXM host now has a net worth of $450 million"); *Howard Stern Net Worth*, CELEBRITY NET WORTH, *available at* https://www.celebritynetworth.com/richest-celebrities/howard-stern-net-worth/ (last visited Nov. 3, 2017) ("He is arguably the most successful radio host of all time").

[4] An example would be surfing the Internet on a smartphone. *See, e.g.*, John F. Gibbs & Todd G. Hartman, *Telecommunications in the 21st Century: The Regulation of Convergence Technologies: An Argument for Technologically Sensitive Regulation*, 27 WM. MITCHELL L. REV. 2193 (2001) (discussing governmental regulatory regimes as applied to new technologies).

[5] *See generally* Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching For Answers*, 76 ALB. L. REV. 631 (2012/2013) (noting that the U.S. Supreme Court, in 2009 and 2012, considered the FCC's regulatory regime as applied to broadcast indecency. In both cases, the high court avoided the constitutional issues); Marc S. Berger, *Keeping Pace with*

framework and freedom of speech applications for broadcast entities should now be examined in a far different light.

BROADCAST INDECENCY REGULATORY RECAP

With faded memories of the George Carlin[6] comedy routine broadcast in the early 1970s,[7] and the subsequent Pacifica Foundation landmark U.S. Supreme Court case that followed,[8] the FCC's regulatory regime for broadcast indecency was virtually silent for years.[9] The inception, however, of developing broadcast radio talent such as Howard Stern[10] seemed to awaken a sleeping governmental giant. On the heels of an aggressive FCC campaign, in the 1990s, to restrain the lionized Stern,[11] Fox Television aired two Billboard

---

the Expanding Internet: Can the Courts Keep Up?, 9 ALB. L. J. SCI. & TECH. 51 (1998) (discussing whether the judiciary can keep pace with the vast changes in technology).

[6] *See* THE OFFICIAL HOME OF GEORGE CARLIN, *available at* https://georgecarlin.com/ (last visited Aug. 26, 2017).

[7] *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978), at 751 (noting the transcript of the WBAI-FM Oct. 30, 1973 broadcast).

[8] *See* 438 U.S. 726 (1978).

[9] *See* KENNETH C. CREECH, ELECTRONIC MEDIA LAW & REGULATION 119 (2000) (observing that between 1975 and 1987, the FCC found no actionable cases for indecent programming).

[10] *See* THE OFFICIAL HOWARD STERN WEBSITE, *available at* https://www.howardstern.com/ (last visited Aug. 26, 2017).

[11] *See, e.g.*, New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987); In the Matter of Infinity Broadcasting, 2 F.C.C.R. 2705 (1987); In the Matter of Infinity Broadcasting Corporation, Inc., 5 F.C.C.R. 7291 (1990); Mr. Mel Karmazin, President, Infinity Broadcasting Corporation, 9 F.C.C.R. 1746 (1994); In the Matter of Infinity Broadcasting Corporation, 10 F.C.C.R. 12245 (1995).

Music Award Shows, shortly after the turn of the century, that raised red flags within the Enforcement Bureau of the Commission,[12] got the attention of newly appointed chief Michael Powell,[13] and energized well organized special interest activist groups such as the Parents Television Council (hereinafter PTC).[14] The Tiffany Network, CBS, then entered into the crosshairs of the FCC's enforcement arm, and President George W. Bush appointee Kevin Martin,[15] with its 2004 broadcast the National Football League's Super Bowl halftime show.[16] These aforementioned broadcast incidents served as a presage for the drama that soon filled judicial courtrooms,[17] in an ongoing legal battle that continues today.

---

12 *See, e.g.*, In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 18 F.C.C.R. 19859 (2003); In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 19 F.C.C.R. 4975 (2004); In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006).

13 *See* Biography of Michael K. Powell, FEDERAL COMMUNICATIONS COMMISSION, *available at* https://www.fcc.gov/biography-michael-k-powell (last visited June 10, 2017).

14 *See* PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/Main/ (last visited Aug. 27, 2017).

15 *See* Biography of Kevin J. Martin, FEDERAL COMMUNICATIONS COMMISSION, *available at* https://www.fcc.gov/biography-kevin-j-martin (last visited Aug. 27, 2017).

16 *See* In the Matter of Complaints Against Various Television Licensees' Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230, 19231 ¶ 2 (2004) (….“culminating in a performance by Ms. Jackson and Mr. Timberlake that concluded with Mr. Timberlake's removal of a portion of Ms. Jackson's bustier, exposing her breast to the camera”).

17 *See infra* notes 18, 22, 25, 26, 31, 35, 40, 44.

Fox Television got its first opportunity, in 2007, to test the Commission's broadcast regulatory regime and "fleeting expletives" in the U.S. Court of Appeals for the Second Circuit (hereinafter Second Circuit).[18] Although some advocates of free speech on the broadcast airwaves may have hoped for the court to address the constitutional issues surrounding the case, that never happened.[19] Instead, the court reasoned that the FCC's action was arbitrary and capricious, under the Administrative Procedures Act, for failing to articulate a reasoned basis for its change in policy.[20] With Fox Television having made a court appearance in response to Commission sanctions for broadcasting fleeting expletives on its Billboard Music Award Shows, CBS would then be forced to justify its infamous Janet Jackson Super Bowl incident.[21]

Attorneys for CBS, the following year, were called to answer for Janet Jackson's "wardrobe malfunction," aired during the 2004 Super Bowl.[22] Much to the chagrin of FCC chair Kevin Martin, the U.S. Court of Appeals for the Third Circuit (hereinafter Third Circuit) ruled in a fashion similar to that of the

---

[18] *See* Fox Television Stations v. FCC, 489 F.3d 444 (2d Cir. 2007).
[19] *Id.*
[20] *Id.* at 446.
[21] *See infra* note 22.
[22] *See* CBS v. FCC, 535 F.3d 167 (3d Cir. 2008).

Second Circuit one year earlier.[23] The determined Commission, however, would continue its fight in the U.S. Supreme Court.[24]

In 2009, the U.S. Supreme Court got its first chance (hereinafter Fox I), since the landmark 1978 *Pacifica*[25] case, to examine the FCC's regulatory regime for broadcast indecency.[26] Much like the above-noted Second and Third Circuit cases, industry insiders, and media law scholars, likely aspired for the high court to tackle the First Amendment issues overshadowing the case.[27] Once again, free speech pundits came away disappointed.[28] Opting instead to exercise constitutional avoidance, the court, in a narrow decision, decided that the Commission had not acted in an arbitrary and capricious manner in punishing Fox Television for its airing of fleeting expletives.[29] For all that, one year later, the Second Circuit would again examine broadcast indecency.[30]

Three years after the Second Circuit first examined the network broadcast of fleeting expletives, the same justices, in 2010, again ruled in favor

---

[23] *Id.* at 209 ("In finding CBS liable for a forfeiture penalty, the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency").
[24] *See supra* note 8.
[25] *Id*.
[26] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
[27] *See generally* Richards & Weinert, *supra* note 5.
[28] *Id*.
[29] *See supra* note 26 at 530.
[30] *See infra* note 31.

of Fox Television.[31] The court, citing an outdated Pacifica framework, and impermissibly vague regulatory guidance by the Commission, held that the FCC's broadcast regulatory regime was unconstitutional.[32] The court's decision was especially noteworthy given its language on the First Amendment underpinnings of the case.[33] The Second Circuit, as history would show, had not yet finished its work on broadcast indecency.[34]

A few months later, the Second Circuit considered whether the ABC network, having aired an episode of *NYPD Blue* which contained fleeting nudity, violated the Commission's policy for broadcast indecency.[35] Relying on its recent Fox Television decision,[36] the justices vacated the FCC's financial sanction for the fleeting nudity.[37] The fight was anything but over as the Second Circuit, then, passed the legal baton back to the Third Circuit.[38]

Having already examined the notorious 2004 Super Bowl halftime show performance with pop music stars Janet Jackson and Justin Timberlake a few

---

31 *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).
32 *Id.* at 330, 333.
33 *Id.*
34 *See infra* note 35.
35 *See* ABC v. FCC, 404 Fed. Appx. 530 (2d Cir. 2011).
36 *See supra* note 31.
37 *Id.* at 535.
38 *See infra* note 40.

years earlier,[39] justices for the Third Circuit again found themselves pondering the same CBS broadcast.[40] On remand from the U.S. Supreme Court, for its 2009 ruling in *Fox I*,[41] the court held that the Commission's $550,000 sanction against CBS was arbitrary and capricious, given the FCC's failure to make clear its policy change prior to the same financial penalty.[42] Still, the broadcast indecency drama was not over as the U.S. Supreme Court would hear arguments on this ongoing dilemma yet again.[43]

Hoping that the justices on the high court, in its second go-around in recent years (hereinafter Fox II),[44] would finally address the constitutional issues surrounding the Commission's broadcast indecency regulatory regime, advocates for free speech were turned away yet again.[45] In its 2012 review of the case, the court would this time avoid the First Amendment underpinnings by relying on the Due Process Clause of the Fifth Amendment.[46] Nonetheless,

---

[39] *See supra* note 22.
[40] *See* CBS v. FCC, 663 F.3d 122 (3d Cir. 2011).
[41] *See supra* note 26.
[42] *See supra* note 40 at 151-52.
[43] *See infra* note 44.
[44] *See* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012).
[45] *Id. See also generally* Richards & Weinert, *supra* note 5.
[46] *See supra* note 44 at 2320.

despite the less than sexy language of *Fox II*,[47] the court did encourage the FCC to reexamine its current broadcast indecency regulatory policy.[48]

Therefore, more than twenty years after the Commission began its campaign to silence the antics of commercial radio's arguably biggest star,[49] Howard Stern,[50] the same legal questions examined multiple times by the Second Circuit,[51] Third Circuit,[52] and U.S. Supreme Court,[53] and with this year marking the fortieth anniversary of the landmark *Pacifica*[54] case, we are still no closer to resolving the looming and pertinent First Amendment issues surrounding the FCC's current broadcast indecency regulatory regime.[55] Further, considering the media landscape that exists today,[56] broadcasters

---

[47] *See supra* note 44.
[48] *Id.* at 2320 ("…this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.").
[49] *See supra* note 3.
[50] *See supra* note 10.
[51] *See supra* notes 18, 31, 35.
[52] *See supra* notes 22, 40.
[53] *See supra* notes 26, 44.
[54] *See supra* note 8.
[55] *See generally infra* Chapter 5, *Overview of the First Amendment, Premises for Free Speech, and Content-Based Restrictions*; Chapter 6, *First Amendment Challenges the FCC Faces with Broadcast Regulation in the 21st Century*.
[56] *See* FCC v. Fox Television Stations, 129 S. Ct. 1800, 1819 (2009) (Thomas, J., opining about how the media landscape has changed markedly over time). *See also infra* Chapter 6, *Government Rationales for Broadcast Regulation*, for discussion of how the media landscape has transformed over the years.

remain unclear as to why they do not have the same First Amendment programming content parity as their competitors.[57]

PROBLEM, SCOPE, AND PURPOSE

The purpose of this dissertation is to examine how the ever-changing media landscape[58] affects the traditional regulatory models for broadcast programming. Policies of the past are seemingly no longer feasible. This study, therefore, will investigate Commission policies and associated court decisions (i.e., as applied to broadcast law and content regulation) and evaluate whether current FCC regulatory policy is consistent with the First Amendment to the United States Constitution. Chapter 2 probes scholarship in this area of media law with a survey of the literature. Chapter 3 chronicles the history of broadcast regulation by the United States government. Chapter 4 explores special interest activist groups and the role they play in (1) policing broadcast programming; (2) influencing Commission policy; and (3) impacting advertiser behavior. Chapter 5 provides an overview of the First Amendment, theories for free speech, and content-based speech restrictions. Chapter 6 investigates

---

[57] *See generally infra* Chapter 7, *A New Direction, Going Forward: After Fox II, Now What?*
[58] *See supra* note 56.

the constitutional hurdles the FCC will face in a 21st century media landscape. Finally, Chapter 7 proposes a new direction for Commission regulatory oversight, going forward.

This dissertation will argue that FCC guidance and enforcement of broadcast content regulation has been arbitrary, capricious, and unconstitutional. Specifically, it aims to answer the following research questions:

I. ***Does the change in the media landscape over the past four decades undermine the rationale for the government's indecency regulations?*** Yes. The research reveals a profound change in the overall media landscape with and through an explosion of technological advances. Accordingly, the three specific rationales that the FCC has used,[59] in concert with the courts, have essentially collapsed.[60]

II. ***Does continued enforcement of broadcast indecency regulations on broadcast licensees' amount to a violation of the First Amendment?*** Yes. The research shows that the Second Circuit, in 2010, found the FCC's current broadcast indecency regulatory regime to be unconstitutional.[61] While the U.S.

---

[59] Spectrum scarcity, unique pervasiveness, and potential "harm" to children. *See infra* note 60.
[60] *See infra* Chapter 6, *Government Rationales for Broadcast Regulation*.
[61] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 327 (2d Cir. 2010).

Supreme Court has, thus far, arguably eluded[62] the First Amendment issues surrounding this area of media law, continuing on the same trajectory would (1) chill speech at the heart of the First Amendment; and (2) undermine the freedom of expression that our democracy needs to survive.

III. ***Given the change in the media landscape, do broadcasters deserve First Amendment parity with other forms of both traditional and new media?*** Yes. The judiciary has now expressed grave concern about constitutional issues surrounding the Commission's current broadcast indecency regulatory regime.[63] Broadcasters, then, should now be recognized as having the same free speech parity as all media entities. As a result, any future FCC regulation of broadcast content would need to meet the judicial threshold of strict scrutiny.[64]

---

[62] Are some members of the U.S. Supreme Court reluctant to overrule Pacifica? To that end, observe the statement of Justice Samuel Alito at the oral argument of Fox II: "It's not going to be long before broadcast television goes the way of vinyl records and eight-track tapes…..[W]hy not just let this die a natural death? Why do you want us to intervene?" *See* Transcript of Oral Argument at 28, FCC v. Fox Television Stations, 132 S. Ct. 2307 (2012) (No. 10-1293).

[63] *See generally infra* Chapter 6, *First Amendment Challenges the FCC Faces with Broadcast Regulation in the 21st Century*.

[64] *See infra* Chapter 5, *Content-Based Regulation and Judicial Review*.

METHODOLOGY

Focusing on broadcast regulation, this study relied primarily[65] on doctrinal legal research methods.[66] Thorough court case analysis and synthesis was conducted.[67] In securing and examining court cases and FCC decisions, the researcher utilized an assortment of electronic library research tools and databases such as Federal Reporters, Federal Supplements, HeinOnline, various Internet resources, the Media Law Reporter, NexisLexis, the Telecommunications Law Resource Center, and Westlaw.

---

[65] It can also be argued that other methodological approaches have been incorporated. Examples include economic, historical, and sociological.

[66] *See* JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW 12 (1990) (noting that historical and legal research methods likely overlap when the aim is to understand and explain communication and the law).

[67] The researcher would note that part of this process involves examining legislative histories and the time periods in which various broadcast laws and regulations were enacted and promulgated.

CHAPTER 2

SURVEY OF THE LITERATURE

Federal Communications Commission regulation of broadcast indecency is not an undiscovered area of academic scholarship. While forty years have passed since the U.S. Supreme Court first examined the Commission's broadcast indecency regulatory regime,[1] this area of First Amendment jurisprudence remains rather ripe within the courts.[2] As a result, opportunities still exist for scholarly contribution to this area of mass communication law and policy.[3] Although it is not the objective of the researcher, and unnecessary, to analyze, synthesize, and critique hundreds of various publications already part of the body of literature in this area of First Amendment study,[4] it is fruitful, nonetheless, to discuss the more noteworthy

---

[1] *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[2] Within the last few years, cases were decided by the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and the U.S. Court of Appeals for the Third Circuit. *See, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012); ABC, Inc. v. FCC, 404 Fed. Appx. 530 (2d Cir. 2011); Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010); FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008); Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007).

[3] Additional ideas for future research are noted near the end of Chapter 7.

[4] Publications that are not directly topic-related, but instead fall around the periphery of the specific dissertation research questions, are noted near the end of the literature review.

academic scholarship below.[5] Going forward, therefore, this literature review, (1) will employ a thematic and chronological pattern; and (2) in an effort to narrow the same search in scope, focus on scholarly product that addresses the dissertation research questions. Specifically, publication was excluded that did not, as the main thrust of the scholarship, focus on the three dissertation research questions noted below.[6]

BROADCAST SCHOLARLY VEHICLES

Scholarship on the FCC's regulation of broadcast indecency has largely been deliberated in law review articles,[7] employing doctrinal legal research methods.[8] The same approach and scholarly product has also, at the same time, used historical research methodology[9] where appropriate.[10] Salient discussion

---

[5] While the researcher located hundreds of publications associated with the topic of this dissertation, only sources that are specifically within the scope of the research questions are included in the literature review. *See also Writing a Literature Review*, Feb. 17, 2005, *available at* https://s3.amazonaws.com/educ599/toolbox_resources/literature_review.pdf (last visited Nov. 3, 2017) ("The idea of the literature review is not to provide a summary of all the published work that relates to your research, but a survey of the most relevant and significant work").

[6] The researcher further notes that publication was excluded that was not "broadcast" in nature. Broadcast would denote radio and television (i.e., not the Internet). Also, the same three dissertation research questions are noted in Chapter 1.

[7] Book publication will be discussed later in the literature review.

[8] *See infra* notes 14-71 and accompanying text.

[9] *See, e.g.*, JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW 12 (1990) (noting historical and legal research methods likely overlap when the aim is to understand and explain communication and the law).

[10] *See, e.g.*, Steve Craig, *Out of Eden: The Legion of Decency, the FCC, & Mae West's 1937 Appearance on The Chase & Sanborn Hour*, 13 J. RAD. STUD. 232 (2006); F. Leslie Smith, *The Charlie Walker*

can likewise be found in academic journals and books.

CHANGES IN THE MEDIA LANDSCAPE

As discussed in Chapters 6 and 7, the government and the courts have used three primary justifications for the regulation of broadcast content.[11] In brief, those justifications include spectrum scarcity, unique pervasiveness, and the "harm-to-children" rationale.[12] Indeed, these aforementioned rationales are intimately connected to the first dissertation research question, noted below.

RESEARCH QUESTION I: *Does the change in the media landscape over the past four decades undermine the rationale for the government's indecency regulations?*

There are those whom have studied the justifications for broadcast regulation, and have likewise kept abreast of the legal developments in this area of media law.[13] For example, in 2013, attorney Barry Chase concluded in his article, *The FCC's Indecency Jurisdiction: A Stale Blemish on the First*

Case, 23 J. BROAD. 142 (1979); John C. Carlin, *The Rise & Fall of Topless Radio*, J. COMM. 31 (Winter 1976).

[11] *See infra* Chapter 6, *Government Rationales for Broadcast Regulation*; Chapter 7, *Debunking Government Rationales for Broadcast Regulation*.

[12] *Id*.

[13] *See infra* notes 14-163.

Amendment, that, "[i]f there were ever any utility to the argument that "broadcast" should be subject to lesser First Amendment protection than, say, newspapers, the argument has been so overtaken by technological and social developments that it is, by now, almost silly."[14] Chase, though, is not alone in his criticism that the justifications used, over time, even if once valid, are now questionable.[15] Blake Lawrence, argued, in 2010:

> The reasoning for speech regulation given in Pacifica and used by the FCC today is no longer viable given that many variables in broadcast media have changed since the 1970s."[16] Lawrence reasoned further, "the FCC still relies on the outdated, outmoded, and out of touch reasoning given in Pacifica to sanction indecent material. Broadcasting is no longer as "uniquely pervasive" or as "uniquely accessible" as it was in the late 1970s when Pacifica was decided. With the rise of parental control tools, parents can rest assured that accessible and effective means of limiting broadcasting exist. Further, Internet technology and the vast stores of information now available at anyone's fingertips prove that the world-wide-web, and not broadcasting, is now the most pervasive and accessible form of communication and expression."[17]

Echoing similar thoughts, in 2007, was Adam Thierer, a Senior Research Fellow with the Technology Policy Program at the Mercatus Center at George Mason

---

[14] *See* Barry Chase, *The FCC's Indecency Jurisdiction: A Stale Blemish on The First Amendment*, 39 OHIO N.U.L. REV. 697, 699 (2013).
[15] *See infra* notes 16-22.
[16] *See* Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148, 150 (2010).
[17] *Id.* at 178.

University.[18] In an article Thierer penned for *CommLaw Conspectus*, he maintained, among other things, "[e]ven if rationales for the unique regulation of broadcasting were once valid, modern marketplace realities and technological changes have undermined whatever remaining credibility they had."[19] One year earlier, lawyer Joshua Gordon analogously opined:

> Technology has eroded Pacifica's argument structure. New communications media are virtually indistinguishable, from the public's standpoint, from broadcast technology. Moreover, household level blocking technology provides parents with near absolute control over what content enters the home. Despite these facts, this argument structure alone continues to be used to justify applying a lower standard of review to broadcasting. In addition, the underlying premise of scarcity is susceptible to varied criticisms of its own and cannot, on its own, logically justify government regulation. Without a replacement argument structure, the Court would be left to reiterate the conceptual fallacy of inferring government power to regulate content from the fact of scarcity.[20]

In the *Berkeley Technology Law Journal*, author Matthew Holohan asserted, similarly:

> The technological underpinnings of the Pacifica decision have been rendered more or less obsolete by advances in communication technology and other changes in the way media programming is transmitted. These technological shifts, coupled with the dearth of evidence that indecent programming is actually harmful to children, calls into question

---

[18] *See infra* note 19.

[19] *See* Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM LAW CONSPECTUS 431, 434 (2007).

[20] *See* Joshua B. Gordon, *Pacifica Is Dead-Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1498 (2006).

> the viability of decreased protection for broadcasters in the indecency realm. The FCC's enforcement procedures are incompatible with current communications technology……[21]

Even former employees of the FCC have expressed concern over whether spectrum scarcity is a sound justification for Commission regulation of broadcast content.[22]

Others have called into question the theory that children, if exposed to broadcast content deemed indecent, would be harmed in some way.[23] Author Sarah Fallon has suggested, in her 2017 work, that children are routinely exposed to pornography.[24] Benjamin K. Bergen, a cognitive scientist and professor, in the Department of Cognitive Science at the University of

---

[21] *See* Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 368-69 (2005).

[22] *See, e.g.,* Emily Hagemann, *FCC Defines the Indefinable: Indecency*, 25 NEWS MEDIA & THE LAW 24 (Spr. 2001) ("Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue."); *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FEDERAL COMMUNICATIONS COMMISSION, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf (last visited July 1, 2017) ("This paper concludes that the Scarcity Rationale for regulating traditional broadcasting is no longer valid. The Scarcity Rationale is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology. It is outmoded in today's media marketplace. Perhaps in recognition of the Rationale's flaws, many variations of it have been attempted, but none fares much better under sensible, factual analysis.").

[23] *See infra* notes 24-39.

[24] *See* Sarah Fallon, *Your Kids Will See Internet Porn. Deal With It. A Conversation With Peggy Orenstein*, WIRED, *available at* https://www.wired.com/2017/08/kids-and-porn/ (last visited Aug. 23, 2017) ("The first thing I recognized when I started working on the new book was that the question to ask boys is not whether or if they watch porn. The question is, when was the first time they saw it? The most typical answer I get is 11, sometimes 13, sometimes younger").

California at San Diego, having done significant research on language studies, profanity, and the human brain, argued recently that profanity does not harm children.[25] Next, in 2013, Professors Kristin Jay and Timothy Jay discussed the "harm-to-children" theory.[26] Their study evidenced, among other things, that children routinely use words that courts (i.e., through their rulings) and the FCC (i.e., with and through its policies and subsequent regulations) have attempted to shield them from.[27] Moreover, Professors Timothy Jay and Kristin Janschewitz (now Jay), in 2012, published scholarly work that yielded similar conclusions.[28] But the mountain of evidence challenging the assumption that

---

[25] *See* BENJAMIN K. BERGEN, WHAT THE F: WHAT SWEARING REVEALS ABOUT OUR LANGUAGE, OUR BRAINS, AND OURSELVES (2016) ("Profanity leaves no such fingerprint on the child's psyche or future. Take the word *fuck*. How exactly can hearing fuck hurt a child? Proponents of censorship often claim that the language is "strong" or "offensive" or "immoral," but as we've seen, this means nothing other than that they themselves are offended by it or believe others might be. And there's no evidence that profanity of the Holy, Fucking, or Shit varieties harms children.").

[26] *See* Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 THE AMERICAN J. OF PSYCH., No. 4, 459 (Winter 2013).

[27] According to Professor Jay, examples of taboo words children, ages 1-12, use are as follows: Shit, fuck, (oh my) god, stupid, damn, jerk, suck(s), crap, hell, bitch, butt, hate you, shut up, asshole, fag(got), (Jesus) (Christ), dink, piss(ed), poopy, fart, bad, brat, poop head, cuckoo(head), scaredy-cat, boob(s) (y), gay, retard(ed), fr(i)(ee)k(en). *See id.* at 465. *See also* Derek Rose, Foul (Mouth) Ball. - *S.I. Must Win Today After F-Bombshell Coach Was Ready To Swear Off Series Following League's Rebuke*, N.Y. DAILY NEWS, Aug. 22, 2006, at 2 ("Down 1-0, 12-year-old outfielder Matt Davis yelled from the dugout, "We need to get one f-----g run.").

[28] Timothy Jay & Kristin Janschewitz, *The Science of Swearing,* ASSOCIATION FOR PSYCHOLOGICAL SCIENCE, May/June 2012, *available at* http://www.psychologicalscience.org/observer/the-science-of-swearing#.WW2ImMaZNE5 (last visited July 17, 2017) ("Courts presume harm from speech in cases involving discrimination or sexual harassment. The original justification for our obscenity laws was predicated on an unfounded assumption that speech can deprave or corrupt children, but there is little (if any) social-science data demonstrating that a word in and

indecent broadcast content supposedly harms children does not end there. Indeed, in a 2009 article,[29] Professor Timothy Jay argued that (1) there was no psychological harm from fleeting expletives;[30] and, further, (2) there are some

---

of itself causes harm;" "Our data show that swearing emerges by age two and becomes adult-like by ages 11 or 12. By the time children enter school, they have a working vocabulary of 30-40 offensive words. We have yet to determine what children know about the meanings of the words they use. We do know that younger children are likely to use milder offensive words than older children and adults, whose lexica may include more strongly offensive terms and words with more nuanced social and cultural meanings. We are currently collecting data to better understand the development of the child's swearing lexicon;" "We do not know exactly how children learn swear words, although this learning is an inevitable part of language learning, and it begins early in life. Whether or not children (and adults) swear, we know that they do acquire a contextually-bound swearing etiquette—the appropriate 'who, what, where, and when' of swearing. This etiquette determines the difference between amusing and insulting and needs to be studied further. Through interview data, we know that young adults report to have learned these words from parents, peers, and siblings, not from mass media.").

[29] Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCHOL. PUB. POL'Y & L. 81 (2009).

[30] *Id.* at 92 ("In recent years over a series of indecency violations, the FCC has issued a confusing series of judgments regarding the meaning of the word fuck. Originally the FCC ruled that Bono's fleeting expletive was an adjective and not indecent, but after thousands of complaints to the FCC, the commission ruled that "fucking brilliant" was indecent (decision FCC 06-17; FCC, 2006). However, in a later opinion, the FCC decided that indecent speech was permissible in the context of showing Saving Private Ryan on ABC TV. It reasoned that the language used in the film represented a realistic depiction of how soldiers spoke during World War II. The vacillating arbitrary and capricious nature of the FCC's rulings were successfully appealed in Fox Television Stations v. FCC, in 2007, which required the Commission to reconsider its decision-making process. If one purpose for the FCC is to protect children from indecent speech in broadcast content, then a current dilemma is to define unambiguously what constitutes "indecent" speech; that is, patently offensive sexual and excretory references. We raise an obvious question: What is the meaning of fuck? Is fuck always indecent? The FCC's contention that fuck always has a sexual meaning in all uses sits at odds with the Supreme Court's ruling in Cohen v. California (1971), where the phrase "fuck the draft" was given a political, as opposed to sexual, interpretation. Fairman (2007) examined the inconsistencies on the interpretation of fuck and demonstrated that the many of the modern uses of fuck are divorced from its earlier predominantly sexual denotation. Public swearing data indicate that the predominant use of fuck is to express emotional connotation (e.g., frustration, surprise) and not literal sexual denotation (*see* Jay, 1992; Jay & Danks, 1977; Jay & Janschwitz, 2007). We have recorded hundreds of incidences of children saying offensive words in public and private places (*see* Jay, 1992; Jay et al., 2006), making suspect assumptions that children are corrupted by fleeting expletives that they already know and use. Judicial reasoning in Pacifica is based

benefits to cursing.[31] Professor of Law at the University of California, Hastings College of Law, Ashutosh Bhagwat, in 2003, encouraged readers to ponder this issue on a number of levels.[32] Bhagwat maintained, given the arguments being used to justify broadcast content regulation, that there needed to be valid (1) empirical justifications as to *why* we are shielding children from sexually explicit material;[33] (2) consideration as to *who* should make such decisions (i.e., the parents or the State);[34] and (3) thought as to the federal government's

---

on the Justices' folk knowledge of offensiveness but not on any scientific evidence of harm from indecent speech. The offensiveness of indecent speech was sufficient to restrict indecent speech in Pacifica, but offensiveness is not a sufficient basis in cases involving sexual harassment or hate speech. There is no psychological evidence of harm from fleeting expletives. In the end, it appears that the FCC remains out of touch with millions of speakers, and with meaningful linguistic analyses of swearing in public, to impose its own notion on propriety on all of us. Unsupported beliefs about indecency are not unlike those underlying our approach to sexuality education in public schools.").

[31] *See supra* note 29 at 89-91.

[32] *See* Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL OF RTS. J. 671, 674 (2003) ("The case law on this subject is hopelessly ambiguous and, to a substantial extent, internally inconsistent. Nonetheless, the issue is an important one to resolve, because if properly analyzed, the constitutionality of many modem indecency regulations turns on whether the government has an independent interest in controlling children's access to indecent materials. In particular, the existence of such an independent interest is highly relevant to the constitutionality of statutes that directly censor indecent speech, as opposed to regulatory measures that merely enhance the effectiveness of parent-controlled screening devices. I argue, moreover, that the controversy and uncertainty in this area highlight a greater problem with the Supreme Court's constitutional jurisprudence: the lack of any coherent theory or approach towards evaluating governmental interests. Thus, the question of why the government is permitted to regulate indecent speech is interesting both intrinsically and because of the insights it offers into the current state of constitutional law.").

[33] *Id.* at 723.

[34] *Id.*

underlying interest in shielding children from indecent materials.[35] In 1992, Edward Donnerstein, Barbara Wilson, and Daniel Linz investigated the potential harm indecent broadcast content might have on children.[36] Much like the academic work noted above, they found no evidence of harm.[37] Even as far back as 1979, as a result of the landmark *Pacifica*[38] case, there are those who questioned the validity of using the "harm-to-children" rationale in policing broadcast content.[39] Still, others have differed with the masses.

In 2003, B. Chad Bungard, then Chief Counsel/Deputy Staff Director for the U.S. House of Representatives Committee on Government Reform

---

[35] *Id.* at 674.

[36] *See infra* note 37.

[37] *See* Edward Donnerstein, Barbara Wilson, & Daniel Linz, *On the Regulation of Broadcast Indecency to Protect Children*, 36 J. BROAD. & ELEC. MEDIA 111 (Winter 1992) ("Based on our review of the evidence we reach the following conclusions: (1) Few studies have been conducted to determine the effects of exposure to indecent materials on children up to the age of 18. Those studies that have been conducted do not show that such exposure has any effect, and thus do not demonstrate that exposure causes harm, however that term may be defined; (2) There is serious reason to doubt that exposure to such material has an effect on children up to age 12 in view of the general sexual illiteracy of this age group, their limited ability to understand sexual references, and their probable lack of interest in indecent materials; (3) Although adolescents 13-17 years old may understand indecent material, they are likely to have developed moral standards which, like adults, enable them to deal with broadcast content more critically. In general, studies of adult behavior fail to indicate any antisocial or harmful effects for indecent materials. We therefore see no reason to conclude any risk of harm should be associated with exposure to broadcast indecency.").

[38] *See supra* note 1.

[39] *See* Dabney Elizabeth Bragg, *Regulation of Programming Content to Protect Children after Pacifica,* 32 VAND. L. REV. 1377, 1415 (1979) ("The protection of children, while a desirable goal, is an insufficient justification for overriding the clear mandate of the First Amendment.").

Subcommittee on the Federal Workforce and Agency Organization, proclaimed:

> The protection of children and the empowerment of the parent to control what the child takes in are no less important simply because of the ubiquitous presence of indecent material in the information age. Protecting the child, therefore, remains a legitimate and important need for the continued regulation of "indecent" material, particularly in light of the invasive nature of broadcast media.[40]

Similarly, Professor of Law Allen S. Hammond,[41] in 1996, suggested that he believed empirical proof of harm to children, exposed to indecent broadcast content, would eventually surface.[42] Former FCC Chairman, Reed Hundt, the same year, likewise, suggested:

> To academics: Please understand that there are some programs society is rightfully not going to allow to be broadcast into people's homes unless parents can ensure that their children will not be able to watch them. If your constitutional theory cannot accommodate regulation of that sort, there is something wrong with your constitutional theory, as the Supreme Court's decision in FCC v. Pacifica Foundation shows.[43]

---

[40] *See* B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 194 (2006).

[41] *See* academic profile, Allen S. Hammond, IV, SANTA CLARA UNIVERSITY SCHOOL OF LAW, *available at* http://law.scu.edu/faculty/profile/hammond-allen/ (last visited Nov. 7, 2017).

[42] *See* Allen S. Hammond, IV, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 293 (1996) ("Even when many of the allegations of the media's adverse impact on children are proved-and I believe it is likely that they will be……").

[43] *See* Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters*, 45 DUKE L.J. 1089, 1118 (1996).

One only wonders, given the massive evidence noted above,[44] more than twenty years later, and no empirical evidence to support their theories, if Chief Council Bungard, Professor Hammond, and former FCC Chair Hundt still maintain the same intellectual posture.

RESEARCH QUESTION II: *Does continued enforcement of broadcast indecency regulations on broadcast licensees' amount to a violation of the First Amendment?*

Unlike the ample academic scholarship, noted above, that discusses the three primary justifications for the government's policing of broadcast content, there is a dearth of publication that, as its main theme,[45] examines whether the FCC's current and past regulation of broadcast content (i.e., as it relates to broadcast indecency) specifically violates the First Amendment. In one example, however, following *FCC v. Fox Television Stations, Inc.*,[46] in 2009, Syracuse University law student Stacy Katz discussed a number of issues related to the Commission's oversight of broadcast content.[47] A significant portion of Katz's article looked at the constitutional issues surrounding the

[44] *See supra* notes 24-39.
[45] Publication that mentions free speech applications (i.e., as part of scholarship of a larger magnitude) are noted near the end of the literature review.
[46] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
[47] *See* Stacy Katz, *The Lewd, Crude, or Partially Nude: Indecency Regulation, Fleeting Expletives, and the High Price We Pay for Not-So-Free "Free Speech*, 60 SYR. L. REV. 347 (2010).

government's policing of indecent broadcast programming. Katz argued, among other things, that (1) in expanding its authority regarding fleeting expletives, the FCC's policy was ultimately encouraging licensee self-censorship;[48] (2) the Commission's new fleeting expletive policy was not narrowly tailored;[49] (3) there is potential for heckler's veto abuses of special interest activist groups;[50] (4) contextual analysis of broadcast content leaves too much latitude for subjective FCC decisions;[51] (5) concepts such as "patently offensive," "contemporary community standards," and "average viewer," again, leave open the potential for government abuses in authority.[52] Differing with Katz, though, was author Abigail Rom.[53] Although Rom argued that the FCC's new fleeting expletive policy afforded the Commission with unprecedented, and perhaps unconstitutional, levels of discretion,[54] she also maintained that broadcast regulation is still warranted given the "basic

---

[48] *Id.* at 376.
[49] *Id.* at 378-81.
[50] *Id.* at 372-73.
[51] *Id.* at 373.
[52] *Id.* at 372.
[53] *See generally* Abigail T. Rom, *From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words You Can Never Say on Broadcast Television*, 44 VAL. U. L. REV. 705 (2010).
[54] *See id.* at 732-35.

rationales"[55] provided in the landmark *Pacifica*.[56] Specifically, Rom suggests that the public interest, convenience, and necessity[57] standard provides today's commission with all it needs to police broadcast airwaves for possible indecent content, and that the FCC's current regulatory regime *already* meets strict scrutiny.[58] As discussed in Chapters 6 and 7, some of Rom's views fail on a number of levels, and are, therefore, deeply flawed.

RESEARCH QUESTION III: *Given the change in the media landscape, do broadcasters deserve First Amendment parity with other forms of both traditional and new media?*

The researcher, after an exhaustive search, failed to locate any scholarly publication (i.e., in law reviews, academic articles, and books) that directly addressed whether broadcasters have now earned First Amendment parity with other forms of traditional and new media. That said, there is scholarship that mentions this concept as part of a larger discussion.[59] These publications, as before, will be noted next.[60]

---

[55] *Id.* at 735.
[56] *See supra* note 1.
[57] *See supra* note 53 at 735-40.
[58] *Id.* at 740-42.
[59] *See infra* note 60.
[60] *See infra* notes 62-71.

<u>UNIQUE APPROACHES</u>:

A rich and massive body of academic scholarship exists that investigates the aforementioned matters *as part of a larger deliberation of issues* surrounding the FCC's regulation of broadcast content.[61] This section, therefore, is organized into the following categories: In chronological order by year produced, publication that, *in part*, addresses (1) constitutional issues of broadcast content regulation; and (2) social science matters surrounding the "harm" rationale used by the FCC and courts. Scholarship included under the "constitutional issues umbrella" includes commentary involving First Amendment matters (e.g., void for vagueness, scarcity rationale, unique pervasiveness rationale, and technological/media convergence), and special interest activist group influence on public policy. The articles with social science underpinnings address whether the "harm-to-children" rationale (i.e., paternalism) used by the Commission and courts is viable.[62]

---

[61] *Id*.

[62] *See, e.g.,* Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 THE AMERICAN J. OF PSYCH., No. 4, 459 (Winter 2013); Jennifer Smith, *The Sixteenth Annual Frankel Lecture: Education Works! How Broadcast Fleeting Expletives Stimulate Comprehensive Sex Education for Our Youth*, 49 HOUS. L. REV. 161 (2012); Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777 (2011); Jessica C. Collins, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225 (2010); Timothy Jay, *Do Offensive Words Harm People?,* 15 PSYCH. PUB. POL. AND L. 81 (2009); Lili Levi, *When Does Government Regulation Go Too Far? The*

In many of the constitutional and First Amendment articles found, the authors make substantive arguments (1) after analyzing content from various broadcasts, that suggest indecency regulation was enforced in an arbitrary manner;[63] (2) that the indecency definition is unconstitutionally vague and overbroad (i.e., guidance provided by the Commission is unsound);[64] (3)

FCC's Affirmative Speech Obligations Promoting Child Welfare, 22 REGENT U.L. REV. 323 (2009); Eric J. Segall, *In the Name of the Children: Government Regulation of Indecency on the Radio, Television, and the Internet-Let's Stop the Madness*, 47 U. LOUISVILLE L. REV. 697 (2008); Jennifer E. Jones, *The Discriminatory Effects of Protecting America's Children*, 3 AM U. MODERN AM. 3 (2007); Morgan J. Lynn, *Indecency, Pornography, and the Protection of Children*, 7 GEO. J. GENDER & L. 701 (2006); Mira T. Ohm, *SEX 24/7: What's the Harm in Broadcast Indecency?,* 26 WOMEN'S RIGHTS L. REP. 167 (2005); Haven G. Ward, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Law Chapter: Indecency, Pornography, and the Protection of Children*, 6 GEO. J. GENDER & L. 315 (2005); Amitai Etzioni, *Do Children Have the Same First Amendment Rights as Adults?: On Protecting Children from Speech*, 79 CHI. KENT L. REV. 3 (2004); Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL OF RTS. J. 671 (2003); Nicole I. Khoury, *United States v. Playboy: Children and Sexually Explicit Material: Whose Problem Is It?,* 33 U. TOL. L. REV. 431 (2002); Monique Redford, *The Indecency of Unsolicited Sexually Explicit Email: A Comment on the Protection of Free Speech v. The Protection of Children*, 26 SEATTLE U. L. REV. 125 (2002); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000); Roxana Wizorek, *Children's Television: the FCC's Attempt to Educate America's Children May Force the Supreme Court to Reconsider the Red Lion Rationale*, 47 CATH. U.L. REV. 153 (1997); Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 VILL. SPORTS & ENT. L.J. 15 (1996); Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 HOFSTRA L. REV. 827-28 (1994); William Banks Wilhelm, Jr., *In the Interest of Children: Action for Children's Television v. FCC Improperly Delineating the Constitutional Limits of Broadcast Indecency Regulation*, 42 CATH. U.L. REV. 215 (1992); Edward Donnerstein, Barbara Wilson, & Daniel Linz, *On the Regulation of Broadcast Indecency to Protect Children*, 36 J. BROAD. & ELEC. MEDIA 111 (Winter 1992); Harvey Jassem & Theodore L. Glasser, *Children, Indecency and the Perils of Broadcasting: The 'Scared Straight' Case*, 60 J. QUAR. 509-12 (1983).

[63] *See, e.g.,* Seth T. Goldsamt, *Crucified by the FCC? Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J. LAW AND SOC. PROB. 203 (1995).

[64] *See, e.g.,* James F.X. Petrich, *Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography*, 16 GEO. J. GENDER & L. 81 (2015); Ellen Alexandra Eichner, *The Seven Dirty Words You Should Be Allowed to Say on Television*, 92 WASH. U. L. REV. 1353 (2015); Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency*

Regulation, 2013 MICH. ST. L. REV. 567 (2013); Barry Chase, *The FCC's Indecency Jurisdiction: A Stale Blemish on The First Amendment*, 39 OHIO N.U.L. REV. 697 (2013); Clay Calvert & Matthew D. Bunker, *An "Actual Problem" in First Amendment Jurisprudence? Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT. L.J. 391 (2012); Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287 (2012); Sarah Herman, *The Battle for the Remote Control - Has the FCC Indecency Policy Worn Out its Welcome in America's Living Room?*, 38 WASH. U. J.L. & POL'Y 357 (2012); Matthew D. Bunker, Clay Calvert, & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349 (2011); William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17 (2011); John W. Lees, F.U.C.K.: FCC's Unlimited Censorship Keeps-Going; When Will This Shit End?, 11 FL. COASTAL L. REV. 409 (2010); Elizabeth H. Steele, *Examining the FCC's Indecency Regulations in Light of Today's Technology*, 63 FED. COMM. L.J. 289 (2010); Elizabeth A. Pike, *Indecency, A La Carte, and the FCC's Approval of the Sirius XM Satellite Radio Merger: How the FCC Indirectly Regulated Indecent Content on Satellite Radio at the Expense of the "Public Interest,"* 18 U. MIAMI BUS. L. REV. 221 (2010); John F. Stephens & Matthew G. Stein, *The Future of the FCC's New Indecency Policy*, 33 LOS ANGELES LAWYER 14 (2010); William Arthur Wines & Mark E. Linebaugh, *Current Issues in Public Policy: An Analysis of the FCC's Ruling on Fleeting Profanities and Observations on the Road Ahead for the High Court*, 8 RUTGERS J.L. & PUB. POL'Y 73 (2010); Abner S. Greene, *Government Speech: The Government's Ability to Compel and Restrict Speech: Speech Platforms*, 61 CASE W. RES. 1253 (2011); Shelly Rosenfeld, *An Indecent Proposal? What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry*, 12 TEX. REV. ENT. & SPORTS L. 225 (2011); Jordan Butler, *The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency*, 39 CAP. U.L. REV. 621 (2011); Kyle A. Beckman, *Why the FCC Failed Geography: The Constitutionality of its Fleeting Expletives Policy Does Not Rise, but Sets Over (The) Pacifica*, 41 CUMB. L. REV. 283 (2011); Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. (2011); Hannibal Travis, *The FCC's New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417 (2011); Shelly Rosenfeld, *An Indecent Proposal? What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry*, 12 TEX. REV. ENT. & SPORTS L. 225 (2011); Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148 (2011); John W. Lees, F.U.C.K.: FCC's Unlimited Censorship Keeps-Going; When Will This Shit End?, 11 FL. COASTAL L. REV. 409 (2010); William Arthur Wines & Mark E. Linebaugh, *Current Issues in Public Policy: an Analysis of the FCC's Ruling on Fleeting Profanities and Observations on the Road Ahead for the High Court*, 8 RUTGERS J.L. & PUB. POL'Y 73 (2010); Trent Franks, *Media and the Law Symposium: When does Government Regulation Go Too Far?: Address: Panel Address: Protecting the Innocent while Preserving Speech: a Balancing Act of Media Regulation*, 22 REGENT U.L. REV. 301 (2010); Adam Candeub, *Media and the Law Symposium: When Does Government Regulation Go Too Far?: Essay: Shall Those Who Live by FCC Indecency Complaints Die by FCC Indecency Complaints*?, 22 REGENT U.L. REV. 307 (2010); Stacy Katz, *The Lewd, Crude, or Partially Nude: Indecency Regulation, Fleeting Expletives, and the High Price We Pay for Not-So-Free "Free Speech*, 60 SYRACUSE L. REV. 347 (2010); Abigail T. Rom, *From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words*

You Can Never Say on Broadcast Television, 44 VAL. U.L. REV. 705 (2010); Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 COMM LAW CONSPECTUS 771 (2009); Dave E. Hutchinson, *"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation*, 61 FED. COMM. L.J. 229 (2009); Michael Kaneb, *Neither Realistic Nor Constitutionally Sound: The Problem of the FCC's Community Standard for Broadcast Indecency Determinations*, 49 B.C. L. REV 1081 (2008); Paige Connor Worsham, *So Easily Offended? A First Amendment Analysis of the FCC's Evolving Regulation of Broadcast Indecency and Standards for Our Contemporary Community*, 6 FIRST AMEND. L. REV. 378 (2008); Edward L. Carter, R. Trevor Hall & James C. Phillips, *Broadcast Profanity and the "Right to Be Let Alone": Can the FCC Regulate Non-Indecent Fleeting Expletives Under a Privacy Model*?, 31 HASTINGS COMM. & ENT. L.J. 1 (2008); Mark Conrad, *"Fleeting Expletives" and Sports Broadcasts: A Legal Nightmare Needs a Safe Harbor*, 18 J. LEGAL ASPECTS OF SPORT 175 (2008); Lindsay Weiss, *S!*t, P*@s, C*t, F*#k, C*@!s*&!er, M*!#$ *@!*#r, T*!s - The FCC's Crackdown on Indecency*, 28 J. NAT'L ASS'N L. JUD. 577 (2008); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008); Courtney Livingston Quale, *Hear An [Expletive], There An [Expletive], But[t]...The Federal Communications Commission Will Not Let You Say An [Expletive]*, 45 WILLAMETTE L. REV. 207 (2008); Matthew S. Schneider, *Silenced: the Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves is Monopolization*, 29 CARDOZO L. REV. 891 (2007); Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007); Amy Kristin Sanders, *When is Enough Too Much? The Broadcast Decency Enforcement Act of 2005 and the Eighth Amendment's Prohibition on Excessive Fines*, 2 DUKE J. CONST. LAW & PUB. POL'Y 75 (2007); Genelle I. Belmas, Gail D. Love & Brian C. Foy, *In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67 (2007); Clay Calvert, *Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority Over Content*, 30 HASTINGS COMM. & ENT. L.J. 1 (2007); Marjorie Heins & Eric M. Freedman, *Reclaiming the First Amendment: Constitutional Theories of Media Reform*, 35 HOFSTRA L. REV. 917 (2007); Kurt Hunt, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. TECH. L. REV. 223 (2007); Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services*, 13 RICH. J.L. & TECH. 17 (2007); Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. LJ 191(2006); Samantha Mortlock, *What the [Expletive Deleted] is a Broadcaster to Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193 (2006); Anthony E. Varona, *Not From Concentrate? Media Regulation at the Turn of the Millennium Symposium: Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149 (2006); Joshua B. Gordon, *Pacifica is Dead. Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451 (2006); Sharokh Sheik, *FCC Indecency Violations: Should the FCC Be Able to Fine Non-Broadcast Licensees for Indecency Violations*?, 35 Sw. U. L. Rev. 457 (2006); B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 195 (2006); Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look to Crackdown on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167 (2006); Matthew Bloom, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based*

Media, 9 YALE J. L. & TECH. 109 (2006); Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U.L. REV. 1463 (2005); Clay Calvert, *The First Amendment, the Media and the Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325 (2005); Clay Calvert, *Payola, Pundits, and the Press: Weighing the Pros and Cons of FCC Regulation*, 13 COMM LAW CONSPECTUS 245 (2005); Matthew A. Klopp, *Constitutional Malfunction: Does the FCC's Authority to Revoke a Broadcaster's License Violate the First Amendment?*, 13 COMM LAW CONSPECTUS 309 (2005); Lindsay LaVine, *Legislative Update: The Lion, the Witch (Hunt) and the Wardrobe Malfunction: Congress's Crackdown on Television Indecency*, 15 DEPAUL-LCA J. ART & ENT. L. 385 (2005); Reed Hundt, *Regulating Indecency: The Federal Communication Commission's Threat to the First Amendment*, DUKE L. & TECH. REV. 13 (2005); Faith Sparr, *From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMEND. L. REV. 207 (2005); Abner Greene, William Davenport, Jeffrey Hoeh, C. Edwin Baker, Paul J. McGeady & John Fiorini, III, *Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087 (2005); Brian J. Rooder, *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); Stephanie L. Reinhart, *The Dirty Words You Cannot Say on Television: does the First Amendment Prohibit Congress from Banning all use of Certain Words*?, U. ILL. L. REV. 989 (2005); Shilpa Mathew, *The Fear-Causing Commission and its Reign of Terror: Examining the Constitutionality of the FCC's Authority to Regulate Speech Under the First Amendment*, 26 LOY. L.A. ENT. L. REV. 107 (2005); Jennifer L. Marino, More *"Filthy Words' But No "Free Passes" for the Cost of Doing Business: New Legislation is the Best Regulation for Broadcast Indecency*, 15 SETON HALL J. OF SPORTS & ENT. L. 135 (2005); Ian J. Antonoff, *You Don't Like It….Change the (Expletive Deleted) Channel!: An Analysis of the Constitutional Issues that Plague FCC Enforcement Actions and a Proposal for Deregulation in Favor of Direct Consumer Control*, 15 SETON HALL J. OF SPORTS & ENT. L. 253 (2005); Mehmet Konar-Steenberg, *The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine*, 8 VAND. J. ENT. & TECH. L. 45 (2005); Noelle Coates, *The Fear Factor: How FCC Fines are Chilling Free Speech*, 14 WM. & MARY BILL OF RTS. J. 775 (2005); Mira T. Ohm, SEX 24/7: *What's the Harm in Broadcast Indecency*?, 26 WOMEN'S RIGHTS L. REP. 167 (2005); Treasa Chidester, *What the # & is Happening on Television? Indecency in Broadcasting*, 13 COMM LAW CONSPECTUS 135 (2004); Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183 (2004); Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE UNIV. L. R. 61 (2004); Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1 (2004); Jacob T. Rigney, *Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 FED. COMM. L.J. 297 (2003); Kate McSweeny, *Hijacking the First Amendment for Economic Gain: The Federal Communications Commission , the Consolidation of the Public Airwaves, and Smut: A Comment on the State of the Broadcast Industry*, 11 GEO. MASON L. REV. 609 (2003); Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 GA. ST. U.L. REV. 671 (2002); Kelly M. Slavitt, *Content-Based Regulation of Electronic Media: Indecent Speech on the Internet*, 21 J. MARSHALL J. COMPUTER & INFO. L. 19 (2002); Chad Davidson, *Constitutional Law--First Amendment--Government Must*

Demonstrate that There Is Not a Less Restrictive Alternative Before a Content-Based Restriction of Protected Speech Can Survive Strict Scrutiny, 70 MISS. L.J. 457 (2000); Stephen J. Shapiro, *One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, 8 MEDIA L. & POL'Y 1 (1999); Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998); Milagros Rivera-Sanchez, *How Far Is Too Far? The Line Between "Offensive" and "Indecent" Speech*, 49 FED. COMM. L.J. 327 (1997); Eric S. Slater, *Broadcasting on the Internet: Legal Issues for Traditional and Internet-Only Broadcasters*, 6 MEDIA L. & POL'Y 25 (1997); Andrew Spett, *A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet*, 26 GOLDEN GATE U.L. REV. 599 (1996); Jonathan Weinberg, *Vagueness and Indecency* 3 VILL. SPORTS & ENT. L. FORUM 221 (1996); C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VIL. SPORTS ENT. L. FORUM 45 (1996); Brett Ferenchak, *Regulating Indecent Broadcasting: Setting Sail from Safe Harbors Or Sunk by the V-Chip*?, 30 U. RICH. L. REV. 831 (1996); Alec Harrell, *Who Cares About Prior Restraint? An Analysis of the FCC's Enforcement of Indecency Forfeiture Orders*, 70 S. CAL. L. REV. 239 (1996); Allen S. Hammond, IV, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259 (1996); Fred H. Cate, *Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression,* J. ONLINE L. ART. 5 (1995); Tara Phelan, *Selective Hearing: A Challenge to the FCC's Indecency Policy*, 12 N.Y.L. SCH. J. HUM. RTS. 347 (1995); Jason Kay, *Sexuality, Live Without a Net: Regulating Obscenity and Indecency on the Global Network*, 4 S. CAL. INTERDIS. L.J. 355 (1995); James H. Quello, *Special Issue on the Sixtieth Anniversary of the Communications Act of 1934: The Future of Broadcast Regulation*, 47 FED. COMM. L.J. 341 (1994); Steven Nudelman, *A Chilly Wait in Radioland: the FCC Forces "Indecent" Radio Broadcasters to Censor Themselves Or Face the Music*, 2 J.L. & POL'Y 115 (1994); Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1103 (1993); Wade Kerrigan, *FCC Regulation of the Radio Industry: A Safe Harbor for Indecent Programming?*, 79 IOWA L. REV. 143 (1993); Wade Kerrigan, *FCC Regulation and the Radio Industry: A Safe Harbor for Indecent Programming*?, 79 IOWA L. REV. 143 (1993); Jeremy H. Lipschultz, *Conceptual Problems of Broadcast Indecency Policy and Application*, COMM. & THE LAW 3-29 (1992); Richard Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited—what does the Future Hold for the Seven "Dirty" Words?*, 65 TUL. L. REV. 131 (1990); Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U.L. REV. 299 (1989); John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U.L. REV. 329 (1989); Paul J. Feldman, *The FCC and Regulation of Broadcast Indecency*: Is There a National Broadcast Standard in the Audience?, 41 FED. COMM. L.J. 369 (1989); Jay A. Gayoso, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality From the Airwaves*, 43 U. MIAMI L. REV. 871 (1989); Helene T. Schrier, *A Solution to Indecency on the Airwaves*, 41 FED. COMM. L.J. 69 (1988); Donald E. Lively, *Deregulatory Illusions and Broadcasting: the First Amendment's Enduring Forked Tongue*, 66 N.C.L. REV. 963 (1988); Laurence H. Winer, *The Signal Cable Sends, Interference From the Indecency Cases?*, 55 FORDHAM L. REV. 459 (1987); L. Allyn Dixon, Jr., *Broadcasters' First Amendment Rights: A New Approach?*, 39 VAND. L. REV. 323 (1986); Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606 (1983); Daniel L. Brenner, *Censoring the Airwaves: The Supreme Court's Pacifica Decision, in* FREE BUT REGULATED: CONFLICTING

concluding the FCC has not been consistent with its regulation of program content;[65] (4) in their First Amendment jurisprudence scholarship, assessing the scarcity rationale and whether scarcity is now, given the massive changes in the media landscape, anachronistic (i.e., the authors infer that scarcity was either a flawed justification for broadcast regulation, or that it no longer exists);[66] and (5) deliberating the unique pervasiveness justification for broadcast regulatory oversight (i.e., the overwhelming trend is to argue for the rights of broadcasters when considering the concept of a captive audience).[67] Some authors have made contributions to this area of mass communication law and policy by focusing on specific court opinions (i.e., after the opinions in key cases have been issued).[68] Consistent with their scholarly colleagues, the

---

TRADITIONS IN MEDIA LAW, 175-80 (D.L. Brenner & W.L. Rivers ed., 1982); Theodore L. Glasser & Harvey Jassem, *Indecent Broadcasts and the Listener's Right of Privacy*, 24 J. BROAD. 285-99 (1980); Viktor V. Pohorelsky, *Constitutional Law—First Amendment—FCC may Regulate Broadcast of Non-Obscene Speech,*53 TUL. L. REV. 273 (1978); Susan Wing, *Morality and Broadcasting: FCC Control of 'Indecent' Material Following Pacifica*, 31 FED. COMM. L.J. 145-73 (1978); Charles Feldman & Stanley Tickton, *Obscene/Indecent Programming: Regulation of Ambiguity*, 20 J. BROAD. 273-81 (1976) (most articles use a hybrid approach and advocate for the free expression rights of broadcasters).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See, e.g.,* Clay Calvert, Minch Minchin, Keran Billaud, Kevin Bruckenstein, & Tershone Phillips, *Indecency Four Years After Fox Television Stations: From Big Papi to a Porn Star, an Egregious Mess at the FCC Continues*, 51 U. RICH. L. REV. 329 (2017); Jamil Aslam, *Taking Free Speech Siriusly: How the Modern Appearance of Personalities on Various Media Supports Overturning Red Lion and Pacifica*, 22 UCLA ENT. L. REV. 133 (2015); Alison Nemeth, *The FCC's Broadcast Indecency Policy on "Fleeting Expletives" After the Supreme Court's Latest Decision in FCC v. Fox Television Stations: Sustainable or Also "Fleeting?"*, 21 COMMLAW CONSPECTUS 394 (2013); Jon

Mills, *The Due Process Clause of the Fifth Amendment Requires Fair Notice of What Violates Federal Agency's Indecency Standards. Fed. Commons Comm'n v. Fox Television Stations, Inc.*, 43 CUMB. L. REV. 573 (2012); David Houska, *Indecent Exposure: FCC v. Fox and the End of An Era*, 7 DUKE J. CONST. LAW & PP SIDEBAR 193 (2012); Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 WASH. U. L. REV. 279 (2012); Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469 (2012); Clay Calvert, *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More than a Half-Century Later*, 64 FED. COMM. L.J. 247 (2012); Clay Calvert, Matthew D. Bunker and Kimberly Bissellx, *Social Science, Media Effects & The Supreme Court: Is Communication Research Relevant After Brown v. Entertainment Merchants Association?*, 19 UCLA ENT. L. REV. 293 (2012); John P. Elwood, Jeremy C. Marwell, & Eric A. White, *FCC, Fox, and That Other F-Word*, 2011-12 CATO SUP. CT. REV. 281 (2011); John V. O'Grady, *The End of Indecency? The Second Circuit Invalidates the FCC's Indecency Policy in Fox Television Stations, Inc. v. FCC*, 18 VILL. SPORTS & ENT. L.J. 527 (2011); Francis Marsico III, *The Fate of Indecency? The Constitutional Issue Presented by Fox Television Stations, Inc. v. Federal Communications Commission*, 21 Fordham Intell. Prop. Media & Ent. L.J. 1033 (2011); W. Wat Hopkins, *When Does F*** Not Mean F***?: FCC v. Fox Television Stations and a Call for Protecting Emotive Speech*, 64 FED. COMM. L.J. 1 (2011); Christopher Hiserman, *Silencing Fox: The Chilling Effect of the FCC's Indecent Speech Policy*, 52 B.C. L. REV. E. SUPP. 15 (2011); John V. O'Grady, *The End of Indecency? The Second Circuit Invalidates the FCC's Indecency Policy in Fox Television Stations, Inc. v. FCC*, 18 VILL. SPORTS & ENT. L.J. 527 (2011); *Second Circuit Strikes Down the FCC's Indecency Policy as Void for Vagueness—Fox Television Stations, Inc. v. FCC*, 613 F.3D 317 (2d Cir. 2010), 124 HARV. L. REV. 835 (2011); Thomas W. Hazlett, Sarah Oh, & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010); Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148 (2010); David Lee, *How Detailed of an Explanation is Required When an Administrative Agency Changes an Existing Policy? Implications and Analysis of FCC v. Fox Television Stations, Inc. on Administrative Law Making and Television Broadcasters*, 30 J. NAT'L ASS'N L. JUD. 681 (2010); Brittany A. Roof, *The Federal Communication Commission's New Enforcement Policy, Which Penalizes Broadcasters for Airing Even a "Fleeting Expletive" in Violation of the Statutory Indecency Ban, Is Not Arbitrary and Capricious Under the Administrative Procedure Act: FCC v. Fox Television Stations, Inc.*, 48 DUQ. L. REV. 699 (2010); Samuel G. Brooks, *FCC v. Fox Television Stations and the Role of Logical Error in Hard Look Review*, B.Y.U.L. REV. 687 (2010); Brittany A. Roof, *The Federal Communication Commission's New Enforcement Policy, Which Penalizes Broadcasters for Airing Even a "Fleeting Expletive" in Violation of the Statutory Indecency Ban, Is Not Arbitrary and Capricious Under the Administrative Procedure Act: FCC v. Fox Television Stations, Inc.*, 48 DUQ. L. REV. 699 (Summer 2010); Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy Over Broadcast Indecency*, 63 FED. COMM. L.J. 195, (2010); Brandon J. Almas, *From One [Expletive] Policy to the Next: The FCC's Regulation of "Fleeting Expletives" and the Supreme Court's Response,* 63 FED. COMM. L.J. 261 (2010); Chad M. Muir, *Case Comment: Bleeping Expletives: Adequate Protection of the Public Or Unjustified Censorship*?, 21 U. FLA. J.L. & PUB. POL'Y 331 (2010); David Lee, *How Detailed of an Explanation is Required When an Administrative Agency Changes an Existing Policy? Implications and Analysis of FCC v. Fox Television Stations, Inc. on*

predominant focus is to aver on behalf of media entities and question the viability of FCC rationales for broadcast oversight. Alternatively, there are those who, as the aim of their writings, have examined media convergence and how such changes in technology has complicated the First Amendment (i.e., while First Amendment applications have traditionally been applied given the

---

Administrative Law Making and Television Broadcasters, 30 J. NAT'L ASS'N L. JUD. 681 (2010); Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?*, 47 SAN DIEGO L. REV. 737 (2010); Robert Corn-Revere, *Speech and Elections: FCC v. Fox Television Stations, Inc.: Awaiting the Next Act*, CATO SUP. CT. REV. 295 (2009); Toby Coleman, *Explaining Change and Rethinking Dirty Words: FCC v. Fox Television Stations, Inc.*, 4 DUKE J. CONST. LAW & PUB. POL'Y 71 (2009); Albert W. Vanderlaan, Sending a Message to the Other Branches: Why the Second and Third Circuits Properly Used the APA to Rule on Fleeting Expletives and How the New FCC Can Undo the Damage, 34 VT. L. REV. 447 (2009); Justin Winquist, *Arbitrary and F****** Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in Fox Television Stations, Inc.* v. FCC, 57 AM. U.L. REV. 723 (2008); Michael Strocko, *Just a Concern for Good Manners: The Second Circuit Strikes Down the FCC's Broadcast Indecency Regime*, 17 U. MIAMI BUS. L. REV. 155 (2008); Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1 (2007); Daniel Mark Cohen, *Unhappy Anniversary: Thirty Years since Miller V. California: The Legacy of the Supreme Court's Misjudgment on Obscenity part*, 15 ST. THOMAS L. REV. 545 (2003); James Mahanna, *United States v. Playboy Entertainment Group, Inc. A Controversy Resolved; Indecent Speech Receives Full First Amendment Protection*, 21 QUINNIPIAC L. REV. 453 (2002); April Bailey Cole, *Indecency on the Internet: Reno and the Communications Decency Act of 1996*, 27 CAP. U.L. REV. 607 (1999); Christine C. Peaslee, *Action for Children's Television v. FCC: Indecency Fines and the Broadcast Medium-When Subsequent Punishments Become Prior Restraints; A Subsequent Restraint Review*, 20 W. NEW ENG. L. REV. 241 (1998); John Matosky, *Current Developments in the Law: Shea on Behalf of American Reporter v. Reno, Section 223(d) of the Communications Decency Act of 1996, a Total Ban on Constitutionally Protected Indecent Communication Among Adults, is Unconstitutionally Overbroad*, 6 B.U. PUB. INT. L.J. 812 (1997); Laurence H. Winer, *The Red Lion of Cable, and Beyond?--Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT L.J. 1 (1997); Jeremy Harris Lipschultz, *The Influence of the United States Court of Appeals for the District of Columbia Circuit on Broadcast Indecency Policy*, 3 VILL. SPORTS & ENT. L.J. 65 (1996); Jeffrey L. Reed, *Recent Development: Constitutional Law—First Amendment Protected for Indecent Speech—Dial-a-Porn: Sable Communications of California, Inc. v. FCC*, 57 TENN. L. REV. 339 (1990).

specific platform of the speech, media convergence has changed that).[69] Finally, a number of articles investigate and assess the overall impact special interest activist groups (e.g., the PTC) might have on government policy

[69] *See, e.g.,* Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM LAW CONSPECTUS 431 (2007); John C. Quale & Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite,* 60 FED. COMM. L.J. 37 (2007); Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?,* 34 PEPP. L. REV. 743 (2007); E. Judson Jennings*, Show & Tell on the Internet: Will Janet & George Set the Standard? FCC Censorship & Converging Technologies*, 17 SETON HALL J. SPORTS & ENT. L. 1 (2007); Josephine Soriano, *The Digital Transition and the First Amendment: Is it Time to Reevaluate Red Lion's Scarcity Rationale?,* 15 B.U. PUB. INT. L.J. 341 (2006); Jessica E. Elliott, *Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?*, 5 CONN. PUB. INT. L.J. 263 (2006); Gregory B. Phillips, *Indecent Content on Satellite Radio: Should the FCC Step In?,* 26 LOY. L.A. ENT. L. REV. 237 (2006); Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L. J. 243 (2006); Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341 (2005); Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment,* 10 COMM. L. & POL'Y 179 (2005); Brian J. Rooder, *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); Andrew Sperry, *Smut In Space: The FCC And Free Speech On Satellite Radio,* 17 LOY. CONSUMER L. REV. 531 (2005); Dana Duffield, *Mixed Media: Conflicting Community Standards for Indecency for Broadcast, Cable and the Internet,* 15 DEPAUL-LCA J. ART & ENT. L. 141 (2004); Otilio Gonzalez, *Regulating Objectionable Content in Multimedia Platforms: Will Convergence Require a Balance of Responsibilities between Senders and Receivers*?, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 609 (2004); Khaldoun Shobaki, *Speech Restraints for Converged Media*, 52 UCLA L. REV. 333 (2004); Emily Vander Wilt, *Considering COPA: A Look at Congress's Second Attempt to Regulate Indecency on the Internet,* 11 VA. J. SOC. POL'Y & L. 373 (2004); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003); Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. TECH. L. REV. 35 (1998); Marie A. Ryan, *To V or Not to V-That is the Regulatory Question: The Role of the V-Chip in Government Regulation of Broadcast and Cable Indecency*, 4 CARDOZO WOMEN'S L.J. 137 (1997); Robert W. Peters, *There is a Need to Regulate Indecency on the Internet,* 6 CORNELL J. L. & PUB. POL'Y 363 (1997); Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321 (1997).

formation, as it relates to the regulation of broadcast programming.[70] The same publication concluded that well-organized special interest activist groups, like the PTC, while minority in status, can, through pressuring techniques, seemingly effect changes in the FCC's regulatory regime.[71]

BOOK PUBLICATION

To date, some books[72] have been dedicated to (1) government oversight of broadcast programming and indecent content; (2) the study of indecent

[70] *See infra* note 71.

[71] *See, e.g.,* Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with Its President, Tim Winter*, 33 HASTINGS COMM. & ENT. L.J. 293 (2011); Patricia Daza, *FCC Regulation: Indecency by Interest Groups*, 3 DUKE L. & TECH. REV. (2008); Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113 (2005); Philip M. Napoli, *The Federal Communications Commission and Broadcast Policy-Making—1966-95: A Logistic Regression Analysis of Interest Group Influence*, 5 COMM. L. & POL'Y 203 (2000).

[72] *See, e.g.,* JEREMY H. LIPSCHULTZ, BROADCAST AND INTERNET INDECENCY (2008); MARTY KLEIN, AMERICA'S WAR ON SEX (2008); KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS (2006); KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (2006); PAUL RUSCHMANN, THE FCC AND REGULATING INDECENCY (2005); DAVID BUCKINGHAM & SARA BRAGG, YOUNG PEOPLE, SEX AND THE MEDIA (2004); JUDITH LEVINE, HARMFUL TO MINORS (2003); ROBERT L. HILLIARD & MICHAEL C. KEITH, DIRTY DISCOURSE: SEX AND INDECENCY IN AMERICAN RADIO (2003); VICTOR C. STRASBURGER & BARBARA J. WILSON, CHILDREN, ADOLESCENTS, AND THE MEDIA (2002); DOROTHY G. SINGER & JEROME L. SINGER, HANDBOOK OF CHILDREN AND THE MEDIA (2001); MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001); CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT (2000); TIMOTHY JAY, WHY WE CURSE (2000); JEREMY H. LIPSCHULTZ, BROADCAST INDECENCY: FCC REGULATION AND THE FIRST AMENDMENT (1997); MARJORIE HEINS, SEX, SIN, AND BLASPHEMY (1993); TIMOTHY JAY, CURSING IN AMERICA (1992); ANDREA MILLWOOD HARGRAVE, A MATTER OF MANNERS: THE LIMITS OF BROADCASTING LANGUAGE (1991); GEOFFREY HUGHES, SWEARING (1991).

language; and (3) how children interact with media content. It is important to note that, unlike the law review articles noted above, books are almost always much more informative than they are persuasive. The aim of the author's discourse is to educate more than "win over" the reader. Notable books are divided into three categories, in chronological order, by year produced: (1) How Children Interact with Media Content; (2) The FCC, Broadcast Indecency, and America's War on Sex; and (3) Blasphemy and Profanity. They are as follows:

HOW CHILDREN INTERACT WITH MEDIA CONTENT

Victor C. Strasburger, Barbara J. Wilson, and Amy B. Jordan, in their 2014 *Children, Adolescents, and the Media*,[73] documented, scientifically, how children interact with the various forms of media content, media technology, video games, and the Internet.[74] Pertinent to this dissertation research, is that it is sometimes difficult to gauge, the authors argue, scientifically, and attribute just how future behaviors of children were impacted by being exposed to the various forms of media content noted above.[75] In fact, the same academics

---

[73] VICTOR C. STRASBURGER, BARBARA J. WILSON, & AMY B. JORDAN, CHILDREN, ADOLESCENTS, AND THE MEDIA (2014).
[74] *See generally id.*
[75] *Id.* at 247-49.

suggest that instead of uncovering answers to much needed questions in this area of academic scholarship, often, more questions emerge.[76] This is largely due to the barriers that often exist with this type of research.[77]

In 2012, Dorothy B. Singer and Jerome L. Singer, with the help of numerous academics, penned the second edition of *Handbook of Children and the Media*.[78] In it, Dale Kunkel and Brian L. Wilcox maintain that while there has been a plethora of research done that strongly suggests violent broadcast content and video images have a subsequent effect on the behaviors of children, due to ethical concerns, there is scant empirical evidence that broadcast programming deemed indecent would harm children.[79] Especially ironic, Kunkel and Wilcox conclude that the federal government has been especially interested in policing alleged broadcast indecent content and not nearly as aggressive in the oversight of televised violent content, and how the same violence might impact the behaviors of children.[80]

Roger J.R. Levesque, in *Adolescents, Media, and the Law,*[81] distinguishes

---

[76] *Id.*

[77] Academics have long suggested that conducting research that involves children being exposed to "adult" media programming is very difficult, if not impossible, given the obvious ethical considerations of exposing children to such content.

[78] DOROTHY G. SINGER & JEROME L. SINGER, HANDBOOK OF CHILDREN AND THE MEDIA (2012).

[79] *Id.* at 577.

[80] *Id*.

[81] ROGER J.R. LEVESQUE, ADOLESCENTS, MEDIA, AND THE LAW (2007).

obscenity from indecency, and examines the various cases the U.S. Supreme Court has entertained related to broadcast programming.[82] He also reminds us that the high court first addressed the "harm" rationale, as it relates to children, in *Prince v. Massachusetts*,[83] later used by the court in *Butler v. Michigan*,[84] *Ginsberg v. New York*,[85] and *Reno v. ACLU*.[86] Levesque contends, among other things, that more research needs to be done on adolescents' right to receive information.[87]

Saving Our Children from the First Amendment, by Kevin W. Saunders,[88] explores free speech underpinnings and how the First Amendment plays a pivotal role in the lives of children.[89] Saunders argues that the First Amendment should fundamentally operate differently for children and adults.[90] He has also authored law review articles with the same theme.[91]

---

[82] *Id.* at 172-80.
[83] 321 U.S. 158 (1944).
[84] 352 U.S. 380 (1957).
[85] 390 U.S. 629 (1968).
[86] 521 U.S. 844 (1997).
[87] *See supra* note 81 at 231.
[88] KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (2007).
[89] *See generally id*.
[90] *See supra* note 88 at 2.
[91] *Id.* at xi.

David Buckingham and Sara Bragg, in their 2004 *Young People, Sex and the Media: The Facts of Life?*,[92] elaborate on the qualitative studies they performed in the United Kingdom involving how children interact with media.[93] The authors, through the research noted above, conclude: (1) children frequently encounter sexual content in the media;[94] (2) the material children encounter is diverse in regard to the 'messages' sent;[95] (3) children value media as a source of information;[96] (4) children don't trust the media and are more literate than anticipated;[97] (5) while children are aware of media regulation, they prefer to make their own judgments;[98] (6) children learn about sex and relationships from the media;[99] (7) younger children don't always understand sexual references or connotations;[100] (8) morality is a key concern for children;[101] (9) there were significant differences between boys and girls in their

---

[92] DAVID BUCKINGHAM & SARA BRAGG, YOUNG PEOPLE, SEX AND THE MEDIA: THE FACTS OF LIFE? (2004).
[93] *See generally id*.
[94] *See id.* at 237.
[95] *Id*. at 237-38.
[96] *Id*. at 238.
[97] *Id.* at 238-39.
[98] *Id.* at 239.
[99] *Id.* at 239.
[100] *Id*. at 240.
[101] *Id.* at 240.

perspectives;[102] and (10) influence of the media depends on the contexts of use.[103]

Judith Levine, in *Harmful to Minors: The Perils of Protecting Children from Sex*,[104] argues that American cultural forces tend to suppress children's access to information about human sexuality.[105] The rationale for the same preventative control is something the Commission (i.e., as well as some courts) has used to justify indecency regulation: "harm" that children would endure after being exposed to sexually-laden broadcast programming content.[106] Levine argues, further, that children would likely benefit from information about sexuality.[107]

In 2001, First Amendment lawyer, writer, and founder of the Free Expression Policy Project,[108] Marjorie Heins published, *Not in Front of the Children: Indecency, Censorship, and the Innocence of Youth*.[109] A staunch advocate for freedom of speech, Heins examines indecency, first, from a historical

---

[102] *Id.* at 240-41.
[103] *Id. at* 241.
[104] JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2003).
[105] *See generally id*.
[106] *See supra* note 104 at xxxi.
[107] *Id.* at xxxiii.
[108] *See* THE FREE EXPRESSION POLICY PROJECT, *available at* http://www.fepproject.org (last visited May 7, 2017).
[109] MAJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001).

perspective,[110] followed by her review of the more pertinent court cases involving indecency,[111] FCC regulation of broadcast content,[112] Howard Stern,[113] and any effects of indecency on children.[114] Heins concluded that one of the key justifications for indecency regulation by the Commission and the courts, potential "harm" to children, has been fundamentally misguided.[115]

THE FCC, BROADCAST INDECENCY, AND AMERICA'S WAR ON SEX

Dr. Marty Klein is a certified sex therapist and author of five books, including, *America's War on Sex: The Attack on Law, Lust and Liberty*, in 2008.[116] The publication investigates the sex education of children,[117] broadcast indecency,[118] pornography,[119] and American culture wars.[120] Klein maintains that the U.S. government, through its broadcast enforcement regime, is

---

[110] *Id*. at 3-14.
[111] *Id*. at chapters 3, 4, 5.
[112] *Id*. at chapter 4.
[113] *Id*. at chapter 5.
[114] *Id*. at chapter 10.
[115] *See, e.g., id.* at 15 ("The notion that young people need special protection from improper ideas was not a moral tenet of the ancient world….The ancient Greeks associated children with grossness and lewdness, not innocence. Youngsters had to be tamed and educated, but not kept ignorant of sexual realities."); *see also generally* 254-63.
[116] MARTY KLEIN, AMERICA'S WAR ON SEX: THE ATTACK ON LAW, LUST AND LIBERTY (2008).
[117] *Id.* at 5-25.
[118] *Id.* at 51-72.
[119] *Id.* at 123-42.
[120] *Id.* at 1-4, 25-28, 95-102, 173-76.

uncomfortable with media content that explores sexual themes in contexts that may be considered nonclinical in nature.[121] He challenges readers to think critically about the role government may play in censoring media producers engaged in disseminating such programming.[122]

University of Nebraska Omaha Professor, Jeremy Lipshultz, in 2008,[123] probed governmental regulation of electronic media content in his book, *Broadcast and Internet Indecency: Defining Free Speech*.[124] Lipshultz looks at the historical foundations of American broadcasting,[125] discusses the landmark court decisions surrounding broadcast indecency,[126] ponders new emerging technologies and how the same electronic dissemination entities might change how the FCC regulates program content,[127] and political and religious issues involving indecent programming.[128] The book is an exhaustive analysis and synthesis of how the Commission has handled broadcast indecency issues, in

---

121 *See generally supra* note 116.
122 *Id*.
123 Professor Lipschultz wrote a similar book, in 1997, titled, *Broadcast Indecency: FCC Regulation and the First Amendment*, which examined similar issues surrounding the FCC's oversight of broadcast indecency.
124 JEREMY H. LIPSHULTZ, BROADCAST AND INTERNET INDECENCY: DEFINING FREE SPEECH (2008).
125 *Id.* at 17-47.
126 *Id.* at 76-94.
127 *Id.* at 95-116.
128 *Id.* at 145-58.

broadcast and the Internet platforms, from a legal and social perspective.[129]

Kimberly Zarkin and Michael Zarkin, in their book, *The Federal Communications Commission: Front Line in the Culture and Regulation Wars*,[130] explore, among other things, the function of the FCC.[131] The same scholarship includes a detailed look at the origin and purpose of the agency,[132] controversies of telephone regulation and associated court cases,[133] and a timeline of U.S. Supreme Court decisions that the Commission has been involved in since 1930.[134]

In *The FCC and Regulating Indecency*,[135] legal analyst, lawyer, and writer, Paul Ruschmann argues both sides of salient problems with Commission regulation of broadcast content[136] and questions (1) whether the U.S. government should protect children from allegedly indecent broadcasts;[137] (2)

---

[129] *See generally supra* note 124. Unlike the writing Professor Lipshultz has done in law review articles and academic journals, writing in his books seemingly avoid strong persuasion and thesis statements. Instead, his books tend to catalog information.

[130] KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS (2006).

[131] *See generally id.* The authors conclude, in the preface, that the book is aimed at cataloging information. However, as they wrote the book, the main theme, as the authors describe in the preface, is: "Any thorough discussion of the FCC should include four interrelated components: people, policy, politics, and procedures.

[132] *Id.* at 1-26.

[133] *Id.* at 59-77.

[134] *Id.* at 207-20.

[135] PAUL RUSCHMANN, THE FCC AND REGULATING INDECENCY (2005).

[136] *See generally id*.

[137] *See id.* at 24-35.

whether current FCC rules governing indecency are legally sound;[138] (3) if the same Commission rules for indecent content should apply across all forms of electronic media distribution;[139] (4) whether indecency relations should be abolished altogether;[140] and (5) the future of indecency regulation.[141]

Three years before penning *The Federal Communications Commission: Front Line in the Culture and Regulation War,* Professor Kimberly Zarkin finished, *Anti-Indecency Groups and the Federal Communications Commission: A Study in the Politics of Broadcast Regulation*.[142] Zarkin's aim with her 2003 book was to document the history of indecency regulation,[143] and look closely at well organized, high-powered special interest activist organizations such as Morality in Media and The American Family Association.[144] Ultimately, Zarkin encourages the reader to think critically about the role special interest activist groups play in FCC regulation of media entities.[145]

---

138 *Id.* at 36-47.
139 *Id.* at 48-61.
140 *Id.* at 62-71.
141 *Id.* at 94-109.
142 KIMBERLY ZARKIN, ANTI-INDECENCY GROUPS AND THE FEDERAL COMMUNICATIONS COMMISSION: A STUDY IN THE POLITICS OF BROADCAST REGULATION (2003).
143 *Id.* at 35-60.
144 *Id.* at 63-82.
145 *Id.* at 113-27.

BLASPHEMY AND PROFANITY[146]

One of the key areas of media regulation that the Commission has been monitoring, closely, in recent years is profanity.[147] As such, it seems appropriate to explore the more notable books published.

Cognitive Scientist, and professor at the University of California at San Diego, Benjamin Bergen, authored, *What the F: What Swearing Reveals About Our Language, Our Brains, and Ourselves*.[148] In his book, Bergen examines why we swear, how cursing allows us to express very strong human emotions, at times of anger, fear, and passion.[149] Bergen argues that, "bad words are powerful—emotionally, physiologically, psychologically, and socially."[150] "What does exposure to bad words do to our brains? Our children's brains?"[151] Ultimately, Bergen maintains that profanity has no harmful effect on children.[152]

Psychology Professor Timothy Jay, in *Why We Curse: A Neuro-Psych-Social Theory of Speech*,[153] delves into theories as to why we, as human beings,

---

[146] A common misperception is that blasphemy and profanity are analogous. *See infra* note 161 at 3.
[147] *See, e.g.,* Fox Television v. FCC, 489 F.3d 444 (2d Cir. 2007).
[148] BENJAMIN K. BERGEN, WHAT THE F: WHAT SWEARING REVEALS ABOUT OUR LANGUAGE, OUR BRAINS, AND OURSELVES (2016).
[149] *See generally id*.
[150] *Id.* at 1.
[151] *Id.*
[152] *Id.* at 224.
[153] TIMOTHY JAY, WHY WE CURSE: A NEURO-PSYCH-SOCIAL THEORY OF SPEECH (2000).

swear.[154] He first uncovers neurological factors,[155] then psychological factors,[156] and ends with an examination of social and cultural reasons as to why we curse.[157] Jay concludes that we swear, in a neurological sense, to express strong emotions verbally where non-curse words would not otherwise permit one to exhaust and exercise the same emotion.[158] At the psychological level, one's personality, child rearing, and genetic makeup play a significant role as it relates to swearing.[159] And when we consider a sociocultural perspective, according to Jay, culture and socioeconomic status are important to forming "norms" as to what is acceptably normative.[160]

Eight years earlier, in 1992, Professor Jay wrote *Cursing in America*.[161] In this publication, Professor Jay examines swearing from a psychological and linguistic perspective.[162] He helps the reader understand how "foul" language relates to censorship, free speech, and the First Amendment.[163]

---

[154] *See generally id*.
[155] *See id.* at 33-77.
[156] *Id.* at 81-143.
[157] *Id.* at 147-241.
[158] *Id.* at 243-45.
[159] *Id.*
[160] *Id.* at 244-45.
[161] TIMOTHY JAY, CURSING IN AMERICA (1992).
[162] *See generally id*.
[163] *Id*.

Chapter 3 now examines the rich history of governmental regulation of broadcast indecency. The same historical events provide a conceptual foundation for later chapters.

CHAPTER 3

THE EVOLUTION OF BROADCAST REGULATION: A HISTORY OF EVENTS

Government oversight of broadcast content has taken place for more than eighty-five years.[1] What follows is a succinct timeline of early activity:

- In 1910, Congress passed the Wireless Ship Act, followed by the Radio Act of 1912.[2]

- In the early 1920s, radio broadcasting became very popular. The resulting emergence of numerus unregulated radio stations, unfortunately, produced technical chaos and interference.[3] As a result, based on the Interstate Commerce Clause in the U.S. Constitution, Congress passed the Radio Act of 1927, creating the Federal Radio Commission (hereinafter FRC).[4] The FRC was the first government authority which oversaw the assignment of radio frequencies, eliminating the technical chaos and operation on unassigned spaces on the electromagnetic spectrum.[5]

---

[1] *See infra* note 11.
[2] *See* KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS 4 (2006).
[3] *See* GENELLE I. BELMAS, JASON M. SHEPARD, & WAYNE E. OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 473 (2016).
[4] *Id.*
[5] *Id.*

- President Franklin D. Roosevelt, in 1934, asked Congress to create the Federal Communications Commission.[6] A few months later, Congress passed the 1934 Communications Act.[7]

- FCC authority to regulate broadcast programming stems from Title 18, Section 1464 of the United States Code which prohibits broadcasting "obscene, indecent or profane language" and provides monetary punishments, two year's imprisonment, or both.[8] Moreover, section 303 of the 1934 Communications Act gives the FCC the requisite power to regulate program content.[9] That said, it is important to note that section 326 of the 1934 Act prohibits censorship by the FCC.[10]

- Commission guidance, and court jurisprudence dates back to the 1930s with a reprimand from the U.S. Court of Appeals for the 9th Circuit.[11] This early case involved a judgment from a federal district court in Oregon that convicted Robert Duncan

---

[6] *See* FEDERAL COMMUNICATIONS COMMISSION, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-298207A1.pdf (last visited Nov. 13, 2017) ("I recommend that the Congress create a new agency to be known as the Federal Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission-the services affected to be all of those which rely on-wires, cables, or radio as a medium of transmission.").

[7] *See supra* note 2 at 5.

[8] 18 U.S.C. § 1464 (2017).

[9] 47 U.S.C. § 303 (2017) ("Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—False or deceptive signals or communications, or a call signal or letter which has not been assigned by proper authority to the station he is operating.").

[10] *Id.* at § 326 (2017) ("Nothing in this Act shall be understood or construed to give this Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

[11] *See* Duncan v. United States, 48 F.2d 128 (9th Cir. 1931).

of profanity,[12] ranting about local political corruption, in violation of section 29 of the Radio Act of 1927.[13]

- A few years later, NBC Radio entered into troubled waters when Mae West, promoting one of her motion pictures on the *Edgar Bergen Show*, "suggestively" spiced up the reading of an Adam and Eve skit.[14]

- In 1952, the National Association of Broadcasters issued a "broadcasting code" that forbade "offensive language, vulgarity, illicit sexual relations, sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience."[15]

- The King of Rock 'n' Roll, Elvis Presley, not long after, came under fire for gyrating his waistline,[16] apparently too suggestive for broadcast network television at the time.[17] Executives at CBS, apparently motivated by recent "controversy" Presley had created, mandated that the singer, in his third appearance on the show, be shot by television cameras from the waist up only.[18]

- WDKD in Kingstree, South Carolina, in the late 1950s, received unwanted FCC attention for content allegedly aired on the

---

[12] *Id.* at 134. ("Under these decisions, the indictment having alleged that the language is profane, the defendant having referred to an individual as "damned," having used the expression "By God" irreverently, and having announced his intention to call down the curse of God upon certain individuals, was properly convicted of using profane language within the meaning of that term as used in the act of Congress prohibiting the use of profane language in radio broadcasting.")

[13] *Id.* at 129.

[14] *See generally* Steve Craig, *Out of Eden: The Legion of Decency, the FCC, & Mae West's 1937 Appearance on The Chase & Sanborn Hour*, 13 J. RAD. STUD. 232-34 (2006) (noting that the broadcast resulted in NBC receiving a "letter of reprimand" from the FCC).

[15] *See, e.g.*, TIMOTHY B. JAY, WE DID WHAT?! OFFENSIVE AND INAPPROPRIATE BEHAVIOR IN AMERICAN HISTORY 316-17 (2016); MAJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH 92 (2001).

[16] *See* Ed Boland, *F.Y.I.*, N.Y. TIMES, Aug. 11, 2002, at 14-2.

[17] *See* Elvis Presley, THE OFFICIAL ED SULLIVAN SITE, *available at* http://www.edsullivan.com/artists/elvis-presley (last visited May 31, 2017).

[18] *Id.*

Charlie Walker Show, ultimately galvanizing a license revocation action.[19]

- Similarly, in 1960, the FCC also began a license revocation proceeding against KIMN in Denver for specific on-air transgressions.[20]

- Mick Jagger and the Rolling Stones, in January 1967, appearing on the *Ed Sullivan Show* ten years after Presley, even changed a song title in an effort to appease the popular CBS television host.[21]

These aforementioned events provide a glimpse of Commission enforcement for broadcast content and set forth a contextual path for the timeline of broadcast indecency regulation and governmental oversight

---

[19] *See In re* Applications of E.G. Robinson, Jr., TR/AS Palmetto Broadcasting Co. (WDKD), for Renewal of License and for License to Cover CP, 33 F.C.C. 265, 266 at ¶ 2 (1961) (observing that the Commission noted the problematic broadcasts as, "allegedly vulgar, suggestive, and susceptible of indecent double' meaning."*).* *See also generally In re* Applications of E.G. Robinson, Jr., TR/AS Palmetto Broadcasting Co. (WDKD), for Renewal of License and for License to Cover CP, 33 F.C.C. 265, 276-77 (1961); E.G. Robinson, Jr., TR/AS Palmetto Broadcasting Co., Applications of Palmetto Broadcasting Co. for Renewal of License and for a License to Cover a Construction Permit; Denied. Licensee Qualifications. Misrepresentations and Lack of Candor; Fitness as a Licensee. Licensee Responsibility. Abdication of Control. Broadcast Material-Nature and Effects of Matter Broadcast. Programming. Whether Programming Met Public Needs. Section 326 of Act. Censorship, Indecent Language. 18 U.S.C. 14611.-Criminal Sanctions., 33 F.C.C. 250 (1962); F. Leslie Smith, *The Charlie Walker Case*, 23 J. BROAD. 142 (1979) (noting, ironically, the decision to revoke the license pivoted on the licensee's apparent lack of candor, in response to the FCC's inquiry, rather than the broadcast content).

[20] The announcer apparently joked about flushing pajamas down the toilet, inflating cheaters with helium, and the "guy who goosed the ghost and got a handful of sheet." *See* 28 F.C.C. 795 (1960).

[21] *See* Fred Bronson, *A Selected Chronology of Musical Controversy*, BILLBOARD, Mar. 26, 1994, at N36. *See also* The Rolling Stones, THE OFFICIAL ED SULLIVAN SITE, *available at* http://www.edsullivan.com/artists/the-rolling-stones (last visited May 31, 2017) (noting the original song title, "Let's Spend the Night Together," was changed to "Let's Spend Some Time Together").

outlined in this chapter.[22]

<u>THE 1960S: LICENSEE PACIFICA FOUNDATION ROCKS THE BOAT, BUT THE GOVERNMENT LOOKS THE OTHER WAY</u>

The events mentioned above were only the very beginning of government involvement in broadcast regulation. The FCC continued its course of policing the broadcast airwaves after receiving complaints,[23] in 1964, about several broadcasts[24] from four different Pacifica Foundation (hereinafter PF) radio stations. Much to the delight, no doubt, of PF management, the Commission fully supported licensee PF and advocated for the strongest First Amendment and free speech protection by propounding:

> We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the maintenance of radio and television as a medium

---

[22] It is not the intention of the researcher to closely examine every Notice of Apparent Liability for Forfeiture or fine ever levied by the FCC. Rather, the researcher wishes to probe the more notable and salient incidents of apparent liability for alleged indecent broadcasts.

[23] *See, e.g.*, *In re* Applications of Pacifica Foundation, 36 F.C.C. 147 (1964).

[24] *Id.* at 147-48. (noting that the complainants labeled the broadcast content, poetry readings by Lawrence Ferlinghetti, Edward Albee's play *The Zoo Story*, a passage from Edward Pomerantz's novel, *The Kid*, a program entitled, *Live and Let Live* during which eight homosexuals discussed their attitudes and problems, and a poetry reading by author Robert Creely dubbed, "Ballad of the Despairing Husband," as "offensive and filthy").

> of freedom of speech and freedom of expression for the people of the Nation as a whole.[25]

The above-described interaction licensee PF had with the federal government was only the beginning as complaints only continued in the years that followed. In fact, while PF attempted to renew the licenses for three of its California radio stations,[26] the FCC, in its response for the same renewal(s), broached ongoing listener complaints.[27] That said, the Commission, once again, balked when contemplating sanctions,[28] and referenced its decision a few years earlier by declaring, "The reasoning of our January 1964 decision as quoted above is equally applicable in our consideration of the instant applications."[29]

---

[25] *Id.* at 149.

[26] KPFA-FM, Berkeley; KPFB-FM, Berkeley; and KPFK-FM, Los Angeles.

[27] *See In re* Applications of Pacifica Foundation, 16 F.C.C.2d 712, 713 ¶ 5 (1969) (indicating that the complainants labeled the allegedly lenocinant programming as, "presenting a one-sided view of this 'new left' movement," advocating "open warfare in the streets," presenting material "full of filth and four-letter words," presenting a program, "disgusting and totally without redeeming qualities," and allowing speakers to use words which, "were the foulest that can be spoken").

[28] Sanctions can include license revocations and/or monetary forfeitures.

[29] *See supra* note 27 at 713.

THE 1970S: THE JACK STRAW MEMORIAL FOUNDATION, AND JERRY GARCIA PUSH THE ENVELOPE: THIS TIME, HOWEVER, GOVERNMENT GUIDANCE IS FAR DIFFERENT

Although the FCC seemed to advocate for free expression in the PF incidents of the 1960s, the commissioners began examining broadcast content with a more watchful and stern eye.[30] Indeed, when Seattle radio station KRAB-FM applied for a full three-year license renewal in 1970, the station met some unexpected resistance from the Commission.[31] Specifically, the Jack Straw Memorial Foundation owned radio station came under fire for airing language labeled by the complainant as, "profane, indecent, or obscene."[32] The FCC responded by chiding KRAB-FM for its seemingly poor overall management and control of the station.[33] Further, while KRAB-FM management sought a full three-year renewal at the time, the commissioners opted for a one-year renewal of the station's license.[34] While KRAB-FM was able to secure a full three-year license renewal one year later, the Commission

---

[30] *See infra* notes 31, 32, 33, 34.

[31] *See generally In re* Application of Jack Straw Mem'l Found. For Renewal of License of Radio Station KRAB-FM, 21 F.C.C.2d 833 (1970).

[32] *Id.* (while the public complained of "profane, indecent, or obscene" language, the Commission did not have a copy of the broadcast in question). *Id.* at 834.

[33] *See supra* note 31 at 834 ("It is expected that appropriate steps will be taken by the licensee to assure implementation of stated procedures regarding the selection of broadcast material consistent with the standards which you have set forth").

[34] *Id*. at 834.

made clear that it would no longer provide a "free pass" for alleged indecent broadcast content.[35]

At the same time Seattle's KRAB-FM was grappling with FCC attention they surely would have preferred to do without, Philadelphia radio station WUHY-FM, owned by Eastern Education Radio, received a formal Commission Notice of Apparent Liability for Forfeiture (hereinafter NAL).[36] The WUHY-FM broadcast in question involved an interview with musical artist, and lead man, for the cult rock group The Grateful Dead, Gerry Garcia.[37] During the interview, Garcia repeatedly used the words "fuck" and "shit."[38] Unlike the laissez-faire FCC approach in the 1960s,[39] the Commission, after review of the WUHY-FM broadcast, asserted:

> We believe that if we have the authority, we have a duty to act to prevent the widespread use on broadcast outlets of such expressions in the above circumstances. For the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the "public interest in the larger and more effective use of radio." As to the first point, it conveys no thought to begin some speech with "S--t, man.. .", or to use "f---

---

[35] *See generally* Application of the Jack Straw Mem'l Found. for Renewal of the License of Station KRAB-FM, 29 F.C.C.2d 334 (1971).
[36] *See generally In re* WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408 (1970).
[37] *Id.*
[38] *Id.* at 409.
[39] The Pacifica Foundation stations, in the 1960s, were not punished for alleged indecent content. Further, it is notable that the FCC received no listener complaints about the WUHY Gerry Garcia interview broadcast. Instead, FCC commissioners apparently heard the broadcast and acted accordingly. *See supra* note 36 at 418.

> --g" as an adjective throughout the speech. We recognize that such speech is frequently used in some settings, but it is not employed in public ones.[40]

As it happens, WUHY-FM was not interested in a courtroom showdown with the government.[41] Instead, Eastern Educational Radio opted to avert any court proceedings, and simply pay the $100 fine assessed by the FCC.[42] Not long thereafter, though, the Commission was able to test its approach and early broadcast indecency regime.[43]

Although some avid radio listeners may think that Howard Stern was the first and original radio host to parade strippers and naked girls into a radio studio and discuss intimate sexual acts, female body parts, and the like, such radio programming existed long before Stern entered into the fray.[44] Indeed, in the early 1970s, "topless radio" was being broadcasted and heard on various

---

[40] *See supra* note 36 at 410-12.
[41] *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 225 (6th ed. 2003).
[42] *Id.*
[43] *See infra* note 46.
[44] *See generally* In the Matter of Sonderling Broadcasting Corp., Notice of Apparent Liability and Inquiry Into Alleged Broadcast and Cablecasts of Obscene, Indecent, or Profane Material by Licensees, Permittees, or Cable Operators, 41 F.C.C.2d 777 (1973). *See also* ARCHIVE OF AMERICAN TELEVISION, INTERVIEW WITH GEORGE CARLIN, Dec. 17, 2007, *available at* http://www.emmytvlegends.org/interviews/people/george-carlin# (last visited July 20, 2017) (observing that in various video clips, Carlin discusses how the HBO specials he did allowed him to have expressive freedom devoid of any censorship that he might experience with the same performances on terrestrial broadcast media entities).

radio stations across the country.[45] One of the stations, WGLD-FM Oak Park, Illinois, aired a show called *Femme Forum*.[46] The show often dealt with rather risqué sexual talk (i.e., especially considering social and cultural norms of the time).[47] For example, one particular show explored the topic, "How do you keep your sex life alive?"[48] In another, the host talked, at length, about fellatio, including some rather explicit exchanges in which various callers talked about their oral sex experiences.[49]

A steadfastly resolute FCC, likely frustrated that its recent action with WUHY-FM had not garnered formal judicial review,[50] immediately turned its focus to WGLD-FM, and its parent company Sonderling Broadcasting.[51] The same Commission pressed forward and, after review of the February 1973 WGLD-FM broadcasts in question, sent a $2,000 NAL[52] to Sonderling Broadcasting.[53] The NAL suggested that WGLD-FM had aired programming that was "obscene or indecent," in violation of Title 18 Section 1464 of the

---

[45] *See infra* note 46.
[46] *See In re* Apparent Liability of Station WGLD-FM, For Forfeiture, 41 F.C.C.2d 919 (1973).
[47] *Id.*
[48] Some callers suggested oral sex. *See, e.g., supra* notes 44, 46, and accompanying text.
[49] *Id*.
[50] *See supra* note 41.
[51] *See supra* note 46.
[52] An NAL is a monetary fine assessed by the FCC.
[53] *See supra* note 46.

United States Code.[54] Even though $2,000, in 1973, may have seemed like a lot of money,[55] management for WGLD-FM was not motivated to fight the FCC penalty.[56] Instead, Sonderling's course of action was to pay the fine and cancel *Femme Forum* entirely.[57] That said, the attention brought by the Commission action, and the nixing of *Femme Forum*, prompted some to rally for free speech on behalf of WGLD-FM.[58]

The Illinois Citizens Committee for Broadcasting (hereinafter ICCB), and the local chapter of the American Civil Liberties Union (hereinafter ACLU), petitioned the FCC to reconsider the WGLD-FM fine.[59] The FCC, responded, in part, with:

> The thrust of both the Petition and the ACLU letter is that the Commission's actions have violated the rights of listeners to hear a diversity of information and opinion. They cite the following as examples of the "chilling effect" of these actions: (1) Sonderling's cancellation of its sex-talk program; (2) Storer Broadcasting Company's reported change in the format of the "Bill Ballance Show," the most widely heard of the sex-talk

---

[54] *See* 18 U.S.C. § 1464 (1970) (noting that this statute provides: whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both).

[55] The rate of inflation, considering $2,000 in 1973, equates to $11,104.68 in 2018. *See* U.S. INFLATION CALCULATOR, *available at* http://www.usinflationcalculator.com/ (last visited June 4, 2017).

[56] *See* In the Matter of Sonderling Broadcasting Corp., Notice of Apparent Liability and Inquiry Into Alleged Broadcast and Cablecasts of Obscene, Indecent, or Profane Material by Licensees, Permittees, or Cable Operators, 41 F.C.C.2d 777, 779 ¶ 9 (1973).

[57] *Id.* at 780 ¶ 11.

[58] *Id*.

[59] *See supra* note 57.

> programs, whereby "intimate topics" will be forbidden; and (3) the NAB resolution of March 27 condemning and deploring "tasteless and vulgar program content." The specific injury to listeners of WGLD, it is asserted, has been to deprive them of "exposure to speech and ideas about important issues, thereby abridging their First Amendment rights to receive 'free speech by radio.'[60]

In July 1973, the Commission denied the groups' petitions.[61] As a result, several months later, the FCC finally got its sought after court examination; review by the U.S. Court of Appeals for the D.C. Circuit (hereinafter DC Circuit).[62] Much to the chagrin of WGLD-FM, the ICCB, the ACLU, and other advocates for free expression, the appellate court held that the broadcasts in question were *obscene*[63] and not entitled to constitutional protection.[64] What followed was a landmark U.S. Supreme Court case that is the subject of media law scholar discussions in university classrooms and First Amendment academic conferences even today.[65]

The contact PF had with the Commission in the 1960s was only a precursor for what was about to happen in the 1970s.[66] PF, once again, found

---

[60] *Id. See also* Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount").
[61] *See generally infra* note 62.
[62] *See* Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1974).
[63] *See generally* Miller v. California, 413 U.S. 15 (1973) (for discussion of obscene content).
[64] *See supra* note 62 at 406.
[65] *See infra* note 81.
[66] *See supra* notes 23, 27.

itself dealing with the FCC commissioners, when WBAI-FM, in New York City, aired a comedy routine performed by comedian George Carlin.[67] The broadcast occurred on 30 October 1973 at approximately 2:00 PM, was twelve minutes in length, and included the "seven dirty words"[68] made so famous by the same comedy routine.[69]

Six weeks after the broadcast,[70] a minister from Florida, and member of the special interest activist group, Morality in Media,[71] allegedly driving in New York City with his "young"[72] son at the time of the broadcast, filed a complaint[73] with the Commission.[74] The letter from the complainant questioned how the station could air such programming when, "[a]ny child could have been turning the dial, and tuned in to that garbage."[75] Suddenly,

---

[67] *See infra* note 73.

[68] Shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.

[69] *See infra* note 73.

[70] *See infra* note 75 (noting that the letter from Mr. Douglas was dated Nov. 28, 1973, and received by the FCC on Dec. 3, 1973).

[71] *See,* L.A. Powe, Jr., *Red Lion and Pacifica: Are They Relics?,* 36 PEPP. L. REV. 445, 461 (2009). *See also* Tom Jicha, *Boca Man Blew the Whistle on Carlin*, S. FLA. SUN SENTINEL, June 30, 2008, at E1 (evidencing that at the time of his FCC complaint, Mr. Douglas was reported to have joined a campaign to eliminate sexually explicit movie theatres from Times Square).

[72] *See* T. BARTON CARTER, MARC A. FRANKLIN, & JAY B. WRIGHT, THE FIRST AMENDMENT & THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 229 (2003) (observing the complaint by Douglas was the only grievance about the broadcast and his "young" son of 15 years).

[73] *See* In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI-FM, 56 F.C.C.2d 94 (1975).

[74] *See infra* note 81 at 730.

[75] *See* Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 201-02 (2010).

Congress seemed interested in the indecency debate,[76] and PF chose to appeal, ultimately seeking a resolution from the DC Circuit.[77]

In what can be seen as the very first court ruling on broadcast indecency,[78] the DC Circuit rescinded the recent FCC guidance and Order regarding the WBAI-FM "George Carlin broadcast."[79] In doing so, the court also seemed to upbraid the Commission at the same time by professing:

> Despite the Commission's professed intentions, the direct effect of its Order is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications. In promulgating the Order the Commission has ignored both the statute which forbids it to censor radio communications and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee. The Commission claims that its Order does not censor indecent language but rather channels it to certain times of the day. In fact, the Order is censorship, regardless of what the Commission calls it.[80]

---

[76] *See generally* H.R. REP. NO. 93-1139 at 15 (1974). (noting that federal lawmakers asked the FCC to respond as to what it was doing to protect children from broadcast indecency and obscenity).
[77] *See infra* note 79.
[78] The researcher would point out that while this was the first ruling by a court regarding broadcast indecency, some appellate courts in recent years seem to have made arguments (regarding indecency enforcement) that are similar to those made by the D.C. Circuit in 1977. *See generally* CBS v. FCC, 663 F.3d 122 (3d Cir. 2011); Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).
[79] *See* Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977).
[80] *Id.* at 13.

Notwithstanding the fact that PF seemed to have scored a major victory with the DC Circuit, a determined Commission would eventually file a petition for a writ of certiorari in the U.S. Supreme Court.[81]

Oral arguments in *FCC v. Pacifica Foundation*[82] were heard on 18 April 1978, and the case was decided by the justices on 3 July 1978.[83] In what still stands as perhaps the biggest and most salient U.S. Supreme Court case ruling regarding broadcast indecency to date, Justice John Paul Stevens delivered the opinion for the court, reversing, by a narrow margin, the 1977 decision by the D.C. Circuit.[84] The Court, considering whether a broadcast of patently offensive words dealing with sex and excretion may be regulated due to its content, in pertinent part, found:

- First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[85]

- Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's

---

[81] *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 748.

> broadcast could have enlarged a child's vocabulary in an instant.[86]
>
> - It is appropriate, in conclusion, to emphasize the narrowness of our holding.[87]
> - The Commission's decision rested entirely on a nuisance rationale under which context is all-important.[88]

Even though Justice Stevens, and the high court members, seemed to provide, with its PF ruling, a new baton and formal "license" for the FCC to regulate and oversee broadcast content,[89] there are those on the same bench that expressed concern[90] with the narrow[91] 5-4 decision.[92] In a strongly-worded dissent, Justices Brennan and Marshall opined:

> I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.
> Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In

---

[86] *Id.* at 749.
[87] *Id.* at 750.
[88] *Id*.
[89] A significant component introduced in the Pacifica case was the "channeling" of indecent broadcast content. Guided by nuisance, and time, place, and manner restrictions, the rationale behind channeling was to protect children from the "harm" generated by indecent content. This topic is discussed thoroughly in Chapter 6 *infra*. *See, e.g.,* In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI-FM, 56 F.C.C.2d 94, 98 (1975) (observing discussion of nuisance law). *See also supra* note 81 at 731 (noting "channeling" or on-air zoning discussion).
[90] *See supra* note 81 at n.4 ("Since the Commission may be expected to proceed cautiously…").
[91] *See id.* at 750. ("It is appropriate, in conclusion, to emphasize the narrowness of our holding").
[92] *Id.* at 760-62. ("This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes").

> finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many--including the FCC and this Court--might find offensive.[93]

Others within academia and the legal community echoed the thoughts and dissent of Justices Brennan and Marshall. Robert Corn-Revere, a leading First Amendment attorney,[94] argued:

> The Supreme Court's 5-4 decision in that case did not give the FCC carte blanche authority to decide what broadcasts are indecent or to impose unlimited penalties. The ability to regulate so-called "indecent" speech is a limited constitutional exception, not the general rule. The Supreme Court has invalidated efforts to restrict indecency in print, on film, in the mails, in the public forum, on cable television and on the Internet. The *Pacifica* Court applied somewhat a different standard for broadcasting, but that decision cannot be read too broadly. *Pacifica* was a fragmented (5-4) decision that did not approve a particular standard or uphold a substantive penalty against the licensee. The Supreme Court subsequently has acknowledged that the FCC's definition of indecency was not

[93] *Id.* at 762-77.

[94] Robert Corn-Revere has an extensive background in First Amendment and media litigation representing media clients such as, A&E Television Networks, Al Jazeera Investigative Unit, American Association of Advertising Agencies, Association of National Advertisers, American Advertising Federation, Association of America's Public Television Stations, Backpage.com, CBS Corporation, Comic Book Legal Defense Fund, Foundation for Individual Rights in Education, Metropolitan Museum of Art, Motion Picture Association of America, National Association of Broadcasters, National Press Photographers Association, and the Reporters Committee for Freedom of the Press. Revere was most notably lead litigation counsel in CBS Corp. v. FCC, and FCC v. Fox Television Stations and ABC, Inc. He has also been named as one of the best lawyers in America. *See* DAVIS, WRIGHT, TREMAINE, LLP, *available at* http://www.dwt.com/people/robertcornrevere/ (last visited June 6, 2017).

> endorsed by a majority of the Justices, and it repeatedly has described *Pacifica* as an "emphatically narrow holding."[95]

THE 1980S & 1990S: MORE CHANGES IN FCC ENFORCEMENT DIRECTION AND HOWARD STERN HAS A TARGET ON HIS BACK

After what was clearly a resounding victory for the Commission in the *Pacifica*[96] case, consistent with its own policy of restraint,[97] the FCC exercised a very relaxed state of regulation regarding broadcast indecency for many years.[98] In fact, the Commission seemed to have followed a pattern of enforcement where only egregious cases of apparent indecency raised an eyebrow with the commissioners.[99]

The late 1980s brought a new commissioner to the FCC, Republican Dennis Patrick. Under the guidance of a new chair in Patrick, and with recent

---

[95] *See* Robert Corn-Revere, *Indecency, Television, & the First Amendment*, 87 CONSUMERS RESEARCH MAGAZINE 22 (2004).

[96] *See supra* note 81.

[97] *See* Eastern Education Radio, 24 F.C.C.2d 408, 414 ¶ 14 (1970) ("The Commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor").

[98] *See* KENNETH C. CREECH, ELECTRONIC MEDIA LAW & REGULATION 119 (2000) (observing that between 1975 and 1987, the FCC found no actionable cases for indecent programming). *See also In re* Application of WGBH Educational Foundation, For Renewal of License for Noncommercial Educational Station WGBH-TV, 69 F.C.C.2d 1250, 1254 ¶ 10 (1978) (noting the FCC's suggestion that it would observe the narrowness of the Pacifica ruling).

[99] The FCC was said to only entertain situations where there was use of the "seven dirty words" from the 1978 Pacifica landmark decision. *See* New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987).

complaints of indecency[100] on the Commission docket still pending, Patrick decided to initiate a far more aggressive regulatory approach toward alleged broadcast indecency.[101] To that end, the FCC released, on 29 April 1987, an entirely new procedure for broadcast regulatory indecency enforcement.[102] Specifically, instead of only taking action for alleged uses of the "seven dirty words" cited in the *Pacifica*[103] case, the Commission would now enforce a new definition for indecency. Broadcast indecency, going forward, would now be characterized as, "language or material that depicts or describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities or organs," and, more importantly, be based on a "contextual" approach.[104]

As part of its new broadcast indecency enforcement regime, the Commission discussed, at length, having received complaints about alleged indecency broadcast from three different radio stations.[105] KPFK-FM, Los Angeles, a PF owned radio station, had apparently aired problematic

[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *See supra* note 81.
[104] *See supra* note 99 at 2726.
[105] *Id. See generally* In the Matter of Infinity Broadcasting; In the matter of Pacifica Foundation; In the Matter of The Regents of the University of California, 3 F.C.C.R. 930 (1987).

programming from shows entitled, "Shocktime USA"[106] and "IMRU."[107] The show, "IMRU," broadcast excerpts from a play, called "Jerker," that included descriptions of sexual encounters.[108] Worse, not only did the commissioners believe the broadcast in question met the standards for indecency, they also suggested that the same broadcast may also be obscene.[109] As a result, the Commission referred the matter to the U.S. Department of Justice for review and possible prosecution.[110] Excerpts, for example, included:

> "Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking."
>
> "sucking ass." "taking piss from a guy's cock." or if he had "a quickie blow job in the Union Square men's room."
>
> "I'll give you the gentlest fuck west of the Mississippi."
>
> "We cuddled and played around a bit before he started working on my ass."
>
> "I remember he was kneeling between my legs and he worked my asshole with lube for the longest time - just gettin' it to relax so there was no tension, no fear."

---

[106] The commission suggested that it was not able to conclusively determine whether the broadcast was indecent or not, under the Pacifica standard. *See* In the Matter of Pacifica Foundation, Inc., 2 F.C.C.R. 2698, 2700 ¶ 17 (1987).
[107] *Id.* at 2698.
[108] *Id.*
[109] *See* Miller v. California, 413 U.S. 15 (1973) (noting the discussion of obscenity, and the standard that must be met).
[110] *See supra* note 99 at 2727. *See also* In the Matter of Pacifica Foundation, Inc., 2 F.C.C.R. 2698, 2701 ¶ 26 (1987).

"He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain."

"His cock felt warm inside me - and full - so nice and full. So he began sliding his cock back and forth inside of my ass - but so gently, so gently."

"I don't think I've ever had such a gentle. sensitive fuck. before or after. 'Well, he must gone at it for twenty minutes at the very least. just slidin" his cock back and forth inside of my ass."

"And then he whispered to me, 'You're gonna feel me come inside of you.' And I did. Man. I could feel the cum pulse up his shaft inside of my ass. I could count the pulses and it felt warm and good."

"You better get yourself ready for some brother-to-brother, sweaty, down and dirty pig sex. you understand?"

"None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?"

"Hot throbbing cocks"[111]

The University of California's KCSB-FM was also in trouble with the federal government.[112] Apparently, they aired a song called "Makin Bacon" that included lyrics supposedly offensive to some listeners.[113] And, not to be outdone by PF or The University of California at Santa Barbara, major-market

[111] *See* In the Matter of Pacifica Foundation, Inc., 2 F.C.C.R. 2698, 2700 (1987).

[112] *See supra* note 99 at 2727.

[113] Lyrics, for example, included, "kneel down and suck on my dick, "bend over baby, gonna give you my meat." *See* In the Matter of The Regents of the University of California, 2 F.C.C.R. 2703 (1987).

radio personality Howard Stern also entered into the melee.[114] A partial transcript from the Stern broadcast is as follows:

> Howard Stern: "God. my testicles are like down to the floor. Boy, Susan, you could really have a party with these. I'm telling you honey."
>
> Ray: "Use them like Bocci balls."
>
> Howard Stern: "Let me tell you something. Those homos you are with are all limp, honey."
>
> Ray: "Yeah. You've never even had a real man." Howard Stern: "You've probably never been with man with a full erection."
>
> Susan: "No. I was in a park in New Rochelle, N.Y."
>
> Howard Stern: "In a park in New Rochelle? On your knees?"
>
> Susan: "No. no."
> Ray: "And squeezing someone's testicles, probably."
>
> Talking to a caller, Howard Stern: "I'd ask your penis size and stuff like that, but I really don't care."
>
> As part of a discussion of lesbians, Howard Stern: "I mean to go around porking other girls with vibrating rubber products and they want the whole world to come to a standstill."
>
> Howard Stern: "Have you ever had sex with an animal?"
>
> Caller: "No."
>
> Howard Stern: "Well, don't knock it. I was sodomized by Lambehop; you know that puppet Sherri Lewis holds?"

---

[114] *See supra* note 99 at 2727. *See also* In the Matter of Infinity Broadcasting, 2 F.C.C.R. 2705 (1987).

> Howard Stern: "Baaaaah. That's where I was thinking that Sherri Lewis. instead of like sodomizing all the people at the Academy to get that shot on the Emmys she could've had Lambchop do it."[115]

After examining the Stern broadcast, the Commission decided not to fine Stern's employer, Infinity Broadcasting (hereinafter IB),[116] but, nonetheless, declared:

> In examining the broadcasts in context, the Commission found that in a number of instances they did not consist merely of an occasional off-color reference or expletive, but instead dwelt on sexual and excretory matters in a pandering and titillating fashion that was patently offensive as measured by contemporary community standards for the broadcast medium. The Commission further found there was a reasonable risk that children may have been in the audience at the time of the broadcast.[117]

Unfortunately for Stern and IB executive Mel Karmazin, "free passes" from the FCC eventually ran out.[118] Complaints about Stern's show continued to roll into the FCC's offices and the commissioners seemingly were not amused.[119] A portion of the 16 December 1988 Stern broadcast went as follows:

---

[115] *See supra* note 99 at 2727. *See also* In the Matter of Infinity Broadcasting, 2 F.C.C.R. 2705, 2706 (1987).
[116] *See supra* note 99 at 2727. *See also* In the Matter of Infinity Broadcasting Corporation of Pennsylvania, 2 F.C.C.R. 2705, 2706 ¶ 11 (1987).
[117] *Id.*
[118] *See generally* In the Matter of Infinity Broadcasting Corporation, Inc., 5 F.C.C.R. 7291 (1990); Mr. Mel Karmazin, President Infinity Broadcasting Corporation, 9 F.C.C.R. 1746 (1994).
[119] *Id.*

Were back at the Christmas Party . . . and I gotta tell you it's wild in here. Robin . . . the guy who plays the piano with his wiener is here now.

(Gay choir) We got two gay guys and a heavy-set woman lesbian (Negro). Remember you're on the radio, will you honey? I get called a fag hag. Have you ever had a man? Have you been with a man? Disappointment, hell. Oh, you like it? Well, it's not just a preference. It just doesn't turn me on as much . . . you gotta be glad about the 5-minute AIDS test. Now you guys can test each other and then hop into the sack.

What is it that men don't find me attractive? . . .men who find other men attractive ... my uh? your small penis probably...

How about this? "A Tuckis So Bright"?

(Gay choir) - "I'm dreaming of some light torture. some bruises just to make me moan . . . Masturbate. Humiliate. Gay sex is fun in the city. Howard Stern is going to learn how great a tuckis can be..."[120]

In response to assessing the broadcast content noted above, the Commission held that stations WXRK-FM, WYSP-FM, and WJFK-FM aired indecent programming, during daytime hours, and accordingly were fined $2,000 each.[121]

Attention from the FCC, though, did not stop there.[122] The evidently unwavering Commission found itself reviewing yet more tapes from *The*

---

[120] *See* In the Matter of Infinity Broadcasting Corporation, Inc., 5 F.C.C.R. 7291, 7293-94 (1990).
[121] *Id.* at 7293.
[122] *See infra* note 124.

Howard Stern Show.[123] In yet more early 1990s broadcasts, the commissioners found additional allegedly problematic programming.[124] As a result of the purported ongoing course of conduct by Stern and IB, in 1994, the Commission sent Mel Karmazin another NAL for indecent broadcast content.[125]

Stern, no secret among veteran radio insiders,[126] was arguably the only major-market on-air radio personality employing a formidable "shock" radio format at the time. With that in mind, and the recent success the celebrated Stern had earned in the late 1980s and early 1990s,[127] Stern believed the Commission had begun an "insider" campaign to selectively target him (i.e., to end his radio career[128]) and the radio stations he was simulcast on at the time.[129]

---

[123] *Id.*
[124] *See* Mr. Mel Karmazin, President Infinity Broadcasting Corporation, 9 F.C.C.R. 1746 (1994).
[125] *Id.*
[126] The researcher is a twelve-year veteran major-market radio on-air talent with stints in Los Angeles, California, and Detroit, Michigan.
[127] The popularity (i.e., Arbitron ratings) of Stern's Show allowed him to begin simulcasting his show on various radio stations across the country. In the major media markets, advertising revenue usually chases ratings. Therefore, it was a "win-win" for Stern and his syndicated radio affiliates. Moreover, in the beginning of the unwanted FCC attention, the fines were viewed as a "cost of doing business" and were not a factor financially (e.g., a $2,000 FCC fine is just a "drop in the bucket" for a station like WXRK-FM New York that might have annual billings north of $50 million). *See also infra* note 128 (observing Stern's success); DUNCAN'S RADIO MARKET GUIDE (noting WXRK-FM, New York, annual advertising billings).
[128] *See* Richard Zoglin, *Shock Jock*: *Howard Stern is Shaking Up Radio—and the FCC—With His Raunchy, Racist, In-Your-Face Talk, But Listeners Seem to Love It*, TIME, Nov. 30, 1992, *available at* http://content.time.com/time/magazine/article/0,9171,977117,00.html (last visited June 7, 2017) (noting that the FCC, Stern charges, is "targeting me because I'm the most visible guy" and is "trying to put a dead stop to my career.").
[129] *Id.*

As a result, and given the underlying comedic nature of his show at the time, Stern made it a point to relentlessly mock and goad[130] the FCC commissioners during his program.[131] Stern, moreover, after learning that the current FCC Chair, Alfred Sikes, had recently been treated for prostate cancer, even reportedly responded, on the air, to the same news with, "I pray for his death."[132] Further, in an effort to evidence that the Commission was carrying out a selective campaign against him, Stern alleged that he mailed bogus complaints to the FCC's Washington offices that, Stern says, were never responded to.[133]

Stern, behind the scenes, no doubt encouraged IB executive Mel Karmazin to fight vigorously the recent FCC fines, but the larger looming picture was that IB planned on adding a number of radio stations to its ownership portfolio with a significant near future purchase.[134] Indeed, inside rumors were very strong that the Commission had threatened to uphold and

---

[130] Stern reportedly would say things on the air, during his show, directed at the FCC Commissioners such as, "hey FCC, penis." *See* Jon Pareles, *Shock Jocks Shake Up Uncle Sam*, N.Y TIMES, Nov. 15, 1992, § 2 at 32.

[131] *See supra* note 128.

[132] *Id.*

[133] *See* Tom Taylor, *Howard Stern Tests the FCC With His Own Indecency Complaints*, INSIDE RADIO, Mar. 11, 1994, at 1.

[134] *See generally* David Hinkley, *It Was Hardly a Coincidence that Infinity Anted Up to Uncle*, N. Y. DAILY NEWS, Sept. 14, 1995, at 102; David Hinkley, *Infinity Pays FCC*, N.Y. DAILY NEWS, Nov. 9, 1995.

not approve any IB purchases until the outstanding Infinity indecency matter was settled.[135] Therefore, feeling pressure, Karmazin reluctantly negotiated a settlement[136] with FCC officials in order to clear Infinity's record, and pave the way for its intention to purchase $275 million in additional radio stations.[137]

YEAR 2000 BRINGS WITH IT NEW FCC LEADERSHIP IN MICHAEL POWELL: POWELL, WORKING IN CONCERT WITH PRESIDENT GEORGE W. BUSH, INITIATES THE MOST AGGRESSIVE FCC ENFORCEMENT TO DATE[138]

On the heels of rather aggressive enforcement action against Howard Stern in the late 1990s, Michael Powell took the reins as chair of the Commission, appointed by President George W. Bush, in January 2001.[139] One of Powell's missions, as FCC Chair, was to provide broadcast licensees clearer guidance on what constituted broadcast indecency.[140] Therefore, as part of a settlement with Evergreen Media, the Commission published new FCC

---

[135] *Id.*

[136] Infinity Broadcasting executive Mel Karmazin reportedly made a "$1.7 million-dollar donation to the U.S. Treasury." *See supra* note 134.

[137] *See* In the Matter of Infinity Broadcasting Corporation, 10 F.C.C.R. 12245 (1995).

[138] *See* John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines'*, CENTER FOR PUBLIC INTEGRITY, Apr. 9, 2004, *available at* https://www.publicintegrity.org/2004/04/09/6588/indecency-air (last visited June 10, 2017) (noting Powell's comments: "This Commission, since I took over, has worked diligently to increase our enforcement efforts," Powell told the National Press Club on Jan. 14. "And I do think the enforcement efforts and fines we have levied have far surpassed those applied by previous commissions combined").

[139] *See* Biography of Michael K. Powell, FEDERAL COMMUNICATIONS COMMISSION, *available at* https://www.fcc.gov/biography-michael-k-powell (last visited June 10, 2017).

[140] *See infra* note 141.

guidelines for enforcement of broadcast indecency.[141] With the salvo of indecency action in the years that followed, though, the same Commission effort, in providing written guidelines, would seemingly prove ineffective and unproductive.[142]

Not long after FCC chair Powell assumed his new role at the Commission, various network television broadcasts involving celebrities appearing on award programs[143] set off alarm bells with the FCC commissioners and well organized special interest activist groups such as the PTC.[144]

In December 2002, Fox Television, broadcasting live from the MGM Grand Hotel and Casino in Las Vegas, faced intense heat from the Commission when musical artist Cher, accepted a Lifetime Achievement award, saying: "People have been telling me I'm on the way out every year, right? So fuck

---

[141] *See* In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 ¶ 1 (2001) ("The Commission issues this Policy Statement to provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency"). *See also* United States v. Evergreen Media Corp., 832 F. Supp. 1179 (N.D. Ill. 1993) (noting discussion of the case with Evergreen Media).

[142] *See infra* notes 145-217.

[143] In December 2002, Cher appeared on Fox Television's Billboard Music Awards show to accept her Lifetime Achievement award. One month later, Bono appeared on the Golden Globes Award Show broadcast by NBC. Nicole Richie made an appearance on Fox Television's Billboard Music Award Show in 2003.

[144] *See* PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/Main/ (last visited June 10, 2017) (noting that the Parents Television Council is a media watchdog organization).

'em."[145] The commissioners, after reviewing the Fox Television broadcast, found:

> In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker's message. Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked. It did not do so. As a result, the Fox affiliate WTTG(TV) broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules. By broadcasting this material, the station apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.
>
> The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the Golden Globe Awards Order. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives. But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that broadcast the program prior to 10 p.m. Accordingly, we find that no forfeiture is warranted in this case.[146]

---

[145] *See* In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 ¶ 101 (2006) (observing the FCC's suggestion that the complainant griped about the expletive by Cher and suggested all stations that aired Cher's appearance be sanctioned).

[146] *See id.* ¶¶ 101-11.

While Cher's "f-bomb," garnered Fox Television no sanction from the FCC, the NBC network ultimately did not fare as well.[147] Ten days after Cher tested the Commission's Enforcement Bureau with her "f-bomb" quip, lead singer for the rock group U2, Bono, similarly, dropped the "f-bomb" upon accepting a Golden Globe award for "Best Original Song," by saying, "this is really, really fucking brilliant."[148] The FCC, after review of the Application for Review petition submitted by the PTC, *initially* maintained:

> As a threshold matter, the material aired during the "Golden Globe Awards" program does not describe or depict sexual and excretory activities and organs. The word "fucking" may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word "fucking" as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the Commission's prohibition of indecent program content.[149]
>
> Moreover, we have previously found that fleeting and isolated remarks of this nature do not warrant Commission action. Thus, because the complained-of material does not fall within the scope of the Commission's indecency prohibition, we reject the claims that this program content is indecent, and we need not reach the second element of the indecency analysis.[150]

---

[147] *See infra* note 152.
[148] *See* In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 18 F.C.C.R. 19859 ¶ 2 (2003).
[149] *Id.* at 19861 ¶ 5.
[150] *Id.* at ¶ 6.

NBC, at the outset, was surely thrilled with the Commission's initial finding that, much like Cher's recent "f-bomb," Bono's "f-bomb" was not actionable. That sigh of relief, though, was short-lived when just a few months later the Commission, without warning, on 4 March 2004, changed its mind.[151] To the likely chagrin of NBC executives, notwithstanding the fact that no monetary forfeiture was levied against NBC, the FCC announced that it had reversed course by positing:

> We disagree with the Bureau and conclude that use of the phrase at issue is within the scope of our indecency definition because it does depict or describe sexual activities. We recognize NBC's argument that the "F-Word" here was used "as an intensifier. Nevertheless, we believe that, given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition. This conclusion is consistent with the Commission's original Pacifica decision, affirmed by the Supreme Court, in which the Commission held that the "F-Word" does depict or describe sexual activities.
>
> While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the "F-Word" such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.
>
> Finally, our decision is not inconsistent with the Supreme Court ruling in Pacifica. The Court explicitly left open the issue of whether an occasional expletive could be considered Carlin routine "could indecent. Just as the Court held that Pacifica's broadcast of the George have enlarged a child's vocabulary in

[151] *See infra* note 152.

> an instant," we believe that even isolated broadcasts of the "F-Word" in situations such as that here could do so as well, in a manner that many, if not most, parents would find highly detrimental and objectionable. Thus, finding broadcast of this word indecent and profane here is consistent with the "well-being of [the country's] youth" and "supporting parents' claims to authority in their own household," which the Court used as a basis for its decision in Pacifica, in combination with the "ease with which children may obtain access to broadcast material.
>
> We conclude, therefore, that NBC and other licensees that broadcast Bono's use of the "F-Word" during the live broadcast of the Golden Globe Awards violated 18 U.S.C. § 1464. By our action today, broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the "F-Word" or a variation thereof in situations such as that here.[152]

Through all of the legal rhetoric in the Commission's Opinion and Order, all that could be reasonably learned is that (1) the "f-word" inherently has a sexual connotation;[153] (2) isolated and fleeting uses of the "f-word" would now be actionable, and previous policy[154] regarding the same was "no longer

---

[152] *See* In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 19 F.C.C.R. 4975, 4978-82 (2004).

[153] Therefore, in extrapolating this theory forwarded by the FCC, the researcher points out that any golfer that shanked a golf ball, and responded by saying "fuck," would apparently be using the same word in a "sexual" manner. *See also* Christopher M. Fairman, *Fuck*, 28 CARDOZO L. Rev. 1711, 1719 (2007) (observing that language linguists classify the use of the word "fuck" into two categories; fuck 1 (noting that it is used to reference sex) and fuck 2 (noting that it is used as an intensifier and emotive force); Cohen v. California, 403 U.S. 15, 25-26 (1971) (noting that the court recognized dual communicative functions of the word "fuck").

[154] *See, e.g.,* In the Matter of Entercom Buffalo License, 17 F.C.C.R. 11997, 12000 ¶ 7, 12001 ¶ 11 (2002) (noting that broadcast use of "prick" and "piss on" was not indecent); Letter to Mr. Peter Branton, 6 F.C.C.R. 610 (1991) (noting that addressing the broadcast use of "fuck" was found to not be indecent).

good law;" and (3) profane language and profanity would now be part of the FCC's broadcast indecency regulatory regime.[155]

One year and one day after Cher stole the headlines at the Billboard Music Awards, Fox Television proved that "what happens in Las Vegas *does,* indeed, stay in Vegas" when author, fashion designer, actress and star of the show *The Simple Life*, Nicole Richie, on live television, quipped, "[h]ave you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[156]

Even with the Commission's earlier warning that an isolated use of the "f-word" might prompt FCC action,[157] the commissioners, nonetheless, issued no sanction to Fox Television for the Nicole Richie incident; Fox Television seemed to graciously receive another free pass.[158] Fox Television and NBC, just the same, though, were just the beginning as CBS would soon set off fireworks at the FCC.[159]

---

[155] *See supra* note 152.
[156] *See* In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664, 2693-95 (2006).
[157] *See generally supra* note 152.
[158] *Id.* ¶ 124.
[159] *See infra* note 165.

The 2004 Super Bowl,[160] broadcast by CBS on 1 February 2004, for some, turned out to be especially engaging during the halftime show musical performance.[161] In what would be the biggest indecency event at the time, and eventually set off a flurry of activity for alleged broadcast indecency,[162] musical artist Janet Jackson, performing on stage with singer Justin Timberlake, near the very end of the performance, exposed her left breast.[163] After the uproar that the same mishap created, Jackson and her staffers suggested the "nipple flash" was a wardrobe malfunction.[164] The Commission, and the PTC, likely anything but delighted, rejected Jackson's justification.[165] As a result, CBS management, on 22 September 2004, received a reprimand from the FCC totaling $550,000.[166] CBS, in response to the Commission's aforementioned NAL, contended:

---

[160] *See, e.g.*, *The Nielsen Company's Guide to Super Bowl XLIII*, THE NIELSEN COMPANY, Jan. 23, 2009, *available at* http://www.nielsen.com/us/en/press-room/2009/the-nielsen-company01.html (last visited June 10, 2017).
[161] *See infra* note 165.
[162] *See generally infra* notes 165-217 and accompanying text.
[163] *See 10 Fourth Estate Follies*, ADVERTISING AGE, Dec. 20, 2004, at 4 (noting that Janet Jackson flashed her right breast for 9/16 of one second).
[164] *See Apologetic Jackson Says Costume Reveal Went Awry*, CNN, Feb. 3, 2004, *available at* http://www.cnn.com/2004/US/02/02/superbowl.jackson/ (last visited June 13, 2017).
[165] *See* In the Matter of Complaints Against Various Television Licensees' Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230, 19231 (2004) (observing, among other things, the FCC received, as of Sept. 2004, more than 542,000 complaints about the broadcasted breast).
[166] *Id.* at 19230.

> No officer, employee or agent of Viacom Inc....CBS, or MTV Networks...had any advance notice or warning that the Super Bowl halftime performance involving Janet Jackson and Justin Timberlake would include the exposure of Ms. Jackson's breast. The exposure resulted from a poorly-executed stunt that was planned by the performers without any involvement from Viacom, CBS, or MTV, all of whom would have forbidden the stunt if there had been any indication that it was planned. While CBS regrets the incident, the Commission should acknowledge that it was unplanned, unanticipated, and contrary to what we intended.[167]

While CBS News posted on the Internet an Associated Press poll[168] that revealed (1) most Americans thought Jackson's breast exposure was in bad taste; and (2) the same respondents indicated that they did *not* believe it was illegal, an astute and determined FCC, steadfastly pressed forward and continued its work in punishing licensees for alleged broadcast indecency[169] and, at the same time, differed with the aforementioned view of CBS network

---

[167] *Id.* at 19232 ¶ 4.

[168] *See Poll: Janet's Revelation No Crime*, CBS NEWS, Feb. 2, 2004, *available at* http://www.cbsnews.com/stories/2004/02/02/entertainment/main597184.shtml (last visited June 10, 2017) (noting an Associated Press poll suggesting that while 54% of people survey indicated the Jackson stunt was in bad taste, only 18% found the incident to be illegal).

[169] *See, e.g.,* In the Matter of Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace," 21 F.C.C.R. 2732 (2006) (observing a $3.55 million fine for alleged indecent content in a scene involving teenage girls and boys participating in a sexual orgy); In the Matter of Clear Channel Broadcasting Licenses, Inc., 19 F.C.C.R. 1768 (2004) (evidencing an FCC forfeiture for $755,000 for sexually explicit content on "Bubba the Love Sponge Show"); In the Matter of AMFM Radio Licenses, LLC, 19 F.C.C.R. 5005 (2004) (mandating an FCC forfeiture for $247,500 for alleged indecent content on the "Eliot in the Morning Show"); In the Matter of Clear Channel Communications, Inc., 19 F.C.C.R. 10880 (2004) (noting a settlement totaling $1.75 million for alleged indecency violations).

brass by observing:

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition-that is, the material must describe or depict sexual or excretory organs or activities.....Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.
>
> Based upon the preceding analysis, we find, in context, that the exposure of Ms. Jackson's breast was apparently indecent, and, therefore, is legally actionable. By airing this material, the licensee of each of the CBS Network Stations apparently violated the prohibitions in 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, the rule against broadcast indecency.[170]

In light of a newly aggressive Commission broadcast indecency regulatory enforcement regime, some of the FCC sanctions, from recent years, would eventually be discussed in court formally.[171]

On 4 June 2007, in a 2-1 decision and crushing defeat for the Commission, the Second Circuit, in admonishing the FCC, ruled that fleeting expletives were not indecent, and that the Commission was "divorced from reality."[172] The court suggested that it was sympathetic to the networks contention that the FCC's indecency test is "undefined, indiscernible,

---

[170] *See supra* note 165 at 19234 ¶ 10; 19236 ¶ 15.

[171] *See generally infra* notes 172-217 and accompanying text.

[172] *See* Fox Television Stations v. FCC, 489 F.3d 444, 460 (2d Cir. 2007).

inconsistent and consequently, unconstitutionally vague."[173] Moreover, the same justices reasoned that the Commission's decision, from March 2006, was arbitrary and capricious under 5 U.S.C. Section 706 of the Administrative Procedures Act because the FCC acted in a way that was inconsistent from earlier rule making, and offered no explanation for the same change.[174] Further, there was no evidence, the court ruled, that fleeting expletives were harmful.[175] Most important, the court was, "skeptical that the Commission could provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster."[176] Even though the FCC argued that fleeting expletives forced viewers to "take the first blow" without warning, the court dismissed the same *Pacifica*[177] argument.[178] Commission chair Kevin Martin responded forcefully[179] and suggested that an appeal was possible.[180] As history would

[173] *Id.* at 463.
[174] *Id.* at 446.
[175] *Id.* at 461.
[176] *Id.* at 462.
[177] *See supra* note 81.
[178] *See supra* note 172 at 458.
[179] *See Statement of FCC Chair Kevin Martin on Second Circuit Court of Appeals Indecency Decision*, FEDERAL COMMUNICATIONS COMMISSION, June 4, 2007, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf. (last visited June 10, 2017) ("This makes it very difficult for us to enforce our indecency regime. I disagree with the decision and I'm disappointed for parents across the country. I find it hard to believe that the New York court would tell American families that "shit" and "fuck" are fine to say on broadcast television during the hours when children are most likely to be in the audience").
[180] *See* Amy Schatz, *Broadcasters Win Profanity Rulings; Appeals-Court Says Unscripted Expletives Don't Violate Standards*, WALL ST. J., June 5, 2007, at A3.

now show, this proved to be just the beginning of several court cases examining the constitutionality of the FCC's oversight in broadcast indecency regulation.

The long-awaited decision from the Third Circuit came down on 21 July 2008.[181] In yet another defeating blow for Commission Chair Kevin Martin and the FCC, the court vacated the $550,000 fine aimed at CBS for the Janet Jackson Super Bowl halftime incident.[182] In language similar to that of the Second Circuit's decision in June 2007, the court held that the Commission had departed from its prior policy of fleeting indecent material and the same change was arbitrary and capricious under section 706 of the Administrative Procedures Act.[183] The court also ruled that Janet Jackson and Justin Timberlake were independent contractors, and, therefore, CBS could not be held liable for their actions.[184] Less than one year later, nevertheless, the

---

[181] *See infra* note 182.
[182] *See* CBS v. FCC, 535 F.3d 167 (3d Cir. 2008).
[183] *Id.* at 209 ("In finding CBS liable for a forfeiture penalty, the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency").
See also Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 41 (1983) (noting that the agency could not change its policy without notice and reasoned explanation for the same).
[184] *See supra* note 182 at 189 ("Jackson and Timberlake were independent contractors, who are outside the scope of *respondeat superior*, rather than employees as the FCC found. The First Amendment precludes the FCC from sanctioning CBS for the indecent expressive conduct of its independent contractors without offering proof of scienter as an element of liability").

broadcast indecency debate would continue its long saga and find its way into the U.S. Supreme Court.[185]

With a panel of justices far different from the ones serving on the *Pacifica*[186] case, and despite comments by Justice Clarence Thomas[187] that

---

[185] *See infra* note 187.

[186] *See supra* note 81.

[187] *See* FCC v. Fox Television Stations, 129 S. Ct. 1800, 1819 (2009) (Thomas, J., concurring) ("I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. Red Lion and Pacifica were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" in these cases. This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional question, the Court relied on a set of transitory facts, *e.g.*, the "scarcity of radio frequencies," to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." In breaching this principle, Red Lion adopted, and Pacifica reaffirmed, a legal rule that lacks any textual basis in the Constitution. Indeed, the logical weakness of Red Lion and Pacifica has been apparent for some time: "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." Highlighting the doctrinal incoherence of Red Lion and Pacifica, the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, cable television programming, and the Internet. There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of Pacifica when it was issued... it makes no sense now. Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of Red Lion and Pacifica, dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. The number of over-the-air broadcast stations grew from 7,411 in 1969, when Red Lion was issued, to 15,273 by the end of 2004. And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today." Moreover, traditional broadcast television and radio are no

questioned the viability of the *Red Lion*[188] and *Pacifica*[189] cases, the U.S. Supreme Court decided, in a 5-4 decision in April 2009, that the FCC did not improperly change policy direction[190] in a disciplinary action that originally left Fox Television holding a $1.2 million indecency NAL.[191] More importantly, while some media law scholars and industry insiders were likely hoping that the high court would entertain the important First Amendment issues[192] associated with government oversight of broadcast content, the Court, instead, avoided ruling on the constitutionality of Commission regulation of broadcast content and,

---

longer the "uniquely pervasive" media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services. Broadcast and other video programming is also widely available over the Internet. And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices. The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today").

[188] 395 U.S. 367 (1969).

[189] *See supra* note 81.

[190] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530 (2009) (noting that, in employing Constitutional avoidance, the FCC's new policy was neither arbitrary nor capricious under the Administrative Procedures Act). *See also* Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2006).

[191] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009). *See also* In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of The Fox Television Network Program "Married By America" on April 7, 2003, 19 F.C.C.R. 20191 (2004) (noting more than one year after the show's cancellation, the FCC fined Fox Television $1.2 million due to an episode which featured 'pixilated' strippers and a woman licking whipped cream off a man's nipple during a bachelor party).

[192] *See* FCC v. Fox Television Stations, 556 U.S. 502, 545-46 (2009) (observing the dissent of Justice Ruth Bader Ginsburg, which noted strong First Amendment concerns with the majorities' decision by reasoning that the content in question here did not measure up to the George Carlin shock treatment in the Pacifica case, and that "words unpalatable to some may be 'commonplace' for others").

specifically, whether broadcast entities can air "fleeting" expletives without fear of federal government attention.[193] The latter could have been far-reaching, redefined broadcast indecency, and had a major impact on radio and television programming decisions for years to come. Further, the same ruling may have also influenced the rights of citizens to receive broadcast programming content[194] that some special interest activist groups, such as the PTC,[195] National Center on Sexual Exploitation (i.e., formerly, Morality in Media),[196] Concerned Women for America,[197] the Family Research Council,[198] the American Family Association,[199] Focus on the Family,[200] and the American Decency Association[201] have vehemently fought to restrict altogether. Litigation on broadcast indecency, however, did not stop there.[202]

---

[193] *See generally* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).
[194] *See generally* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); Butler v. Michigan, 352 U.S. 380, 383 (1957).
[195] *See* PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/PTC/aboutus/main.asp (last visited June 10, 2017).
[196] *See* NATIONAL CENTER ON SEXUAL EXPLOITATION, *available at* http://endsexualexploitation.org/ (last visited June 10, 2017).
[197] *See* CONCERNED WOMEN FOR AMERICA, *available at* https://concernedwomen.org/ (last visited June 10, 2017).
[198] *See* FAMILY RESEARCH COUNCIL, *available at* http://www.frc.org (last visited June 10, 2017).
[199] *See* AMERICAN FAMILY ASSOCIATION, *available at* https://www.afa.net (last visited Dec. 9, 2017).
[200] *See* FOCUS ON THE FAMILY, *available at* http://www.focusonthefamily.com (last visited Dec. 9, 2017).
[201] *See* AMERICAN DECENCY ASSOCIATION, *available at* http://www.americandecency.org (last visited Dec. 9, 2017).
[202] *See, e.g., infra* notes 210, 213, 216, 217.

In July 2010, on remand from the U.S. Supreme Court, the Second Circuit ruled, after avoiding the constitutional issues in its first go around,[203] that the FCC's regulatory regime for broadcast indecency, and specifically "fleeting expletives," was unconstitutional.[204] Although the high court in the landmark *Pacifica*[205] endorsed the Commission's authority to police indecent content on the airwaves because broadcasting was, among other things, "uniquely pervasive,"[206] the appellate judges criticized the *Pacifica*[207] framework as outdated in light of new media forms like the Internet, which undercuts the unique pervasiveness rationale.[208] Additionally, the Second Circuit found the FCC's policy guidance to be impermissibly vague because (1) the Commission had not discussed how it might apply the three "patently

---

[203] *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007).
[204] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 330, 333 (2d Cir. 2010) (noting the court's reasoning that the rule used by the FCC, which relied on a three-factor analysis to determine whether uses of indecent language were patently offensive, failed to give adequate notice of what or would not be a violation). Similar views regarding the constitutionality of FCC broadcast indecency oversight were observed by U.S. Supreme Court Justices Brennan and Marshall, in a strongly-worded dissent, more than thirty-four years ago. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 762-79 (1978) ("I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent….").
[205] *See supra* note 81.
[206] *See supra* note 81 at 748.
[207] *See supra* note 81.
[208] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326-27 (2d Cir. 2010). *See also generally* Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975); Cohen v. California, 403 U.S. 15 (1971); (observing that these courts have ruled the burden is on the individual to avert messages and forms of speech for which they find tasteless).

offensive" factors;[209] (2) constitutional problems existed regarding the FCC's blanket prohibition of certain words (e.g., "fuck" and "shit") and the two exceptions to that prohibition (e.g., bona fide news and artistic necessity); and (3) there was clear evidence of chilling effects (i.e., self-censorship) on broadcasters' protected speech.[210] Continuing the ongoing broadcast indecency narrative, the same court and judges would once again play host to constitutional challenges to the Commission's broadcast regulatory regime.[211]

The Second Circuit, in January 2011, on the heels of its similar decision only six months earlier,[212] vacated a $1.2 million FCC fine sent to ABC for an episode of NYPD Blue.[213] The late evening television drama involved the scripted showing of a woman's nude buttocks (i.e., and side of one of her breasts) for less than seven seconds.[214] Having once examined "fleeting

---

[209] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 322, 330 (2d Cir. 2010) ((1) the explicitness or graphic nature of the description or depiction; (2) whether the material dwells on or repeats at length; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value).

[210] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 334 (2d Cir. 2010) ("Indeed, there is ample evidence in the record that the FCC's indecency policy has chilled protected speech.").

[211] *See infra* note 213.

[212] *See supra* note 210.

[213] *See* ABC v. FCC, 404 Fed. Appx. 530 (2d Cir. 2011). *See also* Fox Television Stations v. FCC, 613 F.3d 317, 327-28 (2d Cir. 2010) (recognizing that the court reasoned laws must be drafted in ways clear enough for a person, with ordinary intelligence, to comprehend); Reno v. ACLU, 512 U.S. 844 (1997) (discussing the overbreadth doctrine); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (noting that the overbreadth doctrine was described by the court as "strong medicine").

[214] *See* ABC v. FCC, 404 Fed. Appx. 530 (2d Cir. 2011).

nudity" from the 2004 Super Bowl halftime show, and ten months after the above-noted Second Circuit ruling, the Third Circuit would again weigh in on the matter.[215]

While interested parties across the country awaited the forthcoming June 2012 decision of the U.S. Supreme Court in *Federal Communications Commission v. Fox Television Stations*,[216] on 2 November 2011, the Third Circuit ruled that CBS would not be liable for a Commission fine of $550,000 dating back to the 2004 Super Bowl incident involving pop music artists Janet Jackson and Justin Timberlake.[217] The decision came, in yet another victory for broadcasters and advocates of free expression, after the U.S. Supreme Court ruled in 2009 that the FCC had provided sufficient rationale for its 2006 policy shift to fine broadcasters for isolated use of on-air expletives.[218] Differing with the 2009 high court decision, judges for the Third Circuit held that the Commission's $550,000 fine was arbitrary and capricious, and issued before the FCC had made clear its policy change.[219] A few months later, though, the

---

215 *See infra* note 217.
216 132 S. Ct. 2307 (2012).
217 *See* CBS v. FCC, 663 F.3d 122 (3d Cir. 2011).
218 *Id.*
219 *Id.* at 151-52 (observing that for more than thirty years, the Commission had exempted "fleeting expletives" from its broadcast indecency regulatory regime).

broadcast indecency chronicles would continue.[220] In a case that would garner an unusual amount of media attention, the U.S. Supreme Court considered, yet again, the Commission's oversight of broadcast programming.[221]

Regrettably, the June 2012 decision of the U.S. Supreme Court, as articulated earlier, was likely not as satisfying as some broadcast industry pundits and media law scholars would have liked. Staunch advocates of broadcast First Amendment freedoms were, no doubt, disappointed when the high court, continuing on a similar trajectory from its 2009 decision, avoided the free speech underpinnings[222] of the case that may well have overturned the landmark 1978 *Pacifica*[223] decision. Instead, engaging once again in constitutional avoidance,[224] the high court held that the FCC failed to provide

---

[220] *See supra* note 216.

[221] *Id.*

[222] *See supra* note 216 at 2320. ("Because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy"). As the U.S. Court of Appeals for the Second Circuit had, indeed, ruled on the constitutionality of the FCC's regulatory regime in 2010, some First Amendment advocates may have been hoping for a similar conclusion from the high court in 2012. *See* Fox Television Stations v. F.C.C, 613 F.3d 317, 327 (2d Cir. 2010) ("For we conclude that, regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague").

[223] *See supra* note 81.

[224] *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) ("We decline to address the constitutional questions at this time"); Fox Television Stations v. FCC, 489 F.3d 444, 462 (2d Cir. 2007) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks"); Harris v. United States, 536 U.S. 545, 546 (2002) ("The canon of

adequate notice under the Due Process Clause of the Fifth Amendment.[225] That said, the Court did, near the end of its ruling, seem to encourage the Commission to modify its current indecency policy.[226]

THE COMMISSION SEEKS GUIDANCE ON DIRECTION OF BROADCAST INDECENCY ENFORCEMENT

With the June 2012 high court decision on the books, the FCC found itself in a position where it seemingly was being scolded, after judicial review, for its broadcast indecency enforcement regime. Therefore, on 1 April 2013, on the heels of providing Boston Red Sox soon-to-be hall of famer, David Ortiz,

---

constitutional avoidance—which provides that when a statute is susceptible of two constructions, the Court must adopt the one that avoids grave and doubtful constitutional questions"). *See also Constitutional Law-Vagueness-Second Circuit Strikes Down the FCC's Indecency Policy as Void for Vagueness-Fox Television Stations, Inc. v. FCC, 613 F3d 317 (2d Cir. 2010)*, 124 HARV. L. REV. 835 (2010-2011) (noting discussion of constitutional avoidance); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 77-82 (2008) (observing discussion of constitutional avoidance).

[225] *See supra* note 216 at 2317 ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement"). *See also* United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague").

[226] *Id.* at 2320 (2012) ("This opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements. And it leaves the courts free to review the current policy or any modified policy in light of its content and application.").

with a complaint-ridden,[227] "speaking from the heart, free pass"[228] on his recently broadcasted (i.e., via local radio and national television)[229] "f-bomb,"[230] the Commission announced that it was seeking formal comments regarding possible changes to its broadcast indecency enforcement policies.[231] Notwithstanding the FCC's reaching out for public comment, broadcast

---

[227] *See* Nick O'Malley, *F-Bomb Fallout: Viewer Complaints to the FCC Over David Ortiz's Foul Language Following Marathon Bombings*, MASSLIVE, July 5, 2013, *available at* http://www.masslive.com/redsox/index.ssf/2013/07/f-bomb_fallout_viewer_complain.html (last visited July 19, 2017) ("On Friday, Deadspin rounded up all of the complaints that were filed to the FCC in regards to David Ortiz's pregame speech to the Fenway crowd. While the public at large was seemingly OK with the use of extreme language in an emotional setting, others were angry with the fact that an athlete had used such language in what is supposed to be very family-friendly programming.").

[228] *See generally* Ari Meltzer, *A "Speaking From the Heart" Exception to Indecency?*, WILEY REIN, LLP, Apr. 24, 2013, *available at* http://www.wileyonmedia.com/2013/04/a-speaking-from-the-heart-exception-to-indecency/ (last visited July 19, 2017); Aaron Couch, *FCC Blesses Red Sox Player's F-Bomb: He 'Spoke From the Heart'*, HOLLYWOOD REPORTER, Apr. 20, 2013, *available at* http://www.hollywoodreporter.com/print/443391 (last visited July 19, 2017).

[229] The Boston Red Sox Pregame Ceremony, and David Ortiz speech, was broadcast nationally on the Major League Baseball Network, Regionally on the New England Sports Network, and locally on radio stations WEEI-AM, and WUFC-AM. *See, Couch, supra* note 228.

[230] *See, e.g.,* Cork Gaines, *The Chairman of The FCC Is Okay with David Ortiz Dropping An F-Bomb During Saturday's Red Sox Ceremony*, BUSINESS INSIDER, Apr. 22, 2013, *available at* http://www.businessinsider.com/fcc-david-ortiz-red-sox-ceremony-2013-4 ("FCC chairman Julius Genachowski issued a brief statement via Twitter endorsing David Ortiz after the Red Sox star dropped an F-bomb during a ceremony honoring the victims and first-responders of the Boston Marathon bombings. During the pregame ceremony, Ortiz caused a stir when he was addressing the crowd and announced on live television that Boston "is our f***ing city!" Shortly after video of the incident started spreading through social media, the official Twitter account of the FCC issued this statement..."David Ortiz spoke from the heart at today's Red Sox game. I stand with Big Papi and the people of Boston—Julius"");

[231] *See FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (noting more than one million complaints); Seeks Comment on Adopting Egregious Cases Policy*, FEDERAL COMMUNICATIONS COMMISSION, Apr. 1, 2013, *available at* https://www.fcc.gov/document/fcc-cuts-indecency-complaints-1-million-seeks-comment-policy (last visited June 11, 2017).

indecency action and enforcement continued.[232]

On 23 March 2015, WDBJ-TV became the latest media entity to receive a NAL from the Enforcement Bureau of the Commission.[233] The purported problem occurred when, during a WDBJ-TV newscast, at approximately 6:00 PM, the station aired video of a hand stroking an erect penis.[234] In response to reviewing the video of the WDBJ-TV newscast, the FCC asserted:

> Based upon the evidence before us, we find that WDBJ apparently willfully violated 18 U.S.C. § 1464 and Section 73.3999 of the Rules. The record here establishes that the Station employee who prepared and edited the news report for broadcast obtained material concerning the former adult film star from the website of a distributor of her sexually explicit films for inclusion in the broadcast news story." Though he claims he did not notice the indecent material, he should have been more alert to what he was downloading for broadcast from a sexually explicit website, and we cannot absolve the Licensee of responsibility because its employee failed to notice what he was downloading and preparing for broadcast."
>
> We recognize that Congress in the Broadcast Decency Enforcement Act increased the maximum forfeiture for violation of the indecency laws in order to increase and strengthen the Commission's enforcement authority in light of concerns that the statutory maximum formerly in effect was not a sufficient deterrent to broadcasting indecent material. We have taken these congressional concerns into account in determining the level of forfeiture to propose against WDBJ here. Therefore, while we recognize and affirm the Commission's overall restrained approach to indecency enforcement, for the reasons stated above, including the gravity

---

[232] *See infra* note 233.
[233] *See* In the Matter of WDBJ Television, Inc., 30 F.C.C.R. 3024 (2015).
[234] *Id.* at 3024 ¶ 1.

of the violation, WDBJ's ability to pay and culpability, and other factors described herein, we find that a proposed forfeiture in the amount of three hundred twenty-five thousand dollars ($325,000) is appropriate.[235]

[235] *Id*. at 3033-34 ¶¶ 23-24; 3036 ¶ 32.

Seemingly outraged by the Commission's punitive action, and amount of the forfeiture, media attorneys for WDBJ-TV fired off letters of opposition to the FCC.[236] Similarly, The National Association of Broadcasters and Radio Television Digital News Association, unlike the seemingly arbitrary and capricious[237] PTC,[238] also echoed the chorus of discontent with its own criticism.[239] While management for WDBJ-TV awaited the Commission's final decision, and the FCC's Enforcement Bureau seemed busy contemplating whether to sanction a CBS late-night talk show host for alleged on-air improprieties,[240] the commissioners were making a deal to settle other licensee issues.[241]

---

[236] *See* In the Matter of WDBJ Television, Inc., *Opposition of WDBJ Television, Inc., to Notice of Apparent Liability*, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, June 30, 2015, *available at* https://rtdna.org/uploads/files/WDBJ%20Opposition%20to%20NAL%2006_30_15.pdf (last visited June 11, 2017).

[237] Only one month earlier, ABC television, in a live nationally broadcast network telecast, eerily analogous to the Janet Jackson 2004 Super Bowl halftime show melee on the CBS television network, inadvertently showed the penis of Cleveland Cavalier, and NBA star player, LeBron James. For reasons unknown, the Parents Television Council gave ABC and James a "free pass" on the "penis flash" commotion. *See, e.g.*, Kelly Oliver, *PTC Statement on LeBron James Controversy*, PARENTS TELEVISION COUNCIL, June 12, 2015, *available at* http://w2.parentstv.org/Main/News/Detail.aspx?docID=3268 (last visited July 19, 2017) ("The Parents Television Council issued a statement in response to the LeBron James controversy during last night's NBA playoffs game. "After reviewing the video clip at issue, we find nothing that reasonably violates the spirit or the letter of the longstanding law against broadcasting indecent material over the public airwaves between 6 am and 10 pm. We will absolutely *not* be encouraging our members to file complaints, as we feel it is much ado about nothing," said PTC President Tim Winter."); Hilary Lewis, *Parents Group Calls LeBron James' Penis Flash "Much Ado About Nothing"*, HOLLYWOOD REPORTER, June 12, 2015, *available at* http://www.hollywoodreporter.com/news/lebron-james-penis-nba-finals-802148 (last visited July 19, 2017) ("The Internet may have been worked up into a frenzy over LeBron James

possibly exposing his penis to millions of viewers on live television Thursday night, but the Parents Television Council doesn't think the potentially indecent footage, broadcast during ABC's live coverage of the NBA Finals, is that big of a deal and the watchdog group says it won't be encouraging its members to file complaints. The PTC previously encouraged people to file complaints about a February episode of Fox's *Family Guy* in which a character was on trial for statutory rape, saying that the show's sexual content, including explicit dialogue, violated indecency standards."). *See also "LeBron's Exposed Penis Triggered FCC Complaints 'It Ruined My Tinder Date'"*, TMZ, July 26, 2015, *available at* http://www.tmz.com/2015/07/26/lebron-james-exposed-penis-triggered-fcc-complaints-it-ruined-my-tinder-date/ (last visited July 19, 2017) ("TMZ Sports obtained the complaints that were sent to the Federal Communications Commission back in June after cameras got too close to LeBron's crotch while he was adjusting himself during Game 4. In total, 5 people bitched about the impromptu peep show to the FCC—which released the documents to TMZ Sports, though the names of the complainers were redacted. Here are the highlights: "LeBron James showed his dick on national television and completely ruined my tinder date. It made us late for laser tag because I had to rewind it a few times to make sure that's exactly what we saw so we missed our bus. He clearly did it on purpose and he's not as good as Michael Jordan;" "I am shocked and appalled! I don't want my kids looking at male genitalia on broadcast television. I am ok with seeing female mammary glands, labia, vagina, etc., over broadcast but no more penis, please!"; "The camera had a close up of [LeBron's] tallywacker. This is the type of stuff I would expect from Game of Thrones, but not from the American Broadcasting Channel. At least I now know that I am bigger than the purportedly 'biggest' star in the NBA." When asked if the FCC ever launched an investigation into the penis, the org. told us they couldn't comment on the matter."); Spencer Hall & Matt Brown, *Actual FCC complaints from People Who Saw LeBron James' Penis on TV*, SBNATION, July 14, 2015, *available at* https://www.sbnation.com/nba/2015/7/14/8962625/lebron-james-fcc-complaints (last visited July 19, 2017) ("The Federal Communications Commission receives a lot of complaints, and some of them are about LeBron James' penis. After the King flashed his court jester during an NBA Finals broadcast on June 11, SB Nation filed a records request for any complaints about James' previously unequalled degree of national exposure."); Jessica Rawden, *Read The FCC Complaints About ABC Accidentally Showing LeBron James' Penis*, CINEMABLEND, *available at* http://www.cinemablend.com/television/Read-FCC-Complaints-About-ABC-Accidentally-Showing-LeBron-James-Penis-73907.html (last visited July 19, 2017) ("LeBron James showed his dick on national television and completely ruined my tinder date. It made us late for laser tag because I had to rewind it a few times to make sure that's exactly what we saw so we missed our bus. He clearly did it on purpose and hes not as good as Michael Jordan;" "The camera had a close up of [LeBron's] tallywacker. This is the type of stuff I would expect from *Game of Thrones*, but not from the American Broadcasting Channel. At least I now know that I am bigger than the purportedly 'biggest' star in the NBA."); *"ABC Accidentally Shows LeBron James' Penis During NBA Finals,"* VARIETY, June 11, 2015, *available at* http://variety.com/2015/film/news/abc-shows-lebron-james-penis-during-the-nba-finals-1201518247/ (last visited July 19, 2017) ("ABC got a little too close to LeBron James on Thursday night. Prior to the start of Game 4 between the Cleveland Cavaliers and Golden State Warriors, James adjusted his shorts during a team huddle, briefly exposing his penis on live television.");

On 5 April 2017, the Commission released an Order suggesting it had entered into a Consent Decree with WSKQ-FM, New York.[242] The agreement resulted from an investigation the FCC did after receiving complaints about an alleged (1) indecent broadcast; and (2) violations of the broadcast hoax rules.[243]

"NBA Finals: ABC Accidentally Flashes LeBron James' Penis," HOLLYWOOD REPORTER, June 11, 2015, *available at* http://www.hollywoodreporter.com/news/nba-finals-abc-accidentally-flashes-802084 (last visited July 19, 2017) ("Before the start of the Cleveland Cavaliers fourth game against the Golden State Warriors, the basketball front man adjusted his shorts on live television, flashing his penis on the screen.").

[238] *See, e.g.,* Julian Hattem, *Feds Fine TV Station $325K for Nudity*, THE HILL, Mar. 23, 2015, *available at* http://thehill.com/policy/technology/236660-feds-fine-tv-station-for-nudity-for-first-time-in-7-years (last visited July 19, 2017) ("Tim Winter, the president of the Parents Television Council, called the proposed fine "a victory for families" that "serves as a powerful reminder to broadcasters who borrow the public's airwaves that they must abide by the law."); Ted Johnson, *FCC Slaps Virginia TV Station With $325,000 Indecency Fine,* VARIETY, Mar. 23, 2015, *available at* http://variety.com/2015/biz/news/fcc-slaps-virginia-tv-station-with-325000-indecency-fine-1201458034/ (last visited July 19, 2017) (observing discussion of the incident).

[239] *See Comments of the National Association of Broadcasters and the Radio Television Digital News Association*, NATIONAL ASSOCIATION OF BROADCASTERS, July 28, 2015, *available at* www.nab.org/documents/newsRoom/pdfs/072815_WDBJ_indecency_comments.pdf (last visited June 11, 2017) (showing a copy of the written document).

[240] The FCC announced on May 23, 2017 that it would not take any action for the May 1, 2017 CBS Television broadcast of The Late Show with Steve Colbert. The controversy centered around a joke Colbert made about President Donald Trump and Russian President Vladimir Putin. CBS claimed that the joke was "bleeped," "pixelated over," and aired inside the safe harbor for indecency. *See U.S. Agency Will Not Take Action Against CBS' 'Colbert' Show*, REUTERS, May 23, 2017, *available at* http://www.reuters.com/article/us-usa-fcc-cbs-corp-idUSKBN18J32S (last visited June 13, 2017). *See also FCC Won't Take Action Against Stephen Colbert Over Trump Jokes*, WALL ST. J., May 23, 2017, *available at* https://www.wsj.com/articles/fcc-wont-take-action-against-stephen-colbert-over-trump-jokes-1495579574 (last visited June 13, 2017) (noting further discussion of the same Colbert incident).

[241] *See infra* note 242.

[242] *See In re* Applications of WSKQ Licensing, Inc., *Commission Adopts Consent Decree with WSKQ Licensing, Inc., Licensee of WSKQ-FM, New York, New York*, FEDERAL COMMUNICATIONS COMMISSION, Apr. 5, 2017, *available at* https://www.fcc.gov/document/commission-adopts-consent-decree-wskq-licensing-inc (last visited June 13, 2017.)

[243] *See id.*

The Commission held:

> The Consent Decree resolves the Bureau's investigation of the alleged violations. For the reasons stated in the March Decision, the Bureau has concluded that there is no basis for finding a violation of the broadcast hoax rule. With respect to the indecency allegations, Licensee argued that no sanction is appropriate because none of the Broadcasts are actionably indecent. The petitioners argued that the broadcasts in question are indecent, but they have not shown, and we are not aware of, any case where a broadcast station faced the prospect of license revocation pursuant to Section 312(a)(6) of the Act or non-renewal pursuant to Section 309(k) of the Act based on comparable facts. We note that Section 1.80 of the Rules, as of the date of the broadcasts in question, specified a base forfeiture amount of $7,000 for a broadcast of indecent material between the hours of 6 a.m. and 10 p.m. Based on our review of the record, we find that the broadcasts are of a nature that could support a forfeiture proceeding against Licensee for violations of 18 U.S.C. § 1464, but do not implicate Licensee's basic qualifications, demonstrate a failure to serve the public interest, convenience, and necessity over the Station's license term of 1998-2006, or constitute serious violations for purposes of Section 309(k)(1) of the Act. In order to resolve the matter without further expenditure of scarce resources, the Bureau and Licensee have negotiated the attached Consent Decree to provide for Licensee to pay a civil penalty in the amount of $10,000 and for the Bureau to terminate its investigation of the alleged violations.[244]

---

[244] *Id.*

With the stroke of a pen from the FCC's Acting Chief of the Media Bureau, Michelle Carey, and a $10,000 check from WSKQ-FM, the petitioner's allegations of indecency[245] and broadcast hoax violations were resolved.[246] Although WSKQ-FM was able to successfully negotiate a settlement with broadcasting's enforcement arm of the federal government, the PTC remained active in its pursuit to cleanse the broadcast airwaves of anything potentially offensive.[247]

On 28 April 2017, the PTC, apparently in a lather, petitioned the Commission about an 8:30 PM Fox Television network broadcast, on 25 April 2017, of *The Mick*.[248] The television episode in question involved a 17-year old girl and her desire to get breast implants.[249] In response to the same broadcast, PTC President Tim Winter opined:

> …..not only was an indecent word used in a sexual context, but the dialogue was delivered by a minor. Furthermore, the entire episode included graphic sexual dialogue and double-entendres, yet it was rated by Fox as appropriate for viewing by children as young as 14 years old.

---

245 What remains unclear, however, is why WSKQ-FM management would be concerned with an alleged indecency violation that had already run its five-year statute of limitations. *See, e.g.*, Time for Commencing Proceedings, U.S.C. § 2462 (noting the five-year statute of limitations on civil fines, penalties, forfeitures).

246 *See supra* note 242.

247 *See infra* note 248.

248 *See The Business of Broadcasting*, TVNEWSCHECK, Apr. 28, 2017, *available at* http://www.tvnewscheck.com/article/103656/ptc-urges-indecency-inquiry-on-the-mick (last visited June 12, 2017).

249 *Id.*

> You'd think that the network programmers and broadcast standards staffs at Fox, the media company facing tremendous public criticism over allegations of sexual harassment and misconduct, would avoid airing a broadcast TV sitcom that so blatantly sexualizes a 17-year-old girl. Beyond being grotesquely irresponsible, we believe the content violates the broadcast indecency law.[250]

While the FCC wrestles[251] with whether to sanction Fox Television for the April 2017 broadcast of *The Mick*, and other recent broadcast television incidents,[252]

---

[250] *Id.*

[251] At the same time the PTC pressured the FCC to financially sanction Fox Television for the recent broadcast episode of *The Mick*, PBS (i.e., along with NPR and CPB), currently in the news given President Donald Trump's proposed PBS funding cuts, petitioned the Commission to reexamine its "hard stance" on broadcast indecency regulation. *See* In the Matter of Modernization of Media Regulation Initiative, FEDERAL COMMUNICATIONS COMMISSION, MB Docket No 17-105, July 5, 2017, *available at* https://www.fcc.gov/document/media-bureau-open-mb-docket-no-17-105 (last visited July 24, 2017) ("The Commission should revisit what constitutes actionable indecency, what process should be implemented for reviewing and acting on complaints (given that these matters can take many years), and what sanctions are appropriate for violations, particularly in context-related circumstances such as typically arise on an NCE station. Over four years ago, the Commission commenced a review of its broadcast indecency polices and enforcement in GN Docket No. 13-86. 13 NPR, APTS, and PBS filed comments urging the Commission to return to its long-standing pre-2004 policy of generally deferring to broadcasters' reasonable good faith editorial judgment in these matters, and to update its complaint process to: (i) provide greater transparency and predictability for stations, program producers, and distributors; and (ii) empower FCC staff to more quickly address complaints, including by disposing of meritless complaints that can negatively impact stations by remaining unresolved for extended periods of time. Public Broadcasting strongly stands behind its 2013 filings on this issue and urges the Commission to resolve the proceeding it initiated four years ago by clarifying its enforcement priorities and practices in a manner that accords appropriate deference to the essential First Amendment values and interests at stake.").

[252] *See, e.g.*, John Hendel, *Trump 'Shithole' Coverage Prompted More Than 160 Indecency Complaints*, POLITICO, Apr. 3, 2018, *available at* https://www.politico.com/story/2018/04/03/trump-shithole-media-coverage-indecency-complaints-454928 (last visited Apr. 4, 2018); Stephen Fuzesi, *Olympics Cast Spotlight on FCC Indecency Policies*, LAW360.COM, Feb. 26, 2018, *available at* https://www.law360.com/articles/1016130/olympics-cast-spotlight-on-fcc-indecency-policies (last visited Feb. 27, 2018) ("French ice dancer Gabriella Papadakis has called it her "worst

what remains clear is the PTC's determination in potentially influencing, with and through its pressuring efforts, what we as a society are able to see on terrestrial television and hear on terrestrial radio. Given its sheer "political power" to alter broadcast programming, it seems fruitful to explore the PTC in the next chapter.[253] In the meantime, the Commission's enforcement machine and regulatory guidance on broadcast indecency, for now, remains intact and, unfortunately, the quandary for broadcast licensees continues.

---

nightmare—in the midst of her program, broadcast live by NBC and around the globe, the top of the skater's emerald costume came undone, exposing herself to television viewers as she and her partner twirled a silver medal;" Ted Johnson, *FCC Received Complaints Over NBC, CNN Use of Trump Profanity*, VARIETY, Jan. 12, 2018, *available at* http://variety.com/2018/tv/news/trump-shithole-fcc-complaints-1202662858/ (last visited Jan. 26, 2018) ("The FCC received complaints after NBC and CNN used the word "s—hole" in their coverage of the controversy over comments President Donald Trump reportedly made to lawmakers during a meeting about immigration.").

[253] *See infra* Chapter 4.

CHAPTER 4

SPECIAL INTEREST ACTIVIST GROUPS: TYRANNY OF THE MINORITY?

PARENTS TELEVISION COUNCIL

The PTC, arguably the most influential media watchdog group in recent years, focusing its efforts on broadcast indecency, succinctly explains its mission as follows:

> To protect children and families from graphic sex, violence and profanity in the media, because of their proven long-term harmful effects.[1]

As noted on its Internet website,[2] and further revealed in a 2010 candid interview[3] with its President, Tim Winter, the PTC works to accomplish its purpose by monitoring radio and television broadcast programming for what it deems as inappropriate or objectionable content.[4] Moreover, the PTC also makes special note of the individual sponsors that advertise on the alleged

[1] *See* PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/main/About/FAQ.aspx (last visited on Dec. 8, 2017).
[2] *See generally* PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/Main/ (last visited Dec. 8, 2017).
[3] *See generally* Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with Its President, Tim Winter*, 33 HASTINGS COMM. & ENT. L.J. 293 (2011).
[4] *See supra* notes 1-3.

problematic radio and television broadcasts, only to subsequently "share" its concerns with those advertisers.[5]

THE PTC BECOMES ESPECIALLY VISIBLE SHORTLY AFTER Y2K

While the PTC has been active as a media watchdog organization[6] since 1995,[7] it really made its presence known shortly after the airing of the 2002 and 2003 Billboard Music Awards broadcasted live on Fox Television stations.[8] In these programs, noted in Chapter 3 of this dissertation, musical artist Cher, and actress Nicole Richie, blurted the words, "fuck" and "shit."[9] Those fleeting expletive broadcast incidents were followed by the Fox network being fined

[5] *See, e.g., supra* note 3 at 315-18 (observing that the PTC will "engage" broadcast programming advertisers by a variety of means, including, (1) having its members write the advertiser; (2) sending press releases to print media; (3) showing up unannounced at advertiser shareholder meetings to express its views; (4) and buying shares of an advertiser's stock). *See also* PARENTS TELEVISION COUNCIL ADVERTISER ACCOUNTABILITY Internet page, *available at* http://w2.parentstv.org/blog/index.php/category/aa/ (last visited Dec. 9, 2017).

[6] *See supra* notes 1-3.

[7] The PTC was founded by conservative Catholic activist, L. Brent Bozell III. *See TV Watchdog Group is on the Defensive*, N.Y. TIMES, Oct. 24, 2010, *available at* http://www.nytimes.com/2010/10/25/business/media/25watchdog.html (last visited Dec. 9, 2017).

[8] *See* In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of The Fox Television Network Program "Married By America" on April 7, 2003, 19 F.C.C.R. 20191 (2004).

[9] *Id.*

$1.2 million for the reality show *Married by America*,[10] and the 2004 Super Bowl halftime show stunt by Janet Jackson, netting CBS a $550,000 bill.[11] What role, then, might the PTC have played in the above-noted FCC forfeitures?[12]

Despite the fact that the FCC claimed that it had received 159 complaints about the *Married by America* program,[13] a freedom of information request filed by author, professor, and former *TV Guide* critic, Jeff Jarvis, revealed different conclusions.[14] Specifically, Jarvis maintains, there were only ninety complaints filed by twenty-three individuals (i.e., multiple complaints using the same letter).[15] Jarvis contends, further, that all but two of the ninety complaints were identical.[16] Clearly, the PTC seemingly had mobilized its membership to petition the Commission through its electronic complaint process.[17] Indeed,

---

[10] *Id*. More than one year after the show's cancellation, the FCC fined Fox Television a record $1.2 million due to an episode which featured 'pixilated' strippers and a woman licking whipped cream off a man's nipple during a bachelor party. *See also FCC Proposes Record $1.2 Million Indecency Fine Against Fox*, WASH. POST, *available at* http://www.washingtonpost.com/wp-dyn/articles/A27857-2004Oct12.html (last visited June 13, 2017) (noting discussion of the incident and television episode).

[11] *See* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008).

[12] *See generally* PARENTS TELEVISION COUNCIL'S INDECENCY CAMPAIGN information, *available at* http://w2.parentstv.org/main/Campaigns/Indecency.aspx (last visited June 15, 2017).

[13] *See supra* note 8, 20191 ¶ 2.

[14] *See* Jeff Jarvis, *A BUZZMACHINE EXCLUSIVE! The Shocking Truth About the FCC: Censorship by the Tyranny of the Few,* BUZZMACHINE, Nov. 15, 2004, *available at* http://www.buzzmachine.com/archives/2004_11_15.html (last visited June 14, 2017).

[15] *Id.*

[16] *Id.*

[17] *Id.*

the PTC has set up an electronic link on its Internet website where one can fill in some information, make a few mouse clicks,[18] and the same formal complaint is sent to the FCC's Enforcement Bureau.[19] This process, though, can artificially inflate and, thereby, inaccurately report the number of complaints.[20] To that end, one reasonably wonders about what percentage of average Americans are actually complaining about alleged indecent television or radio broadcasts. And, further, are all complainants filing formal grievances after hearing or seeing the allegedly problematic broadcast? Is there broad discontent with television and radio programming?[21] Might there be broad

---

[18] Without even seeing/viewing/listening to the program in question. *See supra* note 3 at 326-28.

[19] *See File an Official Indecency Complaint with the FCC*, PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/main/Action/ContactFCC.aspx (last visited June 14, 2017).

[20] *See generally supra* notes 12, 14.

[21] While the researcher argues that there is not vast unrest, among the populace, with broadcast television and radio programming, overall, there are those that might be labeled as extremely conservative. *See, e.g., Must See the TV: FCC Complaints*, MUCKROCK, *available at* https://www.muckrock.com/project/must-seethe-tv-fcc-complaints-19/ (last visited July 17, 2017) (noting some of the most ridiculous broadcast programming complaints lodged with the FCC*). But see* Timothy Jay, *The Internet has Changed How We Curse*, WASH. POST, June 24, 2014, *available at* https://www.washingtonpost.com/posteverything/wp/2014/06/23/the-internet-has-changed-how-we-curse/?utm_term=.501d3281f42c (last visited July 17, 2017) ("Politicians get caught swearing all the time. In 2000, George W. Bush referred to a New York Times reporter as a "major league a--hole." In 2004, Vice President Dick Cheney told Vermont Senator Pat Leahy to go f--k himself on the floor of the U.S. Senate. In 2010, Vice President Joe Biden called the passage of President Obama's health care legislation "a big f--king deal;" "In using an expletive last week to tell a rally of hockey fans, "This is a big f--kin' day," did Los Angeles Mayor Eric Garcetti cross a line?").

discontent with the Commission?[22]

Syndicated columnist Todd Shields discovered that, in 2003, the PTC was responsible for 99.8% of all broadcast media programming complaints.[23] Similarly, in 2004, Shield's research showed, despite strong denials by the PTC's President Tim Winter,[24] excluding the complaints for the 2004 Super Bowl "wardrobe malfunction," 99.9% of complaints about broadcast programming were generated by the PTC.[25] Adding to this, the FCC itself has seemingly complicated things with its own deeply flawed administrative efforts in tallying alleged indecency complaints.[26]

Adam Thierer, Senior Research Fellow with the Mercatus Center at George Mason University, wrote extensively in a 2007 law review article about

---

[22] *See generally Dereliction of Duty: How the Federal Communications Commission Has Failed the Public*, PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/PTC/publications/reports/fccwhitepaper/main.asp (last visited June 16, 2017).

[23] *See* Todd Shields, *Activists Dominate Content Complaints*, MEDIA WEEK, Dec. 6, 2004.

[24] *See supra* note 3 at 328 ("The FCC can't keep track of the number of complaints we send them. They screw up the number all the time, by thousands, or even hundreds of thousands;" "There was no data to back up that figure. It was a knee-jerk response from someone who didn't like us at the FCC;" "Whoever gave that number at the FCC was a liar." When asked whether he had ever confronted the FCC with what Winter describes as inaccurate information, Winter replied, "It was one of those things where the people who like us would say, "Yes. Go for it, PTC, whereas people who hate us would say, "You guys are filing all the complaints." It's like the old adage, "Don't stop to kick every barking dog. That was one where we thought we had other things to do. But it was patently untrue.").

[25] *See supra* note 23 at 4.

[26] *See generally infra* note 27.

the vast methodological changes the Commission has made in recent years to its indecency complaint process, and the troubling issues that have followed.[27] The same changes, Thierer argues, at best, have contributed to an unreliable means for counting alleged indecency complaints.[28] Thierer, in part, posited:

> Change #1: Computer-Generated Form Letters Counted as Individual Complaints
>
> This category of complaints has created special problems for the FCC in recent years because of the increasing use of computer-generated complaint campaigns by groups such as the PTC. If the PTC or other activist groups generate the bulk of most of the complaints about a specific program, and all those complaints are the exact same form letter sent from their Web sites, should they be counted as a single complaint or multiple complaints?
>
> Prior to the summer of 2003, the Commission aggregated identically-worded form letters or computer-generated electronic complaints such that they counted as a single complaint. But at some point during the summer of 2003, the FCC quietly changed its methodology to count group complaints as individual complaints. Although the agency did not release any public notices or press releases to explain its methodological switch, the change can be verified by examining FCC data and statements by the PTC from that time.[29]
>
> Change #2: Complaints to Multiple Offices Counted Multiple Times
>
> In early 2004, the agency again quietly changed its method of counting indecency complaints. In its Quarterly Report on Informal Consumer Inquiries and Complaints for the first

[27] *See* Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM LAW CONSPECTUS 431, 460-69 (2007).
[28] *See generally id*.
[29] *Id.* at 464.

quarter of 2004, the FCC reported a significant jump in indecency complaints in January and February following the Janet Jackson Super Bowl incident. On its own, the jump in indecency complaints was not surprising. However, buried in the fine print of the footnotes of that FCC Quarterly Report was the following note regarding indecency tallies:

> "Commencing with this report, the reported counts reflect complaints received directly by CGB, complaints forwarded to EB, complaints received separately by EB, and complaints emailed directly to the FCC's Commissioner's offices and FCCINFO. The reported counts may also include duplicate complaints or contacts that subsequently are determined insufficient to constitute actionable complaints."

In other words, since the first quarter of 2004, the FCC has been counting identical indecency complaints multiple times according to how many Commissioner's offices and other divisions receive the complaints. Consequently, some indecency complaints could be inflated by a factor of six or seven, while others are counted singly. In an age of computer-generated petitions, bombarding multiple FCC offices with complaints literally is as simple as the click of a button. As a result, it is impossible to determine exactly how much indecency "complaint inflation" is taking place today at the FCC, but there seems to be little doubt that it is taking place.[30]

Thierer asserts, additionally, that when the FCC provides a minority, but vocal, voice the power to potentially change media programming, it may be providing advocacy groups like the PTC a "heckler's veto."[31] In other

[30] *Id.* at 465-66.

[31] Heckler's veto case law has an important First Amendment place when considering the dissemination of clashing or despised views (i.e., unpopular speech). *See, e.g.,* Startzell v. Fisher, 533 F.3d 183, 200 (3d Cir. 2008) ("A heckler's veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience. See Brown v. Louisiana, 383 U.S. 131, 133 n.1, 86 S. Ct. 719, 15 L.Ed.2d

words, the PTC's views trump the voice of the public at large.[32]

---

637 (1966); Reno v. ACLU, 521 U.S. 844, 880 (1997) ("It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child a "specific person . . . under 18 years of age," 47 U.S.C.A. § 223(d)(1)(A) (Supp. 1997)—would be present"); Feiner v. New York, 340 U.S. 315, 320, 326-29 (1951) ("The ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."); Terminiello v. City of Chicago, 337 U.S. 1, 4-6 (1949) (Black, J.: "A function of free speech under our system of government is to invite dispute. The vitality of civil and political institutions in our society depends on free discussion. It is only through free debate and free exchange of ideas that government remains responsive to the will of the people. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. The alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.").

[32] *See, e.g.*, First Unitarian Church of Salt Lake City v. Salt Lake City Corporation, 308 F.3d 1114, 1128 (10th Cir. 2002) ("Our country's dedication to both free expression and non-establishment are among its greatest heritages, and our fealty to the concept of a marketplace of ideas in religion as well as other fields has been the hallmark of our society"); Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); Whitney v. California, 274 U.S. 357, 375 (1927) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."); Abrams v. United States, 250 U.S. 616, 630 (1919) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best

The PTC has railed against some of the most popular radio and television programs (i.e., evidenced by Arbitron and Nielsen data).[33] Given the popularity of these programs, does the voice of the PTC represent broad public discontent, or should the individual media markets, instead, decide?[34]

OTHER SPECIAL INTEREST ACTIVIST GROUPS

Although the PTC has arguably been at the forefront, in recent years, lobbying the FCC to sanction broadcasters for allegedly indecent program content, other special interest activist organizations, to one degree or another,[35]

---

test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25 (1965) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said"). *See also generally* PATRICK GARRY, THE AMERICAN VISION OF A FREE PRESS (1990); 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1029 (BERNARD SCHWARTZ ED., 1971) (observing comments of June 8, 1789, House of Representatives); JOHN STUART MILL, ON LIBERTY (ch. II 1869); JOHN MILTON, AREOPAGITICA (1644).

[33] *See Best and Worst TV Shows*, PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/ptc/publications/bw/welcome.asp (last visited June 15, 2017). *See also* ZAP 2 IT, *available at* http://tvbythenumbers.zap2it.com/ (last visited June 15, 2017).

[34] *See generally supra* note 27.

[35] *See, e.g.*, KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS 57 (2006) ("Groups like Morality in Media and the American Family Association have worked for years to get stations fined and, more importantly, get licenses pulled. While they have had some success with getting inappropriate material fined, the Commission has never revoked a license or refused to allow a company to grow because of sexually explicit programing."); KIMBERLY ZARKIN, ANTI-INDECENCY GROUPS AND THE FEDERAL COMMUNICATIONS COMMISSION: A STUDY IN THE POLITICS OF BROADCAST REGULATION 7 (2003) ("Morality in Media takes the more formal, legal

have played a similar role.[36] Therefore, while broadcast indecency may not be a significant part of their current agenda, they may well continue to be one voice in a chorus that advocates for the FCC's policing of the broadcast airwaves.[37] Examples include, the National Center on Sexual Exploitation (i.e., formerly, Morality in Media),[38] Concerned Women for America,[39] the Family

---

approach. The group files formal comments with the FCC as a means to change policy. It has also utilized other means of access, including the submission of amicus briefs to the courts, and drafting legislation. The American Family Association, while active in submitting complaints and comments to the FCC, focuses most of its attention on outsider activity: advertisers, boycotts, and training its members to monitor stations for indecent broadcasts.").

[36] This information is limited in the sense that it is extremely difficult, if not impossible, to precisely tally the number of times any special interest activist group has lobbied the FCC to sanction a broadcaster for alleged indecent content. The FCC's Internet website and associated Complaints and Compliance Office, and the National Record Center, in Suitland, Maryland, provide limited assistance.

[37] *See infra* notes 38-43.

[38] *See* NATIONAL CENTER ON SEXUAL EXPLOITATION, *available at* http://endsexualexploitation.org/ (last visited June 10, 2017). *See also* FCC WATCH ON INDECENCY: DEFENDING BROADCAST DECENCY STANDARDS ON TV AND RADIO BY HOLDING THE FEDERAL COMMUNICATIONS COMMISSION ACCOUNTABLE, *available at* http://endsexualexploitation.org/fcc/ (last visited Dec. 9, 2017) (the NCSE maintains a wealth of information on its website regarding broadcast indecency, some of which is, ironically, not for the squeamish. For example, there are brief articles entitled, "Local Station Fined $325,000 for Showing Erect Penis During News Broadcast," and "Fisting, Anal Sex, Penis Pictures: Broadcast TV's Ratings Grab Gets Raunchy." Further, much like the PTC, the NCSE has an electronic link on its website where one can file programming complaints directly with the FCC.).

[39] *See* CONCERNED WOMEN FOR AMERICA, *available at* https://concernedwomen.org/ (last visited June 10, 2017). *See also* PENNY NANCE ON FCC INDECENCY CASE, *available at* https://concernedwomen.org/penny-nance-on-fcc-indecency-case/ (last visited Dec. 9, 2017) (observing Nance's comments, "Parents want to be able to sit down with their children and watch broadcast television without having to be worried about "f-bombs" or nudity during family hour, but broadcasters believe they have the right to continue to promote indecent material with impunity, under the guise of "Freedom of Speech;" "The FCC's standard is not "arbitrary and capricious" or "vague," as broadcasters claim. The standard is clearly laid out.......It is apparent that Hollywood's goal is for the culture to become only coarser and raunchier.").

Research Council,[40] the American Family Association,[41] Focus on the Family,[42] and the American Decency Association.[43]

---

[40] *See* FAMILY RESEARCH COUNCIL, *available at* http://www.frc.org (last visited June 10, 2017). *See also* FRC WELCOMES FCC ENFORCEMENT ACTION AGAINST PATENTLY OFFENSIVE BROADCAST, *available at* http://www.frc.org/newsroom/frc-welcomes-fcc-enforcement-action-against-patently-offensive-broadcast (last visited Dec. 9, 2017) ("Today, the Federal Communications Commission (FCC) announced that it will enforce the federal broadcast indecency law against WDBJ-TV in Roanoke, Virginia. The new enforcement action was passed by a unanimous vote of the five-member commission and imposes the maximum penalty of $325,000–the largest single forfeiture proposed in the history of FCC enforcement. The penalty stems from a July 12, 2012 6 PM news broadcast about a former pornography performer which included a clip of a pornographic video." Cathy Ruse, FRC's Senior Legal Fellow, released the following statement in response to the FCC action: "Parents have a tough enough job raising their kids today without having to worry that they will be exposed to patently offensive sexual material on broadcast TV;" "The American people have passed laws to protect their public airways and no network or station is above the law.").

[41] *See* AMERICAN FAMILY ASSOCIATION, *available at* https://www.afa.net (last visited Dec. 9, 2017). *See also* SPLC SOUTHERN POVERTY LAW CENTER, *available at* https://www.splcenter.org/fighting-hate/extremist-files/group/american-family-association (last visited Dec. 9, 2017) ("Initially founded as the National Federation for Decency, the American Family Association (AFA) originally focused on what it considered indecent television programming and pornography. The AFA says it promotes "traditional moral values" in media. A large part of that work involves "combating the homosexual agenda" through various means, including publicizing companies that have pro-gay policies and organizing boycotts against them. The AFA has a variety of outlets to disseminate its message, including the American Family Radio Network, its online One News Now and the monthly *AFA Journal*. In early 2011, the AFA claimed more than 2 million online supporters and 180,000 subscribers to its *Journal*;" "Homosexuality is a poor and dangerous choice, and has been proven to lead to a litany of health hazards to not only the individuals but also society as a whole." –AFA Action Alert, July 20, 2012;" "The homosexual movement is a progressive outgrowth of the sexual revolution of the past 40 years and will lead to the normalization of even more deviant behavior." – Don Wildmon, AFA website, 1999;" "Homosexuality is not only harmful to homosexuals themselves, but also to children and to society.").

[42] *See* FOCUS ON THE FAMILY, *available at* http://www.focusonthefamily.com (last visited Dec. 9, 2017). *See also* BROADCAST DECENCY: THE ISSUE, *available at* https://www.focusonthefamily.com/socialissues/family/broadcast-decency-issue (last visited Dec. 9, 2017) ("The FCC also makes clear that the definition of "obscene language" includes non-verbal communication;" "The FCC is also charged with regulating indecent speech. This is speech or material that does not rise to the level of obscene but it is still considered harmful to minors and society. The FCC;" "It is important to note that the FCC only enforces rules

DOES THE THREAT OF FCC ACTION, PROMPTED BY THE PTC, SIMILAR MEDIA WATCHDOG ORGANIZATIONS, AND ADVERTISERS, CHILL FREE SPEECH?

As noted in Chapter 3, the FCC has been vigorous with alleged broadcast indecency forfeitures in recent years.[44] Worthy of further scrutiny, would the same government activity have any effect on whether licensees and networks decide to air programming that may be sensitive or controversial?[45] After all, any such self-censorship runs contrary to the flow of unfettered expression envisioned by the very core of First Amendment freedoms.[46] To that end, several months after the 2004 Super Bowl incident and subsequent

---

against indecency that occurs between the "safe harbor" hours of 6:00 a.m. and 10:00 p.m. Unfortunately, even then, enforcement is rare.").

[43] *See* AMERICAN DECENCY ASSOCIATION, *available at* http://www.americandecency.org (last visited Dec. 9, 2017). *See also* the ADA FACEBOOK page, *available at* https://www.facebook.com/pg/AmericanDecency/about/?ref=page_internal (last visited Dec. 9, 2017) ("The American Decency Association is a non-profit organization founded in the 1980s by Bill Johnson to combat the sale of pornography in our community. Since that time, we have been instrumental in national pro-decency campaigns, *including driving Shock Jock Howard Stern from terrestrial radio* (emphasis added), to cleaning up Abercrombie and Fitch's nudity-ridden catalogs, to encouraging Christians to fight the battle for purity in their own lives and communities. ADA is also a voice for conservatism and political common sense within the Christian community. We promote strong national security, limited government, and personal responsibility from a Biblical perspective.").

[44] *See generally* Chapter 3 and accompanying notes. The Parents Television Council, most recently, petitioned the FCC to sanction Fox Television for a broadcast episode of *The Mick*. *See PTC Urges Indecency Inquiry On 'The Mick'*, TVNEWSCHECK, Apr. 28, 2017, *available at* http://www.tvnewscheck.com/article/103656/ptc-urges-indecency-inquiry-on-the-mick (last visited June 12, 2017).

[45] *See generally* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

[46] *See generally* Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341 (2005).

turmoil, some broadcast network executives found themselves reconsidering their program schedules.[47]

In Fall 2004, sixty-six of 225 ABC television network affiliates would not air the Tom Hanks epic, and Academy Award winning film, *Saving Private Ryan,* for fear of Commission reprimand because the film contained fleeting expletives.[48] Similarly, upon the fifth anniversary of 9/11, CBS television network affiliates were squeamish about broadcasting unedited versions of the same event given the occasional uses of profanity in the television special.[49] Moreover, the Second Circuit noted, in its 2010 Fox Television Stations decision, that the record is replete with examples of broadcasters passing on programs out of fear of federal government reprisal.[50] Clearly, these

---

[47] *See infra* notes 48-50 and accompanying text.

[48] *See* Todd Shields, *Censoring Private Ryan*, MEDIA WEEK, Nov. 15, 2004, at 5. Ironically, the same film ran on network television twice before without FCC sanction. *Id. See also* In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11,2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005) (discussing the FCC Memorandum Opinion and Order thereby denying the petition of The American Family Association to sanction the ABC affiliates that ran the film).

[49] *See CBS Stations Fearful of Airing 9/11 Documentary*, TV TECHNOLOGY, Sept. 10, 2006, *available at* http://www.tvtechnology.com/news/0086/cbs-stations-fearful-of-airing-/-documentary/244908 (last visited June 15, 2017). *See also 9/11 Film Becomes an Indecency Test,* L.A. TIMES, Sept. 4, 2006, *available at* http://articles.latimes.com/2006/sep/04/business/fi-cbs4 (last visited June 15, 2017) (discussing the same CBS self-censorship).

[50] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 334-35 (2010) ("Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose. Indeed, there is ample evidence in the record that the FCC's indecency policy has chilled protected speech. For instance, several CBS affiliates declined to air the

Peabody Award-winning "9/11" documentary, which contains real audio footage—including occasional expletives—of firefighters in the World Trade Center on September 11th. Although the documentary had previously aired twice without complaint, following the *Golden Globes Order* affiliates could no longer be sure whether the expletives contained in the documentary could be found indecent. *See* Larry Neumeister, "Some CBS Affiliates Worry over 9/11 Show," *Associated Press*, Sept. 3, 2006. In yet another example, a radio station cancelled a planned reading of Tom Wolfe's novel, *Am Charlotte Simmons*, based on a single complaint it received about the "adult" language in the book, because the station feared FCC action. When the program was reinstated two weeks later, the station decided that it could only safely air the program during the "safe harbor" period.

The FCC's application of its policy to live broadcasts creates an even more profound chilling effect. In the case of the 2003 Billboard Music Awards broadcasts, Fox had an audio delay system in place to bleep fleeting expletives. It also pre-cleared the scripts of the presenters. Ritchie, however, departed from her script and used three expletives in rapid sequence. While the person employed to monitor and bleep expletives was bleeping the first, the following two slipped through. Even elaborate precautions will not protect a broadcaster against such occurrences. The FCC argues that Fox should simply implement a more effective screening system, but, short of giving up live broadcasting altogether, no system will ever be one hundred percent effective. Instead, Fox may decide not to ask individuals with a history of using profanity to present at its awards shows. But, of course, this will not prevent someone who wins an award—such as Cher or Bono—from using fleeting expletives. In fact, the only way that Fox can be sure that it won't be sanctioned by the FCC is by refusing to air the broadcast live.

This chilling effect extends to news and public affairs programming as well. Broadcasters may well decide not to invite controversial guests on to their programs for fear that an unexpected fleeting expletive will result in fines. The FCC points to its " *bona fide* news" exception to show that such fears would be unfounded. But the FCC has made clear that it considers the decision to apply this exception a matter within its discretion. Otherwise, why not simply make an outright news exception? During the previous proceedings before this Court, amicus curiae gave the example of a local station in Vermont that refused to air a political debate because one of the local politicians involved had previously used expletives on air. The record contains other examples of local stations that have forgone live programming in order to avoid fines. For instance, Phoenix TV stations dropped live coverage of a memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by Tilliman's family members to express their grief. A station in Moosic, Pennsylvania submitted an affidavit stating that in the wake of the FCC's new policy, it had decided to no longer provide live, direct-to-air coverage of news events "unless they affect matters of public safety or convenience." If the FCC's policy is allowed to remain in place, there will undoubtedly be countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment.

broadcasters felt chilled in fear of FCC financial sanctions.[51] Although, as demonstrated above, media entities have made substantive arguments about their individualist[52] First Amendment rights, there are also those that would suggest collectivist[53] interpretations of the First Amendment are equally important.[54]

The chill of protected speech has even extended to programs that contain no expletives, but which contain reference to or discussion of sex, sexual organs, or excretion. For instance, Fox decided not to re-broadcast an episode of "That 70s Show" that dealt with masturbation, even though it neither depicted the act or discussed it in specific terms. The episode subsequently won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue. Similarly, an episode of "House" was rewritten after concerns that one of the character's struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.

As these examples illustrate, the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.").

[51] *Id*.

[52] Individualist interpretations of the First Amendment favors the rights of broadcasters. *See* Jeffrey Layne Blevins, "*The Political Economy of U.S. Broadcast Ownership Regulation and Free Speech After the Telecommunications Act of 1996*," DEMOCRATIC COMMUNIQUE, *available at* http://journals.fcla.edu/demcom/article/view/79947 (last visited June 15, 2017).

[53] Collectivist interpretations of the First Amendment supports the public's right to receive a diverse array of viewpoints. *Id.*

[54] *See generally* PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 29-62 (2001).

Given the aggressive nature of the Commission's broadcast indecency enforcement regime since the 2002 Billboard Music Awards shows, combined with the pressure applied[55] by the PTC, many controversial broadcasters (e.g., Howard Stern) and similar programs have essentially been forced to escape terrestrial forms of broadcasting for the paid services of satellite radio[56] (i.e., and higher tiers of cable television service), all beyond the reach[57] of the FCC. This means that a significant segment of the listening/viewing audience does not have available the same types of discourse that others have.[58] Do such scenarios forward and embrace democracy and democratic discourse? After

---

[55] *See, e.g., PTC Releases Annual Ranking of Best and Worst TV Sponsors,* PARENTS TELEVISION COUNCIL, Nov. 19, 2012, *available at* http://www.parentstv.org/PTC/news/release/2012/1119.asp (last visited June 17, 2017); *PTC Finds Increase in Harsh Profanity on TV*, PARENTS TELEVISION COUNCIL, Oct. 29, 2008, *available at* http://www.parentstv.org/PTC/news/release/2008/1029.asp (last visited June 17, 2017).

[56] *See Howard Stern Signs New Five-Year Deal with SiriusXM; Satellite Radio Service to Launch First Venture into Video Programming with Mr. Stern*, WALL ST. J., Dec. 15, 2015, *available at* https://www.wsj.com/articles/howard-stern-signs-new-five-year-deal-with-siriusxm-1450189126 (last visited July 17, 2017).

[57] *See, e.g.,* Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services,* 13 RICH. J.L. & TECH. 17 (2007); John C. Quale & Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite,* 60 FED. COMM. L.J. 37 (2007); Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?,* 34 PEPP. L. REV. 743 (2007); Jessica E. Elliott, *Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?*, 5 CONN. PUB. INT. L.J. 263 (2006); Gregory B. Phillips, *Indecent Content on Satellite Radio: Should the FCC Step In?,* 26 LOY. L.A. ENT. L. REV. 237 (2006); Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L. J. 243 (2006); Andrew Sperry, *Smut In Space: The FCC And Free Speech On Satellite Radio,* 17 LOY. CONSUMER L. REV. 531 (2005).

[58] The researcher ponders, respectfully, is personal wealth required (i.e., or should one's financial resources play a role) for one to be exposed to all forms of expression?

all, the court in *Red Lion Broadcasting v. FCC*[59] maintained: "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[60] Moreover, Justice Louis Brandeis, in *Whitney v. California*,[61] suggested that the remedy for messages one disagrees with is "[m]ore speech, not enforced silence."[62] Similarly, in *Forsyth County v. Nationalist Movement*,[63] the court held that "listener's reaction to speech is not a content-neutral basis for regulation" and "speech cannot be burdened simply because it might offend a hostile mob."[64] And, in *Reno v. ACLU*,[65] the U.S. Supreme Court reasoned:

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[66]

What is more, some courts have mandated that states allow unpopular

---

[59] 395 U.S. 367 (1969).
[60] *Id*. at 390.
[61] 274 U.S. 357 (1927).
[62] *Id.* at 377.
[63] 505 U.S. 123 (1992).
[64] *Id.* at 134-35.
[65] 521 U.S. 844 (1997).
[66] *Id.* at 885.

speech.[67] The question, as before, is whether special interest activist groups, while well-organized machines advocating for causes it believes to be important, should be permitted to trample the free speech rights of media entities or individuals,[68] or determine what is "best"[69] for society with and through (1) pressuring tactics aimed at the Commission;[70] or (2) boycotting[71] of

---

[67] *See, e.g.*, Ovadal v. City of Madison, 416 F.3d 531, 537 (7th Cir. 2005) ("Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.'" (quoting Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993); Smith v. Ross, 482 F.2d 33, 37 (6th Cir. 1973) ("State officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."). S*ee also* Grider v. Abramson, 994 F. Supp. 840, 845-46 (W.D. Ky. 1998) ("The police were not at liberty to do nothing; authorities had to develop some way of allowing the rallies to proceed…"). The clear exception to the rule is when authorities suspect that discourse will lead to violence. *See, e.g.,* Glasson v. City of Louisville, 518 F2d 899, 905 (6th Cir. 1975) ("Hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker's message so long as the speaker does not go beyond mere persuasion and advocacy of ideas and attempts to incite to riot").

[68] *See, e.g., 73% Say Freedom of Speech Worth Dying For*, RASMUSSEN REPORTS, Aug. 23, 2017, *available at* http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/august_2017/73_say_freedom_of_speech_worth_dying_for (last visited Aug. 27, 2017) ("A new Rasmussen Reports national telephone and online survey finds that an overwhelming 85% of American Adults think giving people the right to free speech is more important than making sure no one is offended by what others say.").

[69] *See What's on TV Tonight?*, PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/main/Toolkit/FamilyGuide.aspx (last visited June 16, 2017) (observing that television show content is ranked by "red, yellow, or green lights").

[70] *See generally* Chapter 4.

[71] *See* Glenn Garvin, *Bozell Army Channels Energy into Decency Fight*, CHI. TRIB., July 4, 2005, *available at* http://articles.chicagotribune.com/2005-07-04/features/0507040074_1_newsletters-and-press-releases-decency-fcc (last visited June 16, 2017) ("PTC-organized advertiser boycotts drove dozens of sponsors away from risqué cable shows."); *But see About the PTC*, PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/blog/index.php/about-the-ptc/ (last visited June 16, 2017) ("Does the PTC organize or advocate boycotts? Not at all. The PTC aims to work with corporations and believes most of them have a sense of social responsibility."). *See also AFA Pledges Advertiser Boycott of ABC's Good Christian B*tches*, CHARISMA NEWS, Mar. 7,

advertisers.[72]

2011, *available at* http://www.charismanews.com/us/36206-afa-pledges-advertiser-boycott-of-abcs-good-christian-btches (last visited June 16, 2017) ("If ABC continues with plans to produce this series, AFA will call for a boycott of both national and local advertisers, and will urge viewers in every community to contact their local ABC affiliate to strongly urge them not to broadcast this toxic waste"); *AFA Reinstates Ford Boycott Over Gay Advertising*, MEDIALIFE MAGAZINE, Mar. 15, 2006, *available at* http://medialifemagazine.com/afa-reinstates-ford-boycott-over-gay-advertising/ (last visited June 16, 2017) ("The American Family Association continues to insist that Ford stop advertising in gay publications. Four months after the first standoff between the two groups resulted in Ford yanking advertising from magazines like The Advocate, only to reinstate it days later, the AFA has undertaken another boycott of the automaker. It has partnered with 18 other family groups in calling for a one-year boycott of Ford for what it terms support of groups supporting gay marriage. AFA chairman Donald Wildmon says that Ford reneged on a written agreement reached between the two sides last year, providing that Ford would pull advertising from gay publications. Ford has admitted to meeting with the AFA but insists that no agreement existed. It cited financial concerns when it pulled the advertising in December, a decision it quickly reversed after a very vocal protest from gay and civil liberties groups. The AFA had called off a previous boycott begun last spring. Previous AFA boycotts have targeted Procter & Gamble and Target.").

[72] *See, e.g.*, 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; *How and Why Howard Stern's TV Show Failed*, PARENTS TELEVISION COUNCIL, Sept. 22, 1999, *available at* http://www.parentstv.org/ptc/publications/reports/sternreport/main.asp (last visited June 16, 2017) ("The Parents Television Council organized a campaign to contact the sponsors of Stern's television program, and the stations that carry Stern. Many of the sponsors contacted agreed not to sponsor the show again, and many more have since stopped advertising on it. As the campaign became more successful, Stern began to lash out at his critics, and began expressing concerns about the future viability of not only his TV show, but his radio program as well. In his April 2 radio broadcast, Stern somberly told his listeners, "Don't allow these whacked out organizations…who want to clean up the airwaves rule your life. And the way to fight them…support this show…because we will be gone…they will win…they will take away what we love;" "Although Stern debuted with the advertising support of numerous major corporations, virtually all have fled from his show, leaving Miller Beer, Glaxo Wellcome's Valtrex (a drug for the treatment of genital herpes), and adult chat lines as the only consistent advertisers.

When the Stern TV program began, the PTC began a campaign of issuing weekly press releases detailing the most offensive content in that week's episode and singling out one of that show's sponsors. Many of the advertisers identified in these press releases denied responsibility for their sponsorship of the program, insisting that their ads were either accidentally placed on the show, or were put there autonomously by an ad buyer without consent from the sponsor.

Not long after the turn of the century, the FCC, influenced by minority special interest activist groups, became very active with punishing broadcasters for any programming it deemed inappropriate.[73] As illustrated above, such action by the federal government[74] may well indeed encroach on

---

Nevertheless, 42 percent of the companies featured in the PTC's press releases have since told the PTC that they have given stations specific instructions to not run their ads during Stern. In addition, over half of those sponsors unwilling to issue a written or verbal commitment to *not* advertise on Stern (or another 30 percent of the total number of sponsors) seem to have voluntarily withdrawn their support and have ceased their advertising on Stern since being contacted by the PTC.

Of the national advertisers singled out by the PTC for sponsoring Stern raunch, 26 percent never advertised on Stern again. Another 26 percent advertised only once again after being identified in a PTC press release (with the second advertisement in nearly every case following the first by one or two weeks). In fact, only a handful of advertisers have continued to sponsor the show; of these, three are movie studios that intermittently advertise movies (like Teaching Mrs. Tingle) aimed at the Stern demographic. The only products that have been consistently hawked on the program are Glaxo Wellcome's drug Valtrex (a treatment for genital herpes), and Miller Beer, a subsidiary of Philip Morris."). *See also* Stephen Battaglio, *Fox News Ratings Slip Among Older Viewers with Bill O'Reilly's Departure, But Advertisers Are Back*, L.A. TIMES, May 9, 2017, *available at* http://www.latimes.com/business/hollywood/la-fi-ct-fox-ratings-20170509-story.html (last visited June 15, 2017). (discussing the fact that broadcast licensees are financially sustained by advertisers for their revenue streams, and any advertiser unrest can clearly underscore the authority the advertising companies have over media entities: "After it was revealed that O'Reilly and Fox News had paid $13 million to settle claims by women who said they had been sexually harassed or verbally abused by the anchor, big-ticket sponsors left the show in droves").

[73] *See generally supra* Chapter 3.

[74] *See, e.g.,* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817-18 (2000) (Kennedy, J.: "It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.").

individualist and collectivist First Amendment freedoms. Accordingly, in the next chapter, we delve into the historical and legal foundations of the same free speech.

CHAPTER 5

OVERVIEW OF THE FIRST AMENDMENT, PREMISES FOR FREE SPEECH, AND CONTENT-BASED RESTRICTIONS

The original meaning of the First Amendment has been debated for many years.[1] This is largely due to the fact that the original framers probably had very different things in mind than how some branches of our current culture and society would like to interpret[2] such a precious commodity.[3] While the brightest legal minds might attempt to argue what the original framers

---

[1] *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (observing early Constitutional interpretations). For further reading, *see also* Phillip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985); William Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L REV. 91 (1984); David Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). For barriers in establishing a general theory, *see generally* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005); Larry Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319 (1983). *See also* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1993) (discussing the framer's original intent, and how that understanding might change over time).

[2] *See* AJ Willingham, *The First Amendment Doesn't Guarantee You the Rights You Think It Does,* CNN POLITICS, Apr. 27, 2017, *available at* http://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html (last visited June 20, 2017).

[3] The same forty-five words: "Congress Shall Make No Law Respecting an Establishment of Religion, or Prohibiting the Free Exercise Thereof, or Abridging the Freedom of Speech, or of the Press, or the Right of the People Peaceably to Assemble, and to Petition the Government for a Redress of Grievances." *See, e.g.,* Constitution of the United States, UNITED STATES GOVERNMENT PUBLISHING OFFICE, *available at* https://www.gpo.gov/fdsys/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf (last visited July 15, 2017); The Constitution, THE WHITE HOUSE, *available at* https://www.whitehouse.gov/1600/constitution (last visited July 15, 2017); America's Founding Documents, NATIONAL ARCHIVES, *available at* https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i (last visited July 15, 2017).

meant by the First Amendment,[4] there will seemingly always be disagreement given the speculation (i.e., not to mention predispositions and associated biases) involved.[5] In extrapolating these foundational thoughts, then, it is fair to say that the makeup of individuals sitting on the U.S. Supreme Court impacts how cases, before the high court, are decided.[6] The same decisions and

---

[4] The late U.S. Supreme Court Justice Antonin Scalia was arguably one to boast about his firm grasp of the framers "original understanding" of constitutional principles. *See, e.g.,* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

[5] *See generally* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press, in* EUGENE W. HICKOK, THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82 (1991); David M. Rabban, *The Original Meaning of the Free Speech Clause of the First Amendment, in* 6 THE UNITED STATES CONSTITUTION: THE FIRST 200 YEARS (R.C. Simmons, ed. 1989); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767 (1985); LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941).

[6] *See, e.g., What Could Gorsuch Mean for the Supreme Court? 13 Top Legal Scholars Weigh In*, POLITICO, Feb. 1, 2017, *available at* https://www.politico.com/magazine/story/2017/02/neil-gorsuch-supreme-court-future-214724 (last visited Dec. 13, 2017) ("On Tuesday, Donald Trump nominated conservative federal appeals court Judge Neil Gorsuch to the Supreme Court. After 11 days packed full of executive actions—on everything from immigration to military spending to trade—it's this decision that could end up being one of the president's most consequential, shaping the country's legal system for decades to come;" Adam Feldman, EMPIRICAL SCOTUS, *Judge Gorsuch by the Numbers and Decisions*, Feb. 1, 2017, *available at* https://empiricalscotus.com/2017/02/01/judge-gorsuch-by-the-numbers-and-decisions/ (last visited Dec. 13, 2017) ("Speculation is abound regarding President Trump's pick for Supreme Court nominee, Judge Neil Gorsuch. Questions range from: "Who is he?" and "How will he rule" to the more specific "Will he help overturn Roe v. Wade." While answers to the last two questions are anyone's guess, answers to the first may shed light on all three. Just a note to wary liberals, Judge Gorsuch is filling Justice Scalia's seat so don't expect much of a rightward shift in the Court until and unless Trump fills another vacancy. Many currently speculate that Gorsuch is very similar to Scalia in judicial philosophy, although judicial scholars are keen to point out Gorsuch's differing and less deferential approach to executive agencies in the sphere of administrative law"); Oliver Roeder, *Clinton And Trump Are Both Promising An Extreme Supreme Court*, FIVETHIRTYEIGHT, Aug. 1, 2016, *available at* https://fivethirtyeight.com/features/clinton-and-trump-are-both-promising-an-extreme-

supreme-court/ (last visited Dec. 13, 2017) ("One of the most enduring legacies of the next president will flow from a few words in Article II, Section 2 of the Constitution: The power to nominate justices to the Supreme Court. With the court still shorthanded after the death of conservative Justice Antonin Scalia, and with two of its sitting justices older than 80, the next president will shape the court, and through it the law of the land, for decades to come;" "If you don't believe this election is important, if you think you can sit it out, take a moment to think about the Supreme Court justices that Donald Trump would nominate and what that would mean to civil liberties, equal rights and the future of our country," said Senator Bernie Sanders; Rachel Gries, *Supreme Court Appointments Vital to Future of American Law*, COLLEGIATE TIMES, Sept. 17, 2016, *available at* http://www.collegiatetimes.com/opinion/supreme-court-appointments-vital-to-future-of-american-law/article_e74435d8-7847-11e6-9802-077b770117ad.html (last visited Dec. 13, 2017) ("The importance of each and every person who is appointed to the highest court in the land is vital;" "The Supreme Court plays such a vital role in the way we interpret the Constitution, which in turn often creates legal changes that effect every single person"); Jeffrey Toobin, *Clarence Thomas Has His Own Constitution*, THE NEW YORKER, June 30, 2016, *available at* https://www.newyorker.com/news/daily-comment/clarence-thomas-has-his-own-constitution ("This year's Supreme Court term abounded in so much drama—the death of Justice Antonin Scalia, the tie votes among the remaining Justices, the liberal victories in the final days—that it was possible to miss a curious subplot: the full flowering of Justice Clarence Thomas's judicial eccentricity;" Christopher E. Smith, *The Impact of New Justices: The U.S. Supreme Court and the Criminal Justice Policy*, 30 AKRON L. REV. 55 (1996). *See also* Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field"); Whitney v. California 274 U.S. 357, 375-76 (1927) (Brandeis, J., dissenting) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed").

associated conclusions seemingly have a profound impact on society and the way individuals live their lives.[7]

<u>THE HOLMES DISSENT</u>

U.S. Supreme Court Justice Oliver Wendell Holmes was a major figure in the development of the First Amendment.[8] In the landmark *Abrams v. United States*,[9] decided with a 7-2 vote,[10] Holmes and the other justices pondered, among other things, whether the Espionage Act violated the First Amendment.[11] Especially notable from the case was the strongly-worded dissent Holmes articulated[12] (i.e., joined by Justice Louis Brandeis), ultimately introducing the "marketplace of ideas" theory into jurisprudence.[13] Judge

---

[7] *Id*.

[8] *See generally* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391 (1992). Also important in the shaping of First Amendment interpretations was the trial of John Zenger and the Sedition Acts. *See generally* John Peter Zenger Trial (1735), FAMOUS TRIALS, *available at* http://www.famous-trials.com/zenger (last visited June 17, 2017); Douglas Linder, *The Trial of John Peter Zenger: An Account*, SSRN, *available at* http://ssrn.com/abstract=1021258 (last visited June 20, 2017); DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 57-58 (2015).

[9] 250 U.S. 616 (1919).

[10] *See infra* note 11.

[11] *See* Abrams v. United States, 250 U.S. 616 (1919), OYEZ, *available at* https://www.oyez.org/cases/1900-1940/250us616 (last visited June 20, 2017).

[12] The Holmes dissent in the Abrams case has been recognized and touted as one of the most compelling passages in American law. *See* Andrew Cohen, *The Most Powerful Dissent in American History*, THE ATLANTIC, Aug. 10, 2013, *available at* https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/ (last visited Dec. 12, 2017).

[13] *See supra* note 9 at 630.

Holmes observed:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.[14]

As it happens, the notorious Holmes dissent in *Abrams*[15] paved the way for the development of free speech theories.[16] Each has been used, to a greater or lesser extent, by various courts in adjudicating free speech cases,[17] and can generally be divided into two components: Values for the individual and values for society.[18] With that in mind, the esteemed and late professor, Thomas Emerson, can be credited for early articulation of the following four salient

---

[14] *Id*.
[15] *See supra* note 9.
[16] *See infra* notes 21, 26, 31, 38. For additional reading, *see generally*, MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984).
[17] *See infra* notes 22, 27, 31, 40.
[18] *See* T. BARTON CARTER, MARC A. FRANKLIN & JAY B. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE 15 (2003).

theories.[19] The same free speech theories, often woven into the case law or useful in explaining it, are the (1) marketplace of ideas, (2) democratic process (or democratic self-governance), (3) safety valve theory, and (4) self-fulfillment (sometimes called self-actualization or self-realization theory).[20]

First, the *marketplace of ideas*[21] approach to First Amendment theory purports that democracy is accomplished when there is a free and open exchange of ideas.[22] To that end, the best process, Emerson argues, for strengthening knowledge and uncovering truth,[23] is through the freedom of

---

[19] *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

[20] *See infra* notes 21-44.

[21] *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881-82 (1963).

[22] *See, e.g.*, Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264 (4th Cir. 2015) ("The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"); McCalden v. California Library Association, 955 F.2d 1214 (9th Cir. 1992) (discussing the "marketplace of ideas"); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."). *See also* Emily Posner, *The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine*, 25 CARDOZO ARTS & ENT. L.J. 717, 737-38 (2007) ("An example of a modern First Amendment doctrine is the Marketplace of Ideas theory, which holds that the truth or the best policy arises out of the competition of widely various ideas in a free market of discussion, an important part of democracy. One legal scholar, Vincent Blasi, thoroughly researched the doctrine and concluded that the theory "serves as a cultural force that contributes to the control of abuses of power.").

[23] *See supra* note 21 at 881.

expressing oneself.[24] With a free exchange of ideas, ideally, the same ideas are essentially allowed to "compete" with one another with the aim that the best ideas will prevail.[25]

Second, the *democratic process*,[26] has traditionally been a potent justification for free speech, and acknowledged strongly by legal scholars and the courts.[27] The theory here is based on the assumption that an informed electorate, among other things, is essential for democracy to survive.[28] Moreover, an informed citizenry is vital for an effective political process, and permits individuals to criticize those running for (i.e., or currently holding) political office.[29] The scholar most associated with this theory is Alexander

---

[24] *Id*.

[25] Ironically, the "best" ideas do not always prevail. And, further, even if ideas do not prevail, that does not necessary mean that the same ideas are not worthy of merit. *See generally* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS (2009); JOHN MILTON, AREOPAGITICA, AND OTHER POLITICAL WRITINGS OF JOHN MILTON (1999).

[26] *See supra* note 21 at 882-84.

[27] *See, e.g.,* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) ("Our constitutional system" seeks to maintain "the opportunity for free political discussion to the end that government may be responsive to the will of the people"); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). *See also generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, IND. L.J. 1 (1971); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH IN WAR TIME (1919).

[28] *See supra* note 21 at 882-84.

[29] *Id.*

Meiklejohn.[30]

Third, the *safety valve theory*[31] serves as a means for individuals, particularly those espousing minority viewpoints, to articulate their concerns about government and its policies.[32] Without such avenues for expressing concerns and criticism, citizens might resort to violence[33] (i.e., or, at the very

---

[30] *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 S. CT. REV. 245; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Meiklejohn, additionally, is arguably most commonly noted for his belief in absolutism.

[31] *See supra* note 21 at 884-86. *See also* Linn v. Plant Guard Workers, 383 U.S. 53, 73 (1966) ("As the majority concedes, Congress has in unmistakable terms recognized the importance of labor-management dialogue untrammelled by fear of retribution for strong utterances. It has manifested awareness that lusty speech provides a useful safety valve for the tensions which often accompany these controversies.").

[32] *Id.*

[33] Recently, there has been recent civil unrest with various policing efforts around the country. *See, e.g.*, Mo Barnes, *Racism, Murder, and Black Pain: The 2017 Riot Season is Here*, ROLLINGOUT, June 22, 2017, *available at* http://rollingout.com/2017/06/22/racism-murder-black-pain-2017-riot-season/ (last visited July 15, 2017). Similarly, there was civil unrest shortly after Donald Trump was elected President of the United States. *See, e.g.*, David Caplan & Morgan Winsor, *Man Shot During Anti-Trump Protest in Portland as Demonstrations Sweep Across US*, ABC NEWS, Nov. 12, 2016, *available at* http://abcnews.go.com/US/anti-trump-protests-continue-3rd-night-portland-experiences/story?id=43479936 (last visited July 15, 2017); Feliz Solomon, *Trump Praises 'Passion' of Demonstrators After Second Night of Protests*, TIME, Nov. 11, 2017, *available at* http://time.com/4567403/anti-donald-trump-protests-civil-rights/ (last visited July 15, 2017); Melanie Eversley, Aamer Madhani, & Natalie DiBlasio, *Thousands Across the USA Protest Trump Victory*, USA TODAY, Nov. 9, 2016, *available at* https://www.usatoday.com/story/news/2016/11/09/anti-trump-protests-erupt-new-york-chicago/93570584/ (last visited July 17, 2017); Peter Holley, *Race Riots, Terrorist Attacks and Martial Law: Oath Keepers Warn of Post-Election Chaos,* WASH. POST, Nov. 8, 2016, *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/11/08/race-riots-terror-attacks-and-martial-law-oath-keepers-warn-of-post-election-chaos/?utm_term=.0df035601b86 (last visited July 15, 2017); Justin Mitchell and Andy Sullivan, *U.S. Militia Girds for Trouble as Presidential Election Nears*, REUTERS, Nov. 2, 2016, *available at* http://www.reuters.com/article/us-usa-election-militia-idUSKBN12X11R (last visited July 15, 2017); Ashley Parker & Nick Corasaniti, *Some Voters Warn of Revolution if Hillary Clinton Wins*, N.Y. TIMES, Oct. 27, 2016,

least, encourage social change through civil unrest).[34] The uprising in Arab countries in 2010 and 2011, what has been coined the "Arab Spring,"[35] provides a stark example of what happens when dissent is driven underground for long periods of time.[36] It eventually bubbles up to the surface as violence.[37]

Fourth, *self-fulfillment*,[38] advocates for individual liberty and autonomy.[39] To curtail speech, for example, would be offensive to one's potential as a human being.[40] Stated differently, this theory posits that people

---

available at https://www.nytimes.com/2016/10/28/us/politics/donald-trump-voters.html (last visited July 15, 2017).

[34] *Id.*

[35] *See, e.g.,* Carol J. Williams, *Where the Arab Spring Revolutions Went Wrong*, L.A. TIMES, Oct. 9, 2015, *available at* http://beta.latimes.com/world/middleeast/la-fg-arab-spring-recap-hml-20151009-htmlstory.html (last visited Dec. 12, 2017); Greg Botelho, *Arab Spring Aftermath: Revolutions Give Way to Violence, More Unrest*, CNN, Mar. 28, 2015, *available at* http://www.cnn.com/2015/03/27/middleeast/arab-spring-aftermath/index.html (last visited Dec. 12, 2017); Yoel Guzansky & Benedetta Berti, *The Arab Spring's Violent Turn*, THE NATIONAL INTEREST, Dec. 15, 2011, *available at* http://nationalinterest.org/commentary/the-arab-springs-violent-turn-6254 (last visited Dec. 12, 2017); *The Arab Spring: Five Years On: Protesters Took to the Streets Across the Arab World in 2011, Pushing Their Leaders to End Decades of Oppression,* AMNESTY, *available at* https://www.amnesty.org/en/latest/campaigns/2016/01/arab-spring-five-years-on/ (last visited Dec. 12, 2017).

[36] *Id.*

[37] *Id*.

[38] *See supra* note 21 at 879-80.

[39] *Id.* For further reading, *see generally* C. EDWIN BAKER, HUMAN LIBERTY AND THE FREEDOM OF SPEECH (1989); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[40] *See e.g.,* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole"); Procunier v. Martinez, 416 U.S. 396, 427 (1974) ("The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the

derive a benefit from speaking even if their views never reach fruition.[41] In his *Whitney v. California*[42] concurrence, Justice Louis Brandeis argued for the importance of self-fulfillment.[43] Others, however, have criticized self-fulfillment as being too general and vague.[44]

ALTERNATIVE METHODOLOGY FOR FREE SPEECH PROTECTION

Absolutism[45] is a theory of free speech methodology that implies just what is says.[46] While a neophyte of First Amendment study may believe that

---

development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity").

41 *Id*.

42 274 U.S. 357 (1927).

43 *Id*. at 372-80.

44 *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, IND. L.J. 1 (1971).

45 *See* Konigsberg v. State Bar of California*, supra* note 6, and accompanying parenthetical citation.

46 *See generally* Patricia R. Stembridge, *Adjusting Absolutism: Extending First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907 (2000); KENT MIDDLETON & ROY M. MERSKY, FREEDOM OF EXPRESSION: A COLLECTION OF THE BEST WRITINGS (1981); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. CT. REV. (1961); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). *See also* Simon Schuster v. Crime Victims Board, 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring) ("The New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written. The regulated content has the full protection of the First Amendment, and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view, it is both unnecessary and incorrect to ask whether the State can show that the statute "`is necessary to serve a compelling state interest, and is narrowly drawn to achieve that end.'" Ante, at 118 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)). That test or formulation derives from our equal protection jurisprudence, see, e.g., Wygant v. Jackson Board of Education, 476 U.S. 267, 273-74 (1986) (opinion of POWELL, J.); Hirabayashi v. United States, 320 U.S. 81, 100 (1943), and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a

burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums.

Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.

Borrowing the compelling interest and narrow tailoring analysis is ill-advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.

This said, it must be acknowledged that the compelling interest inquiry has found its way into our First Amendment jurisprudence of late, even where the sole question is, or ought to be, whether the restriction is in fact content-based. Although the notion that protected speech may be restricted on the basis of content if the restriction survives what has sometimes been termed "`the most exacting scrutiny,'" Texas v. Johnson, 491 US 397, 412 (1989), may seem familiar, the Court appears to have adopted this formulation in First Amendment cases by accident, rather than as the result of a considered judgment. In Johnson, for example, we cited Boos v. Barry, 485 U.S. 312, 320 (1988), as support for the approach. Boos v. Barry, in turn, cited Perry Education Assn v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983), for the proposition that, to justify a content-based restriction on political speech in a public forum, the State must show that "the `regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" Boos v. Barry, supra, at 321. Turning to the appropriate page in Perry, we discover that the statement was supported with a citation of Carey v. Brown, 447 U.S. 455, 461 (1980). Looking at last to Carey, it turns out the Court was making a statement about equal protection: "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. Id. at 461-62. Thus was a principle of equal protection transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech"); Columbia Broadcasting v. Democratic Comm, 412 U.S. 94, 156 (1973) (Douglas, J., concurring) ("The ban of "no" law that abridges freedom of the press is in my view total and complete"); New York Times Co. v. United States, 403 U.S. 713, 720 (1971) (Douglas, J., "It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press."); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25 (1965) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said"); Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First

we, as a society, have absolute rights as applied to free speech, it is common knowledge that the courts over the years have not agreed with the same posture.[47] Indeed, a majority on the U.S. Supreme Court has never subscribed

---

Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field"); Beauharnais v. Illinois, 343 U.S. 250, 274-75 (1952) (Black, J., dissenting) ("I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case-by-case, day-by-day majority of this Court. I had supposed that our people could rely for their freedom on the Constitution's commands, rather than on the grace of this Court on an individual case basis. To say that a legislative body can, with this Court's approval, make it a crime to petition for and publicly discuss proposed legislation seems as farfetched to me as it would be to say that a valid law could be enacted to punish a candidate for President for telling the people his views. I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases."). *But see* Tinker v. Des Moines, 393 U.S. 503, 515-26 (1969) (Black, J., dissenting); Adderly v. Florida, 385 U.S. 39 (1966), (Black, J., "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."); Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) ("The freedom to speak is not absolute").

[47] *See, e.g.,* Dist. of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not"); Fed. Election v. Wisconsin Right to Life, 551 U.S. 449, 29 (2007) ("Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech—between what is protected and what the Government may ban—it is worth recalling the language we are applying"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Schenck v. United States, 249 U.S. 47, 52 (1919) ("We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Aikens v. Wisconsin, 195 U.S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Bucks Stove Range Co., 221 U.S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of

to the absolutist viewpoint.[48]

The *ad hoc balancing*[49] method, described by the late renowned expert on free speech issues, Melville Nimmer, occurs when "the court weighs the competing interests presented in the particular circumstances of the case before the court for the purpose of determining which litigant deserves to prevail in the particular case."[50] Balancing, therefore, is a theory or methodology that does not provide for the "absolutist" position discussed earlier.[51] In this sense, then, and using the balancing method, how might a court decide governmental national security interest weighed against the "public's right to know?" In short, the balancing method provides far less freedom of speech than absolutism might.[52]

---

proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right"); Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("With regard to that argument we think it necessary to add to what has been said in Schenck v. United States, ante, 47, only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. Robertson v. Baldwin, 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.").

[48] *See* GENELLE I. BELMAS, JASON M. SHEPARD, & WAYNE E. OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 53 (2016).

[49] *See generally infra* note 50.

[50] *See* Melville B. Nimmer, *The Right to Speak Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942, 944 (1968).

[51] *See supra* notes 45-48.

[52] *See generally* supra note 50.

Next, the doctrine of *preferred position*[53] argues that free speech and First Amendment freedoms are vital to a free society and, therefore, qualify for more judicial protection than other constitutional standards.[54] Indeed, U.S. Supreme Court Justice Harlan Stone provided the catalyst for the preferred position theory in his famous footnote in *United States v. Carolene Products Company*.[55] The high court, thereafter, in *Murdock v. Pennsylvania*,[56] *Thomas v. Collins*,[57] and a number subsequent cases seemed to echo Justice Stone's argument.[58]

---

[53] *See, e.g.,* Roth v. United States, 354 U.S. 476, 514 (1957) ("The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position."); Kovacs v. Cooper, 336 U.S. 77, 88 (1949) ("The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience.").

[54] *Id.*

[55] *See* 304 U.S. 144, 153 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation").

[56] *See* 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

[57] *See* 323 U.S. 516, 529-30 (1945) ("The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.").

[58] For further reading, *see* the dissent of Justice Hugo Black in Konigsberg v. State Bar of California, 366 U.S. 36, 56-80 (1961).

Last, is the concept of *definitional balancing*.[59] Professor Nimmer helps explain by positing:

> The Supreme Court decision in New York Times Company v. Sullivan indicates a third approach which avoids the all or nothing implications of absolutism versus ad hoc balancing. Times points the way to the employment of the balancing process on the definitional rather than the litigation or ad hoc level. That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as "speech" within the meaning of the first amendment. This at first blush may appear to be only a verbal distinction. Analysis suggests, however, that a good deal more is involved.[60]

Definitional balancing seems to strike a good balance between the aforementioned absolutist and ad hoc methods.[61] That said, when considering First Amendment issues, the courts have arguably not applied any of the aforementioned methods with consistency.

---

[59] *See generally supra* note 50.

[60] *See supra* note 50 at 942. *See also generally* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 916-18 (1963); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

[61] *See generally* Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment,"* 39 AKRON L. REV. 483 (2006).

VAGUENESS AND OVERBREADTH

The doctrines of vagueness and overbreadth have been used by courts to extinguish policies that are facially unconstitutional.[62] The concern for courts, in this area of the law, is that a stated policy needs to be clear enough for a reasonable person, of common intelligence, to understand.[63] Without

---

[62] *See infra* note 63.

[63] *See, e.g.*, United States v. Bronstein, No. 16-3003 (D.C. Cir. 2017) (holding that a statute's words, even when "marked by flexibility and reasonable breadth, rather than meticulous specificity," are clear based on "what the ordinance as a whole prohibits"); United States v. Matchett, 837 F.3d 1118 (11th Cir. 2016) (describing the vagueness doctrine as governing laws that "forbid or require the doing of an act"); United States v. Ball, 771 F.3d 964 (6th Cir. 2014) (finding a criminal statute "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute"); United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012) (holding anti-noise ordinance in question was not impermissibly vague where "it is clear what the ordinance as a whole prohibits ..."); U.S. v. Kilbride, 584 F.3d 1240 (9th Cir. 2009) (concluding that a penal statute requiring that a criminal suspect provide "credible and reliable" identification to police was unconstitutionally vague"); U.S. v. Nieves-Castano, 480 F.3d 597 (1st Cir. 2007) (holding that a modified stop and identify statute was void on vagueness grounds, and declining to reach Fourth Amendment arguments against the statute's validity); Thaeter v. Palm Beach Cty. Sheriff's Office, 449 F.3d 1342 (11th Cir. 2006) (determining that a regulation is facially vague when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"); U.S. v. Williams, 444 F.3d 1286 (11th Cir. 2006) (finding that an anti-noise ordinance was not vague where it was written specifically to forbid disturbance of schools because "prohibited disturbances are easily measured by their impact on normal activities of the school"); U.S. v. Gibson, 409 F.3d 325 (6th Cir. 2005) (holding that a city's anti-noise ordinance that proscribed "the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof" was not unconstitutionally vague because, given its "particular context," the ordinance gave "fair notice to those to whom (it) [was] directed"); Deja Vu of Cincinnati v. Union Twp. Board, 411 F.3d 777 (6th Cir. 2005) (holding that Rockford's anti-noise ordinance was not unconstitutionally vague); U.S. v. Fisher, 289 F.3d 1329 (11th Cir. 2002) (holding that a statute is not void for vagueness if ordinary people can understand what conduct is prohibited); U.S. v. Loy, 237 F.3d 251 (3d Cir. 2001) (holding that facial vagueness challenges are permissible where "a law reaches a substantial amount of constitutionally protected conduct"); Lurie v. Wittner, 228 F.3d 113 (2d Cir. 2000) (striking down, on due process grounds, a state criminal statute that was insufficiently "explicit to inform those who

are subject to it what conduct on their part will render them liable to its penalties"); Forbes v. Napolitano, 236 F.3d 1009 (9th Cir. 2000) (holding that penal statutes must define criminal offenses with "sufficient definiteness," and "in a manner that does not encourage arbitrary and discriminatory enforcement"); St. Croix Waterway Association v. Meyer, 178 F.3d 515 (8th Cir. 1999) (holding anti-noise ordinance in school context was not impermissibly vague); Hodgers-Durgin v. De La Vina 199 F.3d 1037 (9th Cir. 1999) (holding plaintiff who had been stopped fifteen times had standing to challenge an anti-loitering statute as unconstitutionally vague); JB Ent., Inc., City of Jackson, 152 F.3d 362 (5th Cir. 1998) (finding a law to be void for vagueness because it specified no core of prohibited conduct and permitted "`a standardless sweep allow[ing] policemen, prosecutors, and juries to pursue their personal predilections'"); Reno v. ACLU, 521 U.S. 844, 871-72 (1997) ("The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); Jews for Jesus, Inc. v. MBTA, 984 F.2d 1319 (1st Cir. 1993) (holding that crux of time, place, and manner analysis is "whether the manner of [banned] expression is basically incompatible with the normal activity of a particular place at a particular time"); Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); Smith v. Goguen, 415 U.S. 566, 572-73, 576, 578 (1974) ("The settled principles of that doctrine require no extensive restatement here. The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts;" "Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process;" "The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag"); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "`steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."); Connally v. General Const. Co, 269 U.S. 385, 391 (1926) ("That the terms of a

such application, for example, a law, policy, or statute is simply unjust because punishing one for things they may not understand genuinely is unfair, and a violation of due process.[64] Moreover, in the absence of such clarity, there is a concern, by the courts, for "chilling" speech.[65] Indeed, if there is confusion, people might opt not to speak.

The overbreadth doctrine, characterized by the U.S. Supreme Court as, "strong medicine,"[66] does not allow a regulatory authority to control[67] more *protected* speech[68] than is absolutely necessary to quash *unprotected* speech.[69]

---

penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U.S. 216, 221; Collins v. Kentucky, 234 U.S. 634, 638.").

[64] *See generally* Lurie v. Wittner, 228 F.3d 113 (2d Cir. 2000); Grayned v. City of Rockford, 408 U.S. 104 (1972); Connally v. General Const. Co, 269 U.S. 385 (1926).

[65] *See* Reno v. ACLU, 521 U.S. 844, 871-72 (1997) ("The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *See also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-31 (1992) (discussing the method and means of government control on speech).

[66] *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Application of the overbreadth doctrine in this manner is, manifestly, strong medicine.").

[67] *See* Saia v. New York, 344 U.S. 558, 560-62 (1948).

[68] *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984) (discussing how overbroad injunctions can chill protected speech).

[69] *See, e.g.*, U.S. v. Beatty, 10-3634 (3rd Cir. 2011) ("Striking down these sections of the statute as overbroad and unconstitutional"); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) ("The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires

Parsed differently, a law is overbroad if it prohibits not only the targeted expression, but also a substantial amount of protected speech.[70] Additionally, the overbreadth doctrine permits one to argue that the provision, disallowing speech, may be unconstitutional as applied to others.[71]

---

the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted…." Broadrick v. Oklahoma, 413 U.S., at 612. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); Reno v. ACLU, 521 U.S. 844, 874 (1997) ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); Moore v. City of Kilgore, Texas, 877 F.2d 364 (5th Cir. 1989) (explaining ambiguous use of the words overbroad and overbreadth); Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574-75 (1987) ("The resolution therefore does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) ("The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statue's plainly legitimate sweep"). *See generally* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Gooding v. Wilson, 405 U.S. 518 (1972).

[70] *See supra* notes 66-69.

[71] *See, e.g.*, Bell v. Keating, 697 F.3d 445, 454 (7th Cir. 2012) (noting that with respect to an overbreadth challenge, "[a] party [may] assert the rights of another without regard to the ability of the other to assert his own claims and with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."); Secretary of State of Md. v. J. H. Munson Co, 467 U.S. 947, 956-57 (1984) ("Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants, therefore, are permitted to challenge a statute not because

CONTENT-BASED REGULATION AND JUDICIAL REVIEW

Next, is the all-important,[72] but extremely complex,[73] topic of the distinction between content-based[74] and content-neutral[75] speech regulations.[76]

their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."”); City Council v. Taxpayers for Vincent, 466 U.S. 789, 796-98; Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (“Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court”; justifying the overbreadth doctrine because, “the First Amendment needs breathing space”).

[72] The U.S. Supreme Court has held that all content-based regulations on speech are presumptively unenforceable. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech, see, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 309-11 (1940), or even expressive conduct, see, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 406 (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. *Simon Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105, 115 (1991); *id*. at 124 (Kennedy, J., concurring in judgment); *Consolidated Edison of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).”).

[73] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); International Society for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672 (1992); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Turner v. Safley, 482 U.S. 78 (1987); Connick v. Myers, 461 U.S. 138 (1983); Brown v. Glines, 444 U.S. 348 (1980); New York Times v. United States, 403 U.S. 713 (1971); Gregory v. City of Chicago, 394 U.S. 111 (1969); Chaplinski v. New Hampshire, 315 U.S. 568 (1942).

[74] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 334 (1988) (“We conclude that the display clause of § 22-1115 is unconstitutional on its face. It is a content-based restriction on political speech in a public forum, and it is not narrowly tailored to serve a compelling state interest.”).

[75] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (“The city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression.”).

[76] The seminal case for determining whether speech is content-based or content neutral is Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

In fact, while pivotal in the study of free speech regulation,[77] history shows that the courts have at times struggled with determining whether government action related to speech is content-based or content-neutral.[78]

Despite the aforementioned nuances[79] that have emerged from the volume of court cases involving speech,[80] what remains unequivocally clear is that content-based governmental restrictions are presumptively unenforceable.[81] The U.S. Supreme Court, for example, in the seminal *Police*

[77] Government speech regulation is done by impeding (1) content; or (2) time, place, and manner. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[78] *See e.g.*, Hill v. Colorado, 530 U.S. 703 (2000); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Deciding whether a particular regulation is content based or content neutral is not always a simple task.").

[79] *See, e.g.*, Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983) (reasoning that in an effort to be content-neutral, any government regulation of speech must be viewpoint-neutral (i.e., ideology) and subject-matter neutral). For discussion about ideology, in the context noted here, *see* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993). "Purpose" can also play a role in any judicial review of speech. *See, e.g.*, Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994); Texas v. Johnson, 491 U.S. 397, 406-07, 410 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); United States v. O'Brien, 391 U.S. 367, 383 (1968).

[80] The U.S. Supreme Court, with and through a body of case law, has created special rules for speech originating from various settings. *See, e.g.*, National Endowment of the Arts v. Finley, 524 U.S. 569 (1998) (government-funded expression); Reno v. ACLU, 521 U.S. 844 (1997) (Internet); Denver Area Education Telecommunication Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (cable television); Water v. Churchill, 511 U.S. 661 (1994) (public employees); International Society for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672 (1992) (public property); FCC v. Sable Communications, 492 U.S. 115 (1989) (telephony); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) (schools); Brown v. Glines, 444 U.S. 348 (1980) (military); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (broadcasting); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (prisons); Miami Herald v. Tornillo, 418 U.S. 241 (1974) (print); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (schools).

[81] *See, e.g.*, Ysursa v. Pocatello Education Assn., 555 U.S. 353, 5 (2009) ("Restrictions on speech based on its content are "presumptively invalid" and subject to strict

Department of Chicago v. Mosley,[82] in part, observed:

> Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.[83]

That said, determining whether a governmental restriction on speech is content-based or content-neutral is particularly important given the level of judicial scrutiny[84] the same restriction would subsequently receive by the court. Any governmental impediment to speech that is found by the court to be content-based,[85] for example, would merit judicial review via strict

---

scrutiny. Davenport v. Washington Ed. Assn., 551 U. S. 177, 188 (2007); R.A.V. v. St. Paul, 505 U. S. 377, 382 (1992)." *See also supra* note 72.

[82] 408 U.S. 92 (1972).

[83] *Id.* at 95-96.

[84] *See, e.g.*, Bhanodai Pippala, *Levels of Scrutiny in the Equal Protection Clause*, ODYSSEY, Nov. 21, 2016, *available at* https://www.theodysseyonline.com/equal-protection-levels-scrutiny (last visited June 28, 2017) (explaining levels of judicial review); History of Equal Protection and the Levels of Review, NATIONAL PARALEGAL, *available at* https://nationalparalegal.edu/conLawCrimProc_Public/EqualProtection/HistoryOfEqualProtection.asp (last visited June 28, 2017) (discussing strict, intermediate, and rational basis levels of scrutiny).

[85] The exception here would be if the government restriction on speech falls within one of the categories of speech described as "low-level" (noting, e.g., advocacy of imminent lawless action, child pornography, obscenity, fighting words, defamatory statements, commercial speech, profanity, indecent) expression. Speech in this group does not receive full First

scrutiny.[86] Alternatively, content-neutral restrictions would be reviewed judicially with intermediate scrutiny.[87]

Surviving judicial review under strict scrutiny, the most rigorous level of judicial review, is not easy.[88] The same judicial examination would require the said government, content-based, regulation to (1) serve a compelling interest; (2) be narrowly tailored; and (3) be the least restrictive means for serving said interest.[89] Intermediate scrutiny, not as stringent as strict scrutiny,

---

Amendment protection. *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377, 381-83 (1992); Chaplinski v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[86] *See supra* note 84. *See also* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (U.S. 1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. See Simon Schuster, 502 U.S., at 115; id., at 125-126 (Kennedy, J., concurring in judgment); Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. See Riley v. National Federation for Blind of N.C., Inc., 487 U.S., at 798; West Virginia Bd. of Ed. v. Barnette, supra. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, see Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984), because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.").

[87] *Id*. *See also supra* note 84.

[88] The strict scrutiny test has been described as, "strict in theory and fatal in fact." *See* Gerald Gunther, Forward. *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV., 1, 8 (1972). *But see* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact."); Burson v. Freeman, 505 U.S. 191, 211 (1992) (evidencing, in this case, a content-based restriction survived strict scrutiny).

[89] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."); Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 761 (1995) ("It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a

guaranteed forum on all property owned by the State. *Postal Service* v. *Council of Greenburgh Civic Assns*., 453 U.S. 114, 129 (1981); *Perry Ed. Assn*. v. *Perry Local Educators' Assn*., 460 U.S. 37, 44 (1983). The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. *Cornelius* v. *NAACP Legal Defense Ed. Fund, Inc*., 473 U.S. 788, 802-803 (1985). If the former, a State's right to limit protected expressive activity is sharply circumscribed: It may impose reasonable, content-neutral time, place, and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such), but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. *Perry Ed. Assn., supra*, at 45. These strict standards apply here, since the District Court and the Court of Appeals found that Capitol Square was a traditional public forum. 844 F. Supp., at 1184; 30 F.3d, at 678."); Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 227 (1995) ("[A] free people whose institutions are founded upon the doctrine of equality," *ibid*., should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled."); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641-42 (1994) ("For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. *R.A.V*. v. *St. Paul*, 505 U.S. 377, 382-383 (1992); *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. See *Simon Schuster*, 502 U.S., at 115; *id*. at 125-126 (Kennedy, J., concurring in judgment); *Perry Ed. Assn*. v. *Perry Local Educators' Assn*., 460 U.S. 37, 45 (1983). Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. See *Riley* v. *National Federation for Blind of N.C., Inc*., 487 U.S., at 798; *West Virginia Board of Ed*. v. *Barnette, supra*. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, see *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."); Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788, 800 (1985) ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. See *Perry Education Assn*. v. *Perry Local Educators' Assn*., 460 U.S., at 45. Similarly, when the Government has intentionally designated a place or means of communication as a public forum speaker cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.""); Sherbert v. Verner, 374 U.S. 398 (1963) ("We must next consider whether some compelling state interest enforced in the eligibility

would require the content-neutral regulation to (1) further a substantial or important interest; (2) be narrowly tailored; and (3) leave open ample channels for communicating the information.[90] And finally, rational basis, as a form of judicial scrutiny, is the least demanding, only requiring that the said governmental regulation be related to a legitimate government purpose.[91]

---

provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right.").

[90] *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (quoting *Virginia Pharmacy Bd*. v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))."); United States v. Grace, 461 U.S. 171, 177 (1983) ("It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." See *Perry Education Assn*. v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983); *Carey* v. *Brown, supra*, at 460; *Hudgens* v. *NLRB*, 424 U.S. 507, 515 (1976); *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941); *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn., supra*, at 45. See, *e.g., Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 654 (1981); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972); *Cox* v. *Louisiana*, 379 U.S. 559 (1965) *(Cox II)*. Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest. *See*, *e.g., Perry Education Assn., supra*, at 46; *Widmar* v. *Vincent*, 454 U.S. 263 (1981).").

[91] *See, e.g.,* Pennell v. City of San Jose, 485 U.S. 1, 14 (1988) ("We also find that the Ordinance does not violate the Amendment's Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest."); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959) ("But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that

With this foundation for how speech is treated and scrutinized under judicial review, along with the various methodologies for the protection of free speech, the next chapter discusses what challenges the FCC will face with broadcast regulation in the 21st century.

---

the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.").

CHAPTER 6

FIRST AMENDMENT CHALLENGES THE FCC FACES WITH BROADCAST REGULATION IN THE 21ST CENTURY

FCC REGULATORY AUTHORITY

To begin this chapter, in an effort to provide a foundation for discussion later, it is important to first consider the Commission's regulatory authority, followed by a brief examination of obscenity, indecency, and profanity.

The FCC's pertinent authority to regulate broadcast programming stems from Title 18, United States Code (hereinafter U.S.C.), Section 1464, which prohibits broadcasting "obscene, indecent or profane language" and provides monetary punishments, two year's imprisonment, or both.[1] Moreover, section 303 of the 1934 Communications Act (hereinafter 1934 Act) gives the FCC the requisite power to regulate program content.[2] That said, it

[1] *See* 18 U.S.C. § 1464 (2017).

[2] *See* 47 U.S.C. § 303 (2017) ("Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—False or deceptive signals or communications, or a call signal or letter which has not been assigned by proper authority to the station he is operating.").

is important to note that section 326 of the 1934 Act prohibits censorship by the FCC.[3] Given the language above, not to mention the obvious current and long-standing dilemma in this area of broadcast content regulation, squaring all of this has not been easy for broadcasters or the Commission.

DISTINGUISHING OBSCENITY, INDECENCY, AND PROFANITY

Continuing our framework for the challenges the Commission now faces in its oversight of broadcast content, the next step is to illuminate the differences between obscenity, indecency, and profanity.

The U.S. Supreme Court had an opportunity to first address the issue of obscenity[4] in *Roth v. United States*.[5] What can be said with great certainty is that

---

[3] *Id.* at § 326 (2017) ("Nothing in this Act shall be understood or construed to give this Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

[4] *See* Roth v. United States, 354 U.S. 476, 488-89 (1957) ("The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin, [1868] L. R. 3 Q. B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."). *See also* Miller v. California, 413 U.S. 15 (1973) (for further discussion of obscenity).

[5] 354 U.S. 476 (1957).

obscenity has no First Amendment protection.[6] Specifically, the high court in *Roth*[7] opined: "We hold that obscenity is not within the area of constitutionally protected speech or press."[8] The high court went on to maintain that while content deemed obscene might well be "expression," it did not have First or Fourteenth Amendment protection,[9] and was without redeeming social value.[10] Consequently, the same court ruled that federal or state governments could ban obscenity.[11]

---

[6] *Id.* at 484-85.

[7] *See supra* note 5.

[8] *See id*. at 485.

[9] *Id.* at 481 ("The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or under the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.").

[10] *Id.* at 484-85 ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.").

[11] *Id.* at 492-93 ("In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited. Roth's argument that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press where offensive to decency and morality is hinged upon his contention that obscenity is expression not excepted from the sweep of the provision of the First Amendment that " *Congress* shall make *no law* . . . abridging the freedom of speech, or of the press . . . ." (emphasis added) That argument falls in light of our holding that obscenity is not expression protected by the First Amendment. We therefore hold that the federal obscenity

The U.S. Supreme court's next occasion to review obscenity came, several years later, in the landmark *Miller v. California*.[12] In *Miller*,[13] the court developed, from language in *Roth*,[14] what has become known as the LAPS[15] test. Under the LAPS test, the court ruled, a work may be judged obscene if the "average person, applying contemporary community standards, finds that the work, when taken as a whole, appeals to prurient interest; describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and lacks serious literary, artistic, political, or scientific value."[16] One wonders, though, just how easy it is (i.e., for broadcasters) to effectively apply the LAPS test, as described above, and determine unequivocally whether broadcast content would be deemed obscene.[17] As such, the obscenity issue,

---

statute punishing the use of the mails for obscene material is a proper exercise of the postal power delegated to Congress by Art. I, § 8, cl. 7.").

[12] 413 U.S. 15 (1973).

[13] *Id.*

[14] *See supra* note 5.

[15] LAPS is an acronym for literary, artistic, political, or scientific value. *See supra* note 12 at 24 ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[16] *Id.* ("The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

[17] *See, e.g.,* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) ("It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to

much like indecency, has not been without some level of controversy.[18]

---

define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[18] The academic community, legal scholars, and others have historically accepted, given the rulings in *Roth* and *Miller*, that obscenity is unprotected speech. The researcher wonders why this assumption has not been challenged more forcefully. *See, e.g.,* Ex parte Thompson, 414 S.W.3d 872 (Tex. App. 2013) ("Government does not have right to control moral content of person's thoughts"); State v. Jeffrey, 400 S.W.3d 303 (Mo. 2013) (recognizing the right to possess obscene materials in the home); Commonwealth v. Sullivan, 972 N.E.2d 476 (Mass. App. Ct. 2012) (recognizing that the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"); United States v. Robbins, 759 F. Supp.2d 815 (W.D. Va. 2011) (recognizing a right to possess obscene materials in the privacy of one's home); First Time Videos, LLC v. Does 1-500, No. 10 C 6254 (N.D. Ill. Aug. 9, 2011) (invalidating a Georgia statute criminalizing the private possession of obscene materials, because "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch"); Curious Theater v. Dept. of Pub. Health, 216 P.3d 71 (Colo. App. 2008) (obtaining or possessing obscene materials in one's home); State v. Romano, 114 Haw. 1 (Haw. 2007) (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" because although "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his [or her] own home"); TX, Best Int., Prot, J.H., 12-06-00031-CV (Tex. App.-Tyler 10-4-2006), No. 12-06-00031-CV (Tex. App. Oct. 4, 2006) (ruling that obscene thoughts cannot be prohibited); United States v. Williams, 444 F.3d 1286 (11th Cir. 2006) (stating that legislators "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"); Lubin v. Agora, 389 Md. 1 (Md. 2005) (holding that a state statute criminalizing the mere possession of obscene materials in a person's home violates the First Amendment); State v. Acosta, 08-04-00312-CR (Tex. App. El Paso [8th Dist.] 2005), No. 08-04-00312-CR (Tex. App. Aug. 31, 2005) (holding "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime"); United States v. Extreme Associates, Inc., 431 F.3d 150 (3d Cir. 2005) (indicating that even if prohibiting obscenity possession is necessary to facilitate the enforcement of statutory schemes prohibiting its distribution, the right to possess materials within the privacy of the home is so important that "its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."); Willis v. Town of Marshall, N.C., 426 F.3d 251 (4th Cir. 2005) (explaining that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."); Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004) (holding that the First and Fourteenth Amendments prohibit the state's regulatory power from extending to possession

by an individual of obscene materials in his home); American Library Ass'n Inc. v. United States, 201 F. Supp.2d 401 (E.D. Pa. 2002) (holding that individuals have a First Amendment right to possess obscene material, even though the existence of this right makes it more difficult for the states to further their legitimate interest in prosecuting the distribution of obscenity); Planned Parenthood of S. Arizona v. Lawall, 307 F.3d 783 (9th Cir. 2002) (stating that the Founders "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man"); Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2002) (disallowing speculative governmental interest in banning obscene material as justification for statute restricting nonpolitical speech); Doe v. Pulaski County Special School Dist., 306 F.3d 616 (8th Cir. 2002) (recognizing an individual's right under the First Amendment to possess obscene material in the privacy of one's home); Dekart v. Milczark, C4-98-733 (Minn. Ct. App. 1998) (recognizing right to view obscene material in privacy of one's home is protected both by First Amendment and right to privacy); American Federation of Gov. Employees v. HUD, 118 F.3d 786 (D.C. Cir. 1997) (holding a statute prohibiting private possession of obscene material unconstitutional); Loper v. New York City Police Dept., 802 F. Supp. 1029 (S.D.N.Y. 1992) (discussing the right to be spoken to and to receive information and ideas, "regardless of their worth"); Bamon Corp. v. City of Dayton, (S.D. Ohio 1990), 730 F. Supp. 80 (S.D. Ohio 1990) (holding that the viewing of obscene materials in one's home is constitutionally protected); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) ("These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."). *See also generally* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). Others, however, have argued that obscenity, for various reasons, deserves no First Amendment protection. *See, e.g.,* Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 GEO. L.J. 899, 922-23 (1979); HENRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 170-71 (1969).

The FCC's official legal definition for broadcast indecency is different now than from years past.[19] Originally, and after *FCC v. Pacifica Foundation*,[20] broadcasters adhered to direction provided by the Commission that only the repeated use of the "seven dirty words" would lead to FCC action for possible indecent broadcasts.[21] In 1987, however, things changed after the Commission

---

[19] *See infra* notes 21-22 and accompanying text.

[20] 438 U.S. 726 (1978).

[21] *See, e.g.*, New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987) ("Prior to the Commission's April 16 actions, the Commission had limited its enforcement efforts to the specific material involved in Pacifica, that is, to seven particular words that were broadcast in a George Carlin monologue."); In the Matter of Infinity Broadcasting Corporation of Pennsylvania, 3 F.C.C.R. 930 ¶ 4 (1987) ("In cases decided subsequent to the Supreme Court's ruling, the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts. Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975. Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue. Also widely shared was the view that such broadcasts would be actionable only if aired before 10:00 p.m. As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts."); Pacifica Foundation (WPFW-FM), 95 FCC2d 750, 760 ¶ 17 (1984) ("In WBAI-FM, supra, the Commission defined "indecent" language for the purposes of 18 U.S.C. § 1464 as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." In affirming the Commission's ruling the Supreme Court relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive... would justify any sanction..." [438 U.S. at 750]. Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." [438 U.S. at 757]. He specifically distinguished "the verbal shock treatment...." from "the isolated use of a potentially offensive word in the course of a radio broadcast." [438 U.S. at 760-1]. WGBH Educational Foundation, 69 FCC 2d 1250, 1254 (1978). The Supreme Court's affirmance of the Commission's WBAI ruling "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in [WBAI] are broadcast...""); WGBH Educational Foundation, 69 FCC2d 1250, 1254 ¶ 10 (1978) ("With regard to "indecent" or

issued an official public notice entitled, *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*.[22] The revised mandate would reinforce the court's holding in *Pacifica*,[23] and compel the Commission to require all licensees to adhere to the following new definition for indecency, which remains in effect today: "*language or material that depicts or describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities or organs*."[24]

Much like the aforementioned definition for obscenity, broadcast licensees have grappled with how to apply the indecency definition to broadcast content, ultimately suggesting that the indecency guidance

---

"profane" utterances, the First Amendment and the "no censorship" provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. The Supreme Court's decision in FCC v. Pacifica Foundation, 46 U.S.L.W. 5018 (1978); No. 77-528, decided July 3, 1978, 5 affords this Commission no general prerogative to intervene in any case where words similar or identical to those' in Pacifica are broadcast over a licensed radio or television station. We intend strictly to observe the 'narrowness' of the Pacifica holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive. . . would justify any sanction . . ." Slip Op. at 22. Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." Concurring Slip Op. at 2. He specifically distinguished "the verbal shock treatment [in Pacifica]" from "the isolated use of a potentially offensive word in the course of a radio broadcast." Id. at 6. In the case before us, petitioner has made no comparable showing of abuse by WGBH-TV of its programming discretion. This situation clearly is distinguishable from the Pacifica case.").

[22] 2 F.C.C.R. 2726 (1987).

[23] *See supra* note 20.

[24] *Id.* at 772 n.7. *See also supra* note 22.

provided, by the FCC, has been nebulous.[25] In fact, in a settlement agreement[26] between Evergreen Media Corporation and the Commission, the commissioners agreed to publish (i.e., within nine months) clearer written guidelines as to what officially constituted broadcast indecency.[27] It was not, however, until April 2001 that the governmental agency authored and distributed official industry guidance on the indecency policy.[28] Unfortunately, the same 2001 FCC guidance has proven anything but helpful to media entities.[29]

---

[25] *See, e.g.,* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 328 (2010) ("The networks argue that the FCC's indecency test is unconstitutionally vague because it provides no clear guidelines as to what is covered and thus forces broadcasters to "steer far wider of the unlawful zone," rather than risk massive fines.").

[26] *See* In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8016 n.23 (2001) ("This Policy Statement addresses the February 22, 1994, Agreement for Settlement and Dismissal with Prejudice between the United States of America, by and through the Department of Justice and Federal Communications Commission, and Evergreen Media Corporation of Chicago, AM, Licensee of Radio Station WLUP(AM). Specifically, in paragraph 2(b) of the settlement agreement, the Commission agreed to "publish industry guidance relating to its case law interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency." United States v. Evergreen Media Corp., Civ. No. 92 C 5600 (N.D. Ill., E. Div. 1994). The settlement agreement also provides that the forfeiture order imposed in Evergreen Media Corporation of Chicago AM WLUP(AM)), 6 FCC Rcd 502 (MMB 1991), is null and void and expunged from the record. It further specifies that the Notice of Apparent Liability issued to WLUP on February 25, 1993, Evergreen Media Corporation of Chicago AM (WLUP(AM)), 8 F.C.C.R. 1266 (1993), became null and void and expunged from the record six months from the date of the agreement. Accordingly, those decisions are officially vacated."); *See also* United States v. Evergreen Media Corp., 832 F. Supp. 1179 (N.D. Ill. 1993) (noting further discussion of the case with Evergreen Media).

[27] *See Industry Guidance, supra* note 26 at 8016 n.23.

[28] *See Industry Guidance, supra* note 26.

[29] *See generally supra* Chapter 3.

Next, notwithstanding the fact that the term "profane language," is part of Title 18, U.S.C., Section 1464,[30] it is not something the Commission ever enforced (i.e., or even mentioned)[31] prior to all the fuss made about Fox Television's televised Billboard Music Award Shows[32] and the CBS 2004 Super Bowl halftime ruckus.[33] What, therefore, deems broadcast content as "profane" in nature? The FCC's Internet website[34] provides the following guidance, stemming from its 2004 *Golden Globes Order*,[35] relying on *Tallman v. United*

---

[30] *See supra* note 1.

[31] *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461-62 (2d Cir. 2007) ("Prior to 2004, the Commission never attempted to regulate "profane" speech. In fact, the Commission took the view that a separate ban on profane speech was unconstitutional. See 122 Cong. Rec. 33359, 33359, 33364-65 (1976) (recommending Congress delete "profane" from Section 1464 "[b]ecause of the serious constitutional problems involved"); FCC, THE PUBLIC AND BROADCASTING, 1999 WL 391297 (June 1999) ("Profanity that does not fall under one of the above two categories [indecent or obscene] is fully protected by the First Amendment and cannot be regulated."). The courts, however, have dealt with profanity dating back to Duncan v. United States. *See* 48 F.2d 128 (9th Cir. 1931).

[32] *See, e.g.*, In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) (discussing (1) the incident and expletive Cher shared with the viewing audience; and (2) Nicole Richie quipping "fuck" and "shit"); In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 19 F.C.C.R. 4975 (2004) (discussing how the FCC had reversed course on its policies, and profanity would now be part of its regulatory regime); In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 18 F.C.C.R. 19859 (2003) (discussing Bono's "f-bomb.").

[33] *See* In the Matter of Complaints Against Various Television Licensees' Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230, 19231 (2004) (noting, among other things, the FCC received, as of Sept. 2004, more than 542,000 complaints about the broadcasted breast).

[34] *See Obscene, Indecent and Profane Broadcasts*, FEDERAL COMMUNICATIONS COMMISSION, *available at* http://www.fcc.gov/guides/obscenity-indecency-and-profanity (last visited June 30, 2017).

[35] *See* In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globe Awards Program, 19 F.C.C.R. 4975, 4981 ¶ 13 (2004) ("The term "profanity" is commonly defined as "vulgar, irreverent, or coarse language." The Seventh Circuit, in its

States:[36] "Profane content includes "grossly offensive" language that is considered a public nuisance."[37]

GOVERNMENT RATIONALES FOR BROADCAST REGULATION

The history of the FCC's regulation of broadcast programming evidences that the government, along with the courts,[38] has used various rationales[39] to justify the oversight of broadcast content. One of the first rationales, *spectrum scarcity*,[40] was introduced by the U.S. Supreme Court in

---

most recent decision defining "profane" under section 1464, stated that the term is "construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.").

[36] 465 F.2d 282 (7th Cir. 1972).

[37] *Id*. at 286 ("Profane" is, of course, capable of an overbroad interpretation encompassing protected speech, but it is also construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.").

[38] *See infra* notes 41-137 and accompanying text.

[39] *Id*. Licensees also have an intrinsic public interest obligation, articulated in the 1927 Federal Radio Act, and subsequent 1934 Communications Act. *See* Application for License, 47 U.S.C. § 309 (2017) (a) Considerations in granting application: Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. *See also* 47 U.S.C. 303 (g) (2017) (describing the powers and duties of the FCC).

[40] *See infra* notes 41-74.

Federal Radio Commission v. Nelson Brothers Bond & Mortgage Company,[41] followed by analogous language in *FCC v. Sanders Brothers Radio Station*.[42] The same views regarding spectrum scarcity continued and were further expanded in *National Broadcasting Company v. United States*[43] (hereinafter NBC) and *Red Lion Broadcasting Company v. FCC*[44] (hereinafter Red Lion). Simply put, the high court in *NBC*[45] concluded that not all who wished to operate a radio station could do so.[46] As such, given the inherent limited spectrum space for radio, the *NBC*[47] court held, the same technology was subject to government policing.[48]

---

[41] *See* 289 U.S. 266, 279 (1933) ("In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses").
[42] *See* 309 U.S. 470, 474 (1940) ("The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited.").
[43] 319 U.S. 190 (1943).
[44] 395 U.S. 367 (1969).
[45] *See supra* note 43.
[46] *Id.* at 213, 226 ("There is a fixed natural limitation upon the number of stations that can operate without interfering with one another;" "We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all.").
[47] *See supra* note 43.
[48] *See id.* at 213, 226 ("The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers;" "That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."). *See generally* Farina v. Nokia Inc., 625 F.3d 97 (3d Cir. 2010) (describing the history of federal regulation of radio communications).

Similarly, relying on language in *NBC*,[49] the high court would next seize the opportunity to use spectrum scarcity to justify the regulation of broadcast licensees in *Red Lion*[50] by opining:

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[51]

Although the *Red Lion*[52] case certainly reinforced the theory that, given the scarcity[53] of radio frequencies, the FCC wielded substantial authority to oversee broadcast licensees, subsequent court decisions,[54] including the

[49] *See supra* note 43.
[50] *See supra* note 44.
[51] *Id.* at 375.
[52] *See supra* note 44.
[53] *See id.* at 388, 390 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish;" "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").
[54] *See, e.g., In re* Beach Television Partners v. Mills, 38 F.3d 535, 536 (11th Cir. 1994) ("Legislators soon realized, however, that "broadcast frequencies constituted a scarce resource" and thus the government should regulate allocations.").

landmark *Pacifica*,[55] maintained validation of the same hypothesis.[56] Others, still, were not convinced that the spectrum scarcity theory was entirely sound.[57]

---

[55] *See supra* note 20.

[56] *See id.* at 731 n.2 ("Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.").

[57] *See infra* notes 59-68, 70, 74, and accompanying text. *See also* Jonathon A. Messier, *"Too legit to Quit": Free Speech Clause Protection for Frequency Hopping Spread Spectrum Broadcasters*, 9 PITT. J. TECH. L. & POL'Y 1, 18-26 (2009) (discussing disapproval of the spectrum scarcity rationale); *In re* Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York, 2 F.C.C.R. 5043, 5068 n.201 (1987) ("Moreover, the fact that government may license broadcasters to use frequencies in order to minimize interference, and thus to maximize the effective dissemination of speech through the electromagnetic spectrum, does not justify content regulation."); Telecommunications Research Action v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) ("It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion."); FCC v. League of Women Voters of California, 468 U.S. 364, 377 n.11 (1984) ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. See, e.g., Fowler Brenner, A Marketplace Approach to Broadcast Regulation, 60 Texas L. Rev. 207, 221-26 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 102 (1973) ("The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.").

A number of academics and attorneys have discounted the spectrum scarcity rationale for broadcast regulation.[58] For example, attorney Barry Chase maintained, in 2013, "[i]f there were ever any utility to the argument that "broadcast" should be subject to lesser First Amendment protection than, say, newspapers, the argument has been so overtaken by technological and social developments that it is, by now, almost silly."[59] Moreover, attorney and staff editor for the *Oklahoma City University Law Review*, Blake Lawrence, argued, in 2010, "[t]he reasoning for speech regulation given in Pacifica and used by the FCC today is no longer viable given that many variables in broadcast media have changed since the 1970s."[60] Lawrence reasoned further:

> The FCC still relies on the outdated, outmoded, and out of touch reasoning given in Pacifica to sanction indecent material. Broadcasting is no longer as "uniquely pervasive" or as "uniquely accessible" as it was in the late 1970s when Pacifica was decided. With the rise of parental control tools, parents can rest assured that accessible and effective means of limiting broadcasting exist. Further, Internet technology and the vast stores of information now available at anyone's fingertips prove that the world-wide-web, and not broadcasting, is now the most pervasive and accessible form of communication and expression.[61]

---

[58] *See infra* notes 59-68.
[59] *See* Barry Chase, *The FCC's Indecency Jurisdiction: A Stale Blemish on The First Amendment*, 39 OHIO N.U.L. REV. 697, 699 (2013).
[60] *See* Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148, 150 (2010).
[61] *Id.* at 178.

Adam Thierer, Senior Research Fellow at George Mason University opined, "[e]ven if rationales for the unique regulation of broadcasting were once valid, modern marketplace realities and technological changes have undermined whatever remaining credibility they had."[62] Lawyer Joshua B. Gordon has proclaimed:

> Technology has eroded Pacifica's argument structure. New communications media are virtually indistinguishable, from the public's standpoint, from broadcast technology. Moreover, household level blocking technology provides parents with near absolute control over what content enters the home. Despite these facts, this argument structure alone continues to be used to justify applying a lower standard of review to broadcasting. In addition, the underlying premise of scarcity is susceptible to varied criticisms of its own and cannot, on its own, logically justify government regulation. Without a replacement argument structure, the Court would be left to reiterate the conceptual fallacy of inferring government power to regulate content from the fact of scarcity.[63]

Author Matthew Holohan, similarly, asserted:

> The technological underpinnings of the Pacifica decision have been rendered more or less obsolete by advances in communication technology and other changes in the way media programming is transmitted. These technological shifts, coupled with the dearth of evidence that indecent programming is actually harmful to children, calls into question the viability of decreased protection for broadcasters in the

---

[62] *See* Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM LAW CONSPECTUS 431, 434 (2007).

[63] *See* Joshua B. Gordon, *Pacifica Is Dead-Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1498 (2006).

> indecency realm. The FCC's enforcement procedures are incompatible with current communications technology……[64]

Former FCC commissioner Harold W. Furchtgott-Roth, in 2001,[65] declared that broadcast content restrictions should be eliminated.[66] Specifically, he posited: "Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue."[67] And former FCC Media Bureau staffer, John Berresford, also a veteran attorney and George Mason University School of Law adjunct professor, in a March 2005 thirty-four page research report, argued strongly against the validity of the spectrum scarcity rationale by professing:

> This paper concludes that the Scarcity Rationale for regulating traditional broadcasting is no longer valid. The Scarcity Rationale is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology. It is outmoded in today's media marketplace. Perhaps in recognition of the Rationale's flaws, many variations of it have been attempted, but none fares much better under sensible, factual analysis.[68]

---

[64] *See* Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 368-69 (2005).
[65] The researcher emphasizes that this was approximately sixteen years ago.
[66] *See infra* note 67.
[67] *See* Emily Hagemann, *FCC Defines the Indefinable: Indecency*, 25 NEWS MEDIA & THE LAW 24 (Spr. 2001).
[68] *See The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FEDERAL COMMUNICATIONS COMMISSION, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf (last visited July 1, 2017).

If what Professor Berresford argues in his article has any substantive level of validity, then it is reasonable to suggest court decisions that relied on scarcity as a rationale for broadcast indecency regulation, even those at the U.S. Supreme Court level, were flawed.[69] U.S. Supreme Court Justice Clarence Thomas, in strong and detailed language, mirrored some of Berresford's thoughts expressing concern over the spectrum scarcity theory.[70] Last, even

---

[69] *See, e.g.,* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101-02 (1973) ("Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated"). *See also supra* notes 43, 44.

[70] *See* Fox Television Stations, Inc. v. FCC, 556 U.S. 502, 530-35 (2009) (Thomas, J., concurring) ("I join the Court's opinion, which, as a matter of administrative law, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act. I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. See *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S. Ct. 1794, 23 L.Ed.2d 371 (1969) ; *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978). *Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" in these cases. *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 812, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996) (Thomas, J., concurring in judgment in part and dissenting in part).

In *Red Lion,* this Court upheld the so-called "fairness doctrine," a Government requirement "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." 395 U.S., at 369, 400–01, 89 S. Ct. 1794. The decision relied heavily on the scarcity of available broadcast frequencies. According to the Court, because broadcast spectrum was so scarce, it "could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Id.* at 376, 89 S. Ct. 1794 . To this end, the Court concluded that the Government should be "permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390, 89 S. Ct. 1794; see also *id.* at 389, 89 S. Ct. 1794 (concluding that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom

licenses are refused”). Applying this principle, the Court held that “[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.” *Id.* at 394, 89 S. Ct. 1794.

Red Lion specifically declined to answer whether the First Amendment authorized the Government's “refusal to permit the broadcaster to carry a particular program or to publish his own views[,] ... [or] government censorship of a particular program,” *id.* at 396, 89 S. Ct. 1794. But then in *Pacifica,* this Court rejected a challenge to the FCC's authority to impose sanctions on the broadcast of indecent material. See 438 U.S., at 729–30, 750–51, 98 S. Ct. 3026;*id* ., at 742, 98 S. Ct. 3026 (plurality opinion), relying on *Red Lion,* the Court noted that “broadcasting ... has received the most limited First Amendment protection.” 438 U.S., at 748, 98 S. Ct. 3026. The Court also emphasized the “uniquely pervasive presence” of the broadcast media in Americans' lives and the fact that broadcast programming was “uniquely accessible to children.” *Id.* at 748–749, 98 S. Ct. 3026.

This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional question, the Court relied on a set of transitory facts, *e.g.,* the “scarcity of radio frequencies,” *Red Lion, supra,* at 390, 89 S. Ct. 1794, to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” *District of Columbia* v. Heller, 554 U.S. ——, ——, 128 S. Ct. 2783, 2821, 171 L.Ed.2d 637 (2008). In breaching this principle, *Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution. *Denver Area, supra,* at 813, 116 S. Ct. 2374 (THOMAS, J., concurring in judgment in part and dissenting in part) (“First Amendment distinctions between media [have been] dubious from their infancy”). Indeed, the logical weakness of *Red Lion* and *Pacifica* has been apparent for some time: “It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media.” *Telecommunications Research & Action Center v. FCC,* 801 F.2d 501, 508 (C.A.D.C.1986) (Bork, J.).

Highlighting the doctrinal incoherence of *Red Lion* and *Pacifica,* the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, see *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 127–28, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989), cable television programming, see *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 637, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994), and the Internet, see *Reno v. American Civil Liberties Union,* 521 U.S. 844, 867–68, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). “There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued [,] ... it makes no sense now.” *Action for Children's Television v. FCC,* 58 F.3d 654, 673 (C.A.D.C.1995) (Edwards, C. J., dissenting). The justifications relied on by the Court in *Red Lion* and *Pacifica* —“spectrum

scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast."58 F.3d, at 673; see also *In re Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8021, n. 11, 2001 WL 332787 (2001) (statement of Commissioner Furchtgott–Roth) ("It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection, *see Reno* [*v. American Civil Liberties Union,* 521 U.S. 844, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997)], than would the same exact content broadcast over-the-air").

Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica,* dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. See Brief for Respondents NBC Universal et al. 37–38 (hereinafter NBC Brief). As NBC notes, the number of over-the-air broadcast stations grew from 7,411 in 1969, when *Red Lion* was issued, to 15,273 by the end of 2004. See NBC Brief 38; see also FCC Media Bureau Staff Research Paper, J. Berresford, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 12–13 (Mar.2005) (No.2005–2). And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to "stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today." *Consumer Electronics Assn. v. FCC,* 347 F.3d 291, 294 (C.A.D.C.2003).

Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services. See App. to Pet. for Cert. 107a. Broadcast and other video programming is also widely available over the Internet. See Stelter, Serving Up Television Without the TV Set, N.Y. Times, Mar. 10, 2008, p. C1. And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices. See May, Charting a New Constitutional Jurisprudence for the Digital Age, 3 Charleston L. Rev. 373, 375 (2009). The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today. See *In re Industry Guidance, supra,* at 8020 (statement of Commissioner Furchtgott–Roth) ("If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past. As the Commission has long recognized, the facts underlying this justification are no longer true" (footnote omitted)).
These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis*. See *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 855, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992) (asking "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); see also *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 302, 107 S. Ct. 2829, 97 L.Ed.2d 226 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate ..."). "In

the Commission, itself, has hinted at questions about the viability of spectrum scarcity as a justification for broadcast regulation.[71] Notwithstanding the

---

cases involving constitutional issues" that turn on a particular set of factual assumptions, "this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting). For all these reasons, I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case."). *See also* FCC v. League of Women Voters of California, 468 U.S. 364, 377 n.11 (1984) ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.").

[71] *See, e.g., In re* Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York, 2 F.C.C.R. 5043, 5054 ¶¶ 73-74 (1987) ("Certain parties, taking the position that the basis underlying the scarcity rationale in Red Lion is either illogical or anachronistic, assert that the appropriate constitutional test to assess content-based regulations of the electronic media is the one enunciated for the print media. These commenters point to the explosive growth in the number and types of information sources in support of their assertion that the scarcity doctrine is no longer viable. Other commenters, in contrast, state that the general standards of First Amendment jurisprudence applied by the Court in cases not involving broadcast regulation are irrelevant in determining whether the fairness doctrine and other content-based regulations are constitutional. They assert that the increase in the number and types of information sources has nothing to do with the existence of scarcity in the constitutional sense, and emphasize that the appropriate standard of review is that applied by the Court in Red Lion and its progeny specifically relating to broadcast regulation. These parties describe two different notions of scarcity—numerical scarcity and spectrum (or allocational) scarcity. We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media. As stated above, we no longer believe that there is scarcity in the number of broadcast outlets available to the public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters-and indeed the rights of the public to receive information unencumbered by government intrusion-can depend on the number of information outlets in particular markets. Surely a requirement of multiple media outlets could not have formed the basis for the framers of the First Amendment to proscribe government interference with the editorial process. At the time the First Amendment was adopted, there were only eight daily newspapers, seventy weekly newspapers, ten semi-weekly newspapers and three tri-weekly newspapers published in America."); In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 197 ¶ 82 (1985) ("We have witnessed explosive growth in various communications technologies").

possibility that the federal government could, unmistakably, prove "spacing" along the electromagnetic spectrum may have been limited at one time, the unutterable advances in technology, since *Pacifica*,[72] have now virtually diminished any such shortages. As a result, one wonders if courts,[73] going

---

[72] *See supra* note 20.

[73] *See, e.g.*, Minority Television Project, Inc. v. FCC, 676 F.3d 869, 876 (9th Cir. 2012) ("Despite the Court's pronouncement in *League of Women Voters*, which was a public broadcasting case, *Minority* urges us to apply strict scrutiny for two different reasons. First, citing a concurring opinion in *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009), which questioned the continuing validity of the broadcast regulation precedents on which *League of Women Voters* relied, *Minority* contends that new technologies such as cable and the Internet have undermined the core "spectrum scarcity" rationale of broadcast regulation cases. Id. at 1821 (Thomas, J., concurring). Under this theory, because "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were," id. courts should no longer treat broadcast restrictions any differently from other restrictions on speech. *Minority* is surely correct that much has changed in the media landscape since the Supreme Court, in the 1970s, first adopted a standard that treats broadcasters differently under the First Amendment. Indeed, it is possible that the Supreme Court itself may soon declare that the era of a special broadcast exemption from strict scrutiny is over."); *supra* note 25 at 326 (2010) ("The Networks argue that the world has changed since *Pacifica* and the reasons underlying the decision are no longer valid. Indeed, we face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did You-tube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed a "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748, 98 S. Ct. 3026. The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast—almost 87 percent of households subscribe to a cable or satellite service—and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control. *See In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542 ¶ 8 (2009). The internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs. See *In re* Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 24 F.C.C. Red. 11413 ¶ 126 (2009) ("*CSVA Report*") ("The number of suppliers of online video and audio is almost limitless."). As the FCC itself acknowledges, "[c]hildren today live in a media environment that is dramatically different from the one in which their parents

forward, will recognize that terrestrial broadcasters no longer are the only game in town.[74]

A second significant basis to justify the government's policing of

---

and grandparents grew up decades ago." In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 F.C.C. Rcd. 13171 ¶ 11 (2009)."); National Citizens Committee for Broadcasting v. F.C.C., 555 F.2d 938, 950 n.31 (D.C. Cir. 1977) ("Another limitation is contained in the factual predicate for licensing—scarcity. At present, in many cities the available broadcast spectrum is fully occupied. See, e.g., *Red Lion*, supra, 395 U.S. at 398 n.25, 89 S. Ct. 1794. However, currently available technology could eliminate this scarcity. With existing equipment and technology "a single coaxial (tv) cable can carry between 28 and 36 channels of television, plus the entire AM and FM radio bands and a quantity of other nonvisual electronic signals." Smith, The Wired Nation 7 (1972). And in ten years it may be possible to provide each home with as many as 400 cable channels. Id. An innovation developed by the Bell System offers even more promise than conventional cable service. Developed primarily for telephone service, so-called "lightguides" made of broadband fiber optics have a capability of carrying 50,000 telephone calls or their equivalent on a cable one-half inch in diameter. One cable operator has begun experimental use of lightguides for television transmission, reportedly with excellent results. Broadcasting, July 19, 1976, 44. Alleviating scarcity would not only eliminate the need for promoting diversity, it would also presumably eliminate the need for all licensing save that necessary to prevent interference. Of course, the expense required to produce quality programming and lay cable may limit the number of voices that in fact reach each home, but such constraints are common to many businesses. Broadcasting would no longer present unique problems requiring unique regulation.").

[74] For example, the number of people using the Internet in 2014 was more than 277 million, with 87% of Americans actively using the web. *See* INTERNET AND WORLD STATS, *available at* http://www.internetworldstats.com/am/us.htm (last visited July 3, 2017). In the United States, (1) there are approximately 5,208 cable systems; (2) 660 cable operators; (3) Cable TV's share of daily viewership is 70%; (4) Pay TV percentage of all TV households is 85%; (5) the estimated total of cable channels offered is 900+; (6) broadband adoption, now at 67%, has doubled in the past ten years; (7) there are 59 million broadband customers; (8) "The Internet isn't merely developing, it's exploding, and the numbers prove it. Today, there are more connected devices than there are human beings on the planet. This expansion isn't just from cell phones, tablets, and computers-it's thanks to the toothbrushes, stovetops, and millions of other devices that now have IP addresses." *See generally* STATISTICA, *available at* https://www.statista.com/statistics/467842/pay-tv-penetration-rate-usa/ (last visited July 3, 2017); THE INTERNET AND TELEVISION ASSOCIATION, *available at* https://www.ncta.com/data-stats (last visited July 3, 2017).

broadcast content was the *unique pervasiveness*[75] rationale, which received considerable treatment[76] in the *Pacifica*[77] case. The high court in *Pacifica*,[78] in articulating its argument regarding unique pervasiveness, made clear that one's privacy, in the home, undeniably trumped the free expression rights of a speaker.[79] Much like the aforementioned spectrum scarcity rationale, however, the theory of unique pervasiveness, even if credible at one time, has now come under severe condemnation.[80] Broadcasters, given the innumerable media entities that now exist, along with the Internet, are simply not the

---

[75] *See supra* note 20 at 731 n.2, 748, 759 ("Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest;" "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan* v. *Post Office Dept.*, 397 U.S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place;" "A second difference, not without relevance, is that broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.").

[76] *Id.*

[77] *See supra* note 20.

[78] *Id.*

[79] *See supra* note 75.

[80] *See supra* note 73.

unaccompanied mass communication force they once were.[81]

The third premise on which the resolute Commission, and the judiciary, have leaned on to justify broadcast programming regulation is the *"harm-to-children"* rationale.[82] While the high court in *Prince v. Massachusetts*[83] first examined the court's overall role in protecting children,[84] the court thereafter sustained the same discussion in *Ginsberg v. New York.*[85] Relying on language

---

[81] *See supra* notes 70, 71, 73, 74.
[82] *See infra* notes 83-137 and accompanying text.
[83] 321 U.S. 158 (1944).
[84] *Id.* at 165, 167, 168 ("Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens;" "It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction;" "The state's authority over children's activities is broader than over like actions of adults."). *But see* Butler v. Michigan, 352 U.S. 380, 383-84 (1957) ("We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. We are constrained to reverse this conviction.").
[85] 390 U.S. 629, 639-41 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, supra, at 166. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid

in *Prince*,[86] the *Ginsberg*[87] court then amplified the trajectory of dialog for protecting children by espousing "objectionable" and *obscene* material[88] as part

---

discharge of that responsibility;" "In *Prince* v. *Massachusetts, supra*, at 165, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens."").

[86] *See supra* note 83.

[87] *See supra* note 85.

[88] *Id.* at 636, 637, 639, 639 n.6, 641-42, 643 n.10, ("[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults;" "It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see;" "Many commentators, including many committed to the proposition that "[n]o general restriction on expression in terms of `obscenity' can . . . be reconciled with the first amendment," recognize that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," and accordingly acknowledge a supervening state interest in the regulation of literature sold to children, Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 938, 939 (1963): "Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults;"" "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful;" "To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state;"" "But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of some psychiatrists in 77 Yale L. J., at 592-93, said: "It is in the

of the same deliberation.[89] Naturally, as a result, *Ginsberg*[90] served as a catalyst for the high court to extrapolate its theory on protecting children to, then, presuppose and advance the belief that children could somehow be harmed by exposure to broadcast content deemed *indecent*.[91] Shielding children from alleged indecent broadcast content, with and through on-air "zoning"[92] or

---

period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control—it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.").

[89] *Id.*

[90] *See supra* note 85.

[91] *See infra* note 95.

[92] If the underlying premise is to protect children from potentially "harmful" programming, with and through on-air "zoning," or "channeling" of alleged indecent broadcast content, the researcher respectfully wonders why it would be okay to harm some (i.e., a small number of children) as opposed to a vast amount? *See, e.g.,* FCC v. Pacifica Foundation, 438 U.S. 726, 731-33 (1978) ("The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to *channeling* behavior more than actually prohibiting it. . . . [T]he concept of `indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 F.C.C.2d, at 98.

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." *Id.* at 99. In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464." *Ibid*.

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an

"channeling,"[93] received rather significant consideration, going forward, in the *Pacifica*[94] case.[95]

---

absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F.C.C.2d 892 (1976).").

[93] *Id. See also infra* note 94.

[94] *See supra* note 20.

[95] *Id.* at 731-32, 732-33, 749-50, 757-58 ("[T]he concept of `indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 F.C.C.2d, at 98. Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon);" "The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it;"" "broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. Id. at 640 and 639. The case with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting;" "The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 212 (1975); see also, *e.g.*, *Miller* v. *California*, 413 U.S. 15, 36 n.17 (1973); *Ginsberg* v. *New York*, 390 U.S. 629, 636-41 (1968); *Jacobellis* v. *Ohio*, 378 U.S. 184, 195 (1964) (opinion of Brennan, J.). This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York, supra*, at 649-650 (Stewart, J., concurring in result). Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult.").

SOCIAL SCIENCE AND THE "HARM" THEORY

Although the U.S. Supreme court, in *Prince*,[96] *Ginsberg*,[97] and *Pacifica*,[98] no doubt used the "harm"[99] theory to bolster its overall justification for allowing the federal government to watch over the programming of broadcasters, not all academic scholars have agreed with the seemingly scientific underpinnings of the high court.[100] Just this year, for example, author Sarah Fallon suggested that children are routinely exposed to pornography.[101]

---

[96] *See supra* note 83.

[97] *See supra* note 85.

[98] *See supra* note 20.

[99] Academic scholars Edward Donnerstein, Barbara Wilson, and Daniel Linz offered their take on "harm" by opining: "We contend that there are two elements necessary to establish a harmful effect, one based on a societal judgment about what constitutes harm, and the other based on the reliability and validity of scientific evidence necessary to demonstrate such harm. Consistent with this approach, others have asserted that virtually every legal judgment is composed of a "normative principle" and a "factual premise" (Faigman, 1989; Walker & Monahan, 1988)." *See* Edward Donnerstein, Barbara Wilson, & Daniel Linz, *On the Regulation of Broadcast Indecency to Protect Children*, 36 J. BROAD. & ELEC. MEDIA 111 (Winter 1992).

[100] *See infra* notes 101-32 and accompanying text.

[101] *See* Sarah Fallon, *Your Kids Will See Internet Porn. Deal With It. A Conversation With Peggy Orenstein*, WIRED, *available at* https://www.wired.com/2017/08/kids-and-porn/ (last visited Aug. 23, 2017) ("The first thing I recognized when I started working on the new book was that the question to ask boys is not whether or if they watch porn. The question is, when was the first time they saw it? The most typical answer I get is 11, sometimes 13, sometimes younger"). *See also* Darcel Rockett, *Kids Are Seeing Porn Sooner Than Adults Think, Which Can Turn Addictive*, CHI. TRIB., Apr. 2, 2018, *available at* http://www.chicagotribune.com/lifestyles/parenting/sc-fam-porn-addiction-in-youth-0417-story.html (last visited Apr. 2, 2018); Mary Madden, *Internet Penetration and Impact*, PEW INTERNET AND AMERICAN LIFE PROJECT, Apr. 2006, *available at* http://www.pewinternet.org/2006/04/26/internet-penetration-and-impact/ (last visited Mar. 12, 2018) ("[w]e found that 87% of 12-17 year-olds use the Internet."); Amanda Lenhart, Mary Madden, Paul Hitlin, *Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, PEW INTERNET AND AMERICAN LIFE PROJECT, July 27, 2005, *available at* http://www.pewinternet.org/files/old-media/Files/Reports/2005/PIP_Teens_Tech_July2005web.pdf.pdf (last visited Mar. 12, 2018);

Benjamin K. Bergen, a cognitive scientist and professor,[102] in the Department of Cognitive Science at the University of California at San Diego, has done significant research and publication on language studies, profanity, and the human brain.[103] In his latest book,[104] among other things, Bergen declares:

> We're told that these are words, early on, that you can't say. We punish people for saying them, so we're training kids, socially, that these words are powerful;" "When researchers observed how people dealt with the pain of submerging their hands in icy water, they found that people could withstand more discomfort if they repeated a swear word, rather than a non-swear word. Scientists have also found that unlike most sounds we utter, cussing can happen in both voluntary and involuntary ways. The latter—like when we drop our keys in the snow and yell "fuck" without consciously deciding to—offer evidence that language isn't just produced one way in the brain. That has clinical and research implications and it may tell us something about why we came to communicate as we do.[105]
>
> To the best of our knowledge, profanity leaves no such fingerprint on the child's psyche or future. Take the word *fuck*. How exactly can hearing fuck hurt a child? Proponents of censorship often claim that the language is "strong" or "offensive" or "immoral," but as we've seen, this means nothing other than that they themselves are offended by it or

---

DAVID BUCKINGHAM & SARA BRAGG, YOUNG PEOPLE, SEX AND THE MEDIA: THE FACTS OF LIFE? 237 (2004) ("Children frequently encounter sexual material in the media").

102 *See* Benjamin K. Bergen's academic profile, DEPARTMENT OF COGNITIVE SCIENCE, UNIVERSITY OF CALIFORNIA AT SAN DIEGO, *available at* http://www.cogsci.ucsd.edu/~bkbergen/ (last visited July 17, 2017).

103 *Id.*

104 BENJAMIN K. BERGEN, WHAT THE F: WHAT SWEARING REVEALS ABOUT OUR LANGUAGE, OUR BRAINS, AND OURSELVES (2016).

105 *See* Katy Steinmetz, *Swearing Is Scientifically Proven to Help You *%$!ing Deal*, TIME, Dec. 15, 2016, *available at* http://time.com/4602680/profanity-research-why-we-swear/ (last visited July 17, 2017).

believe others might be. And there's no evidence that profanity of the Holy, Fucking, or Shit varieties harms children.[106]

Timothy Jay, a world-renowned emeritus professor[107] for the Massachusetts College of Liberal Arts, and leading authority on cursing, language studies, and psycholinguistics,[108] has completed academic study and work on the aforementioned "harm" theory.[109] Most notable was Jay's 2013 article and research study, authored in part with professor Kristin Jay[110] of Marist College,

---

[106] *See supra* note 104 at 224.

[107] "Dr. Jay began teaching at MCLA shortly after earning his doctorate in Cognitive Psychology at Kent State University 1976. Dr. Jay teaches Introduction to Psychology, Cognitive Psychology, Human Communication and Perception, Environmental Psychology, and Language and Censorship. He is the recipient of several distinguished teaching awards. A world-renowned expert in cursing, Dr. Jay maintains an active schedule of research, writing and speaking. He has published numerous books and chapters on cursing, and a textbook for Prentice Hall on The Psychology of Language. Dr. Jay works closely with undergraduates on empirical research projects, and he and his students have presented their work at numerous conferences including meetings of the Association for Psychological Science, Eastern Psychological Association, New England Psychological Association. Dr. Jay is frequently sought for his expertise on psycholinguistics. He has served as a consultant to a number of school systems, and has been an expert witness in legal cases pertaining to obscenity and censorship. Furthermore, Dr. Jay has been interviewed or featured in dozens of radio shows, televisions programs, and documentary films." *See* Dr. Jay's academic profile on the MASSACHUSETTS COLLEGE OF LIBERAL ARTS Internet website, *available at* http://www.mcla.edu/Academics/undergraduate/psychology/faculty/timothyjay/index (last visited July 9, 2017).

[108] *Id*.

[109] *See infra* notes 111-18 and accompanying text.

[110] "I am a cognitive psychologist. Specifically, my training is in cognitive neuroscience, which is an interdisciplinary field that seeks to understand the biological bases of mental processes such as perception, attention, memory, cognitive control, and language. As an undergraduate, I became interested in psychology when I learned the field of psycholinguistics existed--as someone who has always enjoyed writing and playing with words, I was delighted to find a field in which it was of interest to quantify how people use language to do things to each other. As a graduate student and post doc I studied other mental processes--most of my research projects involved the effect of emotion on attention, long-term memory, and executive function. My dissertation addressed these issues in relatively practical ways--it was generally

a cognitive psychologist, that examined, among other things, "what words, children of different ages know and use."[111] Results of the above-noted study revealed, in part, that, "children are not naive about taboo words."[112] In fact, the same study showed that children routinely use words that the courts (i.e., with and through its rulings) and FCC (i.e., with and through its policies and subsequent regulations) have attempted to shield them from.[113] If the study

---

about cognitive and emotional regulation in the context of maladaptive coping and functional physical disorders. At Marist, I have continued to study how people acquire and use emotional language, and how they self-censor themselves. I have published in scholarly journals including *Pain*, *Behavior Research Methods*, *Language Sciences*, and the *American Journal of Psychology*. My work has been covered by popular media outlets including the *Independent*, *The Guardian*, the *Huffington Post*, and *IFL Science*. Studying maladaptive coping, pain, and offensive language has made me quite aware of the need to better understand adaptive coping. To this end, I am currently working on projects related to mindfulness and other forms of meditation. I am especially interested in how meditative practices impact health, creativity, sensory acuity and phenomenological experience." *See* Dr. Jay's academic profile on the MARIST COLLEGE Internet website, *available at* http://www.marist.edu/sbs/facviewer.html?uid=357 (last visited July 9, 2017).

[111] *See* Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 THE AMERICAN J. OF PSYCH., No. 4, 459 (Winter 2013).

[112] *Id*. at 461.

[113] According to Professor Jay, examples of taboo words children, ages 1-12, use are as follows: shit, fuck, (oh my) god, stupid, damn, jerk, suck(s), crap, hell, bitch, butt, hate you, shut up, asshole, fag(got), (Jesus) (Christ), dink, piss(ed), poopy, fart, bad, brat, poop head, cuckoo(head), scaredy-cat, boob(s)(y), gay, retard(ed), fr(i)(ee)k(en). *See id.* at 465. *See also* Derek Rose, Foul (Mouth) Ball. - *S.I. Must Win Today After F-Bombshell Coach Was Ready To Swear Off Series Following League's Rebuke*, N.Y. DAILY NEWS, Aug. 22, 2006, at 2 ("Down 1-0, 12-year-old outfielder Matt Davis yelled from the dugout, "We need to get one f-----g run."); Timothy Jay & Kristin Janschewitz, *The Science of Swearing,* ASSOCIATION FOR PSYCHOLOGICAL SCIENCE, May/June 2012, *available at* http://www.psychologicalscience.org/observer/the-science-of-swearing#.WW2ImMaZNE5 (last visited July 17, 2017) ("Courts presume harm from speech in cases involving discrimination or sexual harassment. The original justification for our obscenity laws was predicated on an unfounded assumption that speech can deprave or corrupt children, but there is little (if any) social-science data demonstrating that a word in and of itself causes harm;" "Our data show that swearing emerges by age two and becomes adult-like by ages 11 or 12. By the time children enter school, they have a working vocabulary of 30-

the Jay's completed, referenced above, has any level of validity, it is rather easy to understand the complete and utter folly of shielding children from language they apparently already use.[114] One year earlier, the same academics, Professors Timothy Jay and Kristin Janschewitz (i.e., now Jay) published scholarly work that yielded similar conclusions.[115] Further, in a 2009

---

40 offensive words. We have yet to determine what children know about the meanings of the words they use. We do know that younger children are likely to use milder offensive words than older children and adults, whose lexica may include more strongly offensive terms and words with more nuanced social and cultural meanings. We are currently collecting data to better understand the development of the child's swearing lexicon;" "We do not know exactly how children learn swear words, although this learning is an inevitable part of language learning, and it begins early in life. Whether or not children (and adults) swear, we know that they do acquire a contextually-bound swearing etiquette—the appropriate 'who, what, where, and when' of swearing. This etiquette determines the difference between amusing and insulting and needs to be studied further. Through interview data, we know that young adults report to have learned these words from parents, peers, and siblings, not from mass media.").

[114] *See also* Sarah Fallon, *Your Kids Will See Internet Porn. Deal With It. A Conversation With Peggy Orenstein*, WIRED, *available at* https://www.wired.com/2017/08/kids-and-porn/ (last visited Aug. 23, 2017) ("The first thing I recognized when I started working on the new book was that the question to ask boys is not whether or if they watch porn. The question is, when was the first time they saw it? The most typical answer I get is 11, sometimes 13, sometimes younger").

[115] *See* Timothy Jay & Kristin Janschewitz, *The Science of Swearing,* ASSOCIATION FOR PSYCHOLOGICAL SCIENCE, May/June 2012, *available at* http://www.psychologicalscience.org/observer/the-science-of-swearing#.WW2ImMaZNE5 (last visited July 17, 2017) ("Courts presume harm from speech in cases involving discrimination or sexual harassment. The original justification for our obscenity laws was predicated on an unfounded assumption that speech can deprave or corrupt children, but there is little (if any) social-science data demonstrating that a word in and of itself causes harm;" "Our data show that swearing emerges by age two and becomes adult-like by ages 11 or 12. By the time children enter school, they have a working vocabulary of 30-40 offensive words. We have yet to determine what children know about the meanings of the words they use. We do know that younger children are likely to use milder offensive words than older children and adults, whose lexica may include more strongly offensive terms and words with more nuanced social and cultural meanings. We are currently collecting data to better understand the development of the child's swearing lexicon;" "We do not know exactly how children learn swear words, although this learning is an inevitable part of language learning, and it begins early in life. Whether or not children (and adults) swear, we know that they do acquire a

article,[116] Professor Timothy Jay argued that (1) there was no psychological harm from fleeting expletives;[117] and, further, (2) there are some benefits to

---

contextually-bound swearing etiquette—the appropriate 'who, what, where, and when' of swearing. This etiquette determines the difference between amusing and insulting and needs to be studied further. Through interview data, we know that young adults report to have learned these words from parents, peers, and siblings, not from mass media.").

[116] Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCHOL. PUB. POL'Y & L. 81 (2009).

[117] *Id.* at 92. ("In recent years over a series of indecency violations, the FCC has issued a confusing series of judgments regarding the meaning of the word fuck. Originally the FCC ruled that Bono's fleeting expletive was an adjective and not indecent, but after thousands of complaints to the FCC, the commission ruled that "fucking brilliant" was indecent (decision FCC 06-17; FCC, 2006). However, in a later opinion, the FCC decided that indecent speech was permissible in the context of showing Saving Private Ryan on ABC TV. It reasoned that the language used in the film represented a realistic depiction of how soldiers spoke during World War II. The vacillating arbitrary and capricious nature of the FCC's rulings were successfully appealed in Fox Television Stations v. FCC, in 2007, which required the Commission to reconsider its decision-making process. If one purpose for the FCC is to protect children from indecent speech in broadcast content, then a current dilemma is to define unambiguously what constitutes "indecent" speech; that is, patently offensive sexual and excretory references. We raise an obvious question: What is the meaning of fuck? Is fuck always indecent? The FCC's contention that fuck always has a sexual meaning in all uses sits at odds with the Supreme Court's ruling in Cohen v. California (1971), where the phrase "fuck the draft" was given a political, as opposed to sexual, interpretation. Fairman (2007) examined the inconsistencies on the interpretation of fuck and demonstrated that the many of the modern uses of fuck are divorced from its earlier predominantly sexual denotation. Public swearing data indicate that the predominant use of fuck is to express emotional connotation (e.g., frustration, surprise) and not literal sexual denotation (see Jay, 1992; Jay & Danks, 1977; Jay & Janschwitz, 2007). We have recorded hundreds of incidences of children saying offensive words in public and private places (see Jay, 1992; Jay et al., 2006), making suspect assumptions that children are corrupted by fleeting expletives that they already know and use. Judicial reasoning in Pacifica is based on the Justices' folk knowledge of offensiveness but not on any scientific evidence of harm from indecent speech. The offensiveness of indecent speech was sufficient to restrict indecent speech in Pacifica, but offensiveness is not a sufficient basis in cases involving sexual harassment or hate speech. There is no psychological evidence of harm from fleeting expletives. In the end, it appears that the FCC remains out of touch with millions of speakers, and with meaningful linguistic analyses of swearing in public, to impose its own notion on propriety on all of us. Unsupported beliefs about indecency are not unlike those underlying our approach to sexuality education in public schools.").

cursing.[118] Renowned social scientist and scholar, Edward Donnerstein,[119] working in concert with eminent Professor Barbara Wilson,[120] and

---

[118] *See supra* note 116 at 89-91. *See also supra* notes 104-05 (discussing benefits to cursing).

[119] "He has published over 240 scientific articles in these general areas and serves on the editorial boards of a number of academic journals in both psychology and communication. He was a member of the American Psychological Associations Commission on Violence and Youth, and the APA Task Force on Television and Society. He served on the Surgeon Generals panel on youth violence as well as on the Advisory Council of the American Medical Association Alliances violence prevention program. He is a Past-President of the International Society for Research on Aggression. In 2008, he received the American Psychological Association Div. 46 Award for Distinguished Scientific Contributions to Media Psychology. In addition, he was primary research site director for the National Cable Television Associations 3.5 million-dollar project on TV violence. He served as Dean of the College of Social and Behavioral Sciences at the University of Arizona from 2002-2009. He was also Dean of Social Sciences at the University of California-Santa Barbara as well as the Rupe Chair in the Social Effects of Mass Communication. He has testified at numerous governmental hearings both in the United States and abroad regarding the effects and policy implications surrounding mass media violence and pornography, including testimony before the United States Senate on TV violence. He has served as a member of the United States Surgeon Generals Panel on Pornography and the National Academy of Sciences Subpanel on Child Pornography and Child Abuse. He has had invited presentations dealing with the issues of mass media violence and policy at some of the following (1) International Conference on Standards in Screen Entertainment, London, England, (2) National Association of Attorneys General's Presidential Summit, (3) American Academy of Pediatrics (4) National Association of Broadcasters, (5) Directors Guild of America Symposium on Media Violence (6) Sydney Symposium on Social Psychology (7) Federal Communications Commission, (8) International Meeting on Biology and Sociology of Violence, Valencia, Spain (9) International Society for Research on Aggression (10) World Summit on Television and Children, Sydney, Australia." *See* THE UNIVERSITY OF ARIZONA, COLLEGE OF SOCIAL AND BEHAVIORAL SCIENCES, *available at* https://comm.arizona.edu/user/ed-donnerstein (last visited July 4, 2017).

[120] "Barbara J. Wilson is the Interim Chancellor, the Harry E. Preble Dean of LAS, and the Kathryn Lee Baynes Dallenbach Professor of the Department of Communication at the University of Illinois at Urbana-Champaign. Before joining the University of Illinois in 2000, she was on the faculty at the University of California, Santa Barbara for 12 years. Her areas of expertise include the social and psychological effects of the media, particularly on youth. She is co-author of *Children, Adolescents, and the Media* (Sage Publications, 2002; second edition, 2009) and three book volumes of the *National Television Violence Study* (Sage Publications, 1997-1998). She also co-edited the *Handbook of Children, Media, and Development* (Wiley-Blackwell, 2008), and has published dozens of scholarly articles and chapters on media effects and their implications for media policy. Recent projects focus on preschoolers' attachment to media characters, the amount and quality of educational television programming for children, and

Distinguished Professor Daniel Linz,[121] in their 1992 academic journal article,

children's attraction to media violence. Professor Wilson currently serves on the editorial boards of four academic journals, including *Media Psychology* and the *Journal of Media and Children*. In 2008, she was elected as Fellow of the International Communication Association. She has served as a research consultant for Nickelodeon, the National Association of Television Program Executives, Discovery Channel Pictures, and the Centers for Disease Control and Prevention." *See* COLLEGE OF LIBERAL ARTS AND SCIENCES, UNIVERSITY OF ILLINOIS AT CHAMPAIGN, *available at* http://www.communication.illinois.edu/people/bjwilson (last visited July 4, 2017).

[121] Linz's honors and awards include: "2007 National Communication Association: Top Freedom of Expression Scholarship. Paper Title: "Evaluating the Potential Secondary Effects of Adult Video/Bookstores in Indianapolis, IN;" 2006 National Communication Association: Top Four Refereed Papers in Freedom of Expression. Paper Title: "Testing Supreme Court Assumptions in California v. la Rue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?"; 2006 National Communication Association: Top Three Refereed Papers in Mass Communication. "Video game play and the role of frustration: How playing non-violent video games can lead to aggressive effects."; 2006 International Communication Association: Top Three Refereed Papers in Games and Communication. Paper Title: "Sexual Priming, Gender Stereotyping, and Likelihood to Sexually Harass: Examining the Effects of Playing a Sexually Explicit Video Game."; 2002 International Communication Association: Top Four Refereed Papers in Communication, Law and Policy. Paper Title: "Testing Assumptions Made by the Supreme Court Concerning the Negative Secondary Effects of Adult Businesses: A Quasi-Experimental Approach to a First Amendment Issue."; 2002 Center for Successful Parenting Award. Recognition of outstanding research in the area of media violence. Paper Title: "Violence in children's television programming: Assessing the risks."; 2000 International Communication Association: Top Three Refereed Papers in Communication, Law and Policy. Paper Title: "Government regulation of "adult" businesses through zoning and anti-nudity ordinances: Debunking the legal myth of negative secondary effects."; 1999 National Communication Association: Top Three Refereed Papers in Mass Communication Division. Paper Title: "Race and the Misrepresentation of Victimization on Local Television News."; 1992 International Communication Association: Top Three Refereed Papers in Communication Law and Policy. Paper Title: "Defining the limits of public tolerance for sexually explicit and sexually violent materials: A field experiment."; 1990-91 UCSB Plous Memorial Award. Presented to an Assistant professor in the college of Letters and Science "who has demonstrated outstanding performance by creative action or contribution to the intellectual life of the college community."; 1990 International Communication Association. Top Ten Paper in Mass Communication. Paper Title: "Applying social science to film ratings: A shift from what is considered offensive to what is harmful to children."; 1986 Wisconsin Psychological Association Margaret Bernauer Psychology Research Award. Paper Title: "Individual differences in hostility and psychoticism, exposure to sexual violence in the media and reactions to a rape victim."; 1985 First prize: American Psychological Association Division 41 (American Psychology-Law Society, AP-LS) Dissertation Award. Title: "Sexual Violence in the Media: Effects on Male Viewers and Implications for Society.";1985 First prize: American

discussed their research on what impact broadcast indecency might have on children.[122] Specifically, they looked at the following research questions: (1) What are the effects of exposure to indecent language?;[123] (2) What are the effects of exposure to song lyrics or poems that contain sexually explicit language or sexual references?;[124] (3) What are the effects of exposure to movies that include nudity and scenes depicting sexual matters?;[125] (4) what constituted a "harmful effect;"[126] and (5) extrapolated studies with adults.[127] In short, based on their research and collective expertise, Donnerstein and his colleagues simply were not persuaded that children, exposed to broadcast programming deemed indecent, would be harmed.[128] Moreover, and more

---

Psychological Association Division 9 (Society for the Psychological Study of Social Issues, SPSSI) Dissertation Award. Title: "Sexual Violence in the Media: Effects on Male Viewers and Implications for Society."" *See* UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, DEPARTMENT OF COMMUNICATION, *available at* http://www.comm.ucsb.edu/people/daniel-linz (last visited July 4, 2017).

[122] *See supra* note 99.

[123] *Id.* at 111.

[124] *Id.* at 112.

[125] *Id.* at 113.

[126] *Id.* at 114.

[127] *Id.* at 115.

[128] "Based on our review of the evidence we reach the following conclusions: (1) Few studies have been conducted to determine the effects of exposure to indecent materials on children up to the age of 18. Those studies that have been conducted do not show that such exposure has any effect, and thus do not demonstrate that exposure causes harm, however that term may be defined; (2) There is serious reason to doubt that exposure to such material has an effect on children up to age 12 in view of the general sexual illiteracy of this age group, their limited ability to understand sexual references, and their probable lack of interest in indecent materials; (3) Although adolescents 13-17 years old may understand indecent material, they are likely to have developed moral standards which, like adults, enable them to deal with

important, Donnerstein has concluded that the FCC (i.e., which likely means the courts, too), has made regulatory decisions, clearly affecting broadcast programming (i.e., and the viewing public at large), where its policy language purported to support a theory that broadcast indecency would, indeed, harm children.[129] Indeed, the same deeply flawed policy language, Donnerstein propounds, instead, mistakenly makes references to television violence and

---

broadcast content more critically. In general, studies of adult behavior fail to indicate any antisocial or harmful effects for indecent materials. We therefore see no reason to conclude any risk of harm should be associated with exposure to broadcast indecency. The broadcast medium has traditionally held the status of being the least constitutionally protected element of the press. The decision by the FCC to extend the late night "safe harbor" restriction on indecency to a 24-hour ban reflects a dramatic erosion of this already limited protection. The courts have traditionally held that a "compelling governmental interest" is an essential component of any content-based restriction on speech. In this case, the FCC has defined that compelling interest as the prevention of harm to the psychological and physical welfare of children. It would seem that the shift from the "safe harbor" policy to a total ban would require unequivocal evidence of the specific risks to children posed by exposure to indecency. Yet, there is little social science evidence to suggest that the psychological welfare of children is threatened by such content at all. Far from meeting the heavier burden on the government to justify a prohibition on protected speech, the FCC has tightened its indecency restrictions when the available social science evidence does not, in our view, justify even the more narrow and long-standing "safe harbor" restriction." *See supra* note 99 at 115-16.

[129] "As a social scientist, I have written on behalf of Infinity Radio in briefs defending Howard Stern. I do not particularly like his show, but as a social scientist I am appalled at the lack of evidence being used by the Federal Communications Commission to support their conclusion that there is a harmful effect. In fact, when you look at the social science evidence on indecency, there is none. The evidence cited for harm against children from indecency is evidence citing television violence or pornography. It has absolutely nothing to do with children and indecency." *See* Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 HOFSTRA L. REV. 827-28 (1994).

pornography.[130] Other distinguished academics,[131] as far back as 1979,[132] echoed the thoughts of Donnerstein and his colleagues.

Collectively, it would appear that a number of well-accomplished veteran academics have discounted the "harm-to-children" theory that some courts and the government, in years past, have relied upon as one justification for broadcast regulation.[133] Recent court rulings, however, may be a signal that

---

[130] *Id.*

[131] *See, e.g.*, DOROTHY G. SINGER & JEROME L. SINGER, HANDBOOK OF CHILDREN AND THE MEDIA 577 (2012); MAJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001).

[132] *See* Dabney Elizabeth Bragg, *Regulation of Programming Content to Protect Children after Pacifica,* 32 VAND. L. REV. 1377, 1415 (1979) ("The protection of children, while a desirable goal, is an insufficient justification for overriding the clear mandate of the First Amendment.").

[133] Seemingly ironic, as an aside, is that while the courts and FCC have been aggressive in monitoring and regulating broadcast content deemed sexual or indecent in nature (i.e., absent of empirical social scientific evidence to support any apparent harm), both have been anything but vigorous about regulating televised violence (i.e., where harmful effects, indeed, have been evidenced by a voluminous body of respectable research). *See, e.g.,* Brown v. Entertainment Merchants, 131 S. Ct. 2729 (2011) (Breyer, J., dissenting) ("I add that the majority's different conclusion creates a serious anomaly in First Amendment law. Ginsberg makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?"); DOROTHY G. SINGER & JEROME L. SINGER, HANDBOOK OF CHILDREN & THE MEDIA 594 (2001) ("Contrasting the differing fortunes of efforts to regulate indecent and violent television content, one is struck by the substantial restrictions on indecency and the more laissez faire approach to regulating violence. The contrast is particularly ironic if one bears in mind the empirical research on the effects of exposure to indecent versus violent material. There is a substantial body of research indicating that television violence contributes significantly to the aggressive attitudes and behaviors of many children and adolescents. In contrast, there is no comparable body of data to support serious concern about any harmful effects of children's exposure to indecent content. Even though research in the area may be

some justices are now questioning earlier judicial precedent regarding the validity of the "harm-to-children" rationale and justification.[134]

In 2011, the high court in *Brown v. Entertainment Merchants Association*[135] acknowledged concern about policies aimed at protecting children, absent *proof* of such harm.[136] Additional courts have, similarly, expressed discomfort

---

difficult because of ethical concerns, some researchers have applied relevant theory to argue against the expectation of any substantial effects from children's exposure to such material. Interestingly, this absence of empirical validation has not discouraged the courts from upholding the constitutionality of the government's restriction on indecency. The fact that the general public finds greater offense in displays of indecency in the media than they do in depictions of violence is quite likely an important factor underlying the different approaches to policy in these two areas.").

[134] *See infra* notes 135-37 and accompanying text.

[135] 131 S. Ct. 2729 (2011).

[136] *Id.* at 12-13. ("California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994), the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. *Id.* at 661-62. California's burden is much higher, and because it bears the risk of uncertainty, see *Playboy*, *supra*, at 816-17, ambiguous proof will not suffice. The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.""); ""[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 212-13 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg*, *supra*, at 640-41; *Prince* v. *Massachusetts*, 321 U. S. 158, 165 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik*,

with any attempt to enforce regulatory policies without empirical proof of harm.[137] With this in mind, the next chapter will look at what lies ahead for the Commission in its ongoing struggle with broadcast regulatory oversight.

---

supra, at 213-14." *Id.* at 6; "California's effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors." *Id.* at 17; "Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children." *Id.* at 6; "Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media.").

137 *See, e.g.,* List v. Ohio Elections Commission, Case No. 1:10-cv-720 (S.D. Ohio Sep. 11, 2014) (requiring empirical proof of a "direct causal link" between violent video games and harm to minors, not just "some correlation"); 281 Care Comm. v. Arneson, Civil No. 08-5215 ADM/FLN (D. Minn. Jan. 25, 2013) (regarding proof of harm caused by violent video games); Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461 (2d Cir. 2007) ("The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech. Yet the Remand Order provides no reasoned analysis of the purported "problem" it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable. *See, e.g., United States v. Playboy Enter. Group, Inc.*, 529 U.S. 803, 822-23, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000) (rejecting indecency regulation of cable television in part because "[t]he question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban."); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994) (remanding for additional fact finding to determine whether speech regulation justified because government had failed to demonstrate "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (invalidating FCC regulation because "the Commission has failed entirely to determine whether the evil the rules seek to correct `is a real or merely a fanciful threat'"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A]regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal quotation marks omitted)). The Commission has similarly failed to explain how its current policy would remedy the purported "problem" or to point to supporting evidence."); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are

real, not merely conjectural, and that the regulation will, in fact, alleviate these harms in a direct and material way. See Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); Los Angeles v. Preferred Communications, Inc., 476 U.S. at 496 ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (CADC 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist'"); Action for Children's Television v. F.C.C, 11 F.3d 170, 178, 179, 184-85 (D.C. Cir. 1993) ("The Supreme Court has long recognized that the Constitution does not exist for adults alone. *See In re* Gault, 387 U.S. 1, 13, 87 S. Ct. 1428, 1436, 18 L.Ed.2d 527 (1967). "In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." Erznoznik v. City of Jacksonville, 422 U.S. 205, 214, 95 S. Ct. 2268, 2275, 45 L.Ed.2d 125 (1975) (footnote and citations omitted). See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969); Carey v. Population Servs. Int'l, 431 U.S. 678, 692 n. 14, 97 S. Ct. 2010, 2020 n. 14, 52 L. Ed. 2d 675 (1977) (plurality) ("minors are entitled to constitutional protection for freedom of speech" (citing Tinker, 393 U.S. 503, 89 S. Ct. 733));" "while *Pacifica* may have implicitly limited *Erznoznik* where very young children are involved, we do not read *Pacifica* as a wholesale dismissal of older minors' First Amendment rights that had been explicitly recognized by the Court in *Erznoznik*;" (Edwards, J., concurring) ("First, in effectively setting itself up as the final arbiter of what American children may see and hear, the Government tramples heedlessly on parents' rights to rear their children as they see fit and to inculcate in them moral values of the parents' choosing. *See Wisconsin v. Yoder,* 406 U.S. 205, 211, 92 S. Ct. 1526, 1531, 32 L.Ed.2d 15 (1972) (exempting children of Amish faith from compulsory school attendance on grounds that secondary education teachings "are in marked variance with Amish values and the Amish way of life"); *Ginsberg v. New York,* 390 U.S. 629, 639, 88 S. Ct. 1274, 1280, 20 L.Ed.2d 195 (1968) (noting that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of society" and of constitutional magnitude). This countervailing interest is not grounded solely in the First Amendment. As at least one scholar has persuasively posited, this parental interest also derives from our constitutional vision of liberty and the role of the individual in a true democracy. "Free people require `private realms' in which they can develop differently. The child must not be the creature of the state, but must be `conceived in liberty' and nurtured in contexts sheltered from homogenizing control." Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV.C.R.-C.L.L.REV. 299, 392-93 (1993) (footnote omitted). Second, in acting to limit children's exposure to indecent material, the Government's stated purposes rest on inconsistent, confused and possibly false premises. Many persons in society (and I am such a person) suppose that there must be ill effects from exposing children (especially young ones) to "indecent" material; but the truth of the matter is that we have yet to unearth those ill effects with any precision, and we have yet to understand whether the effects are measurably different when parents are available and willing to "supervise" their children. Indeed, "parental supervision" itself is a vague notion, for we surely cannot assume that all parents will act in some uniform way in "supervising" their children. When acting consciously, some parents might prohibit their children from any exposure to indecent material; some might modify a prohibition depending upon the nature of the material

and the age of the child; still others might view or listen to indecent material with their children, either to criticize, endorse or remain neutral about what they see or hear (and these responses might vary depending upon the age of the child and family values). Thus, if facilitation of "parental supervision" is the principal interest to be served, then a good argument can be made that ensuring the availability of "blocking" devices—to *permit* parents to block their children from seeing and hearing indecent material in their absence—is the most that Government ought to do. For the interest of facilitating parental control assumes that parents are entitled to do as they prefer. If, however, the interest to be served is the protection of children, without regard to their parents' preferences, then it seems to me that the issue is quite complicated. A principal problem is that we do not appear to know how the exposure to indecent (as opposed to violent) material affects children, either with respect to their senses of self-worth, their senses of respect for members of the opposite sex, or their behavior patterns as functioning members of society. Thus, to highlight the issue, suppose that we knew for sure that most parents would prefer to retain the right to decide whether and on what terms to allow their children to be exposed to indecent material: could Congress still ban the showing of indecent material? If so, on what terms? Would it be prompted by a " *moral judgment*" that indecent material is bad for all children of all ages? And, if so, how can that be squared with the Supreme Court's rulings that distinguish between unprotected "obscene" and protected "indecent" materials, and suggest that the ages of minors must be considered in assessing the vulnerability of children? Or, rather, would it be premised on a purpose to *save children from harm?* If so, what is the nature of the harm, how does it manifest itself, and are children of all ages affected in the same way? Alternatively, would the action be designed to *protect society from harm* that can come from children who have been exposed to indecent material (or from adults who were exposed when they were minors)? If so, what is the nature of that harm and how pervasive is it? In short, it seems to me that the strength of the Government's interest in shielding children from exposure to indecent programming is tied directly to the magnitude of the harms sought to be prevented. On the record before us, however, I have difficulty discerning precisely what those harms are. In the *1993 Order;* the FCC asserts only that "harm to children from exposure to [indecent] material may be presumed as a matter of law" and adverts to the existence of studies demonstrating certain undefined "negative effects of television on young viewers' sexual development and behavior." 8 F.C.C.R. at 706-07 ¶¶ 17-18. This does not provide a very secure basis on which to anchor significant First Amendment intrusions. The apparent lack of specific evidence of harms from indecent programming stands in direct contrast, for example, to the evidence of harm caused by violent programming—a genre that, as yet, has gone virtually unregulated. *See generally* Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where To Go From Here,* 267 JAMA 3059 (1992) (recounting results of several studies demonstrating that prolonged childhood exposure to television violence correlates with increased levels of physical aggressiveness and violence).

CHAPTER 7

A NEW DIRECTION, GOING FORWARD: AFTER FOX II, NOW WHAT?

The U.S. Supreme Court has held that governmental regulation of violent and indecent speech is content-based and therefore merits strict scrutiny.[1] While broadcast radio and television have traditionally occupied a different, less supportive,[2] position for free expression, given the massive

---

[1] *See, e.g.*, Brown v. Entertainment Merchants Association, 131 S. Ct. 2729, 11 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."); Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 325 (2d Cir. 2010) ("In most contexts, the Supreme Court has considered restrictions on indecent speech to be content-based restrictions subject to strict scrutiny."); Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 464 (2d Cir. 2007) ("Finally, we recognize there is some tension in the law regarding the appropriate level of First Amendment scrutiny. In general, restrictions on First Amendment liberties prompt courts to apply strict scrutiny. FCC v. League of Women Voters, 468 U.S. 364, 376, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984). Outside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations. See, e.g., Playboy, 529 U.S. at 811-13, 120 S. Ct. 1878 (holding that regulation proscribing indecent content on cable television was content-based restriction of speech subject to strict scrutiny); Sable, 492 U.S. at 126, 109 S. Ct. 2829 (finding that indecency regulation of telephone messages was content-based restriction subject to strict scrutiny); Reno, 521 U.S. at 868, 117 S. Ct. 2329 (ruling that indecency regulation of Internet was a content-based restriction subject to strict scrutiny)."

[2] *See* FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978) (observing that the court in Pacifica held that radio and television, at the time, were different given the rationales of unique pervasiveness and accessibility to children). *See generally* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984); United States v. O'Brien, 391 U.S. 367 (1968) (noting, to pass intermediate scrutiny, a law must further an important government interest and be substantially related to that interest. This form of scrutiny is less rigorous than strict scrutiny. On the other hand, rational basis is the least rigorous standard of review, only requiring that the challenged law be related to a legitimate government interest).

advances in technology, evidenced earlier in this dissertation,[3] disfavored speech protection is now outdated.[4] In fact, more than eight years ago, even the FCC acknowledged the vast changes in the media landscape.[5] Despite this, broadcast entities are currently being held to the speech restriction standards established in *FCC v. Pacifica Foundation*.[6]

---

[3] *See supra* Chapter 6, *Government Rationales for Broadcast Regulation.*

[4] *Id*.

[5] *See* In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 F.C.C.R 13171, 13174 ¶ 11 (2009) ("Children today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago. The advent of cable and satellite television, accompanied by the transition to digital technology, has dramatically increased the number of television channels available in most homes. Studies examining the media habits of American children demonstrate 5 that children have access to a wide array of electronic media technologies. For instance, a study using 2004 data indicates that almost all households with children ages 8 to 18 had a television set, video player, radio, and audio player. In fact, a Kaiser Family Foundation study found that in 2004 the typical American child of that age was likely to live in a home with three televisions, three video cassette recorders ("VCRs"), three radios, three CD/tape players, two video game consoles, and a personal computer with an Internet connection. Data from 2005 indicates that this ubiquity even extended to households with children six years and younger, 78 percent of whom had personal computers, and 50 percent of whom had a video game player. According to a recent study by the Pew Internet & American Life Project ("Pew"), 71 percent of children ages 12 to 17 owned cell phones in 2008 and 74 percent owned an iPod or other MP3 player. The study also found that more than 70 percent of 12 and 13-year-olds owned a portable gaming device in 2008 more than the percentage that owned a cell phone among that age group.' We therefore seek information about whether these trends continue to hold true, and ways in which they may have changed.").

[6] 438 U.S. 726 (1978).

DEBUNKING GOVERNMENT RATIONALES FOR BROADCAST REGULATION

As discussed in Chapter 6, there are three key justifications for the current FCC regulatory regime for broadcasters.[7] All three have now been arguably refuted.[8]

First, spectrum scarcity,[9] appearing in U.S. Supreme Court cases dating back to the 1930s,[10] is unquestionably archaic.[11] Two former Commission employees,[12] the U.S. Supreme Court,[13] various other courts,[14] and even the FCC[15] have contended that unspeakable advances in technology, since *Pacifica*,[16] have rendered the spectrum scarcity rationale extinct.[17] As a result, neither the Commission nor the courts can rely soundly on the same grounds for broadcast indecency regulation.

Second, the unique pervasiveness rationale, intimately tied to the

---

[7] *See generally* Chapter 6.
[8] *Id.*
[9] *See supra* Chapter 6 notes 41-74 and accompanying text.
[10] *Id.*
[11] *Id.*
[12] *See supra* note 3.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *See supra* note 6.
[17] *See supra* Chapter 6 discussion of spectrum scarcity. Even if it can be argued that spectrum scarcity is a viable concept, and at one time provided fodder for the Commission's regulatory oversight of broadcast entities, one would be hard-pressed to now argue that modern-day technological advances have not eviscerated the same original FCC reasoning regarding the dearth of spectrum space.

aforementioned spectrum scarcity rationale, much the same, has crumbled.[18] While courts or the FCC may have been able, at the time of *Pacifica*,[19] to aptly evidence the dominance of terrestrial radio and television, those days, needless to say, are gone.[20] Indeed, both the courts and the Commission would be hard pressed to justify that traditional broadcasters have the same presence today as they once did.[21]

Third, the harm-to-children rationale, dating back to *Prince v. Massachusetts*,[22] *Ginsberg v. New York*,[23] and the landmark *Pacifica*,[24] has arguably never had solid empirical footing.[25] Since the aforementioned court

---

[18] *See supra* Chapter 6 notes 75-81 and accompanying text.
[19] *See supra* note 6.
[20] *See supra* note 18.
[21] *Id*. *See also The Best of George Carlin*, YOUTUBE, *available at* https://www.youtube.com/watch?v=Hy-sVByUHqE (last visited July 20, 2017) (noting while at the time of the landmark Pacifica U.S. Supreme Court case one could only possibly hear or see George Carlin's less-than-conservative comedy routines on terrestrial broadcast radio or television, today one can see the same performance(s) on the Internet); The New York City radio station that broadcast the George Carlin comedy routine that ended up in the U.S. Supreme Court, WBAI-FM, can now be heard live via the Internet. *See* WBAI-FM, *available at* https://www.wbai.org/listen.php (last visited July 20, 2017).
[22] 321 U.S. 158 (1944).
[23] 390 U.S. 629 (1968).
[24] *See supra* note 6.
[25] In a, September 1978, blistering editorial, ROLLING STONE magazine offered $5,000, "to anyone who could prove that any of Carlin's words had "in and of themselves" caused "physical, mental, or spiritual" damage to a child." No word, to date, on whether there has ever been a payout. *See* Editorial, *Dollars for Decency*, ROLLING STONE, Sept. 7, 1978, at 17. As an aside, considering the rate of inflation, $5,000 in September 1978 would be approximately $18,500 today. *See* UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR, *available at* https://www.bls.gov/data/inflation_calculator.htm (last visited July 26, 2017). That said, recall that two U.S. Supreme Court cases (Pacifica and Fox I)

decisions,[26] world-renowned academics,[27] in addition to several courts[28] (i.e., and associated justices) have cast grave doubt on the viability of the harm-to-children rationale.[29] Much like spectrum scarcity and unique pervasiveness, the FCC and the courts would face an insurmountable obstacle in establishing a viable empirical harm, as required, with judicial review under strict scrutiny.[30]

---

reasoned that broadcast indecency was harmful to children. *See, e.g., supra* note 6 at 749 ("Pacifica's broadcast could have enlarged a child's vocabulary in an instant"); FCC v. Fox Television Stations, 556 U.S. 502, 15-16 (2009) ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multi-year controlled study in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. See, e.g., State Farm, 463 U.S., at 46-56 (addressing the costs and benefits of mandatory passive restraints for automobiles). It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.").

[26] *See supra* notes 22-24.

[27] *See supra* Chapter 6 notes 99-132 and accompanying text.

[28] *See supra* Chapter 6 notes 135-37 and accompanying text.

[29] *See supra* notes 27-28.

[30] *See generally supra* Chapter 6.

<u>OVERTURNING PACIFICA</u>

Now that the three main justifications for broadcast oversight and the Commission's broadcast indecency regulatory regime have been arguably refuted, overturning the landmark *Pacifica*[31] case is unquestionably warranted.[32] Specifically, the principles of *stare decisis*[33] must now yield[34] to the

---

[31] *See supra* note 6.

[32] Overturning FCC v. Pacifica Foundation is justified given the arguments made in Chapter 6, combined with the reasoning outlined in this section.

[33] *See*, *e.g.*, Pearson v. Callahan, 555 U.S. 223, 7-9 (2009) ("*Stare decisis*" promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Although "[w]e approach the reconsideration of [our] decisions . . . with the utmost caution," "[s]*tare decisis* is not an inexorable command." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-55 (1992) ("Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet* v. *Coronado Oil Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J., dissenting). See also *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., joined by Kennedy, J., concurring); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g., United States v. Title Ins. Trust Co.*, 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g., Burnet, supra*, at 412 (Brandeis, J., dissenting).").

[34] Are some members of the U.S. Supreme Court reluctant to overrule Pacifica? To that end, observe the statement of Justice Samuel Alito at the oral argument of Fox II: "It's not going to

technological and social realities articulated in this section.

THE FCC'S CURRENT BROADCAST INDECENCY REGULATORY REGIME IS NOT AUTHORIZED BY PACIFICA

As an initial matter, the *Pacifica*[35] case was an emphatically narrow decision[36] that did not provide the FCC with unequivocal, wide-ranging, authority to decide the speech rights of broadcasters.[37] The court in *Pacifica*,[38] in fact, reminded the Commission as such.[39] And, ironically, while the FCC seemingly agreed to heed the high court's admonition by exercising caution and restraint with its broadcast indecency regulatory regime,[40] the record is

---

be long before broadcast television goes the way of vinyl records and eight-track tapes…..[W]hy not just let this die a natural death? Why do you want us to intervene?" *See* Transcript of Oral Argument at 28, FCC v. Fox Television Stations, 132 S. Ct. 2307 (2012) (No. 10-1293).

[35] *See supra* note 6.

[36] The case was decided 5-4. *See* FCC v. Pacifica Foundation, OYEZ, *available at* https://www.oyez.org/cases/1977/77-528 (last visited Mar. 28, 2018).

[37] *Id.* at 759-60 ("This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.").

[38] *See supra* note 6.

[39] *See id.* at 750 ("It is appropriate, in conclusion, to emphasize the narrowness of our holding."). *See also id*. at 762 n.4 (1978) ("In addition, since the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue "chilling" effect on broadcasters' exercise of their rights."); *Id.* at 772 ("I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.").

[40] *See* In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI-FM, 56 F.C.C.2d 94 (1975) ("In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes."). It should also be noted that the Commission found no cases of alleged

now replete with examples of anything but subtle governmental discretion.[41] It can be argued, then, that the Commission's current broadcast indecency regulatory regime is overreaching and well above and beyond what was intended and permitted by *Pacifica*.[42]

THE SECOND CIRCUIT FINDS THE FCC'S CURRENT BROADCAST INDECENCY REGULATORY REGIME UNCONSTITUTIONAL

While the U.S. Court of Appeals for the Second Circuit, in 2007, avoided ruling on the constitutionality of the FCC's broadcast indecency regulatory regime,[43] the same court did examine the First Amendment concerns in 2010.[44] As detailed below, the court found the Commission's current broadcast

---

broadcast indecency from 1978 through 1987. *See infra* note 41 at 321 ("In the years after *Pacifica*, the FCC did indeed pursue a restrained enforcement policy, taking the position that its enforcement powers were limited to the seven specific words in the Carlin monologue. *See In re Application of WGBH EDUC. FOUND.*, 69 F.C.C.2d 1250, at ¶ 10 (1978); *Infinity Broadcasting Corp., et al.*, 3 F.C.C.R. 930, at ¶ 5 (1987) (" *Infinity Order*"). No enforcement actions were brought between 1978 and 1987. *Infinity Order*, 3 F.C.C.R. 930, at ¶ 4.").

[41] *See* Fox Television Stations v. FCC, 613 F.3d 317, 329 (2d Cir. 2010) ("The FCC's policy has now changed and we would be hard pressed to characterize it as "restrained.""). *See also supra* Chapter 3 (which chronicles the FCC's broadcast indecency regulatory regime and associated events).

[42] *See supra* note 6.

[43] *See supra* note 41 at 324 ("Because we struck down the indecency policy on APA grounds, we declined to reach the constitutional issues in the case.").

[44] *See generally* Fox Television Stations v. FCC, 613 F.3d 317 (2d Cir. 2010).

indecency regulatory regime, in many ways, troubling.[45] Specifically, the court noted that although indecent broadcast content has full First Amendment protection,[46] the *Pacifica*[47] court's justification of the FCC's broadcast indecency regulatory regime relied upon (1) a nuisance rationale,[48] given broadcasting's unique pervasiveness;[49] and (2) that broadcasting was uniquely accessible to children.[50] As noted in Chapter 6 of this dissertation, given the media landscape we now find ourselves in, the Second Circuit maintained that we can no longer describe broadcasters as *uniquely* pervasive.[51] Additionally, the same

---

[45] *See infra* notes 51, 55-57.

[46] *See supra* note 41 at 325 ("It is well-established that indecent speech is fully protected by the First Amendment.").

[47] *See supra* note 6.

[48] *See supra* note 41 at 320 ("Resting on a nuisance rationale, the Court first noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection" because of its "uniquely pervasive presence in the lives of all Americans."").

[49] *See infra* note 51.

[50] *See supra* note 41 at 320 ("[t]he nature of broadcast television—as opposed to printed materials—made it "uniquely accessible to children, even those too young to read."").

[51] *Id.* at 326 ("Indeed, we face a media landscape that would have been almost unrecognizable in 1978;" "The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."). *See also* Citizens United v. Federal Election Commission, 558 U.S. 310, 352-56 (2010) ("With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred."); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FEDERAL COMMUNICATIONS COMMISSION, Jan. 17, 2017, *available at* https://www.fcc.gov/document/18th-annual-video-competition-report (last visited Mar. 10, 2018); Zach Pontz, *More Turning to Web to Watch TV, Movies*, CNNTECH, Feb. 6, 2009, *available at* http://www.cnn.com/2009/TECH/02/06/internet.tv/index.html (last visited Mar. 10, 2018); Mark Huffman, *Satellite TV Gaines on Cable: Bundled Digital Cable Services Increasingly Popular*, CONSUMERAFFAIRS.COM, Aug. 16, 2006, *available at* https://www.consumeraffairs.com/news04/2006/08/cable_satellite.html (last visited Mar. 10,

court observed that the high court in *United States v. Playboy Entertainment Group, Inc.*,[52] *Reno v. ACLU*,[53] and *Sable Communications of California, Inc. v. FCC*,[54] all found similar government regulations to be problematic.[55] Most important, the Second Circuit found the Commission's current broadcast

---

2018); Denver Area Ed. Tel. Consortium v. FCC, 518 U.S. 727, 748 (1996) ("The Court's distinction in Turner, furthermore, between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable. See 512 U.S., at 637-641. While that distinction was relevant in Turner to the justification for structural regulations at issue there (the "must carry" rules), it has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all.").

[52] 529 U.S. 803 (2000).

[53] 521 U.S. 844 (1997).

[54] 492 U.S. 115 (1989).

[55] *See supra* note 41 at 325 ("[i]n *Reno v. ACLU*, the Supreme Court struck down the Communications Decency Act of 1996, finding that a provision criminalizing the knowing transmission of indecent speech through the internet was unconstitutionally vague and not narrowly tailored. 521 U.S. at 882, 117 S. Ct. 2329. In *Playboy*, the Supreme Court confronted a provision of the Telecommunications Act of 1996 that prohibited cable television operators from broadcasting sexual content during certain hours. While recognizing that television "presents unique problems" not present in other mediums, the Court held unequivocally that the restriction was subject to strict scrutiny, and struck it down because scrambling technology provided a less restrictive means of protecting minors from indecent content. 529 U.S. at 813, 827, 120 S. Ct. 1878. Similarly, the Supreme Court in *Sable Communications of California, Inc. v. FCC* declared unconstitutional a provision of the Communications Act that prohibited the transmission of indecent commercial telephone messages, so-called "dial-a-porn," finding that a total ban was not the least restrictive means available. 492 U.S. 115, 131, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989).").

indecency regulatory regime to be unconstitutional[56] and fickle,[57] given the

---

[56] *Id.* at 319, 327-28 ("We now hold that the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here;" "For we conclude that, regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague. It is to this issue that we now turn. It is a basic principle that a law or regulation "`is void for vagueness if its prohibitions are not clearly defined.'" *Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972)). A law or regulation is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (quoting *Grayned*, 408 U.S. at 108, 92 S. Ct. 2294). The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague. *See Perez v. Hoblock*, 368 F.3d 166, 175 n. 5 (2d Cir. 2004) ("[A] law or regulation that `threatens to inhibit the exercise of constitutionally protected rights,' such as the right of free speech, will generally be subject to a more stringent vagueness test.") (quoting *Vill. of Hoffman Estates v. Flip-side, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982)). However, "`perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1845, 170 L.Ed.2d 650 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989)). The vagueness doctrine serves several important objectives in the First Amendment context. First, the doctrine is based on the principle of fair notice. "`[W]e assume that man is free to steer between lawful and unlawful conduct and we give him notice of what is prohibited so that he may act accordingly.'" *Farrell*, 449 F.3d at 485 (quoting *Grayned*, 408 U.S. at 108, 92 S. Ct. 2294). Notice is particularly important with respect to content-based speech restrictions "because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 872, 117 S. Ct. 2329. Vague regulations "`inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Farrell*, 449 F.3d at 485 (quoting *Grayned*, 408 U.S. at 109, 92 S. Ct. 2294). Second, the vagueness doctrine is based "on the need to eliminate the impermissible risk of discriminatory enforcement." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051, 111 S. Ct. 2720, 115 L.Ed.2d 888 (1991). "A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an ad hoc and subjective basis….." *Grayned*, 408 U.S. at 108-09, 92 S. Ct. 2294 (emphasis added). Specificity, on the other hand, guards against subjectivity and discriminatory enforcement."). *See also* Brown v. Entertainment Merchants Association, 564 U.S. 786, 807 (2011) ("Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972). The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." Reno v. American Civil Liberties Union, 521 U.S. 844, 871–872, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). Vague laws force potential speakers to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L.Ed.2d 377 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L.Ed.2d 1460 (1958))."); Fox

Television v. FCC, 489 F.3d 444, 463 (2d Cir. 2007) ("[w]e are sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."); Reno v. ACLU, 521 U.S. 844, 871-72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, e.g., Gentile v. State Bar of Nev., 501 U.S. 1030, 1048-1051 (1991)."); Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) ("[p]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "`steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.""); Interstate Circuit v. Dallas, 390 U.S. 676, 685 (1968) ("Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial; "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law"); Smith v. California, 361 U.S. 147, 151 (1959) ("And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. Winters v. New York, 333 U.S. 507, 509-510, 517-518."); Connally v. General Const. Co., 269 U.S. 385, 391 (1926) ("That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U.S. 216, 221; Collins v. Kentucky, 234 U.S. 634, 638.").

[57] *Id.* at 332-33 ("There is little rhyme or reason to these decisions and broadcasters are left to guess whether an expletive will be deemed "integral" to a program or whether the FCC will consider a particular broadcast a " *bona fide* news interview;"" "The FCC's current indecency

demands of the First Amendment. Last, although the Second Circuit did not address the harm-to-children rationale[58] used by the Commission (i.e., and the courts) over the years, one year later, the high court in *Brown v. Entertainment Merchants Association* (hereinafter Brown),[59] indeed, did.

In *Brown*,[60] the court reasoned that any government effort to curtail protected speech must (1) pass strict scrutiny;[61] and (2) any regulation related

---

policy undoubtedly gives the FCC more flexibility, but this flexibility comes at a price.….The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently;" "If government officials are permitted to make decisions on an "ad hoc" basis, there is a risk that those decisions will reflect the officials' subjective biases. *Grayned*, 408 U.S. at 108-09, 92 S. Ct. 2294. Thus, in the licensing context, the Supreme Court has consistently rejected regulations that give government officials too much discretion because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L.Ed.2d 101 (1992) (internal quotation marks omitted); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (permit scheme facially unconstitutional because" *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression;"" "[e]ven the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment."). *See also* Smith v. Goguen, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections."); NAACP v. Button, 371 U.S. 415, 433 (1963) ("These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut*, 310 U.S. 296, 311.").

[58] *See supra* Chapter 6, notes 83-137.

[59] 564 U.S. 786 (2011).

[60] *Id.*

[61] *Id.* at 799 ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R.A.V.,* 505 U.S., at 395, 112 S. Ct. 2538.").

to suppressing speech that is underpinned by a harm rationale must first identify an actual harm, and also show the suppression of speech is necessary

for the solution.[62] As the *Brown*[63] court noted, such a test is an extremely

---

[62] *Id.* ("The State must specifically identify an "actual problem" in need of solving, *Playboy,* 529 U.S., at 822–823, 120 S. Ct. 1878, and the curtailment of free speech must be actually necessary to the solution, see *R.A.V., supra,* at 395, 112 S. Ct. 2538."). *See also* Ashcroft v. ACLU, 542 U.S. 656, 666-67 (2004) ("Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them."); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 814 (2000) ("The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative. In Sable Communications, for instance, the feasibility of a technological approach to controlling minors' access to "dial-a-porn" messages required invalidation of a complete statutory ban on the medium. 492 U.S., at 130-131. And, while mentioned only in passing, the mere possibility that user-based Internet screening software would "`soon be widely available'" was relevant to our rejection of an overbroad restriction of indecent cyber speech."); Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173, 188 (1999) ("The third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interest. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S., at 770-771. Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S., at 564. We have observed that "this requirement is critical; otherwise, `a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin*, 514 U.S., at 487, quoting *Edenfield*, 507 U.S., at 771."); Reno v. ACLU, 521 U.S. 844, 877 (1997) ("the District Court found that "[d]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available.""); Denver Area Ed. Tel. Consortium v. FCC, 518 U.S. 727, 766 (1996) ("In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it. See *Turner*, 512 U.S., at 664-665."); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." *Quincy Cable TV, Inc*. v. *FCC*, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will, in fact, alleviate these harms in a direct and material way. See *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993); *Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S., at 496 ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of

difficult criterion to meet.[64] Indeed, not only can the FCC not show or prove a direct harm caused by children being exposed to alleged indecent broadcast

---

expressive activity") (internal quotation marks omitted); *Home Box Office, Inc*. v. *FCC*, 567 F.2d 9, 36 (CADC 1977) ("[A] `regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist'") (citation omitted)."); Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) ("It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n. 20 (1983); *Fox*, 492 U.S., at 480. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real, and that its restriction will in fact alleviate them to a material degree. See, *e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-649 (1985); *Bolger, supra*, at 73; *In re R.M.J.*, 455 U.S., at 205-206; *Central Hudson Gas Electric Corp., supra*, at 569; *Friedman v. Rogers*, 440 U.S., at 13-15; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977)."); Columbia Broadcasting v. Democratic Committee, 412 U.S. 94, 127 (1973) ("To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.").

[63] *See supra* note 59.

[64] *Id.* at 799 ("That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy, supra,* at 818, 120 S. Ct. 1878.").

content, it cannot evidence a correlation either.[65] The *Brown*[66] court, in fact, demanded a more empirical and substantive criteria, candidly observing, "ambiguous proof will not suffice."[67] The same court, further, went on to suggest, "We have no business passing judgment on the view of the California legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development[68]..…Even when the protection of children is the object, the constitutional limits on

---

[65] *See, e.g.,* Fox Television v. FCC, 489 F.3d 444, 461 (2d Cir. 2007) ("The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech. Yet the Remand Order provides no reasoned analysis of the purported "problem" it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable. See, e.g., United States v. Playboy Enter. Group, Inc., 529 U.S. 803, 822-23, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000) (rejecting indecency regulation of cable television in part because "[t]he question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban."); Turner Broadcasting System v. FCC, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994) (remanding for additional fact finding to determine whether speech regulation justified because government had failed to demonstrate "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (invalidating FCC regulation because "the Commission has failed entirely to determine whether the evil the rules seek to correct `is a real or merely a fanciful threat'"); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A]regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal quotation marks omitted)). The Commission has similarly failed to explain how its current policy would remedy the purported "problem" or to point to supporting evidence.").

[66] *See supra* note 59.

[67] *Id.* at 800.

[68] *Id.* at 804.

governmental action apply,"[69] and "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks

---

[69] *Id.* at 804-05. *See also* Citizens United v. Federal Election Commission, 558 U.S. 310, 326 (2010) ("While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 639, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994)."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) ("Nevertheless, minors are entitled to a significant measure of First Amendment protection, see *Tinker* v. *Des Moines" School Dist.*, 393 U.S. 503 (1969), and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. See, *e.g., Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 1968); *Rabeck* v. *New York*, 391 U.S. 462 (1968). In this case, assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible. The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York, supra*. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See *Tinker* v. *Des Moines School Dist., supra*. Cf. *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943)."); Butler v. Michigan, 352 U.S. 380, 383-84 (1957) ("We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."); Scrambling of Cable Channels for Nonsubscribers, 47 U.S.C. § 560 (2018) ("Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.").

unsuitable for them."[70]

In sum, if the three key justifications[71] for the Commission's broadcast indecency regulatory regime have been methodically invalidated, and the courts, further, have now discounted the same governmental oversight,[72] the *Pacifica*[73] case, going forward, is seemingly untenable.

---

[70] *Id.* at 795. *See also* Brown v. Entertainment Merchants Association, 564 U.S. 786, 804 (2011) ("[t]he Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires."); Interactive Digital Software v. St. Louis County, 329 F.3d 954, 960 (8th Cir. 2003) ("We do not mean to denigrate the government's role in supporting parents, or the right of parents to control their children's exposure to graphically violent materials. We merely hold that the government cannot silence protected speech by wrapping itself in the cloak of parental authority. To that end, we are guided by the Supreme Court's recognition that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors." Erznoznik v. Jacksonville, 422 U.S. 205, 213-14, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975)."); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 824 (2000) ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act. If unresponsive operators are a concern, moreover, a notice statute could give cable operators ample incentive, through fines or other penalties for noncompliance, to respond to blocking requests in prompt and efficient fashion.").

[71] *See supra* Chapter 6, *Government Rationales for Broadcast Regulation*.

[72] *See, e.g.*, Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011); Fox Television Stations v. FCC, 613 F.3d 317 (2d Cir. 2010); FCC v. Fox Television Stations, 556 U.S. 502 (2009); Fox Television Stations v. FCC, 489 F.3d 444 (2d Cir. 2007); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000); Reno v. ACLU, 521 U.S. 844 (1997); Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

[73] *See supra* note 6.

JUDICIAL REVIEW UNDER STRICT SCRUTINY

If there simply exists no feasible reason to treat broadcasters differently than other media vehicles,[74] perhaps broadcast entities have earned a far more supportive position for speech protection.[75] This would mean, ultimately, that broadcasters would be treated no differently than other media entities (e.g., print, cable television, satellite radio and television, digital) they compete with and now exist.[76] To that end, in terms of programming regulation by the government, a new and higher judicial threshold for the FCC should perhaps exist: strict scrutiny.[77]

The U.S. Supreme Court, most recently in *Brown*[78] outlined the threshold needed for content-based speech.[79] If broadcast licensees' were to be given the

---

[74] *See* Fox Television Stations v. FCC, 613 F.3d 317, 327 (2d Cir. 2010) ("We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television."). *See also generally* United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000); Reno v. ACLU, 521 U.S. 844 (1997).

[75] *See supra* Chapter 5, *Content-Based Regulation and Judicial Review* (discussing judicial review via strict scrutiny).

[76] *See supra* notes 3, 5.

[77] *See, e.g., supra* notes 59, 74; *infra* note 79; Chapter 5, *Content-Based Regulation and Judicial Review*.

[78] *See supra* note 59.

[79] *Id.* at 11-12 ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. *R.A.V.*, 505 U. S., at 395. The State must specifically identify an "actual problem" in need of solving, *Playboy*, 529 U.S., at 822-823, and the curtailment of free speech must be actually necessary to the solution, see *R. A. V.*, *supra*, at 395. That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, *supra*, at 818.").

same speech protection as all media entities, under a strict scrutiny analysis, any future Commission policy would need to (1) serve a compelling interest; (2) be narrowly tailored; and (3) be the least restrictive means for serving said interest in order for any regulation to survive judicial review.[80] In the event that the FCC was unable to meet the three-prong test noted above, any regulation or policy would fail, under the First Amendment, and be rendered categorically unconstitutional.[81]

PARITY FOR BROADCASTERS

As discussed above, should broadcasters be given the same speech freedom parity as the other media entities they currently compete with, ultimately, the same licensees would have the creative license to air programming content no different than their aforementioned counterparts. While this may seem like a significant change[82] in the overall media landscape

---

[80] *Id.*

[81] *Id.*

[82] *See* Fox Television v. FCC, 489 F.3d 444, 449 n.4 (2d Cir. 2007) ("At the time, the Commission interpreted *Pacifica* as involving a situation "about as likely to occur again as Halley's Comet." Br. of Amici Curiae Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broad. Assoc., Boston, Mass. (July 21, 1978))." *See also* Fox Television v. FCC, 489 F.3d 444, 460 (2d Cir. 2007) ("[t]he Commission's warning that a per se exemption for fleeting expletives would "permit broadcasters to air expletives at all hours of the day so long as they did so one at a time," Remand Order, at ¶ 25, is equally divorced from reality because

for some conservative compatriots, others argue that most cannot tell the difference now.[83] And, remember, given the media environment that now exists, it is easy to understand how traditional broadcasters may believe they

---

the Commission itself recognizes that broadcasters have never barraged the airwaves with expletives even prior to Golden Globes…").

[83] *See, e.g.*, Paul Rodriguez, *Broadcast, Cable…What's the Difference?*, THE INTERNET AND TELEVISION ASSOCIATION, Nov. 12, 2008, *available at* https://www.ncta.com/platform/cable-programming/broadcast-cable-whats-the-difference/ (last visited July 21, 2017) ("To people who have always had cable, there is no difference between an over-the-air (OTA) broadcast channel and cable offerings. However, in both the business and regulatory environments, the difference between OTA television and cable matters. The business models are different, the ad revenue streams are different, the content regulation is different. Whether you run a local TV station or a cable system, a broadcast network or a cable net, you live with these differences every day. To viewers, those differences are invisible. They cruise around the channel lineup, probably not paying any attention when they're tuned to a cable channel and when they're looking at a broadcast station. They may be vaguely aware the rules for swearing vary between basic cable and networks like NBC, CBS, ABC, Fox, or the CW–although, as broadcast standards have changed over the years, the differences aren't as stark as they used to be. Even if they see that distinction, they may not know this is because broadcasters use the public airwaves, while cable programmers do not."); James Endrst, *The Future of Television: It's All a Blur*, L.A. TIMES, July 3, 1998, at 32 ("Battered and at the same time enthralled by a medium gone haywire, the traditional American TV watcher, the ones who sat down with the family with a schedule of favorite shows in mind, who knew what to expect from the set, have been multi-tasked and multiplexed out of existence. In their transitional place is the new American viewer, an overloaded creature, one rewired by technology into a port for hundreds of thousands of signals. Unfortunately, all the viewer can do is blink in stunned reaction and try to keep up. It begins with choices. Too many choices, too many worlds coming out of the same box at the same time. The television set is no longer a place of comfort and respite, a personable, easygoing entertainment alternative, though that's the way so many remember it. It's a potential war zone where morality and codes of conduct change between channels. In split seconds. It's a Molotov cocktail of mixed signals. Unpredictable. A land mine in the middle of our living rooms where explosive, deeply disturbing images can burst onto the screen at any moment.").

are presently at a competitive[84] and creative[85] disadvantage.[86] It may be broadcasters, with equal speech protection parity, will feel like they have matching status, on both a competitive and creative scale.[87]

---

[84] *See e.g.*, U.S. ONLINE AND TRADITIONAL MEDIA ADVERTISING OUTLOOK, 2016-2020, MARKETING CHARTS, June 14, 2016, *available at* https://www.marketingcharts.com/featured-68214 (last visited July 20, 2017) (projecting advertising revenues for the various media platforms in 2020); Robert Hof, *Online Ad Revenues Blow Past Broadcast TV, Thanks To Mobile And Video,* FORBES, Apr. 10, 2014, *available at* https://www.forbes.com/sites/roberthof/2014/04/10/online-ad-revenues-blow-past-broadcast-tv-thanks-to-mobile-and-video/#72fa59473fc6 (last visited July 20, 2017) (evidencing that Internet ad revenues have surpassed those of broadcast television and radio); MEDIA REVENUE MODELS, PEW RESEARCH CENTER, *available at* http://www.pewresearch.org/topics/media-revenue-models/ (last visited July 20, 2017).

[85] *See* Joe Hyrkin, *Audiences No Longer Care About Platforms. The Content Creator is 'King.',* RECODE, Mar. 1, 2017, *available at* https://www.recode.net/2017/3/1/14752020/new-media-distribution-content-creator-sweet-paul-axios-cheddar (last visited July 20, 2017) (arguing that individuals are attracted to content quality; specific media platforms have become unimportant).

[86] *See supra* notes 84-85 and accompanying text.

[87] *Id.*

<u>CONCLUSION</u>

In the end, the FCC has had ample opportunity to restructure its broadcast indecency regulatory regime[88] since *Fox I*[89] and *Fox II*.[90] As of the completion of this dissertation, the Commission has not moved to do so. Most recently, the FCC has turned its attention to the Internet, specifically the issue of net neutrality,[91] and no watershed incidents of alleged broadcast indecency have come to the fore. It is likely, then, that is what it will take for the Commission to once again turn its attention to this issue. If history is any indication, the broadcast indecency matter will not stop at the FCC. Any meaningful change will not come without the legal consent of the U.S. Supreme Court.

---

[88] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) ("This opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.").

[89] FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

[90] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012).

[91] *See, e.g.,* Cecilia Kang, *FCC Repeals Net Neutrality Rules*, N.Y. TIMES, Dec. 14, 2017, *available at* https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html (last visited Dec. 18, 2017); John D. McKinnon, *FCC Votes to Dismantle Net-Neutrality Rules*, WALL ST. J., Dec. 14, 2017, *available at* https://www.wsj.com/articles/fcc-readies-unwinding-of-net-neutrality-regime-1513247401?mod=djem_jiewr_BL_domainid (last visited Dec. 18, 2017).

FUTURE RESEARCH

This dissertation has provided a vivid and in-depth analysis and synthesis of the legal hurdles the FCC will face in creating a new policy governing broadcast indecency. It has also evidenced the constitutional infirmities of the Commission's current broadcast indecency regulatory regime, given the media landscape that now exists. Looking ahead, though, there are ample opportunities for further scholarship in this area (i.e., and somewhat tangential areas) of media law study. They are as follows (i.e., in no specific order):

- It may be productive to complete a national survey of announcer and management behaviors as it applies to how they dealt with the pressure of indecency enforcement and broadcast regulation. The same study might include law firm directives, "chilling effects" tests, and coping analysis. Have the tactics of broadcast entities and personalities (e.g., Howard Stern: "hey FCC, penis") made the FCC less likely to take their positions seriously? Would the National Association of Broadcasters fund such a project?

- Prior to the ruckus in recent years (e.g., Fox I and Fox II) why have broadcast entities, in general, been so lax on the indecency issue? Howard Stern is one, in the early goings-on regulating him, that would comment on-the-air that other broadcast companies would not come to his "free speech" defense. It might be fruitful to interview top broadcast executives in an effort to ascertain why they choose to remain silent.

- An analysis and synthesis of the FCC's rule changes over time, regarding its broadcast indecency regulatory regime, supported by interviews with current and former FCC officials.

- How much does the average citizen know about the FCC indecency rules? Are they really offended by what they see on television or hear on the radio? Is there a difference in tolerance for television versus radio?

- Why have the FCC, courts, and special interest activist groups been aggressive in regulating broadcast indecency, despite no empirical evidence that indecent content would harm children? Alternatively, the FCC has been far more lax in its regulation of violence in broadcast television programming, notwithstanding volumes of evidence that the same type of content may very well have harmful effects on children.

- Regulating indecent speech requires sensitivity and discretion in evaluating the contemporary offensiveness of language (i.e., degrees of offensiveness change over time). Specifically, societal attitudes toward sexual expression have changed since Elvis Presley swiveled his hips on The Ed Sullivan Show.

- Since the passage of the 1996 Telecommunications Act, ownership concentration within media markets has created less diversity in radio programming, job losses have skyrocketed (i.e. particularly for on-air talent), and ultimately the listeners in the same media markets are receiving an inferior programming product, clearly absent of the public interest mandate of the 1934 Communications Act. Why has the FCC not been more aggressive in enforcement of localism?

- As scholar Timothy Jay noted in one of his recent publications, more work needs to be done on "data collection to better understand the development of the child's swearing lexicon."

- More work needs to be done on adolescents' legal rights to receive information from the various media entities.

LIST OF REFERENCES

PRIMARY SOURCES

CONSTITUTIONS:

U.S. CONST. AMEND. I.

U.S. CONST. AMEND. XIV.

COURT CASES:

281 Care Comm. v. Arneson, Civil No. 08-5215 ADM/FLN (D. Minn. Jan. 25, 2013).

ABC v. FCC, 39 Media L. Rep. 1065 (2011).

Abrams v. United States, 250 U.S. 616 (1919).

Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993).

Action for Children’s Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

Adarand Constructors, Inc., v. Pena, 115 S. Ct. 2097 (1995)

Adderly v. Florida, 385 U.S. 39 (1966).

Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959).

American Federation of Gov. Employees v. HUD, 118 F.3d 786 (D.C. Cir. 1997).

American Library Ass'n Inc. v. United States, 201 F. Supp.2d 401 (E.D. Pa. 2002).

Ashcroft v. ACLU, 542 U.S. 656 (2004).

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Bamon Corp. v. City of Dayton, (S.D. Ohio 1990), 730 F. Supp. 80 (S.D. Ohio 1990).

Beauharnais v. Illinois, 343 U.S. 250 (1952).

Bell v. Keating, 697 F.3d 445 (7th Cir. 2012).

Boos v. Barry, 485 U.S. 312 (1988).

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984).

Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264 (4th Cir. 2015).

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Brown v. Entertainment Merchants, 131 S. Ct. 2729 (2011).

Brown v. Glines, 444 U.S. 348 (1980).

Burson v. Freeman, 505 U.S. 191 (1992).

Butler v. Michigan, 352 U.S. 380 (1957).

Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995).

CBS v. FCC, 535 F.3d 167 (3d Cir. 2008).

CBS v. FCC, 663 F.3d 122 (3d Cir. 2011).

Chaplinski v. New Hampshire, 315 U.S. 568 (1942).

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

Cohen v. California, 403 U.S. 15 (1971).

Columbia Broadcasting v. Democratic Committee, 412 U.S. 94 (1973).

Commonwealth v. Sullivan, 972 N.E.2d 476 (Mass. App. Ct. 2012).

Connally v. General Const. Co., 269 U.S. 385 (1926).

Connick v. Myers, 461 U.S. 138 (1983).

Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788 (1985).

Craig v. Boren, 429 U.S. 190 (1976).

Curious Theater v. Dept. of Pub. Health, 216 P.3d 71 (Colo. App. 2008).

Deja Vu of Cincinnati v. Union Twp. Board, 411 F.3d 777 (6th Cir. 2005).

Dekart v. Milczark, C4-98-733 (Minn. Ct. App. 1998).

Dennis v. United States, 341 U.S. 494 (1951).

Denver Area Education Telecommunication Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

District of Columbia v. Heller, 554 U.S. 570 (2008).

Doe v. Pulaski County Special School Dist., 306 F.3d 616 (8th Cir. 2002).

Duncan v. United States, 48 F.2d 128 (9th Cir. 1931).

Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

Ex parte Thompson, 414 S.W.3d 872 (Tex. App. 2013).

Farina v. Nokia Inc., 625 F.3d 97 (3d Cir. 2010).

FCC v. Fox Television Stations, 132 S. Ct. 2307 (2012).

FCC v. Fox Television Stations, 556 U.S. 502 (2009).

FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

FCC v. Sable Communications, 492 U.S. 115 (1989).

FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

Fed. Election v. Wisconsin Right to Life, 551 U.S. 449 (2007).

Federal Radio Commission v. Nelson Brothers Bond & Mortgage Company, 289 U.S. 266 (1933).

Feiner v. New York, 340 U.S. 315 (1951).

First Time Videos, LLC v. Does 1-500, No. 10 C 6254 (N.D. Ill. Aug. 9, 2011).

First Unitarian Church of Salt Lake City v. Salt Lake City Corporation, 308 F.3d 1114, (10th Cir. 2002).

Forbes v. Napolitano, 236 F.3d 1009 (9th Cir. 2000).

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

Fox Television v. FCC, 489 F.3d 444 (2d Cir. 2007).

Frohwerk v. United States, 249 U.S. 204 (1919).

Ginsberg v. New York, 390 U.S. 629 (1968).

Glasson v. City of Louisville, 518 F2d 899 (6th Cir. 1975).

Gooding v. Wilson, 405 U.S. 518 (1972).

Grayned v. City of Rockford, 408 U.S. 104 (1972).

Greater New Orleans Broadcasting Association v. United States, 527 U.S. 173 (1999).

Gregory v. City of Chicago, 394 U.S. 111 (1969).

Grider v. Abramson, 994 F. Supp. 840, 845-46 (W.D. Ky. 1998).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Hill v. Colorado, 530 U.S. 703 (2000).

Hodgers-Durgin v. De La Vina 199 F.3d 1037 (9th Cir. 1999).

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982).

Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1974).

In re Beach Television Partners v. Mills, 38 F.3d 535 (11th Cir. 1994).

Interactive Digital Software v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).

International Society for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672 (1992).

Interstate Circuit v. Dallas, 390 U.S. 676 (1968).

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

JB Ent., Inc., City of Jackson, 152 F.3d 362 (5th Cir. 1998).

Jews for Jesus, Inc. v. MBTA, 984 F.2d 1319 (1st Cir. 1993).

Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977).

Kolender v. Lawson, 461 U.S. 352 (1983).

Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

Kovacs v. Cooper, 336 U.S. 77 (1949).

Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2002).

Lehr v. Robertson, 463 U.S. 248 (1983).

List v. Ohio Elections Commission, Case No. 1:10-cv-720 (S.D. Ohio Sep. 11, 2014).

Loper v. New York City Police Dept., 802 F. Supp. 1029 (S.D.N.Y. 1992)

Lubin v. Agora, 389 Md. 1 (Md. 2005).

Lurie v. Wittner, 228 F.3d 113 (2d Cir. 2000).

Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

Marbury v. Madison, 5 U.S. 137 (1803).

McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1992).

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

Miami Herald v. Tornillo, 418 U.S. 241 (1974).

Miller v. California, 413 U.S. 15 (1973).

Minority Television Project, Inc. v. FCC, 676 F.3d 869 (9th Cir. 2012).

Moore v. City of Kilgore, Texas, 877 F.2d 364 (5th Cir. 1989).

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983).

Murdock v. Pennsylvania, 319 U.S. 105 (1943).

NAACP v. Button, 371 U.S. 415 (1963).

National Broadcasting Company v. United States, 319 U.S. 190 (1943).

National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977).

National Endowment of the Arts v. Finley, 524 U.S. 569 (1998).

New York Times Co. v. United States, 403 U.S. 713 (1971).

Ovadal v. City of Madison, 416 F.3d 531 (7th Cir. 2005).

Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977).

Pearson v. Callahan, 555 U.S. 223 (2009).

Pennell v. City of San Jose, 485 U.S. 1 (1988).

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

Planned Parenthood of S. Arizona v. Lawall, 307 F.3d 783 (9th Cir. 2002).

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004).

Prince v. Massachusetts, 321 U.S. 158 (1944).

Procunier v. Martinez, 416 U.S. 396 (U.S. 1974).

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

Reno v. ACLU, 521 U.S. 844 (1997).

Roth v. United States, 354 U.S. 476 (1957).

Saia v. New York, 344 U.S. 558 (1948).

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

Schenck v. United States, 249 U.S. 47 (1919).

Secretary of State of Md. v. J. H. Munson Co, 467 U.S. 947 (1984).

Sherbert v. Verner, 374 U.S. 398 (1963).

Simon Schuster v. Crime Victims Board, 502 U.S. 105 (1991).

Smith v. California, 361 U.S. 147 (1959).

Smith v. Goguen, 415 U.S. 566 (1974).

Smith v. Ross, 482 F.2d 33 (6th Cir. 1973).

St. Croix Waterway Association v. Meyer, 178 F.3d 515 (8th Cir. 1999).

Stanley v. Georgia, 394 U.S. 557 (1969).

State v. Acosta, 08-04-00312-CR (Tex. App.-El Paso [8th Dist.] 2005), No. 08-04-00312-CR (Tex. App. Aug. 31, 2005).

State v. Jeffrey, 400 S.W.3d 303 (Mo. 2013).

State v. Romano, 114 Haw. 1 (Haw. 2007).

Stromberg v. California, 283 U.S. 359 (1931).

Sugarman v. Dougall, 413 U.S. 634 (1973).

Tallman v. United States, 465 F.2d 282 (7th Cir. 1972).

Telecommunications Research Action v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

Terminiello v. City of Chicago, 337 U.S. 1 (1949).

Texas v. Johnson, 491 U.S. 397 (1989).

Thaeter v. Palm Beach Cty. Sheriff's Office, 449 F.3d 1342 (11th Cir. 2006).

Thomas v. Collins, 323 U.S. 516 (1945).

Tinker v. Des Moines School District, 393 U.S. 503 (1969).

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).

Turner v. Safley, 482 U.S. 78 (1987).

TX, Best Int., Prot, J.H., 12-06-00031-CV (Tex. App.-Tyler 10-4-2006), No. 12-06-00031-CV (Tex. App. Oct. 4, 2006).

U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

U.S. v. Beatty, 10-3634 (3rd Cir. 2011).

U.S. v. Fisher, 289 F.3d 1329 (11th Cir. 2002).

U.S. v. Gibson, 409 F.3d 325 (6th Cir. 2005).

U.S. v. Kilbride, 584 F.3d 1240 (9th Cir. 2009).

U.S. v. Loy, 237 F.3d 251 (3d Cir. 2001).

U.S. v. Nieves-Castano, 480 F.3d 597 (1st Cir. 2007).

U.S. v. Williams, 444 F.3d 1286 (11th Cir. 2006).

United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

United States v. Ball, 771 F.3d 964 (6th Cir. 2014).

United States v. Bronstein, No. 16-3003 (D.C. Cir. Mar. 3, 2017).

United States v. Carolene Products Company, 304 U.S. 144 (1938).

United States v. Evergreen Media Corp., 832 F. Supp. 1179 (N.D. Ill. 1993).

United States v. Extreme Associates, Inc., 431 F.3d 150 (3d Cir. 2005).

United States v. Grace, 461 U.S. 171 (1983).

United States v. Matchett, 837 F.3d 1118 (11th Cir. 2016).

United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012).

United States v. O'Brien, 391 U.S. 367 (1968).

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

United States v. Robbins, 759 F. Supp.2d 815 (W.D. Va. 2011).

United States v. Williams, 444 F.3d 1286 (11th Cir. 2006).

United States v. Williams, 553 U.S. 285 (2008).

Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015).

Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Water v. Churchill, 511 U.S. 661 (1994).

Whitney v. California, 274 U.S. 357 (1927).

Willis v. Town of Marshall, N.C., 426 F.3d 251 (4th Cir. 2005).

Ysursa v. Pocatello Education Assn., 555 U.S. 353, 5 (2009).

FEDERAL STATUTES:

1927 Federal Radio Act

1934 Communications Act

1996 Telecommunications Act

Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2017).

Application for License, 47 U.S.C. § 309 (2017) (a).

Broadcasting Obscene Language, 18 U.S.C. § 1464 (2017).

Censorship, 47 U.S.C. § 326 (2017).

H.R. REP. NO. 93-1139 at 15 (1974).

Powers and Duties of Commission, 47 U.S.C. § 303 (2017).

Reno v. ACLU, 47 U.S.C.A. § 223(d)(1)(A) (Supp. 1997).

Scrambling of Cable Channels for Nonsubscribers, 47 U.S.C. § 560 (2018).

Time for Commencing Proceedings, 28 U.S.C. § 2462 (2017).

SECONDARY SOURCES

ACADEMIC JOURNALS:

John C. Carlin, *The Rise & Fall of Topless Radio*, J. COMM. 31 (Winter 1976).

Robert Corn-Revere, *Indecency, Television, & the First Amendment*, 87 CONSUMERS RESEARCH MAGAZINE 22 (2004).

Steve Craig, *Out of Eden: The Legion of Decency, the FCC, & Mae West's 1937 Appearance on The Chase & Sanborn Hour*, 13 J. RAD. STUD. 232 (2006).

Edward Donnerstein, Barbara Wilson, & Daniel Linz, *On the Regulation of Broadcast Indecency to Protect Children*, 36 J. BROAD. & ELEC. MEDIA 111 (Winter 1992).

Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 THE AMERICAN J. OF PSYCH., No. 4, 459 (Winter 2013).

Timothy Jay, *Do Offensive Words Harm People?,* 15 PSYCH. PUB. POL. AND L. 81 (2009).

Todd Shields, *Activists Dominate Content Complaints*, MEDIA WEEK, Dec. 6, 2004.

F. Leslie Smith, *The Charlie Walker Case*, 23 J. BROAD. 142 (1979).

ADMINISTRATIVE AGENCY REPORTS:

Application of the Jack Straw Mem'l Found. For Renewal of the License of Station KRAB-FM, 29 F.C.C.2d 334 (1971).

Eastern Education Radio, 24 F.C.C.2d 408 (1970).

FCC, The Public and Broadcasting, 1999 WL 391297 (June 1999).

In re Apparent Liability of Station WGLD-FM, For Forfeiture, 41 F.C.C.2d 919 (1973).

In re Application of Jack Straw Mem'l Found. For Renewal of License of Radio Station KRAB-FM, 21 F.C.C.2d 833 (1970).

In re Application of WGBH Educational Foundation, For Renewal of License for Noncommercial Educational Station WGBH-TV, 69 F.C.C.2d 1250 (1978).

In re Applications of E.G. Robinson, Jr., TR/AS Palmetto Broadcasting Co. (WDKD), for Renewal of License and for License to Cover CP, 33 F.C.C. 265, 276-77 (1961); E.G. Robinson, Jr., TR/AS Palmetto Broadcasting Co., Applications of Palmetto Broadcasting Co. for Renewal of License and for a License to Cover a Construction Permit; Denied. Licensee Qualifications. Misrepresentations and Lack of Candor; Fitness as a Licensee. Licensee Responsibility. Abdication of Control. Broadcast Material-Nature and Effects of Matter Broadcast. Programming. Whether Programming Met Public Needs. Section 326 of Act. Censorship, Indecent Language. 18 U.S.C. 14611.-Criminal Sanctions., 33 F.C.C. 250 (1962).

In re Applications of Pacifica Foundation, 16 F.C.C.2d 712 (1969).

In re Applications of Pacifica Foundation, 36 F.C.C. 147 (1964).

In re Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York, 2 F.C.C.R. 5043 (1987).

In re WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408 (1970).

In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI-FM, 56 F.C.C.2d 94 (1975).

In the Matter of AMFM Radio Licenses, L.L.C., 19 F.C.C.R. 5005 (2004).

In the Matter of Clear Channel Broadcasting Licenses, Inc., 19 F.C.C.R. 1768 (2004).

In the Matter of Clear Channel Communications, Inc., 19 F.C.C.R. 10880 (2004).

In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 18 F.C.C.R. 19859 (2003).

In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globes Award Program, 19 F.C.C.R. 4975 (2004).

In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of The Fox Television Network Program "Married By America" on April 7, 2003, 19 F.C.C.R. 20191 (2004).

In the Matter of Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace," 21 F.C.C.R. 2732 (2006).

In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11,2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005).

In the Matter of Complaints Against Various Television Licensees' Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230 (2004).

In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006).

In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 F.C.C.R 13171 (2009).

In the Matter of Entercom Buffalo License, LLC, Licensee of Station WGR(AM), Buffalo, New York, 17 F.C.C.R. 11997 (2002).

In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001).

In the Matter of Infinity Broadcasting Corporation of Pennsylvania, 2 F.C.C.R. 2705 (1987).

In the Matter of Infinity Broadcasting Corporation of Pennsylvania, 3 F.C.C.R. 930 (1987).

In the Matter of Infinity Broadcasting Corporation, 10 F.C.C.R. 12245 (1995).

In the Matter of Infinity Broadcasting Corporation, Inc., 5 F.C.C.R. 7291 (1990).

In the Matter of Infinity Broadcasting, 2 F.C.C.R. 2705 (1987).

In the Matter of Infinity Broadcasting; In the matter of Pacifica Foundation; In the Matter of The Regents of the University of California, 3 F.C.C.R. 930 (1987).

In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

In the Matter of Pacifica Foundation, Inc., 2 F.C.C.R. 2698 (1987).

In the Matter of Revocation of License of Mile High Stations, Inc., for Standard Broadcast Station KIMN, Denver, Colo., 28 F.C.C. 795 (1960).

In the Matter of Sonderling Broadcasting Corp., Notice of Apparent Liability and Inquiry Into Alleged Broadcast and Cablecasts of Obscene, Indecent, or Profane Material by Licensees, Permittees, or Cable Operators, 41 F.C.C.2d 777 (1973).

In the Matter of The Regents of the University of California, 2 F.C.C.R. 2703 (1987).

In the Matter of WDBJ Television, Inc., 30 F.C.C.R. 3024 (2015).

Mr. Mel Karmazin, President Infinity Broadcasting Corporation, 9 F.C.C.R. 1746 (1994).

Mr. Peter Branton, 6 F.C.C.R. 610 (1991).

New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987).

Pacifica Foundation (WPFW-FM), 95 FCC2d 750 (1984).

WGBH Educational Foundation, 69 FCC2d 1250 (1978).

BOOKS:

LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005).

C. EDWIN BAKER, HUMAN LIBERTY AND THE FREEDOM OF SPEECH (1989).

BENJAMIN K. BERGEN, WHAT THE F: WHAT SWEARING REVEALS ABOUT OUR LANGUAGE, OUR BRAINS, AND OURSELVES (2016).

DAVID BUCKINGHAM & SARA BRAGG, YOUNG PEOPLE, SEX AND THE MEDIA: THE FACTS OF LIFE? (2004).

T. BARTON CARTER, MARC A. FRANKLIN, & JAY B. WRIGHT, THE FIRST AMENDMENT & THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA (2003).

Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press, in* EUGENE W. HICKOK, THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (1991).

ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941).

ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH IN WAR TIME (1919).

HENRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY (1969).

JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW (1990).

KENNETH C. CREECH, ELECTRONIC MEDIA LAW & REGULATION (2000).

THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

PATRICK GARRY, THE AMERICAN VISION OF A FREE PRESS (1990).

ANDREA MILLWOOD HARGRAVE, A MATTER OF MANNERS: THE LIMITS OF BROADCASTING LANGUAGE (1991) GEOFFREY HUGHES, SWEARING (1991).

MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001).

MARJORIE HEINS, SEX, SIN, AND BLASPHEMY (1993).

ROBERT L. HILLIARD & MICHAEL C. KEITH, DIRTY DISCOURSE: SEX AND INDECENCY IN AMERICAN RADIO (2003).

TIMOTHY JAY, CURSING IN AMERICA (1992).

TIMOTHY B. JAY, WE DID WHAT?! OFFENSIVE AND INAPPROPRIATE BEHAVIOR IN AMERICAN HISTORY (2016).

TIMOTHY JAY, WHY WE CURSE: A NEURO-PSYCH-SOCIAL THEORY OF SPEECH (2000).

MARTY KLEIN, AMERICA'S WAR ON SEX: THE ATTACK ON LAW, LUST AND LIBERTY (2008).

JUDITH LEVINE, HARMFUL TO MINORS (2003).

ROGER J.R. LEVESQUE, ADOLESCENTS, MEDIA, AND THE LAW (2007).

JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2003).

LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

JEREMY H. LIPSHULTZ, BROADCAST AND INTERNET INDECENCY: DEFINING FREE SPEECH (2008).

JEREMY H. LIPSCHULTZ, BROADCAST INDECENCY: FCC REGULATION AND THE FIRST AMENDMENT (1997).

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965).

KENT MIDDLETON & ROY M. MERSKY, FREEDOM OF EXPRESSION: A COLLECTION OF THE BEST WRITINGS (1981).

JOHN STUART MILL, ON LIBERTY (ch. II 1869).

JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS (2009).

JOHN MILTON, AREOPAGITICA (1644).

JOHN MILTON, AREOPAGITICA, AND OTHER POLITICAL WRITINGS OF JOHN MILTON (1999).

PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA (2001).

MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984).

DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW (2015).

David M. Rabban, *The Original Meaning of the Free Speech Clause of the First Amendment, in* 6 THE UNITED STATES CONSTITUTION: THE FIRST 200 YEARS (R.C. Simmons, ed. 1989).

PAUL RUSCHMANN, THE FCC AND REGULATING INDECENCY (2005).

KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (2006).

DOROTHY G. SINGER & JEROME L. SINGER, HANDBOOK OF CHILDREN AND THE MEDIA (2012).

DOROTHY G. SINGER & JEROME L. SINGER, HANDBOOK OF CHILDREN AND THE MEDIA (2001).

RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1993).

VICTOR C. STRASBURGER, BARBARA J. WILSON, & AMY B. JORDAN, CHILDREN, ADOLESCENTS, AND THE MEDIA (2014).

VICTOR C. STRASBURGER & BARBARA J. WILSON, CHILDREN, ADOLESCENTS, AND THE MEDIA (2002).

THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (BERNARD SCHWARTZ ED., 1971).

CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT (2000).

KIMBERLY ZARKIN, ANTI-INDECENCY GROUPS AND THE FEDERAL COMMUNICATIONS COMMISSION: A STUDY IN THE POLITICS OF BROADCAST REGULATION (2003).

KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS (2006).

<u>LAW REVIEWS AND LEGAL JOURNALS</u>:

Larry Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. Rev. 1319 (1983).

Brandon J. Almas, *From One [Expletive] Policy to the Next: The FCC's Regulation of "Fleeting Expletives" and the Supreme Court's Response,* 63 FED. COMM. L.J. 261 (2010).

David Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

Ian J. Antonoff, *You Don't Like It….Change the (Expletive Deleted) Channel!: An Analysis of the Constitutional Issues that Plague FCC Enforcement Actions and a Proposal for Deregulation in Favor of Direct Consumer Control*, 15 SETON HALL J. OF SPORTS & ENT. L. 253 (2005).

Jamil Aslam, *Taking Free Speech Siriusly: How the Modern Appearance of Personalities on Various Media Supports Overturning Red Lion and Pacifica*, 22 UCLA ENT. L. REV. 133 (2015).

C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VIL. SPORTS ENT. L. FORUM 45 (1996).

Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008).

Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998).

Kyle A. Beckman, *Why the FCC Failed Geography: The Constitutionality of its Fleeting Expletives Policy does Not Rise, but Sets Over (The) Pacifica*, 41 CUMB. L. REV. 283 (2011).

Genelle I. Belmas, Gail D. Love & Brian C. Foy, *In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67 (2007).

Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL OF RTS. J. 671 (2003).

Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321 (1997).

Matthew Bloom, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 YALE J. L. & TECH. 109 (2006).

Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, IND. L.J. 1 (1971).

Dabney Elizabeth Bragg, *Regulation of Programming Content to Protect Children after Pacifica,* 32 VAND. L. REV. 1377, 1415 (1979).

Fowler Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207 (1982).

Daniel L. Brenner, *Censoring the Airwaves: The Supreme Court's Pacifica Decision, in* FREE BUT REGULATED: CONFLICTING TRADITIONS IN MEDIA LAW, 175-80 (D.L. Brenner & W.L. Rivers ed., 1982).

Samuel G. Brooks, *FCC v. Fox Television Stations and the Role of Logical Error in Hard Look Review*, B.Y.U.L. REV. 687 (2010).

Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U.L. REV. 1463 (2005).

B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187 (2006).

Matthew D. Bunker, Clay Calvert, & William C. Nevin, *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349 (2011).

Jordan Butler, *The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency*, 39 CAP. U.L. REV. 621 (2011).

Clay Calvert, *The First Amendment, the Media and the Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325 (2005).

Clay Calvert & Matthew D. Bunker, *An "Actual Problem" in First Amendment Jurisprudence? Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT. L.J. 391 (2012).

Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE UNIV. L.R. 61 (2004).

Clay Calvert & Robert D. Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 VA. SPORTS & ENT. L.J. 1 (2004).

Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 GA. ST. U.L. REV. 671 (2002).

Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?*, 47 SAN DIEGO L. REV. 737 (2010).

Clay Calvert, Minch Minchin, Keran Billaud, Kevin Bruckenstein, & Tershone Phillips, *Indecency Four Years After Fox Television Stations: From Big Papi to a Porn Star, an Egregious Mess at the FCC Continues*, 51 U. RICH. L. REV. 329 (2017).

Clay Calvert, *Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority Over Content*, 30 HASTINGS COMM. & ENT. L.J. 1 (2007).

Clay Calvert, *Of Burning Houses and Roasting Pigs: Why Butler v. Michigan Remains a Key Free Speech Victory More than a Half-Century Later*, 64 FED. COMM. L.J. 247 (2012).

Clay Calvert, *Payola, Pundits, and the Press: Weighing the Pros and Cons of FCC Regulation*, 13 COMM LAW CONSPECTUS 245 (2005).

Clay Calvert, Matthew D. Bunker+ and Kimberly Bissellx, *Social Science, Media Effects & The Supreme Court: Is Communication Research Relevant After Brown v. Entertainment Merchants Association?,* 19 UCLA ENT. L. REV. 293 (2012).

Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1 (2007).

Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency With Its President, Tim Winter*, 33 HASTINGS COMM. & ENT. L.J. 293 (2011).

Angela J. Campbell, *Pacifica Reconsidered: Implications for the Current Controversy Over Broadcast Indecency*, 63 FED. COMM. L.J. 195 (2010).

Adam Candeub, *Media and the Law Symposium: When Does Government Regulation Go Too Far?: Essay: Shall Those Who Live by FCC Indecency Complaints Die by FCC Indecency Complaints*?, 22 REGENT U.L. REV. 307 (2010).

Edward L. Carter, R. Trevor Hall & James C. Phillips, *Broadcast Profanity and the "Right to Be Let Alone": Can the FCC Regulate Non-Indecent Fleeting Expletives Under a Privacy Model*?, 31 HASTINGS COMM. & ENT. L.J. 1 (2008).

Fred H. Cate, *Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression,* J. ONLINE L. ART. 5 (1995).

Barry Chase, *The FCC's Indecency Jurisdiction: A Stale Blemish on The First Amendment*, 39 OHIO N.U.L. REV. 697 (2013).

Treasa Chidester, *What the # & is Happening on Television? Indecency in Broadcasting*, 13 COMM LAW CONSPECTUS 135 (2004).

Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008).

Noelle Coates, *The Fear Factor: How FCC Fines are Chilling Free Speech*, 14 WM. & MARY BILL OF RTS. J. 775 (2005).

Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113 (2005).

Daniel Mark Cohen, *Unhappy Anniversary: Thirty Years since Miller V. California: The Legacy of the Supreme Court's Misjudgment on Obscenity part*, 15 ST. THOMAS L. REV. 545 (2003).

April Bailey Cole, *Indecency on the Internet: Reno and the Communications Decency Act of 1996*, 27 CAP. U.L. REV. 607 (1999).

David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994).

Toby Coleman, *Explaining Change and Rethinking Dirty Words: FCC v. Fox Television Stations, Inc.*, 4 DUKE J. CONST. LAW & PUB. POL'Y 71 (2009).

Jessica C. Collins, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225 (2010).

Mark Conrad, *"Fleeting Expletives" and Sports Broadcasts: A Legal Nightmare Needs a Safe Harbor*, 18 J. LEGAL ASPECTS OF SPORT 175 (2008).

Constitutional Law-Vagueness-Second Circuit Strikes Down the FCC's Indecency Policy as Void for Vagueness-Fox Television Stations, Inc. v. FCC, 613 F3d 317 (2d Cir. 2010), 124 HARV. L. REV. 835 (2010-2011).

Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L. J. 243 (2006).

Robert Corn-Revere, *Speech and Elections: FCC v. Fox Television Stations, Inc.: Awaiting the Next Act*, CATO SUP. CT. REV. 295 (2009).

John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U.L. REV. 329 (1989).

Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?,* 34 PEPP. L. REV. 743 (2007).

Chad Davidson, *Constitutional Law—First Amendment—Government Must Demonstrate that There Is Not a Less Restrictive Alternative Before a Content-Based Restriction of Protected Speech Can Survive Strict Scrutiny*, 70 MISS. L.J. 457 (2000).

Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469 (2012).

Patricia Daza, *FCC Regulation: Indecency by Interest Groups*, 3 DUKE L. & TECH. REV. (2008).

Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment,"* 39 AKRON L. REV. 483 (2006).

L. Allyn Dixon, Jr., *Broadcasters' First Amendment Rights: A New Approach?,* 39 VAND. L. REV. 323 (1986) Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606 (1983).

Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 HOFSTRA L. REV. 827 (1994).

Dana Duffield, *Mixed Media: Conflicting Community Standards for Indecency for Broadcast, Cable and the Internet,* 15 DEPAUL-LCA J. ART & ENT. L. 141 (2004).

Ellen Alexandra Eichner, *The Seven Dirty Words You Should Be Allowed to Say on Television*, 92 WASH. U. L. REV. 1353 (2015).

Jessica E. Elliott, *Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?*, 5 CONN. PUB. INT. L.J. 263 (2006).

Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

John P. Elwood, Jeremy C. Marwell, & Eric A. White, *FCC, Fox, and That Other F-Word*, 2011-12 CATO SUP. CT. REV. 281 (2011).

Amitai Etzioni, *Do Children Have the Same First Amendment Rights as Adults?: On Protecting Children from Speech*, 79 CHI. KENT L. REV. 3 (2004).

Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007).

Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567 (2013).

Paul J. Feldman, *The FCC and Regulation of Broadcast Indecency*: Is There a National Broadcast Standard in the Audience?, 41 FED. COMM. L.J. 369 (1989).

Charles Feldman & Stanley Tickton, *Obscene/Indecent Programming: Regulation of Ambiguity*, 20 J. BROAD. 273 (1976).

Brett Ferenchak, *Regulating Indecent Broadcasting: Setting Sail from Safe Harbors Or Sunk by the V-Chip*?, 30 U. RICH. L. REV. 831 (1996).

Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U.L. REV. 299 (1989).

Trent Franks, *Media and the Law Symposium: When does Government Regulation Go Too Far?: Address: Panel Address: Protecting the Innocent while Preserving Speech: a Balancing Act of Media Regulation*, 22 REGENT U.L. REV. 301 (2010).

Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17 (2011).

Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287 (2012).

Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 WASH. U. L. REV. 279 (2012).

Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183 (2004).

Jay A. Gayoso, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality From the Airwaves*, 43 U. MIAMI L. REV. 871 (1989).

Theodore L. Glasser & Harvey Jassem, *Indecent Broadcasts and the Listener's Right of Privacy*, 24 J. BROAD. 285 (1980).

Seth T. Goldsamt, *Crucified by the FCC? Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J. LAW AND SOC. PROB. 203 (1995).

Otilio Gonzalez, *Regulating Objectionable Content in Multimedia Platforms: Will Convergence Require a Balance of Responsibilities between Senders and Receivers*?, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 609 (2004).

Joshua B. Gordon, *Pacifica is Dead. Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451 (2006).

Abner S. Greene, *Government Speech: The Government's Ability to Compel and Restrict Speech: Speech Platforms*, 61 CASE W. RES. 1253 (2011).

Abner Greene, William Davenport, Jeffrey Hoeh, C. Edwin Baker, Paul J. McGeady & John Fiorini, III, *Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087 (2005).

Gerald Gunther, Forward. *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

Emily Hagemann, *FCC Defines the Indefinable: Indecency*, 25 NEWS MEDIA & THE LAW 24 (Spr. 2001).

Phillip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press,* 37 STAN. L. REV. 661 (1985).

Allen S. Hammond, IV, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259 (1996).

Alec Harrell, *Who Cares About Prior Restraint? An Analysis of the FCC's Enforcement of Indecency Forfeiture Orders*, 70 S. CAL. L. REV. 239 (1996).

Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting*, 4 MICH. TELECOMM. TECH. L. REV. 35 (1998).

Thomas W. Hazlett, Sarah Oh, & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).

Marjorie Heins & Eric M. Freedman, *Reclaiming the First Amendment: Constitutional Theories of Media Reform*, 35 HOFSTRA L. REV. 917 (2007).

Sarah Herman, *The Battle for the Remote Control - Has the FCC Indecency Policy Worn Out its Welcome in America's Living Room?,* 38 WASH. U. J.L. & POL'Y 357 (2012).

Christopher Hiserman, *Silencing Fox: The Chilling Effect of the FCC's Indecent Speech Policy*, 52 B.C. L. REV. E. SUPP. 15 (2011).

Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341 (2005).

W. Wat Hopkins, *When Does F*** Not Mean F***?: FCC v. Fox Television Stations and a Call for Protecting Emotive Speech*, 64 FED. COMM. L.J. 1 (2011).

David Houska, *Indecent Exposure: FCC v. Fox and the End of An Era*, 7 DUKE J. CONST. LAW & PP SIDEBAR 193 (2012).

Reed Hundt, *Regulating Indecency: The Federal Communication Commission's Threat to the First Amendment*, DUKE L. & TECH. REV. 13 (2005).

Kurt Hunt, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. TECH. L. REV. 223 (2007).

Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters*, 45 DUKE L.J. 1089, 1118 (1996).

Dave E. Hutchinson, *"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation*, 61 FED. COMM. L.J. 229 (2009).

Timothy Jay, *Do Offensive Words Harm People?,* 15 PSYCHOL. PUB. POL'Y & L. 81 (2009).

Harvey Jassem & Theodore L. Glasser, *Children, Indecency and the Perils of Broadcasting: The 'Scared Straight' Case*, 60 J. QUAR. 509 (1983).

E. Judson Jennings*, Show & Tell on the Internet: Will Janet & George Set the Standard? FCC Censorship & Converging Technologies*, 17 SETON HALL J. SPORTS & ENT. L. 1 (2007).

Jennifer E. Jones, *The Discriminatory Effects of Protecting America's Children*, 3 AM U. MODERN AM. 3 (2007).

Michael Kaneb, *Neither Realistic Nor Constitutionally Sound: The Problem of the FCC's Community Standard for Broadcast Indecency Determinations*, 49 B.C. L. REV 1081 (2008).

Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

Stacy Katz, *The Lewd, Crude, or Partially Nude: Indecency Regulation, Fleeting Expletives, and the High Price We Pay for Not-So-Free "Free Speech*, 60 SYRACUSE L. REV. 347 (2010).

Jason Kay, *Sexuality, Live Without a Net: Regulating Obscenity and Indecency on the Global Network*, 4 S. CAL. INTERDIS. L.J. 355 (1995).

Wade Kerrigan, *FCC Regulation of the Radio Industry: A Safe Harbor for Indecent Programming?*, 79 IOWA L. REV. 143 (1993).

Nicole I. Khoury, *United States v. Playboy: Children and Sexually Explicit Material: Whose Problem Is It?,* 33 U. TOL. L. REV. 431 (2002).

Matthew A. Klopp, *Constitutional Malfunction: Does the FCC's Authority to Revoke a Broadcaster's License Violate the First Amendment?,* 13 COMM LAW CONSPECTUS 309 (2005).

Mehmet Konar-Steenberg, *The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine*, 8 VAND. J. ENT. & TECH. L. 45 (2005).

Lindsay LaVine, *Legislative Update: The Lion, the Witch (Hunt) and the Wardrobe Malfunction: Congress's Crackdown on Television Indecency*, 15 DEPAUL-LCA J. ART & ENT. L. 385 (2005).

Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148 (2010).

David Lee, *How Detailed of an Explanation is Required When an Administrative Agency Changes an Existing Policy? Implications and Analysis of FCC v. Fox Television Stations, Inc. on Administrative Law Making and Television Broadcasters*, 30 J. NAT'L ASS'N L. JUD. 681 (2010).

John W. Lees, *F.U.C.K.: FCC's Unlimited Censorship Keeps-Going; When Will This Shit End?*, 11 FL. COASTAL L. REV. 409 (2010).

Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992-93).

Lili Levi, *When Does Government Regulation Go Too Far? The FCC's Affirmative Speech Obligations Promoting Child Welfare*, 22 REGENT U.L. REV. 323 (2009).

Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. (2011).

Leonard W. Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767 (1985).

Jeremy H. Lipschultz, *Conceptual Problems of Broadcast Indecency Policy and Application*, COMM. & THE LAW 3-29 (1992).

Jeremy Harris Lipschultz, *The Influence of the United States Court of Appeals for the District of Columbia Circuit on Broadcast Indecency Policy*, 3 VILL. SPORTS & ENT. L.J. 65 (1996).

Donald E. Lively, *Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue*, 66 N.C. L. REV. 963 (1988).

Morgan J. Lynn, *Indecency, Pornography, and the Protection of Children*, 7 GEO. J. GENDER & L. 701 (2006).

James Mahanna, *United States v. Playboy Entertainment Group, Inc. A Controversy Resolved; Indecent Speech Receives Full First Amendment Protection*, 21 QUINNIPIAC L. REV. 453 (2002).

Jennifer L. Marino, More *"Filthy Words' But No "Free Passes" for the Cost of Doing Business: New Legislation is the Best Regulation for Broadcast Indecency*, 15 SETON HALL J. OF SPORTS & ENT. L. 135 (2005).

Francis Marsico III, *The Fate of Indecency? The Constitutional Issue Presented by Fox Television Stations, Inc. v. Federal Communications Commission*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1033 (2011).

Shilpa Mathew, *The Fear-Causing Commission and its Reign of Terror: Examining the Constitutionality of the FCC's Authority to Regulate Speech Under the First Amendment*, 26 LOY. L.A. ENT. L. REV. 107 (2005).

John Matosky, *Current Developments in the Law: Shea on Behalf of American Reporter v. Reno, Section 223(d) of the Communications Decency Act of 1996, a Total Ban on Constitutionally Protected Indecent Communication Among Adults, is Unconstitutionally Overbroad*, 6 B.U. PUB. INT. L.J. 812 (1997).

William Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L REV. 91 (1984).

Kate McSweeny, *Hijacking the First Amendment for Economic Gain: The Federal Communications Commission, the Consolidation of the Public Airwaves, and Smut: A Comment on the State of the Broadcast Industry*, 11 GEO. MASON L. REV. 609 (2003).

Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. CT. REV. (1961).

Jonathon A. Messier, *"Too legit to Quit": Free Speech Clause Protection for Frequency Hopping Spread Spectrum Broadcasters*, 9 PITT. J. TECH. L. & POL'Y 1 (2009).

Jon Mills, *The Due Process Clause of the Fifth Amendment Requires Fair Notice of What Violates Federal Agency's Indecency Standards. Fed. Commons Comm'n v. Fox Television Stations, Inc.,* 43 CUMB. L. REV. 573 (2012).

Samantha Mortlock, *What the [Expletive Deleted] is a Broadcaster to Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193 (2006).

Chad M. Muir, *Case Comment: Bleeping Expletives: Adequate Protection of the Public Or Unjustified Censorship*?, 21 U. FLA. J.L. & PUB. POL'Y 331 (2010).

Philip M. Napoli, *The Federal Communications Commission and Broadcast Policy-Making—1966-95: A Logistic Regression Analysis of Interest Group Influence*, 5 COMM. L. & POL'Y 203 (2000).

Alison Nemeth, *The FCC's Broadcast Indecency Policy on "Fleeting Expletives" After the Supreme Court's Latest Decision in FCC v. Fox Television Stations: Sustainable or Also "Fleeting?"*, 21 COMMLAW CONSPECTUS 394 (2013).

Melville B. Nimmer, *The Right to Speak Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968).

Steven Nudelman, *A Chilly Wait in Radioland: the FCC Forces "Indecent" Radio Broadcasters to Censor Themselves or Face the Music*, 2 J.L. & POL'Y 115 (1994).

John V. O'Grady, *The End of Indecency? The Second Circuit Invalidates the FCC's Indecency Policy in Fox Television Stations, Inc. v. FCC*, 18 VILL. SPORTS & ENT. L.J. 527 (2011).

Mira T. Ohm, SEX 24/7: *What's the Harm in Broadcast Indecency*?, 26 WOMEN'S RIGHTS L. REP. 167 (2005).

Richard Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited—What does the Future Hold for the Seven "Dirty" Words?,* 65 TUL. L. REV. 131 (1990).

Christine C. Peaslee, *Action for Children's Television v. FCC: Indecency Fines and the Broadcast Medium-When Subsequent Punishments Become Prior Restraints; A Subsequent Restraint Review*, 20 W. NEW ENG. L. REV. 241 (1998).

Robert W. Peters, *There is a Need to Regulate Indecency on the Internet,* 6 CORNELL J. L. & PUB. POL'Y 363 (1997).

James F.X. Petrich, *Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography*, 16 GEO. J. GENDER & L. 81 (2015).

Tara Phelan, *Selective Hearing: A Challenge to the FCC's Indecency Policy*, 12 N.Y.L. SCH. J. HUM. RTS. 347 (1995).

Gregory B. Phillips, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237 (2006).

Elizabeth A. Pike, *Indecency, A La Carte, and the FCC's Approval of the Sirius XM Satellite Radio Merger: How the FCC Indirectly Regulated Indecent Content on Satellite Radio at the Expense of the "Public Interest,"* 18 U. MIAMI BUS. L. REV. 221 (2010).

Viktor V. Pohorelsky, *Constitutional Law—First Amendment—FCC may Regulate Broadcast of Non-Obscene Speech,*53 TUL. L. REV. 273 (1978).

Emily Posner, *The War on Speech in the War on Terror: An Examination of the Espionage Act Applied to Modern First Amendment Doctrine*, 25 CARDOZO ARTS & ENT. L.J. 717 (2007).

L.A. Powe, Jr., *Red Lion and Pacifica: Are They Relics?*, 36 PEPP. L. REV. 445 (2009).

Courtney Livingston Quale, *Hear An [Expletive], There An [Expletive], But[t]...The Federal Communications Commission Will Not Let You Say An [Expletive]*, 45 WILLAMETTE L. REV. 207 (2008).

John C. Quale & Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite,* 60 FED. COMM. L.J. 37 (2007).

James H. Quello, *Special Issue on the Sixtieth Anniversary of the Communications Act of 1934: The Future of Broadcast Regulation*, 47 FED. COMM. L.J. 341 (1994).

Monique Redford, *The Indecency of Unsolicited Sexually Explicit Email: A Comment on the Protection of Free Speech v. The Protection of Children*, 26 SEATTLE U. L. REV. 125 (2002).

Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

Jeffrey L. Reed, *Recent Development: Constitutional Law—First Amendment Protected for Indecent Speech—Dial-a-Porn: Sable Communications of California, Inc. v. FCC*, 57 TENN. L. REV. 339 (1990).

Stephanie L. Reinhart, *The Dirty Words You Cannot Say on Television: does the First Amendment Prohibit Congress from Banning all use of Certain Words*?, U. ILL. L. REV. 989 (2005).

David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching For Answers*, 76 ALB. L. REV. 631 (2012/2013).

Jacob T. Rigney, *Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 FED. COMM. L.J. 297 (2003).

Milagros Rivera-Sanchez, *How Far Is Too Far? The Line Between "Offensive" and "Indecent" Speech*, 49 FED. COMM. L.J. 327 (1997).

Abigail T. Rom, *From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words You Can Never Say on Broadcast Television*, 44 VAL. U.L. REV. 705 (2010).

Brian J. Rooder, *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).

Brittany A. Roof, *The Federal Communication Commission's New Enforcement Policy, Which Penalizes Broadcasters for Airing Even a "Fleeting Expletive" in Violation of the Statutory Indecency Ban, Is Not Arbitrary and Capricious Under the Administrative Procedure Act: FCC v. Fox Television Stations, Inc.*, 48 DUQ. L. REV. 699 (Summer 2010).

Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look to Crackdown on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167 (2006).

Shelly Rosenfeld, *An Indecent Proposal? What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry*, 12 TEX. REV. ENT. & SPORTS L. 225 (2011).

Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech,* 53 VAND. L. REV. 427 (2000).

Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 COMM LAW CONSPECTUS 771 (2009).

Marie A. Ryan, *To V or Not to V-That is the Regulatory Question: The Role of the V-Chip in Government Regulation of Broadcast and Cable Indecency*, 4 CARDOZO WOMEN'S L.J. 137 (1997).

Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?,* 102 YALE L.J. 1209 (1993).

Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?,* 40 STETSON L. REV. 777 (2011).

Amy Kristin Sanders, *When is Enough Too Much? The Broadcast Decency Enforcement Act of 2005 and the Eighth Amendment's Prohibition on Excessive Fines*, 2 DUKE J. CONST. LAW & PUB. POL'Y 75 (2007).

Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

Matthew S. Schneider, *Silenced: the Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves is Monopolization*, 29 CARDOZO L. REV. 891 (2007).

Helene T. Schrier, *A Solution to Indecency on the Airwaves*, 41 FED. COMM. L.J. 69 (1988).

Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services,* 13 RICH. J.L. & TECH. 17 (2007).

Second Circuit Strikes Down the FCC's Indecency Policy as Void for Vagueness—Fox Television Stations, Inc. v. FCC, 613 F.3D 317 (2d Cir. 2010), 124 HARV. L. REV. 835 (2011).

Eric J. Segall, *In the Name of the Children: Government Regulation of Indecency on the Radio, Television, and the Internet-Let's Stop the Madness*, 47 U. LOUISVILLE L. REV. 697 (2008).

Stephen J. Shapiro, *One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, 8 MEDIA L. & POL'Y 1 (1999).

Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191(2006).

Sharokh Sheik, *FCC Indecency Violations: Should the FCC Be Able to Fine Non-Broadcast Licensees for Indecency Violations*?, 35 SW. U. L. REV. 457 (2006).

Khaldoun Shobaki, *Speech Restraints for Converged Media*, 52 UCLA L. REV. 333 (2004).

Eric S. Slater, *Broadcasting on the Internet: Legal Issues for Traditional and Internet-Only Broadcasters*, 6 MEDIA L. & POL'Y 25 (1997).

Kelly M. Slavitt, *Content-Based Regulation of Electronic Media: Indecent Speech on the Internet*, 21 J. MARSHALL J. COMPUTER & INFO. L. 19 (2002).

Jennifer Smith, *The Sixteenth Annual Frankel Lecture: Education Works! How Broadcast Fleeting Expletives Stimulate Comprehensive Sex Education for Our Youth,* 49 HOUS. L. REV. 161 (2012).

Josephine Soriano, *The Digital Transition and the First Amendment: Is it Time to Reevaluate Red Lion's Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341 (2006).

Faith Sparr, *From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMEND. L. REV. 207 (2005).

Andrew Sperry, *Smut In Space: The FCC And Free Speech On Satellite Radio,* 17 LOY. CONSUMER L. REV. 531 (2005).

Andrew Spett, *A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet*, 26 GOLDEN GATE U.L. REV. 599 (1996).

Elizabeth H. Steele, *Examining the FCC's Indecency Regulations in Light of Today's Technology*, 63 FED. COMM. L.J. 289 (2010).

Patricia R. Stembridge, *Adjusting Absolutism: Extending First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907 (2000).

John F. Stephens & Matthew G. Stein, *The Future of the FCC's New Indecency Policy*, 33 LOS ANGELES LAWYER 14 (2010).

Michael Strocko, *Just a Concern for Good Manners: The Second Circuit Strikes Down the FCC's Broadcast Indecency Regime*, 17 U. MIAMI BUS. L. REV. 155 (2008).

Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment,* 10 COMM. L. & POL'Y 179 (2005).

Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age,* 15 COMM LAW CONSPECTUS 431 (2007).

Hannibal Travis, *The FCC's New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417 (2011).

Albert W. Vanderlaan, *Sending a Message to the Other Branches: Why the Second and Third Circuits Properly Used the APA to Rule on Fleeting Expletives and How the New FCC Can Undo the Damage*, 34 VT. L. REV. 447 (2009).

Anthony E. Varona, *Not From Concentrate? Media Regulation at the Turn of the Millennium Symposium: Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149 (2006).

Haven G. Ward, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Law Chapter: Indecency, Pornography, and the Protection of Children*, 6 GEO. J. GENDER & L. 315 (2005).

Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1103 (1993).

Jonathan Weinberg, *Vagueness and Indecency* 3 VILL. SPORTS & ENT. L. FORUM 221 (1996).

Lindsay Weiss, *S!*t, P*@s, C*t, F*#k, C*@!s*&!er, M*!#$ *@!*#r, T*!s - The FCC's Crackdown on Indecency*, 28 J. NAT'L ASS'N L. JUD. 577 (2008).

G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391 (1992).

William Banks Wilhelm, Jr., *In the Interest of Children: Action for Children's Television v. FCC Improperly Delineating the Constitutional Limits of Broadcast Indecency Regulation*, 42 CATH. U.L. REV. 215 (1992).

Emily Vander Wilt, *Considering COPA: A Look at Congress's Second Attempt to Regulate Indecency on the Internet,* 11 VA. J. SOC. POL'Y & L. 373 (2004).

Laurence H. Winer, *The Red Lion of Cable, and Beyond?--Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT L.J. 1 (1997).

Laurence H. Winer, *The Signal Cable Sends, Interference From the Indecency Cases?,* 55 FORDHAM L. REV. 459 (1987).

William Arthur Wines & Mark E. Linebaugh, *Current Issues in Public Policy: an Analysis of the FCC's Ruling on Fleeting Profanities and Observations on the Road Ahead for the High Court*, 8 RUTGERS J.L. & PUB. POL'Y 73 (2010).

Susan Wing, *Morality and Broadcasting: FCC Control of 'Indecent' Material Following Pacifica*, 31 FED. COMM. L.J. 145 (1978).

Justin Winquist, *Arbitrary and F****** Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in Fox Television Stations, Inc.* v. FCC, 57 AM. U.L. REV. 723 (2008).

Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 VILL. SPORTS & ENT. L.J. 15 (1996).

Roxana Wizorek, *Children's Television: the FCC's Attempt to Educate America's Children May Force the Supreme Court to Reconsider the Red Lion Rationale*, 47 CATH. U.L. REV. 153 (1997).

Paige Connor Worsham, *So Easily Offended? A First Amendment Analysis of the FCC's Evolving Regulation of Broadcast Indecency and Standards for Our Contemporary Community*, 6 FIRST AMEND. L. REV. 378 (2008).

Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

MAGAZINES, PRINT MEDIA, AND TRADE PUBLICATIONS:

10 Fourth Estate Follies, ADVERTISING AGE, Dec. 20, 2004.

Ed Boland, *F.Y.I.*, N.Y. TIMES, Aug. 11, 2002, at 14-2.

Fred Bronson, *A Selected Chronology of Musical Controversy*, BILLBOARD, Mar. 26, 1994, at N36.

Editorial, *Dollars for Decency*, ROLLING STONE, Sept. 7, 1978, at 17.

James Endrst, *The Future of Television: It's All a Blur*, L.A. TIMES, July 3, 1998, at 32.

David Hinkley, *Infinity Pays FCC*, N.Y. DAILY NEWS, Nov. 9, 1995.

David Hinkley, *It Was Hardly a Coincidence that Infinity Anted Up to Uncle*, N. Y. DAILY NEWS, Sept. 14, 1995, at 102.

List, Moves it to 'Best' Ranking, ADVERTISING AGE, Aug. 28, 2006.

Jon Pareles, *Shock Jocks Shake Up Uncle Sam*, N.Y TIMES, Nov. 15, 1992, § 2 at 32.

Derek Rose, Foul (Mouth) Ball. - *S.I. Must Win Today After F-Bombshell Coach Was Ready To Swear Off Series Following League's Rebuke*, N.Y. DAILY NEWS, Aug. 22, 2006, at 2.

Amy Schatz, *Broadcasters Win Profanity Rulings; Appeals-Court Says Unscripted Expletives Don't Violate Standards*, WALL ST. J., June 5, 2007, at A3.

Todd Shields, *Censoring Private Ryan*, MEDIA WEEK, Nov. 15, 2004.

Tom Taylor, *Howard Stern Tests the FCC With His Own Indecency Complaints*, INSIDE RADIO, Mar.11, 1994, at 1.

Ira Teinowitz, *Ford Makes Leap from Bad Boy to Family Friend; PTC Takes Automaker off 'Worst-Advertiser.'*

<u>ONLINE SOURCES</u>:

9/11 Film Becomes an Indecency Test, L.A. TIMES, Sept. 4, 2006, *available at* http://articles.latimes.com/2006/sep/04/business/fi-cbs4

"ABC Accidentally Shows LeBron James' Penis During NBA Finals," VARIETY, June 11, 2015, *available at* http://variety.com/2015/film/news/abc-shows-lebron-james-penis-during-the-nba-finals-1201518247/

About the PTC, PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/blog/index.php/about-the-ptc/

Abrams v. United States, 250 U.S. 616 (1919), OYEZ, *available at* https://www.oyez.org/cases/1900-1940/250us616

*AFA Pledges Advertiser Boycott of ABC's Good Christian B*tches*, CHARISMA NEWS, Mar. 7, 2011, *available at* http://www.charismanews.com/us/36206-afa-pledges-advertiser-boycott-of-abcs-good-christian-btches

AFA Reinstates Ford Boycott Over Gay Advertising, MEDIALIFE MAGAZINE, Mar. 15, 2006, *available at* http://medialifemagazine.com/afa-reinstates-ford-boycott-over-gay-advertising/

AMERICAN DECENCY ASSOCIATION, *available at* http://www.americandecency.org

AMERICAN FAMILY ASSOCIATION, *available at* https://www.afa.net

AMERICA'S FOUNDING DOCUMENTS, NATIONAL ARCHIVES, *available at* https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-amendment-i

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FEDERAL COMMUNICATIONS COMMISSION, Jan. 17, 2017, *available at* https://www.fcc.gov/document/18th-annual-video-competition-report

Apologetic Jackson Says Costume Reveal Went Awry, CNN, Feb. 3, 2004, *available at* http://www.cnn.com/2004/US/02/02/superbowl.jackson/

ARCHIVE OF AMERICAN TELEVISION, *Interview with George Carlin*, Dec. 17, 2007, *available at* http://www.emmytvlegends.org/interviews/people/george-carlin#

Mo Barnes, *Racism, Murder, and Black Pain: The 2017 Riot Season is Here*, ROLLINGOUT, June 22, 2017, *available at* http://rollingout.com/2017/06/22/racism-murder-black-pain-2017-riot-season/

Stephen Battaglio, *Fox News Ratings Slip Among Older Viewers with Bill O'Reilly's Departure, But Advertisers Are Back*, L.A. TIMES, May 9, 2017, *available at* http://www.latimes.com/business/hollywood/la-fi-ct-fox-ratings-20170509-story.html

Benjamin K. Bergen academic profile, DEPARTMENT OF COGNITIVE SCIENCE, UNIVERSITY OF CALIFORNIA AT SAN DIEGO, *available at* http://www.cogsci.ucsd.edu/~bkbergen/

Best and Worst TV Shows, PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/ptc/publications/bw/welcome.asp

Biography of Michael K. Powell, FEDERAL COMMUNICATIONS COMMISSION, *available at* https://www.fcc.gov/biography-michael-k-powell

Jeffrey Layne Blevins, "*The Political Economy of U.S. Broadcast Ownership Regulation and Free Speech After the Telecommunications Act of 1996*," DEMOCRATIC COMMUNIQUE, *available at* http://journals.fcla.edu/demcom/article/view/79947

Greg Botelho, *Arab Spring Aftermath: Revolutions Give Way to Violence, More Unrest*, CNN, Mar. 28, 2015, *available at* http://www.cnn.com/2015/03/27/middleeast/arab-spring-aftermath/index.html

David Caplan & Morgan Winsor, *Man Shot During Anti-Trump Protest in Portland as Demonstrations Sweep Across US*, ABC NEWS, Nov. 12, 2016, *available at* http://abcnews.go.com/US/anti-trump-protests-continue-3rd-night-portland-experiences/story?id=43479936

CBS Stations Fearful of Airing 9/11 Documentary, TV TECHNOLOGY, Sept. 10, 2006, *available at* http://www.tvtechnology.com/news/0086/cbs-stations-fearful-of-airing-/-documentary/244908

Andrew Cohen, *The Most Powerful Dissent in American History*, THE ATLANTIC, Aug. 10, 2013, *available at*

https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/

COLLEGE OF LIBERAL ARTS AND SCIENCES, UNIVERSITY OF ILLINOIS AT CHAMPAIGN, *available at* http://www.communication.illinois.edu/people/bjwilson

Comments of the National Association of Broadcasters and the Radio Television Digital News Association, NATIONAL ASSOCIATION OF BROADCASTERS, July 28, 2015, *available at* www.nab.org/documents/newsRoom/pdfs/072815_WDBJ_indecency_comments.pdf

CONCERNED WOMEN FOR AMERICA, *available at* https://concernedwomen.org/
CONSTITUTION OF THE UNITED STATES, UNITED STATES GOVERNMENT PUBLISHING OFFICE, *available at* https://www.gpo.gov/fdsys/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf

Aaron Couch, *FCC Blesses Red Sox Player's F-Bomb: He 'Spoke From the Heart'*, HOLLYWOOD REPORTER, Apr. 20, 2013, *available at* http://www.hollywoodreporter.com/print/443391

DAVIS, WRIGHT, TREMAINE, LLP, *available at* http://www.dwt.com/people/robertcornrevere/

Dereliction of Duty: How the Federal Communications Commission Has Failed the Public, PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/PTC/publications/reports/fccwhitepaper/main.asp

John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines'*, CENTER FOR PUBLIC INTEGRITY, Apr. 9, 2004, *available at* https://www.publicintegrity.org/2004/04/09/6588/indecency-air

Melanie Eversley, Aamer Madhani, & Natalie DiBlasio, *Thousands Across the USA Protest Trump Victory*, USA TODAY, Nov. 9, 2016, *available at* https://www.usatoday.com/story/news/2016/11/09/anti-trump-protests-erupt-new-york-chicago/93570584/

Sarah Fallon, *Your Kids Will See Internet Porn. Deal With It. A Conversation With Peggy Orenstein*, WIRED, *available at* https://www.wired.com/2017/08/kids-and-porn/

FAMILY RESEARCH COUNCIL, *available at* http://www.frc.org

FCC Proposes Record $1.2 Million Indecency Fine Against Fox, WASH. POST, *available at* http://www.washingtonpost.com/wp-dyn/articles/A27857-2004Oct12.html

FCC Receives 106 Complaints on Madonna's Speech at Women's March, MORNING CONSULT, Feb. 20, 2017, *available at* https://morningconsult.com/2017/02/20/fcc-receives-106-complaints-madonnas-speech-womens-march/

FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (noting more than one million complaints); Seeks Comment on Adopting Egregious Cases Policy, FEDERAL COMMUNICATIONS COMMISSION, Apr. 1, 2013, *available at* https://www.fcc.gov/document/fcc-cuts-indecency-complaints-1-million-seeks-comment-policy

FCC v. Pacifica Foundation, OYEZ, *available at* https://www.oyez.org/cases/1977/77-528

FCC Won't Take Action Against Stephen Colbert Over Trump Jokes, WALL ST. J., May 23, 2017, *available at* https://www.wsj.com/articles/fcc-wont-take-action-against-stephen-colbert-over-trump-jokes-1495579574

Adam Feldman, EMPIRICAL SCOTUS, *Judge Gorsuch by the Numbers and Decisions*, Feb. 1, 2017, *available at* https://empiricalscotus.com/2017/02/01/judge-gorsuch-by-the-numbers-and-decisions/

File an Official Indecency Complaint with the FCC, PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/main/Action/ContactFCC.aspx

FOCUS ON THE FAMILY, *available at* http://www.focusonthefamily.com

Cork Gaines, *The Chairman of The FCC Is Okay with David Ortiz Dropping An F-Bomb During Saturday's Red Sox Ceremony*, BUSINESS INSIDER, Apr. 22, 2013, *available at* http://www.businessinsider.com/fcc-david-ortiz-red-sox-ceremony-2013-4

Glenn Garvin, *Bozell Army Channels Energy into Decency Fight*, CHI. TRIB., July 4, 2005, *available at* http://articles.chicagotribune.com/2005-07-04/features/0507040074_1_newsletters-and-press-releases-decency-fcc

Rachel Gries, *Supreme Court Appointments Vital to Future of American Law*, COLLEGIATE TIMES, Sept. 17, 2016, *available at* http://www.collegiatetimes.com/opinion/supreme-court-appointments-vital-to-future-of-american-law/article_e74435d8-7847-11e6-9802-077b770117ad.html

Yoel Guzansky & Benedetta Berti, *The Arab Spring's Violent Turn*, THE NATIONAL INTEREST, Dec. 15, 2011, *available at* http://nationalinterest.org/commentary/the-arab-springs-violent-turn-6254

Spencer Hall & Matt Brown, *Actual FCC complaints from People Who Saw LeBron James' Penis on TV*, SBNATION, July 14, 2015, *available at* https://www.sbnation.com/nba/2015/7/14/8962625/lebron-james-fcc-complaints

Julian Hattem, *Feds Fine TV Station $325K for Nudity*, THE HILL, Mar. 23, 2015, *available at* http://thehill.com/policy/technology/236660-feds-fine-tv-station-for-nudity-for-first-time-in-7-years

John Hendel, *Trump 'Shithole' Coverage Prompted More Than 160 Indecency Complaints*, POLITICO, Apr. 3, 2018, *available at* https://www.politico.com/story/2018/04/03/trump-shithole-media-coverage-indecency-complaints-454928

History of Equal Protection and the Levels of Review, NATIONAL PARALEGAL, *available at* https://nationalparalegal.edu/conLawCrimProc_Public/EqualProtection/HistoryOfEqualProtection.asp

Robert Hof, *Online Ad Revenues Blow Past Broadcast TV, Thanks To Mobile and Video,* FORBES, Apr. 10, 2014, *available at* https://www.forbes.com/sites/roberthof/2014/04/10/online-ad-revenues-blow-past-broadcast-tv-thanks-to-mobile-and-video/#72fa59473fc6

Peter Holley, *Race Riots, Terrorist Attacks and Martial Law: Oath Keepers Warn of Post-Election Chaos,* WASH. POST, Nov. 8, 2016, *available at* https://www.washingtonpost.com/news/post-nation/wp/2016/11/08/race-riots-terror-attacks-and-martial-law-oath-keepers-warn-of-post-election-chaos/?utm_term=.0df035601b86

How and Why Howard Stern's TV Show Failed, PARENTS TELEVISION COUNCIL, Sept. 22, 1999, *available at* http://www.parentstv.org/ptc/publications/reports/sternreport/main.asp

Howard Stern Signs New Five-Year Deal with SiriusXM; Satellite Radio Service to Launch First Venture into Video Programming with Mr. Stern, WALL ST. J., Dec. 15, 2015, *available at* https://www.wsj.com/articles/howard-stern-signs-new-five-year-deal-with-siriusxm-1450189126

Mark Huffman, *Satellite TV Gaines on Cable: Bundled Digital Cable Services Increasingly Popular*, CONSUMERAFFAIRS.COM, Aug. 16, 2006, *available at* https://www.consumeraffairs.com/news04/2006/08/cable_satellite.html

Joe Hyrkin, *Audiences No Longer Care About Platforms. The Content Creator is 'King.',* RECODE, Mar. 1, 2017, *available at* https://www.recode.net/2017/3/1/14752020/new-media-distribution-content-creator-sweet-paul-axios-cheddar

In re Applications of WSKQ Licensing, Inc., *Commission Adopts Consent Decree with WSKQ Licensing, Inc., Licensee of WSKQ-FM, New York, New York*, FEDERAL COMMUNICATIONS COMMISSION, Apr. 5, 2017, *available at* https://www.fcc.gov/document/commission-adopts-consent-decree-wskq-licensing-inc

INTERNET AND WORLD STATS, *available at* http://www.internetworldstats.com/am/us.htm

In the Matter of Modernization of Media Regulation Initiative, FEDERAL COMMUNICATIONS COMMISSION, MB Docket No 17-105, July 5, 2017, *available at* https://www.fcc.gov/document/media-bureau-open-mb-docket-no-17-105

In the Matter of WDBJ Television, Inc., *Opposition of WDBJ Television, Inc., to Notice of Apparent Liability,* RADIO TELEVISION DIGITAL NEWS ASSOCIATION, June 30, 2015, *available at* https://rtdna.org/uploads/files/WDBJ%20Opposition%20to%20NAL%2006_30_15.pdf

Jeff Jarvis, *A BUZZMACHINE EXCLUSIVE! The Shocking Truth About the FCC: Censorship by the Tyranny of the Few,* BUZZMACHINE, Nov. 15, 2004, *available at* http://www.buzzmachine.com/archives/2004_11_15.html

Timothy Jay & Kristin Janschewitz, *The Science of Swearing,* ASSOCIATION FOR PSYCHOLOGICAL SCIENCE, May/June 2012, *available at* http://www.psychologicalscience.org/observer/the-science-of-swearing#.WW2ImMaZNE5

Timothy Jay, *The Internet has Changed How We Curse*, WASH. POST, June 24, 2014, *available at* https://www.washingtonpost.com/posteverything/wp/2014/06/23/the-internet-has-changed-how-we-curse/?utm_term=.501d3281f42c

John Peter Zenger Trial (1735), FAMOUS TRIALS, *available at* http://www.famous-trials.com/zenger

Ted Johnson, *FCC Slaps Virginia TV Station With $325,000 Indecency Fine,* VARIETY, Mar. 23, 2015, *available at* http://variety.com/2015/biz/news/fcc-slaps-virginia-tv-station-with-325000-indecency-fine-1201458034/

Cecilia Kang, *FCC Repeals Net Neutrality Rules*, N.Y. TIMES, Dec. 14, 2017, *available at* https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html

"LeBron's Exposed Penis Triggered FCC Complaints 'It Ruined My Tinder Date'", TMZ, July 26, 2015, *available at* http://www.tmz.com/2015/07/26/lebron-james-exposed-penis-triggered-fcc-complaints-it-ruined-my-tinder-date/

Hilary Lewis, *Parents Group Calls LeBron James' Penis Flash "Much Ado About Nothing"*, HOLLYWOOD REPORTER, June 12, 2015, *available at* http://www.hollywoodreporter.com/news/lebron-james-penis-nba-finals-802148

Douglas Linder, *The Trial of John Peter Zenger: An Account*, SSRN, *available at* http://ssrn.com/abstract=1021258

MARIST COLLEGE Internet website, *available at* http://www.marist.edu/sbs/facviewer.html?uid=357

MASSACHUSETTS COLLEGE OF LIBERAL ARTS Internet website, *available at* http://www.mcla.edu/Academics/undergraduate/psychology/faculty/timothy jay/index

John D. McKinnon, *FCC Votes to Dismantle Net-Neutrality Rules*, WALL ST. J., Dec. 14, 2017, *available at* https://www.wsj.com/articles/fcc-readies-unwinding-of-net-neutrality-regime 1513247401?mod=djem_jiewr_BL_domainid

MEDIA REVENUE MODELS, PEW RESEARCH CENTER, *available at* http://www.pewresearch.org/topics/media-revenue-models/

Ari Meltzer, *A "Speaking From the Heart" Exception to Indecency?,* WILEY REIN, LLP, Apr. 24, 2013, *available at* http://www.wileyonmedia.com/2013/04/a-speaking-from-the-heart-exception-to-indecency/

Justin Mitchell and Andy Sullivan, *U.S. Militia Girds for Trouble as Presidential Election Nears*, REUTERS, Nov. 2, 2016, *available at* http://www.reuters.com/article/us-usa-election-militia-idUSKBN12X11R

MORNING CONSULT, *available at* https://morningconsult.com/wp-content/uploads/2017/02/2017-303-NasrMadonna-Final-Docs_Redacted.pdf

Must See the TV: FCC Complaints, MUCKROCK, *available at* https://www.muckrock.com/project/must-seethe-tv-fcc-complaints-19/

NATIONAL CENTER ON SEXUAL EXPLOITATION, *available at* http://endsexualexploitation.org/

"NBA Finals: ABC Accidentally Flashes LeBron James' Penis," HOLLYWOOD REPORTER, June 11, 2015, *available at* http://www.hollywoodreporter.com/news/nba-finals-abc-accidentally-flashes-802084

Obscene, Indecent and Profane Broadcasts, FEDERAL COMMUNICATIONS COMMISSION, *available at* http://www.fcc.gov/guides/obscenity-indecency-and-profanity

Kelly Oliver, *PTC Statement on LeBron James Controversy*, PARENTS TELEVISION COUNCIL, June 12, 2015, *available at* http://w2.parentstv.org/Main/News/Detail.aspx?docID=3268

Nick O'Malley, *F-Bomb Fallout: Viewer Complaints to the FCC Over David Ortiz's Foul Language Following Marathon Bombings*, MASSLIVE, July 5, 2013, *available at* http://www.masslive.com/redsox/index.ssf/2013/07/f-bomb_fallout_viewer_complain.html

PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/PTC/faqs/main.asp

PARENTS TELEVISION COUNCIL'S INDECENCY CAMPAIGN information, *available at* http://w2.parentstv.org/main/Campaigns/Indecency.aspx

Ashley Parker & Nick Corasaniti, *Some Voters Warn of Revolution if Hillary Clinton Wins*, N.Y. TIMES, Oct. 27, 2016, *available at* https://www.nytimes.com/2016/10/28/us/politics/donald-trump-voters.html

Bhanodai Pippala, *Levels of Scrutiny in the Equal Protection Clause*, ODYSSEY, Nov. 21, 2016, *available at* https://www.theodysseyonline.com/equal-protection-levels-scrutiny

Poll: Janet's Revelation No Crime, CBS NEWS, Feb. 2, 2004, *available at* http://www.cbsnews.com/stories/2004/02/02/entertainment/main597184.shtml

Zach Pontz, *More Turning to Web to Watch TV, Movies*, CNNTECH, Feb. 6, 2009, *available at* http://www.cnn.com/2009/TECH/02/06/internet.tv/index.html

PTC Finds Increase in Harsh Profanity on TV, PARENTS TELEVISION COUNCIL, Oct. 29, 2008, *available at* http://www.parentstv.org/PTC/news/release/2008/1029.asp

PTC Releases Annual Ranking of Best and Worst TV Sponsors, PARENTS TELEVISION COUNCIL, Nov. 19, 2012, *available at* http://www.parentstv.org/PTC/news/release/2012/1119.asp

PTC Urges Indecency Inquiry On 'The Mick', TVNEWSCHECK, Apr. 28, 2017, *available at* http://www.tvnewscheck.com/article/103656/ptc-urges-indecency-inquiry-on-the-mick

Jessica Rawden, *Read The FCC Complaints About ABC Accidentally Showing LeBron James' Penis*, CINEMABLEND, *available at* http://www.cinemablend.com/television/Read-FCC-Complaints-About-ABC-Accidentally-Showing-LeBron-James-Penis-73907.html

Darcel Rockett, *Kids Are Seeing Porn Sooner Than Adults Think, Which Can Turn Addictive*, CHI. TRIB., Apr. 2, 2018, *available at* http://www.chicagotribune.com/lifestyles/parenting/sc-fam-porn-addiction-in-youth-0417-story.html

Paul Rodriguez, *Broadcast, Cable…What's the Difference?,* THE INTERNET AND TELEVISION ASSOCIATION, Nov. 12, 2008, *available at* https://www.ncta.com/platform/cable-programming/broadcast-cable-whats-the-difference/

Oliver Roeder, *Clinton And Trump Are Both Promising An Extreme Supreme Court*, FIVETHIRTYEIGHT, Aug. 1, 2016, *available at* https://fivethirtyeight.com/features/clinton-and-trump-are-both-promising-an-extreme-supreme-court/

Feliz Solomon, *Trump Praises 'Passion' of Demonstrators After Second Night of Protests*, TIME, Nov. 11, 2017, *available at* http://time.com/4567403/anti-donald-trump-protests-civil-rights/

Statement of FCC Chair Kevin Martin on Second Circuit Court of Appeals Indecency Decision, FEDERAL COMMUNICATIONS COMMISSION, June 4, 2007, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf.

STATISTICA, *available at* https://www.statista.com/statistics/467842/pay-tv-penetration-rate-usa/

Katy Steinmetz, *Swearing Is Scientifically Proven to Help You *%$!ing Deal*, TIME, Dec. 15, 2016, *available at* http://time.com/4602680/profanity-research-why-we-swear/

The Arab Spring: Five Years On: Protesters Took to the Streets Across the Arab World in 2011, Pushing Their Leaders to End Decades of Oppression, AMNESTY, *available at* https://www.amnesty.org/en/latest/campaigns/2016/01/arab-spring-five-years-on/

The Best of George Carlin, YOUTUBE, *available at* https://www.youtube.com/watch?v=Hy-sVByUHqE

The Business of Broadcasting, TVNEWSCHECK, Apr. 28, 2017, *available at* http://www.tvnewscheck.com/article/103656/ptc-urges-indecency-inquiry-on-the-mick

THE CONSTITUTION, THE WHITE HOUSE, *available at* https://www.whitehouse.gov/1600/constitution

THE FREE EXPRESSION POLICY PROJECT, *available at* http://www.fepproject.org

THE INTERNET AND TELEVISION ASSOCIATION, *available at* https://www.ncta.com/data-stats

The Nielsen Company's Guide to Super Bowl XLIII, THE NIELSEN COMPANY, Jan. 23, 2009, *available at* http://www.nielsen.com/us/en/press-room/2009/the-nielsen-company01.html

PARENTS TELEVISION COUNCIL, *available at* http://www.parentstv.org/PTC/aboutus/main.asp

THE ROLLING STONES, THE OFFICIAL ED SULLIVAN SITE, *available at* http://www.edsullivan.com/artists/the-rolling-stones

The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed, FEDERAL COMMUNICATIONS COMMISSION, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf

The Singer Inserted a Few Expletives into Her Remarks at the D.C. Protest, Adding "Yes I Have Thought an Awful Lot About Blowing Up the White House.", HOLLYWOOD REPORTER, Jan. 21, 2017, *available at* http://www.hollywoodreporter.com/news/madonna-drops-three-f-bombs-cnn-msnbc-live-coverage-womens-march-966944

THE UNIVERSITY OF ARIZONA, COLLEGE OF SOCIAL AND BEHAVIORAL SCIENCES, *available at* https://comm.arizona.edu/user/ed-donnerstein

Jeffrey Toobin, *Clarence Thomas Has His Own Constitution*, THE NEW YORKER, June 30, 2016, *available at* https://www.newyorker.com/news/daily-comment/clarence-thomas-has-his-own-constitution

UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR, *available at* https://www.bls.gov/data/inflation_calculator.htm

U.S. Agency Will Not Take Action Against CBS' 'Colbert' Show, REUTERS, May 23, 2017, *available at* http://www.reuters.com/article/us-usa-fcc-cbs-corp-idUSKBN18J32S

U.S. INFLATION CALCULATOR, *available at* http://www.usinflationcalculator.com/

U.S. ONLINE AND TRADITIONAL MEDIA ADVERTISING OUTLOOK, 2016-2020, MARKETING CHARTS, June 14, 2016, *available at* https://www.marketingcharts.com/featured-68214

UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, DEPARTMENT OF COMMUNICATION, *available at* http://www.comm.ucsb.edu/people/daniel-linz

WBAI-FM, *available at* https://www.wbai.org/listen.php

What Could Gorsuch Mean for the Supreme Court? 13 Top Legal Scholars Weigh In, POLITICO, Feb. 1, 2017, *available at* https://www.politico.com/magazine/story/2017/02/neil-gorsuch-supreme-court-future-214724

What's on TV Tonight?, PARENTS TELEVISION COUNCIL, *available at* http://w2.parentstv.org/main/Toolkit/FamilyGuide.aspx

Carol J. Williams, *Where the Arab Spring Revolutions Went Wrong*, L.A. TIMES, Oct. 9, 2015, *available at* http://beta.latimes.com/world/middleeast/la-fg-arab-spring-recap-hml-20151009-htmlstory.html

AJ Willingham, *The First Amendment Doesn't Guarantee You the Rights You Think It Does*, CNN POLITICS, Apr. 27, 2017, *available at* http://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html

Writing a Literature Review, Feb. 17, 2005, *available at* https://s3.amazonaws.com/educ599/toolbox_resources/literature_review.pdf (last visited Nov. 3, 2017)

Richard Zoglin, *Shock Jock*: *Howard Stern is Shaking Up Radio—and the FCC—With His Raunchy, Racist, In-Your-Face Talk, But Listeners Seem to Love It*, TIME, Nov. 30, 1992, *available at* http://content.time.com/time/magazine/article/0,9171,977117,00.html

BIOGRAPHICAL SKETCH OF VITA

DAVID J. WEINERT

David J. Weinert is a student and scholar of the First Amendment and communication/media law, and eminent major-market radio on-air talent and voice-over artist. With more than 17 years of faculty experience at the university level, Weinert's academic research, published in law review journals, focuses on First Amendment issues, free speech, and Federal Communications Commission regulation of radio and television broadcast content. Along with 125 total courses taught, proven teaching effectiveness at four different universities (including special recognition by the Penn State-University Park President for teaching excellence), his university and academic department service successes include helping revise academic department curriculum, implementation of new courses, student recruitment, spearheading a new internship program for students, research, installation and integration of new state-of-the-art Pro Tools audio and Avid video nonlinear editing labs, fiscal budget management, online teaching, service on new tenure-stream search committees, consulting for local print media, and service to the profession. Weinert is a member of the AAUP, ABA Forum on Communications Law, AEJMC Law and Policy Division, BEA Law and Policy Division, FCBA, and Media Law Resource Center. In addition, he has more than 12 years of commercial radio broadcasting experience. His private sector achievements include hosting daily full-time radio shows in Los Angeles and Detroit, launching marketing and promotional campaigns, thousands of public appearances and presentations, working with community organizations and constituents, managing employees, multiplying audience size, increasing revenue streams, and adhering to fiscal budgets.