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

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I. INTRODUCTION

Just one week before rendering its controversial landmark decision on the Patient Protection and Affordable Care Act[1]—arguably the most anticipated ruling of the October 2011 Term—the U.S. Supreme Court sidestepped the longstanding question of whether the First Amendment, given today's multifaceted media landscape, no longer permits the Federal Communications Commission to regulate broadcast indecency on the nation's airwaves. The Court's narrow ruling in *FCC v. Fox Television Stations, Inc.*[2] ("*Fox II*") let broadcasters off the hook for the specific on-air transgressions that brought the case to the Court's docket—twice[3]—but did little to resolve the larger looming issue of whether such content regulations have become obsolete.

Justice Anthony Kennedy, writing for a unanimous Court, instead concluded that "[t]he Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent."[4] As a result of this lack of notice, "the Commission's standards as applied

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[1] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593, 2598 (2012) (upholding the national healthcare law's mandate that individuals purchase medical insurance as within Congress's "Power To lay and collect Taxes") (quoting U.S. CONST. art. I, § 8, cl. 1).

[2] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) ("*Fox II*") (adjudicating the case on Due Process Clause grounds and not addressing the First Amendment challenge).

[3] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 509–10, 517 (2009) ("*Fox I*") (finding that the Commission's sudden change in enforcement policy on fleeting expletives was not arbitrary and capricious under the Administrative Procedure Act).

[4] *Fox II*, 132 S. Ct. at 2320.

to these broadcasts were vague, and the Commission's orders must be set aside."[5] The Court specifically declined to rule on the constitutionality of the Commission's indecency regulations, noting that "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."[6]

The broadcasters argued that the indecency regulations no longer made sense because other forms of technology have undercut the traditional rationale, articulated in the 1978 case of *FCC v. Pacifica Foundation*,[7] that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[8] In their brief to the Court, they asserted that "[b]roadcasting is not *uniquely* pervasive because Americans today spend more time engaged with cable and satellite television, the internet, video games, and other media than they do with broadcast media. Nor is broadcasting *uniquely* accessible to children because other media are no less accessible than broadcasting."[9] The latter point was also in reference to the *Pacifica* Court's concern that radio and television was so easily in reach of minors that exposure to indecent language "could have enlarged a child's vocabulary in an instant."[10]

Initially, proponents on both sides of the issue claimed victory. Tim Winter, president of the media watchdog group Parents Television Council, stated that "[o]nce again, the Supreme Court has ruled against the networks in their years-long campaign to obliterate broadcast decency standards."[11] Similarly, Family Research Council President Tony Perkins released a statement saying that

> [t]oday, the U.S. Supreme Court gave the FCC the green light to continue imposing indecency fines on the networks for fleeting expletives and brief nudity. When a similar case goes before the Supreme Court again for fines imposed for any future violations, we expect the Court to once again

[5] *Id.*

[6] *Id.* (emphasis added).

[7] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[8] *Id.* at 748.

[9] Brief of Respondents Fox Television Stations, Inc.; NBCUniversal Media, LLC; CBS Broad. Inc.; & FBC Television Affiliates Ass'n at 13, *Fox II*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 U.S. S. Ct. Briefs LEXIS 1783, at *30.

[10] *Pacifica*, 438 U.S. at 749.

[11] Robert Barnes, *High Court Sidesteps Free-Speech Question*, WASH. POST, June 22, 2012, at A11 (observing that "[g]roups that have urged the FCC to take an even stronger role in monitoring what they say is a coursening [sic] of the broadcast networks were pleased that the commission's role was not diminished.") (internal quotation marks omitted).

> decide that fleeting expletives and brief nudity are not protected under the First Amendment.[12]

Meanwhile, Steven Shapiro, legal director for the American Civil Liberties Union,[13] had a different interpretation—one more favorable to broadcasters. To that end, he observed that

> [a]lthough today's decision is a narrow one, the indecency regime is now on life support. Speaking unanimously, the Court made clear that it will not uphold an indecency rule that fails to give broadcasters clear notice of what is allowed and what is prohibited. The FCC's track record in enforcing the indecency rule makes clear that it cannot provide the clarity that the Court and the Constitution demand.[14]

In the days immediately following the release of the Court's opinion, a torrent of criticism appeared in the press,[15] signaling that the decision, a decade in the making,[16] clarified very little with respect to what broadcasters could legally air on broadcast radio and television.[17] After examining the decision and the political environment in which it was rendered, the *New York Times* concluded about the Court's opinion:

> All of which leaves broadcasters with little real grasp of what is allowed and what is not. Similarly, the public has no idea what to expect; the next time Cher appears on a live awards show, should adult viewers cover the ears of their 8-year-olds, or can they depend on the broadcasters to censor indecent content?[18]

Robert Lloyd, television critic for the *Los Angeles Times*, similarly observed that

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[12] Stoyan Zaimov, *ABC, Fox Escape Penalties for Airing 'Fleeting Expletives' and Brief Nudity,* CHRISTIAN POST REPORTER (June 22, 2012, 4:24 PM), http://www.christianpost.com/news/abc-fox-escape-penalties-for-airing-fleeting-expletives-and-brief-nudity-77106 (internal quotation marks omitted).

[13] *Leadership*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/leader/steven-r-shapiro (last visited Dec. 23, 2012).

[14] *ACLU Responds to Decision in FCC v. Fox*, AM. CIVIL LIBERTIES UNION (June 21, 2012), http://www.aclu.org/free-speech/aclu-responds-decision-fcc-v-fox.

[15] *See infra* notes 16, 18–20.

[16] *See* Editorial, *Void for Vagueness*, N.Y. TIMES, June 22, 2012, at A24 ("The case involved a 2002 Fox broadcast when the singer Cher used an expletive in an unscripted acceptance speech at an awards show and a 2003 Fox broadcast when the celebrity Nicole Richie used expletives while presenting an award. The ABC broadcast at issue was a 2003 'NYPD Blue' episode that showed a woman's backside for about seven seconds.").

[17] *See infra* notes 18–20.

[18] Edward Wyatt, *Can You Say That on TV? Broadcasters Aren't Sure*, N.Y. TIMES, June 22, 2012, at B6 ("Part of the uncertainty over what happens next stems from the fact that court cases outlast political appointees.").

> the court, deciding the case on grounds of due process rather than free speech, declined to take up the constitutionality of the regulations; rather, it affirmed the FCC's right to keep writing them, and the broadcasters' right to challenge them: We will meet here again, the justices as good as said.[19]

First Amendment attorney Paul Smith—who wrote the National Association of Broadcasters' brief—agreed with that sentiment, commenting that "[t]he issue will be raised again as broadcasters will continue to . . . grapple with the FCC's vague and inconsistent enforcement regime."[20]

Thus, more than a decade after Cher crudely uttered her thoughts about her critics on live television, neither broadcasters nor the viewing public is any closer to understanding what language today is permissible in the broadcast media. The Supreme Court has invited the FCC to "modify its current indecency policy in light of its determination of the public interest and applicable legal requirements."[21] But the Court also recognized that the issue will not end there, for the opinion "leaves the courts free to review the current policy or any modified policy in light of its content and application."[22]

This article provides an in-depth analysis of the legal hurdles the Federal Communications Commission will face in attempting to construct any modified policy governing broadcast indecency. Part I describes the history of broadcast indecency regulations and how the current policy fell short in attempting to sanction broadcasters for fleeting expletives on live television.[23] Part II examines the judicial path of *Fox I* and *II* and demonstrates how the Supreme Court's decision-making in both cases failed to provide any guidance to either broadcasters or the Commission.[24] Part III discusses the insurmountable First Amendment considerations that will plague the FCC's attempt to reconstruct broadcast indecency regulations, including the current exceptions that swallow the rationale for the regulations, and the dramatically changed media landscape that

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[19] Robert Lloyd, *Self-Interest Still Wins Out; After Supreme Court Ruling, the FCC and Networks will Proceed with Business as Usual*, L.A. TIMES, June 26, 2012, at D4 (opining that "[t]he FCC needs to straighten its own house, but that the industry can be left to police itself, as the National Assn. of Broadcasters would prefer, seems whimsical at best").

[20] Barnes, *supra* note 11, at A11 (internal quotation marks omitted).

[21] *Fox II*, 132 S. Ct. 2307, 2320 (2012).

[22] *Id.*

[23] *See infra* Part I.

[24] *See infra* Part II.

render them futile.[25] Finally, the article concludes that indecency regulations simply do not make sense in today's multi-platform media environment.[26]

I. FROM MAE WEST AND GEORGE CARLIN TO CHER, BONO AND NICOLE RICHIE: A BRIEF CHRONICLE OF BROADCAST INDECENCY

Much has happened since the Federal Communications Commission reprimanded Mae West for a sex-laden, on-air colloquy about Adam and Eve, while promoting one of her motion pictures on NBC Radio in the late 1930s.[27] Elvis Presley, not long after, came under fire for his swiveling hips[28]—tame by today's television standards—and the Rolling Stones changed a song title in an effort to appease television executives and cultural standards at the time.[29] Moreover, WDKD in Kingstree, South Carolina, in the late 1950s, received unwanted FCC attention for double entendres aired on the *Charlie Walker Show*, ultimately galvanizing a license revocation action.[30] These incidents illustrate the early stages of Commission enforcement for broadcast content and provide a contextual path for the timeline of broadcast indecency regulation and governmental oversight outlined in this section.[31]

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[25] *See infra* Part III.

[26] *See infra* Part IV.

[27] *See* Steve Craig, *Out of Eden: The Legion of Decency, the FCC, and Mae West's 1937 Appearance on* The Chase & Sanborn Hour, 13 J. RADIO STUD. 232, 232, 234 (2006) (describing the colloquy and including a short excerpt from it).

[28] *See* Ed Boland, Jr., *Elvis, However Briefly*, N.Y. TIMES, Aug. 11, 2002, at CY-2; *Elvis Presley*, ED SULLIVAN SHOW, http://www.edsullivan.com/artists/elvis-presley (last visited Dec. 23, 2012) (noting the public outrage and controversy arising from Elvis's dance moves); Alex McRae, Op-Ed., *Spring Fever*, TIMES HERALD (Mar. 25, 2012), http://www.times-herald.com/opinion/alexmcraecolumn (indicating television shows refused to point cameras below Elvis Presley's waist).

[29] *See* Fred Bronson, *A Selected Chronology of Musical Controversy*, BILLBOARD, Mar. 26, 1994, at N36, N36, N41.

[30] *See generally In re* Applications of E.G. Robinson, Jr., 33 F.C.C. 250, 258–59 (1962) (denying WDKD's application for renewal of license because it would not serve the public interest); *In re* Applications of E. G. Robinson, Jr., 33 F.C.C. 265, 308 (1961) (denying WDKD's application for renewal of license); F. Leslie Smith, *The Charlie Walker Case*, 23 J. BROAD. 137, 148 (1979) (noting the decision to revoke the license largely pivoted on the licensees apparent lack of candor in response to the FCC's inquiry).

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

A. The 1960s: Pacifica Foundation Makes Waves and the Governmental Protection of Speech

Whereas most broadcast media historians and media law scholars would immediately recall the indelible connection between the George Carlin "seven dirty words" case[32] and licensee Pacifica Foundation; troubled waters between Pacifica and the FCC began long before that.[33] Specifically, in 1964, the Commission responded to complaints about numerous broadcasts, all emanating from Pacifica-owned radio stations.[34] The complainants noted problems with broadcasts, labeling them as "offensive [and] 'filthy,'"[35] that involved 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 Creeley dubbed, "Ballad of the Despairing Husband."[36] Much to the lament of twenty-first century media law scholars, in light of current FCC policy and approach to broadcast content, the Commission fully supported Pacifica Foundation and advocated for the strongest First Amendment and free speech protection by observing that

> [w]e 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 TV 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 of freedom of speech and freedom of expression for the people of the Nation as a whole."[37]

Similarly, in the years that followed, the Commission again received complaints about broadcast content on Pacifica-owned

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[32] *See infra* notes 55–60.

[33] *See In re* Applications of Pacifica Found. for Initial License of Station KPFK and Renewal of Licenses of Stations KPFA-FM and KPFB, 36 F.C.C. 147, 147 (1964).

[34] *Id.* at 147–48.

[35] *Id.* at 148.

[36] *Id.* at 147 (internal quotation marks omitted).

[37] *Id.* at 149 (citation omitted).

radio stations.[38] Listeners characterized the programming as "disgusting and totally without redeeming qualities," and "full of filth and four-letter words."[39] Despite such stern criticism, consistent with its approach years earlier, the FCC again ruled in favor of licensee Pacifica Foundation thereby advocating for broadcast freedom of speech.[40]

B. The 1970s: Pacifica Foundation Awakens a Sleeping Giant and a New Direction in Government Broadcast Enforcement is Born

Unlike in earlier years, fueled by a Commission direction that embraced licensees' First Amendment freedoms, the early 1970s marked the beginning of a vast change in FCC oversight and analysis of broadcast content.[41] Notable was the WUHY-FM Philadelphia broadcast interview with guitarist and cult rock group leader of the Grateful Dead, Jerry Garcia.[42] The interview, while discussing music, politics, and philosophy, was peppered with numerous expletives (e.g., "fuck" and "shit") resulting in listener complaints and an FCC forfeiture of $100.[43] The Commission, seeking formal judicial review of its fine, was made to wait as the non-profit Philadelphia station decided to pay, and instead, avert any court proceedings.[44] Not long thereafter, however, the FCC got its chance to test its approach and indecency regime.

A radio-programming format labeled "topless radio" soon was being heard on various radio stations across the country including WGLD-FM in Oak Park, Illinois.[45] The show, *Femme Forum,* involved radio hosts that discussed sex and intimate sexual acts with callers to the program.[46] Differing from its approach with the

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[38] *In re* Applications of Pacifica Found., 16 F.C.C.2d 712, 713 (1969).

[39] *Id.* (internal quotation marks omitted).

[40] *Id.*

[41] *See In re* Application of Jack Straw Mem'l Found. for Renewal of License of Radio Station KRAB-FM, 21 F.C.C.2d 833, 833, 834 (1970). The FCC received complaints about content broadcast on KRAB-FM Seattle. *Id.* at 833. Instead of responding with rhetoric, the Commission put KRAB-FM on notice with a one-year renewal. *Id.* at 834. While KRAB-FM was able to eventually secure a full license renewal, the FCC made clear that it would no longer provide a free pass for alleged indecent broadcast content. *See* Application of the Jack Straw Mem'l Found. for Renewal of the License of Station KRAB-FM, 29 F.C.C.2d 334, 355–56 (1971).

[42] *In re* WUHY-FM, E. Educ. Radio, 24 F.C.C.2d 408, 408 (1970).

[43] *Id.* at 409, 416.

[44] T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 225 (6th ed. 2003).

[45] *In re* Sonderling Broad. Corp., 41 F.C.C.2d 777, 778–79 (1973).

[46] *In re* Apparent Liab. of Station WGLD-FM, 41 F.C.C.2d 919, 920 (1973). "The February 21 program dealt with the topic of 'How do you keep your sex life alive?' and some callers

Pacifica Foundation in the 1960s' actions noted above, the Commission ruled that the Sonderling Broadcasting shows aired were "obscene or indecent," in violation of Title 18 § 1464 of the United States Code,[47] and accordingly issued a $2000 fine.[48] Much like WUHY-FM a few years prior, WGLD-FM, while denying responsibility, simply paid the fine.[49] Although WGLD-FM management seemed anything but interested in challenging their programming bill from the FCC, two special interest groups saw things differently.[50]

The Illinois Citizens Committee for Broadcasting, an organization concerned with the protection and improvement of television broadcasting, and the American Civil Liberties Union, troubled by WGLD-FM's cancellation of *Femme Forum*, petitioned the FCC to defer the WGLD-FM fine.[51] As part of its plea, the same special interest groups suggested that the Commission action and WGLD-FM forfeiture "violated the rights of listeners to hear a diversity of information and opinion," clearly chilling speech.[52] Three months later, in July 1973, the FCC denied the same inquiry, which later led to a review by the U.S. Court of Appeals for the D.C. Circuit.[53] The court, ruling in favor of the Commission, held that the broadcasts in question were obscene and not entitled to constitutional protection.[54] Then came a case that would serve as the springboard for indecency enforcement for decades.

A New York City radio station, in the early 1970s, played a monologue by comedian George Carlin that sounded alarm bells—triggered by a listener complaint—at the FCC.[55] Specifically, on October 30, 1973, at approximately two o'clock in the afternoon, Pacifica Foundation's WBAI-FM aired a portion of Carlin's monologue—approximately twelve minutes in length—taken from

suggested oral sex. The February 23 program was about oral sex and consisted of explicit exchanges in which female callers spoke of their oral sex experiences." *Id.* at 919.

[47] Act of Jun. 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769 (codified as amended at 18 U.S.C. § 1464 (2006)) (providing that "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.").

[48] *In re Apparent Liab. of Station WGLD-FM*, 41 F.C.C.2d at 919–20.

[49] CARTER ET AL., *supra* note 44, at 226.

[50] *Id.*

[51] *In re* Sonderling Broad. Corp., 41 F.C.C.2d 777, 777 (1973).

[52] *Id.* at 780. *See also* Red Lion Broad. Co. 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").

[53] *See* Illinois Citizens Comm. for Broad. v. FCC, 515 F.2d 397 (D.C. Cir. 1974).

[54] *Id.* at 406.

[55] *See In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975).

the comedian's record album, "Occupation: FOOLE," which included the "Filthy Words" routine.[56] John Douglas, a minister from Florida, and his son allegedly were driving in their car when they tuned in, heard the broadcast, and subsequently complained to the Commission.[57] In response to an FCC inquiry, WBAI-FM management indicated the station had aired a warning before the broadcast, and that the broadcast was a satire about social attitudes on language.[58] The Commission, in response, ruled that WBAI-FM was subject to sanction, but imposed no formal punishment.[59] Pacifica Foundation, fully aware of potential upcoming license renewal problems, nonetheless appealed.[60] Even so, that was only the beginning as federal lawmakers then entered into the debate.

Congress, seemingly interested in voicing its concern over broadcast indecency, asked the FCC to prepare a formal report on what steps it was taking to protect children from violent and obscene programming.[61] Responding with a 1975 Declaratory Order, the Commission ruled that indecency would now be defined 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."[62] Meanwhile, Pacifica Foundation pushed forward seeking judicial review.[63]

In a clear victory for Pacifica Foundation, the U.S. Court of Appeals for the D.C. Circuit reversed the FCC's decision regarding the George Carlin broadcast and chided the Commission.[64] The court held that:

> Despite the Commission's professed intentions, the direct

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[56] *Id.* at 95, 100 (noting that the seven words are "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits").

[57] Kyle A. Beckman, Comment, *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, 290 n.45 (2010–2011); *see Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d at 95; *see also* CARTER ET AL., *supra* note 44, at 229 (noting the complaint by Douglas, who "heard the broadcast while driving with his 15-year-old son," was the only complaint about the broadcast).

[58] *In re Citizen's Complaint Against Pacifica Found.*, 56 F.C.C.2d at 95–96.

[59] *Id.* at 99 (stating that the order would be placed in the licensee's file and if any subsequent infractions occurred, the Commission would decide if formal punishment was appropriate).

[60] Pacifica Found. v. FCC, 556 F.2d 9, 10 (D.C. Cir. 1977).

[61] H.R. REP. NO. 93-1139, at 15 (1974).

[62] *In re Citizen's Complaint Against Pacifica Found.*, 56 F.C.C.2d at 98.

[63] *Pacifica*, 556 F.2d at 10.

[64] *Id.* at 10–11.

> 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 that 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.
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> 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 chooses to call it.[65]

The court further observed that

> [a]s we find that the Commission's *Order* is in violation of its duty to avoid censorship of radio communications under 47 U.S.C. § 326 and that even assuming, arguendo, that the Commission may regulate non-obscene speech, nevertheless its *Order* is overbroad and vague, therefore we must reverse the *Order*. We should continue to trust the licensee to exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes. To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.[66]

Given the landmark nature of the subsequent U.S. Supreme Court decision,[67] it might be easy for media law scholars to forget about the important appellate ruling and language issued by the D.C. Circuit only one year before.[68] This was the first time an appellate court ruled firmly on indecent broadcast content.[69] More important, some of the references made by the court are similar to those of appellate courts in recent years.[70] Specifically, the D.C. Circuit, thirty-five years ago, suggested that the FCC's indecency regime was unconstitutionally overbroad.[71] Moreover, the court went even further and reasoned that Commission oversight of

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[65] *Id.* at 13.

[66] *Id.* at 18.

[67] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[68] *Pacifica*, 556 F.2d at 13, 18.

[69] *Id.*

[70] *See, e.g.*, CBS Corp. v. FCC, 663 F.3d 122, 132 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012); Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 320 (2d Cir. 2010), *vacated*, 132 S. Ct. 2307 (2012).

[71] *Pacifica*, 556 F.2d at 18.

alleged indecent content is censorship, in clear violation of section 326 of the 1934 Communications Act.[72] The FCC, nonetheless, would eventually get the ruling it desired—the ability to regulate indecent content—at the U.S. Supreme Court.[73]

Although *Pacifica* gave the FCC the power to provide regulatory oversight of broadcast content,[74] the decision was a narrow one. In fact, Justices Powell and Blackmun stressed in a concurrence that the Commission does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves."[75] They also asked the Commission to "proceed cautiously."[76] Prominent First Amendment attorney, and former FCC chief counsel, Robert Corn-Revere concluded that

> [t]he 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.
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> 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 a somewhat 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 endorsed by a majority of the Justices, and it repeatedly has described *Pacifica* as an "emphatically narrow holding.[77]

Also notable was the "channeling" of indecent broadcast content—on-air zoning, in a sense—that the *Pacifica* case now permitted.[78] The FCC, through this channeling capacity, would now have the power to restrict indecent programming or broadcasts to certain times of the day.[79] The underlying rationale for such a restriction, an effort to protect children from alleged "harms" of indecent

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[72] *Id.*; *see also* Act of Jun. 19, 1934, ch. 652, § 326, 48 Stat. 1091, 1091.

[73] FCC v. Pacifica Found., 438 U.S. 726, 738 (1978).

[74] *Id.* at 735.

[75] *Id.* at 759 (Powell, J., concurring).

[76] *Id.* at 761–62 n.4.

[77] Robert Corn-Revere, *Indecency, Television, and the First Amendment*, CONSUMERS' RES. MAG., Feb. 2004, at 21, 22.

[78] *Pacifica*, 438 U.S. at 731–32.

[79] *Id.* at 731–33.

broadcast content, lies in the Commission and the Court's belief that the number of children in the broadcast audience after 10 p.m. is minimal.[80] Ironically, studies have evidenced that a respectable amount of children are still in the broadcast audience well after 10 p.m.[81] Further, and perhaps more important, if the position of the authorities is that indecent content will somehow harm children, why would it be okay to harm a small amount as opposed to a vast amount?

C. The 1980s & 1990s: More Changes in FCC Enforcement Direction and Howard Stern is the Target

Though the FCC exercised much restraint for several years,[82] in 1987, it changed regulatory direction[83] again and began to target celebrated radio personality Howard Stern and others.[84] FCC General Counsel Diane Killory warned Stern, the nationally syndicated "shock" radio host, to clean up his act.[85] Specifically, the

[80] *See* Pacifica Found. v. FCC, 556 F.2d 9, 34 (D.C. Cir. 1977). "Pacifica took into account the nature of the broadcast medium when it scheduled [programs with sexual themes or indecent language] for the late evening hours after 10 p. m., when the number of children in the listening audience is at a minimum." *Id.* (quoting Applications of Pacifica Found. for Initial License of Station KPFK and Renewal of Licenses of Stations KPFA-FM and KPFB, 36 F.C.C. 147, 149 (1964)).

[81] *See Pacifica*, 556 F.2d at 13 n.7 (noting the Amicus Brief and statement of John A. Schneider, before the House Subcommittee on Communications, July 15, 1975, p. 9, and recognizing that "large numbers of children are [still] in the … audience until 1:30 a.m.").

[82] *See* KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 180 (5th ed. 2007) (positing that between 1975 and 1987, the FCC found no actionable cases for indecent programming). *See also* Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, 69 F.C.C.2d 1250, 1254 (1978) (noting the FCC's suggestion that it would observe the narrowness of the *Pacifica* ruling).

[83] The FCC, through its new indecency enforcement standards to be applied to all broadcast and amateur radio licensees, implemented a new definition for indecency. *See, e.g.,* NEW INDECENCY ENFORCEMENT STANDARDS TO BE APPLIED TO ALL BROADCAST AND AMATEUR RADIO LICENSEES, 2 FCC Rcd. 2726 (1987) [hereinafter NEW INDECENCY STANDARDS]. Originally, and after *FCC v. Pacifica Foundation*, 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. *Id.* Applying a more "context[ual]" approach, the official definition for indecency was changed to: "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." *Id.*

[84] *See generally In re* Infinity Broad. Corp. of Pa., 3 FCC Rcd. 930, 932 (1987) (finding that the "Howard Stern show constituted actionable indecency"); *In re* Infinity Broad. Corp. of Pa., 2 FCC Rcd. 2705, 2706 (1987) (holding that the Howard Stern show aired during times of the day where it was reasonable that children were in the audience and thus actionable indecency); *In re* Regents of the Univ. of Cal., 2 FCC Rcd. 2703, 2703 (1987) (holding that the "lyrics of the song 'Makin' Bacon' [were] indecent"); *In re* Pacifica Found., Inc., 2 FCC Rcd. 2698, 2701 (1987) (finding that the "IMRU" broadcast fell within the meaning of indecency).

[85] *See* Jon Pareles, *Shock Jocks Shake Up Uncle Sam*, N.Y. TIMES, Nov. 15, 1992, at 32 (noting that Stern and his radio outlet KLSX were fined $105,000).

Commission observed, the broadcasts, in a number of instances, did "not merely [consist of] an occasional off-color reference or expletive, but [consisted of] a dwelling on matters sexual and excretory, in a pandering and titillating fashion."[86] The material that was broadcast on Stern's show included expressions such as "[g]od, my testicles are like down to the floor," "I'd ask your penis size and stuff like that, but I really don't care," and "[h]ave you ever had sex with an animal?"[87] Executive Vice President of Infinity Broadcasting at the time, Mel Karmazin, said he and Stern would comply with the new FCC indecency ruling as long as it was constitutional.[88] The lionized Stern was quoted as saying he felt "vindicated" by the Commission action because he and the station had received no fine or license revocation.[89] Action against Stern, however, did not end there. FCC forfeitures for alleged broadcast indecency continued through the 1990s,[90] and Stern, reportedly believing that the FCC was selectively targeting him, began praying on the air for the death of then-FCC chair Alfred Sikes.[91] Additionally, Stern began taunting the Commission by saying things such as, "Hey, F.C.C.: penis."[92] Stern also said that he had sent phony complaints to the FCC about his show that received no response.[93] Eventually, Stern's employer, Infinity Broadcasting, settled a fine and, according to CEO Karmazin, made a $1.7 million "donation" to the U.S. Treasury.[94]

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[86] *In re Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. at 2706. *See also* NEW INDECENCY STANDARDS, *supra* note 83, at 2727 (alterations in original).

[87] *In re Infinity Broad. Corp. of* Pa., 2 FCC Rcd. at 2706.

[88] *The Aftermath of Indecency Ruling*, BROADCASTING, Apr. 27, 1987, at 34, 34.

[89] Bob Davis, *FCC, in Surprise Move, Says It Will Fine Broadcasters for Indecent Programming*, WALL ST. J., Apr. 17, 1987, at 1; Caroline E. Mayer, *FCC Curbs Radio, TV Language: Agency Threatens Stations That Are Sexually Explicit*, WASH. POST, Apr. 17, 1987, at A1.

[90] *See, e.g.*, Letter from William F. Caton, Acting Secretary, FCC, to Mel Karmazin, Pres., Infinity Broad. Corp., 9 FCC Rcd. 1746, 1747 (1994); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Mel Karmazin, Pres., Sagittarius Broad. Corp., 5 FCC Rcd. 7291, 7293 (1990).

[91] *See* Edmund L. Andrews, *F.C.C. Torn Over Howard Stern Case*, N.Y. TIMES, Nov. 27, 1992, at D14.

[92] Pareles, *supra* note 85, at 32 (internal quotation marks omitted).

[93] Tom Taylor, *Howard Stern Tests the FCC With His Own Indecency Complaints*, INSIDE RADIO, Mar. 11, 1994, at 1. Stern said: "This proves that the FCC is making a selective enforcement to drive me off the air." *Id.* FCC attorney Bob Ratcliffe, in response to Stern's reported tactics, observed: "The commissioners would not be happy. Whether it would be an actionable act, I wouldn't want to say." *Id.*

[94] *In re* Sagittarius Broad. Corp., 10 FCC Rcd. 12245, 12257 (1995). *See also* David Hinckley, *Infinity Pays FCC*, DAILY NEWS (N.Y.), Nov. 9, 1995, at 120; David Hinckley, *It Was Hardly a Coincidence that Infinity Anted Up to Uncle*, DAILY NEWS (N.Y.), Sept. 14, 1995, at 102. Rumors were very strong that Karmazin reluctantly negotiated a settlement with FCC

D. The Turn of the Century Brings a New FCC Chair, Presidential Aim, and Aggressive Enforcement Agenda: Clean Up the Broadcast Airwaves[95]

As Americans rang in a new century, the FCC was keeping a watchful eye on licensees for broadcast indecency. In an effort to solidify its indecency enforcement regime and provide clearer guidance, the Commission published a new document for all broadcast licensees as part of a settlement with Evergreen Media.[96] In the years to follow, though, the FCC's effort would prove to be feckless.

The first few years of the new century remained active on the FCC's forfeiture front when U2 lead singer and rock star Bono, musical artist Cher, and celebrity Nicole Richie, appearing live on NBC and Fox Television's various award shows,[97] sent the Commission's Enforcement Division, and the Parents Television Council (PTC)[98] into a lather.

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officials in order to clear Infinity's record and pave the way for its intention to purchase $275 million in additional radio stations. Christine C. Peaslee, Note, *Constitutional Law*--Action for Children's Television v. FCC*: Indecency Fines and the Broadcast Medium--When Subsequent Punishments Before Prior Restraints; A Subsequent Restraint Review*, 20 W. NEW. ENG. L. REV. 241, 263 n.149 (1998). It was also suggested that the Commission had threatened to uphold and not approve any Infinity purchases until the outstanding Infinity indecency matter was settled. *See* Action for Children's Television v. FCC, 59 F.3d 1249, 1266 (D.C. Cir. 1995) (Tatel, J., dissenting).

[95] Michael Powell, during the latter part of his tenure as FCC Chair, and under the direction of then-President George W. Bush, oversaw the most aggressive FCC actions for broadcast indecency to date. *See generally* Lili Levi, *The FCC's Regulation of Indecency*, 7 First Reports 1, 30 (2008) *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_.final_.pdf (noting that expansion of FCC policy which occurred under the George W. Bush FCC). Moreover, working in concert with the Commission's aggressive regime at the time, President George W. Bush signed into law the Broadcast Decency Enforcement Act that ultimately increased broadcast indecency fines ten-fold ($32,500 to $325,000). *Id.* at 11; Frank Ahrens, *Congress Approves Tenfold Increase in Fines FCC Can Assess*, WASH. POST, Jun. 8, 2006, at D1; *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491, 491 (amending Communications Act of 1934, 47 U.S.C. § 503(b)(2) (2006)); *see also* John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines,'* CENTER FOR PUBLIC INTEGRITY (Apr. 9, 2004, 12:00 AM), http://www.publicintegrity.org/2004/04/09/6588/indecency-air (noting that broadcast indecency fines in 2004 were higher than for the previous ten years combined); Communications Act of 1934, 47 U.S.C. §503(b)(2) (2006) (setting forth the FCC's Forfeiture and Policy Guidelines).

[96] *See In re* Indus. Guidance on the Comm'ns Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8016–17 (2001). *See also* United States v. Evergreen Media Corp., 832 F. Supp. 1179, 1180–81 (N.D. Ill. 1993) (discussing the dispute with Evergreen Media over unpaid forfeitures).

[97] *See infra* notes 99–104 and accompanying text.

[98] *See About Us*, PARENTS TELEVISION COUNCIL,

The trouble began in December 2002 when Cher, appearing live on Fox Television at the MGM Grand Hotel and Casino in Las Vegas, while accepting a Lifetime Achievement award said, "People have been telling me I'm on the way out every year, right? So fuck 'em."[99] Then, one month later, Bono, accepting a Golden Globe award broadcast live on NBC, observed, "[T]his is really, really, fucking brilliant."[100] The FCC's Media Enforcement Bureau, despite protestations by the PTC, first ruled the Bono tongue-slip to be violation free and suggested that Bono's use of "fucking" was not actionable, because while the word "fucking may be crude and offensive," using a contextual analysis, it was used as an intensifier and adjective.[101] Five months later, however, the Commission, facing congressional and additional PTC pressure, reversed course and instead ruled the content to be in violation of indecency and profanity prohibitions.[102] Not to be outdone, author, actress, and singer, Nicole Richie, during a December 2003 Billboard Music Award appearance on the Fox Television network said, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[103] Ultimately, despite the fact that the Commission believed the aforementioned broadcast television incidents to be actionable under its indecency regime, it chose not to financially sanction the networks given its policy for fleeting expletives at the time of the broadcasts.[104] Fox Television and NBC, nonetheless, were not the only networks to enter the indecency fray.

Two months later, CBS's airing of the 2004 Super Bowl[105] provided an opportunity for the FCC to showcase its stepped-up broadcast indecency regime. In what would be arguably one of the most well publicized media incidents in years, on one of televisions biggest stages,[106] pop star Janet Jackson, performing in concert

http://www.parentstv.org/PTC/aboutus/main.asp (last visited Jan. 3, 2013) (describing the PTC as "a non-partisan education organization advocating responsible entertainment").

[99] *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664, 2690 (2006) (internal quotation marks omitted).

[100] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859, 19859 (2003) (internal quotation marks omitted).

[101] *Id*. at 19861.

[102] *See In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4978 (2004) (declaring that any use of "the 'F-Word,' . . . has a sexual connotation, and therefore" is actionable).

[103] *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. at 2692 n.164.

[104] *Id.* at 2692, 2695.

[105] *See 10 Fourth Estate Follies*, ADVERTISING AGE, Dec. 20, 2004, at 4.

[106] *See, e.g.*, Michael Hiestand, *Super Bowl XLIV Draws Most Viewers in TV History*, USA

with musical artist Justin Timberlake, near the end of the halftime show, exposed one of her breasts.[107] Notwithstanding the fact that Jackson claimed the mishap was the result of a wardrobe malfunction, the FCC and the PTC were not convinced.[108] Indeed, CBS management later the same year received a sanction from the Commission totaling $550,000 for the glimpse of Jackson's nipple.[109] Irrespective of how the general public felt about "nipple gate"[110] and the music award show spectacles, these incidents prompted judicial review.[111]

In the years that followed the 2004 Super Bowl telecast, the resolute Commission continued its indecency enforcement machine,[112] and some of the recent incidents began making their way into courtrooms—including the one at the U.S. Supreme Court.[113]

TODAY, http://www.usatoday.com/sports/football/nfl/2010-02-08-super-bowl-viewership_N.htm (last updated Feb. 10, 2010, 12:28 AM); Nielsen Media Research, *TV Viewership of the Super Bowl in the United States from 1990 to 2012 (in Millions)*, http://www.statista.com/statistics/216526/super-bowl-us-tv-viewership (last visited Dec. 23, 2012) (indicating that 111 million viewers watched); *The Nielsen Company's Guide to Super Bowl XLIII*, NIELSEN (Jan. 23, 2009), http://www.nielsen.com/us/en/insights/press-room/2009/the_nielsen_company01.html (noting that the previous record for most viewers of the Super Bowl was in 2008, when 97.5 million viewers watched).

[107] *10 Fourth Estate Follies*, *supra* note 105, at 4 (noting that Janet Jackson flashed her right breast for 9/16 of one second).

[108] *In re* Complaints Against Various Television Licensees' Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 FCC Rcd. 19230, 19236 (2004). The FCC received, as of September 2004, more than 542,000 complaints about the televised breast. *Id.* at 19231 n.6.

[109] *See id.* at 19230.

[110] *See Poll: Janet's Revelation No Crime*, CBS NEWS.COM, (Dec. 5, 2007, 3:36 PM), http://www.cbsnews.com/stories/2004/02/02/entertainment/main597184.shtml (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).

[111] *See In re Complaints Against Various Television Licensees' Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd. at 19230.

[112] *See In re* Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without a Trace", 21 FCC Rcd. 2732, 2736–37 (2006) (observing a fine of $32,500 per station for alleged indecent content in a scene involving "teenage boys and girls participating in a sexual orgy"); *In re* Clear Channel Broad. Licenses, Inc., 19 FCC Rcd. 1768, 1768–69 (2004) (evidencing an FCC forfeiture for $755,000 for sexually explicit content on the "Bubba the Love Sponge" show); *In re* AMFM Radio Licenses, L.L.C., 19 FCC Rcd. 5005, 5005–06 (2004) (mandating an FCC forfeiture for $247,500 for alleged indecent content on the "Elliot in the Morning" Show); *In re* Clear Channel Commc'ns, Inc., 19 FCC Rcd. 10880, 10883 (2004) (noting a settlement totaling $1.75 million for alleged indecency violations); Kurt Hunt, Note, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. & TECH. L. REV. 223, 230 (2007) (noting that the CBS fine for the *Without a Trace* scene was $3.6 million in total).

[113] *See Fox I*, 556 U.S. 502 (2009); *Fox II*, 132 S. Ct. 2307 (2010).

II. A SLOW, LEGAL SLOG: THE ULTIMATE BATTLE OF THE NETWORK STARS FIZZLES IN THE COURTROOM

The journey from the airwaves to the courtroom in the *Fox I* and *Fox II* cases has been long, strange, and, as it turns out, unproductive. As discussed above, the current round of litigation began with a major shift in policy enforcement that the FCC embarked upon in 2004.[114] The Commission decided that it would no longer limit its indecency prohibition to repeated or protracted incidents of sexual or excretory content.[115] Instead, even the unscripted, momentary expletive could draw sanctions.[116] Broadcasters were caught off guard by the sudden change, so rather than exact penalties against NBC for its airing of Bono's expletive in the live telecast of the "Golden Globe Awards," the Commission used the infraction to issue a warning, stating that

> [b]y 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. We also take this opportunity to reiterate our recent admonition (which took place after the behavior at issue here) that serious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings, and that we may issue forfeitures for each indecent utterance in a particular broadcast.[117]

In what turned out to be a futile effort to lessen confusion generated by the enforcement change, the Commission issued an Omnibus Order in March 2006[118] that ruled on several other incidents of "fleeting expletives," including Fox Television's live airing of the "Billboard Music Awards" in 2002 during which Cher pronounced that "[p]eople have been telling me I'm on the way out every year, right? So fuck 'em,"[119] and in 2003, when Nicole Richie quipped, "Have you ever tried to get cow shit out of a Prada purse?

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[114] *See In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4980 (2004).

[115] *Id.*

[116] *Id.*

[117] *Id.* at 4982.

[118] *See In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 13299, 13299 (2006) (discussing an interpretation of whether broadcast material was profane even after the FCC's statement).

[119] *Id.* at 13322 (internal quotation marks omitted).

It's not so fucking simple."[120]

Fox Television and other broadcast networks challenged the Order in the United States Court of Appeals for the Second Circuit.[121] The Commission, through a voluntary remand, sought to address the broadcasters' concerns but, in the end, still found the Fox broadcasts to be indecent.[122] That finding formed the basis of the reinstated appeal before the Second Circuit.[123] In that case, the broadcasters argued that the Commission's shift in indecency enforcement was barred under both the Administrative Procedures Act[124] and the First Amendment.[125]

In addressing the APA argument, the court recognized that "[a]gencies are of course free to revise their rules and policies. . . . Such a change, however, must provide a reasoned analysis for departing from prior precedent."[126] The Commission suggested, in its Remand Order and in the subsequent appeal, that a change was warranted because "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'"[127] The court rejected that position "as a reasoned basis justifying the Commission's new rule."[128] Noting that the Commission could not explain why the "first blow" rationale did not apply "for the nearly thirty years between *Pacifica* and *Golden Globes*," the court was even more troubled that the "theory bears no rational connection to the Commission's actual policy regarding fleeting expletives."[129]

Specifically, on this point, the court observed that the Commission was not suggesting an outright ban on the use of certain words.[130] In fact, "the Commission will apparently excuse

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[120] *Id.* at 13303.

[121] Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *rev'd,* 556 U.S. 502 (2009).

[122] *See In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. at 13299 (reversing its earlier finding that *The Early Show* on CBS was indecent and dismissing, on procedural grounds, a complaint against ABC's *NYPD Blue*). *Fox Television Stations, Inc.*, 489 F.3d at 452.

[123] *See Fox Television Stations, Inc.*, 489 F.3d at 444.

[124] *Id.* at 454. *See also* Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2006).

[125] *Fox Television Stations, Inc.*, 489 F.3d at 454–55, 462. The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

[126] *Fox Television Stations, Inc.*, 489 F.3d at 456 (citations omitted).

[127] *Id.* at 458 (quoting *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. at 13309) (internal quotation marks omitted).

[128] *Fox Television Stations, Inc.*, 489 F.3d at 458.

[129] *Id.*

[130] *Id.*

an expletive when it occurs during a '*bona fide* news interview.'"[131] In other words, if a "first blow" is so harmful, it must be so in any context.[132] This notion will be discussed further in Section III of this article, suggesting that any reworking of this position in subsequent Commission policies will fail for constitutional reasons.

Having reached the conclusion that the Commission's sudden shift in enforcement was precluded under the APA, the court declined to decide the case on First Amendment grounds.[133] Nonetheless, it took the bold step of telegraphing its own thoughts on the constitutional arguments—essentially providing broadcasters with a blueprint for future challenges—saying "[w]e note, however, that in reviewing these numerous constitutional challenges, which were fully briefed to this court and discussed at length during oral argument, we are skeptical that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster."[134]

When the case (*Fox I*) reached the U.S. Supreme Court, the five-to-four majority similarly confined its reasoning to the APA argument, but reached a different result.[135] Justice Antonin Scalia, writing for the majority, observed that the "agency's reasons for expanding the scope of its enforcement activity were entirely rational."[136] The Court made clear that the agency

> need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[137]

In what, at first blush, might be described as a surprising concurrence, Justice Clarence Thomas signaled that he would be open to treating broadcasters like all other forms of media and restoring to broadcasters the same First Amendment protections that other media enjoy.[138] He labeled as "problematic" the "deep intrusion into the First Amendment rights of broadcasters, which

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131 *Id.*
132 *See id.* at 459
133 *Id.* at 462.
134 *Id.*
135 *See Fox I*, 556 U.S. 502, 516, 517 (2009).
136 *Id.* at 517.
137 *Id.* at 515.
138 *See id.* at 530 (Thomas, J., concurring).

the Court has justified based only on the nature of the medium."[139] He suggested that "even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified" in earlier cases, "dramatic technological advances have eviscerated the factual assumptions underlying those decisions."[140]

Broadcasters undoubtedly were heartened by the Second Circuit's examination of their First Amendment arguments and Justice Thomas's clear views on the subject, which set the stage for the next round of litigation—a round squarely designed to address the constitutional issues, or so it seemed. On remand from the Supreme Court, the Second Circuit wasted no time in holding 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."[141] The court was swayed by the broadcasters' arguments that the media landscape had changed dramatically and required a reassessment of the differential treatment toward the broadcast media.[142] Noting the many changes since *Pacifica*,[143] the court recognized it is no longer true that the broadcast media are a "uniquely pervasive presence in the lives of all Americans."[144] As the court observed,

> [t]he 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 . . . and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control.[145]

The following year, another panel of the Second Circuit vacated a Commission order against ABC for airing a brief scene that included nudity in its program *NYPD Blue*.[146] The court was compelled to do so, it wrote, because the earlier case's "determination that the FCC's indecency policy is unconstitutionally vague binds this panel."[147]

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[139] *Id.* at 531.

[140] *Id.* at 533.

[141] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010).

[142] *See id.* at 326–27.

[143] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[144] *Fox Television Stations, Inc.*, 613 F.3d at 326 (quoting *Pacifica*, 438 U.S. at 748) (internal quotation marks omitted).

[145] *Fox Television Stations, Inc.*, 613 F.3d at 326.

[146] ABC, Inc. v. FCC, Nos. 08-0841-ag, 08-1424-ag, 08-1781-ag, 08-1966-ag, 2011 U.S. App. LEXIS 72, at *5–6 (2d Cir. Jan. 4, 2011).

[147] *Id.* at *11.

These decisions set the stage for what legal practitioners and scholars believed would be a final resolution of this issue by the U.S. Supreme Court in *Fox II*.[148] Those hopes were dashed, however, on June 21, 2012, when the Supreme Court's decision[149] made clear that this long, strange legal journey would become longer, if not stranger.[150] The Court made three observations about the case. First, it noted that, "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."[151] Second, the Court found "that Fox and ABC lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies."[152] Third, the Court's decision left "the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements."[153] In a bow toward inevitable future litigation, the opinion also made clear that "it leaves the courts free to review the current policy or any modified policy in light of its content and application."[154]

In that spirit, this article now turns to a discussion as to why the existing and any new policies of the Commission will once again be fraught with constitutional infirmities that could have, indeed should have, been resolved in *Fox II*.

III. THE FCC'S INTRACTABLE PROBLEM WITH THE FIRST AMENDMENT: WHY INDECENCY REGULATIONS WILL NOT SURVIVE A CONSTITUTIONAL CHALLENGE

A. The FCC's Indecency Exemptions Swallow the Rationale for Regulation

As the U.S. Supreme Court made abundantly clear in its rationale in *Pacifica*, "broadcasting is uniquely accessible to

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[148] *See Fox Television Stations, Inc.*, 613 F.3d at 326; *ABC, Inc.*, Nos. 08-0841-ag, 08-1424-ag, 08-1781-ag, 08-1966-ag, 2011 U.S. App. LEXIS 72, at *5–6.

[149] *Fox II*, 132 S. Ct. 2307, 2320 (2012) (deciding the case on Due Process Clause grounds and not reaching the First Amendment question).

[150] Abner S. Greene, *No End in Sight for FCC Indecency Fights*, FORDHAM L. NEWSROOM (June 21, 2012), http://law.fordham.edu/26921.htm.

[151] *Fox II*, 132 S. Ct. at 2320.

[152] *Id.*

[153] *Id.*

[154] *Id.*

children, even those too young to read."[155] For that reason, according to the Court, children must be shielded from offensive language such as Carlin's monologue because it "could have enlarged a child's vocabulary in an instant."[156] Indeed, the very notion of youngsters in the listening audience prompted the complaint against the Pacifica Foundation in the first place.[157] The listener noted in his filing with the FCC that "[a]ny child could have been turning the dial, and tuned in to that garbage."[158] He added in the complaint that "[i]ncidentally, my young son was with me when I heard the above."[159]

The concern about children hearing such language was anything but incidental to the FCC's finding in the case.[160] In setting forth reasons for treating broadcasting differently from other forms of media, the Commission first noted that "children have access to radios and in many cases are unsupervised by parents."[161] The FCC also observed that this point was "[o]f special concern to the Commission as well as parents."[162] The FCC's declaratory order in the case further emphasized that "it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear."[163]

Clearly, in framing what it meant by "indecent," the Commission also had the interests of children in mind:

> [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.[164]

The Commission's ruling in *Pacifica* worried news directors across the country about just what language might trigger the

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155 FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

156 *Id.*

157 *See id.* at 730.

158 *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975) (internal quotation marks omitted).

159 *Id.* (internal quotation marks omitted).

160 *See id.* at 97–98.

161 *Id.* at 97.

162 *Id.*

163 *Id.* at 98.

164 *Id.* (footnote omitted).

government's wrath.[165] It prompted the Radio Television News Director's Association (RTNDA) to seek clarification from the FCC as to what effect the ruling might have on "the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program."[166] News coverage often involves audio and video footage of heightened tensions and resultant invective, so the RTNDA raised this issue with respect to events such as "angry political demonstrations and even more structured political debate, interviews and conversations."[167]

The underlying concern for broadcast journalists was the possibility that stations would self-censor in light of *Pacifica* and how such action

> would "not only have a deleterious impact on accurate and insightful reporting in sporadic incidents, but would tend to impact over the long run most heavily on news coverage of those persons who, for whatever reason . . . , regularly and publicly use language which a majority of the public considers to be indecent."[168]

To quell the fears of broadcasters, the FCC essentially outlined the framework for the putative exemption for news programming. The Commission suggested that it shared the "petitioner's concern that we must take no action which would inhibit broadcast journalism."[169] Moreover, this action by the Commission did not mark the first time that it hinted at exemptions.[170] In the WUHY-FM case involving the Jerry Garcia interview,[171] the FCC made a point of the fact that the material at issue did "not involve presentation of a work of art or on-the-spot coverage of a bona fide news event."[172]

Even with the more recent indecency complaints, the FCC appeared squeamish when handling issues involving news or arguably artistic programming. In a complaint filed against CBS Pittsburgh affiliate KDKA, the network's morning program, "The Early Show," came under attack for a live interview with Twila Tanner, a cast member of the show "Survivor: Vanuatu," who

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[165] *See, e.g.*, *In re* Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 59 FCC.2d 892, 892–93 (1976).

[166] *Id.* at 892 (internal quotation marks omitted).

[167] *Id.* at 892–93 (internal quotation marks omitted).

[168] *Id.* at 893.

[169] *Id.*

[170] *Id.*

[171] *See supra* notes 42–43 and accompanying text.

[172] WUHY-FM, 24 FCC.2d 408, 410 (1970).

commented on a fellow contestant, saying: "I knew he was a bullshitter from Day One."[173] At first the Commission ruled against the broadcasters because "the 'S-Word,' under the circumstances presented here, [was] vulgar, graphic and explicit."[174] Once again, the "reasonable risk that children may have been in the audience" guided the Commission's finding that "the broadcast is legally actionable."[175] But then, for some reason, it was not.

Later that year, the Commission reversed its own ruling.[176] In doing so, it pointed out that although

> there is no outright news exemption from our indecency rules. . . . [I]n light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.[177]

Extrapolating from that logic, if Bono had made his "fucking brilliant" remark,[178] Cher had admonished her detractors by saying "fuck 'em,"[179] or Nicole Richie had given her thoughts about extracting "cow shit out of a Prada purse"[180] during a live television news interview program, no sanctions would have followed—undoubtedly because of the First Amendment implications such punishment would raise.[181] While that makes perfect sense in terms of not running afoul of the Constitution, it also illustrates the complete folly of broadcast indecency regulations. As the foundation for the FCC's indecency policy has been, since its inception,[182] the concern about children being exposed to offensive language, what possible difference is there between hearing that very language during a television news program as opposed to a televised award show?

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[173] *In Re* Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664, 2698, 2699 n.199 (2006) (internal quotation marks omitted).

[174] *Id.* at 2699.

[175] *Id.*

[176] *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 13299, 13301–02 (2006).

[177] *Id.* at 13327 (footnote omitted).

[178] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859, 19859 (2003) (internal quotation marks omitted).

[179] *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. at 13300 (internal quotation marks omitted).

[180] *Id.* (internal quotation marks omitted)

[181] *Id.* at 13327.

[182] *See, e.g.*, *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 97–98 (1975).

The Commission's longstanding practice of exempting programs where the indecent content is central to the artistic integrity of the show[183] is similarly wrought with an illogical result. In 2004, several ABC television affiliates were subjected to indecency complaints over the airing of the critically acclaimed film *Saving Private Ryan*.[184] The movie included much language that would have drawn sanctions under the FCC's indecency policy, including "fuck," "asshole," "shit," and "prick," among others.[185] Nonetheless, the Commission found that "[t]he expletives uttered by these men as these events unfold realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves."[186]

Here, the artistic integrity of the motion picture guided the Commission into rejecting an indecency finding.[187] As the ruling pointed out, "[d]eleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[188]

The irony of the Commission's exemptions was not lost on the Second Circuit, which observed that "[t]he FCC created these exceptions because it recognized that an outright ban on certain words would raise grave First Amendment concerns."[189] The court also highlighted the inherent problem the Commission has created: "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.'"[190]

Without question, the exceptions that the FCC has developed in practice over the past four decades undermine any reasoning—valid or not—that the indecency regulations exist in the first place—that is, the shielding of children from offensive content. When the exceptions swallow the rules, courts should view the regulations as

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[183] *Id.* at 100 (demonstrating that, even almost forty years ago, the FCC considered significant artistic value of programming as a valid consideration to override indecent content).

[184] *In re* Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 FCC Rcd. 4507, 4507 (2005).

[185] *Id.* at 4512 (internal quotation marks omitted).

[186] *Id.*

[187] *See id.* at 4515.

[188] *Id.* at 4513.

[189] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 332 (2d Cir. 2010).

[190] *Id.*

underinclusive. In 2011, Justice Scalia made an analogous point in his majority opinion in *Brown v. Entertainment Merchants Association*.[191]

In *Brown*, the state of California argued that playing violent video games was detrimental to the physical and psychological well-being of minors and the law it crafted was designed to restrict their access to the games.[192] Nonetheless, the statute also included an exception if the minors' parents or guardians permitted the child to have access to the games.[193] Justice Scalia seized upon the irony of finding that these games are so harmful that they should be kept away from minors, except if the minors' protectors say differently.[194] This illogical result rendered the law, in the view of the majority, "seriously underinclusive."[195] As the Court observed, "[t]he California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK."[196]

The Commission operates under this same illusion. In essence, a child's exposure to indecent language is so harmful that he or she must be shielded from it[197]—unless, of course, that exposure comes in the form of a news program or artistically sound entertainment offering. As the Court concluded in *Brown*, "[t]hat is not how one addresses a serious social problem."[198] And here, just as the Court found in *Brown*, such restrictions are unconstitutional.[199]

B. Vast Changes in the Media Landscape: A Path for Constitutional Infirmities and a New Direction Going Forward

According to the U.S. Supreme Court, the degree of speech protection afforded media entities largely depends on the platform or medium in which the speech emanates.[200] Broadcast radio and television have been, as a general rule, subject to the most

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[191] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2740, 2742 (2011).

[192] *See id.* at 2735–36, 2738–39.

[193] CAL. CIV. CODE § 1746.1(c) (West 2006) *invalidated by Brown*, 131 S. Ct. at 2729.

[194] *Brown*, 131 S. Ct. at 2740.

[195] *Id.*

[196] *Id.*

[197] *See, e.g.*, *In re* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975) ("[W]e believe that such words are indecent . . . and have no place on radio when children are in the audience.)

[198] *Brown*, 131 S. Ct. at 2740.

[199] *Id.* at 2742.

[200] *See generally* Reno v. ACLU, 521 U.S. 844 (1997) (internet); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (telephony); FCC v. Pacifica Found., 438 U.S. 726 (1978) (broadcasting); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (print).

restrictive governmental regulation of media.[201] The reasons for the differential treatment are varied, but notably include (1) the public interest obligations of licensees,[202] (2) the scarcity rationale,[203] and (3) the pervasiveness justification.[204] Print media, on the other hand, has been afforded tremendous speech protection as illustrated by the landmark *Miami Herald v. Tornillo* case, which demonstrated that newspapers could not be forced to run responses to published attacks.[205] Cable television, despite its close link to broadcast television, is a paid-for service and arrives in the home through private coaxial cable that run along municipal rights-of-way (and therefore does not use electromagnetic spectrum).[206] Accordingly, courts have traditionally given cable television strong First Amendment protection.[207] Telephony is different than the aforementioned media vehicles in that, while it provides a platform for communication, it is not the speaker.[208] When content-based[209] communication over telephone lines was examined by the U.S. Supreme Court, the Justices gave broad protection to telephony-based speech.[210] The current media landscape, nonetheless, combines all of these technologies creating a "blurring" effect, which has made government oversight rather complex.

Indeed, researchers examining media convergence, net neutrality, and associated free speech issues suggest that technological advances in recent years have had, and will continue to have, a profound effect on First Amendment jurisprudence—to the point that the application of First Amendment principles to today's convergence of technology *is* the free speech issue of the twenty-first century.[211] The question all of this raises is whether the pertinent

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[201] *See Pacifica*, 438 U.S. at 748–49 (finding that radio and television were different given the rationales of pervasiveness and accessibility to children).

[202] *See* 47 U.S.C. § 303(g) (2006) (describing the powers and duties of the FCC).

[203] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389–90 (1969); NBC v. United States, 319 U.S. 190, 226 (1943).

[204] *See Pacifica*, 438 U.S. at 748–49.

[205] *Tornillo*, 418 U.S. at 258.

[206] *See* Marc S. Berger, Comment, *Keeping Pace with the Expanding Internet: Can the Courts Keep up?*, 9 ALB. L.J. SCI. & TECH. 51, 65–66 (1998).

[207] *See, e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 811 (2000).

[208] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127–28 (1989).

[209] *See, e.g.*, Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188–89 (2007); Reno v. ACLU, 521 U.S. 844, 871–72 (1997); Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988); Sharkey's, Inc. v. City of Waukesha, 265 F. Supp. 2d 984, 990 (E.D. Wis. 2003); Clarkson v. Town of Florence, 198 F. Supp. 2d 997, 1005–06 (E.D. Wis. 2002).

[210] *See Sable Commc'ns*, 492 U.S. at 130–31.

[211] *See* Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL'Y REV. INTER ALIA 1, 3 (2010), *available at*

regulatory justifications noted in *Pacifica* are still viable and make sense in today's media environment.[212]

The scarcity rationale, first introduced in *NBC v. United States*,[213] and later more thoroughly examined in *Red Lion Broad. v. FCC*,[214] was one basis used by the *Pacifica* Court to justify indecency regulation.[215] Scarcity meant that the electromagnetic spectrum was limited in its physical space (i.e., available channels on which to broadcast).[216] Because the government received many more requests for licenses than it could grant, given those physical constraints, the spectrum became a scarce resource.[217]

While spacing on the electromagnetic spectrum may have been limited in the early days of broadcasting, the aforementioned recent surge in technology arguably has diminished such deficiencies.[218] In fact, even the Court in *Red Lion* hinted that a possible reexamination of scarcity might be needed in the future.[219] Other courts have echoed those thoughts.[220]

In *CBS v. Democratic National Committee*,[221] the Court noted that "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."[222] Additionally, in *Telecommunications Research and Action Center v. FCC*,[223] appellate court judge Robert Bork openly questioned the scarcity rationale.[224] Further, the high court in *FCC v. League of*

http://yalelawandpolicy.org/sites/default/files/YLPRIA29_Nunziato.pdf (examining both sides of the net neutrality debate between advancing technologies and "what has been called 'the First Amendment issue of our time.'").

[212] *See In re* Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 FCC Rcd. 13171, 13174 (2009) (noting that the FCC has acknowledged the changes in the media landscape).

[213] NBC v. United States, 319 U.S. 190, 226 (1943).

[214] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[215] FCC v. Pacifica Found., 438 U.S. 726, 731 n.2 (1978).

[216] *Red Lion*, 395 U.S. at 388–89.

[217] *Id.*

[218] *See, e.g.*, Jonathan 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 criticism of the scarcity rationale).

[219] *Red Lion*, 395 U.S. at 386 n.15, 399.

[220] *See* Minority Television Project, Inc. v. FCC, 676 F.3d 869, 876 (9th Cir. 2012); Nat'l Citizens Comm. for Broad. v. FCC, 555 F.2d 938, 950 n.31 (D.C. Cir. 1977).

[221] CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[222] *Id.* at 102.

[223] Telecomm. Research and Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

[224] *Id.* at 508–09 ("[T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and

Women Voters of California[225] acknowledged the scarcity argument and implied that the question of its constitutionality should be revisited.[226] And Justice Clarence Thomas, in *Fox I*, while concurring with the majority (on Administrative Procedures Act grounds), his opinion, in part, suggested that the days of broadcast regulation, as has been provided by *Pacifica*, might be ending.[227] Specifically, Justice Thomas questioned the viability of *Red Lion* and *Pacifica*,[228] noting that "dramatic technological advances have eviscerated the factual assumptions underlying" *Red Lion* and *Pacifica*,[229] and traditional broadcasting is no longer pervasive.[230] Even FCC staffers have suggested the scarcity rationale is outdated.[231] The scarcity rationale, nonetheless, was not the only justification for regulatory oversight.[232]

Much like scarcity, the FCC and the courts have, in part, based the oversight of indecency regulation on the premise that content deemed indecent would be "harmful" to children.[233] As evidenced

unforeseen technologies, inevitably leads to strained reasoning and artificial results. 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. . . . There may be ways to reconcile *Red Lion* and *Tornillo* but the 'scarcity' of broadcast frequencies does not appear capable of doing so. Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media . . . or announce a constitutional distinction that is more usable than the present one.").

225 FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).

226 *Id.* at 376 n.11 (observing that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years").

227 *See Fox I*, 556 U.S. 502, 530–31 (2009) (Thomas, J., concurring).

228 *Id.* at 530, 533.

229 *Id.* at 533.

230 *Id.* at 533–34.

231 *See* Emily Hagemann, *FCC Defines the Indefinable: Indecency*, 25 NEWS MEDIA & L. 1, 24 (2001). In 2001, Commissioner Harold W. Furchtgott-Roth observed that "[t]echnology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue." *Id.* at 25 (internal quotation marks omitted). In a thirty-four page 2005 research report, FCC Media Bureau staffer John Berresford strongly argued against the validity of the scarcity rationale and suggested it "is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology" and declared that the opinions in *NBC* and *Red Lion* were flawed, as were other cases that subsequently relied on the same precedent. John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FCC (Mar. 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf.

232 *See supra* Part III.A.

233 *See* Ginsberg v. New York, 390 U.S. 629, 631–33 (1968) (permitting variable obscenity statutes to protect minors from exposure to pornographic material); *see also* FCC v. Pacifica

below, it is questionable as to whether children have the mental or cognitive capacity to understand or interpret sexual content, language, innuendoes, or topics.[234] If children cannot fully comprehend this type of content, courts must then cast doubt upon whether it would possibly harm them, psychologically or otherwise.[235]

Scholars Edward Donnerstein, Barbara Wilson, and Daniel Linz have concluded that content deemed indecent would likely have no harmful effect on children.[236] Donnerstein has also suggested that the Commission has erroneously used references, in their discussions of harmful effects, to violence and pornography.[237] Other scholars have reached similar conclusions, or at least observed the dearth of unequivocal scientific evidence validating claims of harm from indecent broadcast content.[238] Moreover,

Found., 438 U.S. 726, 758 (1978) (Powell, J., concurring) (observing that vulgar language can be as harmful to a child as sexually explicit material, with Justice Powell writing "[t]he language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts").

[234] *See infra* notes 236–38 and accompanying text.

[235] *See infra* notes 239–42 and accompanying text.

[236] Edward Donnerstein, Barbara Wilson, and Daniel Linz, *On the Regulation of Broadcast Indecency to Protect Children*, 36 J. BROADCASTING & ELECTRONIC MEDIA 111, 115–16 (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.").

[237] Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 HOFSTRA L. REV. 827, 827–28 (1994) ("[A]s 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 ("FCC") 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.") (footnote omitted).

[238] Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCHOL. PUB. POL'Y & L. 81, 96, 97 (2009) (observing that "there is no clear definition of what constitutes harm . . . because of methodological inadequacies and ethical problems with exposing people to offensive speech, there is little good research evidence of harm," and "[o]verhearing others' offensive or bawdy general comments is, in most cases, harmless speech"). *See also* VICTOR C. STRASBURGER & BARBARA J. WILSON, CHILDREN, ADOLESCENTS, & THE MEDIA 168 (2002) (noting that "[t]o date, no research examines the impact of 'raunchy' content or language on children or adolescents").

courts also have questioned the harm theory.[239]

Most recently, the Second Circuit suggested that the FCC had not established that a fleeting expletive would have deleterious effects.[240] In similar fashion, the Court of Appeals in *Action for Children's Television* concluded that there was an absence of harm by content deemed indecent.[241] Given that both major rationales for broadcast regulatory oversight provided by *Pacifica* have arguably now been refuted, the courts should reconsider whether broadcasting should be treated as other media vehicles and thus merit strict scrutiny as the threshold for speech protection.[242]

Pacifica did not specify the exact level of scrutiny courts should apply when evaluating the constitutionality of content-based[243] broadcast regulations, but as the U.S. Court of Appeals for the Second Circuit recently observed, "subsequent cases have applied something akin to intermediate scrutiny."[244] Conversely, cases that

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[239] *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461 (2d Cir. 2007); *see also* Action for Children's Television v. FCC, 11 F.3d 170, 185 (D.C. Cir. 1993) (criticizing the harm theory).

[240] *Fox Television Stations*, 489 F.3d at 461 (observing that "[t]he 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," and that "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").

[241] *Action for Children's Television*, 11 F.3d at 185 (1993) ("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.' 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.") (alteration in original) (citations omitted).

[242] *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that laws regulating the content of protected speech will only be enforced when justified by a "compelling" government interest, and are narrowly tailored). *See also* Reno v. ACLU, 521 U.S. 844, 870 (1997) (explaining that precedent has not established what standard of review should be applied to regulating the internet).

[243] *See* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188–89 (2007); Reno v. ACLU, 521 U.S. 844, 871–72 (1997); Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988); Sharkey's, Inc. v. City of Waukesha, 265 F. Supp. 2d 984, 990 (E.D. Wis. 2003); Clarkson v. Town of Florence, 198 F. Supp. 2d 997, 1005–06 (E.D. Wis. 2002).

[244] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326 (2d Cir. 2010). *See also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 380 (1984) (using a standard which mixed language from strict scrutiny and intermediate scrutiny, narrow tailoring but furthering an

have dealt with indecent content in other media have applied a strict scrutiny analysis.[245] Much of the rationale for treating broadcasting with a less exacting form of scrutiny comes from *Pacifica's* pronouncement that broadcasting has a "uniquely pervasive presence in the lives of all Americans."[246]

As mentioned earlier, this notion of *unique* pervasiveness has come under intense criticism.[247] It is hardly the case, given the massive change in the media landscape since *Pacifica* was decided in 1978, that broadcasting stands alone in accessibility and overall omnipresence.[248] Cable television penetration in American homes moved from 9.4 million homes in 1978 to 59.8 million homes in 2010.[249] Meanwhile, the number of people using the internet in 2010 reached almost 240 million, and the number continues to rise.[250] As the Second Circuit has acknowledged, "[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."[251]

As a result, the underlying rationale for treating broadcasters differently under the First Amendment essentially has crumbled.[252] In fact, the Second Circuit noted in *Fox Television Stations* that it "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."[253] Clearly, the time has come for giving broadcasters First Amendment parity with other forms of media in terms of content regulation.

That said, the Federal Communications Commission, and any other government actors, would then be required to demonstrate a compelling governmental interest in order to satisfy the first prong of the strict scrutiny test.[254]

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important, though not necessarily compelling government interest). To pass intermediate scrutiny, a law must further an important government interest and be substantially related to that interest. Clark v. Jeter, 486 U.S. 456, 461 (1988). This form of scrutiny is less rigorous than strict scrutiny. *See id.* Rational basis is the least rigorous standard of review, only requiring that the challenged law be related to a legitimate government interest. *Id.*

[245] *See supra* notes 205–10 and accompanying text.

[246] FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

[247] *See supra* notes 144–45 and accompanying text.

[248] *See infra* notes 249–53 and accompanying text.

[249] *Cable Video Customers*, NCTA, http://www.ncta.com/Stats/BasicCableSubscribers.aspx (last visited Dec. 23, 2012).

[250] *United States of America: Internet and Broadband Usage Report*, INTERNET WORLD STATS, http://www.internetworldstats.com/am/us.htm (last visited Dec. 23, 2012).

[251] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326 (2d Cir. 2010).

[252] *See supra* Part III.

[253] *Fox Television Stations*, 613 F.3d at 327.

[254] *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, §551(a)(9), 110

IV. CONCLUSION

The Supreme Court in *Fox I* and *Fox II* arguably accomplished one thing for certain: ensuring that there will be a *Fox III*. Broadcasters and the Commission essentially are in the same holding pattern they were prior to the latest opinion in June 2012.[255] First, broadcasters are on notice that the Commission has abandoned its former policy of not punishing "fleeting expletives."[256] Of course, they have been on such notice since the FCC's ruling in the Bono case in 2004.[257] Second, the constitutionality of the FCC's broadcast indecency regulations remains undecided—though the Second Circuit strongly hinted that the policy could not survive a First Amendment challenge in 2007[258] and explicitly decided that it could not in 2010.[259] Third, the Supreme Court seems perfectly content to wait for another day to clear up any problems that may crop up as a result of this indecision, as Justice Ginsburg wrote, while concurring in a denial of certiorari the week after the release of *Fox II*, "[t]he Court's remand . . . affords the Commission an opportunity to reconsider its indecency policy in light of technological advances and the Commission's uncertain course since this Court's ruling in *FCC v. Pacifica*."[260]

Should the Commission decide to reformulate its indecency policy, what guidance does it have from the Court to help fashion regulations that can survive a constitutional challenge? In short, the answer is very little. In *Fox I*, the Court sidestepped the First Amendment challenge, opting instead for a decision based upon the Administrative Procedures Act.[261] Nonetheless, Justice Thomas boldly found it "problematic" that broadcasters' diminished First

Stat. 56, 140 (1996) (stating that Congress asserted that the v-chip "is a nonintrusive and narrowly tailored means of achieving that compelling government interest" in promoting parental authority); *In re* Implementation of Section 551 of the Telecomms. Act of 1996, 13 FCC Rcd. 8232, 8243 (1998) (noting that the v-chip, installed in most television sets, permits parents to block programming content they deem inappropriate for their children). *See also* United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000) (stating that "if a less restrictive means is available for the Government to achieve its goals, the Government must use it").

[255] *Fox II*, 132 S. Ct. 2307 (2012); *see supra* Part II.

[256] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 FCC Rcd. 4975, 4980 (2004).

[257] *Id.* at 4975–76.

[258] Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007).

[259] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319, 355 (2d Cir. 2010).

[260] FCC v. CBS Corp., 132 S. Ct. 2677, 2678 (2012) (Ginsburg, J., concurring) (citation omitted).

[261] *Fox I*, 556 U.S. 502, 513, 529 (2009).

Amendment rights could be "justified based only on the nature of the medium."[262] Yet, in *Fox II*, when the First Amendment issue was squarely before the Court, the justices punted—opting instead for a due process solution[263]—and Justice Thomas remained silent.[264]

As this article has made clear, the long history of broadcast indecency enforcement in this country similarly has been rife with confusion. The resulting quagmire for broadcasters is trying to determine just what programming is acceptable and which shows, if aired, could place their licenses in jeopardy. No business should face such a daily dilemma—yet alone one whose product enjoys First Amendment protection. As discussed above, the Commission's own exceptions to its indecency policy defy the very rationale for the regulations in the first instance.[265] Moreover, the media landscape has changed so dramatically since the Court's *Pacifica* decision in 1978[266] that one can easily envision a situation in which a television broadcaster is sanctioned for violating the indecency regulations for a particular program it aired, yet that very program could safely—without fear of punishment—be streamed on the myriad video sites available on the internet or even that broadcasters own website—all just a few clicks away, easily in reach, of the tender, young fingers the FCC's indecency policy purports to protect. The solution for the Commission is a simple one. It is time to recognize that technology has developed to the point that the government can no longer stop the dissemination of content it deems inappropriate. The examples of FCC decisions discussed above further illustrates that the Commission itself cannot even adequately determine what content is appropriate, nor should it try.[267] As the Supreme Court aptly observed in a case decided seven years before *Pacifica*, "it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[268] The same principle should ring true in broadcasting.

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[262] *Id.* at 531 (Thomas, J., concurring).

[263] *Fox II*, 132 S. Ct. 2307, 2320 (2012).

[264] *Id.* at 2310 (noting that Thomas joined the majority opinion).

[265] *See supra* Part III.A.

[266] *See supra* Part III.B.

[267] *See supra* Part II.

[268] Cohen v. California, 403 U.S. 15, 16, 25 (1971) (noting famously, with respect to Paul Robert Cohen's jacket with the emblazoned message "Fuck the Draft," that, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric").