THE FCC IS NOT "F-ING" AROUND ANYMORE: A DISCUSSION OF THE CONSTITUTIONAL ISSUES SURROUNDING THE FCC'S NEW INDECENCY STANDARD REGARDING FLEETING EXPLETIVES ON BROADCAST MEDIA

Comment

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I. OVERVIEW OF THE CONTROVERSY SURROUNDING THE FCC'S NEW INDECENCY STANDARD

"'This is really, really f***ing brilliant. Really, really great.'"[1] During a live broadcast of the 2003 *Golden Globes* on NBC, Bono, lead singer of the musical group U2, made the above statement in response to winning an award for "Best Original Song."[2] Unbeknownst to Bono, NBC, or the rest of the television broadcast community, this single use of a fleeting expletive during a live television broadcast sparked a dynamic and controversial shift in the Federal Communications Commission's (FCC) previously restrained indecency standard.[3] After Bono's speech at the *Golden Globes*, the FCC issued its first Memorandum Opinion declaring that a single, non-literal use of

1. Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4976 n.4 (2004) [hereinafter *Golden Globes Order*]. For the sake of readability, the expletives used in this Comment have been censored. Please note that the U.S. Supreme Court heard oral argument on this case on January 10, 2012. Accordingly, the Court's subsequent decision will likely change the legal analysis on this issue.

2. *Id.* at 4976.

3. *See id.* at 4982.

an expletive could be actionably indecent.[4] This new FCC indecency standard has given rise to intense controversy and questions regarding whether the standard constitutes a violation of television broadcasters' First Amendment rights.[5]

This Comment analyzes two major issues brought about by the Second Circuit's review of the FCC's current indecency standard in *Fox Television Stations, Inc. v. FCC*: (1) why the rationale for applying a lesser level of constitutional scrutiny to broadcast media restrictions no longer holds true, and (2) why the current FCC indecency standard regarding a single fleeting expletive is a violation of the First Amendment.[6] Part II outlines the historical evolution of the FCC's indecency standard into the current standard that is at issue in *Fox*. In light of the FCC's historical approach to indecency, Part III highlights the procedural history and principal constitutional issues raised by the Second Circuit's opinion in *Fox*. Part IV assesses the First Amendment implications regarding restrictions to broadcast speech.

Content-based restrictions on broadcast media, such as the FCC's new indecency standard, have historically received a lesser level of constitutional scrutiny than similar restrictions to other types of media because, as the Supreme Court explained in its *FCC v. Pacifica Found.* decision in 1978: (1) broadcast media was uniquely pervasive in American society, and (2) broadcast media was uniquely accessible to children.[7] Given the societal and technological changes in American society over the last several decades, Part V analyzes whether the rationale for applying this lesser level of constitutional scrutiny still holds true today. Even under an application of a lesser level of constitutional scrutiny, though, the current FCC indecency standard raises significant constitutional concerns due to the potential chilling effect it has on broadcasters' protected speech.[8] Accordingly, Part VI discusses the significant constitutional concerns with the current FCC indecency standard. Finally, Part VII recommends that the FCC revert back to its previous indecency standard used from 1987-2003 to ensure that its indecency standard is operating within the permissible limits of the First Amendment; it also applies the previous indecency standard to determine whether Bono's use of a fleeting expletive during his acceptance speech was actionably indecent. The constitutional issues raised by *Fox v. FCC* are important because they concern balancing the two competing interests of broadcasters' First Amendment rights and the FCC's compelling interest in protecting children from being exposed to indecent content on broadcast media.[9]

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4. *Id.*

5. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

6. *See infra* Parts V-VI. Because the FCC's indecency standard applies to both broadcast radio and television, this Comment will frequently use the tem broadcast "media" to refer generally to the indecency standard and both methods of broadcast communication.

7. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

8. *See Fox*, 613 F.3d at 333-34.

9. *See infra* Parts V-VII.

II. HISTORICAL EVOLUTION OF THE FCC'S INDECENCY STANDARD FOR BROADCAST MEDIA

Section 1464 of the United States Criminal Code states "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[10] This statute serves as the primary prohibition to broadcast indecency, and, although this section is part of the Criminal Code, the FCC primarily enforces this provision and has the discretion to determine whether media broadcasters are in violation of § 1464 and to impose penalties ranging from civil fines,[11] license revocations,[12] and even criminal sanctions.[13] Because of this discretion, the FCC's indecency standard regarding broadcast media has evolved considerably over the past several decades.[14] The following sections will outline the evolution of the FCC's indecency standard into the current standard that is at issue in *Fox v. FCC*.[15]

A. FCC's Indecency Standard Before 1978

Historically, the FCC treated § 1464 cases as obscenity cases and made little distinction between the terms "obscene," "indecent," and "profane" in the statute.[16] In 1975, though, the FCC made a distinct change in its handling of these cases and began to regulate speech deemed to be indecent and not just obscene.[17] A complaint over a radio broadcast of comedian George Carlin's "Filthy Words" monologue, which contained a string of expletives, gave rise to this shift in the FCC's indecency standard.[18] In its review of the monologue, the Commission made its first attempt to define "indecent" as "language that describes, in terms patently offensive as measured by

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10. 18 U.S.C. § 1464 (2006).

11. *See id.*; *see also* 47 U.S.C. § 503(b)(1)(D).

12. *See* 47 U.S.C. § 315(a)-(b); *see also* 18 U.S.C. § 1464.

13. *See* 47 U.S.C. § 312(b)(2); *see also* 18 U.S.C. § 1464; 47 U.S.C. § 501 (issuing criminal penalties for anyone who "willfully" violates this act).

14. *See infra* Parts II.A-E.

15. *See infra* Parts II.A-E.

16. *See, e.g.*, Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 403-04 (D.C. Cir. 1974); Sonderling Broad. Corp., 41 F.C.C. 2d 777, 782 n.14 (1975); *see also* Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 VILL. SPORTS & ENT. L.J. 15, 21 (1996) ("The Commission . . . did not focus on the distinction between obscenity and indecency in broadcasting until the 1970s.").

17. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 320 (2d Cir. 2010).

18. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C. 2d 94, 99 (1975) [hereinafter *FCC Pacifica Order*]. The Carlin monologue can be viewed at the following internet hyperlink: http://www.youtube.com/watch?v=3_Nrp7cj_tM.

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."[19] The Commission acknowledged that "people do not have an unlimited right to avoid exposure" to speech protected under the First Amendment; therefore, it is necessary for the FCC to "make it explicit whom [it is] protecting and from what."[20] Pacifica petitioned to the D.C. Circuit for review of the FCC order, and the court held that the FCC's order was vague and overbroad, and that the order amounted to unconstitutional censorship.[21]

B. Supreme Court's Guidelines in Pacifica *(1978)*

In the plurality opinion in *FCC v. Pacifica Foundation*, the Supreme Court reversed the decision of the D.C. Circuit and held that the FCC could, at least in the specific factual scenario presented in the case, restrict indecent broadcast speech.[22] The Court emphasized that the opinion was a narrow holding applying only to the specific factual context of the Carlin monologue and that it approved only of the Commission's decision that the Carlin monologue was indecent during the time the network broadcasted the program.[23] The FCC does not have an "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes."[24] The Court allowed for a limited restriction in this case, however, based on the following rationale: (1) "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and (2) the broadcast media was "uniquely accessible to children."[25] The Court took the Commission at its word that it would "proceed cautiously, as it ha[d] in the past" to refrain from creating policies that have the effect of chilling speech protected by the First Amendment.[26]

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19. *FCC Pacifica Order*, *supra* note 18, at 98.
20. *Id.* at 106 (concurring statement of Commissioners Robinson and Hooks); *see also id.* at 98.
21. Pacifica Found. v. FCC, 556 F.2d 9, 16 (D.C. Cir. 1977).
22. *See* FCC v. Pacifica Found., 438 U.S. 726, 733-34, 750-51 (1978).
23. *See id.* at 742-50 ("It is appropriate . . . to emphasize the narrowness of our holding."). It is also noteworthy that the Court stated that it was not holding that a single expletive broadcasted would warrant action by the FCC under its indecency policy. *See id.* at 750 ("We have not decided that an occasional expletive . . . would justify any sanction . . . ."). In his monologue, Carlin began by referencing his thoughts on words you cannot say in public or on the airwaves, and "[h]e proceeded to list those words and repeat them *over and over again*." *Id.* at 729 (emphasis added).
24. *Id.* at 759-60 (Powell, J., concurring).
25. *Id.* at 748-49.
26. *Id.* at 761 n.4 (Powell, J., concurring).

C. Post-Pacifica *Indecency Standard (1978-1987)*

Following *Pacifica*, the FCC diligently followed the restrained enforcement policy set out by the Court, and actions were limited to the seven specific words taken from the Carlin monologue.[27] Three weeks after the *Pacifica* decision, the FCC had its first chance to apply its new restrained indecency standard; the Commission held that it would not deny the renewal of a broadcaster's license based on the audience's subjective determination as to whether the programming was satisfactory or not.[28] In another example of the FCC's application of the post-*Pacifica* indecency standard, the FCC denied a challenge to a license renewal to Pacifica station WP-FW based on a complaint of an announcer's repeated use of the "F-word," the "S-word," and similar indecent language.[29] The Commission denied the challenge to the license renewal because it determined that the broadcast expletives at issue were no more than isolated occurrences over the course of the station's three year license period.[30]

D. A Shift to a More Flexible and "Difficult" Indecency Standard (1987-2003)

In 1987, the FCC issued its *Infinity Order* opinion which classified the post-*Pacifica* indecency standard as "unduly narrow" because it allowed speech that was just as patently offensive as that used in the Carlin monologue to be permissible simply because it avoided the seven previously forbidden words.[31] Because the post-*Pacifica* indecency standard needlessly exposed children to indecent content, the Commission created a new flexible and "more difficult" approach that focused its analysis on whether there was a risk that

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27. *See, e.g.*, Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, Bos., Mass., 69 F.C.C. 2d 1251-55 (1978) (relying on the narrowness of the Court's holding in *Pacifica* for its finding that the program was not actionably indecent). The seven words used in the Carlin monologue that served as the initial indecency standard after *Pacifica* were: "f***," "sh*t," "piss," "motherf***er," "c*cks***er," "c*nt," and "t*t." *FCC Pacifica Order*, *supra* note 18, at 99.

28. *See* WGBH Educ. Found., 69 F.C.C.2d at 1250. The petition focused on (1) an unidentified installment of *Masterpiece Theater* that is described as "a story principally concerned with adultery expressing a philosophy that approved of adulterous relationships"; (2) a program called *The Thin Edge*, which allegedly "'espoused a hedonistic attitude about guilt resulting from adultery and fornication'; (3) numerous episodes of *Monty Python's Flying Circus*, which [it said] 'relies primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege for "humor"'; (4) a program entitled *Rock Follies*, . . . which it describe[d] as 'vulgar' and as containing 'profanity' (*i.e.* 'The name of God (six times)'), 'obscenities,' . . . and action indicating some sexually-oriented content in the program; and (5) other programs that allegedly contained nudity and/or sexually-oriented material." *Id.* at 1250-51.

29. *See* Application of Pacifica Found. for Renewal for Noncommercial Station WPFW(FM), Wash. D.C., 95 F.C.C.2d 750, 758-64 (1983).

30. *See id.* at 760-61.

31. *See In re* Infinity Broad. Corp. of Pa., Licensee of Station WYSP(FM), 3 FCC Rcd. 930, 930-31 (1987) [hereinafter *Infinity Order*].

children would be in the audience at the time of the broadcast.[32] In applying this new standard, however, the Commission remained committed to the essential premise of *Pacifica*—that a single, non-literal use of an indecent word on broadcast television would not be actionable under its indecency standard.[33] Although expressing some concerns on the "inherent vagueness" in the new FCC indecency standard after the *Infinity Order*, the D.C. Circuit concluded that this new FCC definition of "indecent" broadcast material "[was] not constitutionally defective."[34]

In 2001, the FCC issued its *Industry Guidance* opinion to provide guidance to the broadcast industry regarding its enforcement policies under the current broadcast indecency standard.[35] In making indecency determinations, the Commission stated that broadcasters should focus on two fundamental determinations under the indecency standard: (1) whether the speech falls within the scope of the definition of indecency as "describ[ing] or depict[ing] sexual or excretory organs"; and (2) whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium."[36] In determining whether speech is "patently offensive" under this approach, the Commission laid out three principal factors that are significant in case comparisons: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" sexual depictions; and (3) "whether the material appears to ponder or is used to titillate, or whether the material appears to have been presented for its shock value."[37] The FCC reiterated the supple nature of this standard by stating that no single factor is determinative in an indecency analysis, and the context in which the networks broadcasted the material is critical when examining each factor.[38]

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32. *See id.* Although the FCC ruled that the broadcasts at issue were in violation of the heightened indecency standard created by the *Infinity Order*, the Commission limited its enforcement action to merely a warning to the broadcasters that the language at issue would be actionable in the future. *See id.* at 931.

33. *See, e.g.*, Letter from FCC to L.M. Commc'ns of S.C., Inc. (WYBB (FM) Folly Beach, S.C.), 7 FCC Rcd. 1595, 1595 (1992) (finding that a broadcast containing only a "fleeting and isolated utterance" in the context of a live television broadcast did not warrant sanction from the Commission); In re Applications of Lincoln Dellar, Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM), 8 FCC Rcd. 2582, 2585 (1993) (noting that the "isolated and accidental nature of a broadcast" that included a news announcer's use of a single expletive did not warrant Commission review).

34. Action for Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) *rev'd on other grounds*, 58 F.3d 654 (D.C. Cir. 1995) (citing Pub. L. No. 1009549, § 608, 102 Stat. 2186, which created a 24-hour ban that was originally held unconstitutional).

35. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8008-09 (2001) [hereinafter *Industry Guidance*].

36. *Id.* at 8002. The FCC defines the "community standard" used to make fundamental indecency determinations as "that of an average broadcast viewer or listener and not the sensibilities of any individual complainant." *Id.*

37. *Id.* at 8002-03.

38. *Id.* at 8003.

E. FCC's New Indecency Standard: Crossing the Line into Unconstitutionality (2004-Present)

In light of the FCC's totality of the circumstances approach to indecency, in 2004, the FCC issued one of its more controversial decisions.[39] The FCC abandoned its previous restrained indecency standard per *Pacifica* and created a much different type of policy regarding the use of fleeting expletives on broadcast media.[40] In its review of Bono's use of a fleeting expletive during a live broadcast of the 2003 *Golden Globes*, the Commission found that Bono's single use of the "F-word" was within the scope of the indecency standard because it inherently depicts or describes sexual activity.[41] Despite the fact that the Commission indicated that the "full *context* in which the material appeared is critically important," it seemed to completely disregard the argument that the use of the word in this instance was merely an exclamation of his happiness and was not actually used to depict or describe sexual activity.[42] This conclusion was based on the determination that the "core meaning" of the F-word possesses an inherently sexual connotation.[43] In addressing the second prong of the indecency analysis, the Commission stated that the F-word "is one of the most vulgar, graphic and explicit descriptions of sexual activity," and Bono's use of the word on national television "was shocking and gratuitous."[44]

The key difference between this FCC decision regarding broadcast expletives and previous FCC decisions on broadcast expletives is that it expressly stated that expletives can be indecent, even if not sustained or repeated, and that the previous FCC decisions holding otherwise are "no longer good law."[45] For the first time in the history of the FCC's indecency standard, the Commission held that it was irrelevant whether the use of the fleeting expletive was intentional or not.[46]

Despite the language from the Supreme Court's decision in *Pacifica*—that the FCC should "proceed cautiously, as it ha[d] in the past"—the FCC

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39. *See Golden Globes Order*, *supra* note 1, at 4978-82.

40. *See id.* The FCC initially heard complaints concerning Bono's use of the F-Word as a fleeting expletive at the *Golden Globe Awards Show* in 2003. *See* Complaints Against Various Broadcast Licensees Regarding Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859 (Enf. Bur. 2003) [hereinafter *Golden Globes Bureau Order*]. Despite the Commission's later decision to completely change its indecency policy, the FCC initially followed the "critical constitutional limitation" that the Commission "proceed cautiously and with appropriate restraint" in determining whether speech constitutes actionable indecency. *Id.* at 19860.

41. *Golden Globes Order*, *supra* note 1, at 4978.

42. *See id.* at 4977-78.

43. *Id.* at 4978.

44. *Id.* at 4979.

45. *Compare Golden Globes Order*, *supra* note 1, at 4978-80 (finding that a single, non-literal use of an expletive is actionably indecent), *with In re* Pacifica Found., Inc., 2 FCC Rcd. 2698, 2699 (1987) (maintaining the standard that indecent speech must involve more than an isolated use of an offensive word).

46. *See Golden Globes Order*, *supra* note 1, at 4979.

sought to rationalize its decision as consistent with the holding from *Pacifica*.[47] In finding Bono's single use of an expletive as actionably indecent, the FCC concluded this was consistent with promoting the well-being of America's youth, in accordance with the rationale behind the *Pacifica* decision.[48] This section of the FCC decision, however, makes little reference to the *Pacifica* Court's statement that the FCC does not have uninhibited discretion in determining what speech is banned from the airwaves, as well as the *Pacifica* Court's express reservation against holding that an isolated use of an expletive was actionably indecent.[49]

In its attempt to address both the broadcasters' concerns about the lack of certainty with the indecency standard and what it termed American's increased concern over television programming, the FCC issued an order in February 2006 to offer guidance about the new indecency rules.[50] In the February 2006 *Omnibus Order*, the Commission proposed fines against six programs and found four other programs to also be indecent, but declined to impose fines because they aired before the 2004 *Golden Globes Order*.[51] In addition to its expansion of the indecency standard to now include a single use of an expletive, the FCC also began issuing a record amount of fines for violations of the indecency standard.[52] The FCC treated "each licensee's broadcast of the same program as a separate violation" of the standard, and this gave the FCC the authority to issue a maximum fine for each use of the "indecent" speech.[53] Although the Commission stated that its new indecency standard did not mean any use of a fleeting expletive was *per se* indecent, the FCC's recently expanded indecency standard has created great uncertainty for both broadcasters and complainants in determining exactly what speech is indecent and in violation of the new standard.[54]

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47. *See* FCC v. Pacifica Found., 438 U.S. 726, 761 n.4 (1978) (Powell, J., concurring); *Golden Globes Order*, *supra* note 1, at 4982.

48. *See Pacifica*, 438 U.S. at 749 (1978); *Golden Globes Order*, *supra* note 1, at 4982.

49. *See Pacifica*, 438 U.S. at 759-61 (1978) (Powell, J., concurring); *Golden Globes Order*, *supra* note 1, at 4982.

50. *See* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 2664 (2006) [hereinafter *Omnibus Order*].

51. *Id.* at 2670-700.

52. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 322 (2d Cir. 2010). The FCC imposed a record $8,000,000 in fines in 2004. *Id.*

53. *Id.* Congress subsequently amended the maximum fine amount allowed to be issued by the FCC under the statue from $32,500 to $325,000 for a single violation. *See* 47 U.S.C. § 503(b)(2)(c)(iii) (2010).

54. *See* Complaints Regarding Various Television Broads. Between Feb 2, 2002 & Mar 8, 2005, 21 FCC Rcd. 13299, 13308 (2006) [hereinafter *Remand Order*]. The Commission reserved exceptions to its fleeting expletive standard for uses that are "integral" parts to either an artistic work or occur during a "*bona fide* news interview." *Id.* at 13325-27.

III. THE COURTS' REVIEW OF THE FCC'S NEW INDECENCY STANDARD

The Second Circuit's review of the new, unrestrained FCC indecency standard in *Fox v. FCC* originally arose from the 2006 *Omnibus Order* issued by the FCC in which the Commission upheld its revised indecency standard that a single use of a fleeting expletive on broadcast television is actionably indecent.[55] Specifically, the *Omnibus Order* found that four programs were indecent and profane under the new indecency standard following Bono's acceptance speech incident.[56] The first incident was at the 2002 *Billboard Music Awards* program on the Fox Television Network (Fox), in which Cher stated during a live broadcast that, "People have been telling me I'm on the way out every year, right? So f*** 'em."[57] The second incident occurred at the 2003 *Billboard Music Awards* program—also on Fox—in which Nicole Richie made the following non-scripted remark: "Have you ever tried to get cow sh*t out of a Prada purse? It's not so f***ing simple."[58] The third incident involved several episodes of *NYPD Blue* in which the Commission ruled that use of the word "bullsh*t" was patently offensive and a violation of the newly revised indecency standard.[59] The final incident was a December 13, 2004, broadcast of *The Early Show* in which a *Survivor* contestant in an interview described a fellow contestant of the show as a "bullsh*tter."[60]

The four case examples in the *Omnibus Order* all share the common characteristic of containing only an isolated and fleeting use of an expletive on broadcast television.[61] In finding these four programs to be a violation of the FCC indecency standard, the Commission reaffirmed its *Golden Globes Order* that any use of the F-word or S-word was presumptively indecent and profane.[62] As a result of the *Omnibus Order*, Fox, CBS, ABC, and several network affiliates filed petitions for review, and the FCC subsequently issued a *Remand Order* in which it affirmed its finding that the first two programs were indecent and profane.[63] The Commission found *The Early Show* and *NYPD Blue* broadcasts to not be indecent "in light of First Amendment values."[64] The networks subsequently took their case to the Second Circuit for review of the *Remand Order*, making a variety of administrative, statutory, and constitutional arguments.[65]

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55. *Omnibus Order*, *supra* note 50, at 2665-66.
56. *Id.* at 2690-700.
57. *Id.* at 2690-92.
58. *Id.* at 2692 n.164.
59. *Id.* at 2696-98.
60. *Id.* at 2698-700.
61. *See id.* at 2690-700.
62. *See id.*
63. *Remand Order*, *supra* note 54, at 13326-28.
64. *Id.* at 13326-29.
65. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 447 (2d Cir. 2007) *rev'd*, 129 S. Ct. 1800 (2009).

A. Round 1: Second Circuit Reverses the FCC Indecency Standard on APA Grounds

The Second Circuit, in its first review of the case, held in a 2-1 decision that the FCC's indecency standard was arbitrary and capricious and thus a violation of the Administrative Procedures Act (APA) because the FCC failed to adequately explain why it had changed its longstanding policy on fleeting expletives.[66] Although the Second Circuit reversed the case on the APA issue, the court also offered some dicta on the constitutional challenges to the standard.[67] Even though the court refrained from addressing the constitutional issues raised by the new indecency standard, it stated in dicta that "we are skeptical that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster."[68] The court specifically focused on an earlier FCC decision in which the Commission held that the repeated use of expletives in the television broadcast of the uncensored film *Saving Private Ryan* was neither indecent nor profane because the numerous expletives were "integral" to a film about World War II.[69] The court also made note of a recent case in which the Supreme Court struck down a similarly worded indecency regulation regarding the Internet as unconstitutionally vague for its use of the general terms "indecent" and "patently offensive," which would "unquestionably silence[] some speakers whose messages would be entitled to constitutional protection."[70] The court recognized a separate constitutional issue of whether the new FCC policy provides too much discretion in allowing the Commission to sanction speech based on its own subjective view of the speech's merit.[71]

B. Round 2: U.S. Supreme Court's Remand to Address the Constitutional Issues

The Supreme Court, in its first review of the case, issued a fragmented opinion in which a slim 5-4 majority held that the FCC's recent orders creating a new fleeting expletive standard were neither arbitrary nor capricious, and thus, were not a violation of the APA.[72] Despite the parties extensively briefing and arguing the issues regarding whether the new indecency standard was a violation of the First Amendment, the Court restricted its analysis solely

66. *Id.*
67. *Id.* at 462-67.
68. *Id.* at 462.
69. *Id.* at 462-63.
70. *Id.*
71. *Id.* at 464.
72. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009). Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito all joined in the judgment of the case that the policy was not a violation of the APA. *Id.* Justice Breyer wrote the dissent, with whom Justices Stevens, Souter, and Ginsberg joined. *Id.* at 1829-41 (Breyer, J., dissenting).

to the APA issue.[73] While the Court stated that references to excretory and sexual material "surely lie at the periphery of First Amendment concern," it did acknowledge that it was at least "conceivable" that the new FCC indecency standard could extend beyond that which is allowed under the First Amendment.[74] Even though the majority declined to rush to judgment on the constitutional issue in this case, it did recognize that the courts would decide the constitutionality of the FCC's current indecency standard "soon enough, perhaps in this very case."[75] Based on this foreshadowing language offered by the Court, it appears that the Supreme Court's decision in *Fox* "is more like an intermission between acts."[76]

C. Round 3: Second Circuit Reverses the FCC Standard on First Amendment Grounds

After the Supreme Court's reversal and remand on APA grounds, the Second Circuit took up the task to fully address the question of whether the FCC's current indecency standard violated the First Amendment—an issue the Supreme Court declined to consider.[77] After rejecting both the FCC's and the networks' arguments that current First Amendment jurisprudence resolved the vagueness challenge in the case, the Second Circuit addressed two specific constitutional problems raised by the current indecency standard.[78]

1. Problem #1: FCC's Current Indecency Standard Is Indiscernible

The first problem highlighted was how the FCC's determination as to which words or expressions qualify as patently offensive creates an "indiscernible standard" that fails to provide sufficient notice to broadcasters of prohibited speech.[79] In its *Omnibus Order*, the FCC concluded that the term "bullsh*t" used in an *NYPD Blue* episode was patently offensive.[80] In the same *Omnibus Order*, however, the FCC found the terms "dick," "dickhead," "pissed off," "up yours," "kiss my ass," and "wiping his ass" all *not* patently offensive.[81] These FCC decisions hardly provide broadcasters with sufficient notice as to how to apply this new indecency standard in the future.[82] "The

73. *See id.* at 1819. "This Court, however, is one of final review, 'not of first view.'" *Id.*

74. *Id.* (citing FCC v. Pacifica Found., 438 U.S. 726, 743 (1978) (plurality opinion of Stevens, J.).

75. *Id.*

76. *See* Robert Corn-Revere, FCC v. Fox Television Stations, Inc.*: Awaiting the Next Act*, 2009 CATO SUP. CT. REV. 295, 297 (stating that because the Supreme Court failed to reach the constitutional issues, its decision was more like "an intermission between acts").

77. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 330 (2d Cir. 2010); *see supra* notes 72-73 and accompanying text.

78. *Fox*, 613 F.3d at 330-34.

79. *Id.* at 330-33.

80. *Omnibus Order*, *supra* note 50, at 2696-97.

81. *Id.* at 2696-97, 2710-13.

82. *See Fox*, 613 F.3d at 330-33.

First Amendment requires nothing less" than that the FCC provide the networks notice, with at least some degree of certainty, as to how to comply with the current policy.[83] "Broadcasters are entitled to the same degree of clarity" regarding government restrictions on speech.[84]

The Second Circuit also took issue with the "artistic necessity" and "bona fide news" exceptions that afford the FCC the flexibility to decide whether the First Amendment is implicated.[85] The FCC put these exceptions in place because an outright ban of certain words would assuredly give rise to First Amendment issues.[86] Both exceptions, however, are impermissibly vague because they leave broadcasters guessing whether the content of the program and the use of the expletive warrant an application of an exception to the indecency standard.[87] This results in the creation of an indecency standard that "even the FCC cannot articulate or apply consistently."[88]

Because the FCC's indecency standard constitutes an indiscernible standard, there is a risk that the Commission's "ad-hoc" indecency determinations will reflect the individual biases of the officials.[89] The court did note that it had "no reason to suspect that the FCC [was] using or abusing its discretion to suppress free speech."[90] Nevertheless, even the risk of subjective, content-based decision making gives rise to serious concerns under the First Amendment.[91] The Supreme Court has rejected giving the government too much discretion in regulating speech because of the risk of

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83. *Id.* at 331.

84. *Id.* at 329.

85. *Id.* at 331-32.

86. *Id.* at 332.

87. *See id.* at 332-33. The Second Circuit makes specific reference to three examples from its first opinion to emphasize how little "rhyme or reason" there is to these FCC indecency decisions. *Id.* The first example was a complaint regarding the film *Saving Private Ryan* where the FCC found that the repeated use of numerous expletives were an "integral" part of a fictional movie about war, and thus, not actionably indecent. *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, 4509-14 (2005) [hereinafter *Saving Private Ryan Order*]. The second example was the FCC's finding that the broadcast of expletives in the television musical documentary *The Blues: Godfathers and Sons* was "shocking and offensive" because the educational purpose of the program "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Omnibus Order*, *supra* note 50, at 2683-85. The final example was the FCC finding that use of the S-word on the *Early Show* was not actionable under the standard because it was a "bone fide news interview." *Remand Order*, *supra* note 54, at 13326-28.

88. *See Fox*, 613 F.3d at 332.

89. *See id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

90. *Id.* at 333.

91. *Id.* at 332-33. Although the court stopped short of accusing the FCC of employing a subjective and discriminatory standard, it did make reference again to specific examples that illustrate some concern. *Id*. at 333. The court seemed to speculate that the FCC decided that the use of expletives in the film *Saving Private Ryan* was acceptable under the standard because it was a mainstream film "with a familiar cultural milieu" as opposed to a film like *The Blues* which mainly portrayed an outsider genre of musical experience. *See id.*

suppressing a particular point of view based on an arbitrary determination that it is "unfavorable."[92]

2. Problem #2: FCC's Current Indecency Standard Has a Chilling Effect on Speech

Given the indiscernible standard created by the FCC, the Second Circuit concluded that there was more than enough evidence to establish that the indecency standard had "chilled protected speech."[93] Under the current system, networks are forced to make a choice between either not airing any material in question or facing the risk of severe fines or a loss of their broadcasting license.[94] A Peabody Award-winning "9/11" documentary that contained real audio footage of some of the firefighters and rescue members at the scene presents one example of this chilling effect.[95] Although the documentary had aired twice before the FCC put the new indecency standard into place, several CBS affiliates declined to later air the program for fear that some of the expletives uttered in the documentary would be found indecent under the newly revised standard.[96] Another example of this chilling effect was a radio station that cancelled a reading of the novel, *I Am Charlotte Simmons*, due to a single complaint about the "adult" language in the book.[97]

In response, the Commission argued that current technology allows the networks to monitor or bleep expletives, so that the new indecency standard does not have a chilling effect on broadcast speech.[98] The Second Circuit, however, rejected any argument that current technology will prevent all fleeting expletives from occurring because even elaborate systems cannot be one hundred percent effective in preventing sudden departures from the script.[99] The court expressed great concern at the possibility of broadcasters declining to pursue contentious people or subjects or declining to run live programming altogether to avoid becoming subject to FCC fines and penalties.[100] This chilling effect has even extended into programs that contain no fleeting expletives, but merely contain a reference or discussion of sex,

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92. *See* Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 131 (1992) ("If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and abridgment of our precious First Amendment freedoms is too great' to be permitted").

93. *Fox*, 613 F.3d at 334.

94. *Id.*

95. *See* Larry Neumeister, *Some CBS Affiliates Worry Over 9/11 Show*, ASSOCIATED PRESS, (Sept. 3, 2006), *available at* http://breitbart.com/article.php?id=d8jtkafo2&show_article=1.

96. *Fox*, 613 F.3d at 334.

97. *Id.*

98. *See id.*

99. *See id.* The court also made note that it would cost the network an estimated $16 million annually to install an audio delay system for all live programming. *Id.* at 334 n.10.

100. *See id.* at 335.

sexual organs, or excretion.[101] Sex, sexual attraction, and the human digestive system are all "important areas of human attention" and the FCC's standard has the effect of chilling discussion of valuable material that deserves complete protection under the First Amendment.[102] The FCC's current indecency standard fails to pass constitutional scrutiny because it has a chilling effect on broadcast speech, and thus, the Second Circuit struck it down in *Fox v. FCC*.[103]

IV. FIRST AMENDMENT IMPLICATIONS REGARDING RESTRICTIONS ON BROADCAST MEDIA

Although the First Amendment protects speech made on broadcast media, the Supreme Court has historically treated this category of speech differently from all other forms of communication.[104] The Court has applied a strict scrutiny standard to content-based restrictions of indecent speech in other communication contexts, but attempts to limit broadcast speech have instead received a lesser level of scrutiny by the Court because of "differences in the characteristics of the new media."[105] Strict constitutional scrutiny of content-based restrictions requires that the government narrowly tailor its restriction by utilizing only the least restrictive method of promoting its compelling interest.[106] On the other hand, the lesser level of constitutional scrutiny applied to content-based restrictions of broadcast media has allowed the FCC much greater discretion in restricting speech if such action would serve "the public

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101. *See id.* The first example provided to illustrate this chilling effect was Fox's decision not to re-broadcast an episode of *That 70's Show*—which subsequently received an award from the Kaiser Foundation "for its honest an accurate depiction of a sexual health issue"—because it dealt with the topic of masturbation. *Id.* The second example of this chilling effect was Fox's decision to rewrite an episode of the television show *House* for fear that the topic of a character's psychiatric issues involving his sexuality would be indecent under the new FCC standard. *Id.*

102. *Id.*

103. *See id.*

104. *See, e.g.*, *infra* note 105.

105. *See* Red Lion Broad. Co., v. FCC, 395 U.S. 367, 386-87 (1969); *see also* Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (striking down a state statute attempting to regulate "obscene" material in print media as a violation of due process); United States v. 12 200-Foot Reels of Super 8mm Film, 413 U.S. 123, 130 n.7 (1973) (internal citations omitted) (noting that the Court has the power to construe federal statutes regulating indecent films and to construe vague terms in the statute that raise serious constitutional doubts as limited to only patently offensive or other specific hardcore examples); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216-18 (1975) (holding that a city ordinance prohibiting speech in a public forum was impermissibly broad and unconstitutionality invalid on its face); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983) (holding that Congress's justification for passing a federal statute prohibiting unsolicited mailings was insufficient, and the statute was an unconstitutional restriction on commercial speech); Reno v. ACLU, 521 U.S. 844, 882-85 (1997) (holding that provisions seeking to protect minors from harmful material on the internet were facially overbroad in violation of the First Amendment); United States v. Playboy Entm't. Grp., Inc., 529 U.S. 803, 826-27 (2000) (holding that a statute requiring cable television programmers to scramble sexually explicit channels was subject to strict scrutiny and in violation of the First Amendment's free speech clause).

106. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

interest, convenience, and necessity."[107] In *Red Lion Broad. Co. v. FCC*, the Court first laid out the justification for allowing the FCC to regulate this "new technology" by pointing to the fact that broadcasts can produce sounds harsher than the human voice.[108] The justification provided in *Red Lion* serves as the basis for the Court's future application of a lesser level of constitutional scrutiny for content-based restrictions on broadcast media by requiring only that the restrictions be reasonable and non-discriminatory.[109]

A. Lesser Level of Scrutiny Applied to Restrictions on Broadcast Media After Pacifica

Although some limited jurisprudence existed on the topic of the First Amendment's level of protection for broadcast speech prior to 1978, the Court's decision in *Pacifica* was, and remains, the only Supreme Court precedent specifically addressing the FCC's power to regulate indecent broadcast speech.[110] The *Pacifica* Court began by re-affirming that Congress was within its constitutional limits to draft 18 U.S.C. § 1464 to regulate speech that is indecent but not obscene in the broadcast context, unlike in other areas.[111]

The Court relied on twin pillars of reasoning to justify this distinction for broadcast media.[112] The Court's first reason centered on the fact that broadcast media had a uniquely pervasive presence in American society.[113] Because the Internet and cable television remained in their infancy in 1978, broadcast television and radio undoubtedly had an extensive and unique influence on Americans—both in public and in the privacy of their homes.[114] "[I]ndecent material . . . confronts the citizen, not only in public, but also in the privacy of

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107. *See* FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946) (holding that the Commission, and not the courts, must be satisfied that its decision to renew a radio broadcaster's license will serve the public interest).

108. *Red Lion*, 395 U.S. at 386-87.

109. *See* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (citing *Red Lion* to support its decision to carve out a First Amendment distinction for restrictions on broadcast media).

110. *See id*. at 744-51.

111. *See id.* at 735-38. *Compare* Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (regulating speech through the mail that is not fraudulent or obscene raises "grave constitutional questions"), *with Red Lion*, 395 U.S. at 386 (stating that "differences in the characteristics of new broadcast [media] justify differences in the First Amendment standards applied to them").

112. *See Pacifica*, 438 U.S. at 748-51. "The reasons for these distinctions are complex, but two have relevance to the present case." *Id.* at 748.

113. *See id.* at 748.

114. *See generally* Darrel Ince, *Internet History*, A DICTIONARY OF THE INTERNET, http://www.encyclopedia.com/doc/1O12-Internethistory.html (outlining the historical development of the internet from its origin as a U.S. Defense project in the 1960s to its commercial development in the 1990s); *Cable Television*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 209-11 (2d ed. 2005), *available at* http://www.encyclopedia. com/topic/cable_television.aspx#2 (highlighting the growth of cable programming during the 1980s and early 90s).

the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[115]

The Court's second reason given for the distinction was that broadcast media was inimitably accessible to children, including those that may be too young to even read.[116] The ease by which broadcast media exposed children to indecent content, combined with the government's interest in children's well-being and parents' authority to promote that well-being in their own household, rationalized this second reason the Court offered.[117] Notably, the Court expressly refrained from holding that an *occasional* expletive in a broadcast setting would justify restriction, and the Court further emphasized the *narrowness* of its holding.[118] In addition, in determining whether restrictions on broadcast speech are unconstitutional, the courts must analyze "a host of variables," including the time, context, and type of broadcast media involved.[119] Interestingly, the Court also recognized how the content of the program can dictate the composition of the audience, which supports the conclusion that if the content of the program commands the attention of a more adult audience, then the program is less likely to meet the second prong of the Court's indecency test.[120] The governmental interest in protecting children does not justify a gratuitously broad suppression of speech addressed to adults.[121] In its effort to protect children from harmful materials, the government may not "'reduc[e] . . . the adult population . . . to . . . only what is fit for children.'"[122]

B. Void for Vagueness Doctrine

The void for vagueness doctrine is another constitutional issue that has implications on content-based restrictions to broadcast speech because it is a principle of law closely intertwined with the First Amendment right to freedom of speech.[123] The doctrine requires that prohibitions on speech be clearly defined and provide reasonable notice so that a person knows what

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115. *Pacifica*, 438 U.S. at 748.

116. *Id.* at 749.

117. *See id.* Conversely, the Court did not state that adults are precluded from hearing indecent speech, nor did it hold that broadcast of indecent speech during the late evening is impermissible. *See id.* at 750-51 n.28.

118. *See id.* at 750.

119. *See id.*

120. *See id.* at 750-51. The Court provided an example of this conclusion—even a primetime airing of a program like Geoffrey Chaucer's *Canterbury Tales* would not attract an audience old enough to understand the content and young enough to be adversely affected by certain sexually explicit passages. *See id.* at 751 n.29; Geoffrey Chaucer, *The Canterbury Tales*, *in* Great Books of the Western World 159 (Robert Maynard Hutchison, ed., 1952).

121. *See* Reno v. ACLU, 521 U.S. 844, 875 (1997).

122. *Id.* (quoting Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727, 759 (1996)).

123. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

speech is restricted under the standard.[124] The First Amendment places strict requirements on governments to ensure that regulations do not threaten to "chill" constitutionally protected speech.[125] But regulations of speech, including those that involve expressive activity, are not required to present "perfect clarity and precise guidance."[126]

The void for vagueness doctrine serves two important First Amendment principles.[127] First, the doctrine ensures that regulations and restrictions provide fair notice to those subject to them.[128] Vague laws run the risk of trapping the innocent into unlawful conduct by failing to provide fair warning.[129] If citizens are uncertain of a law's meaning, then it will inevitably lead them to "steer far wider of the unlawful zone . . . than if boundaries of the forbidden areas were clearly marked."[130] A vague statute that collides with an area provided First Amendment protection operates to obstruct one's ability to exercise those protected freedoms.[131] Content-based restrictions raise special First Amendment concerns, and the void for vagueness doctrine places particular importance on notice, given the obvious risk of creating a chilling effect on protected speech.[132]

Second, the doctrine supports the principle that the First Amendment prohibits vague regulations because they create the risk of discriminatory enforcement.[133] Even if discriminatory enforcement has not occurred, the real issue is whether the regulation is so vague that there exists a real possibility that discriminatory enforcement could occur.[134] "[F]or history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law."[135] The fear is that vague laws will result in police, judges, and juries resolving public policy matters in an impromptu and biased manner, combined with the likelihood of an arbitrary and discriminatory application of the vague regulation.[136] Although the FCC's current indecency standard raises significant First Amendment concerns involving the void for vagueness doctrine, the first issue this Comment will address is what level of

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124. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

125. *See Vill. of Hoffman Estates*, 455 U.S. at 499. "[A] law or regulation that 'threatens to inhibit the exercise of constitutionally protected rights,' such as the right of free speech, will generally be subject to a more stringent vagueness test." Perez v. Hoblock, 368 F.3d 166, 175 n.5 (2d Cir. 2004) (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

126. United States v. Williams, 553 U.S. 285, 304 (1989). "'[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

127. *See infra* notes 128-134 and accompanying text.

128. *See Grayned*, 408 U.S. at 108-09.

129. *Id.* at 108.

130. *Id.* at 109 (quoting Bagett v. Bulitt, 377 U.S. 360, 372 (1972)).

131. *See id.* at 108-09.

132. *See* Reno v. ACLU, 521 U.S. 844, 871-72 (1997).

133. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991).

134. *See id.*

135. *Id.*

136. *Grayned*, 408 U.S. at 108-09.

scrutiny the courts should apply when analyzing the constitutionality of the FCC's current indecency standard on broadcast media.[137]

V. THE *PACIFICA* RATIONALE FOR APPLYING A LESSER LEVEL OF CONSTITUTIONAL SCRUTINY TO CONTENT-BASED RESTRICTIONS ON BROADCAST MEDIA NO LONGER HOLDS TRUE

The Second Circuit's review of the FCC's current indecency standard in *Fox v. FCC* raises a key issue of whether broadcast media still retains its characteristics of being uniquely pervasive and uniquely accessible in today's society to warrant the court's continued application of a lesser level of constitutional scrutiny when analyzing whether the restrictions fall within the permissible guidelines of the First Amendment.[138] As noted, broadcast media has historically presented a special First Amendment problem.[139] Due to its expansive reach and intrusive nature into the privacy of people's homes, broadcast media has received the most limited First Amendment protection.[140] Broadcast media received this distinction because (1) it had a uniquely pervasive presence in American society, and (2) it was uniquely accessible to children.[141] Based on an analysis of the societal and technological changes since *Pacifica* and a comparison of the strict scrutiny standard applied to cable television, the Court should reconsider its rationale from *Pacifica* and instead apply a strict scrutiny standard to restrictions on broadcast media as well.[142]

A. Broadcast Media No Longer Has a Uniquely Pervasive Presence in Today's Society

While testifying at a Senate Commerce Committee hearing entitled "Rethinking the Children's Television Act for a Digital Media Age," FCC Chairman Julius Genachowski highlighted an array of new choices, including direct broadcast satellite, Internet-based video, mobile services, video offerings from telephone companies, and video games which have joined broadcast and cable television as a daily reality for millions of Americans.[143]

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137. *See infra* Part V.

138. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 327 (2d Cir. 2010). "We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television . . . ." *Id.*

139. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

140. *See id.* at 748-49.

141. *See id.*

142. *See infra* Part V.A-B.

143. *See Rethinking the Children's Television Act for a Digital Media Age: Hearing Before S. Comm. on Commerce, Sci., and Transp.*, 111th Congress (statement of Julius Genakowski, Chairman, FCC), 2009 WL 2194549 at *1-2 (2009) [hereinafter *Chairman's Statement*]; *see also* Robert Corn-Revere, *Regulating Media Content In an Age of Abundance*, 27-SEP COMM. LAW. 1 (2010) (discussing many of the recent technological advancements in media content over the last several decades) [hereinafter *Regulating Media Content*].

Based on the Chairman's statement, the FCC plainly is aware that—unlike American society just a few decades ago—there is now a variety of different types of media, other than just broadcast radio and television, that have a pervasive presence in today's society.[144] In its biennial review of broadcast ownership rules in 2002, the FCC stated that "the modern media marketplace is far different than just a decade ago" and is now "characterized by abundance."[145]

Because of requirements under the 1992 Cable Act, the FCC has issued annual reports tracking many of the recent changes in the American media market.[146] For example, the Commission found that almost 90% of television homes now subscribe to a multi-channel programming service such as cable or satellite television.[147] The ability of these services to provide viewers with access to hundreds of cable television channels, in addition to the traditional broadcast channels, represents a drastic change from the limited number of basic broadcast channels available in 1978 when *Pacifica* was decided.[148]

With advancements in technology, the channels of communication have dramatically changed in recent years.[149] Internet-based broadcasts are another recent media innovation that has become increasingly popular.[150] As of 2004, more than 99% of households had access to at least one high speed Internet service.[151] In addition, 70% of U.S. households now actually subscribe to Internet service, and 60% of internet users are now viewing or downloading videos online.[152] The Internet offers access to almost limitless amounts of content, including viral videos, feature films, and even broadcast television and radio programs.[153] Viewing video and audio content on mobile phones is also becoming much more commonplace in today's society, and 70% of teens in the U.S. now have their own mobile phone.[154] Mobile phone services now

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144. *See Chairman's Statement*, *supra* note 143, at *1-2.

145. 2002 Biennial Regulatory Review - Review of the Comm'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, 18 FCC Rcd. 13, 620, 13647-48 (2003).

146. *Regulating Media Content*, *supra* note 143, at *23.

147. *See* Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, 24 FCC Rcd. 542, 546 (2009) [hereinafter *Thirteenth Annual Report*]; *Regulating Media Content, supra* note 143 at *23.

148. *See Thirteenth Annual Report, supra* note 147 at 544-46. *See generally Cable Television*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 209-11 (2d ed. 2008), *available at* http://www.encyclopedia.com/topic/cable_television.aspx#2 (discussing how the large growth in cable programming options did not occur until the 1980s and early 1990s).

149. *See Regulating Media Content*, *supra* note 143, at *23.

150. *See Thirteenth Annual Report*, *supra* note 147, at 549-50.

151. *See* Press Release, F.C.C., *High-Speed Services for Internet Access: Status as of December 31, 2004*, at 4, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf.

152. *See Thirteenth Annual Report*, *supra* note 147, at 549-50.

153. *See* Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming, 24 FCC Rcd. 11413, 11468 (2009) [hereinafter CSVA Report].

154. *See id.* at 11414 & n.5; *see also Regulating Media Content, supra* note 143, at *23 (noting the range of video offerings for mobile devices).

offer a wide range of video content including programming from CNN, ESPN, MTV, Comedy Central, Discovery, and Fox News.[155]

Due to the above societal and technological changes, it is apparent that "[c]hildren today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago."[156] While broadcast media is undoubtedly still widely pervasive in today's society, the technological advances highlighted above support the conclusion that broadcast media no longer has the same *uniquely* pervasive presence in today's society that it did in 1978 when the Court decided *Pacifica*.[157] "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."[158] Accordingly, content-based restrictions on broadcast media, such as the FCC's new indecency standard, should receive the same strict scrutiny standard that the courts apply to restrictions on other forms of constitutionally protected speech.[159]

Perhaps the most persuasive example to support this argument is cable television broadcasting, and the Court's failure to apply a lesser level of constitutional scrutiny to content-based restrictions on this type of media despite arguments that cable television also holds a uniquely pervasive presence in modern society.[160] As noted above, almost 90% of television homes now subscribe to a multichannel programming service such as cable or satellite television.[161] As a result, "[c]able television broadcasting, including access channel broadcasting, is [now] as 'accessible'. . . as over-the-air broadcasting, if not more so."[162] Research indicates households that subscribe to cable television programming spend a greater portion of their day watching television and will watch more channels than households that do not subscribe to cable service.[163] Despite the above arguments, the Court has expressly stated that "the rationale for applying a less rigorous standard of First

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155. *Thirteenth Annual Report*, *supra* note 147, at 549, 610-12.

156. Empowering Parents and Protecting Children in an Evolving Media Landscape, 74 Fed. Reg. 61308, 61309 (proposed Nov. 24, 2009) (to be codified at 47 C.F.R pt. 73).

157. *See supra* notes 145-155 and accompanying text.

158. Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973).

159. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that content-based restrictions on a newspaper were struck down under a strict scrutiny standard as unconstitutional); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (holding that content-based restrictions on movies did not meet the rigorous constitutional standards that apply to regulations of expression); Sable Commc'ns, Inc. v. FCC, 492 U.S. 115 (1989) (applying a strict or exacting scrutiny standard to content-based restrictions to communications over the telephone); Reno v. ACLU, 521 U.S. 844 (1997) (declining to qualify a lower level of scrutiny for content-based restrictions on speech over the internet); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (2000) (striking down a government regulation for failing to utilize a less restrictive alternative to the content-based regulation).

160. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).

161. *Thirteenth Annual Report*, *supra* note 147, at 546.

162. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality op.).

163. *See id*. at 744-45 (citing Greenberg, Heeter, D'Alessio, & Sipes, *Cable and Noncable Viewing Style Comparisons*, *in* CABLEVIEWING, 140, 207 (1988)).

Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable television."[164] While content-based restrictions on cable television broadcasts are subject to strict scrutiny, the same restrictions on regular broadcast television continue to receive a lesser level of constitutional scrutiny.[165]

Moreover, the Court's recent opinion in *Citizens United v. Federal Election Commission* signals a growing disdain for applying different levels of constitutional protection to various types of media.[166]

> The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.[167]

Justice Kennedy stressed that "[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used" to transmit the speech at issue because "those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux."[168] Perhaps Justice Kennedy's statement in *Citizens United* offers some foreshadowing as to how the Court might approach the issue—should it decide to hear the *Fox v. FCC* case again—of whether broadcast media still retains its uniquely pervasive characteristic in today's society, given the technological and societal changes since the *Pacifica* decision.[169]

B. Broadcast Media Is No Longer Uniquely Accessible to Children

In addition to the above rationale supporting the argument that broadcast media no longer retains its uniquely pervasive characteristics in today's society, *Fox v. FCC* also supports the notion that technological innovations in today's society have similarly rendered broadcast media no longer uniquely accessible to children.[170] When *Pacifica* was decided in 1978, technology did not allow parents to protect their children by blocking or filtering indecent content from being aired over broadcast television, and "prior warnings [could not] completely protect the listener or viewer from unexpected program

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164. *Turner*, 512 U.S. at 637; *see also Playboy*, 529 U.S. at 816 (applying a strict scrutiny standard when analyzing the constitutionality of a content-based regulation on a cable television broadcast).

165. *See supra* notes 160-164 and accompanying text.

166. *See* Citizens United v. FEC, 130 S Ct. 876, 906 (2010); *see also Regulating Media Content*, *supra* note 143, at 25 (discussing how recent precedent indicates the Court is unlikely to allow the FCC to expand its regulatory power regarding media content in the future).

167. *Citizens United*, 130 S. Ct. at 906.

168. *Id.* at 890-91.

169. *See id.*; FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

170. *See infra* Part V.B.

content."[171] Parents' ability to turn off the broadcast program, after being exposed to indecent content, in order to avoid further exposure does not give a speaker constitutional immunity for the harm that has already taken place.[172] The Court in *United States v. Playboy* stated that the crucial difference between cable television and broadcast media was that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis."[173] When the Court decided *Pacifica* in 1978, and in 2000 when *Playboy* was decided, technology did not allow parents to effectively shield their children from accessing indecent content on broadcast television.[174] Thus, the rationale for applying strict scrutiny to content-based restrictions on cable television and not to broadcast television was that, unlike broadcast television, cable television gave parents the ability to selectively limit their children's access to indecent programming by choosing what channels to subscribe to.[175]

In *Fox v. FCC*, however, the Second Circuit discarded that distinction between broadcast and cable television because, unlike in 1978, current technology now offers parents a way to protect their children from being exposed to indecent content on broadcast television.[176] As of January 2000, every television set thirteen inches or larger contains a V-chip, which allows parents to block programs on broadcast television based on a standardized rating system.[177] As of June 11, 2009—the date of the transition to digital broadcast television—any household using a digital converter box to view broadcast television also has access to a V-chip.[178] Unlike in 1978, every parent viewing broadcast television in their home now has access to a V-chip either through their television or their digital converter box.[179] Moreover, the FCC has itself identified "a wide array of [additional] parental control technologies for television," including "VCRs, DVD players, and digital video recorders (DVRs), that permit parents to accumulate a library of preferred programming for their children to watch."[180]

Due to the recent innovations of the V-chip and other parental-control measures, children no longer have the same unique access to indecent content on broadcast television that they did in the past.[181] Furthermore, the V-chip, as well as the other types of parental control technologies available, offer the

171. *See Pacifica*, 438 U.S. at 748-49.

172. *Id.*

173. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000).

174. *See id.* (stating that the reason restrictions on cable television receive a lesser level of constitutional scrutiny is because cable television allows parents to protect their children from unwanted content).

175. *See id.*

176. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 325-27 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011) (No. 10-1293).

177. *See* 47 U.S.C. § 303(x) (2006).

178. *CSVA Report*, *supra* note 153, at 11418-19.

179. *See id.*; § 303(x).

180. *CSVA Report*, *supra* note 153, at 11418.

181. *See supra* notes 177-180 and accompanying text.

FCC much less intrusive methods of promoting its compelling interest in protecting children from indecent speech on broadcast television.[182] "[T]argeted blocking [such as the V-chip] is less restrictive than banning . . . and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests."[183]

The Court expressly stated in *Pacifica* that "[t]he Commission's action [did] not by any means reduce adults to hearing only what is fit for children."[184] The Court also refrained from holding that broadcasters could not air indecent speech altogether.[185] The FCC's current indecency standard, though, does exactly what *Pacifica* spoke against by implementing a broad program that restricts all adults' ability to view content on broadcast media.[186] The V-chip, on the other hand, provides the FCC with an effective and less restrictive means to control children's access to indecent content on broadcast television without encroaching on the First Amendment rights of broadcasters or willing adult listeners of indecent speech.[187]

Because of societal and technological changes since *Pacifica*, broadcast media is no longer uniquely accessible to children as to justify an application of a lesser level of scrutiny.[188] Under an application of strict scrutiny, the FCC must narrowly tailor its indecency standard by utilizing only the least restrictive method of promoting its compelling interest in protecting children from indecent speech on broadcast television.[189] The current FCC indecency standard, unlike narrowly tailored restrictions such as the V-chip, does not represent the least restrictive method for the FCC to promote its compelling interest in protecting children from indecent speech on broadcast television.[190] Based on the above reasoning, the courts should apply strict scrutiny to the current FCC indecency standard and strike it down for its failure to employ the

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182. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 327 (2d Cir. 2010) ("[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners"), *cert. granted*, 131 S. Ct. 3065 (2011) (No. 10-1293).

183. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000).

184. FCC v. Pacifica Found., 438 U.S. 726, 750 n.28 (1978).

185. *Id.* at 760-61.

186. *See id*. at 750 n.28.

187. *See supra* note 182. Congress found the V-chip program would be an effective means of limiting children's access to indecent content on broadcast television by "[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest." Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a)(9), 110 Stat. 140. President Clinton also endorsed this finding by Congress by stating that the V-chip will "empower families to choose the kind of programming suitable for their children." Presidential Statement on Signing the Telecomm's Act of 1996, 32 WEEKLY COMP. PRES. DOC. 218 (Feb. 8, 1996). Moreover, even the FCC has stated that the V-chip is an acceptable means of providing parents "an effective method . . . to block programming they believe too harmful to their children." *In re Implementation of Section 551 of the Telecommunications Act of 1996*, 13 FCC Rcd. 8232, 8233 (1998).

188. *See supra* text accompanying notes 170-187.

189. *See* Sable Commc'n of Cal, Inc. v. FCC, 492 U.S. 115, 126 (1989).

190. *See supra* notes 170-187 and accompanying text.

least restrictive means in furthering its interest in protecting children from indecent speech.[191]

VI. CONSTITUTIONAL CONCERNS WITH THE CURRENT FCC INDECENCY STANDARD

Despite the compelling rationale for abandoning the application of a lesser level constitutional scrutiny to content-based restrictions on broadcast media, this lesser level of constitutional scrutiny under *Pacifica* remains the standard lower courts are bound to follow—until the Supreme Court holds otherwise.[192] This means that broadcast media still receives the most limited First Amendment protection of all forms of communication.[193] Even under an application of a lesser level of constitutional scrutiny, though, the First Amendment nonetheless requires the FCC to clearly define its indecency policy so as to provide broadcasters with sufficient notice as to what constitutes actionably indecent speech.[194] The current FCC indecency standard is, nevertheless, unconstitutional under this lesser level of scrutiny because it (1) provides insufficient notice to broadcasters as to the scope of the indecency standard, and (2) has a chilling effect on speech protected by the First Amendment.[195]

A. The Current FCC Indecency Standard Provides Insufficient Notice to Broadcasters as to What Constitutes Indecent Speech

The initial constitutional concern with the current FCC indecency standard is that it is impermissibly vague and creates an indiscernible standard that fails to provide networks with fair notice as to what speech is actionably indecent.[196] A persuasive example to support this concern is the FCC's recent finding that the *repeated* use of the F-word in the broadcast television airing of the uncensored film *Saving Private Ryan*—a film relating the story of eight soldiers on a mission in World War II—was neither indecent nor profane under an application of the current indecency standard.[197] In its *Golden Globes Order*, the FCC stated that the F-word, no matter the context in which it is used, possesses an inherent sexual connotation and "is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English

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191. *See* discussion *supra* Part V.A-B.

192. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978). Lower courts are not at liberty to depart from binding Supreme Court precedent "unless and until [the] Court reinterpret[s]" that precedent. Agostini v. Felton, 521 U.S. 203, 238 (1997).

193. *See* cases cited *supra* note 105.

194. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

195. *See infra* Parts VI.A-B.

196. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 330-32 (2d Cir. 2010).

197. *See Saving Private Ryan Order*, *supra* note 87, at 4509-14.

language."[198] The Commission, however, somehow overcame its previous strong language concerning uses of the F-word by holding that the repeated use of the expletive in the uncensored airing of *Saving Private Ryan* was neither gratuitous nor actionably indecent.[199] The Commission based this holding on its finding that the use of the F-word was "integral to the film's objective of conveying the horrors of war," and omitting the expletive would have materially altered the film.[200]

This application of the current indecency standard fails to provide sufficient notice to broadcasters as to exactly what material falls under this integral exception.[201] The Commission found that the broadcast television airing of the uncensored *Saving Private Ryan* film had sufficient social or artistic value to allow for this integral exception to apply.[202] The Commission, however, failed to provide both reasonable and constitutionally sufficient notice as to why the uncensored broadcast of the *Saving Private Ryan* film had sufficient value, but the 2003 *Golden Globes* did not.[203] The problem with allowing the FCC to make determinations as to the value of a program, its context, or whether the use of expletives therein meet the integral exception is that it grants the FCC overly broad discretion and further creates the risk of discriminatory enforcement of the indecency standard as a whole.[204] The current indecency standard leaves broadcasters guessing as to (1) whether their live broadcasts possess sufficient social, scientific, or artistic value, and (2) whether any expletives used therein are an integral part of that program.[205] The purpose of the void for vagueness doctrine is to protect the First Amendment rights of broadcasters from exactly this type of discriminatory enforcement of a standard based on the arbitrary opinions and tastes of the Commissioners.[206] This sort of "we'll know it when we see it" rationale regarding the integral exception and a program's value fails to comply with the

198. *Golden Globes Order*, *supra* note 1, at 4978-79.

199. *See Saving Private Ryan Order*, *supra* note 87, at 4512-13.

200. *Id.*

201. *See Fox*, 613 F.3d at 332 (stating that the Commission's application of its "integral" exceptions to the indecency standard has "little rhyme or reason").

202. *See Saving Private Ryan Order*, *supra* note 87, at 4509-15.

203. *See id.* at 4514. The Commission distinguished Bono's use of a single expletive from the *Saving Private Ryan* film by arbitrarily concluding that the context of the *Golden Globes* did not have "any political, scientific or other independent value." *See id.*

204. *See generally* Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 131 (1992) (holding that allowing the government to have too much discretion risks potentially suppressing a particular point of view); City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 758 (1988) (stating that government officials using shifting or illegitimate criteria in their decision making makes it difficult for the courts to determine whether the officials are simply permitting favorable and suppressing unfavorable expressing).

205. *See Fox*, 613 F.3d at 332.

206. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1051 (1991) (stating that the void for vagueness doctrine is based on the need to remove the risk of discriminatory enforcement of a government restriction on speech).

notice requirements of the void for vagueness doctrine.[207] This example is not given to support the idea that broadcasters and celebrities should be given free reign to pollute the airwaves with indecent content, but instead is provided to show that, at the very least, these people should be given proper notice of what is prohibited so they can conduct themselves in accordance with the current indecency standard.[208]

Furthermore, the determination that the uncensored *Saving Private Ryan* film could not convey its horrors of war objective without the broadcast of *repeated* expletives further highlights the irrationality of the FCC's application of its indiscernible indecency standard here.[209] A film conveying themes of honor, courage, and combat does not ordinarily require the use of repeated expletives to enhance the realism of those themes.[210] The use of expletives does not logically seem to be so crucial an aspect of World War II history, that the failure to use these expletives would detract from the film's material value of portraying themes of honor, courage, and combat.[211]

B. The Current Indecency Standard Has a Chilling Effect on Protected Speech

The second constitutional concern raised by the current FCC indecency standard is the chilling effect that it has on broadcast speech protected by the First Amendment.[212] An application of the current indiscernible FCC indecency standard forces networks to either risk FCC fines for their live broadcasts or choose to not air them at all because they do not have sufficient notice as to what speech is actionably indecent under the standard.[213] This result is a violation of the constitutional void for vagueness doctrine because of the chilling effect it has on broadcasters' First Amendment free speech rights.[214] "[T]he absence of reliable guidance in the FCC's [current] standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature."[215] Accordingly, an application of the current indecency standard would mean NBC would no longer pursue controversial people and subjects for its future broadcasts of the *Golden Globes*—which undoubtedly possesses at least some social and artistic

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207. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (holding that a government restriction is impermissibly vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited").

208. *See supra* notes 197-207 and accompanying text.

209. *See Saving Private Ryan Order*, *supra* note 87, at 4512-13 ("[T]he complained-of material . . . is integral to the film's objective of conveying the horrors of war . . . .").

210. *See id.*

211. *See id.*

212. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 334-35 (2d Cir. 2010).

213. *See id.*

214. *See id.*

215. *Id.* at 335.

value in the areas of television, film, and music—for fear of FCC fines or a revocation of its broadcasting license.[216]

An example of this chilling effect is a Phoenix television station declining to broadcast live coverage of a memorial service for Pat Tillman, a former Arizona Cardinals football player and Army soldier killed while serving in Afghanistan, for fear of the family members' statements expressing their grief.[217] Clearly, broadcasting the live memorial service of a well-known American soldier who died while serving his country in Afghanistan possesses at least some social and political value to warrant protection under the First Amendment.[218] In addition, the live broadcast of this memorial service portrayed the same type of horrors of war theme that the Commission found in the uncensored *Saving Private Ryan* film possessed sufficient social and artistic value to be exempt from the current indecency standard.[219] The station, however, exercised its editorial judgment by declining to broadcast any live programming for fear of an FCC fine or revocation of its broadcasting license.[220] The First Amendment requires the FCC to provide networks with sufficient notice of its indecency standard to avoid the chilling effect of networks "'steer[ing] far wider of the unlawful zone' than . . . if the boundaries of the forbidden areas were clearly marked."[221] The fact that the station declined to broadcast this memorial service which, based on the Commission's own precedent, possessed sufficient social and artistic value to be exempt from the current indecency standard, undoubtedly displays the constitutionally impermissible chilling effect that the current indecency standard has on protected broadcast speech.[222] Based on the significant constitutional issues raised by the current FCC indecency standard, the FCC should reconsider its recent opinions stating that a single use of a fleeting expletive on broadcast media is effectively *per se* actionably indecent—unless a narrow and arbitrary exception applies—and instead, the FCC should revert back to its more restrained standard from 1987-2003 that fell within the permissible guidelines of the First Amendment.[223]

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216. *See id.*

217. *Id.*

218. *See id.* ("This chill reaches speech at the heart of the First Amendment.").

219. *Compare Saving Private Ryan Order*, *supra* note 87, at 4512-14 (holding that the repeated broadcast of expletives in a World War II film portraying a horrors of war theme were integral to the film's objective and were not actionably indecent), *with Fox*, 613 F.3d at 335 (discussing how the broadcast of a memorial service for a soldier killed while serving in Afghanistan should be protected under the First Amendment).

220. *See Fox*, 613 F.3d at 335.

221. *See* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (citation omitted).

222. *See supra* notes 217-221 and accompanying text.

223. *See supra* Part VI.B.

VII. A RETURN TO CONSTITUTIONALITY: APPLICATION OF THE 1987-2003 INDECENCY STANDARD

In 1987, the FCC modified its indecency standard to a more flexible and admittedly more difficult approach that allowed for restrictions on indecent speech, outside of the seven specific words in the George Carlin monologue, when there was a reasonable risk that children may have been in the viewing audience.[224] Unlike the current FCC indecency standard, this standard provides networks with reasonable notice as to the boundaries of the unlawful zone, and it avoids creating a chilling effect on speech protected by the First Amendment.[225] The 1987-2003 indecency standard does not rely on arbitrary or potentially discriminatory indecency determinations but instead relies on an in-depth analysis of the nature of the speech, the context in which it was used, and the risk of exposure to the audience when making indecency determinations.[226] Accordingly, it offers a much more reasonable balance between broadcasters' right to free speech under the First Amendment and the FCC's compelling interest in protecting children from exposure to indecent content on broadcast television than the current indecency standard.[227] Hence, the FCC should have instead applied the 1987-2003 indecency standard to determine whether the television broadcast of the following statement made by Bono was actionably indecent:[228] "This is really, really, f***ing brilliant. Really, really great."[229] The following sections will offer an analysis under the 1987-2003 indecency standard to determine whether the broadcast of Bono's expletive was actionably indecent.[230]

A. Does Bono's Fleeting Expletive Fall Within the Material Scope of the Definition of Indecency?

The first prong of the indecency analysis under the 1987-2003 indecency standard is the fundamental determination of whether the speech falls within the material scope of the definition of indecency as "describ[ing] or depict[ing] sexual or excretory organs."[231] The FCC argues that any use of the F-word, no

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224. *Infinity Order*, *supra* note 31, at 930-31.

225. *Compare Infinity Order*, *supra* note 31, at 930-31 (expanding the indecency standard beyond the seven specific words from the Carlin monologue to better protect children from being exposed to indecent content) *and Industry Guidance*, *supra* note 35, at 8002-03 (stressing the importance of applying an analytical approach that takes into account the *full context* in which the expletive was used when making indecency determinations); *with Golden Globes Order*, *supra* note 1, at 4978-82. The court held that a single, non-literal expletive, even if the context in which it was used was fleeting and unintentional, is actionably indecent unless part of an integral or bona fide news exception. *Id.* at 4979 n.25.

226. *See supra* Part II.D.

227. *See supra* Part II.D.

228. *See supra* notes 224-227 and accompanying text.

229. *See supra* note 1 and accompanying text.

230. *See infra* Part VII.A-B.

231. *Industry Guidance*, *supra* note 35, at 8002.

matter the context, would fall within the scope of indecency because it is one of the most vulgar and explicit descriptions of sexual activity, and it has an inherently sexual connotation.[232] In support of this argument, the FCC stated in its brief to the Supreme Court that even if the speaker does not intend a sexual meaning, a substantial part of the television audience will understand the word as "freighted with an offensive sexual connotation."[233] The problem with the FCC's reasoning, however, is that it is in direct opposition with and ignores the binding precedent of *Pacifica* requiring a review of the *context* of the broadcast in order to determine First Amendment protection.[234] Further, the reasoning is illogical because it states that Bono's use of the F-word in his acceptance speech is a depiction of sexual activity—without reviewing the context of the speech—merely because the Commission says it is a depiction of sexual activity.[235]

NBC aired Bono's fleeting expletive over a live broadcast of the 2003 *Golden Globes*.[236] The ceremony is an annual event held by the Hollywood Foreign Press Association, an organization known worldwide for its multi-million dollar donations to entertainment-related charities and scholarships.[237] The purpose of the ceremony is to recognize outstanding achievements by conferring awards in the areas of television, film, and music.[238] The general context and purpose of the ceremony were simply to honor achievements in television and film that year, and not to "describe or depict sexual or excretory organs" or activity.[239] Hence, NBC was not on notice that the live broadcast of the *Golden Globes* might contain allegedly indecent content.[240]

Moreover, the FCC Enforcement Bureau itself initially disregarded all the complaints it received concerning the broadcast of the expletive by applying the 1987-2003 indecency standard.[241] The FCC found that Bono's expletive and the context in which it was used did not even "describe [or depict] sexual or excretory organs or activities" in a literal sense.[242] Rather, Bono used the F-word merely as an exclamation to emphasize his happiness in receiving his award.[243] In previous cases applying the 1987-2003 indecency standard, the

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232. *Golden Globes Order*, *supra* note 1, at 4979.

233. Brief for the Petitioners at 35, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2008) (No. 07-582).

234. *See* FCC v. Pacifica Found., 438 U.S. 726, 747-48 (1978) ("[W]e must consider [the broadcast's] context in order to determine whether the Commission's action was constitutionally permissible.").

235. *See Golden Globes Order*, *supra* note 1, at 4978-79 (holding that any use of the F-word is a depiction or description of sexual activity, even if the context of the use shows otherwise).

236. *Id.* at 4975-76.

237. *The Hollywood Foreign Press Association Covering the Entertainment Capital for 66 Years*, ABOUT THE HFPA, http://www.goldenglobes.org/about/ (last visited Jan. 11, 2011).

238. *Id.*

239. *Industry Guidance*, *supra* note 35, at 8002; *see id.*

240. *See supra* notes 236-239 and accompanying text.

241. *Golden Globes Bureau Order*, *supra* note 40, at 19860-62.

242. *Id.* at 19861.

243. *See id.*

FCC repeatedly held that a single utterance of a fleeting expletive in the context of being used merely as an adjective or intensifier—and not as a description of sexual activity—was not actionably indecent.[244]

Although the 1987-2003 indecency standard does not provide the networks with "perfect clarity and precise guidance," it does provide more reasonable and constitutionally sufficient notice to the networks by following established precedent—that single expletives broadcasted in an isolated and fleeting manner, are rarely sufficient to satisfy the indecency standard.[245] Under an application of the 1987-2003 standard, Bono's use of a fleeting expletive would fall outside the scope of the definition of indecency because the context and usage of the word did not "describe or depict sexual or excretory organs" or activities, and the single expletive was used merely as an exclamation to emphasize his happiness in winning his award.[246]

B. Was Bono's Speech "Patently Offensive as Measured by Contemporary Standards"?

The second prong of the analysis under the 1987-2003 indecency standard is the fundamental determination of whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium."[247] Whether speech is "patently offensive" is determined based on a review of the following factors: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" sexual depictions; and (3) "whether the material appears to have been presented for its shock value."[248] In applying these factors, it is important to note that no single factor is determinative, and the overall context of the broadcast is critical in determining whether a broadcast is "patently offensive."[249]

1. Was Bono's Speech Explicit and Graphic?

In applying the explicit/graphic nature factor to the broadcast of Bono's expletive, it is difficult to argue against the statement that the F-word used by itself does not ordinarily possess significant literary, political, or scientific

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244. *Industry Guidance*, *supra* note 35, at 8008-09 (citing with approval Lincoln Deller, Renewal of License for Stations KPRL(AM) and KDDB(FM), 8 FCC Rcd. 2582, 2585 (1993) (finding that a news announcer's statement "Oops, f***ed that one up" was not indecent); L.M. Commc'n of S.C., Inc., 7 FCC Rcd. 1595 (1992) ("The hell I did, I drove mother-f***er, oh. Oh.").

245. *See* United States v. Williams, 553 U.S. 285, 304 (2008) ("'[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity'") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989); *supra* Part II.D.

246. *Industry Guidance*, *supra* note 35, at 8002; s*ee supra* Part VII.A.

247. *Industry Guidance*, *supra* note 35, at 8002.

248. *Id.* at 8002-03.

249. *See id.* at 8003.

value to afford it a high level of First Amendment protection.[250] The FCC, for instance, would argue that the use of the F-word should be afforded minimal First Amendment protection because it "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."[251] In 2001, the FCC issued its *Industry Guidance* opinion in order to provide better notice to broadcasters on what speech was patently offensive under the 1987-2003 indecency standard.[252] The opinion provided a list of cases where the explicit/graphic nature of the speech played a central role in the Commission's determination that the broadcast was indecent.[253] The common theme among all of the cases the FCC found to be indecent based on this factor was the *unmistakable* explicit/graphic nature of both the speech and the context.[254]

For example, the FCC found the following statement made on the *Howard Stern Show* to be actionably indecent due to its explicit and graphic nature: "I mean to go around porking other girls with vibrating rubber products . . . . Have you ever had sex with an animal? Well, don't knock it. I was sodomized by Lambchop."[255] The FCC based its indecency determination on the fact that the statement "consisted of vulgar and lewd references" to various crude and sexual subject matters, and the references were more than fleeting or isolated.[256] In contrast to the statement on the *Howard Stern Show*, the context of Bono's use of a single fleeting expletive as an exclamation emphasizing his happiness during his award acceptance speech was not meant to support any unmistakably "vulgar and lewd references" to sexual or excretory material.[257]

In another example, the FCC found the following statement to be actionably indecent due to its explicit and graphic nature: "Suck my d*ck you f***ing c*nt."[258] Although the use of expletives in this statement was only

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250. *See* FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) ("[Broadcast expletives] ordinarily lack literary, political, or scientific value.").

251. *Golden Globes Order*, *supra* note 1, at 4979.

252. *See Industry Guidance*, *supra* note 35, at 7999-8000.

253. *See id.* at 8003-08.

254. *See In re* Narragansett Broad. Co. of Cal., Inc. (KSJO(FM)), 5 FCC Rcd. 3821, 3822 (1990) ("[A] poor politician that barely kept his winky fed, then one day he's poking a chick and up from his pants came a bubbling crude"); *In re* S.F. Century Broad., L.P. (KMEL(FM)), 7 FCC Rcd. 4857, 4859 (1992), *aff'd* 8 FCC Rcd. 498 (1993) ("Blow me, you hardly even know me, just set yourself below me and blow me, tonight."); *In re* KGB, Inc. (KGB-FM), 7 FCC Rcd. 3207, 3208 (1992) ("Sit on my face and tell me that you love me. I'll sit on your face and tell you I love you, too. I love to hear you moralize when I'm between your thighs.").

255. *Industry Guidance*, *supra* note 35, at 8004 (citing Infinity Broad. Corp. of Pa. (WYSP(FM)), 2 FCC Rcd. 2705 (1987), *aff'd* 3 FCC Rcd 930 (1987), *aff'd in part, vacated in part on other grounds, remanded sub nom. Act I*, 852 F.2d 1332 (D.C. Cir. 1988) (subsequent history omitted) [hereinafter *Infinity*]).

256. *Id.*

257. *Compare Infinity, supra* note 255 at 2706 (finding a broadcast to be indecent based on its vulgar and lewd references to topics such as masturbation, sodomy, and bestiality), *with Golden Globes Bureau Order*, *supra* note 40, at 19860-62 (finding that Bono's single non-literal use of an expletive during his award acceptance speech did not describe or depict sexual or excretory organs or activities).

258. *Industry Guidance*, *supra* note 35, at 8010 (2001) (citing LBJS Broad. Co., L.P. (KLBJ(FM)), 13 FCC Rcd. 20956 (1998)).

fleeting, the explicit and graphic nature of the speech was unmistakable due to the sexual context and description surrounding the use of the expletives.[259] Unlike the statement in this example, Bono's speech contains no unmistakable or unambiguous string of explicit and graphic language describing sexual activity.[260] Because Bono's use of a fleeting expletive, as well as the context surrounding the use of the expletive, was devoid of any unmistakable "vulgar or lewd references" to sexual or excretory material, Bono's speech was insufficiently explicit/graphic to warrant a patently offensive classification under an application of the 1987-2003 indecency standard.[261]

2. Did Bono's Speech Dwell on or Repeat at Length Sexual or Excretory Material?

In its 2001 *Industry Guidance* opinion, the FCC noted that repetition or a persistent focus on sexual or excretory material is a characteristic of broadcast speech commonly relied upon to support indecency determinations.[262] Importantly, though, the FCC also expressly stated that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic . . . weigh[s] against a finding of indecency."[263]

The *Industry Guidance* opinion specifically addressed a case involving the broadcast of a fleeting expletive that is conveniently similar to Bono's use of a fleeting expletive.[264] A news announcer made the following on-air statement: "Oops, f***ed that one up."[265] The FCC found that the news announcer's use of a single expletive did not warrant further indecency consideration because of the "*isolated and accidental nature* of the broadcast."[266] Similarly, Bono's speech contained only a single, isolated, and likely accidental use of the F-word as an adjective, and he did not dwell or focus on any sexual or excretory material in his speech.[267] NBC's isolated and accidental broadcast of Bono's single expletive supports the notion that the speech was not actionably indecent.[268]

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259. *See id.*

260. *Compare LBJS Broad. Co., L.P. (KLBJ(FM))*, 13 FCC Rcd. 20956, 20958 (1998) ("[S]uck my d*ck you f***ing c*nt."), *with Golden Globes Bureau Order*, *supra* note 40, at 19860-62 (finding that Bono's single non-literal use of an expletive during his award acceptance speech did not describe or depict sexual or excretory organs or activities).

261. *See Golden Globes Bureau Order*, *supra* note 40, at 19860-62 (finding that Bono's single non-literal use of an expletive during his award acceptance speech did not describe or depict sexual or excretory organs or activities).

262. *Industry Guidance*, *supra* note 35, at 8008.

263. *Id.*

264. *See id.* at 8009 (citing Lincoln Deller, Renewal of License for Stations KPRL(AM) and KDDB(FM), 8 FCC Rcd. 2582, 2585 (1993)).

265. *Id.*

266. *Id.* (emphasis added).

267. *See supra* note 261 and accompanying text.

268. *See id.*

Another example provided by the FCC was the following statement made on a radio morning show: "The hell I did, I drove mother-f***er, oh. Oh."[269] Much like the example of the news announcer's fleeting expletive used above, the FCC found that this broadcast was not actionably indecent because the speaker used the word within the context of a "*live and spontaneous programming*."[270] Similarly, the 2003 *Golden Globes* was a "live and spontaneous" broadcast containing unscripted material such as Bono's single, fleeting expletive during his award acceptance speech.[271] Even elaborate precautions taken by NBC could not have prevented the broadcast of Bono's unscripted and spontaneous speech.[272]

George Carlin's "Filthy Words" monologue, on the other hand, serves as an obvious example of a broadcast that dwells on or repeats at length sexual or excretory material.[273] In the twelve minute "Filthy Words" satirical monologue, Carlin used 100 separate utterances of the F-word and S-word (an average of one every seven seconds) in reference to sexual or excretory material.[274] Bono's speech is clearly not in the same realm as the Carlin monologue as far as the factor dealing with speech that dwells on or repeats at length sexual or excretory material.[275] Bono used only one expletive in his speech, and it is highly debatable whether he made any intentional reference to sexual or excretory material at all.[276] Based on the examples above and the fact that Bono's speech did not dwell on or repeat at length sexual or excretory material, it does not warrant a patently offensive classification under an application of the 1987-2003 indecency standard.[277]

3. Was Bono's Speech Presented for Shock Value?

A determination that speech is patently offensive based on its shock value stems from Justice Powell's concurrence in *Pacifica* where he made the following statement about Carlin's "Filthy Words" monologue: "[T]he language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment."[278] The purpose of Carlin's inherently satirical

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269. *Industry Guidance*, *supra* note 35, at 8009 (citing L.M. Commc'n of S.C., Inc., 7 FCC Rcd. 1595 (1992)).

270. *Id.* (emphasis added).

271. *See supra* note 261 and accompanying text.

272. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 334 (2d Cir. 2010).

273. *See* FCC v. Pacifica Found., 438 U.S. 726, 729 (1978) ("He proceeded to list those words and repeat them over and over again in a variety of colloquialisms").

274. *See id.* at 751-56 (listing the verbatim transcript of the Carlin monologue).

275. *Compare Golden Globes Order*, *supra* note 1, at 4976 n.4 (analyzing Bono's single use of an expletive), *with Pacifica*, 438 U.S. at 751-56 (listing the transcript of Carlin's monologue using over 100 expletives in the twelve minute television broadcast).

276. *See Golden Globes Order*, *supra* note 1, at 4976 n.4.

277. *See supra* Part VII.B.2.

278. *Pacifica*, 438 U.S. at 757 (1978) (Powell, J., concurring in part and concurring in judgment).

monologue was to present a point of view that the expletives used therein were harmless and that society's attitude towards the use of them was "essentially silly."[279] This purpose, however, does not take away from the fact that Carlin intended to inflict a high level of shock value on audience members exposed to his repeated use of sexual and excretory expletives in the monologue.[280] Bono's intent for using a single, fleeting expletive in his acceptance speech, though, is not as clear.[281] Although it is entirely possible that Bono specifically and intentionally chose to use the F-word in his speech to get some kind of reaction from the audience or to make a social statement, the language and context surrounding the expletive better supports the conclusion that the use was merely spontaneous and unintentional.[282] In looking only at whether the speaker intended for his speech to possess shock value, Bono's use of an expletive would not be patently offensive under this factor.[283] There are additional relevant considerations, however, that factor into this analysis.[284]

Particularly when analyzing the shock value factor to determine whether speech is patently offensive, the context in which the speaker made the statement is crucial.[285] Just like "a pig in a parlor," words commonly used in one setting may be shocking in another.[286] The content of the program and the time of day in which the network broadcasted the language are relevant factors in analyzing the shock value speech has on the audience.[287] In this case, NBC's live broadcast of the 2003 *Golden Globes* was intended to honor achievements in television and film that year, so the viewing audience was not provided sufficient notice that they might be exposed to allegedly indecent content.[288] In addition, NBC aired the award ceremony between the hours of 6am and 10pm and there was a reasonable risk that children were in the viewing audience at that time.[289] Because of these conditions, the FCC argues that Bono's speech possessed more than sufficient shock value, and the viewing audience (including children) should not be forced to take the "first blow" of vulgar expletives.[290] Accordingly, Bono's single, fleeting expletive inflicted at least some shock value on the audience to warrant a patently

279. *See id.* at 746 n.22.

280. *See id.* at 747.

281. *See id.*; *Golden Globes Order*, *supra* note 1, at 4975.

282. *See Golden Globes Order*, *supra* note 1, at 4975-76.

283. *See supra* notes 278-282 and accompanying text.

284. *See infra* notes 285-294 and accompanying text.

285. *See Industry Guidance*, *supra* note 35, at 8003 (discussing the nature of a statement to provoke or shock the senses).

286. *See Pacifica*, 438 U.S. at 750-51.

287. *See id.* at 750.

288. *See supra* notes 236-240 and accompanying text.

289. *See Golden Globes Order*, *supra* note 1, at 4979-82.

290. Brief for the Petitioners at 25, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2008) (No. 07-582); *see also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1839 (2008) (rearticulating the FCC's argument).

offensive classification under an application of the 1987-2003 indecency standard.[291]

Under the 1987-2003 indecency standard's totality of the circumstances approach, however, it is important to note that no single factor is determinative in making indecency determinations.[292] Even if the FCC did find that there was some shock value resulting from Bono's single expletive, this finding alone would be insufficient to support an indecency determination, given the analysis under the other relevant factors in making indecency determinations.[293] Therefore, Bono's use of a single, fleeting expletive during his acceptance speech was not patently offensive and thus not actionably indecent under an application of the FCC's 1987-2003 indecency standard.[294]

VIII. CONCLUSION

In *Fox v. FCC*, the Second Circuit highlights the major constitutional issues raised by the FCC's sudden and controversial change to its indecency standard following Bono's use of a single, fleeting expletive during his acceptance speech at the 2003 *Golden Globes*.[295] The first issue is that the *Pacifica* rationale for applying a lesser level of constitutional scrutiny to content-based restrictions on broadcast media no longer holds true because of recent societal and technological changes.[296] The second constitutional issue is that the FCC ignored its previous assurances to the *Pacifica* Court that it would "proceed cautiously" in making indecency determinations under a restrained indecency standard.[297] The FCC's current indecency standard, even under an application of a lesser level of scrutiny, is unconstitutional due to (1) its failure to provide sufficient notice to broadcasters as to the scope of the indecency standard and (2) its chilling effect of broadcaster's speech protected by the First Amendment.[298] The previous FCC indecency standard used from 1987-2003 avoids those significant constitutional concerns because it does not rely on arbitrary or potentially discriminatory indecency determinations.[299] It instead relies on an in-depth analysis of the nature of the speech, the context in which it was used, and the risks of exposure to the audience when making indecency determinations.[300] Hence, the FCC should have instead applied the 1987-2003 indecency standard to Bono's use of a single, fleeting expletive and

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291. *See supra* notes 285-290 and accompanying text.
292. *Industry Guidance*, *supra* note 35, at 8003.
293. *See supra* Parts VII.A-B.2.
294. *See supra* Part VII.B.3.
295. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 330-35 (2d Cir. 2010).
296. *See supra* Part V.
297. FCC v. Pacifica Found., 438 U.S. 726, 761 n.4 (1978) (recognizing the Commission's commitment to judiciously enforcing broadcast standards).
298. *See supra* Part VI.
299. *See supra* Part VII.
300. *See supra* Part VII.

found it to be not actionably indecent based on an analysis of the relevant factors.[301]

The constitutional issues raised by the current FCC indecency standard and the Second Circuit's subsequent review of that standard in *Fox v. FCC* are far from settled, and it is highly likely that the Supreme Court will take up the task of resolving these issues "soon enough, perhaps in this very case."[302] Although the current indecency standard is in violation of broadcasters' First Amendment rights, this is not to say that the FCC does not still have a compelling interest in protecting children from exposure to indecent content on broadcast media.[303] In order to better balance these two competing interests, the Supreme Court should now apply a strict scrutiny standard to restrictions on broadcast media and further require that the FCC revert back to its 1987-2003 indecency standard so that it complies with this new level of constitutional scrutiny.[304]

301. *See supra* Part VII.
302. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).
303. *See supra* Part VI.
304. *See supra* Parts V-VII.