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To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and Into the Digital Age

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To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age

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Abstract: This article argues that FCC enforcement of broadcast indecency has become severely outdated, especially with the internet revolution of the past two decades. In Fox Television Studios v. FCC, the Court insisted on upholding the analysis of In re Pacifica (from the 1970s) which limited indecent speech based on the “unique accessibility” and the “uniquely pervasive” nature of broadcast television. However, the rise of cable television and internet television (from sites such as YouTube and Hulu) has nullified that rationale. The article further argues that the FCC’s method of enforcement based on complaints does not serve the public interest and limits speech based on the views of a severe minority of television consumers. To Infinity and Beyond concludes by analyzing the rise of cable network branding techniques and suggests that broadcast stations could mimic those techniques to inform the viewing public of their programming content.

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“Okay, I was thinking one night about the words you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever . . .”¹ This remark by the late George Carlin began his infamous “Filthy Words” monologue, a monologue that was broadcast over the “public airwaves” and became central to famous litigation that is debated to this day. In re Pacifica marked the first instance in which the Federal Communications Commission (FCC or Commission) sanctioned a broadcaster for using indecent language.² In the years following the Pacifica ruling the FCC heeded Supreme Court guidance and observed its narrowly tailored power to prohibit Carlin’s seven “Filthy Words” from being broadcast on the air. However, during the past decade the policies of the FCC have dramatically changed and the agency now advises broadcasters to refrain from more speech than ever before. These rules may not, when examined closely, survive against a claim of unconstitutionality.

The reasoning given in Pacifica, which has been relied on in FCC rulings regarding indecent speech to this day, is outdated, outmoded, and overly intrusive to broadcasters. The rise of modern technology renders obsolete the notion that broadcasting is as “uniquely pervasive”³ and as “uniquely accessible to children”⁴ as it may have been at the time of the Pacifica ruling. Filtering technology enabling parents to limit unsupervised television viewing more accurately coupled with a laissez-faire market-oriented approach allowing networks to police themselves may better serve the legitimate purpose of maintaining a communications medium for education or entertainment that is free from indecent language. Further, analysis of FCC investigation policies will show the possibility that while the Commission claims to looks towards “contemporary community standards of the broadcast medium”⁵ to determine indecency, it may
actually be serving a small minority of broadcast viewers when determining whether speech is indecent.\(^6\)

This paper begins by charting the statutory history of broadcast indecency regulation, beginning with the Radio Act of 1927,\(^7\) and moving forward to the Communications Act of 1934.\(^8\) A few major cases will be discussed, with special attention paid to the reasoning the Supreme Court gives for allowing regulation of indecent speech in *FCC v. Pacifica Foundation*.\(^9\) Next, the FCC’s marked change of course in *In re Infinity Broadcasting Corporation of Pennsylvania*.\(^10\) merits discussion, where the FCC Commission determined the *Pacifica* enforcement standard to be “unduly narrow”\(^11\) and began sanctioning broadcasters for airing words other than those explicitly uttered in Carlin’s “Filthy Words” monologue.\(^12\) Then the investigative scheme of the FCC will be explained, questioning whether the policies for determining indecency are still in the “public interest.”\(^13\) Further, a discussion on the validity of *Pacifica*’s reasoning in light of new and improved filtering technology will be undertaken. Lastly, the paper will conclude by analyzing whether simple market powers and “branding”\(^14\) techniques may be more effective at curtailing indecent speech while at the same time being less intrusive to broadcasters First Amendment rights.

As a threshold matter, it should be conceded that each type of communications medium lends itself to some type of governmental regulation and some degree of limitation on speech.\(^15\) This note will not argue that all regulation on speech should be abolished, nor will it argue that the “channeling” approach used by both network broadcasters and cable companies is ineffective to meet its legitimate goal of shielding children from indecent speech.\(^16\) This note will argue, however, that the same reasoning for speech regulation given in *Pacifica* and used by the FCC today is no longer viable given that many variables in broadcast media have changed since the
1970s. Professors, at least one Supreme Court Justice,\textsuperscript{17} and the commentariat believe similarly and this note hopes to add to the ideas advanced by those writers.

I. History of the FCC and Major Cases Interpreting Its Regulatory Power

Congress granted the Federal Communications Commission, and the Federal Radio Commission before it, power to regulate the finite resources of the electromagnetic spectrum – the “airwaves.”\textsuperscript{18} Before creation of regulatory bodies to control the use of the radio waves, multiple amateur and professional users would broadcast on top of each other by using the same frequencies, creating a “cacophony of competing voices”\textsuperscript{19} and effectively silencing each other through the confusion. Broadcasters realized that under the “traditional broadcast model, the electromagnetic spectrum was considered to be a scarce physical resource that could support only a limited number of users at one time.”\textsuperscript{20} However, broadcasters also realized early on that radio technology was uniquely effective as a method of quickly and easily disseminating information to a wide audience. As such, Congress stepped in and adopted the Radio Act of 1927, which created the Federal Radio Commission.\textsuperscript{21}

The Federal Radio Commission (FRC) held broadly defined powers, mainly regulating the radio airwaves for the public. Its responsibilities consisted of assigning professional and amateur radio broadcasters specific frequencies on which to transmit a signal, assigning each broadcaster a specific call name, and developing rules on what they could broadcast and when. FRC rules were somewhat vague and were challenged sporadically. As radio broadcasting grew in popularity, so did major companies that attempted to make it big business. For example, the major three broadcasters that exist today had their humble beginnings in radio.\textsuperscript{22}

Almost as soon as radio broadcasting became popular, innovators began experimenting with television broadcasting and its capabilities. The Communications Act of 1934 expanded the
Radio Act of 1927 to encompass television technology, which logically grew out of advancements from radio. The Act established the Federal Communications Commission, which regulated the electromagnetic spectrum and controlled receipt of licenses to broadcast both radio and television programs. The Commission was given wide power to regulate broadcasting due to the “uniquely pervasive presence”\(^2\) of broadcasting in the American home and the possibility of using mass media as “a prime source of national cohesion.”\(^4\) The FCC was given a statutory call to regulate broadcasters “from time to time, as public convenience, interest, or necessity require.”\(^5\) Understandably, legislators were anxious to effectively regulate the public airwaves. Private businesses in the broadcasting industry, however, began to argue that the direction to regulate in the public interest was overly broad.

**A) Regulation in Its Infancy**

*National Broadcasting Corporation v. FCC* petitioned the federal courts stating that FCC regulation “in the public interest” consisted of an overly broad delegation of powers.\(^6\) The Communications Act itself defined public interest as being “the interest of the listening public in ‘the larger and more effective use of radio.’”\(^7\) NBC worried, quite prophetically, that regulation in the public interest may yield inconsistent and unpredictable broadcast standards that would stretch the limits of power that Congress intended the FCC to have.\(^8\) The FCC argued in response that it was not given ultimate power to regulate, but rather that its power was confined to the “public interest, convenience, or necessity.”\(^9\) The Court agreed with the Commission, stating that the public interest was “a criterion . . . as concrete as the complicated factors for judgment in such a field of delegated authority permit.”\(^10\)
The Court further held that a broadcaster was not serving the “public interest” if the broadcaster took actions that did not amount to the best use of their frequencies.\textsuperscript{31} The FCC argued:

With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest . . . The net effect (of the practices disclosed by the investigation) has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging ‘the larger and more effective use of radio in the public interest’ if we were to grant licenses to persons who persist in these practices.\textsuperscript{32}

The case concluded “that because broadcast cannot be used by all, the Commission is empowered to regulate those who do use the electromagnetic spectrum through leased radio frequencies, so long as the Commission’s regulations fall within the ‘statutory criterion of the public interest.’”\textsuperscript{33}

Twenty-five years later the Court was asked again to rule on the FCC definition of “public interest.” In \textit{Red Lion Broadcasting v. FCC},\textsuperscript{34} the “Fairness Doctrine,” in which a broadcaster must give a public figure or political campaign a chance to respond to public criticism, regardless of whether the speaker would be able to pay for the broadcast time, was challenged.\textsuperscript{35} Policy behind the rule rests on a broadcaster’s obligation to cover important issues fairly and avoid a monopolization of ideas presented to the public. To the Court, “[e]very licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias.”\textsuperscript{36} However, from the perspective of the broadcaster the “Fairness Doctrine” imposes content that any broadcast editor may, through the exercise of freedom of expression, choose to leave out.
The Court took a different view, however, and stated that broadcasters are “a fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.” It seems plain that the government worried about a few major broadcasters controlling the flow of information to a vast majority of the public. Monopolization of ideas would easily leave out the minority viewpoint, or just a viewpoint contrary to what broadcasters wanted to show.

At this point in time the Court made clear that broadcasters are not necessarily the “speakers” of what they broadcast. Rather they are the carriers of others’ constitutionally protected speech. “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Further, the Court rested its rationale on the still-prevalent basis of scarcity of resources and decided in favor of regulation of broadcasters to control access to a limited, but desired, medium. The holding of the case explains that in light of “the Government’s role in allocating those [broadcast] frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.”

B) *Pacifica* and the Unwilling Constitutional Scholar

While nothing in the Communications Act of 1934 specifically allows the FCC to sanction or punish indecent speech, legislation required it to enforce all federal laws within the scope of its regulation. Congress promulgated 18 U.S.C. § 1464 to criminalize obscene or indecent speech, stating that “[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.” So, if a broadcaster aired indecent speech the FCC could choose to refuse renewal of that broadcaster’s license or fine them.

Though the FCC held such power, they declined to enforce it during the first few decades of its existence. Instead of sanctioning or punishing those who aired questionable speech, the FCC rendered only some advisory opinions on what indecent speech would be if they happened to hear it.\textsuperscript{41} For example, \textit{In re WUHY-FM} involved the broadcast of Jerry Garcia’s (front man for the famous jam-rock band The Grateful Dead) adjectival use of “shit” and “fuck,” using them to emphasize certain parts of common speech during an interview.\textsuperscript{42} In declining to sanction the radio station for airing the segment, the FCC reasoned that “in sensitive areas like this, the Commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee’s favor.”\textsuperscript{43} Perhaps part of the reason that the FCC trudged softly when First Amendment concerns arose was the fact that the agency had been given very little guidance from the courts on what qualifies as indecent speech. George Carlin presented the federal judiciary with a perfect opportunity to do so.

George Carlin, a prolific stand-up comic of considerable fame, specialized in clever puns and uses of words. He especially had shown an interest “in society’s use, overuse, or misuse of [words] and in society’s reaction to them.”\textsuperscript{44} Even the FCC had respect for his talent, comparing him with other renowned authors of the past. “As with other great satirists – from Jonathan Swift to Mort Sahl – George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate.”\textsuperscript{45} A particularly illuminating excerpt from one of his stand-up routines is reprinted here, to show how the words he chooses are central to his message. The following is from \textit{Airline Announcements: Part One},\textsuperscript{46} where he critiques the modern parlance of boarding an airplane:
It starts at the gate: “We’d like to being the boarding process.” Extra word. “Process.” Not necessary. Boarding is sufficient. “We’d like to begin the boarding.” Simple. Tells the story. People add extra words when they want things to sound more important than they really are. “Boarding process” sounds important. It isn’t. It’s just a group of people getting on an airplane.

To begin the boarding process, the airline announces they will preboard certain passengers. And I wonder, How can that be? How can people board before they board? This I gotta see. But before anything interesting can happen I’m told to get on the plane. “Sir, you can get on the plane now.” And I think for a moment. “On the plane? No, my friends, not me. I’m not getting on the plane; I’m getting in the plane! Let Evel Knievel get on the plane, I’ll be sitting inside in one of those little chairs. It seems less windy in there.”

Then they mention that it’s a nonstop flight. Well, I must say I don’t care for that sort of thing. Call me old-fashioned, but I insist that my flight stop. Preferably at an airport. Somehow those sudden cornfield stops interfere with the flow of my day. And just about at this point, they tell me the flight has been delayed because of a change of equipment. And deep down I’m thinking, “broken plane!”

Speaking of potential mishaps, here’s a phrase that apparently the airlines simply made up: near miss. They say that if two planes almost collide it’s a near miss. Bullshit, my friend. It’s a near hit! A collision is a near miss.

As Carlin proceeded to examine speech patterns of America, he found troubling the fact that out of the hundreds of thousands of words in the English language, only a select few were prohibited from the “airwaves.” So, to bring that fact to light he authored a monologue entitled “Filthy Words.” That monologue was broadcast at around 2:00 p.m. on a talk show radio program that was known for some of its racy tendencies, Paul Gorman’s “Lunchpail.” The show frequently “discussed and analyzed society’s attitude toward the use of language.”

The monologue itself, which dwelled upon and repeated (arguably to fully explain their uses) the words shit, piss, fuck, cunt, cocksucker, motherfucker, and tits, naturally merited an FCC complaint regarding Carlin’s use of indecent language. After handing down a sanction to Pacifica Corporation, the company that owned the broadcasting radio station, the decision was appealed to the D.C. Circuit Court and eventually to the Supreme Court.
FCC v. Pacifica Foundation\textsuperscript{50} presented the first opportunity for the Supreme Court to determine whether the FCC had the power to regulate radio broadcasts that were considered indecent, but not obscene. From the complaint lodged the FCC found the language used to be “patently offensive,” though not offensive enough to rise to the level of obscenity.\textsuperscript{51} The Commission argued for a classification of indecent speech as language “in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of day when there is a reasonable risk that children may be in the audience.”\textsuperscript{52} Protecting children was central to the FCC’s determination of indecency as it reasoned that children most likely heard the broadcast and that the language, with the offensive words repeated numerous times, was indecent.\textsuperscript{53} However, rather than limit it completely from the airwaves, the Commission wanted to channel the speech to an appropriate time of day.

Pacifica argued in response that the FCC was only allowed to sanction and restrict obscene speech, as defined in Miller v. California.\textsuperscript{54} The Court disagreed and upon examination determined that statutory language prohibiting obscene speech was written in the disjunctive; as such the statute was intended to cover more than obscene speech.\textsuperscript{55} The Court further concluded that allowing the FCC to sanction certain types of speech “may lead some broadcasters to censor themselves. At most, however, the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.”\textsuperscript{56}

What brings speech in from the periphery, then, is the context in which it is used. Indecent speech is inextricably tied to its context, making both content and context of speech
critical to First Amendment analysis. The Court conceded that in many settings the speech used by Carlin would be constitutionally protected. For example, in a theater in front of a live audience no government regulation could prohibit his indecent speech. However, “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . .”

After analysis the Court concluded that the FCC has the power to prohibit the broadcast of indecent speech on television and radio. Justice Stevens, writing for the majority, explained that “[w]e have long recognized that each medium of expression presents special First Amendment problems” and “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.” The Court considered heightened regulation of indecent speech persuasive due to broadcasting’s “uniquely pervasive presence in the lives of all Americans” and the fact that broadcasting was “uniquely accessible to children, even those too young to read.”

Allowing regulation of indecent speech, the Court emphasized the narrowness of its holding. It had “not decided that an occasional expletive . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.” Since Carlin’s monologue involved such a specific use of a specific number of words, the FCC was well aware of what sort of speech Pacifica allowed it to sanction. However, the question remained whether, in practice, such sanctions would have a chilling effect on the wrong types of speech – maybe even speech with artistic or intellectual value.

The majority opinion in Pacifica observed that the chilling of indecent speech will have its primary effect on the “form, rather than the content, of serious communication.” Specifically, the Court mentions that an Elizabethan comedy would not be considered indecent
because of its context.\textsuperscript{65} So, the difference between such works and the Carlin monologue can only rest on the subjective views of the FCC commissioners themselves and whether they think that “the play and its author are more worthy of family-hour broadcast, on context as well as on language itself.”\textsuperscript{66} Perhaps an argument exists that this speech was a form of appropriate art that should not have been labeled indecent, with Carlin being regarded as a great satirist of the modern English language. “Satirists like Carlin rely on both form and content to deliver their message. If the Court limits First Amendment protection of the content, it also seriously limits the message. If it also limits the protection of the form [for example, through channeling], it cripples that message even more severely.”\textsuperscript{67} So for artists like Carlin, his particular choice in conveying certain content (in a form that some deem to be inappropriate) would possibly face an unfair roadblock to reach a willing end-user. Therefore, “[i]n Carlin’s case, ironically, the Court may have anointed him a more prescient First Amendment scholar than anyone could have predicted.”\textsuperscript{68} 

\textit{Pacifica} represents, maybe for the first time, a main-stream celebrity being restricted by the government from airing speech that many non-lawyers viewed as protected by the First Amendment. One author notes:

Most people with any first amendment bones in their bodies are troubled by the \textit{Pacifica} case . . . [The] case produces heat precisely because Carlin’s speech is considered by many to be precisely what the first amendment is \textit{supposed} to protect. Carlin is attacking conventions; assaulting the prescribed orthodoxy; mocking the stuffed shirts; Carlin \textit{is} the prototypical dissenter.\textsuperscript{69}

\textbf{C) Infinity and a New Standard}

For the years following \textit{Pacifica} the FCC observed the very narrow rule given by the Court and restricted its sanctions to broadcasts that used the seven words described in Carlin’s monologue.\textsuperscript{70} The Commission considered the “host of variables” that determine the context of
the speech used, including the time of day, program content, and transmission medium. By focusing on the context of speech that borders on indecency, the FCC operated on an unstated assumption that “only material that closely resembled the George Carlin monologue would satisfy the indecency [standard].”\textsuperscript{71} Therefore, the Court’s decision in \textit{Pacifica} was constrained and most speech was free from FCC sanction.

Without Court approval or Congressional urging the FCC began a more stringent enforcement policy regarding indecency, perhaps at the request of “lobbying groups, dissatisfied with the Reagan administration’s agenda as it pertained to indecency.”\textsuperscript{72} The Commission stated:

\begin{quote}
\textit{[o]n close analysis, we found that the highly restricted enforcement standard employed after the 1975 \textit{Pacifica} decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464. Essentially, we concluded that, although enforcement was clearly easier under the former standard, it could lead to anomalous results that could not be justified . . . That approach, in essence ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency.}\textsuperscript{73}
\end{quote}

The Commission further advised broadcasters that the “safe harbor” that developed to channel indecent speech to between the hours of 10:00 p.m. and 6:00 a.m. would no longer apply, replacing it with a safe harbor that existed between 12:00 a.m. and 6:00 a.m. Rather, indecent broadcasts would be “actionable, if broadcast when there is a reasonable risk that children may be in the audience, a determination that was to be based on ratings data on a market-by-market basis.”\textsuperscript{74} Therefore, the new policy did not take time of broadcast into account but based actionable decisions off of whether there was a “reasonable risk” that children may be present. Such a risk may have no supporting data and rely only on the veracity of whatever complaints the Commission received.
The incidents at issue in *Infinity* involved the broadcast of a critically acclaimed play, excerpts from Howard Stern’s radio show, and a sexually explicit song played on the radio. Upon review of the material aired and the time of broadcast, the Commission found all to be patently offensive according to contemporary standards for the broadcast medium. In order to clarify its position on how contemporary standards are determined and applied, the FCC explained that the system “ensure[s] that material is judged neither on the basis of a decisionmaker’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. Rather, decisionmakers are to draw on their views of the average persons in the community.”

So, instead of indecency being judged by the commissioners themselves, it should be analyzed objectively from the point of view of the average broadcast viewer or listener.

*Infinity* was eventually overturned after a flurry of litigation pled for the return of the 10:00 p.m. to 6:00 a.m. safe harbor for indecent speech. The D.C. Circuit found persuasive an argument that private broadcasters (like NBC, CBS, and ABC) were not allowed to air indecent speech until 12:00 a.m. while public broadcasters (who went off the air at 12:00 a.m.) could air indecent speech beginning at 10:00 p.m. “After noting there was no compelling interest for advancing such a distinction, the Court found the Act was unconstitutional to the extent it prohibited the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight.”

**D) Indecency Regulation in the New Millennium**

Since *Action for Children’s Television* and the return of the safe harbor, FCC rules have remained consistent, though the Commission’s interpretation of the rules has changed over time. The latest case to squarely tackle FCC enforcement of indecent speech involved three separate
utterances by three major celebrities. The litigation that followed, while supporting the FCC in the end, casts serious doubt on the constitutionality of the agency’s enforcement regime.

*Fox Television Studios, Inc. v. FCC* involved the unlikely constitutional characters of Bono (famous lead vocalist from musical group U2), Cher (infamous singer and songwriter), and Nicole Richie (actress/heiress and star of the hit television show “The Simple Life”). After winning an award for musical talent Bono exclaimed that the award was “really, really fucking brilliant.” Cher lambasted her critics by saying “fuck them” after winning a similar award. Lastly, Nicole Richie rhetorically asked if the audience had “ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.” The FCC stated that the speech was indecent and actionable, despite being non-repetitive expletives, because each of the broadcasts were patently offensive due to the speech being “explicit, shocking, and gratuitous.”

Fox Television Studios, along with a host of interpleader broadcast companies, sought judicial review by the Second Circuit Court of Appeals arguing that the FCC change in policy (away from *Pacifica* which only found indecent speech actionable if it was dwelled upon and repeated) was arbitrary and capricious. The Second Circuit agreed with the broadcasters, holding that since the FCC could produce no data to show that fleeting expletives caused harm to those listening, its actions were, in fact, arbitrary and capricious and violated the Administrative Procedure Act.

The Circuit avoided perhaps the major issue in the case, however, by not resting any of its holding on constitutional First Amendment grounds. The opinion does state, though, much dicta regarding the constitutional issues involved, explaining that the court was not convinced the FCC policies would “pass constitutional muster.” Broadcasters still had hope for a ruling on
constitutional grounds because the FCC managed to gain certiorari from the United States Supreme Court.

Disappointingly, Justice Scalia (writing for the majority) punts the First Amendment issue and rests his opinion entirely on administrative law grounds. In terms of administrative law the opinion makes complete sense and empowers other agencies to continue to act in ways that they find appropriate. The Court found that the FCC received guidance through recent legislation to enforce indecent language differently than it had in the past. Due to legislative guidance the decision to punish fleeting expletives as indecent was not arbitrary and capricious. As the extensive history of the case law suggests, broadcasters and Constitutional Law scholars expected the Court to take the opportunity to squarely approach the First Amendment issue. Not only did Justice Scalia refuse to take up the constitutional issue in the case, he neglected to even acknowledge the legitimate constitutional concerns raised by Justice Thomas’ concurring opinion and Justice Ginsburg’s dissenting thoughts.

Justice Thomas expresses especially deep concern over the constitutional issues present in Fox and dismay at the majority’s decision not to argue them given the chance. He joins the majority’s opinion “which, as a matter of administrative law, correctly upholds the Federal Communications Commission’s (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act.” To him, the precedents that the Court and the FCC rely on, mainly Red Lion and Pacifica, “were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.” Since the text of the First Amendment does not facially discriminate based on the type of media used to disseminate speech that should be protected, the distinctions that the Court articulated have carved “a legal rule that lacks any textual basis in the Constitution.” Justice Thomas therefore believes that the
broadcast medium should have the same First Amendment protections as communication over
the phone, communication over the internet, speech presented through cable television, and
print media. He opines that the content of the speech and not its form or context afford it First
Amendment protection.

Technological improvements and advances in communication further support Justice
Thomas’ opinion that the reasoning of Red Lion and Pacifica should be abandoned. He finds
that broadcast television and radio in the 21st Century “are no longer the uniquely pervasive”
media forms they once were. Further, after 2009 and the “digital transition,” the
electromagnetic spectrum is no longer as scarce as it once was. Digital transmission of broadcast
signals gives the FCC the ability to “stack broadcast channels right beside one another along the
spectrum, and ultimately utilize significantly less . . . of [the electromagnetic] spectrum the
analog system absorbs today.” Due to these factors Justice Thomas feels a “departure from
precedent under the prevailing approach to stare decisis” is warranted.

Justice Ginsburg writes separately “only to note that there is no way to hide the long
shadow the First Amendment casts over what the Commission has done.” She states that
“[W]ords are often chosen as much for their emotive as their cognitive force.” Further,
Ginsburg cautions against the labeling of certain types of speech as indecent or inappropriate,
urging the Court to be aware “that words unpalatable to some may be ‘commonplace’ for others,
‘the stuff of everyday conversations.’

While a majority of the Court agreed that the FCC change of policy was not arbitrary and
capricious under the Administrative Procedure Act, if the Fox case came back to the Court on
First Amendment grounds at least Justices Thomas and Ginsburg would be open to declaring the
enforcement regime unconstitutional as applied. In the event the Court tackles the constitutional concerns presented in the case, perhaps it would find the following arguments persuasive.

II. Arguments Against the FCC’s Current Enforcement Regime

In the orders that prompted litigation in Fox, the FCC relied yet again on the unique pervasiveness and accessibility of broadcast television and radio. However, that reasoning is no longer in touch with modern technology. Broadcasting cannot reasonably be considered “uniquely pervasive” and “uniquely accessible” when cable and satellite technologies (not to mention the internet and accessibility of the world-wide-web) are so widely used today. Statistics show that 86% of American households have cable, yet cable’s status as an “invited guest” make it somewhat impervious to FCC regulation. Further, examining the freedom of information over the internet further weakens the FCC’s argument of unique pervasiveness. The vast amount of unregulated information on the internet, both good and bad, and the broad ability to access it arguably makes the world-wide-web the most pervasive medium of communication.

Why, then, has the FCC continued to rely on antiquated policies? Shouldn’t FCC policies reflect the “public interest” in its regulation? What the general public regards as indecent is subject to change over time, and the public perception of indecent language surely has changed since the 1970s and Pacifica. Has the FCC misinterpreted the public? An examination of FCC investigative procedures may reveal a pattern of disconnect between FCC sanctions on indecent speech and the “public” majority.

A) Investigative Flaws May Counteract the “Public Interest” Rationale and the Objective Determination Test in Favor of “Public Interest” Groups

The FCC is not a general police power. As an enforcement group, they do not actively monitor everything that is broadcast. Rather, they investigate materials based on complaints. In
turn, “the FCC [has] only issued forfeitures to [broadcast] stations who were actually the subject of complaints.” Therefore, it is possible that a person who lodges a complaint with the FCC may be particularly sensitive to certain types of speech or content and not necessarily represent the relevant community.

It is further possible that if a particularly sensitive group of individuals were to organize, they could effectively lodge many complaints with the FCC against certain types of speech to the exclusion of others. One such group, the Parents Television Council (PTC), likely uses its numbers in an attempt to persuade FCC rules. Coupled with commissioners who listen to and agree with their value judgments, certain interest groups like the PTC may disproportionately drive communications policy. Therefore, the majority of complaints most likely do not represent the “community” as it is understood and used in the FCC’s objective test for indecency. If a disproportionately small number of people are offended by certain speech, yet those people limit the access of a likely non-offended majority of Americans, the FCC is not fulfilling their requirement to regulate in the “public interest.” Rather, they are holding the majority of consenting viewers/listeners to the standard of a much more fragile minority – effectively “burning the house to roast the pig.”

As mentioned previously, the FCC determines whether speech is indecent by utilizing a test that involves “contemporary community standards” for the broadcast medium. In Infinity the Commission maintained that contemporary community standards are “judged neither on the basis of a decisionmaker’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.” However, the FCC also utilizes its “collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for
the broadcast medium.”

In order to determine the relevant community standard, then, “[t]he decision process simultaneously removes the ‘average person’ from the central role of decisionmaker, while allowing subjective judgments to replace a general standard.”

Not only do commissioners likely inject their own subjective beliefs when examining the merit of speech, but the FCC responds “to complaints filed disproportionately by one advocacy group [the PTC], asserting a single viewpoint,” so “the representation is not an accurate portrayal of community standards.” The PTC accounts for an overwhelming majority of complaints filed to the FCC. For example, 99.8% of complaints filed in 2003, and 99.9% in 2004, were filed by members of the Parents Television Council. The Council itself encouraged members to file complaints over programs they had not seen, perhaps shows not even in their viewing area. Each complainant may file multiple times, need not have watched the program to file a complaint about it, and each complaint is counted individually. “The complaint process does not provide the opinion of contemporary community in America, and may allow a heckler’s veto where community standards would not find the speech patently offensive.” In effect, the FCC’s complaint process cannot be used as a gauge of any particular community’s broadcast standards. As a result of the disproportional complaining of a few (not to mention the possible subjectivity of the FCC commissioners), “FCC orders imposing fines or license revocation for indecent speech are made in an inconsistent manner, implicating First Amendment concerns.”

Perhaps the most blatant example of regulation inconsistency is shown by the FCC decision not to find a full, unedited broadcast of the R-rated film SAVING PRIVATE RYAN patently offensive or indecent as broadcast. The award-winning film was broadcast on Veterans Day and endorsed by United States Senator John McCain, a veteran of the Vietnam War. He stated that “the R-rated language and graphic content [of the film] is for mature audiences and not
appropriate for children.” Also, the show had a rating of “TV-MA LV” and gave a disclaimer of its content after every commercial break.

The FCC explained in its order that material is indecent “only if it is patently offensive based on an examination of the material’s explicit or graphic nature, whether it is dwelled upon or repeated, and whether it appears to pander or is intended to titillate or shock the audience.”

The Commission agreed that the film was patently offensive, fulfilling prong one of their indecency test. They further found that the offensive material was dwelled upon and repeated, satisfying prong two of the test. However, the Commission was persuaded that the offensive material was not used to pander, and so found the broadcast *not* indecent. By finding the material patently offensive and repeated, yet lacking pandering quality and not indecent, the Commission implicitly states that the artistic merit of the work (as determined by the commissioners and not the general community) may yield certain speech not indecent. How then, can the FCC distinguish the speech in *Saving Private Ryan* from the fleeting expletives uttered by Bono or Cher?

The Commission attempted to do so, stating that the profanity used by Bono and Cher was “‘shocking and gratuitous’ and had no claim of ‘any political, scientific or other independent value.’ The FCC decided the vulgar language in *Saving Private Ryan*, on the other hand, held artistic merit and was integral to the message of the film.” However, compare the speech at issue in both cases. The isolated and fleeting uses of profanity during the Golden Globes, while maybe used to pander the audience or (in Cher’s case) to shock, were not near as patently offensive as the depictions of gruesome war violence and *consistent* profane language, including the words “motherfucker” and “shit,” seen in *Saving Private Ryan*. Perhaps the only explanation, then, is that the FCC either values mainstream artistic work that has subjective merit
or their actual test for indecency rests purely on the last factor of analysis, whether the speech is used to “pander, titillate, or shock.”

If that is, indeed, the case, the FCC should start saying so instead of paying lip-service to the other parts of its rule.

Regardless of whether the FCC decides to reform its rule, or its interpretation, defining indecent speech, the Commission should no longer ignore the legitimate and varied ways for the end-user to control the content they allow into their home. Technological advances allowing blocking of certain programming should be considered as effective ways to prevent children and unwilling adults from viewing material that they might subjectively find indecent. This approach allows broadcasters to air programming they find to be within the “community standards for the broadcast medium” while not being restricted by complaints from those who have other avenues for entertainment.

B) Technological Advances Make Pacifica Obsolete

Prohibition of indecency over the broadcast airwaves stems in significant part from the FCC’s attempts to limit children’s access to indecent material. However, given technological advancements in the past two decades, parents are now better able to make determinations on what their children can and cannot view in their own household. “The market for these parental empowerment tools and technological controls is broad and growing.” Perhaps the most available technology to limit content on television is the V-Chip, a blocking tool that “gives households the ability to screen televised content by ratings that are affixed to almost all programs.” The V-Chip allows a household member to block all content that carries with it a certain rating. The ratings for particular television shows are usually found at the beginning of programs and are shown when a program returns from a commercial break. The following describes the different ratings available for each program:
“TV-Y” – All Children
“TV-Y7 – Directed to Children Age 7 and Older
“TV-Y7 (FV)” – Directed to Older Children Due to Fantasy Violence
“TV-G” – General Audience
“TV-PG” – Parental Guidance Suggested
“TV-14” – Parents Strongly Cautioned
“TV-MA” – Mature Audience Only

The TV ratings system also uses several specific content descriptors to better inform parents and all viewers about the nature of the content they will be experiencing. These labels include:

“D” – Suggestive Dialogue
“L” – Course Language
“S” – Sexual Situations
“V” – Violence
“FV” – Fantasy Violence.

With the ability to effectively limit certain types of speech from entering the home, parents concerned about whether their children are encountering indecent language can simply restrict programs with questionable ratings. Thus, V-Chip technology limits the usefulness of the argument that broadcasting is as “uniquely accessible” as it once was.

Past the V-Chip, some cable and satellite television providers offer more effective methods of limiting access to programming. “[T]he tools that these video providers offer to subscribers are a vital part of the parental controls mix today.” Some providers offer parents the ability to not only limit programming based on rating (which may at times be misleading) but also completely block certain channels or program titles. If an especially determined parent still desired further protection for young ears, some companies offer after-market devices that work with your television to limit speech past the blocking technique. One such device is the “TVGuardian,” which advertises as “The Foul Language Filter.”

TVGuardian’s set-top boxes filter out profanity “by monitoring the closed-caption [signal embedded in the broadcast video signal] and comparing each word against a dictionary of more than 150 offensive words and phrases.” If the device finds a profanity in this broadcast, it temporarily mutes the audio signal and displays a
The V-Chip and TVGuardian are not the only available tools to curtail indecent speech on television. In fact, often overlooked is the ability of a parent to more closely monitor what their children are viewing on television and then make a decision for themselves as to whether that is appropriate for the child.

“Parents who allow their children to lock themselves in their rooms with media technologies have surrendered their first line of defense for protecting them from potentially objectionable content.” Ultimately, of course, it is up to the parents to allow or disallow their children’s access to media if exposure to indecent material presents as an especially important concern. Options abound as to how to accomplish the goal, though many are as simple as “limit[ing] viewing to a single TV in a room where a parent can always have an eye on the screen or listen to the dialogue.” Lastly, parents should be encouraged to sit down with their children and watch television together. In the event that indecent material appears, the parent could then discuss with the child what was shown and spin the content in whatever manner they feel appropriate. “Because it is impossible to generalize about the needs of diverse families and parenting choices they make, the government should not impose a one-size-fits-all solution.”

In the event that parents are unwilling or unable to attempt controlling their child’s access to indecent material in a direct way, and are unaware of the control mechanisms readily available to them from the marketplace, perhaps market forces themselves will keep broadcasters from becoming overrun with indecent speech. At the very least, market branding of broadcast stations will curtail the “shock” of indecent material if unwillingly encountered.
C) Station “Branding” and Market Forces May Effectively Limit Indecent Speech Without Regulation

The Supreme Court noted in *Pacifica* that the element of surprise was crucial in its decision to allow broadcasters less First Amendment protection than it gives other types of communications venues.\(^{135}\) “The idea was that viewers flip through channels frequently and could never be warned properly of the indecency to come, warranting curtailed First Amendment freedom for the broadcaster that was intruding upon their home.”\(^{136}\) Perhaps the “unique pervasiveness” rationale at play in *Pacifica* can be more easily described by dissecting it into three distinct parts: popularity, intruder, and surprise.\(^{137}\)

The popularity rationale concerns the widespread use and novelty of broadcast television and radio. However, that is no longer true since cable television and satellite radio are at least as popular as traditional broadcast, if not more so. The intruder rationale, describing broadcasting as an intruder into the privacy of the home, has come under some fierce criticism as well. If the Court wants to characterize broadcasters as intruders into the privacy of the home, that “characterization might prompt Joe Couch Potato to wonder whether the Justices ever noticed the ‘off’ button on their remote controls as an efficient mechanism with which to fend off intrusive and pervasive television.”\(^{138}\) Therefore the surprise rationale allows for a more textured argument.

Most importantly, “[u]ndercutting *Pacifica*’s ‘surprise’ rationale through branding undermines the basis for the lowered First Amendment protection that allows the FCC to regulate broadcast content as much as it does.”\(^{139}\) By increasing brand name recognition and brand identity in themselves, broadcasters may be able to inform viewers of the types of content that will be shown on their stations before the viewer turns on their television. Some cable
television stations have branded themselves effectively by grabbing a niche audience that tunes in to see just the type of programming that the station consistently offers. Or, conversely, a station’s brand informs those looking for certain types of programming to stay away.

“Cable networks started the branding trend” as soon as they entered the market, perhaps to differentiate themselves from their major broadcast counterparts. However, “the economic structure of the television industry is shifting toward the cable model, which suggests that branding practices will only become more important” for broadcasters to implement. Part of any effective brand is selling it to the public, so that the general audience can differentiate between brands. For instance, “Disney is wholesome but Fox is ‘edgy’; Playboy is sexy-but-classy whereas Spice is ‘hot.’”

At the inception of television, only the major three networks existed; NBC, ABC, and CBS. All three companies, therefore, attempted to gain the widest market share they could, which could be accomplished by not airing anything that would offend anyone. “When so few options existed for viewers, there was little incentive for a network to risk alienating some to become more appealing to others.” However, with cable and satellite television options, viewers may now access literally hundreds of channels, many that cater to a purely niche following. “More channels meant stiffer competition, and competition drives branding.” The trend towards “niche-casting” gained popularity as an attempt to “target a specific demographic in hopes of obtaining a small but devoted audience and its accompanying advertiser revenue.” Three cable stations that have enjoyed considerable branding success are Playboy, Disney, and Music Television (MTV).

Playboy represents an internationally known brand that “developed its reputation as a lifestyle brand centered on ‘the good life.’” However, Playboy markets itself as distinct from
other magazines in the adult genre, and is more sophisticated and “couples-friendly” than similar products. For example, Playboy is a purveyor of “soft-core” pornography that “features pinups, not sex.” In stark contrast to Playboy’s image is Spice, a channel that is now within the Playboy network yet markets more explicit material. “Spice’s reputation is for hard-core adult entertainment, but Playboy ‘is careful to differentiate [Spice] from Playboy’s soft-focus, rather kitsch positioning.’” Due to the differences in the brand and marketing tailored to its content, a viewer may tune in to either Playboy or Spice and predict what type of material they will encounter.

Ironically enough, the Disney channel has employed a similar technique to differentiate between its dynamic classes of viewers. Holistically, “Disney is so thoroughly known as the place for ‘wholesome family entertainment’ that it is hardly necessary to belabor the point.” Disney found itself in a strange position recently, though, trying to retain its core viewership of nine to fourteen-year-old viewers. That specific demographic began watching Nickelodeon instead of the standard animation based programming that Disney had to offer. As a result, Disney “revamped” itself with “newer, hipper characters [to] dominate the after-school block for tweens” and scheduled programming that was more “emotionally stimulating.”

If broadcasting networks could more effectively market their brand, the general public would be put on notice to shows that conform to their brand identity. If done successfully, a network could downplay any sort of “shock” that an individual viewer claimed they faced in hearing indecent speech on one of its stations – if that station branded itself as one that would allow edgy material. Conversely, if a network wanted to maintain a “family-friendly” persona, it could brand itself as such and attract the market-share that desired that type of programming. “Broadcast brands are not as deeply defined as cable brands” yet some are beginning to realize
how useful the practice could be for their business. Fox “has long positioned itself as the provider of ‘edgy’ and ‘irreverent’ fare, and viewers recognize that image.”¹⁵⁴ On the contrary, “ABC has become ‘the Lifetime Television of broadcast TV’ by focusing on ‘light, female-targeted dramas.’”¹⁵⁵ Television viewers, at least those who view a significant amount of television, will recognize and differentiate between the two stations and choose their entertainment accordingly. Therefore, if a fleeting expletive is heard while watching *Family Guy* on Fox, the viewer will not be caught unawares since the majority of Fox shows position themselves on the racy side of general television content. If broadcasters desire to utilize branding to its full extent, “only a consistent brand identity will provide enough notice to be valuable to consumers and thus valuable to companies,”¹⁵⁶ making dedication to the brand extremely important.

No one can deny the fact that television is big business. Third-party companies utilize broadcast television to advertise a vast array of products, from shaving cream to cars and paper products to vacation destinations. “Advertisers will pay a premium for advertising space that reaches their desired niche audience.”¹⁵⁷ Further, “[a]dvertisers control their brand image by choosing appropriate programming during which to advertise. An advertiser wants to know who watches the program to ensure that the people most likely to purchase its product see the ad.”¹⁵⁸ If an advertiser has a vested interest in appealing to a certain type of audience (or a wide range of audiences) such a decision will prompt them to refrain from advertising in certain markets to not confuse the consumer.

As such, an advertiser who wishes to maintain a family-friendly image will choose not to advertise during racy television programs or on stations that have a niche audience apart from their target demographic. Advertisers have organized coalitions that refrain from advertising
during programs that they deem inappropriate for families. One such coalition has named itself the Family Friendly Programming Forum and is a subsection of the Association of National Advertisers. Major companies like Coca-Cola, Pepsi, Kellogg, Proctor & Gamble, and Verizon have joined the Family Friendly Programming Forum and effectively steer certain station’s programming by withholding advertising dollars for shows that air indecent content. “Such efforts have been effective at changing corporate behavior” at the broadcaster level and, in effect, have limited the amount of indecent material aired. Pressure from advertisers may be an effective alternative to government regulation, preventing a “race to the bottom, pushing the decency envelope to distinguish themselves in the increasingly crowded entertainment field.”

III. Conclusion

Until the Supreme Court mandates a change to the FCC, the agency will not likely alter its policies regarding indecent speech. The Court was presented with such an opportunity on a silver platter, yet refused to decide Fox Television Studios, Inc. v. FCC on constitutional grounds. Regardless of how the Court rules in the future regarding a broadcaster’s ability to air indecent speech, current FCC policies must change to keep up with modern technology and the business of broadcast.

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

FCC investigative policies require further change to ensure that no one particular group or point of view drives communications policy limiting indecent speech. Some of the more recent sanctions handed down by the FCC do not represent the general public’s perception of what is “patently offensive,” but rather represent a small minority viewpoint from one group attempting to limit the adult expression of a consenting public. When certain types of speech are treated differently than others, such as finding an un-cut, unedited showing of SAVING PRIVATE RYAN not to be indecent because of its artistic merit, First Amendment concerns arise. By only investigating complaints that are submitted to the FCC, the commissioners are likely only to hear from a uniquely sensitive minority of television viewers.

Lastly, modern market forces and broadcaster branding increase notice that certain types of content are likely to appear on certain stations. If broadcasters take it upon themselves to create a strong brand identity with their followers, similar to the model employed by cable networks, their devoted viewership is likely to increase and those who desire to watch different types of programming can choose to watch other stations. Such a practice would severely limit the shock that indecent speech might have on the unwilling listener.

After extensively tracking the beginnings of broadcast regulation and examining important cases interpreting FCC powers, the FCC enforcement regime can be shown as extensively flawed. The reasoning given for broadcaster sanctions refuses to take technological advances into account, fails to realize that broadcasting is no longer the most popular mode of communication, and declines to allow broadcasters to police themselves by airing material that appeals to their target audience. While each communications medium lends itself to some type
of government regulation, current FCC policies unduly limit broadcast speech, implicating serious First Amendment concerns that have yet to be addressed by the modern Supreme Court.

2 In re Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94 (1975) [hereinafter In re Pacifica].

3 Pacifica, 438 U.S. at 748.

4 Id. at 749.

5 Id. at 732. The FCC has used this constant test for determining indecent speech since the Supreme Court decided Pacifica.

6 See In re Pacifica, supra note 2, at 98. “[T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary 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.”


9 Pacifica, 438 U.S. 726.

10 In re Infinity Broad. Corp. of Pa., 3 F.C.C.R. 930 (1987) [hereinafter Infinity].
11 Id. at 930.

12 The seven words included “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.”

Pacific, 438 U.S. at 751.

13 FCC holds regulatory power “from time to time, as public interest, convenience, or necessity requires.” 42 U.S.C. § 303 (2006).

14 Referring to the practice of creating a brand-name and a brand identity.

15 For example, no matter the medium of communication, obscene speech is prohibited. See generally Miller v. California, 413 U.S. 15 (1973).

16 “Channeling” refers to the current FCC policy of allowing indecent language to be broadcast (to a point) during the “safe harbor” of 10:00 p.m. to 6:00 a.m. It was determined that during these times children were not likely to be in the audience.


American Broadcasting Company (ABC), Columbia Broadcasting System (CBS), and National Broadcasting Corporation (NBC).

Pacifica, 438 U.S. at 748.

Red Lion, 395 U.S. at 386, n.15.


Id. at 216 (quoting 47 U.S.C. § 303(g)).

See infra text accompanying notes 121-126.

30 Id. (quoting FCC v. Pottsville Broadcasting Company, 309 U.S. 134, 138 (1940)).

31 Id. at 218.

32 Id. at 218 (internal citation omitted).

33 Quale, supra note 21, at 224.

34 Red Lion, 395 U.S. 367.

35 For a brief discussion of the “Fairness Doctrine,” see Id. at 369.

36 Id. at 383.

37 Id. at 390.

38 Id.

39 Id. at 400-401.

40 The FCC mandate to uphold all federal laws may be found in 47 U.S.C. § 303 (2006).

41 See generally In re Sonderling Broad. Corp. 41 F.C.C.2d 777 (1973).


*In re Pacifica, supra* note 2, at 95.

*George Carlin, Airline Announcements: Part One, in NAPALM & SILLY PUTTY* 12-13 (Hyperion 2001).

*Id.* (emphasis in original).

*In re Pacifica, supra* note 2, at 95.

*Id.* See also Corcos, *supra* note 44, at 909.

*Pacifica*, 438 U.S. 726.

*In re Pacifica, supra* note 2, at 97 (“There is authority for the proposition that the term “indecent” . . . is not subsumed by the concept of obscenity – that the two terms refer to two different things.”).

*Id.* at 98.

*Id.* at 99.
Miller v. California, 413 U.S. 15, 24-25 (1973). The *Miller* test determines obscenity by balancing

(a) whether ‘the average person applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* (internal citations omitted). The test does not apply to determine indecent speech, however, and has been limited to curtailing the dissemination of pornography.


*Pacifica*, 438 U.S. at 743.


*Id.*

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

*Id.*

*Id.* at 749.
62 *Id.*

63 *Id.* at 750.

64 *Id.* at 743 n.18. See also Corcos, *supra* note 44, at 924.

65 *Pacifica*, 438 U.S. at 750.

66 Corcos, *supra* note 44, at 925.

67 *Id.*

68 *Id.*


72 Corcos, *supra* note 44, at 930.
73 Infinity, supra note 10, at 930.

74 Id. at 931.

75 Id.

76 See Action for Children’s Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995).

77 Corcos, supra note 44, at 932. See generally Action for Children’s Television, 58 F.3d at 667-670 (holding a Congressional mandate to extend the “safe harbor” from 6:00 a.m. until 12:00 a.m. unconstitutional).

78 See Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 451-452 (2nd Cir. 2007).

79 Id. at 451.

80 Id. at 452.

81 Id. Richie, in saying that it’s “not so fucking simple,” was making a pun towards her show “The Simple Life.”

82 Fox Television, 489 F.3d at 453.

83 Id. at 444.

84 Id. at 462.


89 Id. at 129 S.Ct. 1819 (Thomas, J., concurring).


92 Id. at 1821.

93 See Sable Commc’n of Cali., Inc. v. FCC, 492 U.S. 115 (1989) (finding restrictions against “Dial-a-Porn” services to be an unconstitutional abridgement of speech).
See Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (holding that content-based restriction on the internet are unconstitutional because they would limit expression that was not obscene).

Cable is considered an “invited guest” and as such enjoys full First Amendment protection. Cmty. Television of Utah, Inc. v. Wilkinson, 611 F.Supp. 1099, 1113 (D. Utah 1985), aff’d sub nom Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986).


Id. at 1821 (quoting Consumer Elec. Ass’n v. FCC, 347 F.3d 291, 294 (D.C. Cir. 2003)).

Id. at 1822.


Id. at 1829 (quoting Cohen v. Cali. 403 U.S. 15, 26 (1971)).

Id. (quoting Pacifica, 438 U.S. at 776 (Brennan, J., dissenting)).

See Fox Television, 489 F.3d at 465.

See supra, note 95.


See generally Pacifica, 438 U.S. 726.

Infinity, supra note 10, at 933.


Worsham, supra note 107, at 392.
The broadcast was complained of, however. *See In re Complaints Against Various Television Licensees Regarding Their Broad* of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,” 20 F.C.C.R. 4507 (2005) [hereinafter *Saving Private Ryan*].


*See Saving Private Ryan, supra* note 117, at 4512.

Id. at 471.

Id.

Id. at 472, n.187.

Pacifica, 438 U.S. at 749.

Thierer, supra note 123, at 473.

The Golden Globes program in question in Fox Television contained a TV-PG rating. Since ratings are so general, the viewer may not be able to accurately predict program content.

Thierer, supra note 126, at 473. See also Comcast, Parental Controls, http://www.comcast.com/Corporate/Customers/ParentalControls.html/?lid=9CustomersParentalControls&pos=Nav (last visited Jan. 19, 2010).


Id. at 475-476, n.212.
Id. at 475.

Id. at 476.

Pacifica, 438 U.S. at 748.


Id. at 7.


Id.

Id. at 27.

Id. at 4.

Id. at 28.

Consider the Golf Channel (http://www.thegolfchannel.com/company-history), the Tennis Channel (http://www.tennischannel.com/aboutus), and Versus
Those channels garner towards a specific type of person, mainly one who enjoys the particular sport or group of sports that the channel specializes in. Also consider stations such as Women’s Entertainment (WEtv) (http://www.wetv.com/about-we-tv.html) which caters almost exclusively to women’s interest and Logo (http://www.logoonline.com/about), a new station devoted to the interests of the gay, lesbian, bisexual, and transgender community.

145 Rokowski, supra note 136, at 29.

146 Id.

147 Id. at 30.

148 Id. at 31.

149 Id. at 30-31.

150 Id. at 31 (quoting MARK TUNGATE, MEDIA MONOLITHS 183 (2004)).

151 Rokowski, supra note 136, at 32.

152 Id.

153 Id. at 35.
Id. at 36.

Id. at 37.

Id. at 18.

Rokowski, supra note 136, at 24.

Id. at 25.

See Id. at 26, n.157. See also Association of National Advertisers, Family Friendly Programming Forum: About FFPF, http://www.ana.net/ffpf/content/aboutffpf (last visited Jan. 19, 2010).

Rokowski, supra note 139, at 26 n.157. “Members of the Forum include Coca-Cola, Pepsi, McDonalds, Kellogg, Johnson & Johnson, Proctor & Gamble, and Verizon, and together its members control thirty percent of all money spent on advertising in the United States.”

Thierer, supra note 123, at 477.