Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation

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Abstract

Indecency regulation by the Federal Communication Commission and Supreme Court is the product of word taboo—the subconscious, emotional, involuntary avoidance of certain words out of fear that some harm will occur if they are spoken. Acting in tandem, the Court and the Commissioners create institutionalized word taboo based upon the assumption that broadcast media’s pervasive and intrusive presence into the home endangers unsupervised children. Technological innovation renders this premise invalid today, but institutionalized word taboo remains. This article (1) traces the rise of indecency regulation, (2) explains the invalidity of the assumptions used to justify it, (3) introduces word taboo as an explanation for the resilience of regulation, and (4) offers preferable options providing a path for science and reason to triumph over institutionalized word taboo.
Introduction

“This is fucking awesome!” That is how Baltimore Ravens quarterback and game MVP Joe Flacco captured the moment immediately following victory in Super Bowl XLVII on February 3, 2013. The exclamation was broadcast live by CBS to over 108 million viewers. The Parents Television Council (PTC) immediately issued a press release demanding the Federal Communication Commission (FCC) to take action. If this sounds familiar, it should.

Ten years ago, Bono, the lead vocalist for the band U2, expressed his excitement after winning a Golden Globe award in 2003 for Best Song in a Motion Picture by exclaiming, “This is really, really fucking brilliant!” NBC broadcasted his exuberance live as well. The Parents Television Council filed a complaint with the FCC then too. After the agency first denied the complaint, the PTC lobbied for a rehearing. On reconsideration, the FCC reversed itself declaring any use of the word fuck was presumptively indecent and profane. For most of the

1 See Gabe Lacques, Joe Flacco’s f-bomb caps off MVP night, USA TODAY (Feb. 4, 2013), http://www.usatoday.com/story/gameon/2013/02/03/ravens-super-bowl-mvp-joe-flacco-cbs-obscenity/1889425/. This was during an exchange with Ravens lineman Marshal Yanda who first queried, “Holy Sh!t, huh?” See id. By the way, that is Super Bowl 47 for those of you who have forgotten your Latin.
2 With 108.41 million viewers, this was the third most watched program in television history behind two other Super Bowls—2012 (111.3 million) and 2011 (111.0 million). Liana B. Baker, Super Bowl viewer ratings down from a year ago, Reuters.com, http://www.reuters.com/article/2013/02/04/us-superbowl-cbs-ratings-idUSBRE9130P72013024 (Feb 4, 2013 6:26pm EST).
next decade, the broadcast networks challenged this conclusion in court.

Today, after two trips to the Supreme Court, we still do not know the answer to one simple question: Is the live broadcast of a single fleeting expletive indecent? The complaint against CBS for broadcasting Flacco’s outburst can now join the stack of half a million pending complaints against 5500 shows that has piled up at the FCC while the agency and the networks have squared off in court over the constitutionality of indecency regulation. The saga of FCC indecency regulation continues.

For over forty years, the FCC has been trying to keep the airwaves clean. What began with fit and starts, indecency regulation entrenched with the Supreme Court’s imprimatur in FCC v. Pacifica Foundation. The content of broadcast speech receives less constitutional protection because its uniquely pervasive and intrusive presence into the home endangers unsupervised children. Whatever validity the twin assumptions of pervasiveness and paternalism had in the 20th century, they retain no vitality in the 21st.

Where the major broadcast networks once commanded nearly all of the television viewing market, they now retain but a sliver. The explosion of media sources from cable to satellite to Internet, magnified by new methods of access through laptops, video gaming systems, iPads, and smartphones, has eliminated broadcast network dominance. Once prima donnas, the major networks are now merely part of the troupe. While it is doubtful that parents were ever helpless to insulate their children from unwanted programming, technological innovation now

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10 See infra Part II.A (discussing why broadcast media is no longer pervasive).
provides an arsenal for parental control with the V-chip, filters, rating systems, and other blocking devices.\textsuperscript{11} Despite this new media reality, \textit{Pacifica} lives on.

The explanation for the resilience of indecency regulation is word taboo—the subconscious, emotional, involuntary avoidance of certain words out of fear that some harm will occur if they are spoken. Extreme responses can lead individuals to influence institutions to formalize the taboo and transform it into law. The advent and longevity of the FCC’s indecency policy is due to agency procedures permitting word taboo to be entrenched in its substantive decisions. Institutionalized word taboo is the result.

Part I of this article traces the origins of FCC indecency regulation from its inception in 1970 through its most recent visit to the Supreme Court last term in FCC v. Fox Television Stations, Inc. Part II dissects \textit{Pacifica} to show that it no longer can justify continued regulation. The concept of word taboo, its influence on indecency policy, and the creation of institutionalized word taboo are presented in Part III. With the demise of \textit{Pacifica} on the horizon, Part IV explores the preferable alternatives to the FCC’s current regulation of indecency and provides a path for science and reason to triumph over institutionalized word taboo.

I. The FCC’s Fuss Over Fleeting Expletives

A. Section 1464 and Early Enforcement Against Indecency

Title 18 U. S. C. § 1464 provides 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.” The Federal Communications Commission (FCC) is the agency

\textsuperscript{11} \textit{See} infra Part II.B.1 (describing technological innovation’s erosion of child protection rationale).
empowered to administratively enforce § 1464.12 Despite the statutory limitation to radio communication, the FCC applies its regulations to radio and television broadcasters alike.13 Although the FCC had the authority to regulate indecent broadcasts under § 1464 since 1948,14 it did not begin to enforce it until the 1970’s.15

While the late comedian George Carlin is most often credited with providing the fodder for the FCC’s indecency regulation,16 that honor should rightfully go to Jerry Garcia. The FCC’s first enforcement of § 1464 was against a Philadelphia noncommercial educational radio station, WUHY-FM, for broadcasting an interview with Garcia—who the FCC described as a “leader and member the ‘The Grateful Dead,’ a California rock and roll musical group.”17 In a fifty minute taped interview broadcast on January 4, 1970 at 10:00 p.m. as part of the weekly program

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12 Prior to the creation of the FCC, its predecessor, the Federal Radio Commission, was authorized to prosecute obscene, indecent, or profane language uttered by means of radio communication. Fox II, 132 S. Ct. at 2312. Congress authorized the enforcement between the hours of 6 a.m. and 10 p.m. See id.
13 See Fox I, 556 U.S. at 505–06.
14 Fox II, 132 S. Ct. at 2312. Presumably, the FCC had the power to regulate such speech since its inception in 1934 since the legislation creating it adopted the 1927 Radio Act’s prohibition against the broadcast of obscene, indecent, and profane language. However, in 1948, the ban on obscene, indecent, and profane language was amended and replaced with criminal penalties for using such language over the airwaves, struck from the Communications Act, and incorporated into the Criminal Code. See Keith Brown & Adam Candeub, The Law and Economics of Wardrobe Malfunction, 2005 B.Y.U. L. REV. 1463, 1479 (2005). This recodification made the Department of Justice responsible for criminal enforcement of § 1464. While this reclassification created some uncertainty as to the FCC’s continuing ability to administratively enforce § 1464, the Court concluded the FCC retained power to impose sanctions under § 1464 in Pacifica. 438 U.S. at 738.
15 Fox II, 132 S. Ct. at 2312; see Angela Campbell, Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency, 63 FED. COMM. L.J. 195, 198 (2010). Prior to 1970, the FCC did occasionally react to isolated concerns about indecency, but did not rely on § 1464. See Brown & Candeub, supra note 14, at 1481-83 (discussing isolated examples).
“Cycle II”, Garcia shared his views on ecology, music, philosophy, and interpersonal relations; he also said shit, fucking, and motherfucking. The FCC issued a Notice of Apparent Liability against the radio station (on April Fool’s Day 1970 no less). The FCC based the action on its “duty to act to prevent the widespread use on broadcast outlets of such expressions” because “the speech involved has no redeeming social value, and is patently offensive by contemporary community standards.” According to the FCC, “it conveys no thought to begin some speech with ‘S—t, man...’ or to use ‘f—g’ as an adjective throughout the speech.” Drawing an analogy between using the language at home but not in an elevator, the FCC concluded “its use can be avoided on radio without stifling in the slightest any thought which the person wishes to convey.” The fear was that if Garcia could use such language then any other person on radio—newscasters, disc jockeys, talk show moderators or participants—could use the same expressions.

The consequence of this hypothetical widespread use would be to undermine the usefulness of radio because these expressions are patently offensive to millions of listeners. The FCC described the specter:

Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the ‘intended’ audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. Were this type of programming (e.g., the WUHY interview with the above described language) to become widespread, it would drastically affect the use of radio by millions of people. No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or

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18 Id. at 409, ¶ 3. For excerpts from the broadcast provided by WUHY-FM, see id. at 416.
19 Id. at 410, ¶ 7.
20 Id.
21 Id.
22 Id. at 410, ¶ 8.
would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program.\textsuperscript{23}

Having assumed widespread use and an audience full of children, the FCC justified regulation of “expression which conveys no thought, has no redeeming social value, and in the context of broadcasting, drastically curtails the usefulness of the medium for millions of people.”\textsuperscript{24}

While the FCC felt it had a duty to act to prevent an emerging trend, it recognized that there was no precedent. As a case of first impression, the FCC welcomed judicial review to definitively determine appropriate standards.\textsuperscript{25} Accordingly, it assessed a forfeiture of only $100.

The Commissioners were not all of like mind. Seeing the issue as a reflection of the generation gap, Commissioner Nicholas Johnson dissented. He saw the restriction as unfairly targeting minority groups: “What the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor, or the blacks may not.”\textsuperscript{26} He lambasted the Commission for declaring that certain forms of speech and expression are “patently offensive by contemporary community standards” without conducting a single survey among the relevant population groups in Philadelphia, nor compiling a single word of testimony on contemporary community standards, nor attempting even to define the relevant “community” in question.\textsuperscript{27} Further, he criticized the conclusion that the speech in question had “no redeeming social value,” when the leading academic authority was to the contrary.\textsuperscript{28} He noted the irony that the “Commission declares that a four-letter word ‘conveys no thought’ —
and proceeds to punish a broadcaster for speech which apparently conveys so much thought that it must be banned.”

Commissioner Kenneth Cox also dissented from the result because he disagreed “that the problem is as great as the majority say it is, or that it is likely to become endemic.” Cox explained that the “underground” program dealing “with the avant-garde movement in music, publications, art, film, personalities, and other forms of social and artistic experimentation” was presented between 10 and 11 P.M. on Sunday night, and was designed to appeal to the large college population in Philadelphia and to alienated segments of the new generation. Although the language they used might be offensive to the older generation, they did not have to listen to it. Further, Cox was also concerned stations might not to carry programming they would otherwise have broadcast, out of fear that someone will be offended, will complain to the Commission, and the latter will find the broadcast improper.

Indeed, who did complain in the first place? No one. WUHY-FM received no complaints about the broadcast; neither did the FCC. Because there had been earlier complaints about a different program airing during the 10 to 11 p.m. time slot, the FCC just happened to be monitoring the station on the night of January 4, 1970. Commissioner Cox sized up the problem: “So far as I can tell, my colleagues are the only people who have encountered this program who are greatly disturbed by it.” Apparently, Chairman Dean Burch was the instigator of the action. He wanted this type of language off the air. Despite being advised that

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29 Id.
30 Id. at 417 (Cox, dissenting in part).
31 Id. at 417-18.
32 Id.
33 Id. at 417.
34 Id. at 418.
35 Id.
36 Id.
the language was not in violation § 1464 and that they would lose in court, the agency acquiesced to Chairman Burch’s wishes.\textsuperscript{37}

The efforts of the FCC to generate a test case on indecency ultimately failed. The strategy of “picking on little educational FM radio stations that can scarcely afford the postage to answer our letters, let alone hire lawyers”\textsuperscript{38} does seem inherently flawed. It was likely an easy decision by WUHY-FM to simply pay the $100 fine rather than appeal. Thus, by default the FCC wins its first victory under § 1464.\textsuperscript{39}

B. Filthy Words and \textit{Pacifica}

While the taboo language used by Jerry Garcia may have started the FCC’s enforcement against indecency under § 1464, there is no denying the pivotal role played by the late comedian George Carlin in solidifying it. Carlin’s monologue “Filthy Words” was a comedy routine “about the curse words and the swear words, the cuss words and the words that you can’t say, that you’re not supposed to say.”\textsuperscript{40} Carlin’s infamous list of seven was: shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.\textsuperscript{41} At 2:00 pm on Tuesday, October 30, 1973, New York City radio station WBAI played a recording of Carlin’s “Filthy Words” routine.\textsuperscript{42} One parent, John

\textsuperscript{37} \textit{See} Campbell, \textit{supra} note 15, at 200 (describing Burch as the instigator of the action).

\textsuperscript{38} \textit{In re} WUHY-FM, \textit{supra} note 17, at 423 (Johnson, dissenting).

\textsuperscript{39} One other pre-\textit{Pacifica} enforcement action merits mention. In 1973, the FCC issued a NAL proposing a $2,000 fine against Sonderling Broadcasting Corporation for broadcasting obscene or indecent matter in violation of §1464 for using a “topless radio” format. Sonderling paid the fine rather than appeal. \textit{See} \textit{In re Apparent Liability of Station WGLD-FM, Oak Park, Ill. for Forfeiture}, 41 F.C.C.2d 919 (1973). A branch of the ACLU appealed to the D.C. Circuit who found the broadcast obscene and did not reach whether it was also indecent. \textit{See} Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397, 403-04 (D.C. Cir. 1975).

\textsuperscript{40} \textit{Pacifica}, 438 U.S. at 751 (Appendix containing transcript of the broadcast).

\textsuperscript{41} \textit{Id}. When Carlin debuted the routine in July 1972 in Milwaukee, Wisconsin at an outdoor festival, there were originally only six dirty words: fuck, fucker, mother-fucker, cock-sucker, asshole, and tits. \textit{See} George Carlin’s \textit{Milwaukee Six}, MALEDICTA II, at 40, 40-41 (1978).

\textsuperscript{42} \textit{Pacifica}, 438 U.S. at 729-30.
H. Douglas, who was driving with his fifteen-year-old son, heard the broadcast and wrote a letter complaining to the FCC.\textsuperscript{43}

The complaint was forwarded to the radio station’s owner, Pacifica Foundation, for a response. Pacifica defended the use of the monologue as part of a program about contemporary society’s attitudes toward language.\textsuperscript{44} Describing George Carlin as “a significant social satirist of American manners and language in the tradition of Mark Twain,” Pacifica explained that Carlin was “not mouthing obscenities,” but merely using “words to satirize as harmless and essentially silly our attitudes toward those words.”\textsuperscript{45} Additionally, immediately prior to playing the Carlin monologue, the station had advised listeners of the “sensitive language” to be broadcast and advised those who might be offended to change the station for 15 minutes.\textsuperscript{46}

The FCC shifted its strategy in \textit{Pacifica}. Instead of issuing a notice of apparent liability as used in previous enforcement actions under § 1464, the FCC used a declaratory order. Professor Angela Campbell’s research reveals that the use of the declaratory order was to provide a test case for the FCC’s new interpretation of indecency.\textsuperscript{47} The Commissioners were frustrated. Previous enforcement actions like WUHY-FM had not abated the use of indecent language. While most broadcasters refrained from broadcasting indecent language, they felt that some stations, like WBAI, were not acting responsibly.\textsuperscript{48} Congress mandated the FCC to enforce § 1464, yet the agency felt it had no guidance. It was simply not clear to the Commissioners what

\begin{thebibliography}{99}
\bibitem{43} Id. at 730. The full text of Douglas’s letter can be found in Campbell, \textit{supra} note 15, at 201-02.
\bibitem{44} \textit{Pacifica}, 438 U.S. at 730.
\bibitem{45} Id. The full text of Pacifica’s response to the complaint can be found in Campbell, \textit{supra} note 15, at 202-03.
\bibitem{46} See Campbell, \textit{supra} note 15, at 202.
\bibitem{47} See id. at 205-06.
\bibitem{48} Id. at 206 (interview with former Chairman Richard Wiley).
\end{thebibliography}
the difference was between obscenity and indecency.\textsuperscript{49} “The FCC had no position, but wanted finality more than anything else.”\textsuperscript{50}

For an agency professing a “no dog in the fight” mentality, its declaratory order against Pacifica reflects no reservations in its power to regulate. Instead, special treatment for the broadcasting of indecent speech was required. This special treatment was premised on four important considerations: “(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.”\textsuperscript{51} Of these four, “special concern to the Commission as well as parents is the first point regarding the use of radio by children.”\textsuperscript{52}

Paternalism not only justified regulation, it was central to the very definition of indecency. In the absence of judicial interpretation of the term “indecent” under § 1464, the FCC had previously relied substantially on the definition of obscenity.\textsuperscript{53} Since the Supreme Court had recently refined its obscenity definition to include an appeal-to-the-prurient-interest standard,\textsuperscript{54} the FCC reformulated the concept of “indecent” to divorce it from obscenity:

\begin{quote}
[T]he concept of “indecent” is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk
\end{quote}

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} \textit{In re Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 97, ¶ 9 (1975) [hereinafter WBAI].}
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 97, ¶ 10.
\textsuperscript{54} \textit{See Miller v. California, 413 U.S. 15, 24 (1972).}
that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.\(^55\)

Hence, indecent language is distinguished from obscene language in two ways: it lacks the appeal to prurient interest essential for obscenity and, when children are in the audience, it cannot be redeemed by a claim that it has literary, artistic, political, or scientific value.\(^56\)

The FCC sought to align indecency with nuisance law. The idea was not to prohibit, but channel the behavior. So when the number of children in the audience was reduced to a minimum, for example during the late evening hours, a different standard might be used.\(^57\) The definition of indecent would remain the same (language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs); however, the FCC would also consider whether the material has serious literary, artistic, political or scientific value.\(^58\)

Applying this new standard, the FCC concluded “that words such as ‘fuck,’ ‘shit,’ ‘piss,’ ‘motherfucker,’ ‘cocksucker,’ ‘cunt’ and ‘tit’ depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly ‘indecent’ when broadcast on radio or television.”\(^59\) Because the words were broadcast at a time when children were undoubtedly in the audience, as well as being pre-recorded, repeated over and over, and deliberately broadcast, the FCC held that the language as

\(^{55}\) *WBAI*, *supra* note 51, at 98, ¶ 11.

\(^{56}\) *Id.*

\(^{57}\) *Id.* at 98, ¶ 12.

\(^{58}\) *Id.*

\(^{59}\) *Id.* at 99, ¶ 14.
broadcast was indecent under § 1464. While this conclusion could subject Pacifica to fines, none were imposed because the complaint was used to clarify the appropriate standards. However, the FCC warned the station that subsequent complaints could lead to revocation of its license, a cease and desist order, or imposition of a monetary forfeiture.

Pacifica immediately sought review in United States Court of Appeals for the District of Columbia Circuit. The court of appeals reversed the FCC by a 2-1 vote that generated three separate opinions. Judge Tamm, writing for the majority, concluded that the “Order is censorship, regardless of what the Commission chooses to call it.” Judge Tamm noted that 1 million children were watching television until 1:00 a.m. As long as such large numbers of children were in the audience, the “Commission's action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible.”

While Judge Tamm did not find it necessary to even reach the issue of whether the agency could constitutionally prohibit indecent speech, he noted the FCC order was clearly overbroad—reducing the adult population to hearing or viewing only that which is fit for children. He invoked the colorful analogy that this was the “classic example of burning the house to roast the pig.” Tamm concluded by challenging the fallacy that absent FCC action,

\[\text{60 Id.}\]
\[\text{61 Id.}\]
\[\text{63 Id. at 13.}\]
\[\text{64 Id. at 13-14.}\]
\[\text{65 Id. at 14.}\]
\[\text{66 Id. at 17.}\]
\[\text{67 Id.}\]
filth will flood the airwaves. First, there was no empirical data to substantiate this assumption.\textsuperscript{68} Moreover, the assumption ignored the forces of economics. The market would limit an explosion of indecent programming.\textsuperscript{69}

Chief Judge Bazelon concurred, but felt it necessary to reach the First Amendment question.\textsuperscript{70} The thrust of Bazelon’s concurrence is the FCC’s failure to conform with the \textit{Miller} test for obscenity. In the process, however, he raises criticisms of the FCC action that remain instructive. To begin with, the test for “contemporary community standards for the broadcast medium” is “chimerical.”\textsuperscript{71} As Bazelon points out, “[t]he Commission never solicited a jury verdict or expert testimony. Nor did it rely on polls or letters of complaint. The Commission simply recorded its conclusion that the words were indecent, thereby creating the suspicion that its national standard is in fact either the composite of the individual Commissioner’s standards or what they suppose are the national standards.”\textsuperscript{72} Bazelon also points out that under the breadth of the Commission’s definition of indecency, its own Order could not itself be read over the airwaves.\textsuperscript{73} He rejected the FCC’s notion that only words and not ideas are being suppressed. Since words are often chosen as much for their emotive as cognitive force, “a person's choice of words is an important and protected element of the overall message sought to be communicated.”\textsuperscript{74} Additionally, Bazelon notes the “undocumented assumptions” underlying the \textit{in loco parentis} basis for regulation that parents: consider any mention of dirty words to be

\textsuperscript{68} \textit{Id.} at 18.

\textsuperscript{69} See \textit{id.}

\textsuperscript{70} \textit{Pacifica}, 556 F.2d at 18 (Bazelon, C.J., concurring).

\textsuperscript{71} \textit{Id.} at 23.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.} at 23.

\textsuperscript{74} \textit{Id.} at 23-24.
unsuitable for their children; are unable to control their children’s listening habits; and are less able to control their access to television and radio than to such media as books and newspapers.\footnote{Pacifica, 556 F.2d at 28.}

Judge Leventhal dissented on the grounds that the FCC order did not prohibit any use of the seven words, but only their use “as broadcast”—that is, “prerecorded language with the words repeated over and over” deliberately broadcast “in the early afternoon when children were undoubtedly in the audience.”\footnote{Id. at 31 (Leventhal, J., dissenting).} The FCC’s determination reflected “a broad consensus of society” that “the great bulk of families would consider it potentially dangerous to their children.”\footnote{Id. at 33.} While it is the family that should have the means to make that choice, he labeled it a “cruel reality” that “latchkey children” from single-parent families or those with working mothers had widespread, unsupervised access to radio and television during the day.\footnote{Id. at 34 \& n.6.} Thus, the pervasiveness of TV-radio and its reach into the home precluded an effective choice by the family.\footnote{Id. at 33.} After acknowledging the inherent difficulty in defining “indecent,” he concluded that the agency made the appropriate trade-off between assisting parents in protecting young children and protecting privacy against free speech rights.\footnote{Id. at 35.} Agreeing with Judge Leventhal, the FCC sought Supreme Court review.

The Supreme Court granted certiorari\footnote{FCC v. Pacifica Found., 434 U.S. 1008 (1978).} and ultimately reversed the D.C. Circuit by a 5-4 vote.\footnote{FCC v. Pacifica Found., 438 U.S. 732 (1978).} Justice Stevens wrote the opinion for the Court.\footnote{Stevens was joined \textit{in toto} only by Chief Justice Burger and Rehnquist. Powell and Blackmun concur in part and in the judgment.} He first dispensed with two preliminary issues: the scope of the Court’s review was on the FCC’s determination that the

\footnote{75 Pacifica, 556 F.2d at 28.} \footnote{76 Id. at 31 (Leventhal, J., dissenting).} \footnote{77 Id. at 33.} \footnote{78 Id. at 34 \& n.6.} \footnote{79 Id. at 33.} \footnote{80 Id. at 35.} \footnote{81 FCC v. Pacifica Found., 434 U.S. 1008 (1978).} \footnote{82 FCC v. Pacifica Found., 438 U.S. 732 (1978).} \footnote{83 Stevens was joined \textit{in toto} only by Chief Justice Burger and Rehnquist. Powell and Blackmun concur in part and in the judgment.}
monologue was indecent “as broadcast” and that the order was not forbidden “censorship” under 47 U.S.C. § 326. Stevens then turned to the statutory question of whether the broadcast of “Filthy Words” was indecent under § 1464. Concluding the words “obscene, indecent, or profane” were disjunctive in the statute and therefore had separate meanings, Stevens rejected the argument that “indecent” had to construed as “obscene” to include an appeal to prurient interest. Having divorced the two concepts, all that remained was addressing the constitutional attacks.

Significantly, the majority parts ways on the First Amendment analysis. Stevens, joined by Chief Justice Burger and Rehnquist, based his analysis on the relative value of the content of the speech. For example, Stevens rejected the argument that the FCC order was overbroad. In so doing, he recognized the order “may lead some broadcasters to censor themselves,” but this was of no matter because it would only deter broadcasting of patently offensive references to excretory and sexual organs and activities—references that “surely lie at the periphery of First Amendment concern.” Stevens continued his content-based approach when he addressed the central question of whether the First Amendment permitted any restriction on indecent speech: “If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case.” Instead, Stevens characterized Carlin’s monologue as “no essential part of any exposition of ideas” and “of such slight social value” with any

84 438 U.S. at 735.
85 Id. at 735-38.
86 Id. at 739-40.
87 Id. at 742.
88 Id. at 746.
benefit being “clearly outweighed by the social interest in order and morality.” However, since some uses of the offensive words were “unquestionably protected,” it was necessary to consider the context of the FCC order.

Stevens then embraced the FCC’s position that broadcasting indecency required special treatment. First, broadcast media was different because of its “uniquely pervasive presence.” Patently offensive, indecent material broadcast “over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” Because the audience is constantly tuning in and out, prior warning could not protect the listener or viewer from broadcast indecency. Additionally, broadcasting is uniquely accessible to children. Stevens claimed that “Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant.” Consequently, the FCC’s special treatment for indecent broadcasting was reasonable under the circumstances. Nonetheless, Stevens emphasized the narrowness of the holding. Of particular importance, Stevens made clear that the Court had “not decided that an occasional expletive in either setting would justify any sanction.” He concluded with his take on the pig metaphor introduced by Judge Tamm below: “We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”

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89 Id. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
90 Id. at 746-47.
91 Id. at 748.
92 Id.
93 Id.
94 Id. at 749.
95 Id. at 750.
96 Id. at 750-51.
Justice Powell, joined by Blackmun, concurred with the protection of children rationale.\(^97\) Aligning himself with the “thoughtful opinion” of Judge Leventhal below, Powell agreed that the FCC was primarily concerned with preventing the broadcast of indecent speech from reaching the unsupervised ears of children.\(^98\) Similarly, Powell agreed about the uniqueness of broadcast media and its ability to invade the privacy of the home, “the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.”\(^99\) He also reiterated the limited nature of the case: “The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.”\(^100\) Powell wrote separately, however, to distance himself from the theory that the Court was free generally to decide on the basis of its content which speech protected by the First Amendment is most “valuable” and hence deserving of the most protection, and which is less “valuable” and hence deserving of less protection.\(^101\)

The four remaining justices dissented.\(^102\) All four agreed with Justice Stewart that the term “indecent” as used in §1464 should have the same meaning as “obscene” speech.\(^103\) Since Carlin’s language was not obscene, the FCC lacked the authority to restrict it.\(^104\) Justice Brennan, joined by Marshall, wrote a separate scathing dissent on the First Amendment analysis of the majority.\(^105\) He rejected the sliding scale First Amendment protection created by Stevens that

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97 Id. at 755 (Powell, J., concurring in part and concurring in judgment).
98 Id. at 757 & n.1.
99 Id. at 759.
100 Id. at 760-61.
101 Id. at 761-62.
102 The dissenters were Justices Stewart, White, Brennan, and Marshall.
103 Pacifica, 438 U.S. at 780 (Stewart, J., dissenting).
104 Id.
105 Id. at 762 (Brennan, J., dissenting).
permitted regulation of the Carlin monologue based on the social value of the speech.\textsuperscript{106} Additionally, Brennan critiqued the privacy and \textit{in loco parentis} rationales for permitting regulation. According to Brennan, privacy interests in your home were not infringed because turning on the radio was taking part in public discourse by listening.\textsuperscript{107} After the voluntary act of admitting the broadcast into your own home, inadvertently confronting Carlin’s monologue had an easy solution--you can hit the off button on the radio.\textsuperscript{108} Brennan also invoked the animal metaphor; to follow Stevens’ approach was “to burn the house to roast the pig.”\textsuperscript{109} What of the presence of children in the audience rationale? While Brennan agreed that parents had the right to raise their children as they see fit, the principle cut against regulation because “parents, not the government, have the right to decide what their children should hear.”\textsuperscript{110} Brennan also condemned the majority for adopting a standard that could ban a myriad of literary works from Shakespeare and Joyce to the Nixon tapes and the Bible.\textsuperscript{111} Finally, Brennan stressed the discriminatory impact of the decision. Relying on the work of sociolinguists, Brennan noted that words like bullshit, fuck, and motherfucker were commonplace and not considered obscene or derogatory among blacks and “young radicals and protestors.”\textsuperscript{112}

C. Post-\textit{Pacifica} Enforcement and the Rise of Fleeting Expletives

While the Supreme Court permitted the FCC to regulate the broadcast of indecent language, the agency itself recognized the narrow nature of the authorization. In fact, the

\begin{itemize}
\item \textsuperscript{106} \textit{Id.} at 763-64.
\item \textsuperscript{107} \textit{Id.} at 764-65
\item \textsuperscript{108} \textit{Id.} at 765-66.
\item \textsuperscript{109} \textit{Pacifica}, 438 U.S. at 766 (Brennan, J., dissenting).
\item \textsuperscript{110} \textit{Id.} at 769-70.
\item \textsuperscript{111} \textit{Id.} at 771.
\item \textsuperscript{112} \textit{Id.} at 776.
\end{itemize}
Democratic Chairman of the FCC, Charles Ferris, outright disagreed with *Pacifica*.\textsuperscript{113} Determined to show that there was “an infinitesimal chance of the FCC ever coming out with a ruling that something is indecent,” Ferris instructed staffers to find an indecency complaint and make sure that *Pacifica* would never reoccur.\textsuperscript{114} They wasted no time. The Court’s opinion in *Pacifica* was issued on July 3, 1978. Before the month was out, Chairman Ferris made his point with the license renewal of Boston’s public television station, WGBH.\textsuperscript{115} A group called Morality in Media had petitioned the FCC to deny renewal of WGBH for broadcasting a number of programs including an “unidentified installment of the *Masterpiece Theatre* series”\textsuperscript{116} which contained all seven of Carlin’s filthy words, several episodes of *Monty Python's Flying Circus* which included “vulgarity, nudity, and sacrilege,” and a program entitled *Rock Follies*, which contained “obscenities” such as shit and bullshit.\textsuperscript{117} In rejecting the challenge, the FCC stated that *Pacifica* “affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station.”\textsuperscript{118} Instead, the FCC intended to strictly observe the narrowness of the *Pacifica* holding.\textsuperscript{119} In this regard, both the Commission and the Court relied on the repetitive occurrence of the indecent words in question. Indeed, the Court specifically stated that it was not ruling that “an occasional expletive” justified sanction.\textsuperscript{120} Therefore, the FCC concluded there was no

\textsuperscript{113} Campbell, *supra* note 15, at 243.
\textsuperscript{114} See *id.* at 244 (quoting former FCC Chief of Staff Frank Lloyd).
\textsuperscript{116} *Id.* at 1250, ¶ 2. While the order does not identify the program, according to former FCC Chief of Staff Frank Lloyd it was “Molly Bloom’s soliloquy in Ulysses which had all the seven dirty words in it.” Campbell, *supra* note 15, at 244 (quoting Lloyd).
\textsuperscript{117} WGBH *supra* note 115, at 1250, ¶ 2.
\textsuperscript{118} *Id.* at 1254, ¶ 10.
\textsuperscript{119} *Id.*
\textsuperscript{120} *Id.*
showing of abuse by WGBH of its programming discretion.\textsuperscript{121} In public comments after WGBH, Chairman Ferris stressed that \textit{Pacifica} was limited to its unique facts and was “as likely to occur again as Halley’s Comet.”\textsuperscript{122}

For a decade after \textit{Pacifica}, the FCC continued to exercise restraint in enforcing § 1464 against indecent language.\textsuperscript{123} First, it limited its focus to the broadcast of the seven taboo words at issue in \textit{Pacifica}.\textsuperscript{124} Additionally, it created a safe harbor for indecent broadcasts between the hours of 10:00 p.m. and 6:00 a.m.\textsuperscript{125} Moreover, the FCC continued to reassure broadcasters that the use of fleeting expletives would not be the subject of enforcement actions.\textsuperscript{126} As a result, the FCC took no action against a broadcaster for indecency after \textit{Pacifica} in 1975 until 1987.

In 1987, after Republican Dennis Patrick became Chairman, the FCC began its shift away from a policy of restraint by issuing the Infinity Order—a ruling affirming on reconsideration three separate broadcasts as indecent.\textsuperscript{127} The FCC explained in the Infinity Order that it would no

\textsuperscript{121} \textit{Id.}
\textsuperscript{122} Campbell, \textit{supra} note 15, at 244 (quoting Ferris); Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 448 n.4 (2d Cir. 2007) (“At the time, the Commission interpreted \textit{Pacifica} as involving a situation ‘about as likely to occur again as Halley’s Comet.’”), rev’d, 556 U.S. 502 (2009).
\textsuperscript{123} \textit{See} Robert Corn-Revere, \textit{FCC v. Fox Television Stations, Inc.: Awaiting the Next Act}, 2009 \textit{CATO SUP. CT. REV.} 295, 305 (2009) (“After the Supreme Court upheld its authority to enforce Section 1464, the Commission continued--as it had promised--to show great restraint in its construction of the law.”).
\textsuperscript{124} \textit{See} Fox, 489 F.3d at 449; Terri R. Day & Danielle Weatherby, \textit{Bleeeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for \textit{Pacifica} v. FCC}, 3 \textit{CHARLOTTE L. REV.} 469, 483 (2012) (describing the limitation to only those seven words).
\textsuperscript{125} Action for Children’s Television v. FCC, 852 F.2d 1332, 1336 (D.C. Cir. 1988) [hereinafter \textit{ACT I}].
\textsuperscript{126} \textit{See}, e.g., In re Application of Pacifica Found. For Renewal of License for Noncommercial Station WPFW(FM), 95 F.C.C.2d 750, 760, ¶¶ 16, 18 (1983) (holding three separate occasions using “motherfucker,” “fuck,” and “shit,” did not amount to “verbal shock treatment”).
\textsuperscript{127} In re Infinity Broadcasting Corp. of Pennsylvania, Licensee of Station WYSP(FM); In re Pacifica Found., Inc., Licensee of Station KPFK–FM; In re The Regents of the University of California, Licensee of Station KCSB–FM, 3 F.C.C.R. 930 (1987) [hereinafter \textit{Infinity Order}]; \textit{see} Fox, 489 F.3d at 450. In an appendix to the Infinity Order, the FCC specifically identified the
longer take the narrow view that a finding of indecency required the use of one of the seven “dirty words” used in Carlin's monologue. Finding their deliberately-repeated-use-of-dirty-words policy “unduly narrow” and inconsistent with its obligation to enforce § 1464, the FCC said it made no legal or policy sense to regulate the Carlin monologue but not “material that portrayed sexual or excretory activities or organs in as patently offensive a manner simply because it avoided certain words.” The FCC instead would use the generic definition of indecency it had articulated in its prior decision in Pacifica. Under the Commission's definition, “indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.” The Infinity Order also retreated from the safe harbor period by concluding that indecent speech is actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience, whether before or after 10:00 pm. They reaffirmed, however, that a fleeting expletive would not be actionable. The FCC preserved a distinction between literal and nonliteral uses of evocative language; deliberate and repetitive use was a requisite to a finding of indecency when a complaint focused solely on the use on nonliteral expletives.

Broadcasters appealed the Infinity Order to the D.C. Circuit arguing the indecency definition was unconstitutionally vague. The D.C. Circuit rejected the challenge since the

indécis speech from each action. See Infinity Order, 3 F.C.C.R. at 934-35.

128 See Infinity Order, supra note 127, at 930, ¶ 5.

129 Id.

130 Id.

131 Id. at 930-31

132 Fox, 489 F.3d at 449.

133 Pacifica Found., Inc., 2 F.C.C.R. 2698, at ¶ 13 (1987) (“If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.”).
definition was virtually the same as the one reviewed by the Supreme Court in *Pacifica*. The FCC’s attempt to alter the safe harbor met with a different, and ultimately convoluted, fate. The court of appeals rejected the FCC’s push-back of the safe harbor until midnight because the agency “failed to adduce evidence or cause” to support the expanded restraint and remanded the matter for the FCC’s reconsideration of an appropriate safe harbor period. After two congressional attempts to mandate the safe harbor period and two additional trips to the D.C. Circuit, the safe harbor was ultimately returned to 10:00 p.m. to 6:00 a.m.

The uncertainty generated by more aggressive enforcement led the FCC to issue a policy statement in 2001 to provide guidance to the broadcast industry on its enforcement of § 1464 and indecency. According to the policy statement, the courts had approved regulation of broadcast indecency to support “parental supervision of children” and more generally out of “concern for children’s well being.” The FCC restated its two-part test to define indecent broadcasting. First, the material must depict sexual or excretory organs or activities. If so, then the FCC determines if the material is patently offensive as measured by community standards for the broadcast medium. To provide a framework for determining what it considered patently offensive, the FCC explained that three factors had proved significant: “(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or

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134 *ACT I*, 852 F.2d at 1338-40.
135 *Id.* at 1335.
136 See Brown & Candeub, *supra* note 14, at 1491-92 (describing the three ACT cases and congressional reactions).
138 *Id.* at 8001, ¶ 5.
139 *Id.* at 8002, ¶ 7.
140 *Id.* at 8002, ¶ 8.
activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.”

141 With regard to the second factor, the FCC explained that repetition of and persistent focus on sexual or excretory material had been cited consistently as factors that exacerbated the potential offensiveness of broadcasts. In contrast, where sexual or excretory references had been made once or had been passing or fleeting in nature, this characteristic weighed against a finding of indecency.

Despite the recently issued Policy Statement, the FCC’s approach to indecency changed dramatically following NBC’s broadcast of the Golden Globe Awards on January 19, 2003. During the show, U2’s lead singer Bono accepted the award for Best Original Song in a Motion Picture with excitement exclaiming: “This is really, really fucking brilliant.” The statement was delivered live on the East coast, but was bleeped later on the West coast. There were 234 total complaints to the FCC of which 217 were part of an organized campaign launched by the Parents Television Council (PTC). FCC Enforcement Bureau Chief David Solomon issued a decision of no liability on the part of the broadcasters because the Policy Statement, as a

141 Id. at 8003, ¶ 10.
142 Id. at 8008, ¶ 17.
143 Id. The policy statement provided examples of material that was found not indecent because it was fleeting and isolated, such as a fleeting and isolated utterance during live programming (“The hell I did, I drove mother-fucker, oh. Oh.”) and a news announcer’s use of a single expletive (“Oops, I fucked that one up.”) and contrasted it with fleeting references that were found patently offensive in light of other factors, such as the fleeting language in a graphic joke that clearly refers to sexual activity with a child (“What is the best part of screwing an eight-year-old? Hearing the pelvis crack.”). See id. at 8009, ¶ 18.
144 The song was “The Hands That Built America.” The film was GANGS OF NEW YORK (Miramax Films 2002).
147 See Golden Globe I, supra note 5, at 19859 & n.1
threshold matter, required indecent speech to describe sexual or excretory organs or activities.\textsuperscript{148} Solomon concluded that Bono used fucking as an adjective or expletive, not to describe sex or excretory matters.\textsuperscript{149} Moreover, a fleeting and isolated use of fuck was considered nonactionable under FCC precedent.\textsuperscript{150} The PTC lobbied the Commissioners to reverse it because in their view any use of the word fuck on broadcast television was patently offensive.\textsuperscript{151} The PTC got the attention of FCC Chairman Michael Powell\textsuperscript{152} who made repeated public statements that fuck was coarse, abhorrent, and profane.\textsuperscript{153} On March 18, 2004—over a year after the Golden Globe Awards—the Commission granted the PTC’s application for review and concluded that Bono’s use of fucking was not only indecent, but also profane.\textsuperscript{154}

To reverse the Bureau on indecency, the Commissioners had to find that the phrase “really fucking brilliant” both described sexual activities and was patently offensive.\textsuperscript{155} First, the Commissioners held that any use of the word fuck is \textit{per se} sexual: “[W]e believe that, given the

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\textsuperscript{148} See id. at 19860-61, ¶ 5.
\textsuperscript{149} Id. at 19861, ¶ 5.
\textsuperscript{150} Id. at 19861, ¶ 6.
\textsuperscript{151} See Golden Globe II, supra note 6, at 4976, ¶ 3.
\textsuperscript{152} See Clay Calvert, Bono, The Culture Wars, and a Profane Decision: The FCC’s Reversal of Course on Decency Determinations and its New Path on Profanity, 28 Seattle U. L. Rev. 61, 71 (2004) (describing personal correspondence from Powell to PTC President Brent Bozell applauding their efforts). But see Clay Calvert & Robert D. Richards, The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with its President, Tim Winter, 33 Hastings Comm. & Ent. L.J. 293, 324 (2011) (quoting PTC President Tim Winter: “[Powell] doesn’t care much for either our organization or for broadcast indecency enforcement. In fact, he loathed it and was forced into it.”).
\textsuperscript{154} See Golden Globe II, supra note 6, at 4975, ¶ 3.
\textsuperscript{155} Id. at 4977, ¶ 6.
core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.”

To reach this result, the Commissioners abandoned agency policy and precedent, ignored judicial authority to the contrary, and simply snubbed the scientific research by linguists distinguishing between uses of the word fuck.

Nonetheless, having cleared the first part of their own definition of indecency, the Commissioners turned to whether the use of fucking was patently offensive based on three factors described in the Policy Statement. First, the word was “explicit or graphic” because the “‘F-Word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language.” On the second factor involving repetition, the Commissioners again reversed itself: “While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.” The final element of patent offensiveness was also met because the use of the F-Word on a nationally telecast awards ceremony was shocking and gratuitous.

156 Id. at 4978, ¶ 8.
157 See, e.g., Mr. Peter Branton, 6 F.C.C.R. 610 (1991)(broadcast of repeated use of fuck by John Gotti found not indecent); Entercom Buffalo License, LLC (WGR(AM)), 17 F.C.C.R. 11997, 11999-12000 ¶¶ 7, 9-10 (2002) (finding use of “prick” and “piss” not indecent because words were not used to describe sexual or excretory acts or organs).
158 In Cohen, the Court recognized the dual communicative functions of the word fuck. See 403 U.S. at 25-26.
159 Linguists classify the different uses of fuck into two broad categories--Fuck¹ and Fuck². Fuck¹ is the word used to reference sex. Fuck² is the word used for its emotive force. Bono was clearly using the nonssexual, emotive Fuck². See FAIRMAN, supra note 69, at 44-45 (describing Fuck¹ and Fuck²).
160 See Policy Statement, supra note 137, at 8003, at ¶ 10 (listing 3 factors).
161 Golden Globe II, supra note 6, at 4979, ¶ 9.
162 Id. at 4980, ¶ 12.
163 Id. at 4979, ¶ 9.
Finally, the Commissioners applied a whole new, independent ground for speech restriction—profanity. Section 1464 applies to “obscene, indecent, or profane language.” In resurrecting profanity, the Commissioners recognized that the “limited case law on profane speech had focused on what is profane in the sense of blasphemy.” Nonetheless, the Commissioners declared that fuck was profane on the strength of common knowledge that profanity meant “vulgar, irreverent, or coarse language,” a stale Seventh Circuit case that predated Pacifica, and Black’s Law Dictionary. This misinterpretation once again ignored the science of language where, according to linguistics, profanity is a special category of offensive speech that means to be secular or indifferent to religion as in “Holy shit,” “God damned,” or “Jesus Christ!” Luckily, NBC avoided fines for the broadcast because the Commissioners recognized that the network had no notice of the new departures from FCC policy.

By 2004, the FCC’s approach to indecency enforcement bore little resemblance to the policy of restraint exercised post-Pacifica. In 1978, FCC Chairman Ferris thought indecency cases would be as rare as Halley’s Comet; in 2004, Chairman Powell must have envisioned a meteor shower when he told Congress that the FCC was about to embark on an aggressive

164 Id. at 4981, ¶ 14; see also Statement of Chairman Michael K. Powell, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4988, 4988 (2004) (noting this was the first time the profanity section was applied to fuck and stating that “today’s decision clearly departs from past precedent”); Statement of Commissioner Kathleen Q. Abernathy, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4989, 4989 (2004) (“Rather, ‘profane’ language has historically been interpreted in a legal sense to be blasphemy.”).
165 Golden Globe II, supra note 6, at 4981, ¶ 13.
166 See Tallman v. United States, 465 F.2d 282, 286 (7th Cir. 1972).
167 See Golden Globe II, supra note 6, at 4981, ¶ 13 n.34 (citing Black’s last definition of profane).
168 See TIMOTHY JAY, WHY WE CURSE 191 (2000); Levinson, supra note 153, at 1389.
169 Golden Globe II, supra note 6, at 4981, ¶ 14.
enforcement campaign. Armed with *Golden Globe II*, the FCC was now free to go after fleeting expletives, any use of fuck, and profanity. As an example of this aggressiveness, the target of enforcement included alleged incidents of indecency that happened prior to *Golden Globe II*. This in turn spawns the Fox Television litigation.

D. *Fox I* and the First Amendment

With the intention of providing substantial guidance about the types of programs that were impermissible under the new indecency standard, on February 21, 2006, the FCC issued an omnibus order resolving various complaints against several television broadcasts. In one part of the Omnibus Order, the FCC found four programs indecent and profane under the policy announced in *Golden Globe II*. The objectionable programs were:

- Fox’s 2002 Billboard Music Awards where, in her acceptance speech, Cher stated: “People have been telling me I'm on the way out every year, right? So fuck ‘em.”

- Fox’s 2003 Billboard Music Awards where Nicole Richie, a presenter on the show, stated: “Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.”

- ABC’s NYPD Blue where in various episodes, Detective Andy Sipowitz and other

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171 Another example of their aggressive posture was the willingness of the FCC to enforce *Golden Globe II* even though NBC and Fox had filed petitions for reconsideration and subsequently a joint petition to stay enforcement. These petitions were pending for more than two years without action when Fox made its first trip to the Second Circuit in 2007. See *Fox I*, 489 F.3d at 452.


173 In Section III.B. of the Omnibus Order, the FCC identified four programs that were indecent and profane, but the agency did not propose any forfeitures because the incidents predated the order in *Golden Globe II*. See id. at ¶¶ 100-145. In Section III.A., the FCC identified six programs that were indecent and profane and subject to NAL forfeitures. See id. at ¶¶ 22-99. In Section III.C., the FCC identified broadcasts that did not violate indecency, profanity, or obscenity restrictions. See id. at ¶¶ 146-232.

174 See id. at ¶ 101.

175 See id. at ¶ 112 & n164.
characters used certain expletives including “bullshit,” “dick,” and “dickhead.”;\(^{176}\) and CBS’s The Early Show where during a live interview of Twila Tanner, a contestant from CBS’s reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a “bullshitter.”\(^{177}\)

In finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globe II* that any use of the word “fuck” was presumptively indecent and profane.\(^{178}\) The FCC then concluded that any use of the word “shit” was also presumptively indecent and profane because it is “a vulgar, graphic, and explicit description of excretory material” and “[i]ts use invariably invokes a coarse excretory image, even when its meaning is not the literal one.”\(^{179}\)

Turning to the second part of its indecency test, the FCC found that each of the programs were “patently offensive” because the material was explicit, shocking, and gratuitous.\(^{180}\) It dismissed the fact that the expletives were fleeting and isolated and, relying on *Golden Globe II*, held that repeated use was not necessary for a finding of indecency.\(^{181}\) The FCC, however, declined to issue a forfeiture in these four cases because the broadcasts occurred before the decision in *Golden Globe II*, and thus “existing precedent would have permitted this broadcast.”\(^{182}\)

The networks sought review of the Omnibus Order in the court of appeals.\(^{183}\) However, the Second Circuit granted the FCC a voluntary remand to permit the agency to consider the

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\(^{176}\) *See id.* at ¶ 125.

\(^{177}\) *See id.* at ¶ 137.

\(^{178}\) *Id.* at ¶¶ 102, 107.

\(^{179}\) *Id.* at ¶¶ 138, 143.

\(^{180}\) *See id.* at ¶¶ 106, 120, 131, 141.

\(^{181}\) *See id.* at ¶¶ 104, 116, 129, 140.

\(^{182}\) *See id.* at ¶¶ 111, 124, 136, 145.

\(^{183}\) Fox and CBS filed a petition for review of the Omnibus Order in the Second Circuit. ABC filed a petition for review in the D.C. Circuit, which was then transferred to the Second Circuit and consolidated with the petition for review filed by Fox and CBS. *See Fox I*, 489 F.3d at 453.
networks’ arguments. After soliciting public comments, the FCC issued a new remand order replacing the entire section of the Omnibus Order that dealt with the four broadcasts previously found indecent and profane.

The Remand Order reaffirmed its conclusion that the 2002 and 2003 Billboard Music Award programs were both indecent and profane. With regard to the 2003 Billboard Music Awards, the FCC found that it would have been indecent even prior to the decision in *Golden Globe II* because Nicole Richie used “two extremely graphic and offensive words” that were “deliberately uttered” because of “Ms. Richie's confident and fluid delivery of the lines.” With regard to the 2002 Billboard Music Awards, the FCC acknowledged that “it was not apparent that Fox could be penalized for Cher’s comment at the time it was broadcast.” In both cases, the FCC rejected Fox’s argument that fleeting expletives were not actionable, now characterizing its prior decisions on that issue as “staff letters and dicta.” The FCC still declined to impose a forfeiture in either case.

However, the FCC reversed its finding against The Early Show concluding that, while “there is no outright news exception to our indecency rules,” the language was part of a news interview where it was “imperative that we proceed with the utmost restraint.” While expressing some doubt about whether the segment was “legitimate new programming” or

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184 On September 7, 2006, the Second Circuit granted the FCC's request for remand and stayed enforcement of the Omnibus Order. The Commission was given sixty days to issue a final or appealable order, at which time the pending appeal would be automatically reinstated. See id.
186 Id. at ¶ 12-66.
187 Id. at ¶ 22.
188 Id. at ¶ 60.
189 Id. at ¶ 20.
190 Id. at ¶ 53, 66.
191 Id. at ¶ 71.
“merely promotions for CBS’s own entertainment programming,” the FCC deferred to “CBS’s plausible characterization of its own programming.”192 Accordingly, the FCC now denied the complaint because “regardless of whether such language would be actionable in the context of an entertainment program,” it was “neither actionably indecent nor profane in this context.”193 The Remand Order also dismissed on procedural grounds the complaint against NYPD Blue. It turns out that the sole complainant resided in the Eastern time zone where NYPD Blue was broadcast during the recognized safe harbor period after 10:00 p.m.194

Fox, CBS, and NBC (the “Networks”) challenged the Remand Order in the Second Circuit195 raising administrative and constitutional law arguments.196 In a 2-1 decision, the Second Circuit found the FCC’s new fleeting expletives policy was arbitrary and capricious because it made “a 180-degree turn” without “a reasoned explanation justifying the about-face.”197 The panel majority found the FCC’s action arbitrary and capricious on three grounds. First, they rejected the primary reason offered by the FCC for the crackdown on fleeting expletives—exempting isolated and fleeting expletives unfairly forces viewers to take the first

192 Id. at ¶ 72.
193 Id. at ¶ 73.
194 Id. at ¶ 75.
195 The Second Circuit appeal of the Omnibus Order was automatically reinstated on November 8, 2006 under the terms of the original order granting the voluntary remand to the FCC. After the Remand Order, only the two Fox broadcasts were at issue. Fox then filed a petition for review of the Remand Order which was consolidated with the original appeal. The Second Circuit then granted the intervention of CBS Broadcasting Inc. (“CBS”) and NBC Universal Inc. and NBC Telemundo License Co. (collectively, “NBC”). ABC opted to forgo participation in this appeal. See Fox I, 489 F.3d at 453-54.
196 Id. at 454.
197 Id. at 455. The three-judge panel of the Second Circuit was composed of Rosemary Pooler, Pierre Leval, and Peter Hall. Judge Leval dissented because he believed the FCC gave a reasoned explanation for the change complying with the APA. See id. at 467-74 (Leval, J., dissenting).
The court rejected the “first blow” justification because the FCC failed to explain why in the last thirty years it had not previously banned fleeting expletives as harmful. In the majority's view, the FCC decision was “devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.” The court's second objection was that the first blow theory would require a categorical ban on all broadcasts of expletives. However, FCC policy permitted “first blows” if part of a news interview and even repeated expletives if integral to the work as in the FCC’s treatment of Saving Private Ryan. The FCC’s failure to go to this extreme thus undermined the coherence of its rationale. Finally, the Court of Appeals rejected as “divorced from reality” the prediction that a per se exemption for fleeting expletives would lead to increased use of expletives one at a time because broadcasters had never barraged the airwaves with expletives.

Having held the FCC’s change in policy on fleeting expletives was arbitrary and capricious, the majority did not decide the constitutional issues. However, in the “interest of judicial economy” the court did “review” the constitutional challenges because they were “skeptical that the Commission can provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.” First, the court sympathized with the Networks’ contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague. For example, the FCC had declared that all variants of “fuck” and “shit” were presumptively indecent and profane, repeated use of those words in

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198 Id. at 458.
199 Id.
200 Id. at 461.
201 Id. at 458
202 Id. at 458-59.
203 Id. at 460.
204 Id. at 462.
205 Id. at 463.
Saving Private Ryan, for example, was neither indecent nor profane. 206 This created an undue chilling effect on free speech. The court noted that the FCC's indecency test raised an additional constitutional question of whether it permitted the sanction of speech based on the FCC’s subjective view of the merit of that speech. 207 The court noted: “It appears that under the FCC's current indecency regime, any and all uses of an expletive is presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were ‘integral’ to the work.” 208 Finally, the court recognized the tension in the law regarding the appropriate level of First Amendment scrutiny to be applied because the premises of Pacifica—pervasiveness of broadcast television and protection of children—had eroded over time. 209

When the Supreme Court granted certiorari in 2008 210, Fox I was the first indecency case to reach the high court in over thirty years. There was speculation that the Supreme Court was ready to reconsider Pacifica and its authorization for the FCC’s indecency regulation. The Court scheduled oral argument for Election Day, November 4, 2008, so whatever happened was destined to be overshadowed by the election of a new President. Of course, anyone attending oral argument that day would have known that this case was not destined to be a landmark free speech decision.

Stripped of its layers of legal argument, this was a case about when and where one could say fuck and shit without fear of government intervention. In the Second Circuit oral argument,

206 Id.
207 Id. at 464.
208 Id.
209 Id. at 464-66.
Fox’s advocate, Carter Phillips, freely used the words fuck and shit. So did the panel of judges. The odd man out was the FCC lawyer; he consistently used the euphemisms “F-word” and “S-word.” In the Supreme Court oral argument of Fox I, the FCC captured the discourse. The newly appointed Solicitor General Gregory Garre argued for the FCC. He used nothing but euphemisms. Carter Phillips again argued for Fox, but this time there were no four-letter words—only a single use of the euphemism “S-word.” It was as if Fox conceded that these were bad words—too coarse to utter in the Supreme Court. None of the Justices was going to take the lead either. The closest thing to a four-letter word was Justice Stevens’ use of “dung.” Without the dirty words, what had the potential to be a landmark First Amendment case ends up being a vanilla Administrative Procedures Act agency review. And as General Garre pointed out, the Court had never overruled an agency under the arbitrary and capricious standard where they had articulated some reason for its policy.

True to this prediction, the Supreme Court reversed the Second Circuit in a 5-4 decision based purely on administrative law principles. Justice Scalia wrote for the majority. While it is

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211 In fact, Phillips opened oral argument with the following statement:

In 2002, the renowned actress and singer, Cher, responded to her critics in a television show by saying “fuck em.” In 2003, Nicole Ritchie who is an actress commented on her own television show which is entitled The Simple Life by saying it was hardly all that simple because does any body know how hard it is to get, how “fuckin” hard it is to get cow shit out of a Prada purse.

212 See Transcript of Oral Argument at 11, Fox I, 556 U.S. 502 (07-582) Garre did manage a few laugh lines though like the specter of “Big Bird dropping the F-Bomb on Sesame Street.” Id. at 8.
213 See id at 35.

214 Id. at 60 (asking Garre: “Do you think the use of the word dung, D-U-N-G, would be indecent?”). We did hear a “golly waddles” courtesy of Justice Scalia. Id. at 35.
215 Id. at 8.
well settled that under the Administrative Procedure Act the courts could set aside agency action that was arbitrary and capricious, this was a “narrow” standard of review.\textsuperscript{216} The Second Circuit erred by “requiring a more substantial explanation for agency action that changes prior policy.”\textsuperscript{217} In the context of a change in policy, the majority held that an agency should acknowledge that it is in fact changing its position and “show that there are good reasons for the new policy.”\textsuperscript{218} However, the agency does not have to show that the reasons for the new policy are better than the reasons for the old one or “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”\textsuperscript{219}

Judged under the proper standard, the majority found the FCC’s new indecency enforcement policy was neither arbitrary nor capricious.\textsuperscript{220} The Court noted the FCC had “forthrightly acknowledged” that it had “broken new ground” in ruling that fleeting and nonliteral expletives could be deemed indecent.\textsuperscript{221} The Court concluded that the FCC’s reasons for expanding the scope of its enforcement activity were entirely rational. Not only was it “certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words,” but the Court agreed that the FCC’s decision to “look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach” sanctioned in \textit{Pacifica}.\textsuperscript{222} Given that even isolated utterances can be made in pandering, vulgar, and shocking manners, and can constitute harmful first blows to children, the

\textsuperscript{216} Fox I, 556 U.S. at 513.
\textsuperscript{217} Id. at 514.
\textsuperscript{218} Id. at 515.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 517.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 517-18.
majority held that the FCC could “decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable.”223

The Court then dispensed with the Second Circuit’s reasons for finding the FCC’s action arbitrary and capricious. First, the majority rejected the lower court’s criticism that the FCC’s failure to previously ban fleeting expletives prevented the agency from doing so now without evidence of harm.224 Scalia stressed that such evidence was impossible to obtain:

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.225 Instead, all that is required is apparently common knowledge: “Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.”226

The Court dispensed with the court of appeals next contention that accepting the first blow theory required a ban on all expletives because the FCC’s prior enforcement practice already drew distinctions between offensiveness of words based upon context.227 Moreover, the FCC’s decision to consider the patent offensiveness of isolated expletives on a case-by-case

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223 *Id.* at 518.
224 *Id.* at 518-19.
225 *Id.* at 519.
226 *Id.*
227 *Id.* at 520.
basis was not arbitrary or capricious.\textsuperscript{228} Quoting from \textit{Pacifica}, Scalia explained that “[e]ven a prime-time recitation of Geoffrey Chaucer’s Miller’s Tale . . . would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected.”\textsuperscript{229} According to the Court, the same rationale explained the FCC finding that a broadcast of Saving Private Ryan was not indecent. “The frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material.”\textsuperscript{230} However, the FCC’s retention of some discretion did not render arbitrary or capricious its regulation of the “deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children.”\textsuperscript{231}

Finally, while the lower court found unconvincing the prediction (without any evidence) that a \textit{per se} exemption for fleeting expletives would lead to increased use of expletives, the Court found that “even in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense.”\textsuperscript{232} The prediction that complete immunity for fleeting expletives will lead to a substantial increase in fleeting expletives seemed to the majority as “an exercise in logic rather than clairvoyance.”\textsuperscript{233}

Having found the FCC’s action to be neither arbitrary nor capricious, the Supreme Court remanded the case to the Second Circuit to definitively rule on the constitutionality of the FCC’s orders.\textsuperscript{234}

\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.} at 521.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{Id.} at 529.
In addition to Scalia’s opinion for the majority, there are two separate concurrences. Justice Thomas joined the Court’s opinion but wrote separately “to note the questionable viability”\textsuperscript{235} of \textit{Pacifica} and \textit{Red Lion Broadcasting Co. v. FCC}.\textsuperscript{236} Thomas invited reevaluation of these two cases supporting FCC authority to regulate indecency because technological advances have now eroded their soundness.\textsuperscript{237} Noting the “deep intrusion into First Amendment rights of broadcasters,” Thomas’s concurrence clearly suggested that the FCC’s policy was on shaky constitutional footing.\textsuperscript{238} While concurring in most of Scalia’s majority opinion, Justice Kennedy wrote separately to underscore that an agency’s decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so.\textsuperscript{239} Kennedy agreed with Breyer’s dissent that the agency must explain why it now rejects the considerations that led it to adopt that initial policy.\textsuperscript{240}

The dissenters produced three additional opinions. Justice Stevens dissented to emphasize two points.\textsuperscript{241} Because the “FCC's shifting and impermissibly vague indecency policy only imperils these broadcasters and muddles the regulatory landscape,” the FCC should be required to justify why its prior policy is no longer sound before allowing it to change course.\textsuperscript{242} According to Stevens, the Court made a second critical error by assuming that \textit{Pacifica} authorized regulation of fleeting expletives because the Court explicitly did not decide whether an isolated expletive could be indecent and “did not hold that any word with a sexual or

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\textsuperscript{235} 556 U.S. at 530 (Thomas, J., concurring).
\textsuperscript{236} 395 U.S. 367 (1969) (upholding the fairness doctrine).
\textsuperscript{237} 556 U.S. at 532-35.
\textsuperscript{238} \textit{Id.} at 531.
\textsuperscript{239} 556 U.S. at 535 (Kennedy, J., concurring in part and concurring in judgment).
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} 556 U.S. at 539 (Stevens, J., dissenting).
\textsuperscript{242} \textit{Id.} at 541.
scatological origin, however used, was indecent.” 243 Justice Ginsburg also dissented separately to stress the First Amendment implications of the FCC’s policy. 244 In particular she emphasized the narrow decision issued by a divided court in Pacifica. 245 Accordingly, the fleeting expletives of Fox simply did not measure up to the verbal shock treatment of Carlin’s monologue because they were neither deliberate nor relentlessly repetitive and they did not describe sex or excrement. 246 Ginsburg concluded with the reminder that “words unpalatable to some may be commonplace to others.” 247

Justice Breyer’s dissent, joined by Stevens, Souter, and Ginsburg, directly addressed why the change in indecency policy was arbitrary and capricious. 248 According to the dissenters, the FCC failed to consider the First Amendment implications of moving from its prior fleeting expletive policy to one closer toward censorship. 249 Breyer stressed the agency’s repeated recognition that Justice Powell’s “verbal shock treatment” requiring repetitive occurrence of indecent words set the constitutional line. 250 The FCC failed to explain “the transformation of what the FCC had long thought an insurmountable obstacle into an open door.” 251 Additionally, Breyer noted that the FCC failed to consider the impact of its new policy on local broadcasters who would be forced to reduce or cancel coverage of local events because they were unable to afford expensive bleeping technology. 252

243 Id. at 542.
244 556 U.S. at 544 (Ginsburg, J., dissenting).
245 Id. at 545.
246 Id. at 545-46.
247 Id. at 546.
248 556 U.S. at 546 (Breyer, J., dissenting).
249 Id. at 553.
250 Id. at 553-55.
251 Id. at 556.
252 Id. at 556-61.
E. Fox II and the Court’s Failure on Fleeting Expletives

With the remand of the case, the Second Circuit addressed the constitutional questions that it had reserved from the prior decision. This time the panel was unanimous that the FCC’s indecency policy was unconstitutionally vague and therefore invalid in its entirety.253 The court of appeals began by noting how the media world had changed since Pacifica with the rise of cable television, satellite broadcasts, and the Internet.254 The uniquely pervasive presence of broadcast television no longer exists—“broadcast television has become only one voice in a chorus.”255 Moreover, technological change such as V-chip technology has given parents the ability to decide which programs they will permit their children to watch.256 In light of these changes, the Second Circuit saw no reason why strict scrutiny should not now apply.257 Nonetheless, the court was bound by controlling Supreme Court precedent, Pacifica.258

The concession that Pacifica controlled did not, however, end the matter because the Second Circuit found the FCC’s indecency policy was unconstitutionally vague. The first problem the court identified was the inconsistency in the FCC’s determination of which words were patently offensive, such as their conclusion that bullshit in a NYPD Blue episode was patently offensive while dick and dickhead were not.259 The court rejected the idea that the FCC’s three-factor “patently offensive” test gave broadcasters fair notice.260 Since the FCC’s test found bullshit was indecent because it was “vulgar, graphic and explicit” while dickhead was not

253 Fox Television Stations, Inc. v. F.C.C., 613 F.3d 317, 327 (2d Cir. 2010).
254 Id. at 325-26.
255 Id. at 326.
256 Id.
257 Id. at 327.
258 Id.
259 Id. at 330.
260 Id.
indecent because it was “not sufficiently vulgar, explicit, or graphic,” broadcasters hardly had notice of how the test would apply in the future.\(^{261}\)

The Second Circuit rejected the FCC’s argument that it needed a flexible standard because it cannot anticipate how broadcasters will attempt to circumvent the prohibition on indecent speech.\(^{262}\) The court observed “that people will always find a way to subvert censorship laws may expose a certain futility in the FCC’s crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so.”\(^{263}\)

The court also found the FCC’s presumptive prohibition on the words fuck and shit impossibly vague due to the application of two exceptions. According to the court, the FCC could not even articulate much less apply the “bona fide news exception.”\(^{264}\) Thus, the FCC found the use of the word bullshitter on CBS’s The Early Show to be “shocking and gratuitous” because it occurred “during a morning television interview,” before reversing itself because the broadcast was a “bona fide news interview.”\(^{265}\) “In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word bullshitter was uttered during a news program.”\(^{266}\)

Similarly, the court criticized application of the FCC’s artistic necessity exception, in which fleeting expletives are permissible if they are “demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public

\(^{261}\) Id.
\(^{262}\) Id. at 331.
\(^{263}\) Id.
\(^{264}\) Id.
\(^{265}\) Id. at 332.
\(^{266}\) Id.
The court made its point by comparing the disparate treatment of Saving Private Ryan and the documentary, The Blues, where the FCC decided that the words fuck and shit were integral to the realism and immediacy of the film experience for viewers in Saving Private Ryan, “a mainstream movie with a familiar cultural milieu,” than it was with The Blues, which “profiled an outsider genre of musical experience.” While the FCC argued that a context-based approach was necessary, the court lacked any discernible standards by which individual contexts are judged.

According to the Second Circuit, there was ample evidence that the FCC's indecency policy has chilled protected speech. Examples included: CBS affiliates declining to air the Peabody Award-winning “9/11” documentary; a radio station cancelling a planned reading of Tom Wolfe's novel I Am Charlotte Simmons, based on a single complaint it received about the adult language in the book, because the station feared FCC action; and local broadcasters deciding not to invite controversial guests for fear that an unexpected fleeting expletive will result in fines. The court noted that the indecency policy had even chilled programs that contained no expletives, but which contained reference to or discussion of sex, sexual organs, or excretion. Consequently, the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature.

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267 Id. at 331.
269 Fox II, 613 F.3d at 333.
270 Id.
271 Id. at 334.
272 Id. at 335.
273 Id.
Following the Second Circuit’s decision in *Fox II*, the court had the opportunity to apply its holding to fleeting nudity in *ABC, Inc. v. FCC*.\(^{274}\) This case involved another episode of ABC’s NYPD Blue. The episode broadcast on February 25, 2003, showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast. During the scene, in which the character was preparing to take a shower, a child portraying her boyfriend’s son entered the bathroom. A moment of awkwardness followed.\(^{275}\) On February 19, 2008, the FCC issued a forfeiture order finding the display of the woman’s nude buttocks in NYPD Blue was actionably indecent.\(^{276}\) According to the FCC, displays of buttocks fell within the category of displays of sexual or excretory organs because the depiction was “widely associated with sexual arousal and closely associated by most people with excretory activities.”\(^{277}\) The FCC also deemed the scene patently offensive as measured by contemporary community standards and that the nudity was presented in a manner that clearly panders to and titillates the audience.\(^{278}\) The FCC then imposed a forfeiture of $27,500 on each of the 45 ABC-affiliated stations that aired the indecent episode. Finding no significant difference between this case and *Fox* and bound by that panel’s decision striking down the FCC’s indecency policy in its entirety, the Second Circuit vacated the forfeiture order in summary opinion.\(^{279}\)

The Supreme Court granted certiorari in both cases and consolidated them for argument.\(^{280}\) It appeared that Scalia’s prediction that the *Fox* litigation might ultimately answer

\(^{274}\) 404 Fed. Appx. 530 (2d Cir. 2011).
\(^{275}\) For a complete description of the scene, see *id*. at 533-34.
\(^{277}\) *Id*. at 3150.
\(^{278}\) *Id*. at 3153.
\(^{279}\) 404 Fed. Appx. at 535.
the constitutional questions surrounding the FCC’s indecency policy might come true. This was not to be. Once again the Court managed to resolve the case while dodging the central question of whether the First Amendment protects broadcasting of indecent language. However, the Court made clear that the FCC was not free to change indecency regulation without notice. In a rare showing of near-unanimity (Justice Sotomayor was recused and Ginsburg concurred in the judgment only), the Supreme Court held that the FCC’s fleeting expletives and nudity policy was unconstitutionally vague because it failed to give proper notice to broadcasters. Justice Kennedy, writing for the Court, noted that the regulatory history “makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation.” The Court rejected the idea that the FCC’s “policy of forbearance”—imposing no forfeiture against Fox—solved the due process problem because the agency could consider prior offenses when setting future penalties or at license renewal. Moreover, potential reputational damage could follow from viewers or advertisers.

With ABC, the FCC was foreclosed from raising the argument that no sanction was imposed: “The fine against ABC and its network affiliates for the seven seconds of nudity was nearly $1.24 million.” Instead, the FCC argued that ABC had notice that the scene in NYPD Blue would be considered indecent in light of a 1960 decision declaring that the “televising of

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\footnote{Fox I, 556 U.S. at (“Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case.”).}

\footnote{FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (Fox II).}

\footnote{Id. at 2318.}

\footnote{Id.}

\footnote{Id. at 2318-19.}

\footnote{Id. at 2319.}
nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464.”287 The Court rejected the idea that an isolated and ambiguous statement from a 1960 decision provided the fair notice to impose over a $1 million fine for allegedly impermissible speech, especially in light of previous FCC decision that declined to find isolated and brief moments of nudity actionably indecent.288

While the Court set aside the FCC orders for vagueness as applied to the Fox and ABC broadcasts, it also made clear just how limited its decision was. First, because the Court resolved the cases on a failure to provide fair notice under the Due Process Clause, it was unnecessary to reach the First Amendment implications of the FCC’s indecency policy or reconsider Pacifica.289 Second, the Court ruled that Fox and ABC “lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies.”290 Accordingly, it was unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the Golden Globe II and subsequent orders.291 Third, the Court’s opinion left the FCC “free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements” and “courts free to review the current policy or any modified policy in light of its content and application.”292

287 Id.
289 Fox II, 132 S. Ct. at 2320. Justice Ginsburg did write a one sentence concurrence in the judgment once again declaring Pacifica wrong when issued and in need of reconsideration. See id. at 2321 (Ginsburg, J., concurring in judgment).
290 Fox II, 132 S. Ct. at 2320.
291 Id.
292 Id.
Amazingly, after two trips to the Supreme Court, the Fox litigation brought us no closer to understanding the constitutionality of the FCC’s fleeting indecency policy than we were when the FCC first announced its about-face in *Golden Globe II* in 2004. It seems clear that this Court is not prepared to revisit *Pacifica* and the constitutionality of the FCC’s fleeting expletive and nudity policy. Consider a final example—*CBS Corp. v. FCC* and the so-called “Nipplegate” controversy. On February 1, 2004, CBS presented a live broadcast of Super Bowl XXXVIII, which include a halftime show produced by MTV Networks featuring Janet Jackson and Justin Timberlake. Timberlake and Jackson performed his popular song “Rock Your Body” as the show’s finale. The performance ended with Timberlake singing, “gonna have you naked by the end of this song,” and simultaneously tearing away part of Jackson’s bustier. As a result, Jackson's bare right breast was exposed on camera for nine-sixteenths of one second. In response to complaints, following a letter of inquiry and notice of apparent liability, the FCC issued a forfeiture order of $550,000. CBS sought review in the Third Circuit. The Third Circuit vacated the order holding the FCC arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency. Additionally, the court of appeals held that the FCC could not impose liability on CBS for the acts of Janet Jackson and Justin Timberlake, independent contractors hired for the limited

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293 535 F.3d 167 (3d Cir. 2008).
295 *CBS*, 535 F.3d at 171-72.
296 *Id.* at 172.
297 *Id.* at 209.
purposes of the Halftime Show in light of the First Amendment requirement that the content of speech or expression not be penalized absent a showing of scienter.\textsuperscript{298}

The FCC appealed to the Supreme Court. On May 4, 2009, the Court granted certiorari and summarily vacated and remanded the case in light of its decision in \textit{Fox I}.\textsuperscript{299} On remand, the Third Circuit reaffirmed its holding that the FCC acted arbitrarily and capriciously.\textsuperscript{300} The court noted that \textit{Fox I} strengthened the holding because the change in FCC policy was announced in March 2004—after the Super Bowl incident occurred on February 1, 2004.\textsuperscript{301} Because the FCC did not announce the change in its fleeting-material policy until March 2004, and because the offensive conduct in this case \textit{preceded} that date, the FCC's assessment of a forfeiture and imposition of a penalty against CBS constituted arbitrary, and therefore unlawful, punishment.\textsuperscript{302}

The FCC once again sought review in the Supreme Court; the Court denied review on June 29, 2012.\textsuperscript{303} In the process, Chief Justice Roberts and Justice Ginsburg wrote separately on what the denial should mean. The Chief Justice wrote that the FCC never stated that the fleeting expletive exception applied to fleeting images as well.\textsuperscript{304} He added: “As every schoolchild knows, a picture is worth a thousand words, and CBS broadcast this particular picture to millions of impressionable children.”\textsuperscript{305} Roberts nonetheless concurred in the denial of certiorari because even if the Third Circuit was wrong, that error has been rendered moot going forward because the FCC has made clear that it has abandoned its exception for fleeting expletives.\textsuperscript{306} “It is now

\textsuperscript{298} \textit{Id.}
\textsuperscript{299} FCC v. CBS Corp., 129 S. Ct. 2176 (2009).
\textsuperscript{300} See CBS Corp. v. FCC, 663 F.3d 122 (3d Cir. 2011).
\textsuperscript{301} \textit{Id.} at 130.
\textsuperscript{302} \textit{Id.}
\textsuperscript{303} FCC v. CBS Corp., 132 S. Ct. 2677 (2012).
\textsuperscript{304} \textit{Id.} at 2677 (Roberts, C.J., concurring).
\textsuperscript{305} \textit{Id.} at 2678.
\textsuperscript{306} \textit{Id.}
clear that the brevity of an indecent broadcast—be it word or image—cannot immunize it from FCC censure.” 307 Justice Ginsburg saw things quite differently. She reminded the FCC that their decision in Fox II “affords the Commission an opportunity to reconsider its indecency policy in light of technological advances and the Commission’s uncertain course since this Court’s ruling in FCC v. Pacifica Foundation.” 308

II. Pacifica Laid Bare

When Justices at opposite ends of the judicial spectrum, such as Ginsburg and Thomas, both call for the reevaluation of Pacifica and its special treatment of broadcast media, its days would seem to be numbered. Yet, Pacifica is resilient. Despite multiple opportunities to revisit the case, the Supreme Court has chosen to evade the issue. Eventually, the Court will have to confront the fact that Pacifica is a relic. As a reflection of its time the case may be understandable, but times change. There is little dispute that the media landscape of today is nothing like the 1970’s. These changes have permanently eroded the Court’s justifications in Pacifica for permitting regulation of broadcast indecency.

A. Broadcast Media No Longer Uniquely Pervasive

The divided Pacifica Court squarely premised regulation on the unique qualities of the broadcast media. Stevens’ plurality opinion noted that broadcast media was different because of its “uniquely pervasive presence.” 309 Not only was it pervasive, but also intrusive because material broadcast “over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First

307 Id.
308 Id. at 2678 (Ginsburg, J., concurring).
309 Pacifica, 438 U.S. at 748.
Amendment rights of an intruder.” 310 Stevens’ saw the listener or viewer as someone constantly tuning in and out searching for content because access was limited to chiefly broadcast media in 1978. 311 A majority for regulation was only achieved with the support of Justice Powell. He agreed about the uniqueness of broadcast media and its ability to invade the privacy of the home, “the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.” 312

The same is simply not true today. As the Second Circuit captured it best when it observed that “[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus.” 313 Today, only a small proportion of households still rely on over-the-air broadcast signals for video programming. In 1978, almost the entire television viewing public relied on broadcasts compared to 15 percent at most and perhaps as low as eight percent today. 314 Percentages this low would be characterized “rare,” not “pervasive.” 315

Traditional over-the-air broadcasts have been displaced. With almost 87 percent of households subscribing to a cable or satellite service, most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control. 316 Let us not forget the

310 Id.
311 Id.
312 Id. at 759.
315 Brief of the Cato Institute, supra note 314, at *11.
omnipresent Internet “offering access to everything from viral videos to feature films and, yes, even broadcast television programs.” Consumers increasingly access new video content through cable, telephone, and satellite operators such as Comcast's Xfinity, EchoStar's DISH Network, AT&T's UVerse, Verizon's FIOS, and DirecTV; over the Internet on popular websites such as YouTube, iTunes, and Hulu; via podcasts; by online video streaming through services such as Netflix; and through DVD purchases and rentals. All of these forms of media come into the home as invited guests, not as intruders.

One of the main factors Pacifica cited to justify regulation of broadcast television was that broadcasting was a medium uniquely accessible to children. However, the FCC itself acknowledges now notes that children today “live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago.” Indeed, children are leading the shift away from broadcast television to a variety of new media outlets and technologies such as websites, blogs, social networking services, iPads, iPods, MP3 players, smart phones, other mobile devices, and cable and satellite networks. It is the young that lead in Internet use—upward of 87% of U.S. children ages 12 to 17. And when children do watch broadcast content, they do so increasingly using non-broadcast platforms.

318 Brief of the Cato Institute, supra note 314, at *6.
319 See Pacifica. 438 U.S. at 749.
320 Fox II, 613 F.3d at 326; In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13171, at ¶ 11 (2009); Gamse, supra note 313, at 299 (“American children are now exposed to a wide range of media that extend well beyond just broadcast television.”).
321 Brief of the Cato Institute, supra note 314, at *12.
322 Id.
323 Id.
Pacifica concluded that broadcasting deserved only limited First Amendment protection because it was a pervasive and uncontrolled medium that intruded into the privacy of your own home. Thirty-five years later, technological innovation has created a landscape where broadcasting is no longer uniquely pervasive or intrusive. With these characteristics gone, they can no longer support only limited First Amendment protection for broadcast speech.

B. Protection of Children Rationale Undermined

According to the Stevens plurality in Pacifica, a corollary to the uniquely pervasive presence of broadcast media was its accessibility to children. Stevens feared that widely available broadcast media, such as the Pacifica’s broadcast, “could have enlarged a child’s vocabulary in an instant.” Justice Powell agreed that the FCC was primarily concerned with preventing the broadcast of indecent speech from reaching the unsupervised ears of children. Powell aligned himself with Judge Leventhal’s opinion from the D.C. Circuit. Leventhal saw a “cruel reality” that “latchkey children” from single-parent families or those with working mothers had widespread, unsupervised access to radio and television during the day. Thus, the pervasiveness of television and radio and their reach into the home made by broadcasters precluded an effective choice by the family to control access to unwanted programming.

1. Technological innovation

Once again technology erases a basis for regulation. Today, viewers can effectively shield themselves and their children from content they deem undesirable using a wide variety of

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324 Pacifica, 438 U.S. at 749.
325 Id. at 757 & n.1.
326 Pacifica, 556 F.2d at 34 & n.6 (Leventhal, J., dissenting).
327 Id. at 33.
tools. Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system. Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip. The rating system uses age-based designations as well as several specific content descriptors (for coarse language, sex, and violence) allowing parents the ability to tailor the programming they want children to have access to. 

Cable and satellite subscribers can filter or block unwanted broadcast programming using set-top boxes offer locking functions for individual channels and by password protecting access to channels. Parental controls are also usually available such as DirecTV’s “Locks & Limits” feature built into its equipment, which allows parents to block specific movie, lock out entire channels, and set limited viewing hours. In addition, specialized remote controls can also limit children to channels approved by their parents. Screening tools such as TVGuardian offer a “Foul Language Filter” that can filter out profanity from broadcast signals based on closed captioning.

331 Brief of the Cato Institute, supra note 314, at *14. These ratings are displayed prominently at the beginning of programs, in onscreen menus and interactive guides, and in local newspaper listings. Id. at *15.
332 Id. at *17; see Gamse, supra note 313, at 298-99 (“These pay-TV services typically include additional filtering capabilities for their customers. In fact, cable companies are legally bound to provide blocking devices to their customers upon request, and most do so for free.”).
333 Brief of the Cato Institute, supra note 314, at *17.
334 Id.
335 Id.
There are a large number of tools available to parents to allow them to exercise control over what content their children access on the Internet. Many Internet Service Providers such as Comcast, Verizon, and Charter provide an array of parental control features to their subscribers. The rise of DVD players, digital video recorders (“DVRs”), and video on demand (“VOD”) services provide an additional way for parents to create libraries of approved programming. Using these tools, households can tailor programming to their specific needs and values.

These technologies were unimaginable in 1978, yet are already available to most Americans. The notion that parents are powerless to keep content they deem objectionable away from their children is simple wrong. Parents are now clearly empowered by these accessible new technologies to take an active role in what their children watch. Just as with broadcast media’s pervasive presence, technological innovation erases concerns over parental control and, with that, the judicial justification for denying broadcast speech full First Amendment protection.

2. Protection from what?

Independent of the technological change and innovation that undermines the foundation of Pacifica, there is an additional reason for rejection of the FCC’s indecency policy. The government intervention authorized by the Supreme Court is not just to aid the parent in

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336 *Id.* at *12-13. Numerous software filtering and other tools are available, often as free downloads, and websites such as www.GetNetWise.org provide information to help parents compare available tools. *Id.* at *13.

337 *Id.* at *15.

338 The percentage of households with a DVD player climbed from 13% in 2000 to 83% in 2007. It is estimated that two out of five U.S. households had a DVR last year, up from one in every five households in 2007 and one in every 13 households in 2005. Nearly 90% of U.S. digital cable subscribers had access to VOD as of March 2007. *Id.* at *16.

339 *See* Elwood, *supra* note 328, at 297-300.
controlling access to taboo language, but it reflects an *in loco parentis* judgment. *Pacifica* assumes that exposure to indecent language is harmful to children. This assumption lacks support. All Justice Stevens has to offer is: “Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant.”340 Justice Powell’s concurrence adds nothing except to note the “primary concern was to prevent the broadcast from reaching the ears of unsupervised children.”341 At best, these statements by the Court reflect the notion that preventing children from hearing indecent language was necessary to keep them from using it. But the FCC in *Pacifica* “had adduced no quantifiable measure of the harm caused by the language.”342 But should they?

When the Second Circuit reviewed the FCC’s fleeting expletives policy in *Fox I*, the appellate court observed that the FCC’s decision to start targeting fleeting expletives was “devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.”343 The court indicated that such evidence was particularly relevant today because children likely hear this language far more often from other sources than they did in the 1970s when the FCC first began sanctioning indecent speech.344 The FCC not only failed to demonstrate that there was an actual problem, it offered no proof of causation of harm from hearing expletives or even a positive correlation showing that an increase in expletives on the airwaves is associated with an increase in use of those expletives by minors.345

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340 *Pacifica*, 438 U.S. at 749.
341 *Pacifica*, 438 U.S. at 757 (Powell, J., concurring).
342 *Fox I*, 556 U.S. at 519.
343 489 F.3d at 461.
344 Id.
345 See Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?*, 47 SAN DIEGO L. REV. 737,
Scalia responded to the absence of proof argument in his opinion in *Fox I* when he declared that “[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them.”

Apparently equating empirical with a multiyear controlled study, Scalia stated the one could not demand such a study “in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.” Instead Scalia espouses what Professor Timothy Jay describes as “folk knowledge of offensiveness”:

> “Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.”

Professors Clay Calvert and Matthew Bunker have taken Scalia to task for his position on the harm from indecent language. For example, Scalia’s first assertion that “the harmful effect of broadcast profanity on children” is a “proposition[] for which scant empirical evidence can be marshaled” carries with it numerous assumptions. First, is it really true that there is no empirical evidence of the supposed harm to children from taboo language? Justice Breyer found some: “One review of the empirical evidence, for example, reports that “[i]t is doubtful that children under the age of 12 understand sexual language and innuendo; therefore it is unlikely that vulgarities have any negative effect.” Kaye & Sapolsky, Watch Your Mouth! An Analysis of

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743 (2010).

346 *Fox I*, 556 U.S. at 519.

347 *Id*.

348 Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCHOL. PUB. POL’Y & L. 81, 92 (2009)

349 *Fox I*, 556 U.S. at 519.


351 *Fox I*, 556 U.S. at 519; *see id.* at 744-45.

What does Scalia mean by “empirical evidence?” Calvert and Bunker concede that the multiyear controlled study Scalia alludes to would be unlikely to pass IRB scrutiny, but that “does not mean that surveys, field studies, or other forms of communication or psychology research cannot be, or have not already been conducted regarding the possible impact of profanity.” They go on to point out that much scholarly literature exists on profanity and swearing from the fields of communication, sociology, psychology, and pediatric medicine. Professor Jay points out the “comprehensive studies of public swearing that have emerged.” These are clearly “empirical” pointing out the frequency of use of offensive words at between 0.3 to 0.7% of verbal output per day (an average of 60-90 offensive words out of the daily production of 15,000-16,000 words). Empirical evidence on use of indecent language is not impossible to obtain; it already exists.

Continuing the autopsy of Scalia’s argument, what is the “harmful effect on children” that we should be concerned about in the first place? Is it preventing psychological harm? Or is it preventing the imitation of harmful behavior? Or is it a interest in promoting civility and socially appropriate behavior? The failure to even identify the harm may well be related to the complete absence of support for any of these potential harm areas. As to psychological harm, Professor Jay’s research is instructive. Having recorded hundreds of incidences of children

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352 Fox I, 556 U.S. at 564 (Breyer, J., dissenting).
353 See Calvert & Bunker, supra note 345, at 746.
354 Id. at 746-47.
355 Jay, supra note 348, at 89-90.
356 Id. at 90.
saying offensive words in public and private places, Jay is emphatic: “There is no psychological evidence of harm from fleeting expletives.”

Perhaps, instead of psychological harm, the fear is that hearing sexual expletives will lead to harmful sexual behaviors. This has been a popular misconception surrounding sex education: discussions about sexuality have harmful effects on children and young adults. While sex education opponents argue that exposing children to explicit discussions of sexuality will result in promiscuous or deviant behavior, sex education research fails to support the harm assumption. Yet, this misconception persists. In contrast, studies demonstrate that abstinence-only programs fail resulting in either higher rates of sexually transmitted diseases or no change in sexual activities.

The best Scalia can do to identify a harm is that children mimic behavior they observe so programs with one-word indecent expletives will produce children who use them. When this statement is deconstructed, several concerns emerge. Do children really mimic behavior they observe? In other words, do children use expletives because they hear them on television? According to Calvert & Bunker, the impact of television viewing on minors is complex involving a number of dependent variables. Minors are likely to learn expletives from sources

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358 See Jay, supra note 348, at 92.
359 See id. Two Presidential commissions on pornography and found little convincing evidence that offensive speech harmed normal adults. The one exception was for deleterious effects on children that were used to create pornographic images, but evidence is lacking that children are harmed by speech. Id. at 92-93.
360 Id. at 93.
361 See id. (citing the Henry Kaiser Foundation published reports). Other commentators see the same similarity. See Jennifer Smith, Comment, Education Works! How Broadcast Fleeting Expletives Stimulate Comprehensive Sex Education for our Youth, 49 HOUS. L. REV. 161, 195-96 (2012) (describing the negative effects of abstinence-only sex education policies in Texas).
362 Fox I, 556 U.S. at 519.
363 See Calvert & Bunker, supra note 345, at 750.
other than television, such as their peers, parents, or music.\textsuperscript{364} And while it is conceivable that children might learn a new expletive from watching television, this does not mean they will start using the word. Social cognitive theory distinguishes between acquisition and performance because people do not perform everything they learn.\textsuperscript{365} Whether “observers actually engage in that learned behavior is a function of the reinforcement contingencies (positive or negative) they associate with it.”\textsuperscript{366}

And what if Scalia’s speculation is correct and minors do learn expletives from television and then use them? “There is no evidence to show that their usage is, standing alone, harmful.”\textsuperscript{367} What the research does show is exactly the opposite—swearing has beneficial effects.\textsuperscript{368} Jay concludes “using offensive words in conversations with friends can achieve a number of desirable social effects, which include promoting social cohesion, producing childhood and adult humor as well as catharsis, and using self-deprecation and sarcastic irony to produce harmony.”\textsuperscript{369}

In both Pacifica and Fox I, the Court lacks evidence of any type to support the harm of indecent language—fleeting or otherwise—on children. The Court (and the FCC) fills this vacuum with folk psychology of offensive words.\textsuperscript{370} As Professor Jay explains: “Our folk psychology and commonsense beliefs about offensive words do not amount to a scientific understanding of the reasons why people swear or the impact of swearing on other people.”\textsuperscript{371}

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\textsuperscript{364} Id. at 754.
\textsuperscript{365} Id. at 751.
\textsuperscript{366} Id. at 752.
\textsuperscript{367} Id. at 753.
\textsuperscript{368} See Jay, supra note 348, at 90-91.
\textsuperscript{369} See id. at 89-90.
\textsuperscript{370} See id. at 92 (“Judicial reasoning in Pacifica is based on the Justices’ folk knowledge of offensiveness but not on any scientific evidence of harm from indecent speech.”).
\textsuperscript{371} Id. at 91.
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Folk psychology is inadequate for judges to use in making decisions regarding the harm of offensive language. Jay concludes, “We must discredit folk psychology and supplement it with a more objective, research-oriented view of offensive speech[].” To do otherwise, permits institutionalized word taboo.

With the twin justifications for Pacifica eroded, there is no basis for the continued use of intermediate scrutiny for broadcast media. Content-based restrictions by the government should be treated with strict scrutiny as they have been in other forms of media such as cable television and the Internet. With the availability of many self-help alternatives made possible by technological advancement, the FCC’s indecency regulations should fall.

C. Cohen is Key

As future courts consider the retirement of Pacifica, they should not neglect the lessons of Cohen v. California. More commonly known as the “Fuck the Draft” case, Cohen was the Court’s head-on collision with the word fuck. The facts are quite simple: Paul Cohen was arrested for disturbing the peace for wearing a jacket in the Los Angeles Municipal Courthouse for wearing a jacket that included the words “Fuck the Draft.” Cohen was convicted and sentenced to thirty days in jail; the California Court of Appeal affirmed; the California Supreme Court denied review. In a 5-4 decision the United States Supreme Court reversed holding that

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372 Id. (citation omitted). Some legal scholars appear to be equally swayed by folk psychology as the federal judiciary. See Deana Pollard Sacks, Children’s Developmental Vulnerability and the Roberts Court’s Child-Protective Jurisprudence: An Emerging Trend?, 40 STETSON L. REV. 777, 777 (2011) (claiming the Roberts Court has rendered three opinions that utilize empirical data to protect children including the commonsense of Fox I).
375 Cohen, 403 U.S. at 16.
376 Id. at 16-17.
“the State may not, consistent with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.”  

To be sure, there are differences between Cohen and Carlin. The FCC’s indecency restriction is not a criminal offense, although fines amounting to hundreds of thousands to millions of dollars must seem pretty punitive to the broadcasters. It is also true that Cohen’s coat did not say merely fuck, but fuck “the draft.” It also included other anti-war expressions, including peace symbols and “Stop the War.”  

In this context, Cohen is obviously engaged in what would be considered core political speech, notwithstanding Justice Blackmun’s dissent characterizing Cohen’s behavior as conduct, not speech.  

Place the whole case in historical time—the turbulent anti-Vietnam War era—and in hindsight a reversal of Cohen’s conviction seems like the only possible resolution.

But according to Thomas Krattenmaker, former law clerk to Justice Harlan and author of the opinion in Cohen, while it may be tempting “to ask why all this agonizing over something that was bound to pass,” it was not a foregone conclusion. The reason is that “from our current vantage point” it is hard to comprehend “just how extraordinarily unusual it was then to hear or see the word “fuck” uttered in public.” It was not that fuck was not spoken on radio or television; “in conventional American society, “fuck” was not spoken where people whom the speaker did not know might overhear it.” Accordingly, Cohen was an outlier who meant “to

377 Id. at 26.
379 Cohen, 403 U.S. at 27 (Blackmun, J., dissenting).
381 Id. at 654.
382 Id.
say something dramatic, offensive, and distasteful.” Viewed in this context, if Cohen could say fuck in 1971, why not Carlin in 1978?

The *Pacifica* Court managed to turn *Cohen* on its head and use the pro-speech case as a reason for restricting speech. According to Stevens’ opinion, *Cohen* illustrates the importance of context. “Words that are commonplace are shocking in another,” wrote Stevens. Therefore, FCC regulation of indecency was permissible under *Cohen* because “material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, were the individual’s right to be left alone plainly outweighs the First Amendment rights of the intruder.” The dissenters in *Pacifica* pointed out at the time the fallacy of this argument.

Your privacy interests are not infringed when one turns on a public medium, like the radio, and takes part in public discourse by listening. The voluntary act of admitting the broadcast into your own home, and inadvertently confronting Carlin saying fuck, is no different from walking through the courthouse corridor and seeing Cohen wearing Fuck. Just as you can avert your eyes from the offensive jacket, you can change the channel on the radio. Of course, the existence of the V-chip, ratings systems, parental controls, filters, and other technological innovations make it even easier to avoid inadvertent confrontation.

The *Cohen* Court’s analysis offers additional guidance in resolving questions surrounding the constitutionality of broadcast indecency. There is no need to struggle over the FCC decision

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383 Id.
384 As Krattenmaker points out, this may say more about the appointment process of Supreme Court justices than about constitutional law. Every justice who was on the Court for *Cohen* sided with Carlin against the FCC in *Pacifica*. See Krattenmaker, supra note 380, at 680.
385 *Pacifica*, 438 U.S. at 747.
386 See id. at 748.
387 Id. at 764-66.
that all uses of fuck are per se sexual and therefore presumptively indecent. In discussing the
inapplicability of the obscenity doctrine, the Court in Cohen stated there was nothing erotic
about “Cohen’s crudely defaced jacket.”\textsuperscript{389} The Court explicitly recognized “that much
linguistic expression serves a dual communicative function: it conveys not only ideas capable of
relatively precise, detached explication, but otherwise inexpressible emotions as well.”\textsuperscript{390} The
Constitution protects not just cognitive content, but also “emotive function”—“which practically
speaking, may often be the more important element of the overall message sought to be
communicated.”\textsuperscript{391} The FCC's contention that fuck always has a sexual meaning in all uses is
squarely at odds with the Court's ruling in Cohen.

\textit{Cohen} also rejects the idea that government can punish “public utterance of this
unseemly expletive” as a guardian of public morality.\textsuperscript{392} What may appear as “verbal tumult,
discord, and offensive utterance” is a necessary side effect of freedom of speech. Peaceful
communication “need not meet standards of acceptability.”\textsuperscript{393} Two additional reasons for
rejecting regulation on moral grounds also relate to the indecency debate. The first involves the
problem of government line-drawing in determining which words are offensive.\textsuperscript{394} Harlan asked,
“How is one to distinguish this from any other offensive word?”\textsuperscript{395} He then answers his own
rhetorical question: “Indeed, we think it is largely because governmental officials cannot make
principled distinctions in this area that the Constitution leaves matters of taste and style so

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\textsuperscript{389} Cohen, 403 U.S. at 20.
\textsuperscript{390} \textit{Id.} at 26.
\textsuperscript{391} \textit{Id.}
\textsuperscript{392} \textit{Id.} at 22-23; see Calvert, supra note 378, at 12-14 (discussing numerous reasons for rejecting
public morality argument).
\textsuperscript{393} Cohen, 403 U.S at 24-25.
\textsuperscript{394} See Calvert, \textit{supra} note 378, at 12.
\textsuperscript{395} Cohen, 403 U.S at 25.
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largely to the individual.”\textsuperscript{396} The FCC’s struggle at classification of fuck and shit illustrates this difficulty. The second involves concern about government’s use of public morality “as a convenient guise for banning expression of unpopular views.”\textsuperscript{397} The same concern exists with the FCC’s inconsistent application of its indecency restriction, such as concluding fuck in Saving Private Ryan is okay, but not in the documentary The Blues.

As future courts revisit \textit{Pacifica} and indecency regulation, \textit{Cohen} provides many answers. For the same reasons California cannot punish Paul Cohen for wearing fuck, the FCC cannot punish Cher for saying fuck ‘em. “For while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another man’s lyric.”\textsuperscript{398} Taking liberties with Harlan’s language, “[t]hat the air[waves] may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.”\textsuperscript{399}

\section*{III. Indecency and Institutionalized Word Taboo}

Conceived by the FCC and approved by the Supreme Court, the government’s regulation of broadcast indecency is a triumph of word taboo. Taboo words are those that are restricted or sanctioned by individuals and institutions on the assumption that some harm will occur if the taboo word is spoken.\textsuperscript{400} Word taboo triggers a subconscious, involuntary, and emotional reaction in us all. When the response is extreme, individuals may influence institutions to formalize the taboo. The development and perpetuation of the FCC’s indecency policy is directly related to agency procedures that permit the influence of word taboo to be enshrined in

\textsuperscript{396} \textit{Id.}
\textsuperscript{397} \textit{Id.} at 26; \textit{see} Calvert, \textit{supra} note 378, at 13.
\textsuperscript{398} \textit{Cohen}, 403 U.S at 25.
\textsuperscript{399} \textit{Id.} at 24-25.
\textsuperscript{400} Timothy Jay, \textit{The Utility and Ubiquity of Taboo Words}, 4 Perspectives on Psychological Science 153, 153 (2009).
its substantive decisions. The result, institutionalized word taboo, allows our subconscious feelings to become law and triumph over science and reason.

A. What is Word Taboo?

A taboo is a cultural proscription on behavior. Common areas for taboo include sex and sex organs, body effluvia, death, disease, dangerous animals, and sacred beings. These categories have a commonality—there is a risk of harm to individuals or the community from engaging in dangerous behaviors. For example, our body fluids harbor disease that can affect both the individual and community; hence, we have taboos against contact with them.

Effluvia taboos illustrate how taboo acts can create taboo words. Public health researchers show that we have a powerful feeling of disgust to avoid contact with filthy, oozing, teeming matter. Subconsciously, disgust tells us to stay away from things like body fluids that are associated with disease in our evolutionary past. The strongest disgust reaction would be to eating or touching effluvia, followed by seeing body fluids or images of them. Even hearing the words to describe our own excretions and the associated body parts can trigger the involuntary reaction of disgust. In this way, the words themselves can become the object of disgust and taboo. There is a transmutation from a taboo act (do not handle, much less eat, your feces) to a taboo word (do not say shit).

401 Id. at 153.
402 See FAIRMAN, supra note 69, at 28.
403 Id.
404 See Valerie A. Curtis, Dirt, Disgust and Disease: A Natural History of Hygiene, 61 J. EPIDEMIC CMTY. HEALTH 660 (2007).
405 See Valerie A. Curtis & Adam Biran, Dirt, Disgust and Disease, 44 PERSP. IN BIOLOGY AND MED. 17, 17-18, 21 (2001).
407 See Curtis, supra note 404, at 660.
408 See id.
We have similar taboos surrounding sex, so it should not be surprising that many of our taboo words also involve sex and sex organs: fuck, motherfucker, cunt, cocksucker.\textsuperscript{409} Consider fuck. The work of psycholinguists show that fuck’s taboo status stems from our deep and dark subconscious feelings about sex—“the brute act of reproduction, incest sex outside marriage, sex without love, selfish sex, child sexual abuse, fatal venereal diseases.”\textsuperscript{410} When we hear the word, it conjures up all of the buried, subconscious feelings about sex.\textsuperscript{411} The listener has a reflexive, involuntary, and emotional reaction when exposed to taboo words.\textsuperscript{412} The brain automatically processes the meaning of taboo words including the unpleasant and emotional connotations.\textsuperscript{413} Linguists Keith Allen and Kate Burridge conclude “the evidence seems overwhelming: taboo language is rooted deeply in human neural anatomy; it is inbuilt, hard-wired into the limbic systems of our brains.”\textsuperscript{414} This automatic reflexive response occurs regardless of the use intended by the speaker.\textsuperscript{415}

There are literal, denotative uses of taboo words—“we fucked” or “I stepped in shit.” However, “the primary use of swearing is for emotional connotation, which occurs in the form of epithets or as insults directed at others.”\textsuperscript{416} Research shows that two-thirds of our swearing is

\textsuperscript{409} Carlin’s list was pretty much on target when you add shit and piss to the list. In fact, research on the most frequently used taboo words show that fuck and shit account for a third to a half of all taboo words used. See Jay, supra note 400, at 156. Highly offensive words such as cunt and cocksucker occur relatively infrequently in public. Id.

\textsuperscript{410} RICHARD DOOLING, BLUE STREAK 46 (1996).

\textsuperscript{411} See FAIRMAN, supra note 69, at 46-50 (describing research by psycholinguists).


\textsuperscript{413} See Steven Pinker, What the F***, THE NEW REPUBLIC, Sept. 28, 2007, http://pinker.wjh.harvard.edu/books/stuff/media_articles/TNR%20Online%20%20%20What%20the%20F%20(1%20of%203)%20(print).htm

\textsuperscript{414} KEITH ALLEN & KATE BURRIDGE, FORBIDDEN WORDS 249 (2006).

\textsuperscript{415} See FAIRMAN, supra note 69, at 52.

\textsuperscript{416} Jay, supra note 400, at 155. The neuro-psycho-social (NPS) model of swearing is a comprehensive framework that specifies the conditions under which swearing is likely to occur.
personal and interpersonal expressions of frustration and anger. The subconscious mind, however, does not distinguish between the use of fuck to mean sexual intercourse or shit to mean excrement and the use of fuck or shit as merely an emotive expletive. According to Professor Timothy Jay, “Taboo words persist because they can intensify emotional communication to a degree that nontaboo words cannot.”

We all internalize word taboo first at a personal level. Many engage in individual self-censorship. For some there is an extreme emotional response described by some psycholinguists as a word fetish. Of course, such responses only serve to perpetuate negative attitudes. In the case of taboo words such as fuck, unhealthy feelings about sex are reinforced and exacerbated by the continuing word taboo. Some overzealous adherents of word taboo, unsatisfied by their own self-censorship, want to extend their own sense of “good words” and “bad words” to limit the use of taboo words by others. Word fetish can be so intense that all uses of the word are targets of restriction. This explains why fuck is at the center of the fleeting expletive debate. Both sexual and nonsexual uses are swept into indecency regulation. When those who have

417 See Jay, supra note 400, at 155 (citing studies).
418 Id.
419 Id. at 153.
422 Id.
423 Id. at 1727-28.
power to define taboo words and restrict speech exercise their power by policing and punishing violations, institutionalized word taboo exists.\textsuperscript{424}

B. Word Taboo and the Supreme Court

Much of the behavior of the participants in the saga of indecency regulation can be explained by word taboo. It is evident in the opinions and actions of Justices on the Supreme Court. From the Court’s first word on indecency in \textit{Pacifica} to its most recent opinion in \textit{Fox II}, the influence of word taboo is unmistakable.

The Court’s action in \textit{Pacifica} illustrates word taboo in several ways. It started at oral argument on April 18, 1978. The FCC, as petitioner seeking review of the D.C. Circuit’s reversal of the order against Pacifica, argued first. Immediately after Chief Justice Burger called the case, he instructed the FCC’s counsel Joseph Marino to keep it clean: “You may bear in mind that we are familiar with the facts of the case and get directly to your legal argument, if you wish.”\textsuperscript{425} Marino no doubt was delighted to accept the Chief’s request. It was precisely the position of the FCC that the words from Carlin’s monologue were socially unacceptable and needed to be confined to late-night radio when no child might inadvertently tune into the program.\textsuperscript{426} Burger’s request reflects word taboo’s grip on him.

Seven years earlier on February 22, 1971, Burger tried the same tactic when he called \textit{Cohen} for oral argument. He admonished Cohen’s lawyer, Professor Melville Nimmer, to keep it clean: “the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you . . . to dwell on the facts.”\textsuperscript{427} Nimmer responded: “At Mr. Chief Justice’s suggestion, I certainly will keep very brief the statement of facts. . . . What this young man did

\textsuperscript{424} \textit{See} Jay, \textit{supra} note 400, at 153 (describing word taboo at the institutional level).
\textsuperscript{425} \textit{Transcript of Oral Argument at 1, FCC v. Pacifica Found.}, 438 U.S. 726 (77-528).
\textsuperscript{426} \textit{See Levinson, \textit{supra}} note 153, at 1365.
was to walk through a courthouse corridor . . . wearing a jacket on which were inscribed the words ‘Fuck the Draft.’**428** The Chief was irritated; no one else on the Court said fuck, referring instead to “that word.”**429** But the consensus is that the case would have been lost if Nimmer had acquiesced to Burger’s word taboo; he would have conceded that fuck should not be said in the sanctified courthouse.**430**

In contrast, word taboo carried the day in *Pacifica* not only at oral argument, but in the decision as well. Of course, the clearest example of institutionalized word taboo is the 5-4 judgment itself allowing the agency to continue to proscribe indecent language. As Professor Jay points out, *Pacifica* and similar legal decisions actually create taboos on speech considered to be indecent.**431** In the process, the use of concepts that are ambiguous, such as “patently offensive sexual and excretory references,” further contribute to the taboo.**432** Additionally, Stevens uses negative framing when he writes that taboo words “ordinarily lack literary, political, or scientific value,”**433** “surely lie at the periphery of First Amendment concern,”**434** “are no essential part of any exposition of ideas,”**435** and are the same as pigs in the parlor.**436** Authority figures like judges reinforce word taboo with these characterizations.**437**

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**428** *Id.*

**429** *Id.*

**430** *See id.* (recounting Nimmer’s thought that he would lose if he didn’t say *fuck* at least once); Levinson, *supra* note 153, at 1365-66 (describing making the concession as malpractice). Woodward and Armstrong have other examples of the influence of taboo on the *Cohen* Court. *See* WOODWARD & ARMSTRONG, *supra* note 427, at 149-54.

**431** *See Jay, supra* note 400, at 154.

**432** *Id.*

**433** *Pacifica*, 438 U.S. at 746.

**434** *Id.* at 742.

**435** *Id.* at 746 (quoting *Chaplinsky*).

**436** *Id.* at 750-51.

**437** *See Jay, supra* note 400, at 154.
Justice Brennan clearly understood the case was really about taboo: “As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven ‘dirty words’ healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words.”  He also found it disturbing and depressing that “ethnocentric myopia” kept the majority from seeing the many people “who think, act, and talk differently from the Members of the Court, and who do not share their fragile sensibilities.” In other words, those who do not harbor the same word taboos as the Court. Brennan stressed that words like bullshit, fuck, and motherfucker were commonplace and not considered obscene or derogatory among blacks and “young radicals and protestors.” Psycholinguistics confirms Brennan’s observation that whether one swears often depends on one’s group identity. Moreover, the offensiveness of words is determined entirely by contextual variables such as speaker-listener relationship and social-physical setting as well as the words and the tone used. Consequently, the Court’s imprimatur on indecency regulation in *Pacifica* not only reflects institutionalized word taboo, but it unfairly discriminates as well.

Thirty years later when the invigorated indecency policy of the FCC returns to the high court in *Fox I*, the same evidence of word taboo exists as in *Pacifica*. The oral argument is sanitized of any reference to the words fuck and shit—the language that is at issue in the FCC orders against Fox. The failure of Fox’s counsel to be explicit is an example of self-censorship made all the more glaring by his repeated use of the words in Second Circuit appeal and his pre-

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438 *Id.* at 770 (Brennan, J., dissenting).
439 *Id.* at 775.
440 *Id.* at 776.
441 *See* Jay, *supra* note 400, at 156.
442 *Id.* at 154.
443 *See supra* notes 212-215 and accompanying text (describing oral argument in Supreme Court in *Fox I*).
argument statements that he do so again in the Supreme Court. Justice Ginsburg later reported that “the lawyers were alerted that some of the justices might find [the use of fuck and shit] unseemly, so only the letters ‘f’ and ‘s’ were used in our court.” While she does not indicate which justices or who issued the alerts, all fingers point to the Chief Justice Roberts and his chambers. Suffice it to say, word taboo affected the course of this oral argument likely to the detriment of Fox.

As with *Pacifica*, the judgment in *Fox I* is institutionalized word taboo. The Court permits the FCC to continue using its aggressive fleeting expletives enforcement policy in the face of administrative and constitutional law challenges. Arguably the majority’s decision to resolve the case under administrative law’s lenient standards of arbitrariness and capriciousness is framing of the dispute that both evidences and perpetuates word taboo. Scalia admits as much in his opinion. When addressing the doctrine of constitutional avoidance and the possibility that broadcasters would self-censor, he invoked the language of *Pacifica* that “any chilled references to excretory and sexual material ‘surely lie at the periphery of First Amendment concern.’” Further evidence of word taboo can be gleaned from Scalia’s use of euphemism. A euphemism is a word or phrase that is substituted for a taboo word. Resorting to euphemisms

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444 See supra note 211 and accompanying text (describing oral argument in Second Circuit in *Fox I*);
446 Id.
447 See Adam Liptak, *A Word Heard Often, Except at the Supreme Court*, N.Y. TIMES, Apr. 30, 2012, available at http://www.nytimes.com/2012/05/01/us/a-word-heard-everywhere-except-the-supreme-court.html (“In a way that conceded that the word remained radioactive and thus was fit for regulation.”).
448 *Fox I*, 556 U.S. at 529.
449 See FAIRMAN, supra note 69, at 56.
is a common response to word taboo. The “F-word” is the most common euphemism for fuck. Scalia’s use of “F-word” and its cousin “S-word” is word taboo. Another use of euphemism Scalia adopts is to obscure part of the word by using asterisks: Cher’s fuck ‘em becomes “f*** ‘em” and Richie’s fucking and shit become “f***ing” and “s***.” Scalia’s decision to use euphemisms could be a desire to communicate the word without conveying the emotive hostility of the original or to provide a politeness filter for his discourse. Whatever the motivation, the use of euphemisms reinforces the taboo status of fuck and shit.

Finally, the majority strengthens word taboo when it perpetuates the folk knowledge of offensiveness. For example, when the Court accepts that there is no difference between literal and nonliteral uses of offensive words and that any use of fuck is per se sexual, it ignores volumes of research by linguists and psycholinguists distinguishing between the different uses. Rote acceptance of ideas such as, fleeting expletives constitute harmful first blows, exempting fleeting expletives would lead to more widespread use of the offensive language, and programming with expletives will increase use of expletives by children, replaces scientific

450 See Jay, supra note 400, at 154.
451 There are certainly others: f-bomb, fudge, fricking, f’ing, etc.
452 See Fox I, 556 U.S. at 508 (F-word and S-word), 509 (F-word).
453 Id. at 510. Scalia chooses to quote from the FCC’s brief to get the sanitized asterisk version of the facts rather then use the record developed by the court below—another example of word taboo at work.
454 See FAIRMAN, supra note 69, at 56-57 (discussing potential uses of euphemism). The use of the asterisk euphemism was pushed to the limit of absurdity in a recent article. The truly offensive sentence was: “S***, p***, c***, f***, c***s*****; m*****f***** and t***.” Shelly Rosenfeld, Note, An Indecent Proposal? What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry, 12 TEX. REV. ENT. & SPORTS L. 225, 228 (2011). Who knew that “sucker” and “mother” were expletives.
455 See W. Wat Hopkins, When Does F*** Not Mean F***?: FCC v. Fox Television Stations and a Call for Protecting Emotive Speech, 64 FED. COMM. L.J. 1, 35 (2011) (“Most authorities disagree. They are virtually unanimous in their answers to the question: There are many nonsexual definitions for “fuck.””); FAIRMAN, supra note 69, at 44-46. It also ignores the Court’s own precedent recognizing the importance of the difference in Cohen.
inquiry with folk knowledge, anecdote, and assumption. When the Court does this, it accepts and reinforces the taboo at work.

When the case returned to the Supreme Court in Fox II after the Second Circuit directly addressed the constitutional infirmities of the fleeting expletive policy, one would have thought that we would get clarity and closure. Instead, the Court once again punts on the First Amendment. Word taboo again plays a prominent role. Oral argument is a good starting point. As with Fox I, the advocates and Court eschewed the “bad words.” In fact, the advocates did not even use euphemisms; only Roberts and Scalia used F-word and S-word. Given the criticism lodged at Fox’s counsel Carter Phillips for not using the words in Fox I, it is a little surprising that the vacuum continued. Maybe he was reminded again to keep it clean through back channels or maybe he just did not need to be told twice. Or maybe he read the tea leaves and predicted a path to victory on the merits that he did not want to jeopardize.

Oral argument still delivered some insights. Fox II was consolidated with ABC’s appeal of a separate FCC order of forfeiture for an episode of NYPD Blue that included seven seconds of nudity. The discussion of fleeting nudity produced an entertaining moment when ABC’s counsel Seth Waxman discussed a pending complaint at the FCC concerning a nude statue seen at the start of the 2008 Olympic games. Waxman pointed out that it was “a statue very much like some of the statues that are here in this courtroom, that had bare breasts and buttocks.” When

456 See Jay, supra note 348, at 91.
457 Oral argument was heard on January 10, 2012.
458 See Liptak, supra note 447.
461 See supra notes 274-279 and accompanying text (discussing appeal in ABC v FCC).
462 Transcript, supra note 459, at 47.
Justice Scalia craned his neck to see what Waxman was talking about, Waxman pointed to the friezes surrounding the inside of the courtroom: “Well, there’s a bare buttock there, and there’s a bare buttock here. And there may be more that I hadn’t seen. But, frankly, I had never focused on it before.”\(^{463}\) Scalia blushed and replied through laughter: “Me either.”\(^{464}\) Waxman, however, missed his opportunity to have a Nimmer-moment; he could have pointed out the similarities been the frieze’s nudity and the images from NYPD Blue.

Oral argument also provided an opportunity for both Justices Scalia\(^ {465}\) and Alito to show their sympathy for the FCC and in the process a mindset receptive to word taboo. Scalia flat out endorsed institutionalized word taboo and appeared to take Kennedy with him:

> Sign - sign me up as supporting Justice Kennedy’s notion that this has a symbolic value, just as we require a certain modicum of dress for the people that attend this Court and the people that attend other federal courts. It’s a symbolic matter. And if this is – if these are public airwaves, the government is entitled to insist upon a certain modicum of decency. I’m not sure it even has to relate to juveniles, to tell the truth.\(^ {466}\)

It is with a slip of the tongue that Alito shows his sympathy:

> People who want to watch broadcasts where these words or expose their children to broadcasts where these words are used, where there is nudity, there are 800 channels where they can go for that. All we're asking for, what the Government is asking for, is a few channels where you can say I'm not going to -- they're not going to hear the "S" word, the "F" word. They're not going to see nudity.\(^ {467}\)

These statements by Scalia and Alito at oral argument support institutionalized word taboo.

\(^{463}\) Id. at 47-48.
\(^{464}\) Id. at 48. The transcript of oral argument captured the laughter, but you had to be present at oral argument as I was to see the blush.
\(^{465}\) Justice Scalia was already squarely under the influence of word taboo as illustrated in Fox I. See supra notes 448-456 and accompanying text.
\(^{466}\) Transcript, supra note 459, at 22.
\(^{467}\) Id. at 28. Prior to Fox II, Professor Calvert already labeled Justice Alito as the justice most prone to censor offensive speech on today’s Court given his lone dissenting positions in recent cases involving free speech. See Clay Calvert, Justice Samuel A. Alito’s Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit, 40 HOFSTRA L. REV. 115 (2011).
The much-awaited decision in *Fox II* turned into a major letdown.\(^{468}\) The Court once again managed to avoid *Pacifica*—this time with near unanimity. Instead of confronting the First Amendment issues squarely presented, the Court resolved the case on due process grounds.\(^{469}\) This certainly resolved the immediate dispute but it left untouched the status of a policy that has been repeatedly called into question on First Amendment grounds in the courts of appeals. Kennedy made clear, however, that the Court was saying nothing about the First Amendment or the FCC’s current indecency policy, leaving the Commission and the courts free to go another round in the future.\(^{470}\) The Court’s judgment reinforces the status quo, which is institutionalized word taboo.

While Justice Kennedy’s opinion is silent on the First Amendment, he lifted his robe a tad to expose his own word taboo. In describing the facts, Kennedy uses asterisk euphemisms for fuck’em, shit, and fucking, just as Scalia did in *Fox I*. This big difference is that Kennedy supposedly uses direct quotes for the Second Circuit opinion below: “So f***’em. 613 F.3d, at 323” and “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple. *Ibid.*”\(^{471}\) Judge Pooler’s opinion, however, used the actual words.\(^{472}\) Justice Kennedy sanitized the Second Circuit. This is word taboo at its finest—the Court as actual censor.

\(^{468}\) See Garfield, *supra* note 460, at 288 (describing opinion as anticlimactic); Ruthann Robson, Supreme Court on FCC v. Fox and ABC: Fleeting Expletive and Nudity Rules Violated Due Process, Constitutional Law Prof Blog (June 21, 2012), http://lawprofessors.typepad.com/conlaw/2012/06/supreme-court-on-fcc-v-fox.html (describing the opinion as sidestepping the key issues). The best description of the disappointment comes from John Elwood and Eric White: “For the Court to duck the First Amendment question and resolve the case on narrow notice grounds was a little like opening a big box Christmas morning and discovering it contained socks from Great Aunt Millie.” John P. Elwood & Eric A. White, *What Were They Thinking*, 15 *GREEN BAG* 405, 418 (2012).


\(^{470}\) *Id.* at 2320.

\(^{471}\) *Id.* at 2314.

\(^{472}\) See *Fox II*, 613 F.3d at 323.
Each time the FCC’s indecency policy finds its way to the Supreme Court, word taboo influences the outcome. It is at work in the course of oral argument, the framing of issues for decision, and in the Court’s opinions. But it is with the Court’s judgments that it permits institutionalized word taboo by allowing the FCC to continue enforcement of its indecency restrictions.

C. FCC’s Institutionalized Word Taboo

By repeatedly refusing to revisit Pacifica, the Supreme Court abdicates control over constitutionally protected indecent speech to the FCC. The agency is chiefly responsible for the creation of institutionalized word taboo. The FCC embraces processes that contribute to the ease with which word taboo takes control. Unsurprisingly, the FCC then makes substantive decisions transforming individual taboos into institutional ones. The combination of infirm procedures and substantive decisions produces obvious negative effects, such as chilling of constitutionally protected speech.

1. Procedures foster word taboo

The survey of the FCC’s development of its indecency policy highlights the role that process and procedure plays in perpetuating word taboo. From the very start of its concern over indecency, the FCC embraced a decision-making model where layperson conclusions defined the nature of the problem. This process systematically excludes the rich body of research by linguists, psycholinguists, communication experts, and other social scientists. The FCC uses a citizen complaint process to identify potential violations that is subject to manipulation by special interests. Decision-making power is concentrated in a handful of partisan appointees, including a Chairman, who can exert excessive influence in the regulatory process. Conflict between Commissioners and civil servants is destabilizing and creates uncertainty. Finally, the
use of notices of apparent liability under the threat of forfeiture encourages settlement at the expense of free speech. These procedural aspects of FCC policy-making and enforcement permit individual reactions to taboo language to become institutionalized.

From the start of FCC enforcement action on indecency, the agency made a conscious choice to use a decision-making process on indecency that elevated its lay opinion over scientific research. In the WUHY-FM matter involving Jerry Garcia’s interview, the FCC declared taboo language “patently offensive by contemporary community standards” without conducting a single survey, compiling a single word of testimony, or even attempting to define the relevant “community.”

The same is true in Pacifica where the chimerical community standard is established without a jury verdict, expert testimony, or polls. Without evidentiary support, the FCC’s standard is in fact either the individual Commissioner’s standards or what they suppose national standards should be. Similarly, the assertions that taboo language will flood the airwaves, children are harmed by the first blow of indecency, and that fleeting expletives are harmful, are all made without any empirical support in WUHY-FM, Pacifica, and the Fox matters. Where there is academic and scientific authority, such as on the social utility and value of taboo language, it is ignored in favor of declarations that taboo words have “no redeeming social value.” Thus, “the divination of the American public's views is left to the discretion of the Commission.” The FCC, armed with only “folk knowledge of offensiveness,” that “remains out of touch with millions of speakers and with meaningful linguistic analyses of

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473 In re WUHY-FM, supra note 17, at 423 (Johnson, dissenting).
474 Pacifica, 556 F.2d at 18 (Bazelon, J., concurring).
475 Id.
476 See id. at 18; In re WUHY-FM, supra note 17, at 410-11; Fox I, 489 F.3d at 461.
477 See, e.g., In re WUHY-FM, supra note 17, at 424; Pacifica, 438 U.S. at 766 (Brennan, J., dissenting).
swearing in public,” imposes its own notion of propriety and word taboo on all of us.\textsuperscript{479} In other words, the Commissioners proscribe language that they do not like to hear.

Another procedure that facilitates word taboo is the FCC’s use of a citizen complaint process to identify indecency violations. Reliance on complaints is an inherently unreliable indicator of national standards and even more so in the hands of the FCC.\textsuperscript{480} Recall that in \textit{Pacifica} the FCC relied on a single complaint from a man who “had heard broadcast while driving with his young son.”\textsuperscript{481} This is suspect. The man was John R. Douglas, a member of the national planning board of Morality in Media. He waited six weeks after the broadcast to complain to the FCC suggesting that he had not been listening, but instead learned of the broadcast some time later. This conclusion is bolstered by the lack of candor about the fact that his “young son” was 15 at the time—who living in New York City had likely heard the words in Carlin’s broadcast before.\textsuperscript{482} It is amazing to think that the entire brouhaha over indecency stems from this single likely false complaint.

However, there is no risk of the FCC being manipulated by a single complaint today. Special interest groups, like the Parents Television Council, churn the complaints distorting their value as a true indicator of community norms. For example, the PTC is chiefly responsible for the inflation in complaints in 2003-04 that was used to justify ratcheting up indecency enforcement. It is reported that in 2003 the PTC filed 99.86% of all indecency complaints; in 2004 it was 99.9%\textsuperscript{483} Reliance on the complaints filed by the PTC is a perfect example of the

\textsuperscript{479} Jay supra note 348, at 92.  
\textsuperscript{480} See \textit{Pacifica}, 556 F.2d at 23 n.16 (Bazelon, J., concurring) (doubting reliability of complaints).  
\textsuperscript{481} \textit{Pacifica}, 438 U.S. at 730.  
\textsuperscript{482} See Powe, supra note 388, at 461.  
\textsuperscript{483} See Clay Calvert, \textit{The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 about Speech, Censorship, Science and Public Policy}, 41 CAL. W. L. REV.
way procedure perpetuates word taboo and institutionalizes it. As Professor Lili Levi explains, the excessive responsiveness to the complaints of the Parents Television Council by the FCC “transforms the agency from an enabler of public discourse to an enforcer of conservative social norms and word taboos.”

Concentration of decision-making power in a handful of partisan appointees, chiefly the Chairman, who can exert excessive influence in the regulatory process affects word taboo. Chairman Dean Burch, the sole instigator in WUHY-FM, wanted taboo language off the air and the agency went along with him. Chairman Richard Wiley spearheads the charge against Pacifica. According to Professor Powe, Wiley was receiving pressure from Congress to do something about all the sex and violence on television. Succumbing to this pressure, including threats to cut FCC funding, Wiley issued a report to Congress explaining the FCC’s new enforcement plan and even attached a copy of the Pacifica declaratory order. By the time Pacifica made its way through the federal courts, a new Democrat Chairman Charles Ferris was in charge. Ferris disagreed with Pacifica so much that within weeks he had the FCC issue an order finding no indecency in broadcast using the same seven forbidden words. Ferris’s goal was to “make it clear that case [Pacifica] will never reoccur at the FCC.”

While it took nearly a decade, additional indecency cases were destined by a structure that allows the Chairman to determine the direction of enforcement. Under pressure from

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325, 330 (2005). The FCC received only 111 total indecency complaints in 2000 and a slightly higher 346 complaints in 2001. Then there was a dramatic upsurge in 2002 (13,922), 2003 (202,032) and in 2004 an amazing 1,068,802 complaints. Id. at 329. PTC President Tim Winters disputes the accuracy of the statistics on the number of PTC complaints. See Calvert & Richards, supra note 152, at 329.

484 Levi, supra note 478, at 847.
485 See Campbell, supra note 15, at 200 (describing Chairman Burch as the instigator of the action).
486 See Powe, supra note 388, at 462.
religious conservatives, Republican Chairman Dennis Patrick untethered indecency policy from the list of Carlin’s seven words to a generic definition that could be used against the highly popular radio personality Howard Stern. Chairman Michael Powell, influenced by the PTC, engineered the reversal of his own Enforcement Bureau in *Golden Globe II*. This set the stage for unprecedented enforcement in 2004 reflected in the Omnibus Order and *Fox I*. The Chairman of the FCC has been at the center of every major change in indecency regulation—often at the expense of the agency itself.

Conflict between the FCC Commissioners and agency staff is at the center of the destabilizing shifts in indecency enforcement. The Commission’s decision in *Golden Globe II* was at the expense of long-standing Enforcement Bureau policy, as well as the Commission’s own Policy Statement on three critical issues: *per se* indecency of fuck, fleeting expletives, and profanity. These changes not only reflect the Commissioners extending word taboo, but also create the uncertainty surrounding enforcement that has lasted for a decade and remained unresolved.

Finally, the use of notices of apparent liability under the threat of forfeiture orders encourages settlement at the expense of free speech. Following submission of a complaint, the FCC can decide the merits without formal pleadings or hearings, based upon non-record

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487 *See id.* at 452. Powell also poses the interesting question of how a top-rated radio program could be patently offensive by contemporary community standards. “The answer was that the standards were those of the five politically pressurable commissioners at 1919 M Street, N.W., the then home of the FCC.” *Id.*

488 Compare *Golden Globe I, supra* note 5, at 19860-61, ¶ 5 (fuck as expletive not sexual) with *Golden Globe II, supra* note 6, at 4978, ¶ 8 (fuck inherently sexual).

489 Compare *Golden Globe I, supra* note 5, at 19861, ¶ 6 (fleeting expletive nonactionable) with *Golden Globe II, supra* note 6, at 4980, ¶ 12 (fleeting expletive exception no longer good law).

490 *See Golden Globe II, supra* note 6, at 4981, ¶ 14.

491 *Fox I, 556 U.S.* at 541 (Stevens, J., dissenting).
evidence.\textsuperscript{492} The FCC can simply issue a notice of apparent liability; the broadcaster must either pay it or refuse to obey triggering the Justice Department to file a civil suit to collect the fine.\textsuperscript{493} Because litigation is an unattractive option for both parties, the FCC relies on consent decrees with broadcasters after issuing a notice of apparent liability.\textsuperscript{494} Broadcasters confronted with settlement pressure essentially engage in self-censorship reinforcing the FCC’s institutionalized word taboo.\textsuperscript{495}

2. \textit{Substantive decisions institutionalize word taboo}

Not only do FCC procedures facilitate the growth of word taboo, the substantive decisions of the FCC institutionalize it. There are numerous FCC interpretations of indecency policy that ingrain and expand word taboo. For example, the FCC conclusion that broadcast media is uniquely pervasive is no longer true. The evidence is legion that broadcasting is no longer ubiquitous having been replaced by new technologies.\textsuperscript{496} The FCC, the agency in the best position to know this, persists on justifying regulation on the unique nature of broadcasting. The

\textsuperscript{492} See id. (“[I]n many situations [the FCC] simply relies upon the complaint—usually without a tape or transcript—and finds the material indecent or not, and enters an order.”).

\textsuperscript{493} Id.

\textsuperscript{494} See Michael Botein, \textit{FCC’s Crackdown on Broadcast Indecency}, N.Y.L.J., Sept. 13, 2005, at 4 (discussing reliance on consent decrees). An example of this tactic comes from an action filed in 2003 against Married by America. The FCC originally fined 169 Fox stations for a total $1.8 million. The FCC later negotiated the scope of the fine down to 13 stations for $7,000 a piece, for a total of $91,000 which the stations paid. See Doug Halonen, FCC to Back Away From a Majority of Its Indecency Complaints, The Wrap TV (Sept. 24, 2012 @ 9:20 am), http://www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766.


\textsuperscript{496} See supra Part III.A.
same is true for the protection of children conclusion; there is no evidence to support this rationale. The FCC has assumed that: most parents consider taboo language unsuitable for their children; that parents are unable to control their children's listening and viewing habits; and that parents are less able to control their children's access to television and radio than to such other forms of media.\textsuperscript{497} The protection of children rationale continues to justify indecency regulation despite the massive technological advancements that empower parents to control viewing and absence of evidence to support a harm thesis.\textsuperscript{498} The FCC’s decision to cling to these justifications enables the agency to continue enforcing word taboo.

The FCC now defines broadcast indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” To meet this definition, the agency post-\textit{Golden Globe II} holds that any use of the fuck is per se sexual and comes within the ambit of indecency.\textsuperscript{499} This conclusion (and its corollary that shit is inherently excretory) is contrary to the scientific authority of linguists and psycholinguists.\textsuperscript{500} This substantive ruling alone greatly expands the scope of indecency, but it is not alone. The FCC also expanded its interpretation of patently offensive\textsuperscript{501} to no longer require repetition—the hallmark of \textit{Pacifica}’s “verbal shock treatment.”\textsuperscript{502} The combination makes actionable single and isolated use of fuck as an expletive and raises the FCC’s word taboo to a new level.\textsuperscript{503}

\textsuperscript{497} \textit{See Pacifica}, 556 F.2d at 28 (Bazelon, J., concurring).
\textsuperscript{498} \textit{See supra} Part III.B.
\textsuperscript{499} \textit{See Golden Globe II, supra} note 6, at 4978, \textsuperscript{498}8.
\textsuperscript{500} \textit{See Fairman, supra} note 69, at 44-46; Hopkins, \textit{supra} note 455, at 37.
\textsuperscript{501} \textit{See Policy Statement, supra} note 137, at 8003, at \textsuperscript{498}10; \textit{Golden Globe II, supra} note 6, at 4978, \textsuperscript{498}7.
\textsuperscript{502} \textit{Golden Globe II, supra} note 6, at 4980, \textsuperscript{498}12.
\textsuperscript{503} \textit{See Smith, supra} note 361, at 194 (“In other words, the Commission's fleeting-expletives policy--by avoiding words because they innately exude a sexual meaning or connotation--simply
Finally, the FCC decision to begin targeting profanity as a new offense separate from obscenity and indecency has the potential to overshadow its intrusion with the other areas. The FCC’s substantive definition, based on common knowledge, is that profanity means “vulgar, irreverent, or coarse language.” This definition not only introduces new, vague, undefined terms, but it places essentially no limit on the FCC’s word taboo.

3. Effects of institutionalized word taboo

Both FCC procedures and substantive rulings impose speech restrictions on broadcasters. These government restrictions institutionalize the Commissioners’ own word taboos and impose them on the nation. This institutionalized word taboo chills protected speech of broadcasters and disproportionately affects minorities, youth, and subcultures.

When the FCC first began enforcement against indecency, it was aware of the potential chilling effect of its regulation on protected speech. In his dissent in WUHY-FM, Commissioner Cox foreshadowed that the case would cause other stations “not to carry programming they would otherwise have broadcast, out of fear that someone will be offended, will complain to the Commission, and the latter will find the broadcast improper.” This prediction is precisely what has happened. As the Second Circuit put it, “Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose.”

reinforces the puritanical American perception of profanity, sex, and sex education as unmentionable and generally deleterious to children and society.

504 Golden Globe II, supra note 6, at 4981, ¶ 13. The definition is contrary to the science of language where, according to linguistics, profanity is a special category of offensive speech that means to be secular or indifferent to religion. See JAY, supra note 168, at 191.
505 In re WUHY-FM, supra note 17, at 417.
506 Fox II, 613 F.3d at 334.
There is “ample evidence” that “the FCC's indecency policy has chilled protected speech.”

Examples of chilled speech identified by the Second Circuit include: CBS affiliates declining to air the Peabody Award-winning “9/11” documentary; a radio station cancelling a planned reading of Tom Wolfe’s novel I Am Charlotte Simmons; firing of public radio personality Sandra Loh for a single use of an expletive; Phoenix TV stations dropping live coverage of a memorial service for Pat Tillman; Moosic, Pennsylvania station cancelling all live coverage; Fox deciding not to re-broadcast an episode of That 70s Show that dealt with masturbation; and an episode of House being re-written after concerns that one of the character’s struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.

Other examples of chilled speech are well known such as: ABC affiliates refusing to rebroadcast Saving Private Ryan; PBS self-censoring The Blues documentary; and PBS editing The War, a WWII documentary to remove expletives. There can be no doubt that the FCC indecency policy is causing broadcasters to forgo programming out of fear of FCC action.

Not only does the current indecency regime chill protected speech, it likely burdens speech is a discriminatory way. From its infancy, the FCC was aware that its enforcement could have a disproportionate impact on minority viewpoints with which the Commissioners disagreed. In WUHY-FM, Commissioner Johnson dissented because he saw the restriction as unfairly targeting minority groups. Commissioner Cox did as well viewing the restriction as targeting

507 Id.
508 Id. at 334-35.
510 In re WUHY-FM, supra note 17, at 423 (Johnson, dissenting).
Justice Brennan voiced the same concern over the discriminatory impact of *Pacifica* on blacks, youth, and protestors.\(^{512}\)

The disparate treatment of the mainstream Spielberg movie *Saving Private Ryan* and the documentary of largely African-American musicians in *The Blues* illustrates the concern about discriminatory effect as the Second Circuit noted in *Fox II*.\(^{513}\) The FCC’s treatment of Sarah Jones’s feminist rap, *Your Revolution*, also evidences the fear. The FCC slapped Portland, Oregon public radio station KBOO-FM with a $7,000 notice of apparent liability in 2001 for broadcasting *Your Revolution*—a song created in response to misogyny in male rap lyrics.\(^{514}\) The Enforcement Bureau deemed the work “patently offensive” and “designed to pander” without identifying exactly what in the song rendered it indecent.\(^{515}\) While the FCC eventually reversed itself after being sued by the artist, the FCC’s delay effectively banned the piece from airing for two years.\(^{516}\) Not only does the FCC’s indecency restrictions chill the protected speech of broadcasters, it also implicates discriminatory enforcement and pretext for suppressing viewpoints contrary to the FCC.\(^{517}\)

### IV. Future of Indecency Regulation

Following the Supreme Court’s second punt on revisiting *Pacifica* and the denial of certiorari for the second time in the Janet Jackson “wardrobe malfunction” case, it appears the Justices are not eager to directly confront the withering indecency doctrine. However, given the

\(^{511}\) *Id.* at 417-18 (Cox, dissenting in part).

\(^{512}\) *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting).

\(^{513}\) *Fox II*, 613 F.3d at 333; *see supra* notes 268-270 and accompanying text.

\(^{514}\) *See In re KBOO Found.*, 16 F.C.C.R. 10731, ¶ 1 (2001).

\(^{515}\) *See id.* at 10733, ¶ 8.


\(^{517}\) *See Olm, supra* note 516, at 179 (arguing FCC standards are problematic and cause minority voices to be censored arbitrarily and irrationally).
complete erosion of Pacifica’s foundation, it is inevitable that it will tumble—eventually. In the meantime, what is the appropriate course to follow? There are three major options: do nothing, do something small, or do something big.

A. The Status Quo

Maintaining the status quo is always an option. At oral argument in Fox II, Justice Alito alluded to this choice. In reaction to the networks argument that broadcast media was a shrinking piece of the media pie, Alito asked Fox’s lawyer Carter Phillips: “What will happen when -- when we get to the point where -- when there are only a handful of people in the entire country who are still receiving television programs via the airwaves? Well, broadcast TV is living on borrowed time. It is not going to be long before it goes the way of vinyl records and 8 track tapes.” Phillips deflected: “I hope that — I’m sure my client is not thrilled to have you say that.” Through the laughter of the courtroom, Alito continued, “I’m sure your clients will continue to make billions of dollars on their programs which are transmitted by cable and by satellite and by internet. But to the extent they are making money from people who are using Rabbit ears, that is disappearing. Do you disagree with that?” Phillips, of course, could not disagree: “No, I — it would be — you know, obviously not, because that’s why we are not uniquely accessible or uniquely pervasive.” Alito then made his point: “Yeah. So why not let this die a natural death?”

So certainly doing nothing is a possibility. However, while broadcast media may control less of the media market share, this is not a justification for allowing continued constitutional injury. This is especially true when the magnitude of potential forfeitures reach into seven figures. Allusion to 8 track tapes and rabbit ears aside, it is premature to write the obituary on Fox, ABC, CBS, and NBC.

518 Transcript, supra note 459, at 33-34.
It is possible that after two close calls in the high court, the FCC would revisit its indecency policy voluntarily or curtail enforcement. However, the statements from the FCC after Fox II was announced do not support this view. Speaking on behalf of the agency, Chairman Julius Genachowski said: “We are reviewing today’s decision, which appears too be narrowly limited to procedural issues related to actions taken a number of years ago. Consistent with vital First Amendment principles, the FCC will carry out Congress’s directive to protect young TV viewers.” This does not sound like much of a retreat. Neither did Commissioner Ajit Pai’s statement: “Today's narrow decision by the U.S. Supreme Court does not call into question the Commission's overall indecency enforcement authority or the constitutionality of the Commission's current indecency policy.” Similar statements came from Commissioners Mignon Clyburn and Jessica Rosenworcel.

So what has the FCC been up to since Fox II? When the Supreme Court handed down its decision in June 2012, the FCC had approximately 1.5 million indecency complaints pending involving about 9,700 broadcasts. In September 2012, the Justice Department dropped a lawsuit complaining of indecent nudity in a 2003 Fox broadcast of Married by America. In the wake of this dismissal, Chairman Genachowski reportedly ordered the Enforcement Bureau

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to “focus its resources on the strongest cases that involve egregious indecency violations” to reduce the backlog of pending complaints. 525 Three months later in December 2012, Commissioner Robert McDowell testified before a House Subcommittee that the Enforcement Bureau had begun “to tackle this monumental undertaking” and had already reduced the backlog to approximately a half million complaints involving about 5500 broadcasts. 526 It will be interesting to see what surfaces from these remaining complaints as examples of egregious indecency.

B. Agency-Directed Policy Revision

Another category of potential revisions is making discrete policy changes to lessen some of the problems associated with the current enforcement regime. These changes include:

returning to the pre-Golden Globe II standards, reducing the amount of forfeitures, altering the safe harbor period, development of cooperative agency-broadcaster initiatives, and conversion to notice and comment rulemaking. Collectively, these suggestions illustrate doing something, but fall short of addressing the full extent of constitutional injury to free speech rights.

The simplest policy revision suggested is to turn the regulatory clock back and restore the indecency policy in place prior to the Commissioners’ intervention in the Golden Globe controversy. 527 A return to pre-2004 policy would minimize some regulatory harm. Fleeting expletives would no longer be actionable. The agency could return to recognizing the linguistic distinction between sexual and nonsexual uses of fuck and similar language. Additionally, the FCC could abandon its newly-minted category of profanity as an independent violation. Another suggestion in this category is to roll back the amount of forfeitures. If fines were reduced,

525 Id.
526 See supra note 8.
527 See Herman, supra note 16, at 377.
broadcasters might feel less pressure to self-censor, especially where live broadcasting is concerned.\textsuperscript{528}

Similarly, the FCC could relax the safe harbor period. For example, if the safe harbor was extended to 9:00 p.m. instead of 10:00 p.m. networks would have increased programming flexibility, yet the risk of exposure to children would not be significantly different.\textsuperscript{529} This would still require the networks to monitor their broadcasts, but under less threat of FCC violation.\textsuperscript{530} All of these changes, whether roll-backs or relaxations, keep the FCC is the business of regulating broadcasts for indecency violations. These moderate policy shifts are certainly preferable to the heightened enforcement of the current regime, but leave broadcasters under the FCC’s regulatory thumb.

Another suggestion is for development of cooperative programs between the FCC and networks to promote the availability and use of technological tools that allow parents to control the programming accessible by their children.\textsuperscript{531} This would empower parents to play a greater role in protecting children from potential exposure to indecent material. The proposal recognizes the rapid technological innovation that has produced the V-chip, rating systems, DVR, VOD, and other parental control technology.\textsuperscript{532} It also responds to criticism that despite availability, the technology is underutilized. The potential benefit of such a program, however, is unknown

\textsuperscript{528} See id. at 377-78.
\textsuperscript{530} See id. at 309.
\textsuperscript{531} See Herman, supra note 16, at 379.
\textsuperscript{532} See id.
especially in light of recent empirical research indicating parent satisfaction with technological options currently available.\textsuperscript{533}

Finally, Professor Angela Campbell suggests that the FCC would be better off conducting notice and comment rulemaking under section 553 of the Administrative Procedure Act.\textsuperscript{534} Campbell notes that the benefits of rulemaking over case-by-case adjudication are well known. Because all potentially affected parties including the general public can participate, rulemaking produces high quality rules when compared to case adjudications.\textsuperscript{535} She points to \textit{Pacifica} and \textit{Fox} as evidence of the problem with the case adjudication method. \textit{Pacifica} left a nonprofit organization with limited resources with the burden of defending all broadcasters’ rights.\textsuperscript{536} Although \textit{Fox} involved well-funded and well-lawyered broadcasters, there still were significant gaps in the record that could have been prevented by notice and comment rulemaking.\textsuperscript{537} However, while rulemaking may be a superior vehicle to case adjudication when starting from scratch, it seems unlikely that the FCC would wipe the slate clean and start over on its indecency policy given the decades of investment in the current regulatory scheme. Moreover, such a change would generate considerable uncertainty with no guarantee of the new policy passing constitutional muster.

While each of the suggestions in this group could provide some relief from the sharpest edges of current enforcement, they do not provide the best avenue for change. If the constitution prohibits the type of content-based speech restriction embodied in the FCC’s indecency

\textsuperscript{533} See Gamse, \textit{supra} note 313, at 312 (reporting 81\% thought that technology like the V-chip was an equally effective or better alternative to government regulation).

\textsuperscript{534} See Campbell, \textit{supra} note 15, at 258.

\textsuperscript{535} \textit{Id.} at 259.

\textsuperscript{536} \textit{Id.}

\textsuperscript{537} \textit{Id.} at 260.
regulation, the solution is not to tweak it along the edges. Instead, the agency should abdicate control over this entire area.

C. Deregulation and Market Control

The best option for the FCC is to get out of indecency business altogether.\(^{538}\) The FCC should seize the opportunity presented by Fox II to reevaluate its indecency regulations and ultimately renounce them for reasons that by now are abundantly clear. The FCC has always premised its intervention into indecency on the twin rationales of the uniquely pervasive presence of broadcast media and the harm to children caused by its easy accessibility. Both of these premises are no longer viable due to advances in technology unimagined when Pacifica was penned. Pacifica may not be dead in the water, but she is surely drowning. Rather than wait for the inevitable repudiation by the Supreme Court, the FCC should on its own initiative, abandon all enforcement of indecency violations of television and radio broadcasts.

Does this mean that Fox will be free to broadcast a video version of Carlin’s Filthy Words performance at 2:00 in the afternoon? It certainly does. That is precisely what deregulation means. Despite this reality, there is no reason to assume that this is likely to ever happen. One need only consider the content that is currently broadcast during the safe harbor window from 10:00 p.m. to 6:00 a.m. The networks are not currently broadcasting highly offensive programming at that time even though they could. The market protects consumers.\(^{539}\)

This is not a novel idea. The D.C. Circuit articulated it in Pacifica: “Licensees are businesses and depend on advertising revenues for survival. The corporate profit motive and the

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\(^{538}\) See Steele, supra note 529 at 309 (stating deregulation is the ideal solution); Herman, supra note 16, at 380 (“[I]t may be wise for the FCC to simply end its effort toward regulating indecent speech on broadcast television.”).

\(^{539}\) See Steele, supra note 529, at 309-10 (advocating market control).
connection between advertising revenue and audience size suggest that the dike will hold as long as the community remains actually offended by what it sees or hears.” The same is true today. There will be no network race to the bottom because audiences will not support broadcasters that offer indecent programming. Of course, if the market does support networks that broadcast what the FCC formerly labeled as indecent programming, well that is okay too. The market defines the community standard.

Consider a personal anecdote. In 2010, I was asked to participate in a special program being developed for The History Channel. The project was entitled, “I Swear: The History of Dirty Words.” After numerous discussions with the producers about the content of the program, it became clear that I was their fuck expert. In October 2010, I spent a day of taping in New York City where I pontificated about the history of the word fuck, the inconsistency in its legal treatment, Cohen, Pacifica, & Fox, taboo language in general, and so on. If you have ever seen a History Channel program, I was one of the expert talking heads. Comedian Adam Ferrara was the host. The special was to be broadcast in early January 2011. The broadcast date came and went. After several more months of anticipation, I finally learned that The History Channel was concerned that the program was too controversial; “I Swear” contained too many dirty words. Imagine that. After editing attempts failed to lift the network’s concerns, the program was scrapped. To my knowledge it has never been broadcast and is unavailable. Keep in mind that this is the reaction of a cable network that was immune from FCC indecency regulation.

540 Pacifica, 556 F.2d at 18 (Tamm, J.) Judge Bazelon agreed. See id. at 29 (Bazelon, C.J., concurring).
541 The production company was True Entertainment, the largest independent television production company in New York City. They have produced programs such as the Real Housewives of Atlanta and the A-List.
542 E-Mail from Erin Mae Miller, Associate Producer, “I Swear” History Channel, True Entertainment, to Christopher M. Fairman, Professor of Law, Michael E. Moritz College of Law, The Ohio State University (Apr. 17, 2011, 5:22 PM) (on file with author).
Even though the FCC had no power over them, The History Channel was not about to risk offending its market.

The experience with The History Channel illustrates another way the market can serve as an alternative to government indecency regulation—branding. In order to attract advertisers, commercial television stations must either attract a large broad audience or a loyal niche one. Cable networks started the branding trend by developing niche markets, for example MTV for music and teens, Nick for children, and Playboy for adults.543 With the help of extensive market research, networks try to understand their audience to determine programming.544 While the niche strategy has been the model for cable networks, broadcast networks are now starting to follow it too. According to one commentator, “ABC courts the female audience of Lifetime, NBC is fashioning itself after quality-driven FX, and the CW recruits the viewers that MTV attracted in its heyday.”545 If trends continue and broadcast networks adopt the brand identification strategies of cable, such as niche-casting,546 it will become less likely that viewers will be surprised by the content they see.547 In this way, branding can provide notice to parents of the content a viewer can expect to see on that station, serving as an alternative to indecency regulation.548 There are, of course, limits to what brand theory can do.549 It does not provide an answer to the fleeting expletive during neutral programming, such as Flacco exclaiming, “This is

543 See Kristin L. Rakowski, Branding as an Antidote to Indecency Regulation, 16 UCLA Ent. L. Rev. 1, 30-35 (2009)(discussing cable brands).
544 See id. at 24-25 (describing different qualitative and quantitative market research techniques).
545 Id. at 4.
546 Niche-casting or narrowcasting is targeting a specific demographic in the hopes of attracting a small, yet devoted audience and subsequent advertiser revenue. Id. at 29.
547 Id. at 41-42.
548 Id.; see Blake Lawrence, Comment, To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age, 18 UCLA Ent. L. Rev. 148,176-77 (2010-11).
549 Id. at 42-43.
fucking awesome!” after winning Super Bowl XLVII. But when the complaint is something like the fleeting nudity in NYPD Blue, clearly defined branding could provide sufficient notice.

Faced with the impending demise of *Pacifica*, the FCC has the opportunity to rehabilitate its credibility and abandon its current unconstitutional, arbitrary, and unnecessary indecency policy. The best approach for the FCC to take is to completely abandon its crusade against taboo language and devote its resources to the rest of its regulatory charge. This is, however, not likely to happen. As a less desirable alternative, the FCC has a series of options to refine, reverse, or replace problematic pieces of its regulatory process. The announcement of the Chairman that they intend to refocus on only the most egregious complaints may be a step in this direction. To do nothing, however, perpetuates the uncertainty that currently chills broadcasters’ speech.

**Conclusion**

For over forty years, the FCC has imposed word taboo on the broadcast media and American audiences. From its inception, the FCC’s indecency policy reflected the sensitivities of its Commissioners, not “contemporary community standards for the broadcast medium.” The Supreme Court institutionalized word taboo in *Pacifica*—and institutions are resilient. The FCC’s enforcement has ebbed and flowed, typically to the rhythm of partisan appointments. Indecency doctrine itself has suffered unpredictable changes with the *per se* indecency of fuck, fleeting expletives, and the redefinition of profanity. It is ironic that the FCC, so deeply immersed in the technological achievements in communication, rely on their own folk psychology of offensiveness when it comes to indecency, rather than embrace the scholarly work

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550 See Scott Bomboy, Super Bowl F-bomb could put FCC in a bind, Yahoo News (Feb. 4, 2012), http://news.yahoo.com/super-bowl-f-bomb-could-212808677.html. It comes as no surprise that the PTC is leading the charge for the FCC to act against CBS.
of linguists, psychologists, psycholinguists, sociologists, and others. Erratic policy changes are to be expected when irrational, emotional, subconscious taboos lie at the heart of the regulation.

But indecency’s days are numbered. The technological innovations of the past four decades have permanently altered the media landscape. Broadcast television networks that once provided virtually 100% of programming now represent only a sliver. The explosion of options, and the seamless way we maneuver through them, erase the once uniquely pervasive nature of broadcasting. The same acceleration of technological change provides parents with myriad ways to control what children see and when they see it. With the twin justifications for indecency regulation now eroded, *Pacifica* cannot last much longer.

Confronted with this reality, the FCC should accept the invitation provided in *Fox II* to reassess its proper role in regulating indecent speech. There are various policy options available to the agency to file down the sharp edges of its current regulatory approach. The superior choice, however, is bring an end to it altogether. This does not mean a surrender to a coarsening culture, but a victory over institutionalized word taboo.