Bleeeeep! The Regulation Of Indecency, Isolated Nudity, And Fleeting Expletives In Broadcast Media: An Uncertain Future For Pacifica V. FCC

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BLEEEEEP! THE REGULATION OF INDECENCY, ISOLATED NUDITY, AND FLEETING EXPLETIVES IN BROADCAST MEDIA: AN UNCERTAIN FUTURE FOR PACIFICA V. FCC

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1. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (discussing categories of speech having such slight social value that restrictions on such speech raise no constitutional problems). The idea of characterizing speech in terms of its value emanates from jurists and scholars attempting to define the parameters of free speech guaranteed by the First Amendment. As set forth herein, despite its unequivocal terms, the First Amendment has never been interpreted to be an absolute ban on government restriction of
I. INTRODUCTION

Videos depicting women clad in high heels stomping animals to death;2 video games for children with the object of maiming, raping, and murdering women;3 and hate-spewing protesters at soldiers’ funerals are linked together by the common thread of First Amendment protection.4 Although some segments of American society find these types of expression too dangerous and too disgusting to fall under the protection of the First Amendment, an overwhelming majority of Supreme Court Justices disagree. How much free speech can Americans tolerate? The answer depends on politics, passions, and, ultimately, the Supreme Court. Although animal rights activists and crusaders for banning children’s access to violent video games won in the court of public opinion, they lost in the court of last appeal. Efforts by advocates clamoring for government restrictions on expression they view so utterly worthless and speech, despite Justices Black and Douglas’s belief that the First Amendment should be literally applied.

Because the Bill of Rights came after the ratification of the Constitution as a means to garner support from the anti-federalists, there was little debate about the meaning of the first ten amendments. The First Amendment in particular did not engender much debate in Congress or the states when they ratified the amendments. Many thought the First Amendment was unnecessary, despite strong support for expressive freedoms. This is because the Constitution was deemed a restraint on the federal government, creating a government with limited powers. As such, the idea that the Constitution had to include an express limitation on the government restriction of speech seemed unnecessary (before 1931, when the Court selectively incorporated the protection of speech through the First Amendment as applicable to the states through the 14th Amendment, the First Amendment applied only to the federal government). Further, many argued that by expressly including guaranteed rights in the Constitution, other rights not included were, by implication, not guaranteed. With little history to understand the Framers’ intent, underlying values helped define the First Amendment’s meaning and scope.

Courts and scholars have since discussed the implicated “values” as a guide to inform judicial review when deciding whether a particular government speech restriction was or was not consistent with the First Amendment. See, e.g., Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 878-86 (1963) (identifying the following four “values” served by the First Amendment’s guarantee of free expression: (1) promoting individual identity and self-fulfillment; (2) encouraging a marketplace of ideas based on the notion that truth will win out if all ideas are considered; (3) supporting the democratic process; and (4) serving as a “safety valve” protecting the balance between stability and change in our democratic government without the threat of a violent uprising). While other scholars and judges define these values differently, the majority agree that the First Amendment is essential to “a government by the People,” securing protection for political speech and debate. Over time, artistic, educational, and scientific speech were also deemed “high value” speech since this type of expression supports the other values articulated by Emerson and other First Amendment scholars.

even harmful have been frustrated by the Roberts Court, a staunch defender of the First Amendment.

Despite its language, no majority of the Court has ever interpreted the First Amendment as absolute. Over the years, free speech rights have waxed and waned as different Courts in different times defined the scope of freedom of expression. The Roberts Court has been a champion of the First Amendment. In its 2010 Term the Court upheld free speech rights of funeral protesters, producers of violent video games, drug marketers, and politicians who decline public financing. These cases followed other recent Supreme Court decisions striking down laws criminalizing depictions of animal cruelty and campaign finance restrictions, for which the Roberts Court received presidential criticism.

Supporters of government restrictions on crush videos and violent video games unsuccessfully argued that these forms of expression are of such slight social value or cause such harm that any First Amendment concerns are outweighed by the “social interest in order and morality.” These arguments have a long history in First Amendment jurisprudence. In 1942, with Chaplinsky v. New Hampshire, the Supreme Court first recognized categories of low value expression that fall outside the protective umbrella of the First Amendment. If government regulates in these categories of expression, the Court will defer to legislative judgment so long as the

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6. Snyder, 131 S. Ct. at 1207.
7. Brown, 131 S. Ct. at 2729.
13. Crush videos are videos that “feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish.” Stevens, 130 S. Ct. at 1579.
15. Id.
regulation is rationally related to a legitimate government interest. However, the government has a much higher hurdle to surmount if it restricts otherwise protected speech because of its content.

In the last two Terms, the Supreme Court has unequivocally stated that the group of unprotected speech categories articulated in Chaplinsky is not a free-floating, expandable list based on an analysis of social utility or relative harm. Rather, the list includes narrowly-defined, historically-recognized categories of unprotected speech. Thus, in deciding both video cases, the Court refused to either carve out new categories of unprotected speech not historically-recognized or to accept the loose causal link between the videos and underlying criminal activity or actual harm. Having lost those arguments, the government could not justify its video restrictions under the strict scrutiny and overbreadth rules applied to these content-based restrictions.

In the aftermath of these two cases and this Court’s demonstrated commitment to the First Amendment, the ability of government to impose future restrictions on speech — many would deem utterly lacking in social value or even harmful — is uncertain. If the Roberts Court has imposed a moratorium on the expansion of the Chaplinsky categories, restrictions on speech at the fringes of core First Amendment values present greater First Amendment challenges. Percolating their way through the federal courts are cases concerning two hotly debated speech restrictions. One re-

16. Calvin Massey, American Constitutional Law: Powers and Liberties 426 (3d ed. 2009) (Unless government is regulating in the area of fundamental rights or equal protection, “most government action is presumed to be valid [unless other constitutional concerns beyond the scope of this paper] . . . will be subject to minimal scrutiny from the courts.”); Id. (stating the test for rational or minimal scrutiny).


19. Stevens, 130 S. Ct. at 1584-88 (discussing both unprotected categories, the balancing of the social utility against the perceived harm, and the overbreadth argument); Brown, 131 S. Ct. at 2734 (citing Stevens, the Court again refused to either carve out new categories of unprotected speech or to apply the balancing test it rejected in Stevens).

20. Id. at 1586 (declining to foreclose the possible creation of a category for historically unprotected speech but refusing to accept an ad hoc balancing test “as a means of identifying them.”).
striction concerns criminal sanctions for false claims about receiving military medals,21 and the other deals with enforcement of the Federal Communications Commission’s (FCC) broadcast indecency policy.22 This paper focuses on the latter case and the future vitality of the FCC’s indecency policy.23

It has long been recognized that broadcast media is unique from other forms of media and, therefore, enjoys less First Amendment protection.24 In the Court’s reasoning, the unique characteristics of broadcast media—namely, access to children, invasion in the privacy of the home, the inadequacy of warnings, the pervasiveness of the medium, and the scarcity of the broadcast airwaves—justified disparate treatment under the First Amendment.25 Although the Administrative Procedure Act’s deferential standard of review applies to FCC decision making, the FCC indecency policy is still subject to First Amendment limitations, albeit under a lower standard of scrutiny than other content-based speech restrictions.26

For nearly half a century, the Court has recognized the FCC’s power to censor speech characterized as indecent, but not obscene, in the broadcast media context.27 After years of limiting its enforcement of indecency violations to instances involving multiple uses of specific words, the FCC adopted a more flexible standard and reversed its long-standing practice of tolerance for “fleeting expletives”28 and isolated depictions of nudity.29 As a result of more aggressive enforcement and costlier fines, the Court agreed to review the FCC’s current policy in Fox Television Stations, Inc. v. FCC.30

23. The authors reserve their discussion of United States. v. Alvarez for another day.
24. See Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970) (distinguishing Congress’s power to regulate material transported through the U.S. mail, which is limited to obscene or fraudulent material, from its power to regulate broadcast content).
26. See Id. at 749-50.
27. See Id. at 729-30.
28. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 321-22 (2d Cir. 2010) (“Fleeting expletives” refer to single utterances that, by practice, were not, prior to 2004, historically actionable under the FCC indecency policy.).
29. CBS Corp. v. FCC 663 F.3d 122 (3d Cir. 2011).
30. This article discusses three opinions — two opinions of the U.S. Court of Appeals for the Second Circuit, and one Supreme Court opinion — issued during different procedural stages of the litigation of the same case as follows: First, Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 452 (2d Cir. 2007) [hereinafter Fox I]; second, Fox Television Stations, Inc. v. FCC, 556 U.S. 502 (2009) [hereinafter Fox II]; and third, Fox Television Stations, Inc. v. FCC,
On the spectrum of protected speech, broadcast indecency falls far from core First Amendment protected speech. However, the FCC’s indecency policy raises debate about where and how to draw the parameters of First Amendment protections even in the context of broadcast media. Line drawing becomes especially problematic when applied to speech at the “fringes,” meaning those categories of speech that raise doubt about their social utility and harmful effects.\textsuperscript{31}

Whether broadcast indecencies have any social value or cause harm is highly debatable. Uncertainty about the expressive value and inconclusive evidence of possible harm caused by specific speech create constitutional questions about the scope of expressive freedom. The greater the uncertainty and controversy is about the causal connection between the at-issue speech and the perceived harm, the closer the speech lurks at the fringes of First Amendment protection. Broadcast indecencies, like crush videos and violent video games for children, certainly lie at the fringes of First Amendment protection. While those fringes have always been hazy, under the Roberts Court, expression at the fringes is a lot more secure from losing First Amendment protection.

Part II of this paper will discuss the recent cases articulating the Court’s rejection of a cost-benefit First Amendment test. In Part III, this paper will outline the procedural posture of \textit{FCC v. Fox} and \textit{CBS v. FCC}, and the changes in the FCC indecency policy from the landmark case \textit{FCC v. Pacifica Foundation} to post 2004, at which time the FCC sanctioned for the first time a fleeting and isolated expletive uttered during a live broadcast of the Golden Globe Awards.\textsuperscript{33} In anticipation of the Supreme Court’s review of \textit{FCC v. Fox Television Stations, Inc.} this Term, Part IV will consider the constitutionality of the FCC’s current broadcast indecency policy


and the continued relevance of the *Pacifica* Court’s justifications for less First Amendment protection to broadcast media.

In conclusion, this article posits that regulating in an area of speech that raises questions about its social value and potential harm will be extremely difficult under the Roberts Court. Government restrictions targeting the content of low value, but protected, expression will be reviewed under the exacting standards of core First Amendment speech. Even though the broadcast indecency policy is shrouded in administrative agency deference standards, it is unlikely that the Court will give the FCC free-wheeling reign to enforce its new policy, which is much more speech-restrictive than the FCC’s enforcement policy of the past forty years. While the Court may not reach the ultimate question of whether *Pacifica* is or should be overturned, the *Fox* case may bring the Court one step closer to erasing the First Amendment distinctions between broadcast media and other forms of media.

II. **Crush Videos and Violent Video Games and the First Amendment: The End of Balancing the Social Utility of Low Value Speech with the Benefits of Regulation**

In its last two Terms, the Supreme Court invalidated restrictions on the production, sale, and possession of depictions of animal cruelty (crush videos) and on minors’ access to violent video games. Reading descriptions of these targeted videos is not for the faint of heart. Even the most avid free speech advocate might have a knee-jerk, gut reaction to such disturbing descriptions, agreeing that crush videos and violent video games for minors should be banned. So horrifyingly disgusting, common sense dictates a conclusion that the most egregious of these videos are utterly lacking in


37. *Stevens*, 130 S. Ct. at 1598 (Alito, J., dissenting) (describing in horrifying detail an example of a crush video in which a woman wearing high heels stomps a kitten to death). Respondent Stevens was originally convicted for possessing videos of animal fighting, which Chief Justice Roberts described as “gruesome.” *Id.* at 1583 (majority opinion). Despite the Court’s disgust with the videos, it upheld the Third Circuit’s decision striking down the statute as overbroad and vacating the conviction. *Id.* at 1592.

38. *Brown*, 131 S. Ct. at 2749 (Alito, J., concurring) (describing the “astounding” violence in some video games “[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools.”).
social value. In Justice Alito’s words, these videos are “a form of depraved entertainment that has no social value.” Despite their low value expressive worth, these video cases clearly establish that speech lacking in social value cannot be subject to a “‘simple balancing test’ that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test.”

A. United States v. Stevens

In violation of a federal statute punishing anyone who knowingly creates, sells, or possesses depictions of animal cruelty, Mr. Stevens was convicted for his internet sales of videos depicting pit bulls attacking other animals. He appealed his conviction, claiming that the federal statute violated the First Amendment. After the Third Circuit invalidated the statute as an impermissible content-based speech restriction which did not pass strict scrutiny, the Supreme Court granted certiorari.

The Supreme Court rejected the Government’s argument that, similar to obscenity and child pornography, depictions of animal cruelty belonged in a category of unprotected speech. Those “few limited” categories of unprotected speech are outside the First Amendment umbrella because of history and tradition. There being no history of excluding depictions of animal cruelty from the protection of the First Amendment and no freedom to disregard “these traditional limitations,” the Court refused to carve out a new category of unprotected speech for crush videos. Recognizing that the notion of balancing the social value against the social costs

39. See Stevens, 130 S. Ct. at 1583 (noting that the videos did not satisfy any of the exemptions in the statutory exception clause, which exempted depictions having “serious religious, political, scientific, educational, journalistic, historical, or artistic value”).
40. Id. at 1592 (Alito, J., dissenting). Although Justice Alito’s dissent focuses on crush videos, it logically follows from his discussion that he would include violent video games in this description based on his concurring opinion in Brown. See id.; see also supra note 38.
41. Brown, 131 S. Ct. at 2734 (quoting Stevens, 130 S. Ct. at 1585).
43. Stevens, 130 S. Ct. at 1577.
44. Id.
45. Id.
46. Id. at 1586.
47. Id. at 1584.
48. Id. at 1584-85 (listing the categories of unprotected speech as obscenity, fraud, incitement, and speech integral to criminal conduct, the Court characterized these categories as “historic and traditional . . . long familiar to the bar.”).
of a particular category of speech is described in previous cases, the Court clarified that those descriptions “are just that — descriptive.” Writing for the eight Justices who joined the majority opinion, Chief Justice Roberts unequivocally stated that those descriptions did not set forth a categorical balancing test to be applied to low value speech.

Finally, the Court held that the statute was substantially overbroad and therefore unconstitutional. In the Court’s view, the statutory exceptions clause for depictions that have “serious literary, artistic, political, or scientific value” did not cure the overbreadth problem. The Court listed several examples of speech prohibited by the statute, including most hunting videos. The Government promised “prosecutorial discretion” to prosecute only the most egregious depictions of animal cruelty. The Court was unwilling, however, to “uphold an unconstitutional statute merely because the Government promised to use it responsibly.”

After the Court’s strong pronouncement against recognizing new categories of unprotected speech, banning minors’ access to violent video games premised on the same argument made in Stevens would be insurmountable. In fact, only one year after the Stevens opinion, California in Brown v. Entertainment Merchants Association did press the “expressive value versus social costs” analysis in maintaining that restricting minors’ access to violent video games did not violate the First Amendment. California distinguished Stevens on the basis that its restriction was not a com-


51. Id. at 1586.

52. Id. (stating there is no First Amendment test that “as a general matter [permits] the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.”).

53. Id. at 1592.

54. Id. at 1591 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

55. Id.

56. Stevens, 130 S. Ct. at 1590 (stating that because the exceptions clause requires the material to have “serious” value, the Court doubts that most hunting videos, which are primarily for entertainment value, would be saved by the exceptions clause).

57. Id. at 1591.

58. Id. (stating that “the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige.”).

plete ban on violent video games and that it applied to children only.\textsuperscript{60}

B. \textit{Brown v. Entertainment Merchants Association}

Advocates against media violence have lobbied state legislatures to ban minors’ access to violent video games for over a decade.\textsuperscript{61} In fact, many state legislatures agreed with the advocates and passed statutes restricting the sale and rental of violent video games to minors.\textsuperscript{62} All the successful lobbying which culminated in legislative action was thwarted, however, when the circuit courts of appeals considered and rejected the constitutionality of these restrictions.\textsuperscript{63} Finally, last Term, the Supreme Court weighed in on the First Amendment implications of the latest legislative attempt by California to restrict minors’ access to violent video games.\textsuperscript{64}

In its decision, the Supreme Court definitively rejected assertions made by California, and previously by other states, that violent video games were not protected by the First Amendment.\textsuperscript{65} Foreclosed by the \textit{Stevens} decision, California needed to rely on something more than a “simple balancing” of the social value of the video games against the social costs to assert that they belonged in a category of unprotected speech.\textsuperscript{66} Instead, California proffered evidence that viewing violent video games caused actual harm to children.\textsuperscript{67} As such, California argued that the Court should apply a “variable violence” standard similar to the “variable obscenity” standard upheld in \textit{Ginsberg v. New York}.\textsuperscript{68} In \textit{Ginsberg}, the Court upheld a restriction on the sale to minors of sexual material that

\textsuperscript{60} \textit{Id.} at 2735.

\textsuperscript{61} See Terri R. Day & Ryan Hall, M.D., \textit{Déjà Vu: From Comic Books to Video Games: Legislative Reliance on “Soft Science” to Protect Against Uncertain Societal Harm Linked to Violence v. the First Amendment}, 89 Or. L. Rev. 415, 419 (2010), for an in-depth discussion of the First Amendment implications of the violent video games restrictions and the studies evaluating the link between violent media and harm to children.

\textsuperscript{62} \textit{Id.} at 419-20.

\textsuperscript{63} \textit{Id.} at 419; \textit{see also Brown}, 131 S. Ct. at 2738, 2739 n.6 (listing several courts that have considered the constitutionality of these restrictions, including the Seventh, Eighth, and Ninth Circuit Courts of Appeals).

\textsuperscript{64} \textit{Brown}, 131 S. Ct. at 2737-38.

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.} at 2734.

\textsuperscript{67} \textit{Id.} at 2738-39.

\textsuperscript{68} \textit{See id.} at 2735 (citing \textit{Ginsberg v. New York}, 390 U.S. 629, 673 (1968) (upholding a restriction on the sale to minors of girlie magazines, otherwise protected under the First Amendment; the Court approved of a variable obscenity standard applying a definition of obscenity from the perspective of a child)).
would otherwise be protected under the First Amendment. In approving a definition of “obscenity” from a child’s perspective, the Court allowed states to restrict minors’ access to sexual material that would not otherwise be categorized as obscene under the Miller v. California standard.

In the alternative, California argued that its regulation of violent video games was necessary to protect children from the alleged harm caused by playing such games. Relying on the “causation of harm” analysis, California asserted that the protection of children from this demonstrated harm served a compelling state interest. Additionally, California presented a second interest served by its restriction—namely, to support parental authority. Based on these arguments, California maintained that its restriction satisfied the strict scrutiny standard required to justify a content-based speech restriction.

Once again, the Court reiterated its clear position, articulated in Stevens, that First Amendment protections do not rise and fall on the value of the speech. Unlike sexual material, violent material does not fall within a long-standing, historically recognized category of unprotected speech. Therefore, consistent with the First Amendment, the “variable child standard” that the Court applied to sexual, but non-obscene material, could not apply to violent material. Further, the Court asserted that children possess significant First Amendment rights. As such, the Government cannot restrict otherwise protected speech “to protect the young from ideas or images that a legislative body thinks unsuitable for them.”

Rejecting the “violence like obscenity” arguments, the Court held that violent video games are protected expression under the

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69. Ginsberg, 390 U.S. at 629.
70. See id. at 638; cf. Miller v. California, 413 U.S. 15, 36-37 (1973) (defining obscenity).
71. Brown, 131 S. Ct. at 2741.
72. Id.
73. Id. at 2740 (asserting that the restriction serves to help parents who wish to protect children from the harm caused by violent video games and are unable to restrict their children’s access to the objectionable videos).
74. Id. at 2738-40.
75. See id. at 2734.
76. Id.
77. Brown, 131 S. Ct. at 2734.
78. Id. at 2736-37 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-13 (1975) (invalidating a restriction on the content of movies shown at drive-in theaters on the basis that children may be exposed to inappropriate images)).
79. Id. at 2736 (quoting Erznoznik, 422 U.S. at 213-14).
First Amendment, and California’s restriction did not satisfy strict scrutiny.80 In addressing the State’s asserted interest in protecting children from harm, the Court concluded that the causation of harm evidence “is not compelling.”81 The studies relied upon by California were essentially the same studies relied upon by other state legislatures, which enacted similar video game restrictions, and these studies were rejected by the courts reviewing those states’ statutes.82 Specifically, the Court noted that the studies established no more than a weak correlation between viewing violence and “real-world effects” on children.83 Further, those effects were the same whether the exposure to violent material was from watching television or playing video games.84

The Court condemned California’s statute as being both “seriously underinclusive”85 and “vastly overinclusive.”86 Because California targeted only video games and not other violent media that caused the same “alleged” harm to children, the Court deemed the statute underinclusive.87 Further, the statute allowed minors access to the banned video games upon parental or another relative’s consent.88 In the Court’s view, this loophole also rendered the statute underinclusive.89 As to the overinclusive infirmity, the Court maintained that California’s asserted interest in aiding parental authority

80. Id. at 2738 (articulating the strict scrutiny standard applied to restrictions on the content of protected speech and concluding that California’s restriction does not satisfy that standard).

81. Brown, 131 S. Ct. at 2739 (stating the studies relied upon by the California legislature have been rejected by seven courts that considered the same studies); see also Terri R. Day & Ryan Hall, Déjà Vu: From Comic Books to Video Games: Legislative Reliance on “Soft Science” to Protect Against Uncertain Societal Harm Linked to Violence v. the First Amendment, 89 Or. L. Rev. 415 (2010) (discussing in-depth the studies exploring the link between exposure to violence and negative effects on children).


83. Brown, 131 S. Ct. at 2739 (discussing the research of Dr. Craig Anderson and the inconclusive findings of cause and effect); see also supra note 82.

84. Brown, 131 S. Ct. at 2739.

85. Id. at 2740.

86. Id. at 2741.

87. Id. at 2740.

88. Id. (“The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK.”).

89. Id. at 2740.
unfairly extended to parents who did not need or want the state to decide what games are appropriate for their children.\footnote{Brown, 131 S. Ct. at 2741 (criticizing the restriction as the state imposing what it “thinks parents ought to want”).}

Describing the statute as “neither fish nor fowl,” the Court held that it did not satisfy strict scrutiny.\footnote{Id. at 2742.} Based on both its underinclusiveness and its overinclusiveness, the Court invalidated the video game restriction as an unconstitutional intrusion on First Amendment protected speech.\footnote{Id.}

For different reasons, two concurring Justices agreed with the majority’s holding that California’s violent video games restriction was invalid. Justice Alito, joined by Chief Justice Roberts, concluded that the statute was void for vagueness.\footnote{Id. (Alito, J., concurring).} Finding that Stevens was not controlling, Justice Alito criticized the majority for applying strict scrutiny to the California statute, thereby foreclosing the possibility of applying a more lenient child standard to future legislative attempts to restrict minors’ access to violent video games.\footnote{Id. at 2747 (asserting that Ginsberg, not Stevens was “our most closely related precedent.”).}

Finding definitions of key terms in California’s statute lacking, Justice Alito concluded that the law did not give fair notice of which videos would be subject to the prohibition on the sale and rental to minors.\footnote{Id. at 2746.} Even speech regulations meant to protect children must comport with the First Amendment principles requiring government to define its restrictions with “narrow specificity.”\footnote{Brown, 131 S. Ct. at 2743.} Finding that California failed to define “violent video games” with the “narrow specification” required by the Constitution, Justice Alito joined the majority in holding the law unconstitutional.\footnote{Id. at 2747, 2751.}

On the heels of these two video cases, it is uncertain how much weight the Court will place on these decisions in reviewing the FCC indecency policy. Since the FCC indecency policy was established to protect children, the Brown decision may be a harbinger of the Court’s decision in FCC v. Fox Television Stations, Inc.
III. CURRENT ATTEMPTS TO REGULATE INDECENCY IN BROADCAST MEDIA

A. Pacifica and Beyond

Fleeting expletives on broadcast television by Cher and Nicole Richie, in episodes of the popular police drama NYPD Blue, and even on CBS’s The Early Show, have led to nearly a decade of litigation culminating in a case the Supreme Court will hear this Term. FCC v. Fox Television Stations, Inc., following the FCC’s landscape-changing order in the matter of the 2003 Golden Globe Awards, will pose the issue of whether the FCC’s policy regime, which now ascribes indecency to a “fleeting expletive,” or a “single, non-literal use of an expletive,” is violative of the First or Fifth Amendment. In considering this question, the Court will likely review the FCC’s historical treatment of indecent and profane speech and the marked change in its enforcement regime that occurred after the 2003 Golden Globe Awards.

The FCC’s enforcement power derives from 18 U.S.C. § 1464, which 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.” In 1975, the FCC first exercised its statutory authority to sanction indecent speech after Pacifica Foundation broadcast a twelve-minute monologue entitled Filthy Words. Airing at 2:00 p.m., the monologue involved comedian George Carlin uttering more than 100 expletives on the radio. In finding that the content in Mr. Carlin’s act was indecent, the FCC defined “indecent” speech as

98. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 452 (2d Cir. 2007) (noting that Cher stated, during her acceptance speech at the Billboard Music Awards, “People have been telling me I'm on the way out every year, right? So fuck 'em.”); id. (noting that while presenting an award during the live broadcast of the 2003 Billboard Music Awards, Nicole Richie stated, “Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.”).

99. Id. (During several episodes of NBC’s popular crime drama NYPD, characters uttered the expletives “bullshit,” “dick,” and “dickhead”).

100. Id. (In an interview on CBS’s The Early Show, a reality game show contestant referred to another contestant as a “bullshitter”).

101. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 321 (2d Cir. 2010).

102. See The Golden Globe Order, supra note 33.


105. Id.

“language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”107 Upon the Pacifica Foundation’s petition for review, the U.S. Court of Appeals for the D.C. Circuit Court found this regime to be unconstitutionally vague and overbroad and expressed its concern that the FCC’s proposed definition of indecent speech would result in unconstitutional censorship.108 On the FCC’s appeal, the Supreme Court upheld the FCC’s finding and declared that the FCC could restrict indecent speech in the broadcast context because of the “uniquely accessible” and pervasive nature of television and radio.109 Nonetheless, the Court “emphasize[d] the narrowness of [its] holding,”110 limiting its review to the “specific factual context”111 of the Carlin monologue and his “deliberate and repetitive use of expletives to describe sexual and excretory activities.”112 With respect to fleeting expletives, Justices Powell and Blackmun, in a concurring opinion, explicitly declared that the Court “does not speak to cases involving the isolated use of a potentially offensive word . . . as distinguished from the verbal shock treatment administered by respondent here.”113

The Pacifica test quickly became the standard the FCC applied to complaints of indecency. With Pacifica as its guide, the FCC assumed a restrained enforcement policy, limiting its sanction powers to only those seven “Filthy Words” uttered in the Carlin monologue.114 In addition, the FCC repeatedly clarified that it would sanction only those instances of indecent speech that involved “more than an isolated use of an offensive word.”115


108. Pacifica Found. v. FCC, 556 F.2d 9, 14 (D.C. Cir. 1977). Specifically, the D.C. Circuit cautioned that the FCC’s definition of indecent speech would prohibit “the uncensored broadcast of many of the great works of literature including Shakespearean plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible.” Id.


110. Id. at 750.

111. Id. at 742 (quoting In re ‘Petition for Clarification or Reconsideration’ of A Citizen’s Complaint Against Pacifica Found., Station WBAI (FM), N.Y., N.Y., 59 F.C.C.2d 892, 893 (1976)).

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


115. In re Regents of the Univ. of Cal., 2 FCC Rcd. 2703, 2703 (1987); see also In re Application of WGBH Educ. Found. 69 F.C.C.2d 1250, 1254 n.6 (1978) (holding that a single
In 2001, the FCC issued a statement regarding industry guidance interpreting 18 U.S.C. § 1464 in which it clarified its indecency regime.\footnote{116. In re Indus. Guidance on Comm’ns. Case Law Interpreting 18 U.S.C. § 1464, 16 FCC Rcd. 7999 (2001) [hereinafter Industry Guidance].} In *Industry Guidance*, the FCC expressly stated the test it applies to determine whether speech is indecent as: (1) whether the material “describe[s] or depict[s] sexual or excretory organs or activities” and (2) whether the broadcast is “patently offensive as measured by contemporary community standards for the broadcast medium.”\footnote{117. Id. at 8002 (emphasis omitted).} In determining whether the subject speech is patently offensive, the Commission set forth the following three factors:

(1) [T]he explicitness or graphic nature of the description or depiction . . . ; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value.\footnote{118. Id. at 8003 (emphasis omitted).}

Here again, the FCC explicitly reiterated that under the second prong of the patently offensive test, “fleeting and isolated” expletives were not actionable.\footnote{119. Id. at 8008.}

In 2004, the FCC completely abandoned its long-standing policy of not sanctioning fleeting expletives. After singer and pop icon Bono stated during a live acceptance speech at the 2003 Golden Globe Awards, “this is really, really, fucking brilliant,”\footnote{120. The Golden Globe Order, supra note 33 at 4976 n.4.} the FCC found for the first time that the single utterance of the “F-word” was actionably indecent.\footnote{121. Id. at 4979.} Initially, a staff decision dismissed complaints that Bono’s single expletive was indecent because it did not fall within the purview of the FCC’s then-current enforcement regime.\footnote{122. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007) (citing In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 18 FCC Rcd. 19,859, 19,860-61 (2003)) [hereinafter Golden Globe Staff Decision].} Members of Congress holding subcommittee hearings requested that the full Commission reverse the *Golden Globe Staff*
Subsequently, in overruling its former policy on fleeting expletives, the full Commission reasoned that the “F-word” “inherently has a sexual connotation” and ignored the isolated and fleeting nature of Bono’s utterance.

B. **FCC v. Fox Television Stations, Inc.: The Post-Golden Globe Regulation of Fleeting Expletives**

It is this 180-degree change in policy that fueled the present controversy currently before the Supreme Court. Between 2002 and 2005, the FCC considered several complaints of indecency lodged by citizens against various television broadcasts and applied the newly articulated Golden Globe standard. Fox Television Stations and several other broadcast network owners (Fox) challenged the FCC’s application of the Golden Globe standard in the U.S. Court of Appeals for the Second Circuit. Fox claimed that the change in policy was unconstitutional under *FCC v. Pacifica Foundation*, and that it was arbitrary and capricious under the Administrative Procedure Act (APA).

Fox argued that *Pacifica* set the ceiling for permissible regulation by the FCC, and the FCC maintained that *Pacifica* set the floor, despite the fact that it was well-established and expressly accepted by the FCC that the Commission did not sanction fleeting expletives. Contrary to its previous position, the FCC interpreted the concurrence of Justices Powell and Blackmun to leave the question open in terms of finding fleeting expletives indecent.

Under the APA, the court can set aside an administrative action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” In finding that the FCC’s policy change
was arbitrary and capricious, the Second Circuit did not address the constitutional issues.131

As to whether the change in policy was arbitrary and capricious, the inquiry hinged on the adequacy of the FCC’s explanation for the change.132 The Second Circuit applied the rule that when an agency changes a well-settled policy, the standard of review is heightened.133 This was later overruled by the Supreme Court.134

With respect to its policy change, the FCC characterized what in reality was a dramatic change as minimal based on its claim that it merely disavowed dicta and various staff opinions and its assertion that the change was in line with *Pacifica*. In support of the substance of its change, it articulated three reasons. First, the FCC argued that there was no difference between a single, fleeting expletive and the literal use of indecent and profane words, as defined by *Pacifica* and later FCC orders and policy statements.135 The argument goes that the harm resulting from a fleeting expletive could be equal to the harm caused by literal depictions or descriptions of sexual or excretory organs or activities.136 Fox argued that the FCC did not produce sufficient evidence that a fleeting expletive causes harm to children.137

The FCC also justified its change based on the “first blow theory,” which the Supreme Court first articulated in *Pacifica*.138 That theory advanced by the *Pacifica* Court did not excuse indecent speech aired during daytime viewing hours based on the fact that the listener can tune out.139 Instead, the Court emphasized its concern that, at first hearing the indecent speech and then tuning out, the child audience has unfairly suffered the “first blow.”140 In response to the FCC’s “first blow” rationale, Fox claimed that this did

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131. See generally Fox, 489 F.3d at 444. The two constitutional issues presented were vagueness and impermissible content-based restrictions. *Id.*

132. *Id.* at 462 (finding the FCC failed to provide a justification for departing from its established practice).

133. *Id.* at 461 (quoting Motor Vehicles Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)) (“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”).


135. See *id.* at 508.

136. See *Fox*, 489 F.3d at 460.


138. *Id.* at 458.


140. *Id.*
not justify the policy change since the FCC allowed children to suffer the first blow by excluding fleeting expletives from its indecency regime from 1978 (Pacifica) to 2004 (Golden Globe Order).141

Finally, the FCC maintained that a per se rule exempting fleeting expletives from the indecency policy would lead to broadcasters using more expletives in the future.142 The FCC based this argument on the belief that the broadcast networks would use more expletives to compete with cable television, which is not subject to the FCC’s indecency regime.143 In response, the Second Circuit highlighted the fact that the FCC’s concern about increased use of expletives on broadcast television did not materialize during the years that fleeting expletives were not subject to indecency sanctions.144 In addition, the FCC’s concern about broadcast television competing with cable networks could be viewed as an admission that broadcast media has become less pervasive since the time of Pacifica, undermining one of the key justifications for the indecency policy in the first place. The court ultimately rejected these reasons as sufficient bases for the FCC’s policy change, and concluded, therefore, that the policy change was arbitrary and capricious under the APA.145 Although the Second Circuit did discuss the constitutional challenges, it did not rule on the constitutionality of the FCC’s change in policy.146

In a divided opinion, Justice Scalia, writing for the majority of the Court, overruled the Second Circuit’s holding that the FCC’s change in policy was arbitrary and capricious.147 The Court declined to address the constitutional questions passed over by the Second Circuit.148 In reviewing the adequacy of the FCC’s decision to change its policy, however, the Court noted that the Second Circuit misstated the standard of review.149 Justice Scalia pointed out that it remains a narrow standard of review whether the agency is making a policy in the first instance or changing an existing policy.150 While an agency must advance good reasons for a new pol-

141. See Brief for Respondent, supra note 137.
142. Fox Television Stations, Inc. v. FCC, 489 F.3d 440, 460 (2d Cir. 2007).
143. Id. at 472-73 (Leval, J., dissenting).
144. Id. at 460 (majority opinion).
145. See id. at 455.
146. Fox, 489 F.3d at 462 n.12 (recognizing that the discussion regarding the constitution challenges was dicta); see also id. at 462-66.
148. Id. at 529.
149. Id. at 514.
150. Id. at 513-16.
icy, it need not satisfy the Court “that the reasons for the new policy are better than the reasons for the old one.”\textsuperscript{151}

The Court found the FCC’s reasoning for its policy change sufficient.\textsuperscript{152} First, the Court accepted the FCC’s assertion that a context-based approach, even for fleeting expletives, is consistent with \textit{Pacifica}.\textsuperscript{153} In addition, the Court deemed it rational to conclude that “first blows” are harmful to children.\textsuperscript{154} Disagreeing with the Second Circuit, the Court found that reasoned decision-making did not require evidence of harm to children caused by fleeting expletives.\textsuperscript{155} In fact, Justice Scalia suggested that this kind of evidence would be unobtainable.\textsuperscript{156} Notably, the Court emphasized the fact that empirical evidence of harm done by broadcast indecencies was not necessary in \textit{Pacifica} to accept the premise that such indecencies did in fact cause harm, and certainly empirical evidence of causation is not required by the APA here.\textsuperscript{157}

Furthermore, the Court disagreed with the Second Circuit that inconsistent findings of indecency based on the use of similar words in different contexts support a finding of arbitrary and capricious.\textsuperscript{158} For instance, the Court understood how the FCC did not find repeated uses of expletives in the film Saving Private Ryan actionable but did sanction a fleeting expletive in a music awards show.\textsuperscript{159} In the first instance, the use of expletives enhanced the realism of the work and its artistic value, whereas in the second instance, the expletive did not have any such value.\textsuperscript{160}

The dissenting Justices, along with Justice Kennedy, concurring, maintained that an agency must not only give good reasons for a new policy but must also explain the reason for a change in an existing policy.\textsuperscript{161} In his dissent, Justice Stevens opined that changing the long-standing policy of exempting fleeting expletives was contrary to the narrow holding in \textit{Pacifica}.\textsuperscript{162} In his view, \textit{Pacifica}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{151} \textit{Id.} at 515.
\item \textsuperscript{152} \textit{Id.} at 517, 538.
\item \textsuperscript{153} \textit{Fox}, 556 U.S. at 517-18.
\item \textsuperscript{154} \textit{Id.} at 518.
\item \textsuperscript{155} \textit{Id.} at 518-20.
\item \textsuperscript{156} \textit{Id.} at 519.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.} at 520 -21.
\item \textsuperscript{159} \textit{Fox}, 556 U.S. 520-21.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.} at 523-24 (discussing the dissenting opinions); \textit{id.} at 535 (Kennedy, J., concurring).
\item \textsuperscript{162} \textit{Id.} at 542-44 (Stevens, J. dissenting).
\end{itemize}
\end{footnotesize}
granted limited power to the FCC to regulate indecency, which was defined as “words that describe sex or excrement.”163 Justice Stevens opined that “the use of an expletive to describe a sexual or excretory function” is miles apart from the use of such a word to express an emotion.164 Moreover, to venture so far from the narrow Pacifica holding and give the FCC discretion in all cases to determine the speaker’s intent on a case-by-case basis would be arbitrary and capricious.165

C. CBS v. FCC: The Post-Golden Globe Regulation of Isolated Nudity

Based on its decision in Fox, the Court remanded to the Third Circuit for reconsideration of a similar case involving the FCC’s indecency regime.166 After singer Justin Timberlake momentarily exposed Janet Jackson’s breast during the live broadcast of the 2004 Super Bowl half-time show, the FCC enforced the congressionally enhanced fines for indecency violations, resulting in a $550,000 fine.167 CBS appealed the penalty, and the U.S. Court of Appeals for the Third Circuit overturned the hefty fine.168 After the Supreme Court granted certiorari and remanded to the Third Circuit in light of Fox, the circuit court reaffirmed its prior holding that the FCC’s actions in finding the isolated depiction of a breast “indecent” were arbitrary and capricious.169 The Third Circuit relied on the Fox case, which held that when there is a change of agency policy without notice, a party cannot be fined.170 In accord with the Fox finding that the FCC abandoned its fleeting expletives exemption with the Golden Globe Order, the Third Circuit found that the FCC likewise eliminated its pre-Golden Globe Order policy exempting fleeting images.171 As such, the Commission’s monetary penalty was arbitrary and capricious because CBS was not put on

163. Id. at 543 (citing FCC v. Pacifica Found., 438 U.S. 726, 745 (1978)).
164. Id.
165. Fox, 556 U.S. at 544.
167. CBS Corp. v. FCC, 535 F.3d 167, 171-72 (3d Cir. 2008) (believing that the exposure was willful, the FCC reasoned that a high monetary penalty was justified).
168. Id. at 209.
169. CBS Corp v. FCC, 663 F.3d 122, 124 (3d Cir. 2011).
170. See generally FCC v. Fox Television Stations, Inc., 556 U.S. 502 (placing great weight on the fact that the FCC did not issue fines to the offenders of its fleeting expletive policy).
171. See CBS, 663 F.3d at 124.
notice of the changed policy. This incident playfully became known as “Nipplegate.”

D. Fox Television Stations, Inc. v. FCC: Round Two

Like the Third Circuit in CBS, the Second Circuit had the opportunity to revisit the issues in Fox upon remand from the Supreme Court. This time, it considered the constitutional issues raised but not decided in its previous opinion.

In finding that the FCC’s indecency policy is unconstitutionally vague in violation of the First Amendment, the Second Circuit expressed its view that broadcast speech restrictions should be subject to the same level of scrutiny — namely, strict scrutiny — that applies to all other media. Referencing cases in which the Supreme Court struck down indecency policies applied to the Internet, cable television, and paid phone sex services, the Second Circuit reasoned that the same standards should apply to broadcast media. The Second Circuit’s view echoed Justice Thomas’s concurring opinion in Fox. As Justice Thomas’s view was not the prevailing view of the Supreme Court, the Second Circuit also realized it was bound by precedent and had to adhere to the lesser standard applied to speech restrictions of broadcast media.

Both parties relied on Reno v. ACLU to bolster their positions. Reno decided the constitutionality of the Communications Decency Act (CDA), which regulated indecent material sent to minors over the Internet. The CDA’s definition of indecent mate-

172. Id. at 130.
173. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 322 n.2 (2d Cir. 2010) (citation omitted).
174. Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010) [hereinafter Fox II].
175. Id. at 319.
176. Id. at 327; see also FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530 (Thomas, J., concurring). Although Pacifica did not address the standard of review for broadcast media indecencies, later cases applied “something akin to intermediate scrutiny.” Fox II, 613 F.3d at 326.
177. Fox II, 613 F.3d at 325 (citing Reno v. ACLU, 521 U.S. 844 (1997)).
178. Id. (citing United States v. Playboy Entm’t Grp., 529 U.S. 803 (2000)).
179. Id. (citing Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989)).
180. Id. at 325-27.
181. See Fox, 556 U.S. at 530-35 (Thomas, J., concurring).
182. Fox II, 613 F.3d at 327.
183. Id. at 328-29.
rial was nearly identical to the FCC’s definition.\textsuperscript{185} Fox maintained that since \textit{Reno} found the CDA’s provision unconstitutionally vague, the Second Circuit must necessarily find the FCC’s identical definition vague.\textsuperscript{186} In contrast, the Commission argued that since \textit{Reno} distinguished \textit{Pacifica} on the basis of the medium at issue, \textit{Reno} does not support the finding that the FCC’s indecency policy is unconstitutionally vague.\textsuperscript{187} The Second Circuit disagreed with both positions.\textsuperscript{188}

As to the FCC argument, the Second Circuit clarified that the distinction made in the \textit{Reno} case from \textit{Pacifica} related to the level of scrutiny applied to restrictions of speech on the Internet as opposed to restrictions of broadcast speech.\textsuperscript{189} The Second Circuit opined that the FCC’s definition of indecency was more detailed than that of the CDA’s.\textsuperscript{190} Therefore, the court reasoned that the \textit{Reno} case neither foreclosed nor required a finding that the FCC’s indecency policy is unconstitutionally vague.\textsuperscript{191}

The Second Circuit ultimately found the FCC’s policy regime unconstitutionally vague, however, because one could not easily ascertain from its meaning what would qualify as actionable indecency.\textsuperscript{192} As a result, when applied in two different broadcasts, the same subject speech yielded inconsistent results.\textsuperscript{193} The Second Circuit also determined that the same vagueness problems plagued the FCC’s rule that the words “fuck” and “shit” were presumptively indecent.\textsuperscript{194} Indeed, two exceptions to the presumption –namely, the bona fide news exception and the exception for artistic or educational work or matters of public importance –yield inconsistent results and give the FCC too much discretion in deciding what does and does not fall within the parameters of its enforcement regime.\textsuperscript{195} With so much uncertainty about what is and is not permiss-

\begin{itemize}
\item \textsuperscript{185} Fox \textit{II}, 613 F.3d at 328.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Id. at 329.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} Fox \textit{II}, 613 F.3d at 329.
\item \textsuperscript{192} Id. at 330-35.
\item \textsuperscript{193} Id. at 330. For example, the court points out that in an episode of NYPD Blue, the word “bullshit” was patently offensive, but the words “dick” and “dickhead” were not, nor were such expletives as “pissed off,” “up yours,” “kiss my ass,” and “wiping his ass.” Id. The Second Circuit posited that even the three-factor patently offensive test did not give broadcasters notice of what is appropriate. Id.
\item \textsuperscript{194} Id. at 331-33.
\item \textsuperscript{195} Id. at 331-32.
\end{itemize}
sible under the FCC’s indecency policy, and the threatened chilling effect it has on broadcasters, the court held that the FCC’s policy was unconstitutionally vague in violation of the First Amendment.196

Now, as this case is before the Supreme Court a second time, it is finally up to the Court to decide the validity of the FCC policy on constitutional grounds. The question before the Court is: “Whether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.”197

IV. FUTURE VALIDITY OF THE FCC’S BROADCAST INDECENCY POLICY: FCC v. FOX TELEVISION

Based on the FCC’s stepped-up enforcement efforts, its discretionary context-based indecency policy now applicable to isolated incidents, and substantially enhanced penalties prescribed by Congress, broadcast media has turned to the courts to decide the constitutionality of the FCC’s indecency enforcement regime. Regulation of broadcast indecency has become the latest “cause celebre” of both First Amendment advocates opposed to more government regulation of protected speech and crusaders seeking to protect children from alleged harm by “sanitizing” broadcast media. Like crush videos and violent video games, broadcast indecencies constitute a category of expression that is neither unprotected nor close to the core of First Amendment values. Sharing some similarities to the two video cases, the Supreme Court’s upcoming review of the Second Circuit’s decision in Fox II opens another window into the Court’s First Amendment stance on low-value speech restrictions.198

While advancements in technology and social media make it very difficult to draw a meaningful distinction between video games and broadcast television, there is a long-standing history and tradition of subjecting broadcast media to greater speech regulation than other forms of media.199 Justice Thomas,200 and the Second

196. Id. at 319.
198. Id.
200. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530 (2009) (Thomas, J., concurring) (concluding that the reasons to apply relaxed First Amendment standards to broadcast media are no longer valid and stating, “The text of the First Amendment makes no distinc-
Circuit expressed their views that broadcast media should no longer “occup[y] a unique position when it comes to First Amendment protection” due to technological advances since *Pacifica*. In the span of over forty years, cable and satellite television have erased the unique position and pervasiveness of broadcast media. Internet has changed the media landscape in ways unthinkable a few decades ago. Finally, advanced technology has made it possible for individual households to block indecent programming, and virtually every new television sold in the United States since 2000 has this V-Chip technology. The underpinnings of *Pacifica*, which justified a different First Amendment standard for broadcast media—namely, its unique position and pervasiveness in American homes, easy access to unsupervised children, and scarcity of the resource—no longer hold true.

Despite these overwhelming and persuasive reasons to erase the First Amendment distinctions between broadcast media and other forms of media, the Court’s limited grant of certiorari foreshadows a narrow decision, one that will not revisit *Pacifica*. Although asked to review the FCC’s “context-based approach . . . in its entirety,” the Court has limited its review to the “current indecencies among print, broadcast, and cable media, but we have done so’ in these cases.” (quoting Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 812 (1996))).

201. Fox v. FCC, 613 F.3d 317, 326-27 (2d Cir. 2010) (discussing the changed landscape since *Pacifica* was decided in 1969 regarding the prevalence of broadcast media).

202. Id. at 326 (justifying the application of a different First Amendment standard to broadcast media based on the view held in 1969 that broadcast media was considered different from other media due to its “uniquely pervasive presence in the lives of all Americans” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978))).

203. Id. at 326 (stating that “almost 87 percent of households subscribe to a cable or satellite service”).

204. Id.

205. Id. (citing United States v. Playboy Entm’t Grp., 529 U.S. 803, 815 (2000)) (one justification for applying a different First Amendment standard to broadcast media was based on the fact that cable television enabled individual households to block unwanted cable channels; V-Chip technology erases this distinction).


207. Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010), cert. granted, FCC v. Fox Television Stations, Inc., 131 S. Ct. 3065, 3066 (U.S. June 27, 2011) (No. 10-1293). The two questions presented in the FCC’s petition for writ of certiorari asked the Court to consider whether the FCC’s “context-based approach to determining indecency [was] unconstitutionally vague in its entirety” (one applied to the FCC’s policy on expletives, the other applied to the FCC’s policy on nudity). Petition for Writ of Certiorari, Fox, 131 S. Ct. 3065-66 (No. 10-1293), 2011 WL 1540430, at *1. The Court limited its review to “[w]hether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.” Fox, 131 S. Ct. at 3065-66.

In essence, the Court will determine if the FCC’s post-Golden Globe Order indecency-enforcement regime, as applied to fleeting expletives and isolated depictions of nudity, violates the First or Fifth Amendment. With such strong evidence to question the validity of Pacifica, it is more likely that the Court’s limited grant of review is not an issue of if Pacifica will be revisited, but when. Therefore, FCC v. Fox may be the beginning of the end of Pacifica.210

Regardless of the continuing efficacy of Pacifica, the Court’s decision in Brown will likely not be controlling in this latest challenge to restrictions on low-value speech. While Brown may be instructive since both the violent video game restrictions and the FCC indecency policy are meant to protect children from offensive speech, the Court rejected the violence-as-sex analysis in Brown.211 In both Brown and Stevens, the Court rejected government attempts to justify speech restrictions on violent material by “shoehorn[ing]” such restrictions into the Miller v. California definition of obscenity.212

There is much to criticize about the FCC’s current indecency regime. Given this Court’s strong First Amendment stance, as evidenced by its decisions over the past few terms, it would be shocking if the Court upheld the FCC’s current enforcement regime.213 Certainly, indecent, non-obscene speech is protected under the First Amendment.214 Although a regulatory agency is given deference in its policy-making, it cannot use its enforcement power in ways that violate the Constitution.215 A context-based, totally discretionary restriction of protected speech hardly satisfies the well-defined, narrowly-drawn regulation that the First Amendment demands.216 A regulation of protected speech that does not give fair notice of what is and is not prohibited violates both the First Amendment.217

209. Fox, 131 S. Ct. at 3065-66.
210. The demise of Pacifica would not preclude the FCC from regulating broadcast indecency. Instead, it would mean that its enforcement decisions would be subject to heightened scrutiny (as opposed to agency policy-making decisions which are granted great deference under the APA).
212. Id. at 2734-35 (discussing previous cases, including Stevens, in which the Court “rejected a State’s attempt to shoehorn speech about violence into obscenity” because violence is not like obscenity for purposes of enacting constitutionally permissible speech restrictions).
213. See supra Part I.
216. See Brown, 131 S. Ct. at 2743 (Alito, J., concurring) (discussing the vagueness doctrine and emphasizing that “government may regulate in the area of First Amendment freedoms ‘only with narrow specificity’” (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).
Amendment and the Fifth Amendment. The Fifth Amendment’s Due Process Clause requires that laws are written with enough clarity and specificity so that “person[s] of ordinary intelligence [have] a reasonable opportunity to know what is prohibited.”

In the area of protected speech, vague laws raise special First Amendment concerns. First, they create a chilling effect on free speech. Self-censorship is required to avoid sanctions imposed by vague laws, resulting in a reduction of otherwise protected speech. Second, vagueness poses the threat of discriminatory enforcement, due to the lack of clear standards to follow.

As Part III of this article details, the FCC’s indecency enforcement regime drastically changed from the time of Pacifica to the FCC’s issuance of the Golden Globe Order. At the heart of the constitutional controversy is the reversal in policy regarding fleeting expletives and isolated depictions of nudity. As such, the Golden Globe Order was a sea change for broadcast media and indecency regulation. The Golden Globe Order transformation was precipitated by congressional pressure. After convening a congressional subcommittee hearing on broadcast indecency, several Members of Congress requested that the Commission change its staff decision dismissing the complaints of a fleeting expletive uttered during the 2003 Golden Globe Awards. This request came despite a thirty-year FCC policy, re-affirming in its 2001 Industry Guidance Policy Statement that “fleeting and isolated” material is not indecent.

Although not at issue at this time, the status of the FCC as an independent agency raises issues of political accountability and sep-

219. Id. at 108-09.
220. Brown, 131 S. Ct. at 2747 (Alito, J., concurring) (indicating when the law is ill-defined and speakers do not know what speech is prohibited, they are forced to “steer far wider than the unlawful zone” (quotations omitted)).
223. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d Cir. 2007) (discussing the FCC’s Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464, which gave examples of materials that would qualify as “patently offensive as measured by contemporary community standards for the broadcast medium” (quoting Industry Guidance, supra, note116 at 8002)). The examples make a distinction between material that dwells on offensive content (indecent) and material that was “fleeting and isolated” (not indecent). Industry Guidance, supra note 116 at 8008-10.
eration of powers. In *Fox*, the majority and dissenting opinions discussed the FCC’s independence from executive oversight and lack of political accountability, and how this independence should affect the amount of deference given to the FCC’s changed indecency policy decision. While Congress may delegate to an administrative agency both rule-making and enforcement power, too much delegated power affects political accountability by insulating both politicians and agency policies from the public’s “voters’ veto.” In this case, it would appear that Congress did more than delegate rule-making and enforcement authority to the FCC. Based on the Court’s description of the chain of events leading to the *Golden Globe Order* transformation, it appears that congressional pressure from Members of Congress forced major substantive changes to the FCC indecency policy and influenced the enforcement of its preferred policy. This is both disturbing and arguably unconstitutional.

While discussion of separation of powers and overzealous congressional oversight strays from the constitutional considerations at issue in *Fox*, these forces pose a threat for the future of First Amendment core values. Indeed, it is a dangerous slippery slope to allow an administrative agency to do what Congress could not, especially when freedom of speech is at issue. If the First Amendment requires legislatively enacted restrictions on protected speech to define with some precision and clarity the boundaries of what is and is not proscribed, then the FCC, which in reality is both defining and enforcing its indecency policy, should be held to the same requirements.

224. *Fox*, 556 U.S. at 547 (Breyer, J., dissenting) (discussing the independent status of the FCC and its political accountability, that Commissioners have fixed terms of office, and that they do not serve at the President’s will).

225. Id.

226. In other words, bad policy decisions cannot be easily remedied through the political process, since Commissioners serve for a fixed term and are not subject to being voted out of office or being fired by the President. Furthermore, elected officials are insulated from unpopular policy decisions; they can distance themselves from unpopular agency decisions and are not subject to public disapproval often demonstrated by voters rejecting incumbents.

227. In dicta, Justice Scalia suggests that congressional pressure on the FCC to change its enforcement efforts is an “unconstitutional[ ] scheme giving the power to enforce laws to agents of Congress.” *Fox*, 556 U.S. at 524. (citation omitted). In other words, Justice Scalia hints at a separation of powers violation.

228. Notwithstanding the First Amendment obstacles for Congress to pass a speech restriction similar to the FCC’s current indecency policy, the congressional handprint on the FCC’s changed policy raises other constitutional concerns. Arguably, the way congressional pressure influenced such a dramatic substantive change by slipping it through the back door of administrative agency policy-making violates both the Bicameralism and Presentment Clauses of the U.S. Constitution. See *U.S. Const.* art. 1, §§ 1, 7, cl. 2, 3.
The FCC’s indecency enforcement process is initiated by viewer complaints. In response to the fleeting expletive aired during the 2003 Golden Globe Awards, the FCC received 234 complaints. The Parents Television Council filed 98% of the total number of those complaints. This organization screens television programs, informs the public through mass e-mails about content it deems objectionable, and invites concerned citizens to visit its website and file a complaint to the FCC. Members of the public can file complaints with the FCC whether they viewed the objected-to program or not.

This process is not so dissimilar from parents who demand certain books to be banned from school libraries, or from parents who attempt to control the content of what is taught in public school. The First Amendment does not permit a small group of parents to dictate the ideas to which school children are exposed, especially when these demands are based on subjective views of the offensiveness of the material, rather than pedagogical concerns. This principle should apply with equal force to parents who use the FCC indecency enforcement processes to dictate what is and is not appropriate for children to view on broadcast television.

With potential for so much abuse, a vaguely defined indecency regime does not adequately protect the freedom of speech and due process rights guaranteed by the First and Fifth Amendments. There is ample evidence, as discussed in the Fox cases, to conclude that the current indecency enforcement regime is impermissibly vague. Most of the examples pointing to both the lack of clear definitions and potential for discriminatory enforcement are discussed above in Part III. They will not be repeated here.

As discussed in Part II, however, Stevens and Brown provide further guidance in predicting that the Court will strike down as unconstitutional the FCC’s current enforcement regime. First, the Stevens Court refused to accept prosecutorial promises to use dis-

229. See Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 451 (2d. Cir. 2007).
231. See id.
233. See id.
cretion in enforcing an overbroad speech restriction targeting crush videos.237 Promises of prosecutorial discretion could not save an unconstitutional statute. As Justice Roberts advised, “the First Amendment protects against Government; it does not leave us at the mercy of noblesse oblige.”238 Discriminatory enforcement is one of the dangers posed by a vague statute. Accordingly, like in Stevens, the Court should invalidate the FCC’s indecency-enforcement regime rather than rely on the FCC to use restraint in exercising its enforcement power.

Another aspect of the current indecency policy that renders it constitutionally suspect is the FCC’s assertion that the harm posed to children is the same whether the indecency is a fleeting expletive or a literal use of a proscribed word.239 In his opinion, Justice Scalia did not think that the FCC needed empirical evidence or could even marshal such evidence to establish fleeting expletives as “harmful first blows” to justify its changed policy.240 In Brown, Justice Scalia expressed a very different view of the necessity for proof of casual harm to support restrictions on minors’ access to violent video games.241 Perhaps these seemingly conflicting views can be explained by the fact that judicial review of the FCC’s policy change was subject to the APA’s deferential arbitrary and capricious standard.242 On the other hand, California’s violent video game restriction was subject to strict scrutiny.243 The Court’s decisions in both Stevens and Brown distinguished sex from violence when government regulates expression in these areas.244 That distinction, however, cannot explain Justice Scalia’s contrary positions in Fox and Brown regarding proof of causal harm.

Indeed, in reviewing the Child Pornography Prevention Act of 1996, the Court was unwilling to sustain a ban on virtual child por-

238. Id.
239. Fox, 556 U.S. at 512 (“[T]he Commission’s prior ‘strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an ‘expletive’s power to offend derives from its sexual or excretory meaning.’” (quoting In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 2664 (2006) (quotations omitted))).
240. Id. at 519.
242. Id. at 513-14 (discussing the APA’s narrow and deferential standard of review, which applies to judicial review of agency policy-making decisions).
243. Brown, 131 S. Ct. at 2729.
244. Id. at 2734 (discussing previous cases, including Stevens, in which the Court “rejected a State’s attempt to shoehorn speech about violence into obscenity” because violence is not like obscenity for purposes of enacting constitutionally permissible speech restrictions).
ography without proof that viewing the images would result in increased instances of child abuse.\textsuperscript{245} Although the restriction targeted sexual material for the purpose of protecting children, the uncertain harm that could result was insufficient to justify a restriction on otherwise protected expression, even though the expressive value of virtual child pornography is questionable.\textsuperscript{246}

Like virtual child pornography and violent video games, fleeting expletives and isolated depictions of nudity are entitled to First Amendment protection unless the FCC can justify its enforcement regime with sufficient evidence that the targeted expression causes actual harm to children. In considering the FCC’s authority to change its indecency policy, proof of harm was not required because of the deference due administrative agencies’ policy-making decisions. In considering whether the FCC’s current enforcement regime passes constitutional muster, however, even under an intermediate scrutiny standard,\textsuperscript{247} the Court should require proof of causal harm.

The FCC will have a difficult time satisfying this requirement. First, expletives and nudity are commonplace in everyday life. In some areas of the country, children can see parts of naked bodies at public places, such as beaches. Plus, fleeting expletives are part of our common vernacular. As Justice Stevens opined in his Fox dissent, “[A]ny golfer who has watched his partner shank a short approach knows [that] it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent.”\textsuperscript{248} Undoubtedly, children hear these types of fleeting expletives uttered as a means to express emotion — on occasion, in their own homes — spilling out of their parents’ mouth. Because such expletives have become common usage in our language, it would be highly improbable for anyone to conclude that exposure to fleeting expletives or isolated nudity in broadcasts are more detrimental than exposure to violent video games.\textsuperscript{249}

\begin{thebibliography}{9}
\bibitem{246} Id. at 253-54.
\bibitem{247} See Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326 (2d Cir. 2010) (noting that the Supreme Court has applied something akin to intermediate scrutiny to speech on broadcast television).
\bibitem{249} See Brown v. Entm’t Merchants Ass’n., 131 S. Ct. 2729, 2739 (2011) (discussing the inconclusive results of studies as to the cause and effect of exposure to violent video games and harm to children).
\end{thebibliography}
Second, the FCC’s indecency enforcement regime as it applies to fleeting expletives and isolated nudity is both overinclusive and underinclusive. It is overinclusive because it penalizes these alleged indecencies without any evidence that one four-letter word or an isolated glimpse of Janet Jackson’s breast is harmful to children. It is underinclusive because the policy exempts, on a case-by-case basis, some of these same words and images if they are essential for artistic, educational, or newsworthy purposes.\(^{250}\) As the *Brown* Court held, a law that is both overinclusive and underinclusive does not satisfy the high hurdle government must overcome to justify a restriction on protected speech “even where the protection of children is the object.”\(^{251}\) While the FCC’s indecency regime is not subject to the strictest level of scrutiny as was the violent video restriction in *Brown*, it must still satisfy an intermediate level of scrutiny, which places the burden on the FCC to overcome a presumption of invalidity.\(^{252}\)

Finally, the hefty fines threatening broadcasters that violate the FCC’s indecency policy should be the death knell of its current enforcement regime. Two changes affecting the maximum amount of fines levied against broadcasters for violating the indecency policy followed close on the heels of the *Golden Globe Order*. Congress increased the maximum fine statutorily permitted by tenfold, amending the $32,500 limit to $325,000.\(^{253}\) At the same time, the FCC changed its interpretation of the applicable statutory maximum fine from a per-program basis to a per-broadcast basis.\(^{254}\) These two changes could subject a broadcast licensee to a fine exceeding millions of dollars based on one fleeting expletive in one broadcast.\(^{255}\) Such huge fines threaten to put broadcasters out of business and are certainly way out of proportion to any provable, potential harm caused by fleeting expletives or isolated nudity.\(^{256}\)

\(^{250}\) See *Fox II*, 613 F.3d at 331 (discussing the artistic necessity exception which the FCC applied to the film *Saving Private Ryan*, thereby justifying its decision that the use of multiple expletives in the movie was not indecent, while a single fleeting expletive in an award show was indecent under its enforcement regime).

\(^{251}\) *Brown*, 131 S. Ct. at 2741.

\(^{252}\) *Massey*, supra note 16 at 427.

\(^{253}\) *Fox II*, 613 F.3d at 322-23 (citing 47 U.S.C. § 503(b)(2)(C)(ii) (2006)).

\(^{254}\) Id. at 322 (noting that the FCC’s changed interpretation means that “each licensee’s broadcast of the same program [is] a separate violation” subject to the statutory maximum fine).

\(^{255}\) Id. at 323 (citing 47 U.S.C. § 503(b)(2)(C)(ii)).

The threat of such huge fines creates a chilling effect on speakers and stifles the protected speech they must avoid. According to broadcasters, the “chilling effect” is a reality.\textsuperscript{257} In combination, the vagueness of the FCC’s indecency policy, its discretionary, context-based enforcement approach, and the potential for such crushing fines so disproportionate to any harm caused creates the perfect storm for government censorship and arbitrary enforcement. The idea that government can punish ideas of which it disapproves is the antithesis of the First Amendment free speech guarantees and the Fifth Amendment due process rights. It is of no moment that the censorship is of low-value speech in the context of broadcast media.

\textbf{V. Conclusion}

A majority of Americans polled are offended by sex, violence, and profanity on television.\textsuperscript{258} Like it or not, however, the four-letter words repeated ad nauseam in George Carlin’s \textit{Dirty Words} monologue have become part of the American vernacular. The widespread use of these dirty little words in everyday speech does not comport with a government agency’s scheme to restrict the use of an isolated “slip of the tongue” in broadcast media, particularly when its prevailing justification in this digital age is the pervasiveness of television and its accessibility to children. Even our most respected political leaders have been caught red-handed blurting out an isolated curse word on live television.\textsuperscript{259} With these undesirable words infiltrating our computer screens,\textsuperscript{260} text messages,\textsuperscript{261}...
and even the floor of a House of Congress, it is more likely that a young child will be exposed — perhaps multiple times — to the very speech that the FCC attempts to restrict on television before even a single click of the remote control. Without its once-compelling justification for such restrictions on speech in broadcast media, the FCC’s fleeting expletive policy, and perhaps its entire indecency-enforcement regime, is at stake.

As posited above, the Roberts Court will likely strike down the FCC’s fleeting expletive policy on several grounds. First, the policy is vague, creating a disparity in enforcement and providing too much discretion to a governmental agency which has the power to trample over First Amendment rights. In addition, in accord with the Brown holding, the FCC’s asserted interest of harm to children will not suffice without proof of actual harm. This burden will be difficult to satisfy since the at-issue speech is so prevalent in everyday language and throughout other forms of media, both of which are easily accessible to children. Finally, the hefty fines issued by the FCC will chill the flow of free speech and the dissemination of ideas, the core First Amendment values. Without more, the FCC’s fleeting expletive policy is simply unable to survive the standard of scrutiny applied to broadcast media speech restrictions.

More significantly, although the courts have historically reviewed restrictions on First Amendment protected expression in the context of broadcast media under something akin to intermediate scrutiny, the justification for the distinction between broadcast media and other avenues no longer exists. While the Court may not reach this question, the FCC case brings the Court one step closer to revisiting its landmark decision in Pacifica. Upon reconsideration of Pacifica and the realization that the grounds for placing broadcast media in a unique category no longer exist, this Court, a staunch defender of the First Amendment, could make a ruling that would have sweeping ramifications for First Amendment jurisprudence. Indeed, this Court could extinguish the distinction created in Pacifica and require the government to survive strict scrutiny when attempting to restrict the content of protected speech, including indecency, in broadcast media.

262. See ‘A Big F — ing Deal,’ supra note 259.