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May 26, 2008

Indecent Speech on Broadcast Television: A Constitutional Challenge to the Government's Time-Channeling Provisions

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**Indecent Speech on Broadcast Television:
A Constitutional Challenge to the Government's Time-
Channeling Provisions**

Krista S. Jacobsen

Abstract

What is the correct level of scrutiny under which to evaluate the constitutionality of restrictions of indecent speech in broadcast television? The Supreme Court has never articulated the answer to this question. Since the mid-1970s, however, courts have seemingly afforded a lower-than-strict level of scrutiny to governmental restrictions of indecent speech in broadcast television.

The Federal Communications Commission (FCC) attempts to “time-channel” indecent content on television to the hours when children are unlikely to be in the audience. In 2006, the FCC announced that it was adopting a more aggressive approach to indecent speech on television. In the future, even single utterances of certain “presumptively profane” words between the hours of 6:00 A.M. and 10:00 P.M. would trigger fines. The Court of Appeals for the Second Circuit found the FCC’s new policy regarding “fleeting expletives” was arbitrary and capricious under the Administrative Procedures Act; the Supreme Court granted certiorari in the case. Thus, the time is ripe for the Court to consider the correct level of scrutiny under which to evaluate regulations of indecent speech on television.

This paper first considers what level of scrutiny the Court would likely use to evaluate the constitutionality of regulations of indecent speech in broadcast television. Based on an analysis of the Court’s broadcasting cases and recent cases concerning indecent speech in other media, the paper concludes strict scrutiny is the correct standard. The paper then applies strict scrutiny in considering whether, in light of technological advancements such as parental controls and the V-Chip, the government may constitutionally ban indecent speech from broadcast television during specific hours.

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1 Introduction

Is it constitutional for the government to ban indecent speech from broadcast television during specific times of the day? The answer to that question turns on the level of scrutiny courts should use when evaluating regulations of indecent speech in broadcast television. Traditionally, courts have reviewed such regulations using an undefined, but seemingly less-than-strict, level of scrutiny. In 1978, in particular, the Supreme Court found in *Federal Communications Commission v. Pacifica Foundation* that the government can “time-channel” indecent speech to nighttime hours because of the “ease with which children may obtain access to broadcast material.”¹ But technology has changed significantly since *Pacifica* was decided in 1978, and tools such as the V-Chip now allow parents, at all hours of the day and night, to prevent their children from accessing content the parents believe is objectionable. This paper investigates whether, in light of developments in technology and structural changes to the broadcast and video marketplace, courts should review regulations of indecent speech in broadcasting as they review similar regulations of indecent speech in other media. In other words, should governmental regulations of indecent speech in broadcast television be required to meet strict scrutiny review? If so, are time-channeling provisions constitutional?

Section 73.3999 of Title 47 of the Code of Federal Regulations forbids the broadcasting of indecent language on both television and by radio between the hours of 6:00 A.M. and 10:00 P.M.² What constitutes “indecent” language, however, is not entirely clear. Congress did not define the term, so the Federal Communications Commission (FCC) must do so. Today, the FCC defines indecent speech as “language that, in context, depicts or describes sexual or

¹ *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978).

² 47 C.F.R. § 73.3999 (West 2006).

excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.”³

Although Congress provided the FCC with several tools to respond to violations of section 73.3999, including the power to revoke a broadcaster’s license,⁴ deny a license renewal,⁵ or renew a license for a shorter term,⁶ the FCC’s sanction of choice today is the fine.⁷ In 2006, Congress passed legislation that increased the maximum fine amount the FCC may assess after determining a licensee has broadcast obscene, indecent, or profane language.⁸ Now the FCC can fine each licensee up to “\$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.”⁹

Ouch.

The Supreme Court has held that indecent speech is protected by the First Amendment of the United States Constitution.¹⁰ Yet much has been made of the “different” and “intrusive” nature of over-the-air signals, and because broadcast licensees are required to operate in the “public interest,” broadcast speech traditionally has been subjected to significantly more regulation than has speech in other media.¹¹ But is it constitutional to ban indecent speech from the airwaves during specific times of the day?

³ *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the Golden Globe Awards Program*, 19 F.C.C.R. 4975, 4977 (citing *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705 (1987)).

⁴ 47 U.S.C. § 312(a) (West 2001).

⁵ 47 U.S.C. § 307 (West 2001).

⁶ 47 U.S.C. § 308 (West 2001).

⁷ *See, e.g., In re Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (2001).

⁸ 47 U.S.C. § 503 (West Supp. 2007).

⁹ 47 U.S.C. § 503(b)(2)(C).

¹⁰ *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

¹¹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

This paper considers the constitutionality of section 73.3999, commonly referred to as the “safe harbor” provision for indecent broadcasts, as applied to television broadcasts, in light of today’s technology, such as the V-Chip and parental controls.¹²

2 The Broadcast Regulatory System and the Public Interest Standard

In the early days of radio, which was developed decades before television was developed, the broadcast spectrum was largely uncontrolled, and anyone with a message to convey and access to the appropriate transmission equipment could broadcast his or her message at will.¹³ During this period, the spectrum was, in a sense, the ultimate public forum because it enabled speakers to reach many more listeners than they could reach by, for example, speaking in a public park or on a street corner. In time, however, the number of broadcasters grew too large for the allocated spectrum to accommodate, and that portion of the spectrum became virtually useless “because of the cacophony of competing voices, none of which could be clearly and predictably heard.”¹⁴ The spectrum was then recognized as a scarce resource, the use of which needed to be managed by a single entity to preserve its value.¹⁵ Consequently, between 1922 and 1925, at a series of conferences, “it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest.”¹⁶ Thus, the government withdrew the management of the radio spectrum from the private sector and established the public interest standard, now codified in section 307(a) of Title

¹² The paper considers the constitutionality of the partial ban of indecent language in section 73.3999 rather than the total ban of 47 U.S.C. section 1464 because if section 73.3999 is unconstitutional, by necessity section 1464 is also unconstitutional. It does not follow, however, that if section 73.3999 is constitutional, section 1464 is also constitutional.

¹³ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969).

¹⁴ *Id.* at 376.

¹⁵ *Id.*

¹⁶ *Id.* at 375 n.4.

47 of the United States Code, as the means by which the government would determine those allowed to use the spectrum.¹⁷

Although the public interest standard pervades broadcasting regulation,¹⁸ Congress did not define what constitutes the “public interest.” The Federal Radio Commission, which was the FCC’s predecessor, interpreted the standard as requiring it to grant licenses “to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals.”¹⁹ Consequently, “a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of its public issues may be broadcast.”²⁰

The Supreme Court later provided its view of the “public interest” standard in *National Broadcasting Co. v. United States*, stating, “[t]he public interest to be served under the Communications Act is . . . the interest of the listening public in the larger and more effective

¹⁷ 47 U.S.C. § 307(a) (“The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.”).

¹⁸ See, e.g., 47 U.S.C. § 303 (West 2001) (stating, in part, that “[e]xcept as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall (a) Classify radio stations; (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class; (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate; (d) Determine the location of classes of stations or individual stations; (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein; (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with; (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; (h) Have authority to establish areas or zones to be served by any station; (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting; (j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable; . . . (y) Have authority to allocate electromagnetic spectrum so as to provide flexibility of use, if (1) such use is consistent with international agreements to which the United States is a party; and (2) the Commission finds, after notice and an opportunity for public comment, that (A) such an allocation would be in the public interest. . .”).

¹⁹ Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1115 (1993) (quoting *Great Lakes Broad. Co.*, 3 F.R.C. Ann. Rep. 32 (1929)).

²⁰ *Id.*

use of radio.”²¹ The Court noted that the FCC does not adequately serve the public interest simply by allocating frequency bands to licensees and prescribing other technical requirements to ensure their transmissions do not interfere, for “[i]f the criterion of public interest were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station?”²² Instead, because “[t]he facilities of radio are limited and therefore precious,” the FCC must ensure they are not used wastefully and thus must not only “supervise” transmissions over the radio spectrum, but also determine “the composition of the traffic.”²³ The Court observed that governmental regulation of radio, and the application of the public interest standard, requires “comparative considerations as to the services to be rendered.”²⁴ Thus, the Court concluded, in carrying out the regulation of the spectrum in the public interest, the FCC has a duty to ensure each licensee provides “the best practicable service to the community reached by his broadcasts.”²⁵

3 The Regulation of Indecent Speech in Broadcasting

The broadcasting of indecent speech is made a crime in section 1464 of Title 18 of the United States Code, 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.”²⁶ Congress defined the term “radio communication” as “the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding,

²¹ *Nat'l Broad. Co., Inc. v United States*, 391 U.S. 190, 216 (1943).

²² *Id.* at 215, 216-17.

²³ *Id.* at 216-17.

²⁴ *Id.* at 217.

²⁵ *Id.* at 216.

²⁶ 18 U.S.C. § 1464 (West 2000).

and delivery of communications) incidental to such transmission,”²⁷ which includes television broadcasts. Congress did not define the term “indecent,” however, which leaves the FCC in the position of having to determine what is indecent.

Originally, the FCC focused on particular words when it determined whether a broadcast was indecent. The case of radio station WUHY-FM is illustrative. At 10:00 P.M. on January 4, 1970, a non-commercial, educational radio station in Philadelphia broadcast a pre-recorded interview with Jerry Garcia, who was characterized in the FCC’s ruling as “leader and member of ‘The Grateful Dead,’ a California rock and roll musical group.”²⁸ During the interview, Garcia used the words “fuck” and “shit” as adjectives, as introductory expletives, and as substitutes for other words.²⁹ Interestingly, neither the FCC nor the licensee received a single complaint about the broadcast of the Garcia interview, but the FCC had received complaints before about WUHY broadcasts during that particular time period and happened to be monitoring the station that night.³⁰ The FCC found that the speech involved had “no redeeming social value” because “it conveys no thought to begin some speech with ‘s-t, man...’, or to use ‘f---g’ as an adjective throughout the speech.”³¹ Relying on the Supreme Court’s definition of “obscenity” from *Miller v. California*, the FCC defined “indecent” speech in broadcasting as speech that is “patently offensive by contemporary community standards and utterly without redeeming social value.”³² Applying this definition, the Commission found the speech was “patently offensive by contemporary community standards, with very serious consequences to

²⁷ 47 U.S.C. § 153(33) (West 2001).

²⁸ *In re WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d 408, 408 (1970).

²⁹ *Id.* (quoting examples, including, “I must answer the phone 900 fuckin’ times a day, man,” “that kind of shit,” and “Shit. I gotta get down there, man.”).

³⁰ *Id.* at 415. As Commissioner Cox observed, “far as I can tell, my colleagues are the only people who have encountered this program who are greatly disturbed by it.”

³¹ *Id.* at 409.

³² *Id.* at 412.

the ‘public interest in the larger and more effective use of radio.’”³³ After stating it had the “duty to act to prevent the widespread use on broadcast outlets of such expressions,” the FCC fined the licensee a nominal \$100 and invited the licensee to seek court review of its ruling so that the correct standard could be determined definitively.³⁴ But the licensee simply paid the fine.

In 1975, after noting that the “intrusive nature” of broadcasting makes radio easily accessible to children, the FCC announced in its *Pacifica* ruling that it was revising its definition of indecency.³⁵ Acknowledging that it could not constitutionally prohibit indecent speech from the airwaves, the FCC stated it believed indecent speech should be regulated in the same way that nuisances are regulated, namely by “channeling” behavior rather than prohibiting it.³⁶ The Commission concluded that the concept of “indecency” is “intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”³⁷ Thus, although in 1970 the FCC had observed that “[i]t would markedly disserve the public interest were the airwaves restricted only to inoffensive, bland material,”³⁸ in 1975 the FCC stated that when children were likely to be in the audience, indecent language was inappropriate even if it had literary, artistic, political, or scientific value.³⁹ The Commission went on to say that at times when children are unlikely to be in the audience, such as during the late evening hours, it would still consider material under the same definition of “indecent,” but in

³³ *Id.* at 409.

³⁴ *Id.* at 413.

³⁵ *In re A Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 96, 97 (1975).

³⁶ *Id.* at 97.

³⁷ *Id.*

³⁸ *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d at 409.

³⁹ *Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94 at 97.

determining whether section 1464 had been violated, the FCC “would also consider whether the material has serious literary, artistic, political or scientific value.”⁴⁰

Today, the FCC defines indecent speech as “language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.”⁴¹ The “channeling” of indecent broadcasts to certain hours is captured in section 73.3999 of Title 47 of the Code of Federal Regulations, which mandates that “[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”⁴²

The FCC is obligated to enforce the prohibitions against indecent speech under the requirement that it regulate to serve the public interest.⁴³ Congress has provided the FCC with several tools to respond to violations of section 1464 and section 73.3999, including the power to revoke a station’s license,⁴⁴ issue a cease and desist order,⁴⁵ impose a fine,⁴⁶ deny a license renewal,⁴⁷ or grant a license renewal for a shorter period than requested.⁴⁸ In recent years, the FCC has aggressively enforced section 1464 and section 73.3999, primarily by imposing fines.⁴⁹

Recently, following legislation that increased the maximum fine for incidents of indecent broadcasting,⁵⁰ the Commission has imposed significant fines for the broadcast of indecent

⁴⁰ *Id.* at 98.

⁴¹ *Complaints Against Various Broad. Licensees Regarding Their Airing of the Golden Globe Awards Program*, 19 F.C.C.R. at 4977 (citing *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705 (1987)).

⁴² 47 C.F.R. § 73.3999.

⁴³ 47 U.S.C. § 303(r) (West 2001).

⁴⁴ 47 U.S.C. § 312(a).

⁴⁵ 47 U.S.C. § 312(b).

⁴⁶ 47 U.S.C. § 503(b)(1)(E).

⁴⁷ 47 U.S.C. § 307.

⁴⁸ 47 U.S.C. § 308.

⁴⁹ *See, e.g., In re Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999 (2001).

⁵⁰ 47 U.S.C. § 503(b)(2)(C).

speech.⁵¹ In 2006, the Commission issued a statement addressing “increasing public unease with the nature of broadcast material” and the lack of certainty among broadcasters about the Commission’s indecency and profanity standards.⁵² In the statement, the FCC fined several licensees but refrained from fining others. For example, the Commission fined a licensee \$32,500 – the maximum fine allowed by statute – for broadcasting an episode of the Fernando Hidalgo Show in Miami on October 19, 2004, at 7:00 P.M. local time.⁵³ In the episode, a female guest appears in “an open-front dress, with her nipples covered, but her breasts otherwise fully exposed. As she makes her entrance, she pirouettes in front of the audience, then shakes her breasts towards the cameras. When she turns to face the host, he briefly stares at her breasts, then mugs for the camera.”⁵⁴ Although the licensee argued that the material was not indecent because it was a comedy routine and not shocking or titillating, the FCC found it indecent because it depicted “sexual organs – specifically an adult woman’s breasts,” and because it “dwelled upon and shocked, pandered to, and titillated the audience.”⁵⁵

In the same order, the FCC also fined a licensee \$27,500 – the maximum statutory fine at the time of the broadcast – for airing an episode of “The Surreal Life 2.”⁵⁶ The episode featured Ron Jeremy, “a veteran actor in pornographic movies,” who held a pool party for about twenty of his friends in the “pornographic movie industry.”⁵⁷ During a ten-minute sequence, the episode showed

approximately 20 pixilated views of various female guests’ nude breasts and, in one case, a female guest’s entire nude body. In addition, there [were] numerous other examples of sexual images and innuendo, including two brief, pixilated

⁵¹ See, e.g., *In re Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 2664 (2006).

⁵² *Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. at 2665.

⁵³ *Id.* at 2676.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2676, 2677.

⁵⁶ *Id.* at 2671.

⁵⁷ *Id.*

scenes in which Mr. Jeremy touches or kisses a female guest's bare breast; a scene in which Andy Dick, another guest at the party, places his mouth on the top portion of a female cast member's breast and makes a comic sound, and the female cast member explains that they are just friends; another scene in which Andy Dick kisses a female guest's pixilated bare breast and spanks her buttocks, stating jestingly that she should go to her room and he'll join her there shortly; a scene where a female guest appears to sexually proposition a male cast member; and a scene in which another female cast member suggests that the party attendees play a game of strip truth or dare to get naked, saying to Ron Jeremy, [c]ome on porn star, everyone knows about your big [bleep], though I haven't seen it.⁵⁸

The FCC found the “several pixilated views of nude breasts and a nude body” and the sexual images and innuendo to be indecent, in part because a child in the audience could “easily discern that nude or partially nude adults [were] attending a party and participating in, or soliciting participation in, sexual activities.”⁵⁹ Thus, because the material was “explicit and graphic, [was] dwelled upon, and [was] presented in a manner to titillate and shock viewers,” the Commission concluded it was indecent and fined the licensee the maximum amount.

Interestingly, however, the FCC chose not to fine a licensee who aired the 2005 Academy Awards.⁶⁰ The program featured a “video montage in which a male actor was naked from the waist up, standing in the background, [while a female actor] was apparently eating a sausage or other item, but it appeared to be superimposed and gave the appearance of her performing oral sex on the man.”⁶¹ The Commission found that the montage lasted only a “fraction of a second,” did not “actually depict sexual organs or activities,” and only used “superimposed images to allude to oral sex.”⁶² Therefore, the “visual allusion, in context, [was] not shocking or titillating, and in any event, [was] simply not explicit and graphic enough to be patently offensive as

⁵⁸ *Id.*

⁵⁹ *Id.* at 2671-72.

⁶⁰ *Id.* at 2715.

⁶¹ *Id.* at 2714.

⁶² *Id.* at 2715.

measured by contemporary community standards for the broadcast medium,” and thus was not indecent.⁶³

The FCC also refrained from fining a station for airing the 2002 Billboard Music Awards, during which Cher said, “People have been telling me I’m on the way out every year, right? So fuck ‘em.”⁶⁴ The FCC found the word “fuck” inherently has a sexual connotation and is indecent,⁶⁵ but because prior to that order single utterances of the words “fuck” and “shit” were not punished, the Commission did not fine the licensee.⁶⁶ It warned, however, that in the future, single utterances of certain “presumptively profane” words would trigger fines.⁶⁷

It is difficult to understand why the FCC would consider indecent a single utterance of the word “shit” or “fuck” as an expletive, but not a montage suggesting oral sex, regardless of how briefly. It is likewise difficult to understand how material that includes pixelated female bodies is indecent, but advertisements for erectile dysfunction remedies apparently are not. What is clear, however, is that the FCC has begun aggressively fining television broadcasters for airing material it considers “indecent” in violation of section 73.3999. Thus, whether section 73.3999 is constitutional is a significant issue.

4 What is the Appropriate Level of Scrutiny to Under Which to Evaluate the Constitutionality of Section 73.3999?

The Supreme Court has never articulated a level of scrutiny under which speech regulations in broadcasting should be evaluated. In *Pacifica* the Court applied something less

⁶³ *Id.*

⁶⁴ *Id.* at 2690.

⁶⁵ *Id.* at 2691.

⁶⁶ *Id.* at 2692.

⁶⁷ *Id.* at 2695. The Court of Appeals for the Second Circuit later vacated this part of the order, holding that the FCC’s new policy regarding “fleeting expletives” was arbitrary and capricious under the Administrative Procedures Act. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 447 (2nd Cir. 2007). The Supreme Court recently granted *certiorari* in the case. See *FCC v. Fox Television Stations, Inc.*, 128 S.Ct. 1647 (2008).

than strict scrutiny based on the ease with which children could access radio content.⁶⁸ Given the evolution of free speech jurisprudence since 1978 and the Court's willingness to articulate levels of scrutiny for speech regulations in other media, including cable television and the Internet, the Court today would probably articulate a level of scrutiny for broadcast television. What level would the Court likely use?

Three factors influence the appropriate level of scrutiny under which to evaluate section 73.3999. The first consideration is whether the restriction is content-based or content-neutral. In general, content-based restrictions must survive strict scrutiny, whereas content-neutral restrictions must only meet intermediate scrutiny.⁶⁹ Even if a restriction is content-based, however, the appropriate level of scrutiny may be something lower than strict scrutiny if the speech being regulated is unprotected by the First Amendment, in which case the government may regulate the speech more extensively.⁷⁰ If the speech is protected by the First Amendment, however, the next issue is whether the "default" level of scrutiny – that for content-based restrictions – should be reduced because of other factors, such as the nature of the broadcast medium.

4.1 Is Section 73.3999 a Content-neutral or Content-based Restriction on Speech?

The level of scrutiny appropriate for Section 73.3999 depends to a large extent on whether the regulation is a content-neutral or content-based restriction of speech. Content-neutral restrictions limit the availability of a particular means of communication for speaking, but by definition they leave speakers alternative means of expression.⁷¹ These sorts of restrictions are thought to distort public debate to a lesser extent than restrictions that prohibit the

⁶⁸ *Pacifica*, 438 U.S. at 750.

⁶⁹ *Turner*, 512 U.S. at 642.

⁷⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

⁷¹ Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 199-200 (1983).

expression of particular viewpoints, ideas, or information by any and all means.⁷² Although content-neutral regulations may have disparate impacts on the abilities of different speakers to communicate – for example, a law banning the distribution of leaflets in public parks would affect parties who use leaflets to communicate more than it would affect parties who use billboards – these “content-differential” effects are considered to be incidental to content-neutral restrictions, and they are not as worrisome to courts as are content-based restrictions.⁷³ Thus, courts apply an intermediate level of scrutiny, which was first articulated in *United States v. O’Brien*: a content-neutral speech regulation will be sustained if it “furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁷⁴

Content-based restrictions, on the other hand, restrict speech based on its message. The Supreme Court has said that “[c]ontent-based regulations are presumptively invalid”⁷⁵ because government regulations of the content of speech are “more likely to interfere with the free exchange of ideas than to encourage it.”⁷⁶ Consequently, “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”⁷⁷ The concern is that government restrictions stifling speech because of its content or requiring speakers to disseminate messages favored by the government contravene the bedrock First Amendment principle that “each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration,

⁷² *Id.* at 200.

⁷³ *Id.* at 236.

⁷⁴ *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

⁷⁵ *R.A.V.*, 505 U.S. at 382 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

⁷⁶ *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

⁷⁷ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

and adherence. Our political system and cultural life rest upon this ideal.”⁷⁸ Thus, when determining the constitutionality of a governmental restriction on speech, the Supreme Court applies the “most exacting scrutiny” to regulations that “suppress, disadvantage, or impose differential burdens upon speech because of its content,” and this standard of review is “subject only to narrow and well-understood exceptions.”⁷⁹

In 2000, the Court considered a provision similar to section 73.3999 in *United States v. Playboy Entertainment Group, Inc.* At issue in the case was section 505 of the Telecommunications Act of 1996, which was enacted to address the perceived problem of “signal bleed” from imperfectly-scrambled sexually explicit channels.⁸⁰ Signal bleed allowed viewers tuned to scrambled channels to discern, at times, pictures or audio.⁸¹ To protect children from viewing or hearing sexually explicit material, the legislature enacted section 561 of Title 47 of the United States Code, which required cable operators either to scramble perfectly their sexually explicit channels, and thus eliminate signal bleed entirely, or to limit sexually explicit programming on those channels to the hours between 10:00 P.M and 6:00 A.M.⁸² Erring on the side of caution, most operators chose the latter option.⁸³

In considering whether the regulation was content-based or content-neutral, the Court noted that the objective of the regulation was to protect children from the effects of viewing or

⁷⁸ *Turner*, 512 U.S. at 641.

⁷⁹ *Id.* at 641-42.

⁸⁰ *Playboy*, 529 U.S. at 807.

⁸¹ *Id.*

⁸² Section (a) of 47 U.S.C. § 561 (1994) required that “[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.” Section (b) required that “[u]ntil a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.” As it had in considering indecency in broadcast television, the FCC determined that children are likely viewers between the hours of 6:00 A.M. and 10:00 P.M. and codified this determination in 47 C.F.R. § 76.227 (1999).

⁸³ *Playboy*, 529 U.S. at 809.

hearing sexually explicit subject matter, and therefore that it was not “justified without reference to the content of the regulated speech,”⁸⁴ as content-neutral regulations must be. Furthermore, the Court found, the regulation focused “only on the content of the speech and the direct impact that speech has on its listeners,”⁸⁵ which “is the essence of content-based regulation.”⁸⁶

Section 73.3999 requires that “[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”⁸⁷ Under *Playboy*, therefore, section 73.3999 is also content-based because, like the regulation at issue in *Playboy*, it focuses only on the content of the speech – that speech which is indecent – and was enacted to protect children from encountering indecent material. The “default” level of scrutiny for content-based regulations is strict scrutiny.⁸⁸ Therefore, based solely on the conclusion that section 73.3999 is content-based, strict scrutiny would ordinarily be the appropriate level of scrutiny under which to evaluate the constitutionality of the regulation.

4.2 Is the Regulated Speech Unprotected by the First Amendment and Thus Subject to Less-Than-Strict Scrutiny?

Another factor that influences the determination of the correct level of scrutiny under which to evaluate section 73.3999 is whether the speech being regulated – indecency – is unprotected by the First Amendment. The government can regulate unprotected speech more extensively than it can regulate protected speech, which translates to a lower level of scrutiny for regulations of unprotected speech.⁸⁹

⁸⁴ *Id.* at 811 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (quoting *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984)), internal quotations omitted).

⁸⁵ *Id.* at 811-12 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O’Connor, J.)).

⁸⁶ *Id.* at 812.

⁸⁷ 47 C.F.R. § 73.3999.

⁸⁸ *Playboy*, 529 U.S. at 814.

⁸⁹ *R.A.V.*, 505 U.S. at 383.

The Supreme Court has held that some classes of speech are protected to a lesser extent by the First Amendment than are other classes. The Court first articulated this theory in dictum in *Chaplinsky v. New Hampshire*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁹⁰

Although the *Chaplinsky* dictum suggests that several categories of speech are entirely unprotected by the First Amendment, obscenity is the only class the Court has explicitly held is unprotected.⁹¹ Since *Chaplinsky*, the Court has not sustained a single fighting words conviction.⁹² Furthermore, the Court has consistently protected indecent speech under the First Amendment. In *FCC v. Pacifica Foundation*, for example, the plurality opinion conceded that even words that “ordinarily lack literary, political, or scientific value” are not “entirely outside the protection of the First Amendment.”⁹³ Likewise, in *Reno v. ACLU*, the Court emphasized that it has “consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”⁹⁴ In *Denver Area Educational Telecommunications Consortium, Inc.*

⁹⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (footnote omitted).

⁹¹ The seminal case in obscenity law is *Roth v. United States*, 354 U.S. 476, 484-85 (1957), the holding of which was reaffirmed in *Miller v. California*, 413 U.S. 15, 23 (1972) (“This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”). It is important to note, however, that although the Supreme Court has said at times that some speech, including obscenity, is “not within the area of constitutionally protected speech,” the Court clarified in *R.A.V. v. City of St. Paul* that such statements are not literally true and must be taken in context. In particular, the Court said the reason certain categories of speech can be regulated consistently with the First Amendment is “because of their constitutionally proscribable content (obscenity, defamation, etc.) – not [because] they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.” *R.A.V.*, 505 U.S. at 383-84 (emphasis in original).

⁹² Erwin Chemerinsky, *Constitutional Law Principles and Policies*, 979 (2nd ed., Aspen Publishers 2002).

⁹³ *Pacifica*, 438 U.S. at 746.

⁹⁴ *ACLU*, 521 U.S. at 874-75.

v. FCC, the Court noted that indecent speech has traditionally been afforded at least some level of First Amendment protection, even though the Justices have differed in their views of whether full protection is warranted.⁹⁵ Thus, Supreme Court precedents indicate that indecent speech enjoys constitutional protection under the First Amendment. Consequently, content-based restrictions of indecent speech should, as a general rule, be reviewed under the same standard as non-indecent content-based restrictions. That standard is strict scrutiny.

4.3 Do Other Considerations Warrant Applying a Reduced Level of Scrutiny to Regulations of Broadcast Indecency?

Having determined that section 73.3999 is a content-based regulation of speech, and having confirmed that indecent speech is protected by the First Amendment, the appropriate level of scrutiny under which to evaluate the regulation turns on whether some other consideration justifies applying lower than strict scrutiny in the area of indecent broadcast speech. If not, section 73.3999 and all regulations of broadcast indecency should be scrutinized as closely by the courts as other content-based restrictions of speech.

In 1969, the Court announced that “[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁹⁶ The Court has since observed that it has tended to permit “more intrusive regulation of broadcast speakers than of speakers in other media” because of the “unique physical limitations of the broadcast medium.”⁹⁷ Unfortunately, however, the Court has not articulated what level of scrutiny it has applied when evaluating content-based regulations of over-the-air broadcast television. As a consequence, it is

⁹⁵ *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 755 (1996). *Accord Playboy*, 529 U.S. at 814 (2000).

⁹⁶ *Red Lion*, 395 U.S. at 386.

⁹⁷ *Turner*, 512 U.S. at 637.

not clear whether the “special treatment”⁹⁸ of broadcasting, particularly in the area of content-based restrictions, resulted because the Court applied strict scrutiny and found the surviving restrictions to be narrowly tailored to serve compelling governmental interests, or because the Court applied a lower level of scrutiny to content-based regulations of broadcast speech and found that the restrictions met this unarticulated, but less-than-strict, level of scrutiny. At least one circuit court has concluded that the strict scrutiny is the correct level of scrutiny for content-based regulations of broadcast speech,⁹⁹ and the FCC itself appears to believe strict scrutiny is the correct standard.¹⁰⁰ Nevertheless, it is the Court’s view that controls, and a brief examination of Supreme Court cases, both in broadcasting and other media, provides a basis for the conclusion that strict scrutiny is the appropriate level of scrutiny under which to review content-based regulations of speech in broadcasting.

In 1943, in *National Broadcasting Co., Inc. v. United States*, the Court considered whether the chain broadcasting regulations the FCC imposed on networks and radio stations were constitutional.¹⁰¹ The regulations addressed the practice of transmitting, simultaneously, identical programs on more than one connected station.¹⁰² Thus, the regulations were content-based regulations. The Court observed that although chain broadcasting provided benefits to both broadcasters and the listening public – for example, by increasing the size of the potential audience for programs, the practice facilitated the production of more expensive programs – the

⁹⁸ *Pacifica*, 438 U.S. at 750.

⁹⁹ *Action for Children’s Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (“In light of these differences, radio and television broadcasts may properly be subject to different – and often more restrictive – regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether [the regulation] survives that scrutiny must necessarily take into account the unique context of the broadcast medium.”).

¹⁰⁰ *Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. at 8000 (“[I]ndecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest.”).

¹⁰¹ *NBC*, 319 U.S. at 193-94.

¹⁰² *Id.* at 194.

FCC has a duty to ensure that “practices which adversely affect the ability of licensees to operate in the public interest are eliminated.”¹⁰³ The Court reviewed eight regulations promulgated by the FCC, and in each case it considered whether the network practice targeted by the FCC’s regulations served the public interest.¹⁰⁴ For example, in reviewing the FCC’s determination that exclusive affiliations of stations with specific networks prevented valuable content produced by other networks from being broadcast by willing licensees, the Court emphasized that licensees have a duty to operate in the public interest.¹⁰⁵ When a licensee cannot choose programming it has determined would serve its audience, the Court said, the licensee does not serve the public interest.¹⁰⁶ Likewise, the Court found that the contractual provisions discouraging affiliates from rejecting network programming did not serve the public interest because stations could not determine in advance whether a program would be in the public interest.¹⁰⁷ Therefore, by not being allowed to make the final decision of whether to broadcast a particular program, the licensee was not fulfilling its obligation to serve the public interest.¹⁰⁸

In upholding all eight regulations, the Court observed that the FCC’s chain broadcasting regulations represented “a particularization of the Commission’s conception of the public interest sought to be safeguarded by Congress in enacting the Communications Act of 1934.”¹⁰⁹ The Court specifically rejected the argument that the FCC could fulfill its duty to serve the public interest solely by allocating frequencies.¹¹⁰ In addition, the Court rejected the notion that the public interest standard was too broad to be enforceable or otherwise vague, observing that any attempt by Congress to itemize all powers of the FCC at the time the Communications Act was

¹⁰³ *Id.* at 198.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 199.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 204-05.

¹⁰⁸ *Id.* at 206.

¹⁰⁹ *Id.* at 218.

¹¹⁰ *Id.* at 215-16.

written would have been impossible or short-lived because of the rapid pace at which development in the radio field was progressing.¹¹¹

Thus, the Court relied heavily on the general concept of “the public interest” to uphold the regulations. Significantly, the Court did not question the validity of the public interest standard itself as a worthy enough governmental objective to justify the FCC’s regulations. Instead, the Court simply observed that serving the public interest is the foundation of the Communications Act.¹¹² The Court’s deference to the legislature is consistent with its general trend between 1937 and 1995 to defer to Congress’s judgment when Congress had acted under its commerce power.¹¹³ Furthermore, the opinion does not mention less restrictive alternatives to the promulgated regulations or whether the FCC had a responsibility to consider any such alternatives. Therefore, *NBC* would seem to suggest that the Court in 1943 applied what is known today as rational basis review, rather than some form of heightened scrutiny, to content-based regulations of broadcast speech.

In 1969, in *Red Lion Broadcasting Co., Inc. v. FCC*, the Court considered the constitutionality of an aspect of the so-called fairness doctrine, which required that licensees provide balanced coverage of issues of interest to the public.¹¹⁴ At issue in the case was a station’s refusal of a man’s request for free airtime to respond to a personal attack aired by the station.¹¹⁵ In affirming the FCC’s finding that the station had failed to meet the “personal attack” requirement of its fairness doctrine obligations, the Court noted that the public interest standard imposes on broadcasters a duty to devote adequate coverage to public issues.¹¹⁶ Furthermore, the

¹¹¹ *Id.* at 219-20.

¹¹² *Id.* at 215.

¹¹³ Chemerinsky, *supra* note 92, at 255.

¹¹⁴ *Red Lion*, 395 U.S. at 369.

¹¹⁵ *Id.* at 371-72.

¹¹⁶ *Id.* at 377.

coverage must be fair and reflect accurately the opposing views.¹¹⁷ The cost to present opposing views must be borne by the broadcaster if “sponsorship is unavailable,” and the broadcaster must obtain programming “at the licensee’s own initiative if available from no other source.”¹¹⁸ The Court stressed that “[e]very licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias.”¹¹⁹ Therefore, the Court concluded, it did not violate the First Amendment to require “a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.”¹²⁰

Thus, in *Red Lion*, the Court relied on a particular duty imposed by the more general public interest standard – the duty to discuss both sides of controversial issues – to determine the constitutionality of the challenged regulations.¹²¹ Again, however, the Court did not question the validity of the public interest standard as a justification for the broadcast regulation. Also, as was the case in *NBC*, the Court did not articulate the level of scrutiny it was applying in *Red Lion*. The opinion suggests, however, the Court was applying a higher level of scrutiny than that applied in *NBC*. For example, the Court did not rely on the amorphous and general “public interest” to uphold the regulations, instead considering a particular duty imposed by the requirement to operate in the public interest. One could read the *Red Lion* opinion as concluding that by fostering debate on public issues, which is one objective of the First Amendment itself, the fairness doctrine advanced a compelling governmental interest. One could also conclude

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 377-78.

¹¹⁹ *Id.* at 383.

¹²⁰ *Id.* at 389.

¹²¹ *Id.* at 380.

from the Court’s remarks about “elementary considerations of fairness”¹²² that the Court believed allowing a person attacked over a station to respond to that attack over that same station was a narrowly tailored means to advance the public interest of hearing both sides of an issue. The Court could have reached this conclusion by recognizing that broadcast signals potentially reach large audiences, and thus the most effective means by which a person attacked on the airwaves could defend himself or herself adequately, and thereby inform the public in a manner as adequate as the manner in which the opposing view had been disseminated, would be by responding directly through that same medium. Thus, although the Court did not explicitly apply strict scrutiny, its opinion is consistent with the application of strict scrutiny. Furthermore, had the Court applied strict scrutiny, its holding would almost certainly have been the same.

In more recent cases, the Court has relied on even narrower and more specific interests in assessing the constitutionality of content-based broadcasting regulations. In the area of broadcast indecency, the most cited case is *Federal Communications Commission v. Pacifica Foundation*, which produced only a plurality opinion.¹²³ The case concerned a radio station’s broadcast during a weekday afternoon of George Carlin’s twelve-minute “Filthy Words” monologue, which the FCC had found to be patently offensive.¹²⁴ In upholding the FCC’s ruling that the broadcast at issue was indecent, and that the FCC would have been justified in imposing sanctions on the station, the Court did not rely on the station’s general obligation to operate in the public interest.¹²⁵ Instead, the Court emphasized that “[p]atently offensive, indecent material presented 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

¹²² *Id.* at 384.

¹²³ *Pacifica*, 438 U.S. at 729.

¹²⁴ *Id.* at 729, 731.

¹²⁵ *Id.* at 748-49.

rights of an intruder.”¹²⁶ Additionally, the Court said “[t]he ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting.”¹²⁷ The Court thus relied on interests more specific than the general public interest in evaluating the FCC’s ruling. *Pacifica* thus suggests that a government assertion that a content-based regulation of broadcast speech serves the general “public interest” may not, by itself, be sufficient to justify content-based speech regulations.

As was the case in *Red Lion*, the Court did not articulate in *Pacifica* a level of scrutiny appropriate for regulations of indecent broadcasts. The issue in *Pacifica* was whether the FCC had erred in finding that the particular broadcast at issue was indecent, so the Court did not need to reach the broader issue of what level of scrutiny is appropriate to review regulations of indecent speech in broadcasting. Nevertheless, the opinion can be read consistently with the hypothesis that the Court would apply strict scrutiny to content-based regulations of indecent speech in broadcasting. For example, if a homeowner’s right to privacy in the home “plainly outweighs” a speaker’s First Amendment rights, the Court may have concluded that the government has a compelling interest to protect that privacy. Likewise, the Court could have determined that the government has a compelling interest to protect children from indecency.¹²⁸ Furthermore, given the state of technology in 1978, the Court could have determined that the only means by which the government could protect children from indecent broadcasts and to protect homeowners’ privacy interests was by allowing the FCC to channel indecent broadcasts to certain hours during which children were unlikely to be in the audience and to impose sanctions on those licensees who broadcast indecent material when children were in the

¹²⁶ *Id.* at 748.

¹²⁷ *Id.* at 750.

¹²⁸ After *Pacifica* was decided, the Court held that the government has a compelling interest to protect the physical and psychological well-being of minors. *See, e.g., Sable*, 492 U.S. at 126.

audience. Therefore, the plurality opinion in *Pacifica* is consistent with the application of strict scrutiny.

Recent cases considering the constitutionality of regulations of indecent speech over telephone lines, in cable television, and over the Internet lend support to the proposition that strict scrutiny is the correct level of scrutiny for content-based regulations in over-the-air broadcasting, and thus that the Court would likely apply strict scrutiny in evaluating a challenge to an indecency regulation such as section 73.3999. In *Sable Communications of California, Inc. v. FCC*, for example, the Court considered whether an outright ban of indecent interstate commercial telephone messages – commonly referred to as “dial-a-porn” – was constitutional.¹²⁹ In analyzing the regulation, the Court did not use the words “strict scrutiny,” but it stated that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”¹³⁰ This definition is a classic strict scrutiny definition. The Court found that the outright ban of indecent messages was not narrowly tailored to serve what it called the “legitimate interest in protecting children from exposure to indecent dial-a-porn messages.”¹³¹

In *Playboy*, the Court squarely confronted the appropriate level of scrutiny for regulations of indecent speech on cable television. The Court stated, “even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive means.” The Court went on to announce explicitly that strict scrutiny is the appropriate level of scrutiny for content-based regulations of speech – including indecent speech – that is protected by the First Amendment: “If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling

¹²⁹ *Sable*, 492 U.S. at 117-18.

¹³⁰ *Id.* at 127.

¹³¹ *Id.* at 126.

Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."¹³² Even though *Playboy* was a cable case, the strong language of opinion suggests that the Court would apply strict scrutiny to content-based regulations of broadcast speech, as well.

In *Reno v. ACLU*, which concerned the constitutionality of provisions of the Communications Decency Act (CDA) that banned indecent communications over the Internet to persons under eighteen, the Court did not explicitly state that it was applying strict scrutiny.¹³³ After noting that the CDA provisions imposed a "content-based blanket restriction on speech," however, the Court observed that its precedents "are fully consistent with the application of the most stringent review" of the challenged provisions.¹³⁴ Furthermore, because the regulations were content-based, it was inappropriate to analyze them as a form of time, place, or manner regulation.¹³⁵ The Court concluded that its precedents provided "no basis for qualifying the level of First Amendment scrutiny that should be applied" to content-based restrictions of Internet speech.¹³⁶

These cases – *Sable*, *Playboy*, and *Reno* – support the proposition that the Court would today likely apply strict scrutiny to assess the constitutionality of indecency regulation in over-the-air broadcast television. Indeed, the District of Columbia Circuit believes that strict scrutiny is now the appropriate standard under which to evaluate content-based regulations of broadcast speech.¹³⁷ Furthermore, in issuing guidance on its enforcement of section 1464, the FCC itself has observed that "indecent speech is protected by the First Amendment, and thus, the

¹³² *Playboy*, 539 U.S. at 813 (citing *Sable*, 492 U.S. 115).

¹³³ *ACLU*, 521 U.S. at 859-60.

¹³⁴ *Id.* at 868.

¹³⁵ *Id.*

¹³⁶ *Id.* at 870.

¹³⁷ *Action for Children's Television*, 58 F.3d at 660 ("While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether [the regulation] survives that scrutiny must necessarily take into account the unique context of the broadcast medium.").

government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest.”¹³⁸ Thus, the consensus today appears to be that even in broadcasting, strict scrutiny is the appropriate standard under which to review regulations of indecent speech.

5 Does Section 73.3999 Survive Strict Scrutiny?

Having determined that strict scrutiny would likely be the level of scrutiny applied by the Supreme Court today were it to consider the constitutionality of broadcast indecency regulations, section 73.3999 would survive if the Court found it narrowly tailored to advance a compelling interest.¹³⁹ Under strict scrutiny, the government bears the burden of demonstrating that other, plausible, less speech-restrictive means would be ineffective to advance the compelling objective, and thus that the regulation is the least restrictive available means.¹⁴⁰

5.1 Is Protecting Children from Indecent Broadcast Speech a Compelling Governmental Interest?

Although the FCC originally advanced four justifications for treating broadcast speech differently than speech in other media,¹⁴¹ it justified the channeling of indecent speech in broadcasting, which is embodied in section 73.3999, solely because of what it perceived as a need to protect children from exposure to indecent broadcasting.¹⁴² Because the FCC treats

¹³⁸ *Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. at 8000 (citing *Sable*, 492 U.S. at 126).

¹³⁹ *Playboy*, 529 U.S. at 813.

¹⁴⁰ *Id.* at 823.

¹⁴¹ *Citizen’s Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d at 98 (distinguishing radio from other media because “(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.”).

¹⁴² *Id.* at 97 (“In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. . . . [T]he most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear.”).

television in the same manner as radio,¹⁴³ an issue in evaluating the constitutionality of section 73.3999 is whether the protection of children from indecent speech on over-the-air television is a compelling interest today.

The Court stated in *Turner* that “[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’”¹⁴⁴ Instead, the government must show that a problem actually exists, because “‘a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.’”¹⁴⁵ Thus, the government “‘must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.’”¹⁴⁶ In *Playboy*, the Court reiterated that when the government regulates to solve a problem, it must “‘present more than anecdote and supposition” to show that the problem it is attempting to solve actually exists.”¹⁴⁷ Thus, before determining whether the government has a compelling interest to protect children from harms caused by exposure to indecent television broadcasts, it is first necessary to determine whether exposure to indecent speech on television harms children in some way.

5.1.1 Does Exposure to Indecent Television Cause Real Harm to Children?

It is perhaps an understatement to say there is no consensus that exposure to indecency on television harms children. The 1995 District of Columbia Circuit case of *Action for Children’s Television v. FCC* (“*ACT III*”) illustrates the sort of debate this issue raises. *ACT III* concerned an indecency time-channeling regulation similar to that in section 73.3999, and one issue in the case was whether a provision that prohibited indecent broadcasts on non-public radio and

¹⁴³ *Indus. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. at 7999.

¹⁴⁴ *Turner*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

¹⁴⁵ *Id.* (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977)).

¹⁴⁶ *Id.*

¹⁴⁷ *Playboy*, 539 U.S. at 822.

television stations until midnight was constitutional, given that another provision allowed public radio and television stations to broadcast indecency starting at 10:00 P.M.¹⁴⁸ Although the court found this disparate regulation of public and non-public stations to violate the First Amendment, it upheld the time channeling of indecent broadcasting, finding that the government has “a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts.”¹⁴⁹ The court did not require concrete evidence that indecent material on television in fact harms children, asserting instead that the government’s interest in protecting children is not limited to protecting them from “clinically measurable injury.”¹⁵⁰ The court was satisfied with the legislative findings Congress made prior to enacting the regulations, observing that “Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity.”¹⁵¹ Noting that the Supreme Court has said society has an interest in both the health and quality of its youth, and observing that many states restrict minors’ access to materials that are not obscene by adult standards, the court concluded that the government has “an independent and compelling interest in preventing minors from being exposed to indecent broadcasts.”¹⁵²

The court’s willingness to accept general assertions that exposure to indecent material harms children seems at odds with the Supreme Court’s admonition in *Turner* that although “Congress’ predictive judgments are entitled to substantial deference,” when First Amendment rights are implicated the Court has a responsibility to ensure that “in formulating its judgments,

¹⁴⁸ *Action for Children’s Television*, 58 F.3d at 658.

¹⁴⁹ *Id.* at 656.

¹⁵⁰ *Id.* at 661.

¹⁵¹ *Id.* at 662.

¹⁵² *Id.* at 663.

Congress has drawn reasonable inferences based on substantial evidence.”¹⁵³ In *ACT III*, no substantial evidence had been gathered. As Chief Judge Edwards noted in dissent, although it is “easy to assume that there must be ill effects from exposing children, and especially young ones, to indecent material,” no concrete ill effects have been found.¹⁵⁴ Chief Judge Edwards noted that of the eight articles cited by Congress to support the legislation at issue, five dealt with violence and not indecency, and although the other three addressed sexual content, they did not account for any harm to children.¹⁵⁵ Chief Judge Edwards concluded that “[t]here simply is no evidence that indecent broadcasts harm children, the absence of which stands in striking contrast [] to the wealth of research conducted on the harmful effects of televised violence.”¹⁵⁶ Chief Judge Edwards thus suggested that Congress’s failure to act to prevent *proven* harms to children caused by violent programming undermined its argument that protection of children motivated its indecency regulation.

Chief Judge Edwards also observed that even though “cable [television] exhibits more and worse indecency than does broadcast [television],” the government had not imposed a similar ban on indecent material on cable.¹⁵⁷ The Chief Judge argued the safe harbor hours “could not withstand constitutional scrutiny if applied against *cable* operators.”¹⁵⁸ He then pointed out that the government’s disparate treatment of the two media, both of which are pervasive in American homes, undermines its argument that exposure to indecent material harms children to the extent that government intrusion is necessary: “*If* exposure to ‘indecency’ really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bands of indecency on *broadcasters*, while simultaneously allowing a virtual free hand for

¹⁵³ *Turner*, 512 U.S. at 666.

¹⁵⁴ *Action for Children’s Television*, 58 F.3d at 680 (Edwards, C.J., dissenting).

¹⁵⁵ *Id.* at 681-82 (Edwards, C.J., dissenting).

¹⁵⁶ *Id.* at 671, 682 (Edwards, C.J., dissenting).

¹⁵⁷ *Id.* at 671-72 (Edwards, C.J., dissenting).

¹⁵⁸ *Id.* at 672 (Edwards, C.J., dissenting, emphasis in original).

the real culprits – *cable operators*.”¹⁵⁹ In the absence of evidence that exposure to indecent television actually harms children, concluded Chief Judge Edwards, the government is not allowed to “tell parents what speech their children should and should not hear.”¹⁶⁰

As the debate in *ACT III* indicates, it is by no means settled that exposure to indecent broadcasting in fact harms children. If the harm is real, however, the next step of the inquiry into the constitutionality of section 73.3999 is to determine whether the government has a compelling interest in preventing that harm.

5.1.2 Does the Government Have a Compelling Interest in Protecting Children from Harm Caused by Indecent Speech in Over-the-air Television?

Many cases establish that the government generally has a compelling interest in protecting children.¹⁶¹ Important to the analysis of the constitutionality of section 73.3999, however, is the relationship between the government’s interest in protecting children and parents’ rights to raise their children as they wish. In particular, when the views of the government and the parents conflict, which party’s interest should prevail? The determination of whether a government regulation supports or preempts parents’ decisions is important to the assessment whether the government’s interest is likely to be considered “compelling.” A regulation that preempts parental discretion in the absence of evidence of harm to children is less likely to be compelling than a regulation that augments or supports parents in their childrearing role.

¹⁵⁹ *Id.* at 671, 672 (Edwards, C.J., dissenting, emphasis in original).

¹⁶⁰ *Id.* at 679 (Edwards, C.J., dissenting).

¹⁶¹ *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (stating it is permissible for a state to determine that, “at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees”); *Sable*, 492 U.S. at 126 (recognizing “there is a compelling interest in protecting the physical and psychological well-being of minors”); *Pacifica*, 438 U.S. at 767 (dissent of Brennan, J.) (observing that “the government unquestionably has a special interest in the well-being of children”); *ACLU*, 521 U.S. at 863 (noting that “the Government generally has a compelling interest in protecting minors from ‘indecent’ and ‘patently offensive’ speech”).

The Supreme Court has consistently recognized that parents have a “primary role . . . in the upbringing of their children,”¹⁶² and that “parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”¹⁶³ Government regulations that have an impact on parents’ authority in childrearing can either support or preempt parental discretion. The general rule is that the government may preempt parents’ decisions only when children are harmed as a result of those decisions.¹⁶⁴

In *Wisconsin v. Yoder*, the Supreme Court considered the relative interests of parents and the government in childrearing when parents wish to educate their children differently from how the government believes the children should be educated.¹⁶⁵ Concluding that the parents’ rights outweigh those of the government in certain areas, the Court recognized that “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.”¹⁶⁶ The Court noted that the case would have been different had the physical or mental health of the child been harmed: “the power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”¹⁶⁷ Thus, the Court recognized that in certain areas of childrearing, parental discretion is paramount, unless the parents’ decisions will harm the child or cause “significant social burdens.”

Some government regulations can support parental decisions. In *Ginsberg*, for example, the Court upheld a ban on the sale of obscene materials to minors.¹⁶⁸ After acknowledging that “the custody, care and nurture of the child reside first in the parents, whose primary function

¹⁶² *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

¹⁶³ *Ginsberg*, 390 U.S. at 639.

¹⁶⁴ *Action for Children’s Television*, 58 F.3d at 679 (Edwards, C.J., dissenting).

¹⁶⁵ *Yoder*, 406 U.S. at 205.

¹⁶⁶ *Id.* at 213-14.

¹⁶⁷ *Id.* at 230, 233-34.

¹⁶⁸ *Ginsberg*, 390 U.S. at 645.

and freedom include preparation for obligations the state can neither supply nor hinder,”¹⁶⁹ the Court noted that “obscenity is not within the area of protected speech” and tacitly assumed that the vast majority of parents do not want their children exposed to obscenity.¹⁷⁰ Consequently, the Court applied rational basis review and upheld the regulation, noting that the “legislature could properly conclude that parents . . . who have this primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.”¹⁷¹ Thus, the Court recognized that, at least in the area of protecting children from obscene materials, government intervention can be helpful to support parents in their childrearing efforts.

One can view the ban of broadcast indecent speech under section 73.3999 between the hours of 10:00 P.M. and 6:00 A.M. as either preempting or supporting parental discretion. Chief Judge Edwards viewed the nighttime ban of indecent speech at issue in *ACT III* as preempting parental discretion because “my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television.”¹⁷² He noted that when the government “channels” indecent – but constitutionally protected – speech to certain hours, those parents who wish to expose their children to the banned speech during the hours when it is banned are deprived of their right to do so.¹⁷³ Time-channeling thus “tramples” on the rights of “those parents who do not agree with the Commission about how best to raise their children.”¹⁷⁴ Furthermore, by assuming parents are unavailable or inept at parenting, the government “establishes itself as the final arbiter of what broadcast American children may see

¹⁶⁹ *Id.* at 639 (quoting *Prince v. Commonwealth of Mass.*, 321 U.S. 158, 170 (1944)).

¹⁷⁰ *Id.* at 635.

¹⁷¹ *Id.* at 639.

¹⁷² *Action for Children’s Television*, 58 F.3d at 670 (Edwards, C.J., dissenting) (quoting *Alliance for Cmty Media v. FCC*, 56 F.3d 105, 145 (D.C. Cir. 1995)).

¹⁷³ *Id.* at 679 (Edwards, C.J., dissenting).

¹⁷⁴ *Id.* (Edwards, C.J., dissenting).

and hear.”¹⁷⁵ Although he acknowledged that the government can intervene to preempt parental rights when children “are abused, neglected, or abandoned, because the harm is clear and such actions are contrary to civilized notions of parenting,”¹⁷⁶ Chief Judge Edwards noted that “Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming.”¹⁷⁷ Because no ill effects of indecent programming on children have been proven, Chief Judge Edwards concluded that the government cannot preempt parents’ right to “run the household in the manner they choose.”¹⁷⁸

Not surprisingly, the majority in *ACT III* argued that the time-channeling provision at issue supported but did not preempt parental discretion. Characterizing the government’s interest in “helping parents exercise their ‘primary responsibility for [their] children’s well-being’” as “fundamental,”¹⁷⁹ the court said the government’s interest “included ‘supporting parents’ claim to authority in their own household’ through ‘regulation of otherwise protected expression.’”¹⁸⁰ The majority then asserted that the government’s interest in the well-being of children independently justified government regulation of indecent television broadcasts.¹⁸¹ Emphasizing that parental supervision may not be effective “even when parent and child are under the same roof,” the court concluded that “‘parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control’ over what their children see on television.”¹⁸² Citing data from a poll, the court noted that over half of children surveyed

¹⁷⁵ *Id.* (Edwards, C.J., dissenting).

¹⁷⁶ *Id.* (Edwards, C.J., dissenting).

¹⁷⁷ *Id.* at 670 (quoting *Alliance for Cmty Media*, 56 F.3d at 145 (Edwards, C.J., dissenting)) (Edwards, C.J., dissenting).

¹⁷⁸ *Id.* at 680 (Edwards, C.J., dissenting).

¹⁷⁹ *Id.* at 661 (quoting *Ginsberg*, 390 U.S. at 639).

¹⁸⁰ *Id.* at 680 (quoting *Pacifica*, 438 U.S. at 749).

¹⁸¹ *Id.* at 661.

¹⁸² *Id.* (quoting *In re Action for Children’s Television*, 50 F.C.C.2d 17, 26 (1974)).

had a television in their bedrooms, and fifty-five percent usually watched television alone or with friends but not family members.¹⁸³ The majority claimed that the government's interest in supporting parental discretion and its independent interest in protecting children do not conflict but rather are "complementary objectives mutually supporting limitations on children's access to material that is not obscene for adults."¹⁸⁴ Noting that parents who wish to expose their children to the material channeled to nighttime hours can do so, whether by subscribing to premium or pay-per-view channels on cable, by using videocassette recorders, or by purchasing video or audio tapes, the court concluded that "[i]t is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency."¹⁸⁵

The issue at the crux of the argument between Chief Judge Edwards and the majority in *ACT III* is the "default" parental view of whether indecency should be allowed on television during hours when children might be in the audience. Under Chief Judge Edwards' view, most parents want to decide for themselves, without government interference, what their children see on television. Government regulations of constitutionally protected speech are unwelcome. Under the majority's view, in contrast, most parents want the government to regulate indecent speech to help protect their children.

Survey data supports both views. Today, by a ratio of eight to one, American adults believe it is parents' job, not the government's, to shield children from objectionable material on television.¹⁸⁶ What is not clear from this data is whether Americans believe it is parents' job to shield children from any and all objectionable material on television, including material that

¹⁸³ *Id.*

¹⁸⁴ *Id.* (citing *Ginsberg*, 390 U.S. at 639-40).

¹⁸⁵ *Id.* at 663.

¹⁸⁶ The Luntz Research Companies and Peter D. Hart Research Associates, *National Survey on Decency in Television*, <http://www.televisionwatch.org/NewsPolls/FactSheets/Luntz-Hart-Survey.pdf>.

would not be allowed under current regulation. For example, if the safe harbor provision of section 73.3999 were eliminated, and indecent but non-obscene material were shown during the after-school hours, would these numbers change? Perhaps the overwhelming numbers reflect that the American public has little concern over the amount of indecent content on television today – a situation that results as a consequence of regulations such as section 73.3999. Perhaps the American public would not be so comfortable with allocating all responsibility to shield children to parents if those regulations were not in place.

Despite the view of most Americans that parents are primarily responsible for protecting their children from indecent content on television, a 2007 Kaiser Family foundation survey indicates that nearly two-thirds of parents favor new government regulations to limit the amount of sex and violence in television shows during the early evening hours.¹⁸⁷ It is impossible to determine from this data whether violence or sexual content is parents' greater concern. Given that fifty-five percent of parents surveyed believe exposure to sexual content in the media contributes to children becoming involved in sexual situations before they're ready,¹⁸⁸ however, it is likely that a significant percentage of parents would favor new regulations of indecent content, even if those regulations did not address violence.

Interestingly, under the current indecency regulations, although a majority of parents are “*very* concerned about the amount of inappropriate media content children in this country are exposed to,” most parents believe their own children’s exposure is not excessive.¹⁸⁹ Whereas two-thirds of parents believe children are exposed to too much inappropriate content, only one in

¹⁸⁷ The Henry K. Kaiser Family Foundation, *Parents, Children & Media*, 4 (Jun 2007) <http://www.kaiserfamilyfoundation.org/entmedia/upload/7638.pdf>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1.

five parents believes his or her own children are seeing “a lot” of inappropriate content.¹⁹⁰ This survey did not distinguish between television and other media outlets, such as radio and the Internet. Therefore, it is impossible to determine precisely the degree to which parents are concerned about indecent content on over-the-air broadcast television. Although thirty-two percent of parents reported that television is the medium that most concerns them, the survey did not distinguish between broadcast television and cable or satellite television. Given Chief Judge Edwards’ observation that “cable exhibits more and worse indecency than does broadcast,”¹⁹¹ and the fact that nearly 86% of homes subscribe either to cable or satellite television,¹⁹² these parents may have been thinking more about cable or satellite television than broadcast television when they responded to the survey questions.

Does the government have a compelling interest that justifies section 73.3999? The answer is unclear. The regulation was adopted to protect children from exposure to indecent material during the hours they would likely be in the audience, yet experts disagree whether exposure to indecency on television even harms children. Because indecent material is constitutionally protected, it seems reasonable to require a showing that exposure to indecent material in fact harms children before accepting any abridgment of fundamental First Amendment rights. Although gathering evidence of the harm might be difficult, it should not be impossible, given the harm to children caused by violence on television has been documented. Absent proof that exposure to indecency harms children, should the government be allowed act to protect children from a possible harm, or should it step aside and allow parents to decide whether the harm is real and decide how best to protect their children? It is unclear whether

¹⁹⁰ *Id.*

¹⁹¹ *Action for Children’s Television*, 58 F.3d at 671 (Edwards, C.J., dissenting).

¹⁹² *Brief of Amici Curiae Center for Democracy & Technology et al.* at 21, 489 F.3d 444 (2nd Cir. 2007) (No. 06-1760-ag).

regulations such as section 73.3999 support or preempt parental discretion. Even if they preempt parental discretion, however, it is possible that parents welcome the preemption. But what about the rest of the broadcast-television-viewing population?

5.2 Is Section 73.3999 Narrowly Tailored?

Assuming the government would be able to show it has a compelling interest to protect children from exposure to indecent television broadcasts, the question becomes whether section 73.3999 is narrowly tailored. In *Playboy*, which concerned a time-channeling provision similar to the one in section 73.3999, the Supreme Court said, “even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.”¹⁹³ The Court added, “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.”¹⁹⁴ In *Reno*, the Court said a content-based speech regulation is does not survive strict scrutiny if less restrictive alternatives would be “at least as effective” to achieve the government’s objective.¹⁹⁵ Together, these two cases indicate “narrowly tailored” means there is no less restrictive, equally effective alternative available to achieve the government’s objective. The inquiry as to whether section 73.3999 is narrowly tailored thus requires an assessment of whether less a restrictive means is available, followed by a determination of whether the less restrictive means is as effective as section 73.3999 in protecting children from exposure to indecent content.

5.2.1 Are Less Restrictive Alternatives Available?

Section 73.3999 forbids the broadcasting of indecent content during certain hours of each day. Modern technology provides at least two means to protect children from unwanted

¹⁹³ *Playboy*, 529 U.S. at 814.

¹⁹⁴ *Id.* at 815.

¹⁹⁵ *ACLU*, 521 U.S. at 874.

television content not just during certain hours of the day, but at all times. The first is the V-Chip, which allows parents to block broadcast content based on a ratings system.¹⁹⁶ The V-Chip has been installed in all thirteen-inch or larger televisions manufactured since January of 2000, and stand-alone set-top boxes incorporating V-Chip functionality are also available.¹⁹⁷ Eighty-two percent of parents report having purchased a new television since the V-Chip requirement became effective.¹⁹⁸ Although some of these purchasers may still have older television sets in their homes, and their children may watch television on the older sets, it is indisputable that as time passes, an increasing number of television sets will contain V-Chips. Furthermore, the transition in February 2009 to digital television¹⁹⁹ will likely prompt many parents to purchase new televisions to replace some or all of their existing sets, which will decrease the number of homes that have children but no television with a V-Chip.

Furthermore, nearly 86% of households with a television subscribe either to cable or satellite service.²⁰⁰ Both cable and satellite television providers offer parental controls to allow parents to block objectionable material.²⁰¹ Parents access the parental controls using a personal identification number, which prevents all but the savviest children from modifying the settings and accessing objectionable material.²⁰² Furthermore, web sites on the Internet explain how to

¹⁹⁶ FCC, V-Chip, <http://www.fcc.gov/vchip/> (last visited Nov. 4, 2007).

¹⁹⁷ *Id.*

¹⁹⁸ Kaiser Foundation, *supra* note 187, at 9.

¹⁹⁹ FCC, Digital Television, <http://www.dtv.gov/> (last visited Jan. 3, 2008).

²⁰⁰ *Brief of Amici Curiae Center for Democracy & Technology et al.*, *supra* note 192, at 21. *See also* National Cable Television Association, *Statistics*, <http://www.ncta.com/Statistic/Statistic/Statistics.aspx> (last visited Dec. 29, 2007) (65.3 million of 112 million United States television households subscribe to basic cable service) and Satellite Broadcasting and Communications Association, http://www.sbca.com/site_filtes/child.asp?page=Facts&sec=industry (last visited Dec. 29, 2007) (nearly 30 million households subscribe to satellite television service).

²⁰¹ Comcast, Parental Controls, <http://www.comcast.com/Corporate/Customers/ParentalControls.html/> (last visited Nov. 4, 2007); DirecTV, Parental Controls, <http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId=P400094> (last visited Nov. 4, 2007).

²⁰² *Id.*

use parental controls,²⁰³ and a television advertising campaign that began in 2006 informs viewers of the existence and value of parental controls.²⁰⁴

The Supreme Court has found that informed parents, equipped with technology to allow them to take affirmative steps to protect their children, adequately serve the government's interest in protecting children from indecency without needlessly curtailing speech rights.²⁰⁵ In *Playboy*, the Court found that targeted blocking of signal bleed, coupled with notices to parents that this solution was available, was less restrictive than the time channeling provision that most cable operators used to avoid liability.²⁰⁶ The Court observed, "targeted blocking enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners."²⁰⁷

The V-Chip and parental controls are similar to the targeted blocking the Court approved in *Playboy*. Both technologies allow parents altogether to prevent unwanted content from entering their homes at all hours of the day and night. Thus, both the V-Chip and parental controls are less restrictive means to protect children from exposure to indecent television broadcasts than section 73.3999. These technologies allow parents to control what their children see on television without treading on the First Amendment right of willing viewers to receive content they are constitutionally entitled to see and hear.

5.2.2 Are the Less Restrictive Means Equally or More Effective than Section 73.3999?

The Court said in *Reno* that available less restrictive alternatives must be "at least as effective" as the means chosen by the government to advance its objective.²⁰⁸ The inquiry

²⁰³ See, e.g., TheTVBoss.org, <http://www.thetvboss.org/> (last visited Nov. 4, 2007).

²⁰⁴ J. Eggerton, Broadcasting & Cable, *Parental Control: TV's new campaign is big but doesn't quiet calls for à la carte*, <http://www.broadcastingcable.com/article/CA6357451.html> (last visited Jan. 3, 2008).

²⁰⁵ *Playboy*, 529 U.S. 803 at 825.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 815.

²⁰⁸ *ACLU*, 521 U.S. at 874.

involves an assessment of how effectively section 73.3999 protects children from exposure to indecent content on television, and whether the alternative means – primarily the V-Chip and parental controls – are equally or more effective.

Section 73.3999 “channels” indecent speech on television to the hours between 10:00 P.M. and 6:00 A.M. Survey data indicates the safe harbor hours correspond to the time during which children sleep.²⁰⁹ On average, children under the age of ten are in bed before 10:00 P.M. and wake up at or after 6:00 P.M.²¹⁰ Thus, if one assumes children watch only live television, section 73.3999 appears well-tailored to protect most children under the age of ten from exposure to indecent television. Indeed, at the time of *Pacifica*, channeling indecent speech to the hours between 10:00 P.M. and 6:00 A.M. was perfectly tailored to protect most children.

Today, however, videocassette recorders (VCRs) and, more recently, personal and digital video recorders (DVRs) have eliminated the need to watch live television to view a program. These devices allow users to record, automatically, particular shows, whenever they are on television. Although VCRs simply record a selected channel during a selected time period, advanced DVRs also include features such as search engines to find and automatically record shows that match user interests, as well as features that allow users to transfer recorded shows to computers or portable devices, or easily burn them to a digital video disk (DVD).²¹¹ In homes with these devices, tech-savvy children may be capable of using them to record nighttime shows, although perhaps not without their parents’ knowledge.

²⁰⁹ National Sleep Foundation, *2004 Sleep in America Poll*, 7, 9 (2004), <http://www.kintera.org/atf/cf/%7BF6BF2668-A1B4-4FE8-8D1A-A5D39340D9CB%7D/2004SleepPollFinalReport.pdf>.

²¹⁰ *Id.* (finding children under age ten are in bed, on average, sometime between 8:45 P.M. and 9:15 P.M., and their average wake time is between 6:52 A.M. and 7:35 A.M.).

²¹¹ TiVo, *What is TiVo Digital Video Recorder?*, <http://www.tivo.com/whatistivo/index.html> (last visited Jan. 3, 2008).

Likewise, many networks maintain web sites through which viewers can download entire episodes of shows.²¹² In *Reno v. ACLU*, the Court invalidated certain provisions of the Communications Decency Act that prohibited users from sending indecent content to minors, finding that the Internet is entitled to broad First Amendment protection.²¹³ As a result of *Reno*, therefore, no legal barriers prohibit networks from posting content that would be “indecent” if broadcast between the hours of 6:00 A.M. and 10:00 P.M. on their websites, which anyone with Internet access may then download at any time of the day or night.

Thus, for those children who have access to VCRs, DVRs, or the Internet, and whose parents do not enable either the V-Chip or parental controls, the broadcast times of programs are no longer meaningful. For these children, the broadcast time is any time after the actual broadcast or after the content has been posted on a web site. Consequently, the effectiveness of section 73.3999, by itself, is reduced. Section 73.3999 arguably does not protect these children at all, because they have access to indecent content broadcast between the hours of 10:00 P.M. and 6:00 A.M., even if they sleep during those hours. These children’s access to inappropriate content must be managed by their parents, either through direct supervision or by using tools such as the V-Chip, cable or satellite parental controls, and Internet parental controls.

Although seventy percent of parents know about the V-Chip, fifty-seven percent of V-Chip-equipped parents are not aware they have the technology.²¹⁴ Furthermore, although eighty-one percent of parents have heard of the television ratings system, most do not understand what the rating symbols mean.²¹⁵ Therefore, supporters of government indecency regulations would argue, the government must regulate to protect these parents’ children from exposure to content

²¹² See, e.g., NBC, <http://www.nbc.com/> (last visited Nov. 26, 2007); CBS, <http://www.cbs.com/> (last visited Nov. 26, 2007).

²¹³ *ACLU*, 521 U.S. at 870 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”).

²¹⁴ Kaiser Foundation, *supra* note 187, at 9.

²¹⁵ *Id.*

the parents find objectionable. The Supreme Court has said, however, that when tools that allow parents to block material from entering the home are available, courts should assume the parents will use them.²¹⁶ In addressing arguments that blocking schemes are not sufficient to protect children from signal bleed, the Court stated in *Playboy* that “it is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”²¹⁷ Following the advertising campaign to inform parents of blocking technology on cable and satellite television, parents should now have full information about the tools available to help them protect their children. In addition, the fact that some parents do not know they have V-Chips in their television sets does not mean the V-Chip is not effective. It may simply indicate those parents did not read the documentation that accompanied their television sets.

The V-Chip and parental controls are plausible, less restrictive alternatives to section 73.3999. Furthermore, as the Court observed in *Playboy*, content blocking using these tools is actually more effective than time channeling because parents can prevent, at all times, their children from accessing certain content.²¹⁸ Time-channeling is only effective if children are not in the audience during the hours when indecent content is broadcast; modern technology, such as DVRs and the Internet, allows children to be “in the audience” all the time.

Section 73.3999 undoubtedly remains effective to protect some children whose access to inappropriate content would otherwise have to be managed directly by parents. For example, section 73.3999 protects children who watch programming on older, non-V-Chip-equipped televisions sets and who do not have access to VCRs, DVRs, or the Internet. For children in

²¹⁶ *Playboy*, 529 U.S. 803 at 824.

²¹⁷ *Id.*

²¹⁸ *Id.* at 825.

homes with cable or satellite service or a V-Chip-equipped television, however, section 73.3999 is not as effective a means of protection as the V-Chip and parental controls.

6 Conclusion

What level of scrutiny would the Supreme Court apply to evaluate indecency regulations of broadcast television today? Based on recent cases evaluating speech restrictions in other media, strict scrutiny appears to be the correct level of scrutiny under which to evaluate content-based speech restrictions in broadcasting. Would section 73.3999 survive strict scrutiny? The answer is unclear. It is not clear that the government has a compelling interest in protecting children from exposure to indecent over-the-air television broadcasts. Experts disagree over whether exposure to indecency on television harms children, yet the Supreme Court has said a real harm must be shown to justify a speech restriction. Furthermore, given the existence of technologies such as the V-Chip and parental controls, even if there is some harm to children from indecency on television, it is not clear that the government, rather than parents, should take measures to protect children. Finally, because recording equipment allows viewers to record programming at all hours, and savvy children know how to use this equipment, section 73.3999 is actually less effective a protection measure than the V-Chip and parental controls, which block content all the time rather than simply during certain hours.

What might happen if section 73.3999 were found unconstitutional? Perhaps broadcasters would run amok and begin to air “indecent” content between the hours of 6:00 A.M. and 10:00 P.M. If so, parents wishing to prevent their children from exposure to this content would be motivated to learn about the V-Chip and parental controls, or they might resort to the old-fashioned remedies of limiting viewing time, enforcing homework hours, or sending children to a library. Perhaps, however, the system would regulate itself, and licensees would air

appropriate content for their target audiences. Even if one does not trust the judgment of broadcast licensees in determining what is “good” or “appropriate” television, broadcasting is a business, and revenue is driven by advertising. In turn, the amount a licensee can charge for advertisements is driven primarily by audience size. In the absence of FCC regulation of indecency, licensees who broadcast indecent material at inappropriate times would find their audiences, and, as a result, their advertising revenues, reduced. In such a self-regulating system, the public, and not the government, would decide what content is in the “public interest.”

As Justice Brandeis said in his concurrence in *Whitney v. California*:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground[s] to believe that the evil to be presented is a serious one. . . .²¹⁹

In the area of television broadcasting, there is no reasonable ground to fear that serious evil will result if the FCC stops banishing indecent speech to the hours of 10:00 P.M to 6:00 A.M.

Furthermore, given advances in technology and the availability of other means for content delivery to viewers, there is no reasonable ground to believe that the danger feared – whether it be the collapse of a moral society or the corruption of the nation’s youth – is imminent.

Channeling indecent speech in over-the-air television to particular hours of the day is arguably an unconstitutional restriction of broadcast speech.

²¹⁹ *Whitney v. California*, 274 U.S. 357, 375-76 (1927).