THE FCC’S BROADCAST INDECENCY POLICY ON “FLEETING EXPLETIVES” AFTER THE SUPREME COURT’S LATEST DECISION IN F.C.C. v. FOX TELEVISION STATIONS: SUSTAINABLE OR ALSO “FLEETING?”

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I. INTRODUCTION

"From Washington to Hollywood to your living room, the air war [on indecency] is in full effect. Do you "know it when you see it?" Most do not, until it is too late. On June 21, 2012, the Supreme Court of the United States decided in F.C.C. v. Fox Television Stations, Inc. (Fox II) that the Federal Communications Commission (“FCC” or “Commission”) failed to provide Fox broadcast stations with fair notice, prior to two broadcasts at issue, that fleeting expletives could be found actionably indecent. Fleeting expletives, according to the Commission, are “gratuitous,” “isolated broadcasts” of a single “vulgar expletive” which are not “sustained or repeated.” The Court held that the FCC failed to provide broadcasters fair notice prior to imposing sanctions, as re-

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3 This is a reference to Supreme Court Justice Potter Stewart’s famous quote, “I know it when I see it” with regard to obscenity from Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (attempting the difficult task of defining “hard-core pornography”).

quired by the Due Process Clause of the Fifth Amendment. Thus, the Court decided to set aside the Commission’s orders because its “standards as applied to these broadcasts were vague” and they violated Fox’s due process rights. This decision marks the latest in the more than forty-year history of, or battle over, broadcast indecency policy and enforcement.

It is critical to first grasp the muddled past surrounding this issue in order to understand how we have arrived where we are today. The legal history on the matter began as follows:

I was thinking one night about the words you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever .... So I have to figure out which ones you couldn’t and ever and it came down to seven but the list is open to amendment .... The original seven words were, s[---], p[---], f[---], c[---], c[---]s[---], motherf[---], and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor ....

This passage is one small part of the George Carlin twelve-minute, pre-recorded monologue entitled “Filthy Words” that was the subject of the Supreme Court’s Pacifica decision in 1978, upholding the FCC’s authority to regulate broadcast indecency. It was this indecent broadcast that set in motion the formulation of the Commission’s still-utilized indecency doctrine.

The U.S. Supreme Court has twice now declined to decide the crucial First

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5 U.S. CONST. amend. V (providing that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”).

6 Fox II, 132 S. Ct. at 2309; see also John Crigler & William J. Byrnes, Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy, 38 CATH. U. L. REV. 329, 359 (1989) (noting that “[t]he First Amendment was adopted to protect the people not from journalists, but from government. It gives the people the right to receive ideals that are unfettered by government interference” (quoting In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, Memorandum Opinion and Order, 2 F.C.C.R. 5043, ¶ 97 (Aug. 4, 1987))).

7 See generally Fox II, 132 S. Ct. at 2312 (reiterating the historical, procedural, and regulatory framework under which the Supreme Court considered the FCC’s “fleeting expletive” indecency policy in Fox I); see also F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 505-10 (2009) (providing a historical perspective of the FCC’s regulation of indecent speech since Pacifica and an overview of the agency’s adoption of the “fleeting expletive” policy); F.C.C. v. Pacifica Found., 438 U.S. 726 (1978) (upholding Congress’s authority to regulate the broadcast of indecent speech, as well as the Commission’s interpretation and implementation of the statute prohibiting it).


9 Pacifica, 438 U.S. at 749-51.

10 Id. at 732 (quoting the Commission’s definition of indecency, which remains largely unchanged); see also Industry Guidance Policy Statement, supra note 8, ¶ 4.
Amendment questions as they relate to the Commission’s authority to regulate broadcast indecency and thus continues to accord broadcast media less First Amendment protection than other forms of communication. While the Supreme Court’s latest decision in Fox II offers the Commission very little guidance on how to proceed with its indecency doctrine, it is clear that the Commission has at least four different options. First, the Commission could retain its current indecency regime on fleeting expletives because broadcasters are now on notice that they may be sanctioned for such broadcasts and the Supreme Court declined to rule on that policy’s constitutionality. Second, the Commission could revert to its 2001 pre-fleeting expletives policy, which largely focused on the “context” of broadcasts, rather than on specific words. Third, the Commission could choose to return to its post-Pacifica enforcement policy of benign neglect, under which it continues to receive indecency complaints, but chooses not to act on them. Finally, the Commission could decide that the indecency doctrine is so riddled with problems of policy and constitutionality that it should no longer be enforced. This last approach is by far the most aggressive and is similar to that of the Commission in the 1980s regard-

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11 See U.S. Const. amend. I (providing that “Congress shall make no law . . . abridging the freedom of speech”). When a government restriction on speech is content-based, as is the regulation of indecent material, the restriction must satisfy “strict scrutiny” in order to pass constitutional muster—the government must establish that it has a compelling government interest and that it is achieving that interest via the least restrictive means. See United States v. Playboy Entm’t Grp., 529 U.S. 803, 813 (2000).

12 See Fox I, 556 U.S. at 529; see also Fox II, 132 S. Ct. at 2320.

13 Charles Coble, Supreme Court Review: What the Court’s Indecency Decision Means for Broadcasters, JD SUPRA (Aug. 27, 2012), http://commcns.org/13EXh1S (arguing that any decision by the FCC to enforce the indecency doctrine as it currently exists is sure to meet First and Fifth Amendment legal challenges from broadcasters).


15 See In re Infinity Broadcasting Corporation of Pennsylvania, Licensee of Station WYSP(FM); Pacifica Foundation, Inc. Licensee of Station KPFK-FM, Los Angeles, Ca.; The Regents of the University of California, Licensee of Station KCSB-FM, Santa Barbara, Ca., Memorandum Opinion and Order, 3 F.C.C.R. 930, ¶ 4 (Nov. 24, 1987) [hereinafter Infinity MO&O] (“In cases decided subsequent to the Supreme Court’s [Pacifica] ruling, the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts. . . . [N]o action was taken unless the material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin ‘Filthy Words’ monologue.”).

ing the Fairness Doctrine. Of the potential options, the Commission should adopt administrative nullification of the indecency doctrine and its enforcement.

Several reasons justify why the Commission should take this last and most aggressive approach. Aside from the muddled, inconsistent enforcement history of broadcast indecency, the media landscape has changed significantly since the 1970s when Pacifica was decided. Furthermore, community standards have also evolved significantly since then and technological advancements have arguably diminished the need for government broadcast regulation.

Towards the goal of achieving a uniform application of the First Amendment to protect all modes of communication, including broadcasting, Part II of this article summarizes the FCC's bewildered and inconsistent enforcement history regarding broadcast indecency regulation. Part III explains the four potential options for the Commission going forward in the wake of the Supreme Court's latest Fox decision. Part IV then argues in favor of administrative nullification of the FCC's indecency doctrine and enforcement procedures because of A) changing community standards and social norms since the 1978 Pacifica decision; B) the proliferation of technology since Pacifica allowing for less restrictive means of curbing indecency without the need of government intervention; C) the undermining of the "uniquely pervasive" justification in Pacifica to regulate the broadcast medium with a limited form of constitutional protection; and D) the fact that no other mode of communication is held to the same limited form of constitutional protection, and thus broadcasting should not be either.

II. BACKGROUND ON THE MUDDLED AND INCONSISTENT HISTORY OF FCC BROADCAST INDECENCY REGULATION

Since 1934, the Commission has had the authority, pursuant to 18 U.S.C. § 1464, to regulate indecent broadcasting. Before that, the FCC's predecessor,

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17 See In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C.2d 142, ¶ 5, 128 (Aug. 7, 1985) (concluding that the Fairness Doctrine no longer serve the "public interest" and that sufficient competition existed in the media marketplace to warrant discontinuation of the policy).

18 CATO Amici Brief, supra note 16, at 5-6, 2011 WL 5562515, at *5-6 (arguing that the convergence of various media platforms and the proliferation of cable and satellite networks has "eroded the 'uniqueness of broadcast media'" (quoting F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978))).


20 See Industry Guidance Policy Statement, supra note 8, ¶ 2. The FCC does not, on its own, monitor public broadcasts for indecent material or enforce its indecency policy sua
the Federal Radio Commission ("FRC"), had regulated indecent broadcasting since 1927.\textsuperscript{21} Section 1464 of the United States Code bans the broadcast of "any obscene, indecent, or profane language by means of radio communications."\textsuperscript{22} Indecent broadcasting is defined as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."\textsuperscript{23}

A. F.C.C. v. Pacifica Foundation

The FCC, Congress's chosen government agency charged with the enforcement of the indecency statute, did not begin to enforce § 1464 until the 1970s—just before F.C.C. v. Pacifica Foundation.\textsuperscript{24} In Pacifica, the Supreme Court upheld the FCC's indecency enforcement authority and accorded broadcasting a limited form of First Amendment protection given its "pervasiveness and accessibility to children."\textsuperscript{25} Pacifica dealt with whether the FCC had the authority to regulate a radio broadcast that was considered indecent, but not obscene.\textsuperscript{26} A man filed a complaint with the Commission after he heard a New York radio station's broadcast, while driving with his young son, of a prerecorded monologue by George Carlin entitled "Filthy Words."\textsuperscript{27} Although the

\textit{sponte.} Rather, the agency acts upon complaints filed with the Commission by the public. \textit{Id.} \textsuperscript{¶} 24.

\textsuperscript{21} See Note, Regulation of Program Content by the FCC, 77 HARV. L. REV. 701, 701 (1964) (noting that the FRC's first renewal form questioned licensees about the average amounts of time they devoted to certain types of programming); see also Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73 (1927) (current version at 18 U.S.C. § 1464 (2006)) (providing, in relevant part, that "no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication").

\textsuperscript{22} 18 U.S.C. § 1464 (2006). This authority allows the Commission to issue a warning to a non-conforming broadcaster, impose a monetary forfeiture, and/or revoke a broadcast station's license depending on the egregiousness of the indecent broadcast. 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D) (2006).

\textsuperscript{23} See Industry Guidance Policy Statement, supra note 8, ¶ 4 (noting that the definition of indecency has not changed significantly since Pacifica was decided in 1978); see also F.C.C. v. Pacifica Found., 438 U.S. 726, 732 (1978).

\textsuperscript{24} See Pacifica, 438 U.S. at 748-50 (holding that the Commission's order banning George Carlin's "Filthy Words" monologue did not violate broadcaster's First Amendment rights). The Court's decision, however, was a narrow one, as it declined to decide whether "an occasional expletive . . . would justify any sanction." Rather, the Commission's decision "rested entirely on a nuisance rationale under which context is all-important." \textit{Id.} at 750.

\textsuperscript{25} Abigail T. Rom, Note, From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words You Can Never Say on Broadcast Television, 44 VAL. U. L. REV. 705, 705-06 (2010).

\textsuperscript{26} See id. at 715-16.

\textsuperscript{27} See Pacifica, 438 U.S. at 730. In his complaint, the man wrote that, "although he could perhaps understand the 'record's being sold for private use, [he] certainly [could not]
Commission did not impose any formal sanctions on the station, it found Pacifica’s broadcast indecent. The Commission also warned that the event would be tied to the station’s license file and, if other complaints were received, the agency would question “whether it should utilize any of the available sanctions it has been granted by Congress.”

It was in this memorandum opinion that the Commission stated that it would work to “clarify the standards which [would] be utilized in considering” the rise in number of complaints about indecent speech being broadcast over the public airwaves. This is also the order in which the Commission first set forth its oft-quoted indecency standard:

[The] concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

This doctrine, with its main goal of protecting children, shaped the indecency debate over the last thirty years and still continues to do so today.
Thus, in answering the question posed in *Pacifica*—whether a "broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content"—three Justices agreed with the Commission's fact-specific decision, as the context of a broadcast can determine its shock factor and "one occasion's lyric is another's vulgarity." Justice Stevens further noted that although *Pacifica*’s broadcast was "vulgar," offensive," and "shocking," its context must be considered in deciding whether the Commission's action was constitutional. Therefore, broadcasting, of all modes of communication, receives the "most limited First Amendment protection." Traditionally, broadcast regulation has been justified on the grounds that the airwaves are a scarce resource, and by their very nature cannot be available to all who wish to use them. Thus, contrary to other methods of expression, "the use of the broadcast airwaves may be permissively denied to some," and this factor has long justified government intervention.

The Court rationalized this limited form of protection with regard to *Pacifica* in two ways:

First, the broadcast media have established a uniquely pervasive presence in the lives

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33 *Pacifica*, 438 U.S. at 745 (Stevens, J.). Generally speaking, the First Amendment forbids content-based regulation. "The Government may, however, regulate the content of such constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 657 (D.C. Cir. 1995) (quoting *Sable Commc'n, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)).

34 *Pacifica*, 438 U.S. at 747 (Stevens, J.). In discussing the Commission's contextual approach, Justice Stevens found 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." *Id.* at 746 (Stevens, J.) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

35 *Id.* at 747-48 (Stevens, J.); see *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents [the] government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (citations omitted). *But see Sable Commc’n, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("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.").

36 *Pacifica*, 438 U.S. at 748 (holding that "although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve 'the public interest, convenience, and necessity'"; see also *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

37 See generally *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (discussing at length the history and availability of broadcast infrastructure in the United States).

38 *Rom*, supra note 25, at 712; see also *Nat'l Broad. Co.*, 319 U.S. at 218-27 (1943) (holding that the FCC can issue regulations pertaining to associations between broadcast networks and affiliated stations).
of all Americans. Patently 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 rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. . . .

Second, broadcasting is uniquely accessible to children . . . [and] Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. . . . We held in Ginsberg v. New York that the government’s interest in the “well-being of its youth” and in supporting “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.39

Despite these two rationales, however, the Court crucially noted the “narrowness” of its holding40. It decided that Pacifica’s broadcast was “indecent as broadcast,”41 meaning that “context [was] all-important,” and such an analysis requires an inquiry into a wide range of factors such as the time of day at which the broadcast occurs, and the make-up of the audience, among others.42


In the nine years following Pacifica and its narrow ruling, the FCC approached indecency enforcement idly and, in fact, declined to find any broadcasts “indecent” during this time.43 During that period, the Commission applied the Pacifica ruling very narrowly and decided not to act on any complaints unless the “material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin ‘Filthy Words’ monologue.”44 Not finding that any complaints that met this narrow standard, the Commission

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40 Pacifica, 438 U.S. at 750. Limited to the excessive use of dirty words, the Court held that “[t]his case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.” Id.

41 Id. at 735.

42 Id. at 750. The FCC’s decision that Pacifica’s broadcast was indecent was based on a “nuisance rationale,” which depends entirely on the context of the broadcast; thus, a nuisance could be “merely” an otherwise acceptable thing in the wrong context i.e., “a pig in the parlor instead of the barnyard.” Id.


failed to sanction any broadcast stations.\footnote{Id.}

C. FCC Assessment of the “Full Context” of Broadcast Indecency: 1987-2001

In 1987, the Commission expanded its indecency policy to analyze the entire context of allegedly indecent broadcasts rather than limiting its parameters to certain indecent words or pictures.\footnote{New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, Public Notice, 2 F.C.C.R. 2726, 2726 (Apr. 27, 1987) [hereinafter Indecency Enforcement PN] (putting licensees on notice that the Commission’s prior enforcement limited to the seven dirty words in \textit{Pacifica} would now be expanded to include the broader definition in \textit{Pacifica}).} However, in beginning to assess the full context of a broadcast for signs of indecency, the Commission continued to note the disparity between “isolated and repeated broadcasts of indecent material”—whether the broadcast contains repetition of words or extended imagery, or if it is just a one-time showing; the first appeared to be actionable while the latter generally received a warning.\footnote{\textit{Fox II}, 132 S. Ct. at 2313-14.} In its 1987 public notice, the Commission further justified the nuisance rationale of regulating broadcast indecency discussed in \textit{Pacifica}, which involves the “time channeling” of behavior rather than an all-out prohibition of it.\footnote{Indecency Enforcement \textit{PN}, supra note 46, at 2726. At the same time, the Commission effectively abandoned its long-time scarcity justification for regulating indecency. \textit{Id.} (“For the broadcast medium, however, the Commission reasoned that the only practicable means for separating adults from children in the broadcast audience is to impose time restrictions.”).} Specifically, the Commission determined that imposing time restrictions on when material could be broadcast was the only effective way of controlling and limiting children’s access to indecent material on television.\footnote{Prior to this case, the “safe harbor” period was from midnight to 6:00 AM. In an effort to serve the government’s compelling interests “without unduly infringing on the adult population’s right to see and hear indecent material,” the D.C. Circuit ultimately decided to expand the existing safe harbor period by two hours, thereby revising it to begin at 10:00 PM and remain in place until 6:00 AM. \textit{Action for Children’s Television v. F.C.C.}, 58 F.3d 654, 664-665 (D.C. Cir. 1995) (en banc).}

This determination paved the way for the “safe harbor” period eventually mandated by Congress and later upheld by the D.C. Circuit Court of Appeals in \textit{Action for Children’s Television v. F.C.C.}\footnote{Indecency Enforcement \textit{PN}, supra note 46, at 2726 (stating the Commission’s belief that the safe harbor constituted a legitimate time, place, and manner restriction on broadcasters’ freedom of speech rights under the First Amendment); see also \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 798-800 (1989) (discussing “time, place, and manner” restrictions).} The safe harbor was the period between 10:00 PM and 6:00 AM when broadcasters were permitted to air indecent material on television without fear of being fined.\footnote{Id.} In 2001, as indecent
broadcasts became more pervasive, the FCC came out with a policy statement clarifying its approach to indecency enforcement to guide the broadcast industry. To find a broadcast indecent, the Commission noted that the material must first fall within the definition of indecency—it must describe or depict "sexual or excretory organs or activities," and second, the description must also be "patently offensive as measured by contemporary community standards for the broadcast medium." The Commission also set forth the following factors that had previously led them to determinations of indecency: (1) The "explicitness or graphic nature" of the material; (2) whether the material is dwelled upon or repeated; and (3) "whether the material appears to pander or is used to titillate, or . . . appears to have been presented for its shock value."

D. 2004 Golden Globe Order: "Fleeting Expletives" Become "Actionable"

In 2004, following three indecent broadcasts to very large audiences, the Commission released its Golden Globe Order tightening the reins on broadcasters' freedom of speech and sanctioning what the FCC had, for the most part, thus far excused. For the first time, the Commission declared, "fleeting expletives could be actionable." Both Fox and ABC Television Networks came under fire without prior notice that their broadcast actions would violate the FCC's (not yet announced) indecency standards and could thus be fined. First, Fox broadcast singer Cher during a 2002 Billboard Music Awards acceptance speech, exclaiming "I've also had my critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em." Second, in 2003, again at the Billboard Music Awards Fox broadcast Nicole Richie saying, "Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple." Finally, on an episode of NYPD Blue, ABC showed "the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast."

Following these three incidents, the Commission sanctioned NBC for a fleeting expletive f-word used by the singer Bono during the 2003 Golden

strictions on speech).

53 Id. ¶ 4.
54 Id. ¶ 10 (explaining that no single factor is determinative as a basis for an indecency finding).
55 Golden Globe Order, supra note 4.
56 Id. ¶ 12.
57 Tom Curry, High Court Rules Against FCC in Clash over Profanity, Nudity, on TV, NBCNEWS.COM (June 21, 2012, 11:00 AM), http://commcnrs.org/15MroUS.
59 Id.
60 Id.
Globe Awards.\textsuperscript{61} With that sanction, the FCC announced a sudden change in its indecency policy,\textsuperscript{62} finding that “\textit{[t]he ‘F-word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language}” and that “any use of that word or a variation, in any context, inherently has a sexual connotation.”\textsuperscript{63} The Commission concluded that such language satisfies the first prong of the agency’s indecency test, and can be found actionable.\textsuperscript{64} As if this determination was not a clear enough indicator of Commission policy change, it further noted that “[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the word “F-Word” such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.”\textsuperscript{65}

Meanwhile, the FCC had not issued Notices of Apparent Liability to Fox or ABC.\textsuperscript{66} Yet, the Commission decided to retroactively apply its new, changed policy to the Fox and ABC broadcasts, despite the fact that they both took place before the Commission’s release of the new “fleeting” indecency policy of the \textit{Golden Globe Order}.\textsuperscript{67} In its Order, the FCC acknowledged that its existing precedent, which was good law at the time of the stations’ alleged violations, would have permitted the Fox and ABC broadcasts.\textsuperscript{68} The Commission thus conceded that the stations did not have proper notice and therefore could not be liable for a monetary forfeiture.\textsuperscript{69} However, the Commission also made clear that from that point forward broadcasters were on notice that the Commission has the authority to sanction and fine them for any broadcast of the “F-word or a variation thereof,” in instances similar to the one at issue.\textsuperscript{70}

Shortly following the release of the \textit{Golden Globe Order}, the Commission acted in a way that appeared, to many, inconsistent with that decision.\textsuperscript{71} On
November 11, 2004, ABC aired the film "Saving Private Ryan" from 8:00 PM to 11:00 PM during a portion of the hours when the FCC has declared "indecent material" must not be shown on television. The Commission decided that the material did not violate the indecency standards and was thus not actionable. The Commission noted that indecency findings require at least two essential determinations: First, the material must "describe or depict sexual or excretory organs or activities... [and] second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium."

With this finding, the Commission found this case distinguishable from when it determined that the use of the f-word in the context of the 2003 broadcast of the Golden Globe Awards was indecent and profane. Because the potentially indecent aspects of the broadcast of Saving Private Ryan were "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations," the broadcast had "artistic value" that the speech during the Golden Globe Awards lacked. Furthermore, the Commission emphasized that ABC attempted to warn the public of the impending broadcast of Saving Private Ryan with repeated aural and visual viewer advisories that the program was not for family viewing and contained unsuitable material for minors. On behalf of the Commission, and in an attempt to defend the FCC from criticism about its enforcement inconsistency, Chairman Michael K. Powell stated:

Today, we reaffirm that content cannot be evaluated without careful consideration of context. . . . [I]t is the responsible broadcaster that will provide full and wide disclosure of what viewers are likely to see and hear, to allow individuals and families to make their own well-informed decisions whether to watch or not. I believe ABC and its affiliated stations made a responsible effort to do just that in this case.

Despite this explanation, the Commission's decision appeared arbitrary in light of the Golden Globe Order, released just months earlier, articulating its new policy.
Fox Television Stations v. F.C.C. was decided in 2007 when the Commission’s 2004 policy changes were first challenged on administrative procedure grounds.\textsuperscript{81} The court found that, in varying its standards, the Commission acted illegally and in an arbitrary and capricious manner because they failed to provide a reasoned analysis for a change in the rule.\textsuperscript{82} However, the case ultimately reached the Supreme Court on a petition for certiorari, where the justices reversed the Second Circuit. The Court held that the agency’s new indecency enforcement policy was “neither arbitrary nor capricious” and therefore legally sound.\textsuperscript{83} The Court then remanded the case to the Second Circuit for continued proceedings.\textsuperscript{84}

E. Latest Supreme Court Decision: F.C.C. v. Fox Television Stations

After the case wound through the lower courts,\textsuperscript{85} the Supreme Court accepted it for review to decide on the constitutional question.\textsuperscript{86} Ultimately, the Court held in favor of the broadcasters, finding that the Commission’s rules in place when the broadcasts occurred provided no warning to Fox or ABC that they could be sanctioned for a fleeting expletive or brief shot of nudity.\textsuperscript{87} The Court noted that laws which regulate individuals or entities must provide fair notice subject to potential enforcement action for any broadcast of the ‘F-Word’).\textsuperscript{88}

\textsuperscript{81} See Fox Television Stations, Inc. v. F.C.C., 489 F.3d 444, 454 (2d Cir. 2007), rev’d, 556 U.S. 502 (2009). Fox and other broadcast stations challenged the 2004 Golden Globe Order in a petition for reconsideration. Two years later, the Commission responded with another Order, finding the three broadcasts at issue “indecent and profane” under the policy announced in the Golden Globe Order. \textit{id.} at 452.

\textsuperscript{82} \textit{id.} at 469 (finding that the Commission’s new policy was arbitrary and capricious and therefore violated the Administrative Procedure Act).


\textsuperscript{84} \textit{id.} at 529-30.


\textsuperscript{86} See F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2311 (2012) (ruling on the question of due process under the Fifth Amendment but declining to address the First Amendment question).

\textsuperscript{87} \textit{id.} at 2317-18. The Court notes that despite the fact that the three indecent broadcasts at issue occurred prior to the Commission’s release of its Golden Globe Order, the agency retroactively applied its new policy sanctioning fleeting expletives to Fox and ABC. Although the Commission acknowledged that “it was not apparent that Fox could be penalized for Cher’s comment at the time it was broadcast,” \textit{id.} at 2315, and for that reason, did not impose a penalty on Fox, as some have pointed out, “findings of wrongdoing can result in harm to a broadcaster’s ‘reputation with viewers and advertisers.’” \textit{id.} at 2318-19.
of conduct that is proscribed or compulsory. The Due Process Clause of the Fifth Amendment ensures this, and requires "the invalidation of laws that are impossibly vague" because they do not provide proper notice to the public.

At the time of the three broadcasts at issue in Fox, the broadcasters were on notice only of the 2001 Commission Guidelines, which focused on "whether the material dwell[ed] on or repeat[ed] at length" the indecent depiction or description. Therefore, the broadcasters were not aware that a single, fleeting expletive could be actionable. It was not until after these broadcasts that the Commission released its 2004 Golden Globe Order which set out its revised policy that a broadcast of a fleeting expletive could result in a statutory violation.

The Commission responded with two arguments, but the Court found neither particularly persuasive. First, the Commission tried to defend its finding that Fox's fleeting expletives were indecent as broadcast on the basis of "forbearance," arguing that the agency acknowledged that Fox could not have known that fleeting expletives could violate Commission policy so the Commission declined to impose any monetary penalty on the station. This argument failed. As the Court noted in its decision, regardless of whether or not Fox was financially penalized for its broadcasts at the Billboard Music Awards in 2002 and 2003, the Commission retained the right to "take into account 'any history of prior offenses' when setting the level of a [future] forfeiture penalty" or in deciding whether to renew the station's license or not. Second, although the FCC stated that it would not consider Fox's prior indecent broadcasts, the

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88 Id. at 2317-18 (discussing the broadcasters' claim that they did not have proper notice at the time of the incidents, nor do they have proper notice presently, of what is prohibited, arguing that the "lengthy procedural history [in this case] shows that [they] did not have fair notice of what was forbidden").
89 Id. at 2317. The Court noted that:
Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminato-

91 Id. at 2318 ("The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of § 1464 as interpreted and enforced by the agency 'failed to provide a person of ordinary intelligence fair notice of what is prohibited.'").
92 Id.
93 Id.
94 Id. (citing 47 U.C.C. § 503(b)(2)(E)).
Court noted that there is still a chance that the station’s reputation would be damaged going forward, especially because “Commission sanctions on broadcasters for indecent material are widely publicized.”

Finally, the Supreme Court emphasized three important points in its decision. First, because the case was resolved on proper notice grounds, the Court “need not address the First Amendment implications of the Commission’s indecency policy.” Second, because the Court’s decision concerns the issue of notice with the Commission’s policy at the time of the Fox broadcasts, the Court found it unnecessary to determine the constitutionality of the agency’s indecency policy as articulated in the Golden Globe Order and in later adjudications. Third, the Court explained that its decision allows the Commission to alter its current indecency policy with reference to the public interest and relevant legal requirements. The decision gives the FCC quite a lot to contemplate. Following the Supreme Court’s Fox II decision, in September 2012, Chairman Julius Genachowski directed the FCC’s Enforcement Bureau to focus its enforcement on only the most “egregious” cases of indecency. Thus, in the wake of the latest Fox decision and the Chairman’s directive, the question remains, where do we go from here?

95 Id. at 2318-19; see also Jeffrey M. McCall, Broadcast Indecency Landscape is Muddled, C. NEWS (July 14, 2012), http://commcns.org/1e9WADm (noting that Fox II did not receive as much press—from the standpoint of the average person—as expected because the decision was made by the Supreme Court the same week as the Health Care decision).

96 Fox II, 132 S. Ct. at 2320.

97 Id.

98 Id.

99 See FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, Public Notice, 28 F.C.C.R. 4082, 4082 (April 1, 2013). The Chairman’s directive was aimed at reducing the backlog of pending indecency complaints and also at ensuring that the Commission’s indecency policies “are fully consistent with vital First Amendment principles.” Id.

100 See, e.g., Clip: Supreme Court Term Review, Criminal Law, C-SPAN (Sept. 18, 2012), http://commcns.org/1e9WFqO (presentation of John Elwood). During Super Bowl XLVII in February of 2013, the first prominent occurrence of a “fleeting expletive” on-air since the Fox II decision occurred when Baltimore Ravens Quarterback Joe Flacco yelled “f—ing awesome” to his teammate after winning the game. The expletive was picked up by microphones and broadcast into America’s living rooms for all to hear. See Peter Gicas, Super Bowl MVP Joe Flacco Drops F-Bomb Live On-Air After Win, Parents Television Council Calls on FCC to Take Action, E. NEWS (Feb. 4, 2013, 7:45 AM), http://commcns.org/1e9WL1x. It will be interesting to see how the Commission handles this most recent case in light of the Fox II decision.
III. THE VARYING APPROACHES THE COMMISSION COULD TAKE POST-F.C.C. V. FOX

The Supreme Court indicated in Fox that its opinion permits the Commission to amend its current indecency policy "in light of its determination of the public interest and applicable legal requirements," and permits the courts to assess the current policy or any amended policy with reference to its "content and application." In view of the Court's hands-off posture, below are four policy and/or legal options that the Commission should consider when moving forward in its decisions addressing indecency regulation and enforcement.

A. The Commission Could Retain its Current Fleeting Expletive Policy Going Forward With Notice to Broadcasters

In future decisions, the Commission may choose to retain the current fleeting expletive policy, announced in its Golden Globe Order, with advance, fair notice to broadcasters. The latest Supreme Court decision in Fox II simply reaffirmed the broadcasters' due process rights under the Fifth Amendment and set aside the Commission's orders because they were unconstitutionally vague. The notice problem in this case was that at the time the broadcasts at issue occurred, the Commission's 2001 policy statement was in place. One factor in this policy statement focused on the length and repetition of sexual or excretory material as a basis for finding it indecent. In contrast, the Commission explained that where such sexual or excretory references occurred just once or were fleeting in nature, the agency generally found the broadcasts not indecent. Therefore, the broadcasters were not on notice that fleeting expletives could be found "actionably indecent" and sanctioned by the Commission.

With this decision, the Supreme Court held only that the Commission's fleeting expletive policy was vague and did not provide fair notice to Fox and ABC as to the three specific broadcasts at issue. The Court did not, however,

101 Fox II, 132 S. Ct. at 2320.
102 See Coble, supra note 13; see generally Golden Globe Order, supra note 4, ¶ 17.
103 Fox II, 132 S. Ct. at, 2320 (holding that the Commission failed to give Fox "fair notice prior to the broadcasts in question that fleeting expletives . . . could be found actionably indecent [and][t]herefore, the Commission's standards as applied to these broadcasts were vague, and the Commission's orders must be set aside").
104 Id. at 2313-14.
106 Fox II, 132 S. Ct. at 2314 (discussing how the Commission also included examples in this statement of broadcasts that were not found "indecent because [they were] fleeting and isolated").
107 Id. at 2314.
108 Id. at 2320.
nullify the Commission’s fleeting expletive policy.\textsuperscript{109} Thus, the Commission could choose this first option in order to preserve its current policy going forward now that broadcasters are on notice,\textsuperscript{110} and sanction any broadcasts that include fleeting expletives that are “patently offensive under contemporary community standards for the broadcast medium.”\textsuperscript{111} It is uncertain how such an approach will play out.\textsuperscript{112} However, in light of the current policy’s unsettled constitutional impediments, the Commission should abandon, or at least amend, its current approach as it will likely be challenged again in court and invalidated on First Amendment grounds.\textsuperscript{113}

B. The Commission Could Return to its Pre-Fleeting Expletive Emphasis on Context

Rather than retaining its current fleeting expletive policy, the Commission may elect to return to its pre-fleeting expletive emphasis on context as set forth in its 2001 policy statement.\textsuperscript{114} In that statement, the Commission laid out the analysis that it would use to determine whether broadcast material is indecent.\textsuperscript{115} It stated that the material must not only “describe or depict sexual or excretory organs or activities,” but must also be “patently offensive.”\textsuperscript{116} The Commission then noted further that when determining whether something is patently offensive, the “full context in which the material appear[s] is critically important.”\textsuperscript{117} As an example, the Commission offered that, “[e]xplicit language in the context of a bona fide newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be.”\textsuperscript{118} Therefore, under this policy, it appears that

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See Warren Richey, Supreme Court Says Broadcast Decency Standards Too Vague, CHRISTIAN SCI. MONITOR (June 21, 2012), http://commcns.org/1929qPi (noting the Parents Television Council’s position that the “notice requirement” for indecency regulation “has already been satisfied for all the pending complaints”).
\item Golden Globe Order, supra note 4, ¶ 9.
\item See Coble, supra note 13 (discussing possible further legal challenges by broadcasters to the existing policy).
\item Fox II, 132 S. Ct. at 2320 (holding that this opinion “leaves the courts free to review the current policy or any modified policy in light of its content and application”). A modified policy, taking into account broadcasters’ First Amendment concerns, may be less likely to be invalidated in court. See Coble, supra note 13 (“The Supreme Court’s limited holding promises further proceedings, at the FCC and in the federal courts, before the contours of the Commission’s constitutional authority to regulate broadcast indecency are finally settled.”).
\item See Industry Guidance Policy Statement, supra note 8, ¶ 9.
\item Id. ¶¶ 7-9.
\item Id. ¶¶ 7-8 (emphasis original).
\item Id. ¶ 9 (emphasis original).
\item Id. (footnote omitted).
\end{enumerate}
\end{footnotesize}
curse words, by themselves, did not automatically result in a finding of indecency. Rather, instead of considering solely what was broadcast, the Commission also evaluated how, when, where, and why the material or words were broadcast—essentially, the material’s surrounding context. In its 2001 Policy Statement, the Commission specifically noted three factors that it would weigh when evaluating a broadcast in context. The Commission considered the “explicitness or graphic nature” of the broadcast, whether it “dwells on or repeats at length,” and whether it “appears to pander or is used to titillate, or . . . appears to have been presented for its shock value.” Under this policy, then, the presence of a specific word in a broadcast would not automatically trigger a finding of indecency, but would rather be evaluated in light of its full overall context. Furthermore, a fleeting expletive would likely not trigger an indecency violation on its own, since a key factor above is whether the broadcast “dwells on or repeats at length” the indecent material. In contrast, under the Commission’s current policy, a broadcast of an expletive such as the f-word does appear to trigger an automatic indecency violation, even though “fleeting.” The Commission reasoned that because of the inherent “sexual connotation” in the f-word, its use would always fulfill the first prong of the indecency rule, regardless of the context in which it is broadcast. In this way, the current fleeting expletive policy has the effect of chilling speech, which likely violates broadcasters’ First Amendment rights.

119 See id. (“An analysis of Commission case law reveals that various factors have been consistently considered relevant in indecency determinations.”).
120 Id.
121 Id. ¶ 10.
122 Id. (emphasis original).
123 See id. ¶¶ 14-15 (citing San Francisco Century Broadcasting, L.P. (KMEL(FM)), Notice of Apparent Liability, 7 F.C.C.R. 4857 (July 29, 1992), aff’d sub nom. In re Liability of San Francisco Century Broadcasting, L.P., Memorandum Opinion and Order, 8 F.C.C.R. 498 (Jan. 5, 1993) (finding that the language in a song “dwelling on descriptions of sexual organs and activities . . . was understandable and clearly capable of a specific sexual meaning and, because of the context, the sexual import was inescapable”)). Compare this to a Commission finding of “not indecent” because the “surrounding contexts do not appear to provide a background against which a sexual import is inescapable.” Id. ¶ 15 (quoting Great American Television and Radio Co., Inc., Notice of Apparent Liability, 6 F.C.C.R. 3692, 3693 (July 19, 1990)).
124 Industry Guidance Policy Statement, supra note 8, ¶ 10 (emphasis original).
125 Golden Globe Order, supra note 4, ¶ 12.
126 Id. ¶ 8.
127 See Jacob Sullum, The FCC’s Incomprehensible Ban on Broadcast Indecency, REASON.COM (Jan. 11, 2012), http://commcnrs.org/17S7nzz (noting that, “[s]ince guessing wrong about the FCC’s taste can cost broadcasters millions of dollars in fines and jeopardize their licenses, they tend to err on the side of restraint, which means much worthy material either is expurgated or never airs”); see also Michael J. Cohen, Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards, 30 SETON HALL LEGIS. J. 113, 131-32
If the Commission retains this current policy, it is likely only a matter of time before the policy is challenged again in court on First Amendment grounds. Therefore, post-\textit{Fox}, the Commission might decide it is better off returning to its context-based approach to indecency.

Such an approach, which emphasizes context as "critically important," provides broadcasters with fair notice that any allegedly indecent broadcasts going forward will be evaluated in light of their overall context.\footnote{See Industry Guidance Policy Statement, supra note 8, ¶ 9 (providing further that it is "not sufficient . . . to know that explicit sexual terms or descriptions were used") (emphasis added).} The Commission's 2001 policy statement offered broadcasters and the public a list of specific examples of cases where the Commission made a decision about indecency after evaluating each of the three factors discussed above.\footnote{Id. ¶¶ 12-23.} The purpose of these examples was to help guide the industry as to what factors the Commission has considered, and how it has decided, with regard to specific contexts.\footnote{Id. ¶ 10.} This approach seems much less likely to implicate the same degree of First Amendment concerns as the Commission's currently fleeting expletive policy. Unlike the Commission's current policy, which effectively bans the use of the f-word in any context due to its inherent "sexual connotation,"\footnote{Golden Globe Order, supra note 4, ¶ 8 (noting that even if the f-word is used as an "intensifier," and not in a way that is meant to depict anything sexual, it would still be considered indecent in any context because of the word's inherent "sexual connotation").} the context-specific approach includes both an objective and subjective component, which actually requires analysis and does not trigger an automatic indecency violation.\footnote{See Industry Guidance Policy Statement, supra note 8, ¶¶ 9-10.} The context-based approach does not create an all-out ban on certain words.\footnote{See id. ¶ 10 ("No single factor generally provides the basis for an indecency finding.").} This factor alone could shield the Commission from the type of First Amendment challenges it would likely receive if it retains its current fleeting expletive policy. This approach would also be consistent with precedent set in \textit{Pacifica}, where the Court upheld the Commission's finding of indecency which "rested entirely on a nuisance rationale under which context is all-important."\footnote{F.C.C. v. Pacifica Foundation, 438 U.S. 726, 750 (1978). The Court further stated: "We have not decided that an occasional expletive in either [a two-way radio conversation or a telecast] would justify a criminal prosecution." Id. (emphasis added).}

\begin{footnotes}
\item[128] See Industry Guidance Policy Statement, supra note 8, ¶ 9 (providing further that it is "not sufficient . . . to know that explicit sexual terms or descriptions were used") (emphasis added).
\item[129] Id. ¶¶ 12-23.
\item[130] Id. ¶ 10.
\item[131] Golden Globe Order, supra note 4, ¶ 8 (noting that even if the f-word is used as an "intensifier," and not in a way that is meant to depict anything sexual, it would still be considered indecent in any context because of the word's inherent "sexual connotation").
\item[132] See Industry Guidance Policy Statement, supra note 8, ¶¶ 9-10.
\item[133] See id. ¶ 10 ("No single factor generally provides the basis for an indecency finding.").
\item[134] F.C.C. v. Pacifica Foundation, 438 U.S. 726, 750 (1978). The Court further stated: "We have not decided that an occasional expletive in either [a two-way radio conversation or a telecast] would justify a criminal prosecution." Id. (emphasis added).
\end{footnotes}
C. The Commission Could Adopt a Position of Benign Neglect

Alternatively, the Commission could decide that neither retaining its current fleeting expletives policy nor returning to its 2001 context-based approach would best suit the industry going forward. In that case, the Commission could take a more radical approach—one of benign neglect—where the Commission continues to receive indecency complaints but chooses not to act on any of them. Such an approach would practically parallel the Commission’s approach in the period directly following the *Pacifica* decision.\(^3\) Between 1975 and 1987, the Commission declined to enforce any actions against broadcasters despite receiving approximately 20,000 indecency complaints each year.\(^1\) The Commission, in fact, was already taking this approach, to a certain extent, up until the Spring of 2013. As of the Fall of 2012 there were approximately 1.5 million indecency complaints pending at the Commission, some of which were filed back in 2003.\(^3\) On April 1, 2013, the Commission announced in a public notice that, since that time, it has reduced the backlog of complaints by 70%.\(^3\)

It is unclear when, however, the Commission will take steps to review and act on the remaining complaints.\(^3\)

In any case, the Commission should be wary of adopting this kind of benign neglect approach. Silently neglecting indecency complaints, without doing anything more, could lead to severe unrest in Congress and public disapproval. Benign neglect would also be inconsistent with the Commission’s statutory mandate to regulate indecency under § 1464.M The Commission would be better off either amending its current indecency policy and enforcing the amended version, or altogether doing away with it through administrative nullification.

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\(^3\) See Jim Sollisch, *Supreme Court Indecency Ruling in FCC vs. Fox TV—Does It Really Matter?,* Christian Sci. Monitor (June 18, 2012, 8:54 AM), http://commens.org/11L8xJ3 (noting that after *Pacifica,* “fines were rarely doled out” until around 2003).

\(^1\) See Crigler & Byrnes, supra note 6, at 330 n.9 (1989); see also Infinity MO&O, supra note 15, ¶ 4 (explaining that “the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts” because it believed that “only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975”).

\(^3\) Coble, supra note 13 (noting that these complaints “involve about 9,700 television broadcasts... and are holding up more than 300 license renewal applications”).

\(^3\) Backlog Reduction Public Notice, supra note 99, at 4082 (stating that the Enforcement Bureau has dismissed more than one million complaints, including those beyond the statute of limitations, those “too stale to pursue,” those that fell outside FCC jurisdiction, those that included incomplete information, and those that were “foreclosed by settled precedent.”).

\(^3\) Coble, supra note 13.

\(^3\) Infinity MO&O, supra note 15, ¶ 5 (finding that “the highly restricted enforcement standard employed after the 1975 *Pacifica* decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464”).
D. The Commission Could Decide To Administratively Nullify Its Indecency Policy and Enforcement Procedures

Ultimately, the Commission may decide that its indecency doctrine is so riddled with problems of policy and constitutionality that none of the above options will suffice. In that case, the Commission could take the more aggressive option and administratively nullify its indecency policy and enforcement procedures.

In Syracuse Peace Council, the Commission held that the Fairness Doctrine was unconstitutional because it chilled speech in violation of the First Amendment and was not "narrowly tailored to achieve a substantial government interest." The Commission administratively ruled to no longer enforce the Fairness Doctrine, despite the fact that it still continues to enforce a similar rule, with regard to "equal time," under 47 U.S.C. § 315. The Commission could, for several reasons, choose this approach with regard to its indecency policy. Not only is the history of broadcast indecency enforcement muddled and inconsistent, but the media landscape of 2013 has significantly changed since indecency regulation began in the 1970s. Broadcasting no longer occupies the same dominant "uniquely pervasive" position in American society that it did at the time of the Pacifica decision. Moreover, community standards have evolved significantly since the days of Pacifica and technological advancements have arguably diminished many justifications for broadcast regulation. In addition to these significant changes in society and technology, the Commission's current indecency policy impedes on broadcasters' First Amendment rights as it effectively chills speech.

Since the original justifications for regulating broadcast indecency in Pacifica are weak today, and the Commission's current indecency policy is peppered...
with First Amendment problems, the Commission could and should decide that the public interest would be better served if the agency did not encumber broadcast media with continued indecency regulation.

IV. FLEETING ALL AROUND: WHY THE COMMISSION SHOULD ADMINISTRATIVELY NULLIFY ITS INDECENCY DOCTRINE AND ENFORCEMENT PROCEDURES

A. More Muddled, Inconsistent History

Ask almost any FCC indecency attorney or long-time media law expert and he or she will tell you that the history of broadcast indecency regulation is a long and bewildering one. While there are quite a number of examples of inconsistent FCC indecency enforcement, the following adequately demonstrate this muddled history of regulation.\footnote{Industry Guidance Policy Statement, supra note 8, ¶¶ 13-23 (providing varying examples of indecency findings the Commission has made).}

In 1993, the FCC ruled that a news announcer’s comment “Oops, f[—]led that one up” was not indecent.\footnote{See id. ¶ 18 (noting that because it was a single curse word, it did not deserve “further Commission consideration in light of the isolated and accidental nature of the broadcast”).} Just five years later, in 1998, the Commission found a DJ’s comment of “suck my d[—] you f[—]ting c[—]” actionably indecent.\footnote{See id. ¶ 19.} While an average person might reasonably understand why the latter comment was found indecent but the former was not, at the time of both of these on-air expletives, the Commission was enforcing a policy where profanity was generally only sanctioned when it was repeated or “persistent[ly] focused” on offensive, sexual, or excretory material.\footnote{Id. ¶ 17.} The Commission admitted that the material was fleeting in the DJ case, but still decided to sanction the station anyway since, “although fleeting, the material [was] explicit.”\footnote{Id. ¶ 19.}

This is one of the many examples of inconsistency in enforcement since the FCC began regulating broadcast indecency. As commentator’s point out, broadcasters feared—and still fear—this enormous uncertainty since they do not know what is allowed on-air, as opposed to what will be penalized, and the FCC fails to provide clarity on the matter.\footnote{Poniewozik, supra note 1, at 29.} Moreover, a TV and film writer noted that no one “know[s] where the line is, and that’s scaring people.”\footnote{Id. at 30.} While broadcasters are left scared and clueless, the Commission itself is not in a much better position; it has been known to reverse its own initial find-
ings, ruling long afterwards that certain broadcasts are actionably indecent.\textsuperscript{154}

Another example of this inconsistent enforcement occurred around the same time. In 2004 following a special Veterans Day presentation of the movie Saving Private Ryan, complaints flooded into the Commission protesting the broadcast of "indecent and profane material" throughout the movie.\textsuperscript{155} After a careful review, and despite the definite presence of profane and allegedly offensive language throughout, the Commission ruled that the broadcast was not indecent.\textsuperscript{156} The FCC's Order distinguished the Saving Private Ryan broadcast from the 2003 Golden Globe Awards where the use of the word "\texttt{f[---]jing}" was found indecent, profane in context, as well as "shocking and gratuitous," and lacking any claim of "political, scientific or other independent value." At first glance, this discrepancy in findings appears reasonable: The Commission distinguished the two broadcasts and seemed to rationally explain its findings. But a closer read of the order reveals that approximately sixty-six of 225 ABC affiliate stations covering one-third of the country decided not to broadcast Saving Private Ryan that same Veterans Day in 2004, because they feared they

\textsuperscript{154} For example, in 2003, the FCC Enforcement Bureau initially found Bono's comment "\texttt{f[---]jing brilliant}," uttered during the broadcast of the Golden Globe Awards, not indecent but then reversed this decision five months later. In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 18 F.C.C.R. 19,859, \textsuperscript{15} 5-6 (Oct. 3, 2003) ("Moreover, we have previously found that fleeting and isolated remarks of this nature do not warrant Commission action. Thus, because the complained-of material does not fall within the scope of the Commission's indecency prohibition, we reject the claims that this program content is indecent . . . ."), rev'd, 19 F.C.C.R. 4975, \textsuperscript{15} 8 (Mar. 3, 2004) ("With respect to the first step of the indecency analysis, we disagree with the Bureau and conclude that use of the phrase at issue is within the scope of our indecency definition because it does depict or describe sexual activities."). As discussed supra, the fact that it was a fleeting remark seemed to hurt the NBC's case. Golden Globe Order, supra note 4, \textsuperscript{15} 11 ("The ease with which broadcasters today can block even fleeting words in a live broadcast is an element in our decision to act upon a single and gratuitous use of a vulgar expletive.").

\textsuperscript{155} Saving Private Ryan MO&O, supra note 71, \textsuperscript{15} 1, 4.

\textsuperscript{156} Id. \textsuperscript{15} 15-16. The Commission held that the broadcast content could not be evaluated solely by itself, but must involve a careful review of context. The Commission explained the significance of preserving the film in its "unedited form" since it was designed to be broadcast as a tribute to honor veterans and the harsh reality of war encompasses the horrors and crude language portrayed. It also noted that in the context of ABC's repeated warnings and Senator John McCain's introduction where he discussed the importance of presenting the realistic version so that we do not repeat the past, the material in context was not indecent since it was not presented to "titillate or shock" the audience. Id. \textsuperscript{15} 13-16. But see Golden Globe Order, supra note 4, \textsuperscript{15} 9 (holding, a mere 8 months earlier, that a single fleeting expletive was patently offensive).

\textsuperscript{157} Saving Private Ryan MO&O, supra note 71, \textsuperscript{15} 18; see also C-SPAN, supra note 100 (presentation of John Elwood) (discussing Justice Kagan's remarks that, in the context of the FCC's enforcement history, acclaimed film director Steven Spielberg's work is not indecent but everyone else's is); Adam Liptak, TV Decency is a Puzzler for Justices, N.Y. Times (Jan. 10, 2012), http://commcns.org/17wqTfr.
would be fined for indecency violations as a result of some prior Commission rulings. So, while the FCC maintains indecency standards based on an articulated two-part test, it appears that "no one knows what that means until the Commission rules, and even then it is impossible to extract clear guidelines from the FCC’s highly subjective judgments." One critic even went so far as to compare the arbitrariness of the FCC’s indecency standard to Justice Potter Stewart’s famous judgment with respect to obscenity: “I know it when I see it.” With regard to indecency complaints by the public, “several broadcasters argue[d] that the Commission’s enforcement is subjective, and that the FCC manipulates its indecency standard to achieve its desired result.” Every change in leadership at the Commission—be it a new Chairman or new Commissioners—could change how the FCC enforces its indecency policy. Political pressures vary depending on the time period and the makeup of the Commission, as Commissioners only serve five-year terms, and it is rare that a Chairman remains in office beyond a single term. These factors combine to ensure that indecency standards remain in flux.

Despite the seemingly swift and endless criticisms from broadcasters and the public regarding the Commission’s indecency findings, the agency is not entirely at fault in its efforts to preserve the “public interest, convenience, and

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158 Saving Private Ryan MO&O, supra note 71, ¶ 4 (noting, however, that with regard to Saving Private Ryan, the Enforcement Bureau had previously declined to find the Veterans Day broadcasts in 2001 and 2002 actionably indecent); see also 66 ABC Affiliates Didn’t Show ‘Ryan’, NBC NEWS (Nov. 12, 2004, 6:03 PM), http://commcns.org/173LBo6 (citing as one of these prior rulings the Commission’s decision to sanction CBS for Janet Jackson’s fleeting nudity during the 2004 Super Bowl Halftime Show).

159 See Industry Guidance Policy Statement, supra note 8, ¶¶ 7-8 (discussing the two-pronged “analytical approach” the FCC takes in evaluating indecency complaints).

160 Sullum, supra note 127 (concluding that from a consumer standpoint, the Commission’s "weirdly selective" indecency standards are not only “unnecessary but increasingly incomprehensible”). The fact that the Commission was forced to put out guidelines in an attempt to explain itself further supports the argument that it was well settled outside the FCC that no one really knew or understood what material was acceptable on-air and what was prohibited. See generally Industry Guidance Policy Statement, supra note 8, ¶¶ 7-8.

161 Cohen, supra note 127, at 140 (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

162 Id. at 141.

163 See, e.g., id. at 134 (discussing Parents Television Council’s expectation that Chairman Kevin Martin would “more aggressively enforce” the Commission’s indecency standards than then-outgoing Chairman Michael Powell did); Sullum, supra note 127 (noting that the American Civil Liberties Union (“ACLU”) has deemed the Commission indecency judgments “simply a matter of taste, and the commissioners’ efforts to rationalize their taste merely emphasize the arbitrary nature of the enterprise”).


165 See Poniewozik, supra note 1, at 25-31 (discussing complaints of advocacy groups and broadcasters alike); see also Sullum, supra note 127.
necessity" in this country.\textsuperscript{166} It is crucial to understand the origins of the FCC's authority to regulate indecency\textsuperscript{167} and to realize that the agency has a very difficult job in enforcing an arguably ambiguous statute\textsuperscript{168}—with little to no guidance from Congress and the courts, respectively.\textsuperscript{169} The Fox II decision is emblematic of this lack of guidance.\textsuperscript{170} The Supreme Court's most recent ruling on indecency in Fox II was a "very narrow decision that broke no new ground."\textsuperscript{171} As John Elwood summarized in the Cato Institute's September review of the Supreme Court's most recent term, "Everything that was undecided before the opinion is more or less still undecided and it remains to be seen how these things are going to be turning out [in the future]."\textsuperscript{172} The Fox decision did not provide any clarity in defining indecency because the Court ruled only that the broadcasters were not liable due to lack of notice,\textsuperscript{173} and the same "FCC standard is still in place now and can apply to any broadcast going forward."\textsuperscript{174} The Court essentially threw the matter back to the Commission to ponder on its own the appropriate next steps.\textsuperscript{175} But that approach almost "guarantees that broadcasters will be back in court the first time the FCC slaps a station on the wrist."\textsuperscript{176} For all of those hoping that the Supreme Court would finally end the fight one way or another,\textsuperscript{177} we will have to wait for another day. Meanwhile, the Commission's scattered broadcast indecency doctrine remains in place.

So why, then, does the FCC continue to regulate broadcast indecency? In

\begin{itemize}
\item \textsuperscript{166} F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978) (citing 47 U.S.C. § 309(a)).
\item \textsuperscript{167} See supra notes 20-23 and accompanying text. For further treatment of this history, see Pacifica, 438 U.S. at 735-38.
\item \textsuperscript{168} See generally 18 U.S.C. § 1464 (2006). The entirety of the statute reads as follows: "Whoever 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." \textit{Id.} As Commissioner Ness pointed out, "Enforcement of the broadcast indecency statute compels the FCC to reconcile two competing fundamental obligations: (1) [T]o ensure that the airwaves are free of indecent programming material during prescribed hours when children are most likely to be in the audience; and (2) to respect the First Amendment rights of broadcasters regarding program content." Industry Guidance \textit{Public Notice}, supra note 8, at 8018 (statement of Comm'r Ness). This is a very difficult, if not impossible, task.
\item \textsuperscript{169} See C-SPAN, \textit{supra} note 100 (presentation of John Elwood).
\item \textsuperscript{170} F.C.C. v. Fox Television Stations, 132 S. Ct. 2307 (2012).
\item \textsuperscript{171} C-SPAN, \textit{supra} note 100 (presentation of John Elwood, at 21:20).
\item \textsuperscript{172} \textit{Id.} (presentation of John Elwood, at 24:25); see also McCall, \textit{supra} note 95 (remarking on the "muddled" indecency regulation of the past and future: "The court issued two rulings last month, but neither clarifies this ongoing and confusing free speech matter").
\item \textsuperscript{173} See Fox II, 132 S. Ct. at 2317-18.
\item \textsuperscript{174} C-SPAN, \textit{supra} note 100 (presentation of John Elwood, at 21:55)
\item \textsuperscript{175} See McCall, \textit{supra} note 95.
\item \textsuperscript{176} \textit{Id.; see also} Coble, \textit{supra} note 13 (noting that the result of the narrow ruling will be future litigation).
\item \textsuperscript{177} See McCall, \textit{supra} note 95 (concluding that it was "[t]oo bad the Supreme Court didn't give [Chairman Julius Genachowski] more guidance either to enforce the indecency laws and affirm their constitutionality, or to simply let the content free-for-all begin").
\end{itemize}
other words, why is it taking so long for the Commission to lose this dirty battle? Perhaps it is because the Supreme Court is attempting to preserve the status quo for the time being by maintaining a state of balance between the law and morality.\textsuperscript{178} Sooner or later, there will come a time when the Supreme Court will have to rule on the First Amendment issues still at the heart of the indecency doctrine.

B. Evolved Community Standards and Changed Social Norms

To come to terms with our nation’s muddled history of broadcast indecency regulation, it is critical to remember when, where, and how the enforcement standards even began.\textsuperscript{179} The Commission has long emphasized the importance of “context” in making indecency determinations.\textsuperscript{180} Now, ironically, it is just that—context—which must be carefully considered in determining whether broadcast indecency should even still be regulated. By “context” here, I offer a broader meaning of the term: The context of society in 2013 (i.e., modern societal norms and technology in 2013 compared to the vastly different 1978 backdrop which formed the \textit{Pacifica} ruling), as opposed to the Commission’s “context” considerations with regard to a specific broadcast.

Within the social context of 1995 in \textit{Action for Children’s Television},\textsuperscript{181} the D.C. Circuit cited the Commission’s three compelling governmental interests in regulating broadcast indecency: (1) Support for parental supervision of children;\textsuperscript{182} (2) a concern for the well-being of children; and (3) the protection of the home against intrusive offensive broadcasts.\textsuperscript{183} The court reasoned that,

\textsuperscript{178} Historically, the Supreme Court declines to rule on constitutional issues if cases can be decided on other grounds. \textit{See}, \textit{e.g.}, Rescue Army v. Mun. Court, 331 U.S. 549, 568-69 (1947). Thus, perhaps here the Supreme Court fears that if it decides the case on First Amendment grounds—which appears to be the only fight left now that the notice issue was decided in June 2012—that it will find the Commission’s indecency regulation unconstitutional as an abridgement of broadcaster’s First Amendment rights, and that will signal the end of indecency regulation and, therefore, whatever morality (as to what is socially acceptable in public) we have left in society.

\textsuperscript{179} \textit{See}, \textit{e.g.}, F.C.C. v. Pacifica Found., 438 U.S. 726, 735-38 (1978).

\textsuperscript{180} \textit{See} Industry Guidance \textit{Public Notice}, supra note 8, ¶ 4 (discussing how the context-based approach has been in place since the time of \textit{Pacifica}).

\textsuperscript{181} \textit{See generally} \textit{Action for Children’s Television} v. F.C.C., 58 F.3d 654 (D.C. Cir. 1995). This case worked its way through the courts long after \textit{Pacifica}. However, it essentially still cited the same compelling government interest for regulating broadcast indecency—to protect children.

\textsuperscript{182} \textit{Id.} at 660. As discussed, this is really the only stated interest that still remains compelling—and by the very words of it (\textit{parental supervision}), neither the government nor the Commission really has any role.

\textsuperscript{183} \textit{Id.} at 660-61, 73 (noting that these three compelling interests are those of the Commission, while the Court itself identified two similar reasons for regulating broadcast indecency first set forth in Pacifica: "[T]he broadcast media have established a uniquely perva-
Unlike cable subscribers, who are offered such options as 'pay-per-view' channels, broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material. Towards this end, the government has long believed—and apparently still believes—that it must create a "safe haven" where parents can let their children freely watch television during certain times on specific channels, and not feel apprehensive about what their children are seeing. However, despite the passage of twenty years, the court in Action for Children's Television still relied on the justifications set forth in Pacifica as well as in an even older precedent, for continuing to regulate broadcast indecency. The reality, though, is that much has changed since 1968 and 1978 when Ginsberg and Pacifica were decided, and the societal context within which we examine the regulatory landscape today is vastly different. Is it still true that kids need government protection from broadcast indecency in the context of 2013? Supreme Court Justice Ruth Bader Ginsburg apparently does not think so. During oral argument in the Fox II case last winter, Justice Ginsburg reportedly remarked that the Commission should no longer curb fleeting expletives because they are "common parlance" nowadays. Furthermore, the Commission's stated interest in the "protection of the home against intrusive broadcasts" is arguably weak considering that, despite attempts at indecency regulation, much more offensive content slips into broadcast programs and other media, and therefore into your living room, undetected and unregulated on a daily basis.

Lately, it seems to some sources, the government has not tuned in to watch what is on TV. The government can continue its prohibition on profanity and nudity, but offensive material remains on TV in other ways, such as on breaking news programs, which sometimes involve "rapes and murders," kidnap-

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184 Id. at 660.
185 Sollisch, supra note 135.
188 F.C.C. v. Fox Television Stations, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring) (“In my view, the Court’s decision in [Pacifica] was wrong when it issued. Time, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why Pacifico bears reconsideration.”) (citations omitted); see also McCall, supra note 95.
189 See McCall, supra note 95 (noting after his remark that Justice Ginsburg must “run with a rough crowd” if she thinks expletives are so common in speech these days).
190 See Sollisch, supra note 135. As noted earlier, cable and Internet are now also “omnipresent.” Arguably, these forms of media may even be more pervasive than broadcast today.
191 Id.
pings, sexual innuendo, and abuse, among other things. Due to this material readily available on TV, one commenter points out that the regulations in place do not appear to be accomplishing the government’s goal of protecting children. For instance, as the commenter describes, it is quite possible that a child could turn to an episode of Criminal Minds on TV, watch and listen to a murderer explain how he kills, and then shortly thereafter, view a commercial for a violent video game. All within a matter of minutes that child could be mentally scarred, but it appears that as long as the program and commercial do not contain the f-word or show nudity, the broadcasters can air everything else.

The question becomes, is broadcasting still as “pervasive” as it was in 1978 when compared, for example, to even more pervasive but mostly unregulated cable TV today? One should reasonably conclude it is not. As some argue, it is a more appropriate and realistic role for parents to close the gap and monitor what their children are hearing and watching if the government fails to do so. Others argue that parents should monitor their children instead of government regulation: “Parents have the right to ban TV shows from their house or ban TV altogether . . . [and] . . . the right and obligation to monitor what their children watch and to watch TV with them to provide context and discussion when difficult subjects come up.” With all the other offensive and pervasive content on broadcast television today, the Commission’s stated interest to protect children via its indecency regulation appears futile.

192 Id.
193 Id.
194 Id.
195 Id.
196 See generally F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Action for Children’s Television v. F.C.C., 58 F.3d 654 (D.C. Cir. 1995). Both cases cite the unique “pervasiveness” of broadcast media in its form and “accessibility” to children. Some might even argue that children are better off hearing a fleeting curse word here and there than seeing multiple and constant depictions of violence on TV.

197 See Sollisch, supra note 135; see also Poniewozik, supra note 1, at 30.
198 Poniewozik, supra note 1, at 31. (posing the rhetorical question, “who should set the standard [for what should be allowed on broadcast radio and television]?” and then answering, “In reality, [all people] do, in their own home. And it’s likely to stay that way... as media evolve and technology advances beyond attempts to corral it”). In other words, government regulation of indecency becomes increasingly unnecessary and antiquated as “media evolve” and “technology advances.” Id.

199 Sollisch, supra note 135; see also Poniewozik, supra note 1, at 30. (including a comment on C-SPAN by former President Bush that “parents are ‘the first line of responsibility’” and “[t]hey put an off button on the TV for a reason,” asserting that it is up to parents to shield their children from offensive material in their own home). But see id. at 28 (citing a comment by one attorney who brought complaints against Howard Stern, that parents cannot always just turn the offensive material off since it does not all have to do with “what we keep our kids from . . . but our inability to keep other kids from [indecent] material, who then share it with our kids in school . . . It’s like dumping toxic waste in a playground”).
C. Advancements in, and Proliferation of, Technology Diminish Need for Government Broadcast Indecency Regulation

In addition to the argument that government regulation of indecency is futile and has become unnecessary in contemporary context, advancements in technology and the proliferation of other communications mediums since Pacifica, have greatly diminished the need for continued government indecency regulation.200 As John Elwood wrote and argued in the Cato Institute’s amicus brief in Fox II, Pacifica should be overruled since it has been “overtaken by events” and is no longer valid.201

When Pacifica was decided in 1978, the Court cited two reasons for justifying regulation of broadcast indecency and according broadcasters a limited form of First Amendment protection: (1) “[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans;” and (2) “broadcasting is uniquely accessible to children, even those too young to read.”202 However, now over thirty years later, these same justifications are simply not true anymore, or at the very least, they are far less persuasive. The media landscape of 2013 has changed significantly since the 1970s, and broadcasting no longer occupies the same dominant “uniquely pervasive” position in American society that it did in Pacifica’s time.203 The reality is that in today’s world, the broadcast medium can no longer be characterized as “unique.” Whereas in 1978 when relatively few people had cable,204 today “nine out of 10 households are served by cable, satellite, or fiber-optic TV and children commonly watch video from nonbroadcast sources, [thus] it is hard to make the Pacifica argument with a straight face.”205 On remand of Fox I in 2010, the Second Circuit also conceded that we live in a communications world that is

204 See United Video v. F.C.C., 890 F.2d 1173, 1181 (D.C. Cir. 1989) (noting that “[i]n 1980, cable served 19% of television households, but in 1988 it served 51%[.] . . .”). These shares have risen steadily in the ensuing years. See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, 27 F.C.C.R. 8610, ¶¶ 30 n.48, 31-32 (July 18, 2012) (discussing how cable makes up almost 60% of multichannel video programming distributor (“MVPD”) subscriptions with 59.8 million subscribers, satellite services make up an additional 33% of MVPD subscriptions with 33 million subscribers, and telephone MVPDs account for the remaining 7% with 6.8 million subscribers). Assuming that many of these almost 100 million subscribers include households—many with children—it is readily apparent that the majority of people in the United States today receive their content from MVPDs, and do not rely solely on over the air broadcast as they may have in 1978.
205 Sullum, supra note 127.
vastly different from that of 1978. Not only was the "Internet . . . a project run out of the Department of Defense with several hundred users[,] . . . [but] Youtube, Facebook, and Twitter [did] not exist . . . ." Against this backdrop, broadcast TV was indeed "uniquely pervasive" in all American homes. The same, however, is not true today. New forms of media have emerged in the last few decades and "broadcast television has become only one voice in the chorus." Cable and Internet are now "omnipresent." Thus, considering how the media environment has advanced so drastically since Pacifica such that broadcast technology is now just one of many modes of communication, it appears that there is no longer a compelling justification to treat it differently than other forms of media when it comes to First Amendment protections. Even eleven years ago, some members of the Commission realized this, observing that "[i]f rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past." However, as new modes of "programming and distribution increase, broadcast content restrictions must be eliminated." Because broadcast media has not sustained this "uniquely per-

207 Id.; see also Sullum, supra note 127.
209 Fox Television Stations, Inc., 613 F.3d at 326; see also Sullum, supra note 129.
210 Fox Television Stations, Inc., 613 F.3d at 326; see Sullum, supra note 127.

[Watch TV programs and movies on DVDs, on smart phones, streaming from Netflix through our Wii, on video websites, on our DVR, and on demand from AT&T U-verse. They do not know or care what 'broadcast television' is, and they certainly do not perceive a categorical distinction between 'over-the-air' channels and the rest. But the [FCC] does, imposing a form of censorship on broadcast TV that would be clearly unconstitutional in any other context . . . .

Id.; see also Berin Szoka, Second Circuit: Pacifica is Outdated, All Media Deserve Full First Amendment Protection, TECH. LIBERATION FRONT (Jul. 13, 2010), http://commcns.org/14/qV.
212 See id. at 8020 (statement of Comm'r Harold W. Furchtgott-Roth) (footnotes omitted). Commissioner Furchtgott-Roth recognized that “[t]echnology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue” and that

Today, the video marketplace is ripe with an abundance of programming, distributed by several types of content providers. A competitive radio marketplace is evolving as well, with dynamic new outlets for speech on the horizon. Because of these market transformations, the ability of the broadcast industry to corral content and control information flow has greatly diminished.

Id. at 8020-21 (statement of Comm'r Harold W. Furchtgott-Roth) (footnotes omitted).
213 See id. at 8021 (statement of Comm'r Harold W. Furchtgott-Roth).
vasive presence" in the lives of all Americans, broadcast media should be accorded the same level of constitutional protection as any other mode of media distribution—such as cable, newspapers, and the Internet.

For many of these same reasons, it can be argued that the Pacifica Court’s second justification in regulating indecency is also fleeting, and perhaps altogether moot, since broadcasting is no longer “uniquely accessible to children” as it once was. In today’s technological age, children are able to access many more forms of media than just broadcast TV or radio. Furthermore, the public can thank advances in technology for the creation of the V-chip, a device that enables parents to unilaterally “block programs based on a standardized rating system.” In fact it is virtually impossible nowadays to own and use a TV without the V-chip capability, since federal statute mandates that “[e]very television, 13 inches or larger, sold in the United States since January 2000 contains [one].” Additionally, any household that uses a digital converter box also has V-chip capability. Thus, because such technology exists today that allows consumers to proactively block indecent or otherwise offensive content on their own terms, there remains little justification or need for government intervention and regulation on this front. The existence of the V-chip in fact

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214 CATO Amici Brief, supra note 16, at 5-6, 2011 WL 5562515, at *5-6 (discussing the fact that modern technology enables the delivery of news and entertainment via means that did not exist at the time of the Pacifica decision, when the broadcasting airwaves and paper publications were the sole means of delivering content to private homes). CATO went on to point out that the FCC has even admitted that “substantial numbers of households now subscribe to cable or satellite . . . (87%).” Id. at 5-7, 2011 WL 5562515, at *5-7 (discussing how broadcast is no longer one of the only forms of media delivering news and entertainment into homes anymore).


216 See id. at 749-50; see also CATO Amici Brief, supra note 16, at 5-6, 2011 WL 5562515, at *5-6.

217 See Industry Guidance Policy Statement, supra note 8, 8020-21 (statement of Comm’r Harold W. Furchtgott-Roth); see also CATO Amici Brief, supra note 16, at 5-6, 2011 WL 5562515, at *5-6 (noting that “new technologies have largely displaced traditional broadcasting”).

218 Szoka, supra note 210 (noting that “technological changes have given parents the ability to decide which programs they will permit their children to watch”); see also Fox Television Stations, Inc. v. F.C.C., 613 F.3d 317, 326-27 (2d Cir. 2010), vacated, 132 S. Ct. 2307 (2012).

219 47 U.S.C. § 303(x) (2012); see also Szoka, supra note 210.

220 Id. (noting that this occurred when the country transitioned in June 2009 to digital TV).

221 The important thing to note here is that this option of self-censoring, so to speak, did not exist in 1978 when Pacifica was decided. Today, technological advances minimize the need for government regulation and intervention.

222 Szoka, supra note 210 (noting the significance of the fact that, in its decision, the Second Circuit wrote almost three pages focused on discrediting Pacifica which supports the contention that broadcast media should be accorded the same First Amendment protection as all other forms of media).
confirms that “there are less intrusive means of controlling content.” Parents are simultaneously able to block unwanted content from their children while being able to access it themselves on their own terms if they desire. With this type of technology, there is no longer a need for the government to make that choice for consumers.

D. No Other Mode of Communication Is Accorded the Same Limited Form of Constitutional Protection, So Broadcasting Should Not Be Either

Of all the various forms of communication, broadcast has long received the most limited First Amendment protection. In the context of modern society and technology, it is irrational to argue that since broadcast technology has always been granted lesser constitutional protection, it should continue to be treated that way. Assuming Pacifica is outdated, and, as discussed above, there are compelling reasons why it is, then a court should apply the standard of strict scrutiny in deciding the constitutionality of indecency regulation.

When a government restriction on speech is content-based, as is the regulation of indecent material, the restriction must satisfy “strict scrutiny” in order to pass constitutional muster—the government must establish that it has a compelling government interest and that it is achieving that interest via the “least restrictive means.” However, even if the government is able to convince a court that it has a compelling governmental interest in protecting children, it is nonetheless difficult to imagine how it can continue to satisfy the second prong of strict scrutiny, and prove that it is achieving that interest via

223 See Poniewozik, supra note 1, at 30. But see id. (stating that the Parents Television Council feels that the V-chip is not a suitable substitute for government regulation as it is not “widely used enough” and its “voluntary ratings system . . . is faulty”).

224 See, e.g., Sollisch, supra note 135 (noting that “only one ruling matters in this case, and that’s the ruling every parent makes at home”); see also Poniewozik, supra note 1, at 27. (describing a comment by L. Brent Bozell, founder of the Parents Television Council—arguably one of the biggest proponents of decency regulation—who nevertheless stated that parents “have the chief responsibility for their kids” with regard to shielding them from indecent broadcast material).

225 F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978) (noting that while other modes of communication/expression can be curbed only when “official discretion” is “carefully define[d]” and “narrow,” broadcasters may lose their licenses, and therefore their voice, if the FCC felt that it is in “the public interest, convenience, and necessity”).

226 See, e.g., supra notes 144-146 and accompanying discussion.


228 Id. at 26-27 (observing that normally when the Federal Government curbs speech with regard to its particular content, the restriction must satisfy “strict scrutiny” in order to pass constitutional muster—i.e. the government must establish that it has a compelling government interest and is achieving that interest via the “least restrictive means”).

229 Despite the weakness of the “uniquely pervasive” arguments in contemporary times.
the least restrictive means considering the current existence of the V-chip and
the availability of similar, if not worse, content on cable and the Internet in
contemporary society.\textsuperscript{230} Therefore, because it appears that the government can
no longer justify its content-based indecency regulation, broadcasting should
be accorded full First Amendment protection like all other modes of commu-
nication.

V. CONCLUSION

In the wake of the Supreme Court's latest decision in \textit{Fox II}, the Commis-
sion has several approaches it could take with regard to its broadcast indecency
policy.\textsuperscript{231} While the Commission could take seemingly well-traveled options,
such as retaining its current fleeting expletive policy or returning to its 2001
emphasis on context approach, the Commission should take the most aggres-
sive option and administratively nullify its indecency policy and enforcement
procedures because the doctrine is riddled with problems of policy and its con-
stitutionality is questionable.\textsuperscript{232}

The most recent court ruling on the matter—\textit{Fox II}—failed, yet again, to
provide the Commission with any clearer guidance on regulating indecency so
that it may justly take into account both the interests of the government and the
free speech rights of the broadcasters.\textsuperscript{233} The original justifications for regulat-
ing broadcast indecency set forth in \textit{Pacifica} no longer apply in the context of
contemporary society. Furthermore, the proliferation of technology and other
forms of communication now render government broadcast indecency regula-
tion unnecessary and ineffective. As Justice Ginsburg noted in her \textit{Fox} concur-

\textsuperscript{230} \textit{See supra} notes 216-224 and accompanying text. \textit{But see} Rom, \textit{supra} note 25, at 740
(,arguing that “the justifications articulated in \textit{Pacifica} would serve as the FCC’s compelling
interests . . . [and] an indecency policy, and not the V-chip, could serve as the least restric-
tive means”).

\textsuperscript{231} F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012). The Supreme Court
did not discuss these “approaches,” but remanded the case back to the FCC to decide how to
move forward. \textit{Id.} at 2320.

\textsuperscript{232} The FCC released a Public Notice on April 1, 2013, seeking comment as to how the
Commission should deal with its current indecency policies and whether it should maintain
them as they are. Specifically, the Commission asked whether it should continue with
Chairman Genachowski’s Fall 2012 directive to focus only on the most “egregious” cases of
indecency, or revert to requiring repeated rather than fleeting utterances for a finding of
indecency, or maintain its approach from the \textit{Golden Globe Order} where even isolated fleet-
ing expletives will be found indecent. The Notice set comments due thirty days after its
publication in the Federal Register with reply comments due sixty days after publication in
the Federal Register. It remains unclear how the Commission will proceed from here. Back-
log Reduction \textit{Public Notice}, \textit{supra} note 99, at 4082-83; \textit{see also} John Eggerton, \textit{FCC Seeks
Comment on ‘Egregious Complaint’ Indecency Enforcement Regime}, \textit{Broadcasting &
Cable} (Apr. 1, 2013, 4:25 PM), http://commcns.org/1baUXkN.

\textsuperscript{233} \textit{Fox II}, 132 S. Ct. at 2320.
rence, "the Court's decision in [Pacifica] was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why Pacifica bears reconsideration."\textsuperscript{234}

\textsuperscript{234} \textit{Id.} at 2321 (Ginsburg, J., concurring) (citations omitted). \textit{But see} McCall, \textit{supra} note 95 (arguing, in response to Ginsburg's concurrence, that the Fox broadcasts at issue were live and thus would not have actually benefitted from any such "technological advances" even if they were used, which ignores the "5 second delay" tactic that, if utilized, could have potentially allowed station programmers to catch and bleep out the material before it was publicly broadcast).