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FRANKLY, MY DEAR, I DON'T GIVE A *DARN*—AN ARGUMENT AGAINST CENSORING BROADCAST MEDIA

ALEXANDER J. LINDVALL*

"*Writers don't use expletives out of laziness or the puerile desire to shock or because we mislaid the thesaurus. We use them because, sometimes, the four-letter word is the better word—indeed, the best one.*" —Kathryn Schulz[1]

"*Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power.*" —Justice Anthony Kennedy[2]

INTRODUCTION

The First Amendment bars the government from restricting any speech because of its content.[3] Consequently, the

* J.D. candidate 2018, Arizona State University—Sandra Day O'Connor College of Law | B.A., Political Science, *magna cum laude*, Iowa State University, 2015. I would like to thank Dr. Kathleen Waggoner and Dr. Dirk Deam for giving me the tools to succeed in law school; Professors Paul Bender and Jessica Berch for their advice and comments on this Note; and, most of all, my parents for being the best parents anyone could ask for.

[1] Kathryn Schulz, *Ode to a Four-Letter Word*, N.Y. MAGAZINE (June 5, 2011), http://nymag.com/arts/books/features/adam-mansbach-2011-6/index1.html.

[2] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring and dissenting in part).

[3] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a statute that proscribed cross-burning and displaying swastikas because the statute discriminated based on viewpoint); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First

government cannot suppress a particular subject matter (*e.g.*, abortion) or viewpoint (*e.g.*, pro-life).[4] Within this framework, courts consider viewpoint-based regulations of speech particularly egregious because such regulations "pose the inherent risk that the Government [will] . . . suppress unpopular ideas or information" or will "manipulate the public debate through coercion rather than persuasion."[5]

Moreover, the Supreme Court explicitly extends First Amendment protection to "indecent" speech[6] (*i.e.*, speech that "describe[s] or depict[s] sexual or excretory organs or activities" in a "patently offensive" manner).[7] In *Cohen v. California*, for example, the Court held that Paul Cohen could not be convicted of disturbing the peace for wearing a jacket that read "Fuck the

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Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[4] Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLE. ST. L. REV. 199, 201 (1994).

[5] Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 641 (1994). *See also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *R.A.V.*, 505 U.S. at 430 (Stevens, J., concurring and dissenting in part) ("[In] the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious.") (emphasis in original); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56 (2000) (noting that subject-matter-based restrictions are rarely upheld, but the Court has *never* upheld a viewpoint-based restriction on speech).

[6] *See, e.g.*, Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("[S]exual expression which is indecent but not obscene is protected by the First Amendment . . . ."); Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974); Papish v. University of Missouri Curators, 410 U.S. 667, 669 (1973); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15, 18 (1971).

[7] Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 ¶ 7 (2001).

Draft" in the Los Angeles County Courthouse.[8] In an opinion by Justice Harlan, the Court held that the State cannot "remove [an] offensive word from the public vocabulary," even if it is acting under the auspices of "guard[ing] the public morality."[9]

Similarly, in *Erznoznik v. Jacksonville*, the Court struck down as unconstitutional a local ordinance making it a crime for drive-in movie theatres to show movies containing nudity.[10] The Court began by "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers."[11] "[O]ur pluralistic society," the Court noted, is "constantly proliferating new and ingenious forms of expression," much of which "offends our esthetic, if not our political and moral, sensibilities."[12] Nonetheless, the government is not allowed to "discriminate[] among movies solely on the basis of content."[13] To hold otherwise would allow the government to act as a censor, "shield[ing] the public from some kinds of speech on the ground that they are more offensive than others."[14] "[T]he First Amendment strictly limits [this] power."[15]

In both *Cohen* and *Erznoznik*, the Court noted that the rights of the viewer are often subservient to the rights of the speaker: "[T]he burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[16] So, while the government has a strong interest in protecting its citizens' right to privacy, content-based speech discrimination is not a constitutionally permissible means to protect individual privacy interests.[17] "Any ordinance which regulates movies on the basis of content . . . impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments."[18]

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[8] Cohen v. California, 403 U.S. 15, 26 (1971).

[9] *Id.* at 22–23.

[10] Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 217 (1975).

[11] *Id.* at 208.

[12] *Id.* at 210.

[13] *Id.* at 211–12.

[14] *Id.* at 209.

[15] *Id.*

[16] *Id.* at 210–11 (citing Cohen v. California, 403 U.S.15, 21 (1971)) (alterations in original) (internal quotations omitted).

[17] *See id.* at 210–12.

[18] *Id.* at 218 (Douglas, J., concurring).

The *Cohen* and *Erznoznik* decisions illustrate several important points regarding the regulation of indecent speech: (1) indecent speech is constitutionally protected; (2) content-based restrictions on indecent speech are presumptively unconstitutional; (3) the rights of the viewer or listener are usually inferior to the rights of the speaker; and (4) the government may only suppress indecent speech if "it [is] impossible for an unwilling individual to avoid exposure to it."[19] In short, the government cannot act as a censor, even if it is trying to shield the public from offensive speech.

The Court, however, has largely ignored the *Cohen* rationale within the context of broadcast media.[20] Most notably, in *FCC v. Pacifica Foundation* the Court held that speech broadcasted over the airwaves has less protection than speech delivered through different media.[21] In ruling for the Federal Communications Commission (FCC), the Court recognized the government has substantial interests in preventing unwanted speech from entering people's homes and shielding children from potentially offensive speech.[22]

This article argues that modern technology has eroded *Pacifica*'s doctrinal underpinnings to the point that the FCC's indecent speech regulations are now unconstitutional under the First Amendment. Part I discusses the frequently cited purposes underlying the freedom of speech and how those purposes are hindered by the *Pacifica* decision and its ilk. Part II gives a brief history of how the Court has grappled with the First Amendment (which was written using a quill and ink) as applied to electronic media. Part III argues that recent technological developments—*e.g.*, the V-chip, parental controls, and other self-censorship

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[19] *Id.* at 212 (citing Redrup v. New York, 386 U.S. 767, 769 (1967)); *see id.* at 210–12.

[20] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 738 (1978) (upholding the FCC's restrictions of broadcast media because these media have less First Amendment protection than other forms of communication). *Compare* Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down the "Fairness Doctrine" as applied to newspaper publishers), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 385 (1969) (upholding the "Fairness Doctrine" as applied to radio broadcasters).

[21] *Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

[22] *See id.* at 748–49.

tools—severely undermine the *Pacifica* Court's rationale. Part IV argues that, V-chip aside, the FCC's content-based censorship of broadcast media is categorically wrong. Finally, Part V addresses the likely counterarguments to this Article.

I. THE PURPOSES UNDERLYING THE FREEDOM OF SPEECH

Scholars largely agree on the primary purposes underlying the First Amendment's protection of the freedom of speech.[23] The most cited purposes are: (1) to assure individual self-fulfillment;[24] (2) to help attain the truth;[25] (3) to inform the electorate;[26] and (4) to promote the arts.[27] This section explores each of these underlying principles and how each relates to the FCC's censorship of broadcasters.

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[23] *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963) (arguing that four major principles underlie the freedom of speech: (1) individual self-fulfillment; (2) the attainment of truth; (3) furthering participation in governmental decisionmaking; and (4) creating a balance between stability and change); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (agreeing with Emerson's four principles, but arguing that "self-fulfillment" and "participation in change" are particular "key values"); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (1961) (arguing that the First Amendment should be thought of as a means to further: (1) education; (2) philosophy and science; (3) literature and the arts; and (4) public discussion); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1199–1204 (4th ed. 2013) (adding "promoting tolerance" to the usual list of First Amendment values). *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) (arguing that constitutional protection should be accorded only to speech that is explicitly political).

[24] *E.g.*, Emerson, *supra* note 23, at 878–79.

[25] *E.g.*, *id.*

[26] *See, e.g.*, Mills v. State of Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[27] *See, e.g.*, Meiklejohn, *supra* note 23, at 257.

A. ASSURING INDIVIDUAL SELF-FULFILLMENT

It is "a widely accepted premise of Western thought" that every person has an individual "right to form [and express] his own beliefs and opinions."[28] As Justice Thurgood Marshall put it, "[t]he First Amendment serves not only the needs of the polity, but also those of the human spirit—a spirit that demands self-expression."[29] For example, if an Iraq War protestor stood on a street corner chanting "Stop this war now!" or if a PETA member held a sign reading "Fur is Murder," they would likely do so knowing their protests will have little effect on society at large. They protest and chant not to alter public policy, but to define themselves publicly.[30]

The FCC's regulations tread heavily on what some scholars believe to be the preeminent value underlying the First Amendment.[31] In modern society, one of the most popular ways to define oneself publicly is through broadcast media. The FCC, however, limits what words you can say,[32] and in some instances, can punish you for not saying something the government has required you to say.[33] Because the First Amendment embodies a distrust of governmental regulations of speech, the Supreme Court applies "the most exacting scrutiny" to regulations that "suppress, disadvantage, or impose differential burdens upon speech because

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[28] Emerson, *supra* note 23, at 879.

[29] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

[30] These examples were largely paraphrased from Professor Baker's *Scope of the First Amendment Freedom of Speech* article. Baker, *supra* note 23, at 994.

[31] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the Free Speech Clause should primarily be thought of as a means to ensure "individual self-realization"). In his frequently cited article, Professor Redish argued the *Pacifica* Court misapplied the First Amendment by protecting speech based on its social "value." *Id.* at 595.

[32] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4982 (2004) (noting that any broadcasters who air the "F-Word" will likely be subject to FCC fines).

[33] *See In re* Shareholders of Univision Commc'ns, Inc. and Broad. Media Partners, Inc., 22 FCC Rcd. 5842, 5859 (2007) (requiring Univision to pay $24 million for not airing programming that "served the educational and informational needs of children").

of its content" or "compel speakers to utter or distribute speech bearing a particular message."[34]

The speech you hear over broadcast media is not the pure, unadulterated words of the speaker; it is the redacted, family-friendly speech the government has authorized. Essentially, what the FCC has said is: "You can express your ideas and opinions over the airwaves, so long as your words meet the federal government's standards of decency; if they do not, you may be subject to fines or jail time."[35] The First Amendment demands more.

B. ATTAINING TRUTH

Perhaps the most frequently cited reason for protecting the freedom of speech is the "marketplace of ideas" rationale.[36] This rationale is premised on the theory that the soundest and most rational judgment is arrived at by considering all facts and arguments for and against a given proposition. Thus, the suppression of information, discussion, or ideas prevents people from reaching the most rational judgment. As a result, this theory requires discussion to be kept open no matter how valid an accepted opinion seems to be, and it disallows suppression of any opinions regardless of how false or pernicious they may appear to be.

The theory argues that by suppressing words, you will inevitably suppress ideas.[37] Justice Brennan summarized this sentiment by noting:

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[34] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

[35] Under 18 U.S.C. § 1464, anyone who "utters any obscene, indecent, or profane language" over a broadcast medium may be subject to fines or imprisonment for up to two years.

[36] *See generally* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out."); MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE OF THE THEORY OF THE FIRST AMENDMENT 1–12 (1984). *But see* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) (arguing that any marketplace of ideas has "long ceased to exist").

[37] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring and dissenting

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word.[38]

The FCC's regulations are in direct opposition to the marketplace rationale. The First Amendment requires the government to "remain neutral in the marketplace of ideas."[39] The FCC, however, has refused to remain neutral in the marketplace: it now chooses what speech is acceptable and what speech will be subject to fines.[40] In doing so, the FCC impairs the First Amendment's truth-attaining purpose.

C. INFORMING THE ELECTORATE

Freedom of speech is essential to any democracy. Only through "uninhibited, robust, and wide-open"[41] public debate can voters make informed selections in elections, intelligently influence their government's choice of policies, and hold public officials accountable for any transgressions.[42] There is little doubt on this point.[43] The Supreme Court has often spoken of the ability

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in part) (noting that a word categorized as "indecent" is "often . . . inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power."); *see also* Cohen v. California, 403 U.S. 15, 26 (1971) (noting that the government "cannot…forbid particular words without also running a substantial risk of suppressing ideas in the process.").

[38] FCC v. Pacifica Found., 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

[39] *Id.* at 745–46.

[40] *Id.* at 748.

[41] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[42] *See* Chemerinsky, *supra* note 23, at 1200–01.

[43] *See Sullivan*, 376 U.S. at 270.

to criticize the government as "the central meaning of the First Amendment."[44]

Professor James Weinstein argues the Free Speech Clause should primarily be thought of as means to ensure participation in the democratic process.[45] While there may be debate about what other values underlie the First Amendment, Weinstein argues, "[t]he opportunity for each citizen to participate in the speech by which public opinion is formed is . . . vital to the legitimacy of the entire legal system."[46] He further argues that "if an individual is excluded from participating in public discourse because the government disagrees with the speaker's views or because it finds the ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would . . . lack legitimacy."[47] This is essentially a rephrasing of the Court's rationale in *Cohen* and *Erznoznik:* the government is not allowed to act as a censor; if it were, it would give our system of government the gloss of an autocracy.[48] That is the crux of this Article.

By proscribing particular words, the FCC prevents television and radio personalities from voicing their full opinions on political candidates. The FCC's fines have substantially chilled speech broadcasted over the airwaves.[49] There is no doubt that in 2016 many television pundits or radio personalities would like to have called Donald Trump a "fucking tyrannical buffoon" or Hillary Clinton a "corrupt, lying bitch," but the federal government prohibits such behavior.

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[44] *Id.* at 273.

[45] James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

[46] *Id.* at 497, 498.

[47] *Id.* at 498.

[48] *See id.*

[49] *See, e.g.*, Noelle Coates, *The Fear Factor: How FCC Fines are Chilling Free Speech*, 14 WM. & MARY BILL OF RTS. J. 775, 779–83, 795–801 (2005); Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 194–97 (2006); David Bauder, *FCC Decisions Making Hollywood Television Executives Very Nervous*, ASSOCIATED PRESS, (Jan. 24, 2005), http://www.heraldextra.com/lifestyles/fcc-decisions-making-hollywood-television-executives-nervous/article_ebbe2cdd-5a5d-54e5-913f-b0e154827d63.html.

D. PROMOTING THE ARTS

Arguably, the primary impetus behind the Free Speech Clause was to remove the federal government's power to prosecute seditious libel.[50] Prior to the Revolution, the English Crown controlled all publications through a system of licensing schemes that proscribed content out-of-line with official agendas.[51] For example, a watershed colonial moment was the prosecution of New York publisher John Peter Zenger. In the 1730s, Zenger published several satirical articles mocking English royalty.[52] Most notably, his publications included "anti-British song-sheets" and advertisements describing an English royal governor as "a large Spaniel, of about 5 feet 5 inches high . . . lately strayed from his kennel . . ."[53] On its third attempt, the Crown finally indicted Zenger on charges of seditious libel.[54] Zenger then sat in a prison cell for ten months awaiting trial.[55]

The First Amendment's resentment for these repressive licensing schemes has led the Supreme Court to state that "prior restraints on speech and publication are the most serious and least tolerable infringements on First Amendment rights,"[56] and that "[a]ny system of prior restraints of expression comes to [the courts] bearing a heavy presumption against its constitutional

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[50] *See generally* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941).

[51] RUSSELL L. WEAVER ET AL., THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS 5 (3d ed. 2011).

[52] Elizabeth I. Haynes, United States v. Thomas: *Pulling the Jury Apart*, 30 CONN. L. REV. 731, 744 (1998).

[53] *Id.*

[54] Chad Reid, *Widely Read by American Patriots in* PERIODICAL LITERATURE IN EIGHTEENTH-CENTURY AMERICA 117 (Mark L. Kamrath & Sharn M. Harris. Eds., 2005).

[55] Weaver et al., *supra* note 51, at 5. The attorney who successfully defended Zenger at trial was founding father Alexander Hamilton. *Id.*

[56] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

validity."[57] Yet, the FCC currently oversees one of the largest systems of prior restraints in United States history.[58]

In some respects, the FCC's regulations go further than the Crown's licensing schemes. Under the English system, publishers could at least *request* permission to publish controversial materials.[59] But under the FCC's regime, the federal government has issued blanket restrictions of certain speech regardless of context.[60] Additionally, the FCC's regulations of "indecency" are often more far-reaching than the government's regulation of "obscene" material—which receives *no* First Amendment protection.[61] For example, nudity, by itself, does not make a movie "obscene."[62] Yet, CBS was fined over $500,000 for Janet Jackson's split-second "wardrobe malfunction" during her Super Bowl halftime performance.[63] This exhibition was not even

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[57] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (citations omitted).

[58] *See* Chemerinsky, *supra* note 23, at 1243 (defining a "prior restraint" as any "administrative system . . . that prevents speech from occurring"); *see also* RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8 (1996).

[59] Weaver, et al., *supra* note 51, at 434.

[60] *See, e.g.*, Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4982 (2004) (noting that any broadcasters who air the "F-Word" will likely be subject to FCC fines, regardless of context).

[61] Miller v. California, 413 U.S. 15, 23–24 (1973) (when determining whether a piece of material is "obscene," which means it is "unprotected by the First Amendment," "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

[62] Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

[63] Forfeiture Order, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 2760, 2760 (2006).

considered obscene under the Supreme Court's standards; yet it is considered "indecent" under the FCC's standards. This does not add up.

Furthermore, attorney Nasoan Sheftel-Gomes argues the FCC's vague, *ad hoc* punishments of "indecent" speech have caused broadcasters to chill free speech through self-censorship.[64] These government-mandated "safe-zones" have led to a less creative marketplace of ideas and have adversely affected artists.[65] What is worse, Gomes argues, is that artists who have been censored have no standing to contest the FCC's censorship.[66] In other words, when the FCC requires a radio station to censor an indecent George Carlin bit, George Carlin would have no ability to challenge the content-based censorship of his work.

How can this be? How can an Amendment whose "chief purpose . . . [is] to prevent previous restraints upon publication[s]"[67] allow such broad censorship of these media? This problem will be discussed in more depth in Part IV of the article.

E. CONCLUSION TO PART I

Our Constitution protects the freedom of speech to facilitate individual self-fulfillment,[68] help attain truth,[69] inform the electorate,[70] and promote art and literature.[71] The FCC's regulations do not further these goals. On the contrary, the FCC's system of prior restraints is one of the most glaring affronts to the First Amendment in United States history. Rather than remaining neutral in the marketplace of ideas, the federal government now controls what words can and cannot be said over the airwaves.

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[64] *See* Sheftel-Gomes, *supra* note 49, at 197–99.

[65] *Id.* at 226.

[66] *Id*. at 221–22.

[67] N.Y. Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (citing Near v. Minnesota, 283 U.S. 697, 713 (1931)).

[68] Emerson, *supra* note 23, at 878–79.

[69] *See id.*

[70] *Id.* at 882–84. *See also* Mills v. State of Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[71] Meiklejohn, *supra* note 23, at 257.

This stifling of speech has led to the stifling of ideas. And the FCC's fines have led to unprecedented levels of self-censorship, chilling the freedom of speech in violation of the First Amendment.[72]

II. THE HISTORY OF ELECTRONIC MEDIA AND THE FIRST AMENDMENT

A. FILMS AND THE FIRST AMENDMENT

The First Amendment was ratified in the context of print media and unamplified speech. Early on, the Supreme Court grappled with the emergence of electronic media. For example, in *Mutual Film Corp. v. Industrial Comm'n of Ohio*, the Court held the First Amendment did not apply to "moving pictures" because they did not constitute a member of the "press" within the meaning of the First Amendment.[73] Following this ruling, several States and hundreds of municipalities implemented censor boards to ban and edit films the government deemed inappropriate for public consumption.[74]

Nearly forty years later, however, in *Joseph Burstyn, Inc. v. Wilson*, the Court overturned *Mutual Film Corp.*, holding that film is an artistic medium worthy of First Amendment protection.[75] In *Burstyn*, the Court was confronted with a New York statute that allowed the State's Commissioner of Education to revoke a film's license if it was deemed to be "obscene, indecent, immoral, inhuman, sacrilegious, or [was] of such a character that its exhibition would tend to corrupt morals or incite . . . crime."[76] In 1951, New York's Commissioner used this statute

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[72] *See generally* Coates, *supra* note 49, at 779–83.

[73] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244–45 (1915). It should be noted that the Court was applying the Ohio Constitution's protection of the freedom of speech in this case. The language of Ohio's Constitution, however, essentially mirrored the First Amendment.

[74] *See, e.g.*, Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 666 (2012).

[75] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[76] *Id.* at 497.

to ban *The Miracle*, a film he believed was "sacrilegious."[77] The Court invalidated the statute at issue,[78] noting that even if it is assumed motion pictures possess a greater capacity for evil, particularly among the youth of a community, "it does not follow that [they] should be disqualified from First Amendment protection."[79] Nor does the First Amendment allow films to be subject to "substantially unbridled censorship."[80] Within ten years of the *Burstyn* decision, film censorship was practically eradicated.[81]

A primary reason the Supreme Court changed course is because the Justices (and society generally) began to recognize the similarities between film and the print media.[82] In the first half of the twentieth century, moviegoers often went to theatres to watch newsreels rather than reading the stories in the newspaper.[83] And by the 1950s, Justice McKenna's fear of film's "[capacity for] evil"[84] seemed hyperbolic. As old and new media converge, society began to realize that—despite Marshall McLuhan's famous statement—the medium is *not* the message,[85] causing the

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[77] *Id.* at 499. More specifically, the film depicted the main character, Joseph, impregnating a peasant who believed she was the Virgin Mary. The film was also voted "Best Foreign Language Film" by the New York Film Critics Circle. William E. Nelson, *Criminality And Sexual Morality In New York, 1920–1980*, 5 YALE J.L. & HUMAN. 265, 293–94 (1993).

[78] *Joseph Burstyn, Inc.*, 343 U.S. at 501–02.

[79] *Id.* at 502.

[80] *Id.*

[81] *See* Barbas, *supra* note 74, at 666 (citing LAURA WITTEN-KELLER, FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915–1981, 247–71 (2008)).

[82] *See id.* at 668–69.

[83] *See id.* at 712–13.

[84] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 242 (1915).

[85] *Cf.* Barbas, *supra* note 74, at 667. Marshall McLuhan is often credited with the famous quote "the medium is the message." Marshall McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) ("[T]he medium is the message. This is merely to say that . . . personal and social consequences . . . result from the new scale that is introduced into our affairs . . . by any new technology."). This rationale appears to explain the Court's thinking in the *Mutual Film* case, where Justice McKenna argued that films themselves are broadly "capable of evil," rather than the messages contained therein.

Mutual Film Court's distinctions between "moving pictures" and "the press" to fade.[86]

But what about the Court's distinctions between broadcast media and print media? Why do we allow the government to censor television in ways we would never allow in the context of print media? In *Near v. Minnesota*, for example, J. M. Near, a bigoted Minneapolis newspaper publisher, planned to publish several articles falsely claiming the Minneapolis Police Chief and other public officials were under the thumb of Minneapolis' Jewish gangs.[87] Before Near could publish these articles, however, the City obtained an injunction that prevented him from publishing the libelous articles.[88] In a landmark decision, the Supreme Court struck down the injunction, holding the City had "impose[d] an unconstitutional restraint" upon Near's First Amendment rights.[89] In writing for the Court, Chief Justice Hughes noted, "the fact that the liberty of the press may be abused . . . does not make any the less necessary the immunity of the press from previous restraint" because "a more serious public evil would be caused" if the government could determine which stories can be published.[90]

Contrast the *Near* decision with several recent FCC orders. In 2003, the band U2 won the Golden Globe Award for "Best Original Song."[91] While accepting his award, Bono said, "this is really, really fucking brilliant."[92] In addressing Bono's offhand remark, the FCC held that "broadcasters . . . will be subject to potential [fines] for *any* broadcast of the 'F-Word.'"[93] Then, in 2007, the FCC required Univision to pay the federal government $24 million because its programming was not

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[86] *See* Barbas, *supra* note 74, at 667.

[87] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 704 (1931).

[88] *Id.* at 704–05.

[89] *Id.* at 723.

[90] *Id.* at 720, 722.

[91] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4975–76 (2004).

[92] *Id.* at 4976 n.4.

[93] *Id.* at 4982 (emphasis added).

"designed to serve the educational and informational needs of children."[94]

The First Amendment typically forbids the government from subsidizing speech it thinks is "especially valuable"[95] or compelling private actors to speak.[96] In the FCC's view, however, the government may punish broadcasters for not airing government-mandated speech.[97] So, how is it that the First Amendment prohibits the government from silencing J. M. Near's libel, but allows the government to penalize Univision $24 million for failing to broadcast certain content? This article argues that the

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[94] *In re* Shareholders of Univision Comm., Inc. and Broad. Media Partners, Inc., 22 FCC Rcd. 5842, 5859 (2007). In 1990, Congress required the FCC to adopt rules requiring "commercial television broadcast licensees" to devote time to "children's television programming." 47 U.S.C. § 303a(a) (1990). The law further requires the FCC to review how the licensee has "served the educational and informational needs of children" when the licensee applies for license renewal. 47 U.S.C. § 303b(a)(2) (1990). The FCC took this somewhat modest granting of power and used it to issue the largest fine in broadcasting history. *See* Frank Ahrens, *FCC Expected to Impose Record $24 Million Fine Against Univision*, WASH. POST (Feb. 25, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401453.html.

[95] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 677–78 (1994) (O'Connor, J., concurring and dissenting in part). *But see* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 569 (1998) (allowing the government to take "general standards of decency" into account when awarding government art subsidies).

[96] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that compelling students to salute the American flag and recite the pledge of allegiance "transcends constitutional limitations on [the State's] power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control").

[97] *See In re* Shareholders of Univision Comm., Inc. and Broad. Media Partners, Inc., 22 FCC Rcd. 5842, 5859 (2007); *see also Children's Educational Television*, FCC, https://www.fcc.gov/consumers/guides/childrens-educational-television (last visited Sep. 27, 2017) ("[b]roadcast television stations . . . have an obligation to offer educational and informational children's programming.").

First Amendment does not recognize such a stark distinction between print media and broadcast media.

B. TELEVISION, RADIO, AND THE FCC

Unlike the silver screen, radio and television have not been deemed worthy of full First Amendment protection.[98] The FCC is charged with regulating these media forms, and the Commission is allowed to impose sanctions—and even jail time—if a station broadcasts material the FCC finds to be "obscene," "indecent," or "profane."[99] Prior to the 1970s, the FCC controlled indecency over the airwaves by sending broadcasters strongly worded letters, chastising them for airing offensive programming.[100] During the 1970s, however, the FCC sought a test case to expand its new definition of broadcast indecency.[101] Then, on October 30, 1973, WBAI (99.5 FM) aired twelve minutes of George Carlin's "Filthy Words" stand-up comedy routine—discussing the "words you [cannot] say on the public . .

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[98] *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

[99] 18 U.S.C. § 1464 (2012) (The law further allows the government to imprison anyone who "utters any obscene, indecent, or profane language" over broadcast media for up to two years). A broadcast is categorized as "indecent" if it "describes, in terms patently offensive measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs…" *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8000 ¶ 4 (2001).

[100] Lili Levi, *"Smut and Nothing But": The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 509, 520 (2013).

[101] The FCC's new definition of indecency adopted the "patently offensive" test, punishing language that "describes, in terms patently offensive measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs…" *Id.* at 521–22; *see also* Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 88 (1992). A potential reason the FCC was eager to get a test case into federal court in the early 1970s may have been because Richard Nixon had recently appointed four new conservative Justices to the U.S. Supreme Court. *See generally* Eric Posner, *Casual with the Court*, NEW REPUBLIC (October 23, 2011), https://newrepublic.com/article/94516/nixons-court-kevin-mcmahon (discussing Nixon's appointments).

. airways . . . the ones you definitely wouldn't say, ever."[102] The FCC found the Carlin broadcast violated its indecency rules.[103] But rather than simply imposing sanctions on WBAI, the FCC actively sought judicial review.[104]

These facts set the framework for the landmark decision in *FCC v. Pacifica Foundation*.[105] The *Pacifica* Court upheld the FCC's power to regulate broadcast media, citing two pervading governmental interests. First, the "uniquely pervasive" nature of these broadcasts allows them to seep into "the privacy of the home" without the consent of the viewer.[106] Second, broadcasting is "uniquely accessible to children" whose "vocabulary [could be enlarged] in an instant" by hearing indecent or profane language.[107] The Court held that these two interests were sufficient to "justify special treatment of indecent broadcasting," thereby allowing the FCC to fine broadcasters for airing inappropriate content.[108]

At first, despite the resounding win in *Pacifica*, the FCC used its new regulatory powers sparingly.[109] In the 1980s, however, the FCC ramped up sanctions for indecent broadcasts as conservative groups and the Reagan Administration expressed concern over the rise of "shock jock" radio personalities.[110] But it was not until the early 2000s that the FCC began to use its

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[102] *Pacifica*, 438 U.S. at 729–30. George Carlin's "seven dirty words" you can never say on television are "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker," and, of course, "tits." *Id.* at 751.

[103] *Id.* at 732.

[104] Levi, *supra* note 100, at 522 (citing Robert Corn-Revere, FCC v. Fox Television Stations, Inc.: *Awaiting the Next Act*, 2008–2009 CATO SUP. CT. REV. 295, 301 (2008)).

[105] *Pacifica*, 438 U.S. 726. For an exhaustive history of the *Pacifica* decision, see Angela J. Campbell, Pacifica *Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 197–247 (2010).

[106] *Pacifica*, 438 U.S. at 748.

[107] *Id.* at 749.

[108] *Id.* at 750.

[109] Levi, *supra* note 100, at 522–23 (noting that the Commission announced a policy where it would only go after "clear-cut, flagrant cases" of indecent broadcasting, *i.e.*, those where the speaker used one of Carlin's "filthy words").

[110] *See id.* at 523.

regulatory power to its full effect.[111] Between 2002 and 2004, there was a string of notable "indecent" moments during major broadcasted events—including Janet Jackson's infamous Super Bowl "wardrobe malfunction"[112] and Bono's use of the word "fuck" at the 2003 Golden Globe Awards.[113]

Following these events, and others, the FCC began to levy more sanctions with higher dollar amounts—with fines of up to $500,000 for some offenses.[114] Fearing these sanctions, broadcasters began to increasingly self-censor their content.[115] For example, during the 2007 Emmy Awards, FOX used a four-second time-delay and a "Disco Censor-Ball" to avoid FCC scrutiny.[116] To illustrate, that year Sally Field won the Emmy for "Outstanding Lead Actress in a Drama Series."[117] During her acceptance speech—for her role where she played a mother—Field said, "[i]f mothers ruled the world, there would be no goddamn wars in the first place."[118] Instead of airing this line of

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[111] *See id.* at 524; Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911, 922–23 (2005).

[112] CBS Corp. v. FCC, 535 F.3d 167, 171–73 (3d Cir. 2008). The FCC eventually fined CBS $550,000 for this accidental "malfunction." Forfeiture Order, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 2760, 2760 (2006).

[113] Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975 (2004). During his acceptance speech, Bono said, "this is really, really fucking brilliant." *Id.* at 4976 n.4.

[114] *See* Sheftel-Gomes, *supra* note 49, at 192, 212–13 (discussing the evolution of the Broadcast Decency Enforcement Act of 2005, 47 U.S.C. 609 *et seq*.).

[115] *See id.* at 212–13 (noting that many broadcasters erred on the side of caution when it came to potentially indecent broadcasts); *see also* Coates, *supra* note 49, at 779–83, 795–801.

[116] Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t]…The Federal Communication Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 211–13 (2008) (citing Lisa de Moraes, *Emmy Awards: The Stars Showed Up. The Viewers Didn't*, WASH. POST, Sept. 18, 2007, at C07).

[117] *Id.* at 212.

[118] *Id.*

Ms. Field's speech, FOX cut the audio and broadcasted a video of a spinning disco ball.[119]

There are countless other examples of networks practicing ridiculous self-censorship techniques.[120] For example, Clear Channel, the nation's largest radio station operator, has issued a "zero tolerance" policy for indecent language, requiring the immediate suspension of anyone who violates the FCC's rules.[121] This robs both the artist of his or her ability to communicate ideas, and it robs the viewer of the benefits that come from receiving new (albeit sometimes uncomfortable) ideas. In *Ferris Bueller's Day Off*,[122] Cameron certainly did not say, "[p]ardon my French, but you're an *aardvark*." But stations have edited the movie in this way to avoid the FCC's Draconian penalties.[123] In *The Exorcist*,[124] Linda Blair never uttered the line, "[y]our mother sews socks that smell." But, once again, the FCC's *ad hoc* enforcement of its vague indecency rules caused broadcasters to self-censor to the point that our paternalistic regulations don't even pass "the laugh test."[125]

This censorship robs these movies of their message. A high school student calling his Principal an "aardvark" is far less funny and rebellious than if he had called him an "asshole." A demon-possessed child telling me my mother "sews socks" that happen to "smell" is not nearly as terrifying or disturbing as the image of my mother "suck[ing] cocks in hell."[126]

What *is* disturbing, however, is the idea that the federal government can censor the depiction of a high school student

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[119] *Id.*

[120] *See, e.g.*, Arika Okrent, *21 Creative TV Edits of Naughty Movie Lines*, MENTAL FLOSS (Apr. 5, 2013), http://mentalfloss.com/article/49927/21-creative-tv-edits-naughty-movie-lines.

[121] *See* Sheftel-Gomes, *supra* note 49, at 213.

[122] FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986).

[123] *See supra* note 120.

[124] THE EXORCIST (Warner Bros. Pictures 1973).

[125] *See supra* note 120. Professor Erik Luna has suggested that the legitimacy of a law can sometimes be gauged by seeing whether it passes the "laugh test" (*i.e.*, is this law so silly that it causes laughter?). *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005).

[126] And, just for good measure, my mother does *not* do what Linda Blair's character suggests. Anne Lindvall is alive-and-well and lives in northern Arkansas—not hell.

calling his principal an "asshole." The fact that FOX is willing to censor Sally Field talking about how more women in politics might lead to fewer wars, solely because she used a word the government has banned, is terrifying. This will be discussed in depth in Part IV of this Article.

C. AN OVERVIEW OF THE CURRENT FIRST AMENDMENT LANDSCAPE

As previously noted, the *Pacifica* Court held the First Amendment allows content-based restrictions on broadcast media to protect children and homeowners.[127] To test the constitutionality of content-based restrictions of speech, the Court first determines whether the speech being regulated occupies a "subordinate position in the scale of First Amendment values."[128] If the speech falls into this "low-value" category of speech, the Court will often define the precise circumstances in which that speech can be regulated.[129] But if the government imposes content-based restrictions on any speech—even low-value forms of speech—the regulation will be subject to strict scrutiny.[130]

In *R.A.V. v. St. Paul*, for example, the Court struck down a statute that forbade placing any symbol, including "a burning cross or Nazi swastika," on "public or private property," if it would "arouse[] anger, alarm or resentment in others" on the basis

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[127] FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

[128] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)). This "two-tier" First Amendment theory first appeared in the famous *dictum* in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that "certain well-defined and narrowly limited classes of speech . . . 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 47 n.2.

[129] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (setting forth the test for when commercial speech can be regulated); United States v. O'Brien, 391 U.S. 367 (1968) (setting forth the test for when expressive conduct may be regulated); *see also* Stone, *supra* note 128, at 47–48.

[130] *See* R.A.V. v. City of St. Paul, 505 U.S. 337, 395–96 (1992).

of "race, color, creed, religion or gender."[131] Although this statute was regulating "fighting words," which receive no First Amendment protection, the Court found this statute imposed impermissible content-based restrictions on speakers who expressed views on the subjects of "race, color, creed, religion or gender."[132] The Court held that low-value speech can only be regulated when: (1) "the basis for the content discrimination consists entirely of the very reason the entire class of speech . . . is proscribable;" [133] or (2) the government is regulating a "subclass" of the less-protected speech that has "particular 'secondary effects' . . . so that the regulation is 'justified without reference to . . . content . . . .'"[134]

The FCC's regulations are clearly content-based.[135] In *United States v. Playboy Entertainment*, the Court noted that the essence of a content-based regulation is the degree to which the law "focuses only on the content of the speech and the direct impact that speech has on its listeners."[136] There could not be a clearer case of content-based regulations.[137]

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[131] *Id.* at 380.

[132] *Id.* at 391.

[133] *Id.* at 388. For example, the government can only ban "obscenity" *because of its prurience*, not because of a particular viewpoint within the obscene material. In other words, the government could proscribe particular types of super-obscene material; but it could not ban only obscene material with particular political messages.

Within the context of "indecency," the government can only ban indecent speech *because of its reference to sexual or excretory activities in patently offensive way.* Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 ¶¶ 7–8 (2001) (defining "indecency" as any expression that "describe[s] or depict[s] sexual or excretory organs or activities" in a "patently offensive" manner, gauged under contemporary community standards). It could not, however, ban indecent speech *because of the speaker's message*.

[134] *R A.V.*, 505 U.S. at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[135] *Id.* at 421–22 (Stevens, J., concurring) (conceding that *Pacifica* allowed for content-based regulations of specific words).

[136] United States v. Playboy Entm't Grp., 529 U.S. 803, 811 (2000); *see also* Chemerinsky, *supra* note 4, at 202.

[137] Justice Stevens, the author of *Pacifica*, openly admits that the FCC issues content-based regulations of speech. *R.A.V.*, 505 U.S. at 421–22 (Stevens, J., concurring).

Indecency, moreover, is inextricable from many forms of expression.[138] In artistic and political contexts, indecency often has strong communicative conduct; it allows speakers to "protest[] conventional norms or giv[e] an edge to a work by conveying otherwise inexpressible emotions."[139] In scientific contexts, "the more graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be."[140] The Court developed the content-based versus content-neutral dichotomy to ensure the government could not "drive certain ideas or viewpoints from the marketplace."[141] The FCC's regulations run afoul of this guarantee.

Thus, the FCC's regulations likely would be subject to strict scrutiny.[142] In *Playboy*, the Court unanimously applied strict scrutiny to the regulation of indecent content shown on cable television.[143] This strict scrutiny standard would require the government to show that its regulations are "reasonably

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[138] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring in part and dissenting in part).

[139] *Id.* (citing Cohen v. California, 403 U.S. 15, 26 (1971) (internal quotes omitted)).

[140] *Id.*

[141] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[142] *See R.A.V.*, 505 U.S. at 391, 395–96; *cf. Denver Area Ed.*, 518 U.S. at 805–812. I say strict scrutiny would *likely* be applied because the Supreme Court is often unpredictable. While *Renton* was pending, no scholar would have predicted that the Court would begin to gauge whether a law is content-neutral based upon the legislature's purpose when passing the law; but that is what happened. Chemerinsky, *supra* note 4, at 60. In this case of broadcast media, the Court could return to its lower-protection-for-lower-value-speech rationale. But after the retirement of Justice Stevens—the main proponent of this rationale—that course does not seem likely. *See* Joshua B. Gordon, Note, *Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1469, 1476 (2006) (noting that Justice Stevens was quick to use the "low-value speech" rationale, but that rationale has "increasingly become an outlier in First Amendment law").

[143] United States v. Playboy Entm't Grp., 529 U.S. 803, 814, 836 (2000).

necessary" to achieve a "compelling [governmental] interest."[144] In applying strict scrutiny to the FCC's indecency regulations, the government's interests would be: (1) to prevent unwanted speech from entering the home, and (2) to protect children from profanity. Both can be assumed to be compelling interests.[145] The question then becomes whether the FCC's regulations are reasonably necessary to serve those interests.

In 1978, when *Pacifica* was decided, the issue of whether these regulations passed constitutional muster was undoubtedly a close call.[146] But it is no longer 1978. With the advent of modern technology, can the FCC really prevent children from being exposed to profanity by penalizing broadcasters? And are the FCC's regulations *necessary* to protect society from unwanted speech entering our homes? In other words, does the *Pacifica* rationale hold up in 2017?

The FCC claims to have a rigorous, multi-faceted process for determining what speech is "indecent."[147] First, the FCC determines whether the challenged material fits into the proscribable category of "sexual or excretory depictions" (in other words, the FCC only purports to censor Carlin's "filthy words" and the like).[148] Next, if the first prong is satisfied, the FCC engages in a "highly fact-specific" analysis to determine whether the broadcast was "patently offensive" under "contemporary community standards."[149] In determining whether a broadcast was

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[144] *R.A.V.*, 505 U.S. at 395–96; Boos v. Barry, 485 U.S. 312, 321 (1988). The Court often uses different phrasing when framing its strict scrutiny standard of review. *See* Stone, *supra* note 128, at 48–50 (identifying seven different standards of review the Court has used when dealing with content regulations). Regardless of the phrasing, however, the Court will invariably strike down every content-based restriction on speech. *Id.* at 48.

[145] I might argue, however, that "enlarg[ing] a child's vocabulary" is a good thing, despite Justice Stevens' assertion in *Pacifica*. FCC v. Pacifica, 438 U.S. 726, 749 (1978).

[146] *Pacifica* was a 5-to-4 decision that prompted two strongly worded dissents by Justices Brennan and Stewart. *Id.* at 757.

[147] *See* Levi, *supra* note 100, at 526–27.

[148] Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 ¶¶ 7, 8 (2001).

[149] *Id.* at 8003. These phrases were taken from the Court's language in *Miller v. California*, 413 U.S. 15, 15 (1973).

patently offensive, the FCC looks at the "explicitness" of the broadcast, the duration of the broadcast, and whether the material was meant to "titillate" for "shock value."[150] On their face, these extensive processes may display sufficient tailoring to uphold the regulations. In practice, however, the FCC does not abide by its own standards.[151]

Additionally, with the advent of parental controls and other self-censorship tools, it is easier than ever to ensure unwanted speech does not enter the home. In *United States v. Playboy,* the Court noted that cable providers "have the capacity to block unwanted channels on a household-by-household basis."[152] Thus, this sort of "targeted blocking is less restrictive than banning," and "if a less restrictive means is available for the Government to achieve its goals, the Government must use it."[153]

Pacifica's rationale does not hold up in 2017. Any child who has ridden a public school bus has likely had their "vocabulary [enlarged] in an instant."[154] Any child who has perused the Internet has undoubtedly come across something the Court would find to be "indecent." And any child with an older sibling has likely been called a "scurrilous epithet."[155] The Second Circuit captured this sentiment by observing that "the past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."[156] The FCC cannot "bleep" reality. Children are going to learn these words,

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[150] *Id.*

[151] *See, e.g.*, Sheftel-Gomes, *supra* note 49, at 197–199 (arguing that the FCC's *ad hoc* administration of its indecency policy leaves broadcasters confused and leaves artists without recourse); *supra* notes 32 and 33 (showing examples of how the FCC levies fines irrespective of context).

[152] United States v. Playboy Entm't Group, 529 U.S. 803, 815 (2000).

[153] *Id.*

[154] FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978).

[155] Cohen v. California, 403 U.S. 15, 22 (1971).

[156] Fox TV, Inc. v. FCC, 613 F.3d 317, 326 (2d Cir. 2010) (*Fox III*); *see also* Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287, 288 (2012) (noting that broadcast media is no longer a dominant force).

and the government's censorship is only delaying the inevitable.[157]

The Court has stated that *stare decisis* may not apply when subsequent cases or circumstances have "undermined" the original case's "doctrinal underpinnings."[158] The following section argues that modern technology has substantially undermined the *Pacifica* Court's rationale for allowing content-based restrictions on speech. In other words, the FCC's regulations are no longer reasonably necessary to serve any governmental interests and are therefore unconstitutional under the First Amendment.

III. THIS IS THE 21ST CENTURY: MODERN TECHNOLOGY HAS SEVERELY UNDERMINDED *PACIFICA*'S RATIONALE

A. AN OVERVIEW OF MODERN SELF-CENSORING TOOLS

There are several prominent tools that allow television viewers to self-censor their programming—the most prominent being the "V-chip." The V-chip was first introduced in 1993 by Congressman Edward Markey (D-Mass.) as part of the proposed Television Violence Reduction Through Parental Empowerment Act.[159] The Bill stalled, however, due to strong pushback from

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[157] *See* King Waters, Pacifica *and the Broadcast of Indecency*, 16 HOUS. L. REV. 551, 591 (1979) ("A short stroll along any Texas pier when fish are not biting would offer an observant child the full gamut of [George] Carlin's monologue."); Travis Wright, *Kids Are Learning Curse Words Earlier Than They Used To*, WASH. POST, Aug. 7, 2015 (citing Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 AM. J. OF PSYCH. 459, 459 (2013) (finding that children are learning the words we categorize as "profane" by age four)).

[158] Dickerson v. United States, 530 U.S. 428, 443 (2000).

[159] *See* 139 CONG. REC. 19,520 (1993) (statement of Rep. Markey, introducing the Television Violence Reduction Through Parental Empowerment Act of 1993, H.R. 2888). The Legislation contained two main requirements: (1) TV sets must be capable of blocking programs based on a violence rating sent electronically by broadcasters, and (2) TV sets must be capable of blocking the display of programs or time slots as well as channels so that parents can block an individual program even if it does not carry an advisory. *Id.* at 19,521.

broadcasters.[160] It was not until 1996, when President Clinton expressed support for the V-chip in his State of the Union Address, that the proposal gained traction.[161] Eventually, Congressman Markey's V-chip proposal became law as an amendment to the Telecommunications Act of 1996, despite strong opposition in the Senate.[162]

The V-chip allows viewers to block certain content on their televisions.[163] Each television program is given a rating based on its content, and the rating of each program is sent electronically to the V-chip.[164] If the viewer has blocked programs with that rating, it is not broadcasted through the television.[165] More specifically, programs fall into one of six age-based categories: TV-Y, TV-Y7, TV-G, TV-PG, TV-14, or TV-M.[166] A "TV-Y" program is "designed to be appropriate for all children" and suitable for "a very young audience."[167] While a "TV-14" program may "contain some material that parents would find unsuitable for children under 14 years of age," so parents are "urged to exercise greater care in monitoring this program."[168] Thus, a parent could direct her television's V-chip to block all programs with a TV-14 or TV-M rating.

Similarly, cable and satellite subscribers can filter and block unwanted broadcast programming by password-encrypting their set-top boxes.[169] For example, DirecTV has a "Locks & Limits" feature that allows subscribers to "block specific movies, . . . lock out entire channels, and set limited viewing hours."[170] In

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[160] Lisa D. Cornacchia, Note, *The V-Chip: A Little Thing But A Big Deal*, 25 SETON HALL LEGIS. J. 385, 393–94 (2001).

[161] *Id.* at 395.

[162] *Id.* at 396–97 (noting that there was bipartisan concern about the First Amendment implications of the V-chip).

[163] *Id.* at 390.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 401.

[167] *Id.* at 401 n.83.

[168] *Id.*

[169] Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 607 (2013).

[170] Brief of the Cato Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom as Amici Curiae Supporting Respondents, FCC v. Fox

addition, "specialized remote controls can . . . limit children to channels approved by their parents," and "[s]creening tools such as TVGuardian offer . . . a 'Foul Language Filter' that can filter out profanity (even from broadcast signals) based on closed captioning."[171]

Outside of these remedies, there are hundreds of companies that now sell downloadable software capable of blocking inappropriate content.[172] For example, Kaspersky Lab, a leader in parental control software, has a program that allows parents to filter inappropriate content, set time limits on when and how their children can use electronic devices, and receive notifications about their children's internet habits—all for just $14.99.[173]

B. THESE SELF-CENSORSHIP TOOLS SEVERELY UNDERMINE *PACIFICA*'S RATIONALE

These self-censoring tools' ability to block certain programming clearly undercuts the *Pacifica* Court's rationale. The Court's rationale for allowing content-based restrictions on broadcast media is to prevent unwanted speech from entering the home and to protect children from indecent speech.[174] But the V-chip allows parents to do the FCC's job. Don't want the "F-word" to come through your television speakers? Go to your TV's settings and block "TV-M" programming. The V-chip allows parents, not the federal government, to choose what they and their children watch. The V-chip is a narrowly tailored means by which the government can further its interests; levying broad content-based restrictions on broadcasters is not.

As previously noted, "if a less restrictive means is available for the Government to achieve its goals, the Government

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Television, 567 U.S. 239 (2012) (No. 10-1293) 2002 WL 1987618, *17–18 (quoting Thomas W. Hazlett, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing*, 5 J. ON TELECOMM. & HIGH TECH. L. 253, 266 n.39 (2006)).

[171] *Id.* at *18.

[172] *See generally* Neil J. Rubenking, *The Best Parental Control Software of 2017*, PCMAG (Jan. 5, 2017, 1:23 PM), http://www.pcmag.com/article2/0,2817,2346997,00.asp.

[173] *Id.*

[174] FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

must use it."[175] As for the FCC's regulations, there are obvious less-restrictive means: the FCC could require viewers to opt-in to receiving channels that air indecent programming; the FCC could set forth a system that allows viewers to opt-out of indecent channels; or, as the government has already chosen, it could require televisions to contain a device that allows viewers to self-censor channels to meet their own preferences. With these available alternatives, the FCC's regulations are far too overinclusive to pass constitutional muster.

C. CONCLUSION TO PART III

Under 2017 standards, the FCC's regulations are not reasonably necessary to prevent unwanted speech from entering the home. The V-chip and other self-censorship tools have made the FCC's regulations superfluous. Viewers now have control over the content of the media they consume to an extent that was unavailable in the 1970s. The FCC's regulations, thus, are overinclusive and cannot survive judicial scrutiny. Additionally, under 2017 standards, the FCC's regulations are not reasonably necessary to prevent children from being exposed to indecent material. In this respect, the FCC's regulations are woefully underinclusive. Because the FCC cannot regulate the Internet,[176] private speech,[177] or broadcasters during certain hours,[178] the FCC's regulations only protect children from profanity in a very limited sense. If the government's true purpose is to prevent children's vocabulary from being "enlarged . . . in an instant,"[179] the regulations would need to be much larger in scope. However,

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[175] United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000).

[176] Reno v. ACLU, 521 U.S. 844, 849 (1997) (striking down the anti-decency provisions of the Communications Decency Act for violating the First Amendment).

[177] *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971).

[178] Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (holding that the FCC cannot prevent the broadcast of indecent speech between 10 p.m. and 6 a.m.).

[179] *Pacifica*, 438 U.S. at 749.

regulations of this magnitude would run afoul of the Constitution.[180]

Accordingly, what you are left with is the federal government issuing broad, content-based restrictions with little, if any, benefits. Because viewers can self-censor their televisions on a household-by-household basis, broadcasters' content is no longer "uniquely pervasive" or "uniquely accessible to children."[181]

IV. REGARDLESS OF MODERN DEVELOPMENTS, *PACIFICA* WAS WRONG WHEN IT WAS DECIDED

Advances in technology have made Justice Stevens' rationale in *Pacifica* untenable. By allowing viewers to select what content enters their home, the V-chip and other parental controls make the FCC's regulations woefully over-inclusive. However, there is a larger point that needs to be made: *Pacifica* was wrong when it was decided. Courts and scholars have largely criticized the *Pacifica* Court's rationale for upholding the FCC's content-based regulations.[182]

Content neutrality is a core principle of free speech analysis. Without this principle, the government would be able to "effectively drive certain ideas or viewpoints from the

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[180] *See Reno*, 521 U.S. at 875 (noting that protecting children is not a sufficient interest when regulating broadcasts addressed toward adults).

[181] For a summary of the general grievances against the FCC, including the problem of technological developments, see generally Joshua B. Gordon, *Long Live* Pacifica: *Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1472–84 (2006).

[182] *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530 (2009) (Thomas, J., concurring) (questioning the continuing viability of *Pacifica*); *id.* at 545 (Ginsburg, J., dissenting) ("[T]here is no way to hide the long shadow the First Amendment casts over what the [FCC] has done."); Action for Children's Television v. FCC, 58 F.3d 654, 673 (D.C. Cir. 1995) (Edwards, C.J., dissenting) ("Whatever the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now."); Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 608–15 (2013) (arguing that the government failed to fully demonstrate that it had a legitimate interest in protecting children from indecent language); Gordon, *supra* note 181, at 1472.

marketplace."[183] This, along with the theoretical and doctrinal inconsistencies in the Court's broadcast media decisions, shows that *Pacifica* is an anomaly that should be discarded.

A. DOCTRINAL PROBLEMS WITH *PACIFICA*'S HOLDING

Under the current First Amendment landscape, protestors can burn the American flag;[184] neo-Nazis can march through Jewish communities;[185] Klan members can burn crosses;[186] and members of the Westboro Baptist Church can protest soldiers' funerals, carrying signs that read "God Hates Fags."[187] The Court did not believe these acts would cause sufficient harm to children or an unwilling audience to carve out a First Amendment exception. But, apparently, George Carlin's utterance of the word "tits" over the radio "amply justif[ies] special treatment of indecent broadcasting,"[188] because an "individual's right to be left alone plainly outweighs the First Amendment rights of [broadcasters]."[189] This does not make sense. Justice Stevens' rationale stands alone in First Amendment jurisprudence, and the Court has refused to extend *Pacifica*'s rationale to any other form of technology.[190]

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[183] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); *see generally* Chemerinsky, *supra* note 5, at 53.

[184] United States v. Eichman, 496 U.S. 310, 312 (1990) (striking down the federal Flag Protection Act of 1989); Texas v. Johnson, 491 U.S. 397, 399 (1989).

[185] Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43 (1977) (allowing neo-Nazis to march through Skokie, Illinois, a town with a large Jewish population, despite numerous threats).

[186] Virginia v. Black, 538 U.S. 343, 347 (2003) (allowing cross burning so long as the act does not amount to a true threat of harm).

[187] Snyder v. Phelps, 562 U.S. 443, 448 (2011).

[188] FCC v. Pacifica Found., 438 U.S. 726, 750, 751 (1978).

[189] *Id.* at 750.

[190] United States v. Playboy Entm't Grp., 529 U.S. 803, 811 (2000) (refusing to apply *Pacifica* to cable television); Reno v. ACLU, 521 U.S. 844, 867 (1997) (refusing to apply *Pacifica* to the internet); Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (refusing to apply *Pacifica* to phone sex services); *see generally* Gordon, *supra* note 181, at 1476–80.

Many people may have found George Carlin's "Filthy Words" monologue to be offensive. But there is no doubt that many people are also offended by burning crosses and desecrated American flags; yet the Court has made it clear that speech cannot be suppressed merely because it offends the majority of citizens.[191] If the First Amendment means anything, it means that the government cannot ban speech just because a majority of citizens find it distasteful.[192] "[T]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[193]

V. COUNTERARGUMENTS CONSIDERED

A. HOW WOULD ALLOWING PROFANITY TO BE BROADCASTED OVER THE AIRWAVES *FURTHER* ANY OF THE FIRST AMENDMENT VALUES LISTED IN PART II?

Response: Allowing speakers to use every word at their disposal allows them to effectively communicate their intended message. This is especially true in the arts, comedy, and political speech. If Paul Cohen had worn a jacket that said, "I Strongly

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[191] *See supra* notes 185–188 and accompanying text; *see also Pacifica*, 438 U.S. at 766 (Brennan, J., dissenting) ("Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.").

[192] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55–56 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit [the] government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Cohen v. California, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric.").

[193] Consol. Edison Co. of NY, Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

Disagree with the Draft" in the L.A. County Courthouse, I doubt it would have conveyed the same message. And, as the title of this article suggests, if the final line in *Gone with the Wind* was, "Frankly, my dear, I am indifferent," it would not have struck the audience as particularly powerful.

Allowing Sally Field to express her disdain for all the "goddamn wars,"[194] rather than just "wars," adds an emotional element to the sentence. Profanity "convey[s] an emotion or intensif[ies] a statement."[195] Justice Harlan acknowledged this truism in *Cohen* when he noted that the government "cannot . . . forbid particular words without also running a substantial risk of suppressing ideas in the process."[196] As Justice Brennan put it:

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word.[197]

In short, you cannot silence particular words without also silencing particular messages.[198] As Justice Kennedy has noted:

> In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying "otherwise inexpressible emotions." In scientific programs, the more

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[194] Quale, *supra* note 116, at 212.

[195] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 546 (2009) (Ginsburg, J., dissenting).

[196] Cohen v. California, 403 U.S. 15, 26 (1971).

[197] FCC v. Pacifica Found., 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

[198] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring and dissenting in part).

> graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. And allowing speakers to use their full vocabulary adds a new dimension to the public discourse.[199]

Overturning *Pacifica* would add clarity to the ideas competing in the marketplace; it would add an emotive element to many forms of artistic expression; and it would allow the individual, not the federal government, to decide what media is appropriate for their personal consumption.

B. IN *R. A. V. V. ST. PAUL*, THE COURT HELD THAT THE GOVERNMENT CAN PROSCRIBE LOW-VALUE SPEECH IF IT ADDRESSES HARMFUL "SECONDARY EFFECTS" ASSOCIATED WITH THE SPEECH. IS THAT NOT THE CASE HERE? IS THE GOVERNMENT NOT SIMPLY TRYING TO LIMIT THE EFFECTS OF WIDESPREAD PROFANITY?

Response: No. All speech gives rise to certain secondary effects. When you see a political advertisement, it might cause you to vote for a particular political candidate. When you see a Nike advertisement, it might cause you to buy a Nike product. And when you hear George Carlin say his "seven dirty words," it may "curve your spine."[200] These are all effects of speech, but they are not the kind of secondary effects that allow the speech to be proscribed. In *Renton v. Playtime Theaters*,[201] for example, the Court upheld a local ordinance that forbade any "adult motion picture theatre" to be located within 1,000 feet of any residential zone.[202] Although the ordinance appeared to be content-based, the Court held that it was "aimed . . . at the secondary effects of such theatres," and "not at the dissemination of offensive speech."[203]

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[199] *Id.*

[200] *Pacifica*, 438 U.S. at 751.

[201] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[202] *Id.* at 43.

[203] *Id.* at 47, 49 (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976)).

Unlike the ordinance in *Renton*, the FCC's regulations are explicitly designed to prevent "the dissemination of offensive speech."[204] The *Renton* Court made clear that "[the] government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[205] That is precisely what the FCC is doing. The City of Renton was attempting to prevent crime and maintain property values.[206] The FCC, on the other hand, is driving certain speech out of the marketplace because it disagrees with the messages conveyed. This is unacceptable under the First Amendment.

C. IF WE ALLOW STATIONS TO BROADCAST INDECENT PROGRAMMING 24/7, WE ARE GOING TO BE INUNDATED WITH PROFANITY, WHERE IT WILL LIKELY BECOME COMMONPLACE IN OUR EVERYDAY LANGUAGE. IS THAT REALLY THE KIND OF SOCIETY WE WANT TO FOSTER?

Response: Perhaps, considering the alternatives. There is, of course, nothing constitutionally impermissible about wanting our society to avoid using profane language. The question is how do we go about achieving that goal? Under our current system, the answer seems to be: by giving the federal government the power to decide which words are suitable for us to hear. That is a radical proposition. If *Pacifica* was overturned, perhaps we would be subject to more profanity, and maybe it would become more commonplace in our speech. But that is far less upsetting than allowing a group of unelected federal officials to determine what we can say and what we can hear.

Additionally, is it such a bad thing that we might use "curse words" more often? The only reason these words cause so much distress is because we allow them to. Yes, the word "fuck" may conjure up "sexual or excretory activities and organs"[207]—

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[204] *Id.* at 49 (quoting *Young*, 427 U.S. at 71 n.34).

[205] *Id.* at 48–49 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

[206] *Id.* at 48.

[207] Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, ¶ 7 at 8002 (2001) (defining "indecency" as any expression that

but so does the phrase "sexual or excretory activities and organs." In *Gone with the Wind*, when Clark Gable told Vivian Leigh that he did not "give a damn," that line shocked and offended many viewers.[208] But now the word is commonplace; few, if any, are offended by its usage. The same can be done with other vulgar terms.

A taboo is "a cultural proscription on behavior."[209] And at least one scholar has called the FCC's current indecency regime "institutionalized word taboo."[210] Society, for whatever reason, has made certain words "taboo." For this reason, certain words cause many people discomfort—some more than others. For all intents and purposes, however, there is no meaningful difference between the phrase "sexual intercourse" and the word "fucking." The point of speaking is to use sound to conjure up an image or idea in the mind of the listener, and these two phrases largely conjure up the same images and ideas. Yet the word "fuck" is somehow worse than the phrase "sexual intercourse." Why? Because society has collectively decided that the word "fuck" should be taboo.

Having societal taboos is, to some extent, irrational. But under our current indecency scheme, we have gone much farther than irrationality—we have "institutionalized" these taboos. In most modern cultures, if someone does something "taboo" (for example, uses profanity around children), they might be scolded by their peers; warned that their behavior is inappropriate; or maybe, if their behavior was bad enough, be asked to leave. But, in America, if a person dares say a taboo word on television, they can be fined thousands of dollars or imprisoned.[211] This degree of punishment for violating a social norm is—for lack of a better phrase—cruel and unusual.

"describe[s] or depict[s] sexual or excretory organs or activities" in a "patently offensive" manner, gauged under contemporary community standards).

[208] *See* Amanda Garrett, *'Frankly, My Dear' From Gone With The Wind*, OLD HOLLYWOOD FILMS, http://www.oldhollywoodfilms.com/2016/03/frankly-my-dear-from-gone-with-wind.html (Mar. 4, 2016) (noting that producer David O. Selznick wrote many other lines—such as "Frankly, my dear, I don't care" and "Frankly, my dear, I don't give a hoot"—but none had "the impact of the original").

[209] Fairman, *supra* note 182, at 616.

[210] *Id.* at 615–32.

[211] 18 U.S.C.A. § 1464 (2015).

D. WHEN STATIONS "BLEEP" WORDS, ADULTS CAN USUALLY INFER THE PARTICULAR INDECENT WORD USED. WHY, THEN, SHOULD WE NOT ALLOW THIS CENSORSHIP TO PREVENT CHILDREN FROM HEARING THESE WORDS?

Response: Because we are just delaying the inevitable. Most research shows that children are learning most of the words we would call "profane" by age four.[212] By the time children are in kindergarten, "they're saying all the words . . . we try to protect them from on television."[213] This marginal positive benefit is not worth sacrificing our First Amendment freedoms. Additionally, most studies show that children under age twelve don't understand sexual language and innuendo (after all, if a child is unfamiliar with the concept of sex—as most children are—how could any word conjure up prurient images in their mind?).[214] So, the FCC is trying to protect children from hearing words they already know, yet don't understand.

Another point: When you "bleep" a profane word, you are often drawing more attention to the word. Children are inherently curious. When they hear a censored word, they know it might be "naughty," and their first instinct is to try to understand this new, bad word.[215] But when they hear an uncensored word they know nothing about the word—it is simply a new word. It is then up to parents to dispel the stigma surrounding that word—to educate their children rather than keep them in the dark about these words. This is how adults should confront uncomfortable situations: head-on. Instead, we allow the federal government to shield us

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[212] Travis Wright, *Kids Are Learning Curse Words Earlier Than They Used To*, WASH. POST (Aug. 7, 2015), https://www.washingtonpost.com/posteverything/wp/2015/08/07/kids-are-learning-curse-words-earlier-than-they-used-to/?utm_term=.c4fe81e5928c (citing Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 AM. J. OF PSYCHOL. 459 (2013)).

[213] *Id.*

[214] *E.g.*, Barbara K. Kaye & Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 MASS COMM. & SOC'Y 429, 433 (2004).

[215] *See*, Patty Wipfler, *Bad Words from Good Kids*, HAND IN HAND, https://www.handinhandparenting.org/article/bad-words-from-good-kids (last visited Sept. 19, 2017).

from these situations so we can avoid talking to our children about uncomfortable topics. By doing this we have allowed our superstitions and subconscious feelings to triumph over reason.[216]

E. THERE IS SO MUCH INDECENCY IN THE WORLD AS IT IS—ON THE INTERNET, IN OUR MOVIES, IN OUR MUSIC. WHY CAN'T TELEVISION JUST BE OUR "SAFE SPACE" WHERE WE DON'T HAVE TO WORRY ABOUT BEING BOMBARDED WITH PROFANITY?

Response: It can. But it should not be imposed by a federal agency with little oversight. In his famous critique of the FCC, Ronald Coase argued that the marketplace is a more effective and more efficient manager of rivalrous goods (*e.g.*, television stations). [217] Because the marketplace has better information, he suggested, it can more efficiently allocate spectrum space to the most effective operators.[218] As shown in Part III, moreover, you can self-censor your televisions using your government-mandated V-chip. The free market is capable of weeding-out programs that don't conform to society's standards of decency. Many are familiar with the phrase, "vote with your feet." Within this context, if you dislike the programs being broadcasted, "vote with your fingers."

CONCLUSION

The FCC currently oversees one of the largest systems of speech censorship in U.S. history. Under this regime, a group of unelected federal officials has broad authority to determine what words deserve suppression. This is the quintessential example of the government refusing to "remain neutral in the marketplace of ideas." The FCC's regulations do nothing to further the purposes underlying the First Amendment. To the contrary, they stifle free expression and represent an intolerable content-based restriction on speech.

Under the *Pacifica* decision, the Court allowed the FCC to issue these content-based restrictions because (1) the "uniquely pervasive" nature of broadcast media allows them to intrude into

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[216] For a more detailed explanation of this argument, *see* Fairman, *supra* note 182, at 615–16.

[217] R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 17–34 (1959).

[218] *Id.*

the unwilling listener's home, and (2) broadcast media are "uniquely accessible to children" whose "vocabulary [could be enlarged] in an instant" if they were exposed to indecent language.[219] These concerns no longer exist. Modern technology has severely undermined *Pacifica*'s rationale. As of the year 2000, all televisions sold in U.S. markets have been required to contain a "V-chip"—a self-censorship tool that allows television viewers to block certain programs based on its rating. If a homeowner does not want certain content to intrude into the home, he or she may simply access the V-chip and block the programming.[220] The V-chip also prevents children from being exposed to indecency—if a parent wants to prevent his or her children from hearing profane language, block it with the password-encrypted V-chip.

The FCC's content-based regulations of speech tested the boundaries of the First Amendment in the 1970s—when the FCC exercised a great deal of discretion and rarely levied sanctions. Today, however, the FCC exercises little-to-no discretion and often doles out massive fines. These fines have led to an unprecedented chilling of speech that the First Amendment cannot allow. It is time for the Court to revisit its decision in *Pacifica* and rid the country of this unconstitutional systematic censorship.

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[219] FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

[220] THE V-CHIP: OPTIONS TO RESTRICT WHAT YOUR CHILDREN WATCH ON TV (2017), https://www.fcc.gov/consumers/guides/v-chip-putting-restrictions-what-your-children-watch.

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