An Indecent Proposal?
What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry

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I. INTRODUCTION

“Why do they even call it ‘The Simple Life?’ Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.”

—Nicole Richie, 2003 Billboard Music Awards, referencing the title of the Fox Television reality show in which she starred, “The Simple Life.”

“I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** ‘em.”

—Cher, singer, 2002 Billboard Music Awards, speaking about her career.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

—United States Constitution, First Amendment

While the Constitution’s First Amendment protects freedom of speech, not all speech is exempt from regulation. Nicole Richie and Cher’s brief remarks, comprising merely seconds of airtime on two live television broadcasts on Fox and its affiliates, spawned years of litigation reaching the nation’s highest court. The FCC sought to punish networks for airing “fleeting expletives.” In April 2009, the Supreme Court ruled in favor of the FCC, in FCC v. Fox Television Stations, Inc. In July 2010, the United States Court of Appeals for the Second Circuit ruled in favor of Fox in Fox Television Stations, Inc. v. FCC. However,

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2. Id.
3. Id. at 1809.
4. Id. at 1800.
5. Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).
the FCC soon appealed the decision. Since experts predict that the case will be finally resolved by the Supreme Court, the Supreme Court’s previous ruling may be especially instructive in understanding the outcome of this issue. This article will explore the Supreme Court’s ruling, its analytical underpinnings, and evaluate the history of the FCC’s regulation. Furthermore, the article will examine the relevant case law, including FCC v. Pacifica Foundation, Miller v. California, CBS Corp. v. FCC, United States v. Playboy Entertainment Group, and Cohen v. California to show how the Court has balanced policing the airwaves to protect vulnerable viewers and preserving the First Amendment right of free speech.

In Fox, the Court ruled that federal regulators have the authority to punish broadcast networks that air isolated cases of profanity, known as fleeting expletives. Fleeting expletives most often occur during a live broadcast on either radio or television. Fox marked a dramatic shift from the previous thirty years of broadcast indecency regulation. Before the Court’s decision in Fox, the Federal Communications Commission (“FCC”) only levied sanctions for an expletive when used repeatedly. Now, the FCC can punish isolated outbursts of the “f-word” and “s-word” on broadcast TV and radio.

The “fleeting expletive” rule raises important questions. First, considering the Supreme Court’s decision to allow the FCC to penalize the broadcasting of “fleeting expletives,” how far could this policy be taken and still remain constitutional? Given that the Supreme Court permitted the FCC to take a more activist role in the name of protection, the FCC may use this license to more actively regulate speech, thus holding the TV networks to an unreasonable standard. Fox could become a dangerous precedent, allowing the FCC to potentially expand the list of words considered profane. Could the expanded list include other words because they are controversial, or because they allude to a controversial topic the FCC terms “indecent?” This ruling has important implications. The Supreme Court decision has a broad reach, and thus numerous television networks filed amicus curiae briefs supporting Fox. Although the majority opinion differed, the ruling is a content based restriction on free speech.

Second, should networks be held accountable for the one-time, spontaneous utterance of a profanity during a live broadcast? In this paper, I will argue that a network should not be held responsible for an unscripted statement because it is one the network could neither anticipate nor control. Moreover, the cost of hearing a rare expletive on television is not so dangerous that it outweighs the benefit of having a press free from such a stringent restriction. If the exclamation were unplanned, what would punishing the network prevent?

In order to avoid these difficult questions, the Court in Fox addressed a rather narrow issue: how adequate was the FCC’s explanation of the decision to forbid broadcasting an expletive, even when uttered only once? The FCC claimed that its change in policy was

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10. CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008).
15. Id.
reasonable to protect children from what the commissioners considered “‘the most objectionable, most offensive language.’”16 The rationale was that “[p]rogramming replete with one-word indecent expletives will tend to produce children” who use them,17 because, the Court argued, kids copy “behavior they observe.”18 This ideal is not something the FCC has the right to promote via regulation, since there is no compelling public interest to reduce the amount of profanities expressed on television when they are isolated and fleeting.

The FCC also argued that the rule punishing fleeting expletives was predicated on the fact that bleeping technology was less expensive, so there was a lighter burden for networks to make sure no one heard a fleeting expletive. Finally, the FCC argued that the networks were on notice of this change based on Janet Jackson’s wardrobe malfunction. The Court decided that the FCC’s decision was not “arbitrary and capricious,”19 and its explanation of the policy was adequate. Thus, in approving the way the FCC reached its new guidelines, the Court allowed the Commission’s new rule to survive.

Before further analysis, it is important to define the issue’s scope: the FCC’s policy only regulates the content of broadcast television—it does not apply to what is broadcast over cable (such as HBO), satellite channels, or the Internet.20 A further limitation on the FCC’s fleeting expletives rule is that broadcasters are only sanctioned for expletives between 6 a.m. and 10 p.m.21 This is a compromise based on the Supreme Court’s previous finding that adults have a First Amendment right to indecent materials,22 balanced with the concern that children are most likely to watch television between the hours of 6 a.m. and 10 p.m.

II. INDECENCY ON BROADCAST AIRWAVES

The Communications Act of 193423 governs the system of broadcast licenses. The Act gives the FCC power to enforce its regulations, and thereby regulate broadcasts. Under the Act, in order to obtain and maintain a broadcast license, a broadcast licensee must operate in the “public interest, convenience and necessity.”24 Exactly what is in the public interest is open to interpretation. One of the requirements for getting a “free and exclusive use of a limited and valuable part of the public domain” is to abide by an indecency ban.25 The consequences of violating the ban may include fines, license revocation, or prevention of license renewal.26

A. REGULATING BROADCAST AIRWAVES

16. Fox, 129 S.Ct. at 1808.
18. Fox, 129 S.Ct. at 1813.
19. Fox, 129 S.Ct. at 1814.
21. Id.
22. Id.
24. Id. § 309(a).
26. Id.
“S***, p***, c***, f***, c***, f****, m*****f***** and t***.”27 These were the seven dirty words that comedian George Carlin famously said were not allowed on the public airwaves. These words that no one could say received plenty of discussion when the Supreme Court addressed them in FCC v. Pacifica Foundation thirty years ago.28 This was the first time the Court was faced with deciding the validity of a government restriction on indecent speech. The Court upheld an administrative sanction—a fine—against a radio station that had aired Carlin’s Filthy Words monologue in the middle of the afternoon, a time when schoolchildren would likely have an opportunity to hear a program. The Court agreed that the FCC could enforce a regulation prohibiting indecent speech against licensed broadcasters during hours children would mostly watch or listen. Indecent speech was defined as follows: “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs . . . .”29 The Court held that “contemporary standards” were to be determined by juries on the basis of their own perceptions, not by reference to nationwide standards.30

The Court emphasized that the speech’s value “lie[s] at the periphery of First Amendment concern.”31 In Red Lion Broadcasting Co. v. FCC,32 the Supreme Court held that broadcasting enjoys the most limited First Amendment protection because of limited broadcast frequencies and Congress’s directive that the FCC “consider the demands of the public interest in the course of granting licenses.”33 The Court emphasized that broadcasting is uniquely “pervasive”34 and “accessible to children, even those too young to read.”35 This means the FCC would crack down more stringently against these broadcast stations because everyone with a television set, including children, has access to them.

The Pacifica Court further stated that instead of a criminal prosecution against a media company, an administrative sanction would be appropriate.36 The opinion focused on the “repeated and deliberate use of vulgar language”37 in Carlin’s comic routine. That opinion only addressed the repeated use of expletives and did not decide that “any word with a sexual or scatological origin, however used, was indecent.”38 The Court did not answer the question of whether a radio or TV network could be sanctioned for a person saying a curse word for its literal meaning rather than an exclamation. Most importantly, the Court did not decide whether “an isolated expletive could qualify as indecent.”39 Although the issue was left unsettled in the years following Pacifica, the FCC implicitly allowed fleeting expletives, rejecting viewer complaints about them. Thus, the policy of the FCC during those years could be inferred from its conduct. The significance of this case was that the Court had to deal with the validity of a government restriction on indecent speech.

For a broadcasted statement to be deemed indecent, it must fulfill two requirements. First, the material must describe or depict sexual or excretory organs or activities.40 Second,
the “broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.”

To determine whether material is patently offensive, the full context of the broadcast must be considered. The factors used to evaluate the context include: (1) the explicit or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander, or is used to titillate, or is presented for its shock value.

Unlike indecency, as described in *Pacifica*, there is a different test to determine whether material, like hard-core pornography, is obscene. In *Miller v. California*, the Supreme Court held that material deemed obscene could be regulated in broadcast and other media. In *Miller*, a man mailed adult material as an advertisement to a restaurant owner and his mother, who did not ask to receive the brochures. Although the Supreme Court remanded the case for further consideration, it defined obscenity as follows:

(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.

Material found to fall within this legal definition of obscene is not protected by the First Amendment. The important point to consider is context. For example, medical school textbooks often have detailed photos and descriptions of anatomy, but they also have tremendous scientific value and do not appeal to a prurient interest. On the other hand, just because something is allowed in a small dose for a specific beneficial purpose, it does not mean that it is permissible in an adulterated and unregulated form—“civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.”

This case is especially relevant to *Fox* for that proposition. It is one thing to have a person repeatedly utter the “f-word” multiple times while describing sexual activity. It is entirely different to say the same word suddenly, without referring to intercourse, but rather to express a sudden emotion, which by its nature, is too overpowering to be pondered. Thoughtful introspection might have prevented the use of that word, but this was not possible, given the very nature of the moment which prompted the exclamation.

### III. Indecency on Cable Television

The Court addressed the subject of sexually explicit cable programming in *United States v. Playboy Entertainment Group*. The problem was “signal bleed,” incomplete
scrambling that might allow children to see or hear some indecent programming.\textsuperscript{51} The case involved a provision of the Telecommunications Act requiring cable operators who provide adult programming that is “indecent” to not provide such programming at hours when children may be in the audience, or to scramble or fully block the channel so that non-subscribers cannot receive it.\textsuperscript{52} The Court in \textit{Playboy} struck down the law. Although the Court assumed that the programming would be “offensive” to many and that it came “unwanted” into the home, the majority opinion reiterated that adults have a First Amendment right to view non-obscene material.

Since the restriction was content based and singled out particular cable programmers (those primarily presenting adult material), it was subject to strict scrutiny. Justice Kennedy’s opinion emphasized that “[t]his case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be established by a less restrictive alternative.”\textsuperscript{53} The Court concluded that the availability of “voluntary blocking” at the request of parents was less restrictive than the “time channeling” mandated by the law. It made no difference that blocking required consumers to take inconvenient affirmative action. Further, even on “the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech.”\textsuperscript{54} As for the argument that adult programming is “not very important” compared to political speech, the Court said that in the past, speech “that many citizens may find shabby, offensive, or even ugly” has been vindicated because, although the Government may have a legitimate interest in regulating such speech, it must do so in a manner consistent with First Amendment principles.\textsuperscript{55} Even presuming a legitimate interest, the less restrictive means of \textit{Pacifica} still discourage expletives, but do not overstep constitutional bounds like in \textit{Fox}.

\textbf{IV. BANNING PROFANITY ON TV BROADCASTS: WHY WE SHOULD GIVE A $\#!\&$

In \textit{Fox}, the Court held that the FCC policy applied because Richie’s statement “involved a literal description of excrement and both broadcasts invoked the ‘F-Word’ which inherently has a sexual connotation.”\textsuperscript{56} Cher’s statement was deemed indecent because she “metaphorically suggested a sexual act as a means of expressing hostility to her critics.”\textsuperscript{57} “The [C]ourt gave tentative approval to government regulation of the use of even a single curse word on live television, but refused to pass judgment on whether the Federal Communications Commission’s ‘fleeting expletives’ policy is in line with First Amendment guarantees of free speech.”\textsuperscript{58} Its failure to do so was erroneous. In \textit{Playboy}, the Court concluded that even if the government has a legitimate reason to regulate a type of speech, it cannot do so unless the rule is constitutional. The Court avoided the question of the First

\textsuperscript{51} Id. at 825.
\textsuperscript{52} Id. at 803-04.
\textsuperscript{53} Id. at 814.
\textsuperscript{54} Id. at 825.
\textsuperscript{55} Id. at 826.
\textsuperscript{57} Id. at 1809.
Amendment in *Fox* because it would likely have found that the fleeting expletives rule would not pass constitutional muster.

Additionally, the Court argued the FCC’s previous “safe-harbor-for-single-words approach” would make widespread use of profanity more likely. The Court reasoned that an automatic exemption for a one-time utterance would lead to increased usage, stating that “[t]o predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance.” However, the nature of fleeting expletives in live broadcasts is that they cannot be anticipated, like Cher and Nicole Richie’s statements. The Court would therefore be asking the TV network to exercise “clairvoyance” in order to avoid a fine. Furthermore, the Court argued that the technological advances, which include mechanisms to bleep out offensive language, have made it easier to comply with the FCC’s more stringent rules.

Although in *Fox*, the FCC did not impose fines, the network challenged the FCC ruling. The Second Circuit in *Fox* concluded that the FCC acted in an “arbitrary and capricious manner because it avoided the procedures for changing its rules.” The court “sent the case back to the FCC for a more reasoned explanation of its policy.” The Supreme Court agreed with the FCC’s position and overruled the Second Circuit’s ruling. The Court decided “that the agency met its burden” even though “[t]he Second Circuit found that the FCC hadn’t adequately explained its rationale.

*Fox*’s argument was that isolated instances of profanity were not as potentially harmful to viewers as other statements that federal regulators had traditionally deemed “indecent.” The Court, however, had changed the position it held in *Pacifica*, which, as previously discussed, had avoided deciding whether any word with a sexual origin, no matter how it was used, would be indecent. Instead the Court said that there was no way to divorce a curse word from its origin, arguing “[e]ven when used as an expletive, the F-Word’s power to insult and offend derives from its sexual meaning.” In addition to *Fox*’s other arguments, the network said that the FCC’s regulation would have a “chilling effect” on broadcasters. They would have to be hyper-vigilant about even one isolated use of an expletive, in order to avoid financial punishment. Finally, the network argued that it is not for the FCC to say what is best for America’s children; perhaps parents should have some responsibility in that regard.

59. *Fox*, 129 S. Ct. at 1813.
60. *Id.* at 1814.
61. See Vicini, *supra* note 16.
64. See Vicini, *supra* note 16.
65. See Bravin & Schatz, *supra* note 19.
66. *Id.*
V. RELATED CASE LAW: “CENSOR SENSIBILITY”\(^69\)

Regulating fleeting moments of indecency isn’t just limited to sound, it also extends to images. Justin Timberlake sang the lyrics, “Gonna have you naked by the end of this song”\(^70\) as he tore away part of Janet Jackson’s outfit, leaving her “right breast . . . exposed on camera for nine-sixteenths of a second.”\(^71\) After this incident during the Super Bowl’s half-time show in 2004, the FCC began to crack down on indecent content on broadcast TV.\(^72\) The Super Bowl stunt sparked litigation, which is relevant to television networks such as the CW Television Network, whose affiliates are also governed by the FCC’s rules.

After the Super Bowl’s halftime broadcast, FCC issued a Notice of Apparent Liability, saying that CBS violated federal law and FCC rules against broadcasting indecent material, fining CBS $550,000, “the aggregate of proposed penalties against individual CBS stations.”\(^73\) In July 2008, the United States Court of Appeals for the Third Circuit ruled in favor of CBS, saying the FCC did not give broadcasters enough notice of changes to the FCC’s indecency policy involving “fleeting displays of nudity, and that CBS should not have been responsible for the actions”\(^74\) of Jackson and Timberlake. On May 4, 2009, the Supreme Court handed down a summary disposition for FCC v. CBS,\(^75\) remanding the case to the United States Court of Appeals “for further consideration in light of FCC v. Fox Television Stations.”\(^76\) However, the Second Circuit seems to have directly opposed the Supreme Court’s decision, holding that the FCC’s current policy violated the First Amendment.\(^77\) Since the FCC policy was “unconstitutionally vague,” the Court of Appeals decided the policy would lead to a “chilling effect.”\(^78\) This conflict between the nation’s highest court and the most recent Court of Appeals decision further illustrates the enormous implications of how a future decision would resolve the differing judicial opinions.

VI. PRO-BONO?

“This is really, really f***ing brilliant.”\(^79\)

—Bono, a rock star with the band U2, in his acceptance speech in the Golden Globe Awards show’s live broadcast in 2003.

\(^70\) CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008).
\(^71\) Id.
\(^72\) See Vicini, supra note 16.
\(^73\) CBS, 535 F.3d at 172.
\(^75\) Id.
\(^77\) Fox Television Stations, Inc. v. FCC, 2010 WL 2736937 (C.A.2).
\(^78\) Id.
\(^79\) See Bravin & Schatz, supra note 22.
“I still think freedom of speech is more important than the risk that some idiot—i.e., me on that occasion—might abuse it.”

—Bono, referring to his statement at the Golden Globe Awards in 2003.

After the *Pacifica* case, the FCC didn’t pay much attention to complaints against broadcasters for fleeting expletives. This changed following an incident at the 2003 Golden Globe Awards when U2 singer Bono uttered an expletive, quoted above, in his acceptance speech on television. The statement led the FCC to say that a “nonliteral [expletive] use of the F- and S-Words could be actionably indecent, even when the word is used only once.” The FCC argued that finding the “F-word, [and] any use of that word or a variation, in any context, inherently has a sexual connotation.” *FCC v. Fox Television Stations* expanded CBS by giving regulators more latitude over the use of “dirty words” on the airwaves.

Given the brevity of the recent Supreme Court decision, the Third Circuit decision in *CBS* provides a more useful background of the issues involved. The court made numerous findings: First, the FCC did not supply notice of and a reasonable explanation of the change in policy that it used to exempt fleeting and isolated cases of expletives from indecency actions. Over the course of thirty years, the FCC’s history in regulating indecent broadcast content exempted “isolated or fleeting material” from legal action. This policy was still in place at the time of the 2004 Super Bowl halftime broadcast. The FCC argued that its “fleeting expletives” exemption applied only to words, and not “images.” However, the court stated that although the FCC may change its policy at any time, it must supply notice of and provide a “reasoned explanation” for its policy change to the networks. Because the FCC did not do this, the court of appeals found that the FCC’s actions were “arbitrary and capricious.”

Moreover, the court held that federal law would decide whether musical performers were employees of the TV network. In this case, the court held that the performers were independent contractors of the network. The FCC argued that under the doctrine of *respondeat superior*, CBS would be liable. The court of appeals concluded that Jackson and Timberlake were independent contractors because they were hired for the limited purpose of the halftime show, and because there was no evidence that these performers considered their relationship with CBS as that of employer-employee. The network, based on its duties as a broadcast licensee, was not vicariously liable for its independent contractors’ actions. The FCC argued that because CBS had a tape delay for verbal statements and not for visual images, it failed to prevent the incident from being broadcast. CBS contended it neither planned nor knew of the performers’ actions in advance.

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80. *Id.*
81. *See Bravin & Schatz, supra* note 19.
85. *Id.* at 175.
86. *Id.*
87. *Id.* at 200.
While a licensee does have a duty to avoid the broadcast of indecent material through delegating that responsibility to a third party, the court concluded that the FCC did not provide any evidence that a “broadcaster may be vicariously liable for the speech or expression of its independent contractors.” Further clarification from the FCC, the Court argued, would be necessary to determine whether it correctly decided that CBS’s actions resulted in a “willful violation of indecency provisions.”

Given the recent Court of Appeals decision following the Supreme Court’s ruling, CBS could still face the FCC’s fine of $550,000 for its Super Bowl halftime broadcast. Even though the Court of Appeals ruled in CBS’s favor, by ruling in favor of Fox, the FCC could still appeal to the Supreme Court. If the Supreme Court once again considers Fox, it is likely the FCC will prevail.

VII. PROPOSAL: “AIR” ON THE SIDE OF CAUTION?

“(O)ne man’s vulgarity is another’s lyric.” So wrote Justice Harlan in Cohen v. California, where the Court ruled a man was permitted to wear a jacket bearing the “f-word,” even in an area where women and children were likely to be present. Just because a word is “distasteful” to some, as long as it does not incite violence, it should be allowed to be said or broadcast, because it may be necessary for others to convey themselves in a specific situation.

Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

Although the content in question was on the man’s jacket and not on a television network, the bottom line is this: it is one thing if a network is repeatedly and intentionally airing gratuitous vulgar statements during children’s programming for the mere purpose of shocking and disturbing a childhood audience. But there are times when someone, in the power of the moment, such as upon receiving an award or in protesting government action, conveys their feelings using a word not for the purpose of describing a “sexual or excretory function.” The Court wrote, “As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent.”

In his dissent to Fox, Justice Stevens stated that it was “ironic . . . that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement,
commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or having trouble going to the bathroom.\footnote{98}

The majority in \textit{Fox} argued that major television networks have a several second delay for live broadcasts so that there is enough time to bleep out objectionable language.\footnote{99} But the FCC did not address the fact that smaller or independent broadcast stations, especially public broadcasters, are unable to afford “bleeping” technology and would therefore be disproportionately subject to excessive fines.\footnote{100} This could influence them not to broadcast live, local events of great public importance.\footnote{101} Stated another way, “broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies.”\footnote{102} Precisely because a national news program would not cover essential community issues, local live news coverage has an important purpose. The majority in \textit{Fox} stated that small-town broadcasters would not run a higher risk of liability for indecent statements, because, in its view, the programming that would be most likely to have fleeting expletives would be a show from a network feed, and networks are be able to afford the more expensive “bleeping” technology.

The Court did not seriously consider the danger that regulation of fleeting expletives poses for locally originated programming: “In programming [small-town broadcasters] originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratæ from Hollywood.”\footnote{103} The Court also mentioned perhaps one of the only redeeming qualities about its decision, a possible exception for fleeting expletives if they are uttered on live TV in the midst of covering breaking news:

[Small-town broadcasters’] main exposure with regard to self-originated programming is live coverage of news and public affairs. But the [FCC’s] Remand Order went out of its way to note that the case at hand did not involve “breaking news coverage,” and that “it may be inequitable to hold a licensee responsible for aiding offensive speech during live coverage of a public event.”\footnote{104}

Moreover, critics claimed that the FCC’s enforcement is inconsistent: the commission allowed the TV broadcast of the movie, \textit{Saving Private Ryan}, although the film contained the same language that Fox was reprimanded for airing. In contrast to a live broadcast, the network airing the movie knew the expletives would appear because the movie was scripted. However, the Justice Department, representing the FCC, said that the language used in the movie did not titillate or pander to the audience, which is the criterion the FCC uses to determine whether a statement is indecent.\footnote{105} Conversely, the Court argued that the movie’s extreme violence actually would put parents on notice that this is a program that may include indecent language.\footnote{106}

\footnote{98. See Bravin & Schatz, \textit{supra} note 19.}
\footnote{100. \textit{Fox}, 129 S.Ct. at 1835.}
\footnote{101. \textit{Id.}}
\footnote{102. FCC, 438 U.S. 726, 743 (1978).}
\footnote{103. \textit{Fox}, 129 S.Ct. at 1818.}
\footnote{104. \textit{Id.}}
\footnote{106. \textit{Fox}, 129 S.Ct. at 1814, 1827.}
Enforcing the Supreme Court’s decision will be unpredictable because as the dissent argues, while an administrative agency is allowed discretion in determining its policy, free from being accountable to voters through elections, it can’t make decisions purely for political reasons or for preferences they don’t explain.\textsuperscript{107} Networks are rather careful in making sure expletives are uncommon, so I would argue the FCC’s policy before Fox had been effective. Therefore, the FCC should explain the necessity to overhaul this policy. The FCC should have good reason to change more than thirty years of history of not punishing networks for single-use of expletives on live TV, to instituting major fines for such actions. Furthermore, the FCC should be able to articulate the basis for the decision.

Having tougher standards is also irrelevant. The V-chip allows parents to block television programs they decide are unsuitable for children.\textsuperscript{108} The V-Chip, in combination with ratings that indicate whether a TV program is suitable for children, gives parents enormous power in determining which television shows their children are exposed to because they can block programs with a certain rating from coming into their home.\textsuperscript{109} The ruling may also be irrelevant because it only applies to U.S. network television, and not to “unregulated medi[a].”\textsuperscript{110} Although very young children may not surf the web, children who are a few years older can easily access the Internet. It is no more difficult to access live video streaming on the Internet than to access a network television show, given the pervasiveness of videos on the web, especially on web sites such as YouTube. Even Justice Thomas said that he “saw little reason to restrict broadcast speech when other media face few limits.”\textsuperscript{111} The Parents Television Council, however, argued that broadcast TV is “uniquely available to children, compared with cable, and should be protected from indecent outbursts.”\textsuperscript{112} Moreover, the Justice Department argued that the FCC wanted to “protect young viewers from the ‘first blow’ of offensive comments, not only from [repeated] vulgarities.”\textsuperscript{113} Instead, the FCC could mandate a more advanced warning system. For example, in addition to warning the viewers of the content of the show and suitable audience for the program before each program and in the beginning of the program with an icon, each program should have the ratings icon appear during the first twenty seconds after each commercial break. Broadcast stations are no longer scarce; “the number of over-the-air broadcast stations grew from 7,411 in 1969 . . . to 15,273 by the end of 2004.”\textsuperscript{114} With the transition from analog to “digital transmission,” even more channels will be able to be broadcasted.\textsuperscript{115}

So where does the First Amendment’s guarantee of free speech come in? The Supreme Court skirted the issue by remanding for further consideration by the Court of Appeals.\textsuperscript{116} But the dissent in Fox did not ignore that omission: “there is no way to hide the long shadow the First Amendment casts over what the Commission has done.”\textsuperscript{117} As opposed to Carlin’s monologue in Pacifica, which repeatedly used vulgar language to
“satirize broadcast censorship,” and engage in “verbal shock treatment.” The incidents involved in Fox were neither intentional nor repetitive. Furthermore, the Court in Pacifica said that the case did not address cases involving “the isolated use of a potentially offensive word,” which the dissent in Fox argued could be interpreted as leaving the prospect open that the FCC punishing a fleeting expletive would be unconstitutional. The FCC in both 1978 and 1983 wrote that it understood Pacifica’s decision to rest on the repetition of indecent words. In 1978, the FCC wrote that the First Amendment curtails the FCC’s power in regulating indecency.

The Supreme Court’s decision in Fox went too far. Based on the FCC’s stringent policy, a network may decide to blur or cut away to a different camera shot altogether to play it safe, in addition to cutting out the sound or bleeping a fleeting expletive. That is completely unreasonable in a live broadcast, even with a several-second delay. But that could be a reality, given the FCC’s new policy, because if a viewer can see what the speaker is saying, the network could face a fine of more than $300,000 per occurrence.

VIII. CONCLUSION

The FCC is now saying that there are some words that are so dangerous that even if someone says that word only once, the networks should have to pay. The agency also argues that the isolated expletives cannot be divorced from their origin. It is a foregone conclusion that young children watch television, even those too young to read. The government has felt a need to protect the youngest members of society by limiting when “indecent” words can be broadcasts, and punishing networks that air offensive content without bleeping it out. In recent years, the FCC’s approach to broadcast indecency has taken a different course than the previous three decades in its treatment of “fleeting expletives.” The culmination of this trend was in the Fox decision, which “upheld the FCC’s zero-tolerance policy for the broadcast of ‘fleeting expletives,’” even if they were isolated and were not in the program’s script. While protecting America’s children from negative messages and crude language is a just cause, it is not up to the government to police the airwaves for children; it is up to their parents.

Organizations such as the Parents Television Council have set up a web site providing the resource, “Family Guide to Prime Time Television.” It explains specific statements or scenes in previous episodes so that someone can anticipate the type of language and content that will appear. Also, for every show the Council features on its web site, they also list the local station’s affiliate. But perhaps the most effective way that the Parents Television Council allows concerned viewers to show their dissatisfaction and effect change in a show

118. See Bravin & Schatz, supra note 19.
120. Id.
121. Id. at 1833 (Breyer, J., dissenting) (quoting Pacifica, 438 U.S. at 760-61 (Powell, J., concurring)).
122. Id. (Breyer, J., dissenting).
is by hitting the program in its pocket. The web site also features the show’s sponsors and their contact information.\footnote{Parents Television Council, Who Is Sponsoring?, http://www.parentstv.org/PTC/familyguide/weekly.asp (follow the hyperlink for any show listed; then follow “Click here to find out who’s sponsoring [the selected show]” button).} The advertiser cares about the viewers because that is their potential customer base. Thus, television shows will generally police themselves. "Self-discipline and market forces — in the form of advertisers that are often loath to be associated with off-color programs — have worked."\footnote{Wash. Post Editorial, supra note 101.} Since cable stations that run commercials are in fact not regulated by the FCC, this argument is even more powerful, since these stations often still self-censor their content. It is redundant to use valuable government resources for the frivolous purpose of having a regulatory agency decide what is appropriate for each family. These funds could be spent in a much more useful direction, such as to encourage reading in addition to television, as a source of entertainment and language development.\footnote{See Parents Television Council, PTC Ranks the Best and Worst TV Sponsors of 2010 (Nov. 3, 2010), http://www.parentstv.org/ptc/news/release2010/1123.asp (describing the best and worst family friendly advertisers); Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 230 (1982) (emphasizing the role of market forces in protecting First Amendment rights of those who operate commercial stations).}

It makes no more sense for a governmental agency to punish a network for its inability to bleep an expletive spontaneously uttered on a live broadcast, than to punish a supermarket for a grocer not blocking a child running into an aisle that sells contraceptives. The FCC’s restriction is vague and too broad. While it would be acceptable for the FCC to advance directives to encourage networks to air adult programming during late-night broadcasts to make it less likely that children would watch such a show, there is a huge difference between that and sanctioning a network and its affiliates because of a guest who utters a fleeting expletive. A fleeting expletive is uttered not for its literal meaning, but rather as an exclamation of an emotional moment. It is time to scale back the FCC’s overarching reach, and at the minimum, go back to the standard described in Pacifica.

The slight concern about what children may hear is outweighed by the need to keep the FCC in check and preserve the First Amendment guarantees of free speech. It is vital to ensure government does not curtail information or words to which people are exposed. Children, and the adults that should be supervising their children if they are concerned about what they may be watching or listening, are not vulnerable captive audiences victimized by profane images and words.\footnote{Fowler & Brenner, supra note 131, at 230.} They have control over what they see or hear — after all, they have a remote.