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**A DECENT PROPOSAL:  
THE CONSTITUTIONALITY OF INDECENCY REGULATION ON  
CABLE AND DIRECT BROADCAST SATELLITE SERVICES**

*Matthew S. Schwartz\**

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I. INTRODUCTION

[1] Little Timmy’s parents both work late, and he often finds himself sitting alone in front of the television after school. He doesn’t know the difference between “broadcast,” “cable,” or “direct broadcast satellite,” but he does know how to work the remote control. One day, as he is clicking through the channels – 2, 4, 7, 93, 128, they’re all the same to him – he comes across a provocative scene. *What are those two people doing?* he wonders with wide eyes. *And where are most of their clothes?* At that moment, Timmy’s father walks in and is shocked by the smut that runs during daytime hours on the basic tier of his satellite service. Outraged, the man files a complaint with the Federal Communications Commission (FCC). Yet because this is a subscription service, the FCC does nothing. It matters not that satellite television is increasingly pervasive, nor that once installed it is easily accessible to children. As households have transitioned from free broadcasting toward digital subscription services, complaints about unexpected indecency have increased exponentially. The FCC claims that without a change in the law, it lacks authority to act outside the realm of free broadcasting. That statement is untrue: the FCC, not Congress or the courts, limited its reach to free, non-subscription broadcasts. The self-imposed restriction is just as easily self-removed.

[2] When the Supreme Court explicitly approved indecency regulation over broadcast signals, it deemed compelling the government's dual interests of protecting children and preventing unwanted indecency from entering private homes.<sup>1</sup> In the intervening years since *FCC v. Pacifica* was decided, those interests have become no less compelling. If anything, they have become more so. In 1978, the government had only to worry about indecency assaulting our children over the free broadcast signals – AM/FM radio, and VHF/UHF television.<sup>2</sup> Satellite radio had not yet been offered to the public. Cable television's penetration rate among American households in 1981 was just twenty two point one percent.<sup>3</sup> In the decades since *Pacifica*, new communications technologies have become ever more pervasive in American homes. By 2001, cable's penetration had more than tripled<sup>4</sup> – yet the FCC still would not touch it. Today, cable's dominance has begun to wane, as direct broadcast satellite (DBS) services infiltrate American homes, transmitted in a specific band of radio frequency spectrum.<sup>5</sup> While cable penetration has fallen a few percentage points since the turn of the century,<sup>6</sup> DBS has enjoyed steady growth.<sup>7</sup> As of April 2004, DBS penetration exceeded thirty percent in five states,

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<sup>1</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51(1978).

<sup>2</sup> Unless stated otherwise, this paper will use the word "broadcast" to mean, generally, the transmission of communication signals wirelessly to radio, television or satellite receivers.

<sup>3</sup> National Cable & Telecommunications Association, <http://www.ncta.com/contentview.aspx?contentID=3577> (last visited May 10, 2007) (listing cable company penetration by year, since 1975).

<sup>4</sup> *Id.*

<sup>5</sup> See *In re Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcasting Satellite for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C. 2d 676 §100.1 (1982) (arguing direct broadcast satellite (DBS) service is a radio communication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals).

<sup>6</sup> See National Cable and Telecomm'n Ass'n, *supra* note 3.

<sup>7</sup> National Cable & Telecommunications Association, *Digital Cable Customers 2001-2006*, <http://www.ncta.com/ContentView.aspx?contentId=58> (last visited May 10, 2007).

twenty percent in thirty one states, and fifteen percent in forty one states.<sup>8</sup> Still, the FCC holds its distance.

[3] Together, cable and DBS command the great majority of viewers. If history is any guide, penetration will only increase. In comparison, audiences of over-the-air broadcasts will continue to dwindle. In 1978, the United States government felt it was important to protect the children. “Young children lack the judgment necessary to consent to exposure to patently offensive language depicting sexual and excretory activities and organs. When unsupervised, they constitute a captive audience incapable of avoiding exposure.”<sup>9</sup> Even today, the FCC acknowledges that the concerns stated in *Pacifica* are “equally, if not more, applicable . . . .”<sup>10</sup>

[4] In this paper I will argue that if the government is serious about its stated goals of protecting children and the sanctity of the home, then the FCC should expand indecency regulations to cable and DBS.<sup>11</sup> The current enforcement system – fining the handful of free broadcasters hundreds of thousands of dollars for each instance of indecency they air, while completely ignoring the much more extreme indecency commonplace on cable and DBS – is arbitrary and nonsensical.

[5] Part II of the paper discusses the relevant statutory provisions and sets out the test for indecency. Part III examines the case law, which sets the level of constitutional protection afforded indecent speech on broadcast and some parts of cable television. Part IV analyzes the regulatory history

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<sup>8</sup> National Cable & Telecommunications Association, *The Video Market is Fully Competitive*, March 27, 2007, <http://www.ncta.com/ContentView.aspx?hiddenavlink=true&type=lpubtp10&contentId=3595>.

<sup>9</sup> Brief of Petitioner, *FCC v. Pacifica*, No. 77-528 (U.S. Mar. 3, 1978).

<sup>10</sup> *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, ¶ 10 (2006).

<sup>11</sup> A quick note about terminology: This paper sometimes refers to the FCC, Congress, and “the government.” The latter term is all-encompassing, used generally to refer to all the bodies of our federal government. The first two terms have specific meanings: Congress is, of course, the legislative body that sets into law the general goals of “the government,” as elected by the people. The FCC, as an administrative agency and part of the executive branch, is in charge of executing the wishes of the legislative branch. This paper attempts precision whenever possible, but when appropriate, uses “the government” as a catch-all phrase.

of broadcast, cable and DBS since *Pacifica*, paying particular attention to a pair of often-overlooked FCC orders from the late 1980's – orders that would point the direction of the FCC for years to come and, if carried out to their logical ends, would lead to conclusions in diametric opposition to each other and to the government's supposedly compelling interests. Part V examines the FCC's current approach to indecency regulation – pausing, at times, to ogle some colorful examples – and ultimately questions whether the FCC's current policies are appropriate. Part VI concludes with a thought about where the burden should lie: with parents who are trying to keep smut out of the home, or with adults who are trying to bring it in?

[6] Upon the conclusion of this paper, a careful reader may feel the urge to broadcast an indecency of one's own, and depending on that reader's predilections, either be pleased that such a broadcast faces little threat from the FCC, or be aghast to learn that the FCC's indecency enforcement division is sadly, needlessly irrelevant.

## II. FEDERAL RULES PROHIBITING INDECENCY

[7] Federal statutes, viewed through the prism of court decisions, define the regulatory powers of the FCC and the limits placed on broadcasters. The Communications Act of 1934 charges the Commission<sup>12</sup> with regulating “communication by wire and radio.”<sup>13</sup> Pertinent here, it must enforce 18 U.S.C. § 1464, which criminalizes the utterance of “any obscene, indecent, or profane language by means of radio communication.”<sup>14</sup> “Radio communication” consists of “transmission[s] by radio of writing, signs, signals, pictures, and sounds of all kinds.”<sup>15</sup> This includes AM/FM radio and television signals that are transmitted via radio waves (specifically, over VHF and UHF).<sup>16</sup> By definition, this does

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<sup>12</sup> This paper refers to the Federal Communications Commission interchangeably as the “FCC” or, at times, the “Commission.”

<sup>13</sup> 47 U.S.C. § 151 (2004).

<sup>14</sup> 18 U.S.C. § 1464 (2004).

<sup>15</sup> 47 U.S.C. § 153(33) (2004).

<sup>16</sup> *About the FCC: A Consumer Guide to our Organization, Functions and Procedures*, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-247863A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247863A1.doc) (last visited May 10, 2007) (explaining Very High Frequency (VHF) is the part of the radio spectrum from

not include cable television, which travels from distributor to viewer not via broadcast signals but through cables strung along poles or buried underground.<sup>17</sup> Section 1468(a) of the U.S.C. criminalizes the transmission of *obscenity* on cable or subscription television: “Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than two years or by a fine in accordance with this title, or both.”<sup>18</sup>

[8] Obscenity and indecency are terms of art; to be obscene, material must satisfy the three-prong test created in *Miller v. California*: 1) “the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;” 2) “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;” and 3) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>19</sup> Obscene speech lacks any First Amendment protection, but in practice, it is quite difficult to satisfy the *Miller* test because even if some parts of the work are beyond defense, it is unusual to find that the material lacks any value “as a whole.”<sup>20</sup> If the test seems a bit subjective, that is because the justices had a difficult time determining what exactly constitutes obscenity. As Justice Potter Stewart famously commented in trying to determine whether a movie was obscene, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”<sup>21</sup>

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30 to 300 megahertz, including channels 2-13; and Ultra High Frequency (UHF) is the part of the radio spectrum from 300 to 3,000 megahertz, which includes channels 14-83).

<sup>17</sup> In the most technical sense, this is untrue: Even cable television signals, which get to their final destination through a coaxial cable, are at one point transmitted through space via satellites and satellite dishes. However, the FCC does not make that distinction.

<sup>18</sup> 18 U.S.C. § 1468(a) (2004).

<sup>19</sup> *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations omitted).

<sup>20</sup> See *In re Various Complaints Against the Cable/Satellite Television Program*

“Nip/Tuck,” 20 F.C.C.R. 4255, 4256 (2005).

<sup>21</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[9] If defining obscenity flummoxes Supreme Court justices, it is no wonder the Court passed on creating a true test for indecency, which *Pacifica* defines as “nonconformance with accepted standards of morality.”<sup>22</sup> The indecency test is similar to that in *Miller*, but drops the third prong: The material in question must 1) “describe or depict sexual or excretory organs or activities,” and 2) “be patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>23</sup> As for what counts as patently offensive, the Court gave full discretion to the FCC. The Commission asserts:

In our assessment of whether broadcast material is patently offensive, the full context in which the material appeared is critically important. Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience. In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because each indecency case presents its own particular mix of these, and possibly, other factors. In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency.<sup>24</sup>

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<sup>22</sup> FCC v. *Pacifica Found.*, 438 U.S. 726, 740 (1978).

<sup>23</sup> *In re Indus. Guidance of the Comm’ns Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, Policy Statement, 16 F.C.C.R. 7999, 8002 (2001).

<sup>24</sup> *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2668 (2006) (internal quotations and citations omitted).

[10] Indecency restrictions only apply from 6:00 a.m. to 10:00 p.m., when children comprise a larger portion of the audience.<sup>25</sup> Nor may broadcasters air “profane” material during this time period. Profanity involves language that, in context, is “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”<sup>26</sup> The FCC, citing First Amendment concerns, has limited profanity prosecutions to “the universe of words that are sexual or excretory in nature or are derived from such terms.”<sup>27</sup> Some of the “most offensive words in the English language” (e.g. “fuck” and “shit”) are “presumptively profane,” but in rare cases, the FCC will find such words acceptable when “demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”<sup>28</sup> (Note, however: there is substantial uncertainty over the future of profanity prohibition, since the Second Circuit ruled in early June 2007 that the Commission’s new policy prohibiting “fleeting expletives” is arbitrary and capricious under the Administrative Procedure Act.<sup>29</sup>)

[11] Section 1464 – the only federal statute prohibiting indecency – does not apply to direct broadcast satellite transmissions.<sup>30</sup> As defined in the Communications Act, the term “broadcasting” is recognized as “the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”<sup>31</sup> Even though DBS signals are sent using radio communications, the FCC decided in 1987 that DBS and all other subscription services are *not* “intended to be

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<sup>25</sup> See Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992); see also *Action for Children’s Television v. FCC (Act III)*, 58 F.3d 654 (D.C. Cir. 1995) *cert. denied*, 516 U.S. 1043 (1996).

<sup>26</sup> *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4981 (2004).

<sup>27</sup> *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2669 (2006).

<sup>28</sup> *Id.*

<sup>29</sup> *Fox Television Stations, Inc. v. FCC*, 06-1760-AG, 2007 WL 1599032 (2d Cir. June 4, 2007). See Section V(C), *infra*.

<sup>30</sup> 18 U.S.C. § 1464 (2004).

<sup>31</sup> 47 U.S.C. § 153(6) (2000).

received by the public,” but rather only by *subscribers*.<sup>32</sup> This runs counter, they said, to the concept of “broadcasting,” which requires that a transmitter does not intend to restrict reception of his signals at all.<sup>33</sup>

### III. CASE LAW

[12] During the first half of the twentieth century, the Supreme Court approved the FCC’s “spectrum scarcity” justification for its regulation of the airwaves. In *NBC v. FCC*,<sup>34</sup> the Court noted that there was not enough free space on the electromagnetic spectrum to handle the explosion of radio stations in the wake of World War I. “The result was confusion and chaos. With everybody on the air, nobody could be heard.”<sup>35</sup> The Radio Act of 1927,<sup>36</sup> the basic provisions of which were later incorporated into the Communications Act of 1934,<sup>37</sup> created the FCC and gave it tremendous power not only to police the airwaves, but also to “determin[e] the composition of that traffic.”<sup>38</sup> The FCC would fulfill this duty by looking toward the “public interest.”<sup>39</sup> According to the Court, the FCC would choose which stations received broadcast licenses by determining which fit the “public interest, convenience or necessity, a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit.”<sup>40</sup>

[13] Thus, the FCC explicitly had the Court’s blessing to decide what kinds of broadcasts would best serve the public interest. Broadcast indecency, however, was not a subject of any federal cases until the 1970s,

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<sup>32</sup> *In re Subscription Video*, 2 F.C.C.R. 1001, 1002 (1987).

<sup>33</sup> Section IV of this paper critically examines the reasons behind the FCC’s 1987 Order, and argues that the Order undercut the government’s greater goal of keeping indecency out of the home. See *In re Subscription Video*, 2 F.C.C.R. at 1002.

<sup>34</sup> *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190 (1943) [Hereinafter *NBC*].

<sup>35</sup> *Id.* at 212.

<sup>36</sup> The Radio Act of 1927, 47 U.S.C. § 81 (2004).

<sup>37</sup> Communications Act of 1934, 47 U.S.C. § 151 (2004).

<sup>38</sup> *Id.* at 216.

<sup>39</sup> See 47 U.S.C. § 303(g) (2000); see also *NBC*, 319 U.S. at 216 (citing 47 U.S.C. § 303(g) (“[T]he Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest”).

<sup>40</sup> *NBC*, 319 U.S. at 216 (internal quotations omitted).

and in *FCC v. Pacifica*, the Supreme Court no longer relied on spectrum scarcity to justify the FCC's restrictions on speech.

A. PACIFICA: PERVASIVENESS, CHILDREN, AND NUISANCE JUSTIFY SOME  
SPEECH RESTRICTIONS ON BROADCAST

[14] The Supreme Court in *Pacifica* approved the FCC's authority to determine what constituted indecency and held that it was not a violation of the First Amendment for the FCC to fine broadcasters for airing indecency. This 1978 decision laid the policy groundwork that would direct the FCC's regulatory mission for the rest of the century. Since *Pacifica*, the FCC's focus has remained on the regulation of free, over-the-air broadcast signals, and nothing more. However, the *Pacifica* decision could just have easily led the FCC down the opposite path, allowing it to regulate indecency on emerging communications technologies.

[15] *Pacifica's* facts are colorful and now legendary. A man driving with his son at 2:00 p.m. was flipping through stations on the radio, when he came to a station playing a George Carlin monologue called "Filthy Words," a satiric monologue discussing "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever."<sup>41</sup> A few weeks later, the man wrote a letter complaining to the Commission.<sup>42</sup> The Commission decided not to fine the radio station, but rather to place an order in its file stating the station "could have been the subject of administrative sanctions" – an act that could harshen sanctions for subsequent violations.<sup>43</sup>

[16] *Pacifica* challenged the Order, claiming its First Amendment rights had been abridged. The Supreme Court ultimately affirmed the constitutionality of indecency regulations on free, over-the-air broadcasts. This holding differed from previous decisions that gave strong First Amendment protections to creators of printed media,<sup>44</sup> but the Court

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<sup>41</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). For the complete text of the monologue, see *id.* at 751.

<sup>42</sup> *Id.* at 730.

<sup>43</sup> *Id.* (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM)* New York, NY, 56 F.C.C. 2d 94, 99 (1975)).

<sup>44</sup> See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969).

distinguished broadcast's disparate treatment in two ways: 1) The broadcast media are uniquely pervasive in the lives of all Americans, and thus deserve greater restrictions than other forms of media;<sup>45</sup> and 2) broadcasting is uniquely accessible to children.<sup>46</sup> It is necessary here to examine these rationales in greater detail to determine what exactly was being regulated, why it was being regulated, and whether these two rationales are unique to free broadcasting, or whether they might apply to other forms of media.

### 1. UNIQUELY PERVASIVE

[17] Pervasiveness is surprisingly difficult to define. Perhaps this difficulty has led to the doctrinal confusion that has plagued the regulation of new communication mediums. With very little elaboration, the *Pacifica* court declared that broadcast was to have weaker First Amendment protections than other forms of media because it was "uniquely pervasive."<sup>47</sup> Later courts have interpreted the word in whatever manner best fits their judicial goal.

[18] *Pacifica* was likely using the word "pervasive" to refer to the broadcast medium's ability to disturb a potential audience. Compared to printed text, which is silent and requires the audience to consciously make an effort to look at and read the message, radio transmissions require no such active engagement on the part of the listeners. Sound clearly has the ability to disturb an audience more than printed text does. Though this admittedly sounds too simple at first, it makes sense when considering the problem the Court was trying to solve: a modern entertainment medium with the ability to shock its audience in ways that text never could.

[19] Radio communications are unique in that they have the ability to disturb people inside their homes, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."<sup>48</sup> By turning on the radio or television, and accepting broadcast signals into one's private space, one is essentially inviting guests into his house. The

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<sup>45</sup> *Pacifica*, 438 U.S. at 748.

<sup>46</sup> *Id.* at 749.

<sup>47</sup> *Id.* at 728.

<sup>48</sup> *Id.* at 748.

problem occurs when the guests do not act as polite or refined as the host had expected.

[20] Justice Stevens, writing for the plurality, contrasts broadcast with public speech in *Cohen v. California*.<sup>49</sup> “Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away.”<sup>50</sup> In contrast, “government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas.”<sup>51</sup> Indeed, the *Cohen* court contrasted the situation there with the far more substantial “interest in being free from unwanted expression in the confines of one’s own home.”<sup>52</sup> Taken together, this suggests that *any* communications medium that enables unwanted speech to enter the home might possess the same level of pervasiveness as broadcast. This reading would have broad ramifications for the entertainment industry and calls into question the FCC’s later decision to classify subscription services as non-broadcast, thus removing them from the FCC’s sphere of influence.<sup>53</sup>

[21] Further, the *Pacifica* court noted that the nature of broadcasts renders prior warnings ineffectual. “Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”<sup>54</sup> When the father in *Pacifica* turned on the radio in the middle of the day, he did not hear the warnings that preceded the broadcast.<sup>55</sup>

[22] “Pervasiveness” could also refer to the penetration rate of a medium in American households. Unlike wired entertainment technologies like cable, which in 1978 had relatively few subscribers, broadcast signals

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<sup>49</sup> *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that a state may not make the public display of the word “Fuck” a criminal offense).

<sup>50</sup> *Pacifica*, 438 U.S. at 749.

<sup>51</sup> *Id.*, quoting *Cohen*, 403 U.S. at 21.

<sup>52</sup> *Cohen*, 403 U.S. at 22.

<sup>53</sup> See Section IV(B), *infra*, for a thorough discussion of this decision.

<sup>54</sup> *Pacifica*, 438 U.S. at 748.

<sup>55</sup> This was not a new problem. One of the earliest (and most exciting) examples of ineffectual warnings is the broadcast of Orson Welles’ “War of the Worlds” (Oct. 30, 1938), which, despite being laced with announcements that it was a fictional piece, still managed to terrify a technologically naïve American public.

reached everyone who purchased a television. In other words, it had a penetration rate of 100 percent among television owners. This raises the question: What must a medium's penetration be before it rises to the level of pervasiveness that concerned the *Pacifica* court? Fifty percent of American homes? More? The Court never attempted to answer that question.

## 2. UNIQUELY ACCESSIBLE TO CHILDREN

[23] The other unique attribute of broadcast was its accessibility to children, far more so than other forms of media, such as printed text. Although a written message might be "incomprehensible to a first grader, *Pacifica*'s broadcast could have enlarged a child's vocabulary in an instant."<sup>56</sup> The immediacy of the spoken word – its ability to instantly pervade the consciousness of everyone in the listening audience – brought it into a different class than other forms of indecent communication.

[24] Though listed as one of two reasons First Amendment protections do not apply to indecency on broadcast, the Court spent just one paragraph discussing why protecting the children is a compelling interest. Apparently, the Court felt little explanation was needed. It had long since held that the government has a dual interest in ensuring the well-being of the country's youth and in supporting parents' "claims to authority in their own household."<sup>57</sup>

[25] The pervasiveness of broadcast television and radio only magnified the problem of parental autonomy. Now, not only did indecency bombard the culture at large, it also had the power to easily seep into the home. As

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<sup>56</sup> *Pacifica*, 438 U.S. at 749.

<sup>57</sup> *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)). Since *Pacifica*, protecting the children has also been a compelling interest. See *Sable Commc'n of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996), discussed *infra* at Section III(C). Some commentators have examined what happens when the government's idea of youthful well-being conflicts with parental claims to authority. In that situation, it appears the government's sensibilities win the day. For a fascinating discussion of this conflict, see generally Ashutosh Bhagwat, *What if I want my kids to watch pornography?: Protecting children from 'indecent' speech*, 11 WM. & MARY BILL RTS. J. 671 (2003).

the Court stated in *Pacifica*, “The ease with which children may obtain access to broadcast material ... amply justif[ies] special treatment of indecent broadcasting.”<sup>58</sup>

### 3. NUISANCE RATIONALE

[26] At the heart of the FCC decision to make a note in *Pacifica*’s file was “a nuisance rationale under which context is all-important.”<sup>59</sup> As the FCC saw it, indecent broadcasts “should be regulated by principles analogous to those found in the law of nuisance where the law generally speaks to *channeling* behavior more than actually prohibiting it . . .”<sup>60</sup> Principles of nuisance law declare that the government “may protect individual privacy by enacting reasonable time, place, and manner regulations to all speech irrespective of content. When government [undertakes] selectively to shield the public from some kinds of speech on the ground that they are more offensive than others,” these selective exclusions may be upheld “when the speaker intrudes on the privacy of the home.”<sup>61</sup> Here, the FCC prohibited the broadcast of indecent language in the mid-afternoon, thus enacting the kind of time regulation common in nuisance law.

[27] In upholding the regulation, the Court explicitly left open the question of whether broadcasting the “Seven Dirty Words”<sup>62</sup> monologue in the late evening hours was permissible. Indeed, the Court emphasized the narrowness of its holding, in that it was only holding that the FCC had not overstepped its power in this instance.<sup>63</sup> Yet, as narrow holdings go, this one was momentous: It stood not simply for the fact that the FCC could prohibit broadcast of that specific indecent monologue at 2:00 in the afternoon, but for the principle that the FCC could ban *any* indecent broadcasts that constituted a nuisance. The Court could not definitely determine what exactly constitutes a nuisance, except to say that context

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<sup>58</sup> *Pacifica*, 438 U.S. at 750.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 731 (quoting *In re Citizen’s Complaint Against Pacifica Found. Station WBAI (FM) New York, NY*, 56 F.C.C. 2d 94, 98 (internal quotations omitted)).

<sup>61</sup> *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975).

<sup>62</sup> *Pacifica*, 438 U.S. at 777.

<sup>63</sup> *Id.* at 750.

was all-important, and a host of variables was involved.<sup>64</sup> The FCC would remain the ultimate arbiter – now, with the Court’s blessings.

#### B. PACIFICA’S PROGENY: MISINTERPRETING THE SUPREME COURT

[28] *Pacifica* was groundbreaking. First Amendment notwithstanding, the Supreme Court had sanctioned the government’s power to restrict indecency on the airwaves. Notably, the Supreme Court did not rely on the idea of spectrum scarcity – the justification for equal-access and other content-related provisions on broadcast – but simply on the concept that broadcast programming was pervasive, with the potential to influence children’s upbringing. The narrowness of the court’s holding applied not to any particular fact pattern; it simply approved the FCC’s ability to contextually decide what was too indecent to air.<sup>65</sup>

[29] However, some lower courts interpreted *Pacifica*’s narrowness to apply only to the specific medium at issue in *Pacifica* – free, over-the-air broadcasts. In *Cruz v. Ferre*,<sup>66</sup> the Circuit Court struck down as unconstitutional a Miami ordinance intended to regulate indecent and obscene material on cable television. The relevant portion stated that “[n]o person shall by means of a cable television system knowingly distribute by wire or cable any obscene or indecent material,” where indecent material was defined as “material which is a representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive.”<sup>67</sup>

[30] At the outset, note that the Miami ordinance would have meant a total ban on cable indecency, which is reason enough for a court to find it unconstitutional.<sup>68</sup> In any case, the *Cruz* court found the fundamental

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<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 760 (Powell, J., concurring) (“Making the sensitive judgments required in these cases is not easy. But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.”).

<sup>66</sup> *Cruz v. Ferre*, 755 F.2d 1415, 1416 (11th Cir. 1985).

<sup>67</sup> *Id.* at 1417 (quoting City of Miami Ordinance No. 9538).

<sup>68</sup> *E.g.*, *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995). When analyzing restrictions on fundamental rights such as freedom of speech, courts apply a strict scrutiny standard, which requires that the government have a compelling interest

rationales of *Pacifica* inapplicable to cable television. First, it held, *Pacifica* does not apply to cable television because cable is not an “intruder into the privacy of the home,” rather, a viewer must affirmatively subscribe to the service, decide whether to purchase premium channels, and make a monthly decision on whether to continue subscribing.<sup>69</sup> Additionally, *Cruz* quickly dismissed *Pacifica*’s “nuisance rationale,” finding it does not apply to cable because there is no possibility that a non-cable subscriber will be confronted with this material.<sup>70</sup>

[31] Moreover, *Cruz* held the concern about children having access to televised programming is “significantly weaker” in the context of cable because “parental manageability of cable television greatly exceeds the ability to manage the broadcast media.”<sup>71</sup> Not only can parents choose whether or not to subscribe, but they can also obtain a “lockbox” blocking access to certain channels.<sup>72</sup>

[32] *Cruz* represents a line of thinking that has persisted among many commentators to this day: Cable television and other subscription services lack the pervasive qualities of broadcast, rendering *Pacifica*’s compelling interests inapplicable. This conclusion cannot withstand thoughtful scrutiny.

[33] *Cruz* notes that *Pacifica* was concerned with pervasiveness of the broadcast medium, which was not as great of a concern with cable. Yet cable television possesses most of the same pervasive qualities as does broadcast. Cable television transmissions have the same ability to disturb a potential audience at home as does broadcast. Prior warnings of potentially indecent material are just as ineffective over cable as they are over broadcast – cable audiences are no less likely than broadcast audiences to be constantly tuning in and out.

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and the means for achieving that interest are narrowly tailored. Total bans almost always fail strict scrutiny analyses.

<sup>69</sup> *Cruz*, 755 F.2d at 1420.

<sup>70</sup> *Id.* (“[C]able programming is available only to those who have the cable attached to their television sets.”)

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1420-21.

[34] The similarities between cable and broadcast are not surprising considering the two mediums are not that distinct. Whether information travels through the air or through a wire, both mediums require the user to take an affirmative step in order to see and hear the transmissions: The broadcast audience must connect rabbit ears, and the cable audience must connect a cable. The only major difference between cable and broadcast is that cable requires an extra step before it can come into the home: The audience must pay a monthly fee. Logically, however, a subscription does not in and of itself nullify the concerns discussed above.

[35] By treating a general decision to subscribe to the medium as a specific decision to accept the speech in question, *Cruz* completely misinterpreted the all-important nuisance rationale emphasized by the Court in *Pacifica*.<sup>73</sup> *Pacifica* was concerned not with the audience's intent to bring the medium into the home, but with its *intent to listen to particular speech*.<sup>74</sup> Here, the issue is not whether a possibility exists that a non-cable subscriber will be confronted with indecent material on cable; of course there is a zero percent chance of that. The proper question – and the correct way to view the nuisance rationale – is whether indecent material will confront an unwitting *subscriber*.

[36] The *Cruz* court's logic is analogous to the *Pacifica* court finding that because there is no chance that someone who lacks a TV will be confronted with indecent material over broadcast, the nuisance rationale does not apply because indecent programming over broadcast is only available to those who have brought a television set into their homes. Furthermore, broadcasts are not intruders because a viewer must affirmatively bring a television into his house, set up the device, and make a daily decision on whether to continue watching.

[37] It may seem at first that this analogy is misplaced, for it gives potential television viewers the binary choices of on or off – television or no television – whereas the *Cruz* court implicitly understands that even if someone is dissatisfied with indecent cable offerings, free broadcast signals are still plentiful.<sup>75</sup> Perhaps in 1985 this criticism was merited:

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<sup>73</sup> FCC v. *Pacifica Found.*, 438 U.S. 726, 750 (1978); *Cruz*, 755 F.2d at 1420.

<sup>74</sup> See *Pacifica*, 438 U.S. at 748-50.

<sup>75</sup> See *Cruz*, 755 F.2d at 1420.

Cable choices were relatively few, and a comparatively small proportion of the population subscribed. Today, however, *Cruz's* reasoning forces people into a classic Hobson's choice: Accept cable in its totality – indecency and all – or make due with three channels, rabbit ears, and poor picture quality. It is unfair to suggest to someone who wants to enjoy the benefits of a modern, connected world that his only real option in the face of cable indecency is to cancel the service.

[38] *Cruz* is not the only case to find that because cable subscribers actively subscribe to the service, they deserve less government protection from indecency. *ACT III* upheld a time-channeling provision in the Public Telecommunication Act of 1992 that required the FCC to prohibit the broadcasting of indecent programming “between 6:00 a.m. and 10:00 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight.”<sup>76</sup> In doing so, the court noted that “[u]nlike cable subscribers, who are offered such options as ‘pay-per-view’ channels, broadcast audiences have no choice but to ‘subscribe’ to the entire output of traditional broadcasters.”<sup>77</sup>

[39] This view demonstrates an ignorance of how cable television works. A cable subscriber can subscribe to various “tiers” of programming, each tier containing a block of channels.<sup>78</sup> The basic tier includes a limited number of cable channels, and federal law requires that it also carry the local broadcast channels. Cable operators usually offer additional packages of channels, sometimes called “Cable Programming Service Tiers.”<sup>79</sup> Finally, premium stations like HBO are available for an additional fee, as are one-time “pay-per-view” programs. DBS operators have similar tiers.<sup>80</sup>

[40] Cable subscribers share many more similarities with broadcast viewers than the *Cruz* or *Act III* courts believe. Contrary to the insinuation,

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<sup>76</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 658 (D.C. Cir. 1995).

<sup>77</sup> *Id.* at 660.

<sup>78</sup> *See generally* ANDREW S. WISE & KIRAN DUWADI, “COMPETITION BETWEEN CABLE TELEVISION AND DIRECT BROADCAST SATELLITE – IT'S MORE COMPLICATED THAN YOU THINK” (2005), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-255869A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf) (last visited May 10, 2007).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 3.

cable television offerings are not a buffet from which subscribers may choose their favorite dishes. For example, Comcast, the largest cable company in the country,<sup>81</sup> offers twenty channels on its “Limited Service;” seventy-two channels in “Full Standard Service;” dozens more channels in “Digital Classic,” “Digital Plus,” five different options of “Digital Plus Premium Packages,” and “Digital Premium;” dozens of premium stations devoted entirely to movies, music or original programming; and some “Digital PPV” (pay-per-view) and “Adult PPV” programs for additional purchase.<sup>82</sup> This kind of tiered system is typical in the cable industry.

[41] Cable viewers have some choice, but not nearly as much as the courts assume. If a Comcast subscriber wants to receive CNN or The History Channel, he must subscribe to “Full Standard Service,” which also includes MTV, Comedy Central, and FX, each of which has been known to push the limits of decency.<sup>83</sup> Cable viewers, just like broadcast viewers, “have no choice but to ‘subscribe’ to the entire output” of their tier.<sup>84</sup>

[42] Certainly there is validity in the argument that people who subscribe to certain extra channels on cable know what they are getting. One cannot imagine an HBO subscriber would be entirely surprised or outraged by the graphic language in a Chris Rock routine or on the latest episode of *The Sopranos*. However, premium channels do not have a monopoly on indecency. Because the FCC does not regulate indecency on anything other than broadcast, indecency could appear at *any* time and on *any* channel.

[43] The *Cruz* court argues that cable requires less regulation because parents can block unwanted channels with a lockbox provided by the cable operator. In a perfect world, a lockbox would be the ideal solution. Parents would know exactly where and when indecency would appear and

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<sup>81</sup> Comcast, About Comcast Corporation, <http://www.comcast.com/Corporate/About/CorporateInfo/CorporateInfo.html> (last visited May 10, 2007).

<sup>82</sup> Comcast, Richmond - My Channel Lineup, <http://www.comcast.com/customers/clu/channelLineup.ashx> (last visited May 10, 2007).

<sup>83</sup> See Denise Martin, *FX Goes Beyond the Basics: Despite Threat of Indecency Legislation Cable Adds More Edgy Fare to Slate*, VARIETY, Mar. 7, 2005, available at <http://www.variety.com/article/VR1117918928?categoryid=1296&cs=1&s=h&p=0>.

<sup>84</sup> *Action for Children’s Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995).

would preemptively block those channels. Unfortunately, a lockbox is not effective because parents can only guess. In the process, they will block large amounts of “decent” programming (which, incidentally, they are still paying for as part of their chosen tier).

[44] *Unexpected* indecency is, recall, the root of the problem. The modern spate of indecency case law was sparked by a parent who unexpectedly heard the Carlin broadcasting while driving with a child in the car. As noted by the D.C. Circuit, lockboxes are only effective if people “knew in advance” that the programming would be undesirable. “Otherwise, why would anyone bother to place a lockbox in operation? For parents to make an informed judgment about which course to follow, and when, they must have information in advance . . . .”<sup>85</sup>

[45] Further, that advance information will only help parents if it is accurate. Lockboxes rely on a ratings system that tags programming with content descriptors to indicate the presence of specific types of content (e.g. “S” for sexual content, “L” for coarse language, etc.) Yet, according to a recent study by the Parents Television Council, an organization devoted to promoting family-friendly fare on TV, two-thirds of the shows it reviewed on six major broadcast networks lacked appropriate content descriptors.<sup>86</sup> “None of the programs included in this analysis received a TV-MA rating,” the study authors write, “meaning every program was deemed appropriate by the networks to be viewed by a child aged fourteen or younger, including (for example) an episode of C.S.I. Miami in which a woman died of asphyxiation during an oral rape.”<sup>87</sup>

[46] Even if the ratings were accurate, a lockbox is a surprisingly clumsy solution when compared to the commercial filtering options available on other mediums, such as the Internet. Internet filters intercept all incoming content and allow parents to prevent specific types of indecency from

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<sup>85</sup> *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 982 (D.C. Cir. 1996) (upholding as constitutional provisions of the 1992 Cable Act which, among other things, placed restrictions on leased access and public, educational and governmental [PEG] channels).

<sup>86</sup> *The Ratings Sham II: TV Executives Still Hiding Behind a System That Doesn’t Work*, Parents Television Council, April 2007, <http://www.parentstv.org/ptc/publications/reports/ratingsstudy/exsummary.asp> (last visited May 10, 2007).

<sup>87</sup> *Id.*

becoming visible on screen;<sup>88</sup> a lockbox simply blocks the signal on a given channel, regardless of what the channel is showing at the time.

[47] Super Bowl XXXVIII provides an appropriate demonstration of the problems with lockboxes. In February 2004, Janet Jackson's infamous "wardrobe malfunction" caused her breast to be exposed during the halftime show, televised live on CBS, a standard broadcast channel.<sup>89</sup> As broadcast channels are not supposed to broadcast indecent content, the lockbox would have had no effect because it would not have been in use. A parent concerned about protecting his child from indecency would have had no reason to preemptively block CBS that night. FCC Commissioner Deborah Taylor Tate has expressed the same concerns: "Even the most diligent parent...cannot be expected to protect their [sic] children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be 'appropriate' programming."<sup>90</sup>

[48] Because CBS was transmitted on a broadcast station, the FCC was able to fine the network for what it considered a clear violation of indecency rules during a purportedly family-friendly program. In 2006, in response to increasing public concern over indecency, Congress passed the Broadcast Decency Enforcement Act of 2005, which imposes a much harsher fine for indecent content. Formerly \$32,500 per violation, each indecent episode now costs stations \$325,000, with a maximum of \$3,000,000 for any "continuing violation."<sup>91</sup> The president swiftly signed the bill into law.<sup>92</sup> This increase has had an immediate effect on the

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<sup>88</sup> See Wikipedia, Content Control Filter, [http://en.wikipedia.org/wiki/Internet\\_filter](http://en.wikipedia.org/wiki/Internet_filter) (last visited May 10, 2007).

<sup>89</sup> See *Bush Backs Tough TV Decency Laws*, BBC NEWS, Apr. 15, 2005, [http://news.bbc.co.uk/1/hi/entertainment/tv\\_and\\_radio/4449685.stm](http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/4449685.stm) (last visited May 10, 2007).

<sup>90</sup> *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2730 (2006) (Statement of Commissioner Deborah Taylor Tate), *vacated in part by In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13,299 (2006) (not affecting validity of Commissioner Tate's statement).

<sup>91</sup> Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified as amended in scattered sections of 47 U.S.C.).

<sup>92</sup> Press Release, The White House, President Signs the Broadcast Decency Enforcement Act of 2005 (June 15, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/06/20060615-1.html>. In his release,

broadcast industry. For instance, aware that just one fine could bankrupt some of its stations, the Public Broadcasting Service recently instituted a tough new editing policy for shows airing before 10:00 p.m.: Offensive words will not only be bleeped out, but from now on, editors must digitally mask the mouths of any on-camera speakers of indecency.<sup>93</sup> Further, “profanities expressed in compound words must be audibly bleeped in their entirety so that viewers cannot decipher the words.”<sup>94</sup> Previously, editors bleeped only the offending portion of the compound word.<sup>95</sup>

[49] Whether a \$325,000 fine for indecency is excessive is open to debate; this article does not seek to answer that question. No one can deny, however, that such fines *are* having the intended effect. Most broadcast stations will now go to great lengths to avoid being fined. Meanwhile, cable and DBS, immune to fines, continue to air indecency with impunity. When an open microphone caught President Bush using foul language in conversation with British Prime Minister Tony Blair, cable news networks repeatedly aired the offending portion of audio, while broadcast networks conspicuously bleeped out the word.<sup>96</sup>

[50] Even advertisers, traditionally skittish about indecency, are beginning to embrace such programming as a direct line to their most valued demographic: Males age eighteen to forty-nine.<sup>97</sup> Cable stations have little incentive to prevent the airing of indecency.

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President Bush stated that, “[b]y allowing the FCC to levy stiffer and more meaningful fines on broadcasters who violate decency standards, this law will ensure that broadcasters take seriously their duty to keep the public airwaves free of obscene, profane and indecent material. American families expect and deserve nothing less.” *Id.*

<sup>93</sup> Elizabeth Jensen, *Soldiers’ Words May Test PBS Language Guidelines*, N.Y. TIMES, July 22, 2006, at B7.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Posting of Amy Schatz to Washington Wire, <http://blogs.wsj.com/washwire/2006/07/17/bush’s-open-mike-indecnt-disclosure/> (July 17, 2006, 17:28 EDT).

<sup>97</sup> See Martin, *supra* note 83.

C. *DENVER AREA*: SUPREME COURT OPENS THE DOOR TO NEW INDECENCY  
REGULATION

[51] In *Denver Area*, the Supreme Court reaffirmed the importance of protecting the children and upheld legislation giving cable operators the ability to restrict content due to indecency.<sup>98</sup> Most notably, the court emphasized the similarities between cable and broadcast, noting that in some respects, cable presented even greater indecency concerns than the situation in *Pacifica*. In so doing, the Court implicitly made clear that subscription services did indeed call into play the issue of indecency.

[52] In 1992, Congress sought to deal with the problem of indecency on leased and public access cable channels.<sup>99</sup> Section 10 of the Cable Act was meant to give cable operators the power to restrict “patently offensive” sexually-related content from leased and public access channels, and to segregate and block certain indecent programming while giving cable subscribers the ability to request that it be unblocked.

[53] The Denver Area Educational Telecommunications Consortium challenged the constitutionality of the provisions.<sup>100</sup> The Supreme Court came to the conclusion that cable shares the same qualities as the broadcast that so concerned the *Pacifica* court, and the problem faced by Congress today was “remarkably similar” to the problems faced two decades earlier.<sup>101</sup> The Court held that Section 10(a), which permitted the cable operator to decide whether to broadcast indecent programs on leased access channels, was consistent with the First Amendment.<sup>102</sup> The other two provisions, which *required* operators to segregate and block channels with “patently offensive” programming, violated the First Amendment.<sup>103</sup>

[54] Although the First Amendment ordinarily does not come into play when a private company controls the speech, the Court appreciated

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<sup>98</sup> *Denver Area Educ. Telcomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996).

<sup>99</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (1992) (amending scattered sections of 47 U.S.C., but enacting no currently effective sections).

<sup>100</sup> *Denver Area*, 518 U.S. at 732.

<sup>101</sup> *Id.* at 744.

<sup>102</sup> *Id.* at 733.

<sup>103</sup> *Id.*

petitioners' concern that permitting cable operators to regulate speech on its leased access channels would create a private-censorship risk, necessitating a First Amendment analysis.<sup>104</sup> Further, cable operators develop close relationships with officials in various levels of government since they need municipal permission and rights-of-way to string their cables. This gives cable operators a government-imbued authority that invokes First Amendment issues.<sup>105</sup>

[55] Noting at the outset that Congress may only regulate speech in “cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required,”<sup>106</sup> the Court quickly went on to emphasize that the governmental interest at stake – protecting children from exposure to patently offensive descriptions of sex – was an “extremely important justification.”<sup>107</sup>

[56] All the factors the *Pacifica* court found important were present here:

Cable television broadcasting, including access channel broadcasting, is as “accessible to children” as over-the-air broadcasting, if not more so. Cable television systems, including access channels, “have established a uniquely pervasive presence in the lives of all Americans.” “Patently offensive” material from these stations can “confron[t] the citizen” in the “privacy of the home,” with little or no prior warning. There is nothing to stop “adults who feel the need” from finding similar programming elsewhere, say, on tape or in theaters.<sup>108</sup>

Without ever mentioning *Cruz*, the Court gutted its primary justifications. *Cruz* said cable was not an intruder in the home; *Denver Area* said it was. *Cruz* said cable was not as pervasive as broadcast; *Denver Area* said it was, having then established a sixty-three percent penetration rate in American homes. *Cruz* said the concern about child access to cable

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<sup>104</sup> *Id.* at 738-39

<sup>105</sup> *Id.* at 739.

<sup>106</sup> *Id.* at 740.

<sup>107</sup> *Id.* at 743.

<sup>108</sup> *Id.* at 744-45 (considering *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (internal citations omitted)).

indecenty was weaker than the situation in *Pacifica*; *Denver Area* said the concern was even *more* pertinent on cable.

[57] It seems like such a common-sense observation: of *course* cable subscribers can be confronted with unexpected indecenty. Yet, until the Supreme Court acknowledged that this was the case, the reasoning of the lower courts was muddled, new technologies stymieing their old analogies. From the beginning of its analysis, the *Denver Area* Court was especially cognizant of the misleading potential of analogies. “We are wary of the notion,” the Court wrote, “that a *partial* analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.”<sup>109</sup>

[58] Crucially, by acknowledging that indecent speech can confront subscribers with little or no prior warning, the Court undermined *Cruz*’s entire argument that because people bring cable into their home, they clearly desire to accept the speech in question. *Denver Area* comes to this conclusion *despite the fact* that “cable subscribers tend to use guides more than do broadcast viewers”: Cable subscribers’ tendency to “sample more channels before settling on a program” makes them “*more, not less* susceptible to random exposure to unwanted materials.”<sup>110</sup>

[59] The Court also dismissed cable operators’ arguments that the FCC’s power to regulate content on broadcast had long depended on the scarcity rationale, which did not apply to cable. Petitioners had argued that the Supreme Court’s recent decision in *Turner Broadcasting System, Inc. v. FCC*<sup>111</sup> to give cable broadcasts full First Amendment protection relied on the inapplicability of the spectrum scarcity problem to cable. The *Denver* court responded that the distinction, while relevant in *Turner* to justify structural regulations (i.e. “must carry” rules), “has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming,

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<sup>109</sup> *Id.* at 749 (emphasis added).

<sup>110</sup> *Id.* at 745 (emphasis added).

<sup>111</sup> *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 629 (1994) (using “heightened scrutiny” to address content-neutral regulations of cable system broadcasts).

and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all.”<sup>112</sup>

[60] With that, the Court officially put to rest the idea that spectrum scarcity is involved in content restriction. Although it had been out of favor for some time – argued in *Pacifica* by the FCC but not used as a justification in the decision – the Court now explicitly stated it was not a factor to be considered.

[61] The second section of the statute was found unconstitutional by six justices, and there is little question why. Section 10(b) required cable operators to segregate and block patently offensive sex-related programming on leased channels. To unblock the channel, subscribers were required to send a written request up to thirty days in advance. This system was clearly too restrictive, said the Court, and not practicable for adult cable viewers who might want “occasionally to watch a few, but not many, of the programs on the ‘patently offensive’ channel.”<sup>113</sup> Further, requiring a written request was an onerous restriction that might cause subscribers to “fear for their reputations” if the request ever became public.<sup>114</sup>

[62] As “obvious[ly]” restrictive as 10(b) was,<sup>115</sup> it is useful in demonstrating the theoretical limits of protect-the-children jurisprudence. A plea for the continued innocence of our nation’s youth – in this case, “protecting the physical and psychological well-being of minors”<sup>116</sup> – is apparently not enough to justify every burdensome regulation the government may impose. It also demonstrates the difference between a nuanced policy – *i.e.* the FCC’s thoughtful contextual method for determining whether a broadcast is indecent – and a heavy-handed policy that makes the Supreme Court very uneasy.

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<sup>112</sup> *Denver Area*, 518 U.S. at 748.

<sup>113</sup> *Id.* at 754.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 753.

<sup>116</sup> *Id.* at 754 (quoting Brief for Federal Respondents at 11 (quoting *Sable*, 492 U.S. at 126)).

[63] In *Time Warner*, the D.C. Circuit dealt with the next provision of the statute, 47 U.S.C. 558 § 10(d).<sup>117</sup> This provision, which imposed obscenity restrictions on cable services, stripped operators of the immunity they once had if any obscenity ran on public access or leased cable channels.<sup>118</sup> Picking up where *Denver* left off, the court found the section constitutional. “Section 10(d) merely imposes upon cable operators the same responsibility that others face. As the district court pointed out, no speakers – cable operators included – have a constitutional *right* to immunity from obscenity liability.”<sup>119</sup>

[64] Taken by itself, *Time Warner*’s conclusion seems fairly straightforward. Taken in combination with *Denver*, however, new issues start to emerge. The *Denver* court, looking at 10(a) alone, found it Constitutional in part because it “*permits* the operator to decide whether or not to broadcast [indecent] programs”<sup>120</sup> – and any regulation that offers leeway to a company to censor as it sees fit, as opposed to *requiring* a particular result, was perfectly okay. But when 10(d) enters the picture, the full import of § 10 becomes clear: By stripping operators of the immunity they once had from liability for aired obscenity, 10(a) looks less like an *option* and more like a requirement. In light of the sudden possibility that operators could be hit with criminal obscenity charges, 10(a)’s grant of autonomy doesn’t look as generous. To put it simply: 10(a) told cable operators that if they *wanted* to, they could censor “patently offensive” programming on leased access channels. If, for some reason, the cable operator decided to air the patently offensive programming, fine; but if anything *obscene* happened to run, the cable operator could now be found guilty of criminal obscenity charges. How could a cable operator know for sure if programming is indecent or obscene? Why risk making the wrong decision, airing obscenity, and being subject to criminal penalties? Section 10(a) is starting to look far less permissive.

[65] No discussion of indecency regulation is complete without discussing the Playboy Channel. In the mid-1990s, Congress tried to do something about cable indecency. Many teenagers had been familiar with “signal

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<sup>117</sup> 47 U.S.C. § 10(d) (2004).

<sup>118</sup> *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957 (1996).

<sup>119</sup> *Id.* at 981.

<sup>120</sup> *Denver Area*, 518 U.S. at 733 (emphasis in original).

bleed” – clear audio and scrambled video that “bled” from pay-per-view channels that were otherwise blocked. The Communications Decency Act of 1996 required cable operators of channels “primarily dedicated to sexually-oriented programming” to either totally block the signal and all associated signal bleed, or alternatively time-channel adult programming to the hours between 10:00 p.m. and 6:00 a.m., which was the same “safe harbor” zone applied to broadcast. The Playboy Channel sued, claiming a violation of their First Amendment rights. The Supreme Court struck down this method as too restrictive on speech and thus a violation of the First Amendment.<sup>121</sup>

[66] The Congressional Research Service, researching the indecency case law in response to lawmaker interest in expanding regulation to cable, has found that protecting the children may no longer be compelling enough to satisfy strict scrutiny.

In *Playboy*, the Court, applying strict scrutiny, struck down a speech restriction on cable television, in part because ‘for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.’ Thus, it appears likely that a court would find that to apply the FCC’s indecency restriction to cable television would be unconstitutional.”<sup>122</sup>

[67] The Congressional Research Service misses an important distinction. In *Playboy*, the Court was dealing with a new federal statute that would lead to a 6:00 – 10:00 p.m. ban on indecent material being aired on *primarily sexually-explicit channels*. By its very definition, this was *expected* indecency, and the lockbox and other technological solutions discussed in *Cruz* would actually work as intended. The Court called this

a key difference between cable television and the broadcasting media, which is the point on which this case

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<sup>121</sup> United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813 (2000).

<sup>122</sup> Henry Cohen, *Constitutionality of Applying the FCC’s Indecency Restriction to Cable Television*. Congressional Research Service, Order Code RL33170 at 11, available at [http://www.opencrs.com/rpts/RL33170\\_20051201.pdf](http://www.opencrs.com/rpts/RL33170_20051201.pdf) (internal citation omitted).

turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis. . . .[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners.<sup>123</sup>

This blocking technology was a “less restrictive alternative” than the law Congress enacted, because it would be just as effective in protecting unwitting cable subscribers from receiving indecency, without unnecessarily limiting the rights of adult video subscribers to listen to (or watch) the speech they desired.

[68] *Playboy* does not stand for the presumption that the First Amendment forbids the government from regulating indecent speech on cable; it stands for the well-settled presumption that the government may not use highly restrictive means to regulate speech when less restrictive means are readily available. For a pay-per-view cable channel that peddles exclusively in smut, blocking technologies are highly effective remedies. The problem is that blocks are totally ineffective when dealing with *unexpected* indecency. Protecting the children, while not compelling enough to warrant a draconian block on all sexual programming from adults who explicitly request it, is likely still compelling enough to warrant the prohibition of indecency on general cable channels.

IV. INCREASED ENFORCEMENT, REDUCED SCOPE: THE FCC DECLARES  
WAR AGAINST BROADCAST INDECENCY – AND THEN REDEFINES  
“BROADCAST” TO EXCLUDE ALL EMERGING BROADCAST  
TECHNOLOGIES FROM ITS INDECENCY RULES

A. FCC PROMULGATES AN ORDER EXPANDING THE DEFINITION OF  
“INDECENCY”

[69] In the decade following *Pacifica*, the FCC was rather timid in its enforcement, only focusing on the seven words in the Carlin

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<sup>123</sup> *Playboy*, 529 U.S. at 815.

monologue.<sup>124</sup> By the late 1980s, however, the FCC lost much of its reticence in going after indecency on the airwaves. Discontinuing its adherence to the “seven dirty words” standard promulgated in *Pacifica*, the FCC determined it was “more appropriate” to use the broader definition of indecency advanced in *Pacifica*: “language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”<sup>125</sup> Further relying on *Pacifica*, the FCC ruled that “such indecency will be actionable if broadcast or transmitted at a time of day when there is a reasonable risk that children may be in the audience.”<sup>126</sup> For the first time since *Pacifica* was handed down, the Commission finally embraced its broad agency power of basing regulation on *context* rather than on the few words used in Carlin’s monologue.<sup>127</sup>

[70] During *Pacifica*, the FCC argued that spectrum scarcity considerations bolstered its authority to prohibit indecency.<sup>128</sup> The Court, however, did not discuss scarcity when approving the FCC’s authority. Now, specifically rejecting the scarcity rationale, the FCC relied instead on *Pacifica*’s “nuisance rationale” to support its decision to time-channel broadcast indecency to the early morning hours.<sup>129</sup> With its newfound power, the FCC took action against two commercial radio stations, a student-run station at the University of California, and an amateur licensee.<sup>130</sup>

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<sup>124</sup> Kristin A. Finch, *Comment: Lights, Camera, and Action for Children’s Television v. FCC: The Story of Broadcast Indecency, Starring Howard Stern*, 63 U. CIN. L. REV. 1275, 1293 (1995).

<sup>125</sup> *New Indecency Enforcement Standards to be Applied to All Broad. and Amateur Radio License*, 2 F.C.C.R. 2726, 2726 (1987) (quoting *Pacifica*, 438 U.S. 726, 732 (1978)).

<sup>126</sup> *Id.* (internal quotations omitted).

<sup>127</sup> *Id.* (“If a broadcast goes beyond the use of expletives . . . then the context in which the allegedly indecent language is broadcast will serve as an important factor in determining whether it is, in fact, indecent.”)

<sup>128</sup> *Pacifica*, 438 U.S. at 731 n. 2 (“[T]here is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.”).

<sup>129</sup> *New Indecency Enforcement Standards*, 2 F.C.C.R. 2726.

<sup>130</sup> *Id.* Sure enough, much of the material to which the FCC was responding used none of the classic “seven dirty words,” but reasonable people might nevertheless find the material indecent.

[71] Had the FCC reaffirmed its original argument that regulations were based on scarcity, limiting indecency regulations to broadcast would arguably be warranted, for the problem would be unique to broadcast: Spectrum scarcity does not occur on cable because cable does not use the e-m spectrum to propagate its signal. Should a cable use up its available bandwidth, the cable operator could install additional cables.

[72] Taken alone, the Commission's rejection of the scarcity rationale might have indicated a desire to expand its power into new communications technologies. Ironically, however, at the same time the FCC was stepping up both the scope and the enforcement of its indecency regulation, it issued an administrative order that effectively nullified its ability to control indecency into the future.<sup>131</sup> What could have been a massive power grab was offset by an order clarifying the definition of "broadcast" and in the process drastically limiting the agency's purview.

B. FCC PROMULGATES AN ORDER LIMITING THE DEFINITION OF  
"BROADCASTING" AND EXEMPTS DBS AND OTHER SUBSCRIPTION  
SERVICES FROM BROADCASTING REQUIREMENTS

[73] In response to emerging technologies, the FCC issued a Notice of Proposed Rulemaking, which sought to properly classify certain subscription video programming services.<sup>132</sup> The Notice had tentatively concluded that "the characteristics of such services made classification of them as point-to-multipoint, non-broadcast services appropriate."<sup>133</sup> The Communications Act of 1934, it said, was buckling under the strain of new technologies that defied easy classification. The result was "different regulatory treatment of services which share what may be considered important characteristics."<sup>134</sup> Put simply, some subscription services were facing the same regulation as standard broadcast services, while others were not.<sup>135</sup> The FCC could take one of two actions in order to fix the inconsistency: Expand regulation to subscription services, or free all of those services from the requirements faced by broadcasters.

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<sup>131</sup> *In re* Subscription Video, 2 F.C.C.R. 1001 (1987)

<sup>132</sup> *Id.* at 1001 (citing 51 Fed.Reg. 1817 (Jan. 15, 1986)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1007 n.2.

[74] The question before the FCC was whether DBS and other such subscription services counted as “broadcasting.” The FCC examined the origins of broadcasting and learned that radio pioneers had distinguished between “unaddressed radio service directed to the indeterminate public at large, and multiple addressed transmission, intended for a prescribed number of particular receive points.”<sup>136</sup> This definition was later wrapped into the 1934 Communications Act.<sup>137</sup>

[75] Note, of course, that there was no way the original radio communication regulators were contemplating services like DBS. The technology simply did not exist. It is far more likely they were considering private communications from one company or individual to another. Yet after considering the medium’s history and finding no legislative history indicating otherwise, the FCC decided that because the intent of a subscription service is to limit access to its signals, subscription services should not be classified as broadcasting.<sup>138</sup>

[76] Interestingly, the Circuit Court for the District of Columbia had reached the opposite conclusion three years earlier, ruling that satellite radio clearly fit the definition of broadcasting, despite it being a subscription service.<sup>139</sup> In *National Association of Broadcasters v. FCC*, the D.C. Circuit Court affirmed in part and vacated in part a 1982 FCC Order that, in essence, “deregulate[d] DBS even before the service was born.”<sup>140</sup> While commending the Commission for attempting to ensure that the development of DBS would not be impeded, the Court also found that, “in its zeal to promote this new technology, the FCC gave short shrift to certain of its statutory obligations.”<sup>141</sup>

[77] In 1982, the FCC had adopted interim DBS regulations designed to assure “maximum flexibility” to the new industry.<sup>142</sup> In order to help

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<sup>136</sup> *Id.* at 1001.

<sup>137</sup> *Id.* 1002.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1003 (citing *Nat. Ass’n Broad. v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984)).

<sup>140</sup> *Nat. Ass’n Broad.*, 740 F.2d at 1195.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1197 (quoting *In re* inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, 86 F.C.C.2d 719 (1981)).

facilitate its growth, the FCC implemented a system that would free DBS from the major regulatory restrictions faced by broadcasters. If a DBS satellite owner chose to provide service directly to homes while retaining control over the content of the transmissions, it would be considered a broadcaster and subject to the Communications Act's restrictions. Alternatively, the DBS satellite owner could choose to operate as a common carrier instead of a broadcaster and not face broadcaster regulations.<sup>143</sup>

[78] The court held that the Commission had engaged in "forbidden statutory experimentation" in allowing DBS systems to be classified as non-broadcast. "When DBS systems transmit signals directly to homes with the intent that those signals be received by the public, such transmissions rather clearly fit the definition of broadcasting; radio communications are being disseminated with the intent that they be received by the public."<sup>144</sup> The court also quoted a 1966 decision in which the FCC itself declared that the subscriptions do not negate a medium's broadcast-like qualities: "[B]roadcasting remains broadcasting even though a segment of the public is unable to view programs without special equipment," the FCC wrote. "[S]ubscription operations are intended to be received by the public [and] such operations would be able to comply with all requirements applicable to broadcasting[.]"<sup>145</sup>

[79] The FCC briefly considered *NAB* before finalizing its 1987 Order. Recognizing that categorizing subscription services as broadcasting would have a "considerable impact" on the statutory obligations of these kinds of services, the Commission determined it would be "both legally permissible and more appropriate as a matter of regulatory policy" to reclassify subscription services as non-broadcast.<sup>146</sup>

[80] The FCC knew that its new definition of broadcast would have wide-ranging effects. "We are not unmindful of the fact that classification of subscription program services as non-broadcast will have other regulatory

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<sup>143</sup> *Id.* at 1200.

<sup>144</sup> *Id.* at 1201.

<sup>145</sup> *In re* Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, 3 F.C.C.2d 1, 10 (1966).

<sup>146</sup> *In re* Subscription Video, 2 F.C.C.R. 1001, 1001 (1987).

consequences,” the Commission wrote. For instance, “such services would not be subject to the Commission’s broadcast equal employment opportunity rules.”<sup>147</sup> The Commission decided that such effects would be *de minimus*, and proceeded accordingly.

[81] In a footnote to the Notice of Proposed Rulemaking preceding the actual Order, the Commission briefly mentioned obscenity as part of a discussion about its authority to impose content-related requirements on programmers who were not radio station licensees:

[W]hen Congress has decided to impose program content restrictions on persons other than licensees, it has ordinarily done so expressly. *See, e.g.*, the Act’s obscenity prohibitions (now codified in the U.S. Criminal Code), which apply to “[w]hoever utters obscene language by means of radio communication.”<sup>148</sup>

Thus, the footnote said, should the FCC reclassify DBS as non-broadcast, its “authority to impose content related requirements on programmers . . . [may] be open to question.”<sup>149</sup>

[82] That was the extent of the FCC’s discussion on the effect DBS reclassification would have on indecency enforcement. The 1987 Order finalizing the reclassification mentioned neither indecency nor obscenity as a factor to consider – a “regulatory consequence” apparently no longer worth discussing.

[83] Without explicitly knowing Congress’s intent in this pressing and controversial area, and based in large part on the Congressional intent it could divine from the Communications Act, the FCC in one fell swoop exempted an entire communications medium from indecency regulations. As the D.C. Circuit Court had pointed out a few years earlier, this kind of sweeping action is problematic. “[T]he fact that Congress did not in 1934 contemplate DBS does not give the Commission a blank check to regulate

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<sup>147</sup> *Id.* at 1003.

<sup>148</sup> Subscription Video Services, 51 Fed. Reg. 1817, 1824 n.36 (Proposed Jan. 15, 1986).

<sup>149</sup> *Id.*

DBS in any way it deems fit.”<sup>150</sup> Despite broadcaster concerns that such a reclassification after the circuit court had specifically ruled otherwise might constitute a forbidden experiment with the Commission’s statutory mandate,<sup>151</sup> the circuit court ultimately upheld the FCC’s decision as neither arbitrary nor capricious.<sup>152</sup>

[84] It is ironic that the FCC would seek to expand the definition of indecency, thereby increasing its power, while simultaneously limiting that power to free broadcast media. The FCC could effortlessly have gone in the other direction. “Given the Commission’s apparent lack of desire to confront its confused history of STV [subscription television] regulation, and given its discretion to classify the new DBS services as it chose, the FCC on remand could just as easily have imposed broadcast-type regulation on DBS operators as removed such regulation from STV operators.”<sup>153</sup> Had the Commission decided to characterize subscription services as broadcast, the government’s goal of weeding out indecency in entertainment would have been easily achievable. By characterizing subscription services as non-broadcast, the FCC was severely hampering its ability to regulate emerging technologies.

[85] Why would the FCC do such a thing, especially coming just a few months after the public notice that it was ramping up indecency enforcement? There are a few possibilities: As the final Order nowhere mentioned indecency concerns, perhaps the FCC did not realize it was limiting its power in this way. This suggestion is bolstered by the fact that the Order seemed mostly focused on equal-access regulatory concerns. However, the footnote in the earlier Notice of Proposed Rulemaking mentioning obscenity seems to counter such a reading.

[86] Perhaps the reason is more mundane: Different divisions of the FCC deal with different matters.<sup>154</sup> How much input did the indecency

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<sup>150</sup> Nat. Ass’n Broad. v. FCC, 740 F.2d 1190, 1203 (D.C. Cir. 1984).

<sup>151</sup> *Id.* at 1200-01.

<sup>152</sup> *Id.* at 1207.

<sup>153</sup> Howard Shelanski, *The Bending Line Between Conventional “Broadcast” and Wireless “Carriage,”* 97 COLUM. L. REV. 1048, 1066 (1997).

<sup>154</sup> See FCC.gov for a listing of the FCC’s different divisions and offices. For instance, the Enforcement bureau is responsible for enforcing the Communications Act (<http://www.fcc.gov/eb/>); the Office of Administrative Law Judges

enforcement division have in this Order? Still more likely is that no one stopped to think about unintended consequences. How could the FCC have known that, in twenty years, DBS would be one of the fastest-growing forms of home entertainment? Whatever the reason, it is clear that freeing DBS of indecency regulations was not the aim of the measure, but merely a byproduct.

C. CONGRESS PASSES THE 1992 CABLE ACT, APPLYING BROADCASTING REQUIREMENTS TO DBS AND OTHER MULTICHANNEL DISTRIBUTORS

[87] In any case, five years later Congress reversed much of what the FCC had decided in the 1987 Order: now, satellite services *were* to be regulated. In the 1992 Cable Act, Congress promulgated regulations about program access, must-carry provisions, and ownership limits.<sup>155</sup> These regulations applied to all “multichannel” distributors, which includes DBS as well as anyone who “makes available for purchase by subscribers or customers, multiple channels of video programming.”<sup>156</sup>

[88] One commenter downplays the importance of the regulations that the 1992 Act imposed on DBS, calling them only “modest broadcaster duties.”<sup>157</sup> Perhaps the duties were modest, but the very idea that Congress was imposing any duties at all demonstrated a fundamental difference in opinion with the FCC about the proper scope of regulation. The FCC, hesitant to regulate such a “nascent industry,”<sup>158</sup> decided that all subscription services, including DBS, should be free of broadcast-like restrictions. Now, Congress essentially reversed and remanded. The only lingering remnant of the 1987 Order was its characterization of DBS as a “subscription service,” which in recent years has been cited for little more

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(<http://www.fcc.gov/oalj/>) is responsible for conducting the hearings ordered by the Commission. (last visited May 10, 2007.)

<sup>155</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 amending Title VI, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, of the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. 521-59 (1992 & Supp. 1993)).

<sup>156</sup> David Saylor, *Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour through the Maze*, 12 CARDOZO ARTS & ENT. L.J. 321, 325-26 (1994).

<sup>157</sup> Shelanski, *supra* note 152, at 1067.

<sup>158</sup> Subscription Video Services, 51 Fed. Reg. 1817, 1824 (Proposed Jan. 15, 1986).

than the proposition that “subscription-based satellite services are not ‘broadcasting’ as defined by the Communications Act.”<sup>159</sup>

[89] This is a powerful idea, invoking *Cruz*’s faulty logic about the inappropriateness of applying *Pacifica*’s indecency rationales to cable television. It is not surprising that seventeen years later, the FCC would begin invoking the Order for the principle that, as a subscription service, DBS was not subject to indecency rules.

#### V. APPLICATION: “SUBSCRIPTION SERVICES DO NOT CALL INTO PLAY THE ISSUE OF INDECENCY”

[90] In 2005, the FCC received complaints about “Nip/Tuck,” a television program shown on the FX Network.<sup>160</sup> FX is part of the basic tier offered with many cable and satellite subscription services.<sup>161</sup> Apparently the basic tier gets you quite a bit these days: According to the complaints, the show “depicts actors engaged in an array of simulated sexual acts, including oral, anal, and genital intercourse, as well as nudity.”<sup>162</sup>

[91] The FCC’s response was succinct: “[T]he Commission does not regulate cable indecency.”<sup>163</sup> First, it explained, the criminal code restriction on indecency, 18 USC § 1464, only applies to “radio communication,” not to programming carried over cables. Second, both cable and DBS are subscription services, which itself means two things: 1) As the 1987 Order specified, they are not broadcasting as defined by the Communications Act and so the Commission has no regulatory control over the content; and 2) subscription services “do not call into play the issue of indecency.”<sup>164</sup>

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<sup>159</sup> *In re* Various Complaints Regarding CNN’s Airing of the 2004 Democratic National Convention, 20 F.C.C.R. 6070, 6072 n.2 (2005). *See also In re* Policies and Rules for the Direct Broadcast Satellite Service, 17 F.C.C.R. 11331, 11334 (2002).

<sup>160</sup> *In re* Various Complaints Against the Cable/Satellite Television Program “Nip/Tuck,” 20 F.C.C.R. 4255, 4255 (2005).

<sup>161</sup> *See, e.g.,* RCN Cable TV – Channel Lineups, <http://www.rcn.com/cabletv/lineupDetails.php?lineupID=30> (last visited May 10, 2007).

<sup>162</sup> *Nip/Tuck*, 20 F.C.C.R. at 4255 (2005).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

[92] The response to cable indecency complaints has become, essentially, a form letter: “Dear So-and-So, the FCC does not regulate cable or satellite indecency because subscription services do not call into play the issue of indecency. Period.” They repeat often-used explanations, note that new technologies built into cable and DBS services give users the power to deal with unwanted indecency, and that is that – a few pages at most.<sup>165</sup> The Commission does not pause to ask if the old explanations are still valid. They do not recognize the fallacies in *Cruz*. They do not ponder whether a decision to subscribe is really equivalent to a decision to accept indecency; the complaints, by their very existence, indicate it is not. They do not ask whether technology really *is* the end-all be-all of indecency protection. Technological tools are only as effective as the person who programs them; what happens when the programmer is not aware that indecency might appear, unexpectedly, on a given program? As more form decisions are published, all thoughtful arguments to the contrary will be crushed by an ever growing mountain of inexorable precedent.

[93] The greatest irony is that the 1987 Order – which the FCC cites for the proposition that cable and DBS are subscription services and, therefore, not subject to indecency restrictions – had *nothing* to do with indecency.

A. THE FCC STUBBORNLY ADHERES TO FORMALISTIC DISTINCTIONS.

[94] In holding so steadfastly to its past rulings, the FCC is proving itself concerned solely with consistent application of law, while paying no heed at all to consistency of *result*. In the buildup to the 1987 Order, the FCC took great pains to logically extend the original analogy of broadcasting, to see whether it would apply to today’s technologies. The Commission noted that radio pioneers had borrowed the term “broadcasting” from farming: a “broad cast” is when one scatters seeds in a wide arc – *casting* them *broadly* so as to reach the widest possible area.<sup>166</sup> Thus, the FCC reasoned, “broadcasting” entails transmitting a radio signal to as many people as possible. Because transmitters of subscription services intend for

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<sup>165</sup> See, e.g., *In re* Various Complaints Regarding CNN’s Airing of the 2004 Democratic National Convention, 200 F.C.C.R. 6070, 6071 (2005).

<sup>166</sup> *In re* Subscription Video, 2 F.C.C.R. 1001 (1987).

their signals to be received only by subscribers – and not by as many people as possible – it is not broadcasting.

[95] By performing these mental gymnastics, the FCC essentially changed the definition of broadcasting, making the focus not the *type* of communications technology used, but the *purpose* of using that technology. Today, two main reasons are offered to explain why subscription services do not call into play the issue of indecency – from both the sender’s and receiver’s perspective: 1) Subscription services are not intended to reach the entire public, and, therefore, broadcaster rules do not apply, and 2) As argued in *Cruz*, subscribers to a service intend to receive indecent speech, so *Pacifica’s* nuisance rationales do not apply. As explained earlier, this reasoning is faulty, because: 1) Congress went ahead and applied broadcaster rules to subscriptions services *anyway* in the 1992 Act, and 2) *Denver Area* invalidated *Cruz’s* reasoning, holding that unexpected indecency *can* confront unwitting subscribers. Yet the FCC continues to blindly cite the subscription nature of DBS as the reason it is not subject to indecency rules.

[96] This stubborn adherence to formalistic distinctions – which may have made sense 20 years ago – is irrational today, as communications technologies move toward convergence. As the *Denver Area* court so wisely noted in determining the First Amendment protections to be afforded to cable, “no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes.”<sup>167</sup> Such judicial formulas are “so rigid that they become a straitjacket that disables government from responding to serious problems. ... [A]ware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or specific set of words now.”<sup>168</sup>

[97] The FCC’s rigid definition of broadcast is a straitjacket preventing government from responding to the indecency concerns that accompany increasingly pervasive technology. Nowhere in recent years has the

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<sup>167</sup> *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 741-42 (1996).

<sup>168</sup> *Id.* at 742 (internal citations omitted).

Commission asked whether the government's venerable aims, argued so forcefully in *Pacifica*, are still being met. When broadcast was king, cable and DBS were but nascent industries facing a precarious and uncertain future; today, as broadcast's reign comes to an end, cable and DBS are thriving. Affording them the same laissez-faire protections they received in the 1980s undermines longstanding government policies against indecency. It would be one thing if the FCC stopped enforcing indecency entirely – at least that would be logically consistent. Yet by ramping up indecency enforcement on broadcast, while ignoring indecency on all subscription services – hundreds of channels in all – the FCC is subverting the government's compelling interest in punishing indecency.

[98] Former FCC Chairman Michael Powell has expressed similar reservations: “I think that if you want to talk about the effect of these mediums in our society, you are really kidding yourself if you think you can wall off one small part so your children never hear the ‘F-word’ again through other mediums.”<sup>169</sup> Admittedly, Powell was arguing for scaling down indecency regulations, but his words ring just as true for opponents of indecency.

#### B. ARBITRARY AND NONSENSICAL OUTCOMES

[99] Until the government standardizes indecency rules across all types of technologies, we will continue to see arbitrary and nonsensical outcomes. For example, San Diego radio station KGB-FM repeatedly played the following song, entitled “Candy Wrapper”:

It was another Pay Day and I was tired of being a Mr. Goodbar, when I saw Miss Hershey standing behind the Powerhouse on the corner of Clark and 5th Avenue. I whipped out my Whopper and whispered, Hey Sweetart, How'd you'd like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy. I couldn't help but grab her delicious Mounds 'cause it was easy to see that this little Twix had the Red Hots. It was all

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<sup>169</sup> Michael Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. TELECOMM. & HIGH TECH. L. 5, 16 (2004).

I could do to hold back a Snicker and a Krackle as my Butterfinger went up her tight little Kit Kat, and she started to scream Oh, Henry! Oh Henry! Soon she was fondling my Peter Paul and Zagnuts and I knew it wouldn't be long before I blew my Milk Duds clear to Mars and gave her a taste of the old Milky Way. She asked if I was into M & M's and I said, Hey, Chicklet, no kinky stuff. I said, Look you little Reese Piece, don't be a Zero, be a Life Saver, why don't you just take my Whatchamacallit and slip it up your Bit-O-Honey. Oh, what a piece of Juicy Fruit she was too. She screamed Oh, Crackerjack. You're better than the Three Musketeers! as I rammed my Ding Dong up her Rocky Road and into her Peanut Butter Cup. Well, I was giving it to her Good 'n Plenty, and all of a sudden, my Starburst. Yeah, as luck would have it, she started to grow a bit Chunky and complained of a Wrigley in her stomach. Sure enough, nine months later, out popped a Baby Ruth.<sup>170</sup>

Indecent? Absolutely, said the FCC: Despite the double entendre and indirect references, it was found to be inescapably sexual.<sup>171</sup> As one decision eloquently stated, “[N]otwithstanding the use of candy bar names to symbolize sexual activities, the titillating and pandering nature of the song makes any thought of candy bars peripheral at best.”<sup>172</sup>

[100] This incident demonstrates the length to which the FCC can and will go. The song, while clearly pandering to listeners' baser instincts, contained neither a trace of the seven dirty words nor any explicit references to body parts. It was a play on language, similar to George Carlin's monologue, but arguably less profane. Despite the absence of profanity, the FCC did not hesitate to exercise its enforcement powers – because it was sent to listeners via broadcast radio.

[101] The same exact song, transmitted in its entirety via satellite radio, would face no penalty at all. Is the distinction so relevant anymore?

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<sup>170</sup> Letter to KGB Incorporated, 7 F.C.C.R. 3207, 3208 (1992).

<sup>171</sup> *Id.* at 3207.

<sup>172</sup> Letter to Mr. Michael J. Faherty Executive Vice President-Radio, Cox Broadcasting Division, Cox Enterprises, Inc., 6 F.C.C.R. 3704, 3704 (1989).

Many consumer electronics today are capable of receiving AM, FM and satellite signals, and can switch between them with the press of a button.<sup>173</sup> Receivers for Sirius and XM Radio, the two main competitors in today's market, are available as pre-installed options in dozens of automobile brands.<sup>174</sup> Not only that, but Ford Motor Company recently inked a deal with Sirius, to put factory-installed satellite radio receivers in every Ford vehicle sold in Canada, with free included subscriptions, by 2008.<sup>175</sup> The same fate will almost certainly befall radio in the States, considering that Ford recently announced plans to quadruple the number of pre-installed Sirius receivers in all its cars.<sup>176</sup>

[102] Free satellite radio comes standard in many rental cars, and free subscriptions to satellite radio are common with the purchase of a new car, developments the National Association of Broadcasters finds especially troubling. In a letter to the FCC, NAB Chairman David K. Rehr noted his concern at what he deemed an "increasingly unjustifiable" disparity in the regulatory treatment of broadcast and satellite radio:

To the extent that satellite radio service is now received free by non subscribers, this undermines the frequently-made argument that satellite radio should be regulated very differently than traditional broadcast radio simply because satellite is a subscription service. ... [M]erely asserting that "subscription-based services do not call into play the issue of indecency" no longer seems adequate to justify the inequitable regulatory treatment of free over-the-air and satellite radio.<sup>177</sup>

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<sup>173</sup> See e.g. Edward C. Baig, *Look out iPod: Inno marries satellite radio, portable music*, USA TODAY, April 26, 2006, [http://www.usatoday.com/tech/columnist/edwardbaig/2006-04-26-satellite-mp3-player\\_x.htm](http://www.usatoday.com/tech/columnist/edwardbaig/2006-04-26-satellite-mp3-player_x.htm).

<sup>174</sup> See "SIRIUS Satellite Radio – Auto Dealer Locator," <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/Page&c=Page&cid=1043186280865>; XM Radio – Get XM in Your New Car," <http://www.xmradio.com/cars/> (both accessed July 30, 2006).

<sup>175</sup> *Sirius Signs Ford*, MARKETNEWS.CA DAILY, July 13, 2006.

[http://marketnews.ca/news\\_detail.asp?nid=1937](http://marketnews.ca/news_detail.asp?nid=1937) (last visited July 30, 2006).

<sup>176</sup> Thomas Catino, *Serious Breakdown of Sirius Satellite Radio*, ANT & SONS, July 5, 2006 available at [http://www.antandsons.com/aheadoftheticker/siriusradio\\_070506](http://www.antandsons.com/aheadoftheticker/siriusradio_070506).

<sup>177</sup> Letter from David K. Rehr, NAB Chairman, to Kevin J. Martin, FCC Chairman (June 5, 2006),

[103] Also troubling to the NAB is the recent discovery of a new kind of signal bleed: satellite radio receivers in some cars are so powerful that they inadvertently re-broadcast their signals far beyond the car itself, in some cases up to a quarter mile away.<sup>178</sup> These signals are then received by radios tuned to free broadcast stations.<sup>179</sup> This phenomenon is most invasive in the lower FM band – typically the domain of National Public Radio and religious stations – whose audiences, ironically, are the most likely to object to indecency.<sup>180</sup> Complaints received by the NAB demonstrate that “members of the public today are disturbed about receiving ‘unexpected’ sexually explicit and profane satellite program content, particularly if children are listening.”<sup>181</sup>

[104] It is likely that a technological fix will cure the signal bleed problem, because federal law prohibits such strong FM interference, and satellite radio makers have already halted production of the offending models and are working with the FCC to keep the situation under control.<sup>182</sup> But the issue of free subscriptions to car renters and purchasers raises a pricklier concern. The standard objection to *Cruz* is that a decision to subscribe to a particular medium is not tantamount to a decision to accept all unexpected indecency on that medium. This objection is infinitely more pertinent when applied to a listener who didn’t even subscribe to begin with. When free and subscription radio are combined on one receiver that can instantly switch between the two signals, the irrationality of the regulatory disparities becomes clear.

[105] Again, former chairman Powell sums up the increasing obsolescence of traditional decency rules:

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[http://www.nab.org/images/xertimages/corpcomm/pressrel/060506\\_dkr\\_martin\\_satradio.pdf](http://www.nab.org/images/xertimages/corpcomm/pressrel/060506_dkr_martin_satradio.pdf) (internal citations omitted).

<sup>178</sup> See *Tune in NPR, get Howard Stern Instead*, MSNBC, April 28, 2006.

<http://www.msnbc.msn.com/id/12530600/> (last visited May 10, 2007).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Letter from David K. Kehr to Kevin J. Martin, *supra* note 176, ¶ 6.

<sup>182</sup> Greg Levine, *Halt: Karmazin’s Sirius Confronts FCC’s FM Rule*, FORBES, July 20, 2006. [http://www.forbes.com/2006/07/20/sirius-fcc-production-cx\\_gl\\_0720autofacescan04.html](http://www.forbes.com/2006/07/20/sirius-fcc-production-cx_gl_0720autofacescan04.html).

At some point, if the country is serious about wanting to debate what the public interest is in the media, then it is going to have to broaden its mind and its perspective enormously. I am going to use my children as an example: Ask them if they know what a broadcast channel is. *They do not.* They have a clicker in their hand, and it goes 7, 9, 10, 12, 159, 222, and they do not know the difference between 214 and 7. I find it phenomenal that the First Amendment changes channels too.<sup>183</sup>

C. THE FCC FIGHTS A LOSING BATTLE AGAINST “FLEETING EXPLETIVES”  
WHILE FAR MORE EGREGIOUS CONTENT GOES UNTOUCHED

[106] “Fleeting expletives” had never concerned the FCC. For several years, the Commission had affirmed the prevailing view that a fleeting expletive was not actionable. In its 2001 “Industry Guidance” statement, the Commission stated that in order to be patently offensive, it would strongly weigh “whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities,” distinguishing between material that “dwells” (indecent) and material that was “fleeting and isolated” (not indecent).<sup>184</sup> In 2003, it denied complaints about performer Bono’s use of the phrase “fucking brilliant” at the 2002 Golden Globe Awards, holding that “fleeting and isolated remarks of this nature do not warrant Commission action.”<sup>185</sup>

[107] Everything changed in 2004, when the full Commission reversed the Enforcement Bureau’s decision. Suddenly, any use of the “F-word” was indecent.<sup>186</sup> In 2006, in addition to fining broadcast networks an

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<sup>183</sup> Michael Powell, *Preserving Internet freedom: Guiding principles for the industry*, 3 J. TELECOM. & HIGH TECH. L. 5, 16 (2004) (emphasis added).

<sup>184</sup> *In re Indus. Guidance of the Comm’ns Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, Policy Statement, 16 F.C.C.R. 7999, at ¶¶ 10, 17-18 (2001).

<sup>185</sup> *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order 18 F.C.C.R. 19859 (Enf. Bur. 2003) at ¶ 6, review granted, 19 F.C.C.R. 4975 (2004).

<sup>186</sup> *Id.* at 4981 ¶¶ 13-14.

unprecedented \$4.5 million for Super Bowl nudity<sup>187</sup> and teenage sex scenes,<sup>188</sup> the Commission reaffirmed its 2004 holding that certain words are presumptively profane, even if fleeting and isolated.<sup>189</sup> Now, the Commission was censuring Fox for the 2002 and 2003 Billboard Music Awards, in which Cher and Nicole Richie used the words “fuck” and “shit,” respectively.<sup>190</sup>

[108] Fox and its affiliates quickly appealed. The Commission argued that this “new” policy was merely an extension of the “first blow” theory articulated in *Pacifica*. There, the Supreme Court had held that expecting someone to turn off the radio when confronted with indecent language “is like saying that the remedy for an assault is to run away after the first blow.”<sup>191</sup> But the Second Circuit didn’t buy that excuse:

[T]he “first blow” theory bears no rational connection to the Commission’s actual policy regarding fleeting expletives. ... [T]he Commission does not take the position that *any* occurrence of an expletive is indecent or profane under its rules. ... [T]he Commission will apparently excuse an expletive when it occurs during a *bona fide* news interview. ... The Commission even conceded that a re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same “first blow” that resulted from the original airing of this material. Furthermore, the Commission has also held that even repeated and deliberate use of numerous expletives is not indecent or profane under the FCC’s policy if the expletives are “integral” to the work. ... In all of these

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<sup>187</sup> *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 F.C.C.R. 2760 (2006).

<sup>188</sup> *In re* Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” 21 F.C.C.R. 2732 (2006).

<sup>189</sup> *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006).

<sup>190</sup> *Id.*

<sup>191</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

scenarios, viewers ... will have to accept the alleged “first blow” caused by use of these expletives. ... The “first blow” theory, therefore, fails to provide the reasoned explanation necessary to justify the FCC’s departure from established precedent.<sup>192</sup>

[109] In June 2007, the court held that the Commission had acted arbitrarily and capriciously, having failed to adequately justify its new stance on fleeting expletives.<sup>193</sup> The court remanded, openly skeptical that the Commission could rationalize its fleeting expletive policy in a manner that would “pass constitutional muster.”<sup>194</sup> Moreover, the court proffered eight pages of dicta questioning whether even the Commission’s *general* indecency test<sup>195</sup> can survive First Amendment scrutiny.

[110] As of the date of publication of this Article, the Commission has yet to respond. If on remand the Commission tries to justify its fleeting expletive policy, the networks will certainly appeal, and the case will go back to the Second Circuit, which has clearly telegraphed its intentions. Should the case end up in the Supreme Court, there is no telling what might happen. The newest justice, Samuel Alito, Jr., may be a social conservative, but he is also a First Amendment stalwart.<sup>196</sup> In *Pacifica*, the Supreme Court noted that “[m]aking the sensitive judgments required in [indecency] cases is not easy. But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.”<sup>197</sup> If the court now finds that the FCC has capriciously pursued fleeting expletives, the consequence may be a simple response to *Pacifica*: “The Commission’s judgment is no longer entitled to respect.”

[111] If the FCC continues to fight these skirmishes of principle, it risks losing the greater war as cable and DBS brazenly push the sexual envelope

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<sup>192</sup> Fox Television Stations, Inc. v. FCC, 06-1760-AG, 2007 WL 1599032, at \*24-26 (2d Cir. June 4, 2007).

<sup>193</sup> *Id.* at \*4.

<sup>194</sup> *Id.* at \*32.

<sup>195</sup> *See id.*

<sup>196</sup> Robert Barnes, *Alito Calls Free-Speech Limits ‘Dangerous’ as Court Considers Cases*, THE WASHINGTON POST, June 14, 2007. [http://www.washingtonpost.com/wp-dyn/content/article/2007/06/13/AR2007061302063\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/06/13/AR2007061302063_pf.html)

<sup>197</sup> *Pacifica*, 438 U.S. at 760 (Powell, J., concurring).

with no fear of repercussions. Indecency costing broadcasters \$325,000 per violation is, literally, child's play on basic cable. Putting aside dirty words for a moment, the Comedy Central cartoon South Park routinely depicts sexual acts some might consider so offensive that they cross the line from indecency to obscenity. Episodes run the gamut from surprisingly clever to shockingly crude. In the first seasons of the show, the furthest writers went was creating a dancing piece of manure that "comes out once a year and gives presents to all the little boys and girls who have fiber in their diets."<sup>198</sup> In recent years, writers have pushed the envelope: People excrete from their mouths, children sexually gratify animals, and a teacher inserts a live gerbil into his gay lover's anus in front of a third grade class.<sup>199</sup> Yet the FCC, which rained fire and brimstone on the San Diego radio station that aired a titillating song about candy bars, does nothing.

[112] Nip/Tuck creator Ryan Murphy cavalierly proclaims that his goal is to make the airwaves safe for explicit sex. "It's tough to get that sexual point of view across on television. Hopefully I have made it possible for somebody on broadcast television to do a rear-entry scene in three years. Maybe that will be my legacy."<sup>200</sup> Nip/Tuck, although an unabashed offender is but one of several sexually explicit shows broadcast on basic cable and DBS.<sup>201</sup> The Parents Television Council recently conducted a study of the indecent content available on basic and "extended basic" cable channels, most of which are also available on DBS.<sup>202</sup> The results are, to put it mildly, eye-opening, and they starkly call into question the government's professed desire to protect the children and the sanctity of

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<sup>198</sup> South Park Studios: The Show: Characters, [http://www.southparkstudios.com/show/display\\_char.php?id=41](http://www.southparkstudios.com/show/display_char.php?id=41) (last visited May 10, 2007).

<sup>199</sup> See, e.g., Wikipedia, South Park, [http://en.wikipedia.org/w/index.php?title=South\\_Park&oldid=66638638](http://en.wikipedia.org/w/index.php?title=South_Park&oldid=66638638) (last May 10, 2007).

<sup>200</sup> *Basic Cable Awash in Raunch: A Content Analysis of Expanded Basic Cable's Original Prime-Time Series*, PARENTS TELEVISION COUNCIL, November 2004, <http://www.parentstv.org/PTC/publications/reports/2004cablestudy/main.asp> (last visited May 10, 2007).

<sup>201</sup> Bob Thompson, *Fighting Indecency, One Bleep at a Time*, THE WASHINGTON POST, Dec. 9, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A49907-2004Dec8?language=printer>.

<sup>202</sup> See PARENTS TELEVISION COUNCIL *supra* note 200.

the home. Some excerpts of this study, which are too explicit to be reproduced here, document instances of indecent language, sexually explicit dialogue, on-screen nudity, masturbation, oral sex, threesomes, anal sex, bestiality, sadism and masochism, statutory rape and incest, all aired from early afternoon through late evening.<sup>203</sup>

#### D. THE “A LA CARTE” OPTION

[113] One goal of the study was to push for so-called “*a la carte*” subscription options. As the name suggests, an *a la carte* subscription is one where people subscribe only to the channels they specifically select. Under Chairman Powell, the FCC soundly rejected the *a la carte* suggestion. But when Chairman Kevin Martin took over, the FCC re-examined the issue and ultimately endorsed it, not on the grounds that it would curb unwanted indecency, but because it would be more economically efficient.<sup>204</sup> Authors of the Parents Television study prefer it for a related reason: *a la carte* would allow parents to pick and choose family-friendly channels instead of being forced to subscribe to an entire basic cable package. Currently, in order to “gain access to wholesome and educational programming available on a handful of cable networks,” parents are “forced to pay for channels they don’t want and that actually make their job as a parent much more difficult.”<sup>205</sup>

[114] It is true that *a la carte* subscription plans would effectively address the signal bleed concerns raised in *Playboy*, while being more economically efficient than the channel blocking solution accepted by the Supreme Court. Ideally, cable and DBS operators could bundle indecency-free channels in a separately offered family-friendly tier. Then, instead of requesting a total block of a channel that a subscriber is paying for, someone with a distaste for indecency would only subscribe to the family-friendly tier.

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<sup>203</sup> An explicit video compilation of much of the programming documented in the study is available at <http://www.parentstv.org/ptc/clips/BasicCable/clips.wmv> (last visited May 10, 2007).

<sup>204</sup> FEDERAL COMMUNICATIONS COMMISSION, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (FEB. 9, 2006), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-263740A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf) (last accessed July 29, 2006).

<sup>205</sup> See PARENTS TELEVISION COUNCIL, *supra* note 200.

[115] The problem is that *a la carte* is simply a lockbox by any other name, and would be completely ineffective at countering unexpected indecency on channels that are part of the supposedly family-friendly bundle. *A la carte* may mollify the Parents Television Council for the time being, but it seems more a stopgap measure than a lasting solution.

[116] Nor would *a la carte* be effective against a phenomenon that could best be described as “trickle down indecency.” The concept is simple: most programming available by subscription will eventually trickle down to free broadcast. Episodes of “Sex and the City,” once only available on the premium channel HBO, first trickled down to TBS (which only requires a subscription to basic cable), and then trickled down to late night broadcast television (which requires no subscription at all). Episodes of “South Park,” once only available on the basic cable channel Comedy Central, trickled down a similar path.<sup>206</sup> Even though the episodes are cut down to remove most indecent language and images, sexual situations are often central to the plot and cannot be removed. By turning a blind eye toward subscription services, the FCC tacitly condones the coarsening of broadcast television by way of sex-laden hand-me-downs.

#### E. POSSIBLE SOLUTIONS

[117] If the government no longer wishes to devote its finite resources to fighting this battle, it should scale back or lift indecency regulations from free broadcast television and radio. Rescission of broadcast indecency rules would not be too difficult to accomplish, but the FCC could not do it alone. It would require a repeal of 18 USC § 1464, which would take Congressional and presidential approval. Although the odds of this actually happening are low – especially considering Congress just voted to increase indecency fines tenfold – strong arguments exist. By imposing such stringent controls solely on free broadcast, the government is unnecessarily hampering one segment of the entertainment industry while adopting hands-off policies toward the rest of the industry. This is

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<sup>206</sup> Ileane Rudolph, *South Park Gets Cleaned Up*, TVGUIDE Sept. 1, 2005, <http://www.tvguide.com/News-Views/Interviews-Features/Article/default.aspx?posting=%7B3108701A-4661-429A-A983-DF78A5F51FE6%7D>.

economically inefficient, arbitrary and capricious, and unfair to broadcasters.

[118] Conversely, if the government truly *is* interested in preventing indecency from entering the home, it must do something about the gaping holes in its regulatory policies. Its current implementation makes one wonder whether the government is still sincere about the rationales expressed in *Pacifica*. If the FCC is going to accept *Pacifica*'s bequeathal of power so readily, it must also be prepared to embrace the goals espoused therein.

[119] Expanding broadcast indecency rules to DBS would require nothing but an agency action. Currently 47 C.F.R. § 73.3999 channels § 1464 power to the Commission and allows it to regulate indecency on broadcast. By redefining subscription services as broadcast, the FCC would instantly gain control over indecency on DBS, which arrives in homes via radio communication. The FCC can find precedent for such actions by looking at the deeds of Congress itself: One of the underlying principles behind the 1987 Order's exemption of subscription services from broadcast rules was the FCC's general anti-regulatory stance. When Congress decided *anyway* in 1992 that all multipoint video services were subject to certain obligations and the D.C. Circuit Court approved the regulation in *Time Warner*, the FCC's main rationale went out the window.

[120] The cable industry has a stronger defense than DBS, because cable is by definition non-broadcast and therefore not subject to § 1464, which only applies to "radio communication." However, the Communications Act *does* give the FCC general regulatory power over communications sent by wire – *i.e.* cable. The FCC could argue that § 1464 does apply, because at some point during the cable transmission process, the signal is sent from one satellite to another using radio communications. If that logic seems too specious, Congress could amend § 1464 to apply not just to broadcasts but to all "multichannel distributors." This is probably the easiest and best solution, as "multichannel distributors" encompasses most telecommunications technologies today and will be applicable far into the future.

[121] The cable industry would no doubt complain that Congress lacks the power to do this because the whole rationale for content regulation in the first place was spectrum scarcity, which does not apply to cable. However, the government could respond that scarcity hasn't been a real rationale in 30 years: the Supreme Court abandoned it in *Pacifica*, but that hasn't stopped the government from regulating content on broadcast. And in *Denver Area*, the Court explicitly rejected the assertion that spectrum scarcity is involved in content restriction.

[122] Perhaps the answer lies not in more regulations but in technology, not as the lockbox panacea it is often envisioned to be, but as a solution for *bringing* explicit material into one's home at the time one wants. As discussed above, blocking technology is nowhere near nuanced enough to be an appropriate solution, because it usually just gives parents two options: Block an entire channel that they are paying for, or let the entire channel through. However, technology *is* at the point where adults who "feel the need" to watch such programming, as *Denver Area* put it, can do so at the times they prefer. Using "Digital Video Recorder" (DVR) technology, adults who want to watch sexual programming during the day can automatically record the programming when it airs at night, and then replay it at their leisure. Such DVR technology is readily available on most cable and DBS receivers, or available as an inexpensive add-on (e.g. TiVo). A magic solution does not exist to block all unwanted programming from airing in the household during daylight hours, but DVR may be the magic solution that will allow adults to essentially "re-broadcast" their desired nighttime programming during the day. Potentially, everybody wins.

[123] It may be more productive for the government to explore technological fixes than to continue down its current path, increasing indecency fines tenfold and talking of a "showdown" over indecency with the cable industry.<sup>207</sup> These solutions are simply recipes for protracted legal battles about the constitutionality of new provisions.

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<sup>207</sup> Bill McConnell, *Stevens Vows Cable-Indecency Crackdown*, BROADCASTING & CABLE, March 1, 2005, <http://www.broadcastingcable.com/article/CA507612.html?display=Breaking+News&referral=SUP>.

[124] Whatever the government decides to do, it must do something. Supporters and opponents of indecency regulation should be able to agree on at least one point: It is in no one's interest to have indecency laws inconsistently applied across mediums.

## VI. CONCLUSION

[125] The topic of indecency regulation has the potential to instantly touch a nerve. "Your right to protect your children from what *you* deem offensive" (they say with derision) "does not outweigh *my* right to get the programming that I want! The government cannot be an arbiter of taste! The First Amendment is *paramount*. If you don't like what's playing on television, turn it off. If you don't want your children to watch so-called indecency, try actually parenting your kids instead of plopping them down in front of their electronic babysitter."

[126] Regardless of the merit of these positions, philosophizing about the proper role of parents, the government, and the correct level of interplay between them, has not been the aim of this paper. This paper has simply argued that, given Supreme Court precedent, the FCC *can* regulate indecency on cable and DBS; and if the government is really serious about its stated goal of protecting the children and the sanctity of the home, it *should* regulate indecency on cable and DBS. To enforce staggering fines on free broadcast stations while ignoring indecency on all other technologies is simply disingenuous.

[127] This article first examined federal statutes to determine the law and, correspondingly, the will of Congress. An examination of relevant case law followed, during which it became clear that the Supreme Court has never explicitly dealt with the question of broadcast-style indecency regulation of cable and DBS. That is, the Court has never ruled on whether the FCC has the ability to contextually decide what is indecent on modern entertainment technologies. However, the Supreme Court in *Denver Area* stated that cable presents even greater indecency concerns than broadcast, thus demonstrating that subscription services clearly call into play the issue of indecency. The Article next turned to a pair of FCC orders, both promulgated in 1987, which first expanded the definition of "indecency" and then limited the definition of "broadcasting," thereby exempting subscription services like cable and DBS from broadcast-style regulations.

In 1992, Congress applied broadcast requirements to DBS and other multichannel distributors. Yet the FCC continues to exempt subscription services from indecency regulations, despite the fact that such services are just as pervasive as broadcast, and far more sexually explicit. The article then demonstrated the arbitrary and nonsensical outcomes that stem from the FCC's disparate treatment of broadcast, cable and DBS.

[128] Administrative agencies have long had authority to act on details with which the legislature has not explicitly dealt. But in the case of DBS, the FCC is clearly going against the stated purpose of 18 USC § 1464. Section 1464 prohibits the utterance of indecency by radio communication; DBS technology unarguably uses radio communication. By continuing to exempt subscription services like DBS from indecency regulations, especially after Congress subjected DBS to other broadcast regulations in the 1992 Cable Act, the FCC is ignoring Congress's mandate. Congress would be well within its rights to amend § 1464 to apply to all "multichannel distributors." Given Supreme Court precedent, such a move would likely be constitutional.

[129] Ultimately, the most important question may be a philosophical one. Where should the burden lie, with parents forced to defend their homes from an ever-increasing barrage of raunch and smut, or with people who actually enjoy that material? Which is harder: Keeping indecency out of the home, or bringing it into the home? Whose interests should the government seek to protect? Critics of regulation argue that in adopting an *in loco parentis* role, the government is infringing on the rights of adults to watch the content they want. Supporters of regulation argue that because some people want sexually explicit material entering their home at all hours of the day and night, parents are unable to police the content that gets through the cracks, and need the government to help. It seems, then, the government has an important choice to make: Whose interest is more compelling?