

# 1-12 End Notes

1. An early version of this article is available as Christopher M. Fairman, Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation, Ohio State Public Law Working Paper No. 193 (Feb. 25, 2013), available at <http://ssrn.com/abstract=2223992>.
2. Adam Liptak, A Word Heard Often, Except at the Supreme Court, NY TIMES, Apr. 30, 2012, <http://www.nytimes.com/2012/05/01/us/a-word-heard-everywhere-except-the-supreme-court.html> (describing Fairman as “nation’s leading authority on the legal status of the word [fuck]”). Slightly less glamorously, I have also been called “Professor Fuck.” See Margaret Lyons, 5 Minutes with Christopher M. Fairman, Time Out Chicago, July 13, 2006, available at [timeoutchicago.com/things-to-do/43279/5-minutes-with-christopher-m-fairman](http://timeoutchicago.com/things-to-do/43279/5-minutes-with-christopher-m-fairman)
3. Prior to the creation of the FCC, its predecessor, the Federal Radio Commission, was authorized to prosecute obscene, indecent, or profane language uttered by means of radio communication. See FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2312 (2012) [hereinafter Fox II]. Congress authorized the enforcement between the hours of 6 a.m. and 10 p.m. See id. Despite the statutory limitation to radio communication, the Commission applies its regulations to radio and television broadcasters alike. See FCC v. Fox Televisions, Inc., 556 U.S. 502, 505-06 (2009) [hereinafter Fox I].
4. Fox II, 132 S. Ct. at 2312. Presumably, the FCC had the power to regulate such speech since its inception in 1934 because the legislation creating it adopted the 1927 Radio Act’s prohibition against the broadcast of obscene, indecent, and profane language. However, in 1948, the ban on obscene, indecent, and profane language was amended and replaced with criminal penalties for using such language over the airwaves, struck from the Communications Act, and incorporated into the Criminal Code. See Keith Brown & Adam Candeub, The Law and Economics of Wardrobe Malfunction, 2005 BYU L. REV. 1463, 1479 (2005). This recodification made the Department of Justice responsible for criminal enforcement of §1464. While this reclassification created some uncertainty as to the FCC’s continuing ability to administratively enforce §1464, the Court concluded the FCC retained power to impose sanctions under § 1464 in *Pacifica*. 438 U.S. At 738.
5. Fox II, 132 S. Ct. at 2312; see Angela Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 198 (2010). Prior to 1970, the FCC did occasionally react to isolated concerns about indecency, but did not rely on § 1464. See Brown & Candeub, *supra* note 4, at 1481-83 (discussing isolated examples).
6. 438 U.S. 726 (1978).
7. The Commission described Carlin’s monologue as follows:  
[I]t consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as ‘shit’ and ‘fuck,’ as well as ‘cocksucker,’ ‘motherfucker,’ ‘piss,’ and ‘cunt.’ The comedian begins by stating that he has been thinking about ‘the words you couldn’t say on the public . . . airwaves . . . the ones you definitely couldn’t say . . .’ Thereafter there is repeated use of the words ‘shit’ and ‘fuck’ in a manner designed to draw laughter from his audience.
8. *In re Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 95, ¶ 5 (1975) [hereinafter WBAI].
9. *Pacifica*, 438 U.S. at 729-30. The veracity of this allegation is questionable. The complaint was from John H. Douglas, a member of the national planning board of Morality in Media. He was quite the opposite of a typical listener to WBAI, described as culturally and politically on the left. If Douglas was actually listening to the station, it was in a deliberate attempt to be offended. The fact that he waited six weeks after the broadcast to complain suggests that he had not been listening, but instead learned of the broadcast some time later. This conclusion is bolstered by the lack of candor about the fact that his “young son” was fifteen years old at the time—and who, living in New York City, had likely heard the words in Carlin’s broadcast before. See L.A. Powe, Jr., *Red Lion and Pacifica: Are They Relics?*, 36 PEPP. L. REV. 445, 461 (2009).
10. See Campbell, *supra* note 5, at 205-06.
11. WBAI, *supra* note 7, at 97, ¶ 10.
12. See *Miller v. California*, 413 U.S. 15, 24 (1972).

## (13-22) End Notes

13. WBAI, *supra* note 7, at 98, ¶ 11.
14. In its *Pacifica* order, the Commission identified four important considerations supporting special treatment for broadcasting indecency: “(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.” WBAI, *supra* note 7, at 97, ¶ 9. Of these four, “special concern to the Commission as well as parents is the first point regarding the use of radio by children.” *Id.*
15. The majority was Stevens, Burger (Chief Justice), Rehnquist, Powell, and Blackmun. The dissenters were Justices Stewart, White, Brennan, and Marshall. See *Pacifica*, 438 U.S. At 728-29.
16. *Id.* at 742.
17. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).
18. *Id.* at 748.
19. *Id.*
20. *Id.* at 749.
21. *Id.* at 750.
22. *Id.* at 755 (Powell, J., concurring in part and concurring in judgment).
  14. *Id.* at 757 & n.1.
  15. *Id.* at 759.
  16. *Id.* at 760-61. Powell wrote separately, however, to distance himself from the theory that the Court was free generally to decide on the basis of its content which speech protected by the First Amendment is most “valuable” and hence deserving of the most protection and which is less “valuable” and hence deserving of less protection.
  17. *Id.* at 761-62.
  18. Of course, the four dissenters would not allow the FCC to regulate indecency at all. All four agreed with Justice Stewart that the term “indecent” as used in §1464 should have the same meaning as “obscene” speech. *Pacifica*, 438 U.S. at 780 (Stewart, J., dissenting). Since Carlin’s language was not obscene, the FCC lacked the authority to restrict it. *Id.*
  19. See Robert Corn-Revere, *FCC v. Fox Television Stations, Inc.: Awaiting the Next Act*, 2009 CATO SUP. CT. REV. 295, 305 (2009) (“After the Supreme Court upheld its authority to enforce Section 1464, the Commission continued—as it had promised—to show great restraint in its construction of the law.”).
20. See *Fox Televisions, Inc. v. FCC*, 489 F.3d 444, 449 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009); Terri R. Day & Danielle Weatherby, *Bleeeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469, 483 (2012) (describing the limitation to only those seven words).
21. *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1336 (D.C. Cir. 1988) [hereinafter ACT I].
22. See, e.g., *In re Application of Pacifica Found. For Renewal of License for Noncommercial Station WPFW(FM)*, 95 F.C.C.2d 750, 760, ¶¶ 16, 18 (1983) (holding three separate occasions using “motherfucker,” “fuck,” and “shit,” did not amount to “verbal shock treatment”).

## (23-31) End Notes

23. See KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 180 (5th ed. 2007) (claiming the FCC found no actionable cases for indecent programming between 1975 and 1987.). Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 *ALB. L. REV.* 631, 642 (2012-13) (describing FCC restraint). An example of this policy of restraint is seen in the license renewal of Boston's public television station, WGBH. See *WGBH Educational Found.*, 69 *F.C.C.2d* 1250 (1978) (issued July 31, 1978). *Morality in Media* had petitioned the FCC to deny renewal of WGBH for broadcasting a number of programs including an "unidentified installment of the *Masterpiece Theatre* series," which contained all seven of Carlin's filthy words; several episodes of *Monty Python's Flying Circus*, which included "vulgarity, nudity, and sacrilege"; and a program entitled *Rock Follies*, which contained "obscenities" such as "shit" and "bullshit."<sup>30</sup> See *id.* at 1250, ¶ 2; *Campbell*, *supra* note 5, at 244 (quoting former FCC Chief of Staff Frank Lloyd that the unidentified program was "Molly Bloom's soliloquy in *Ulysses* which had all the seven dirty words in it"). In *Infinity Order and Policy Statement*, rejecting the challenge, the FCC stated that *Pacifica* "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station."<sup>30</sup> *WGBH Educational Found.*, 69 *F.C.C.2d* at 1254, ¶ 10. Instead, the FCC intended to strictly observe the narrowness of the *Pacifica* holding. *Id.* Therefore, the FCC concluded there was no showing of abuse by WGBH of its programming discretion. *Id.* In *re Infinity Broadcasting Corp. of Pennsylvania, Licensee of Station WYSP(FM)*; *In re Pacifica Found., Inc., Licensee of Station KPFK-FM*; *In re The Regents of the University of California, Licensee of Station KCSB-FM*, 3 *F.C.C.R.* 930 (1987) [hereinafter *Infinity Order*]; see *Fox I*, 489 *F.3d* at 450. In an appendix to the *Infinity Order*, the FCC specifically identified the indecent speech from each action. See *Infinity Order*, 3 *F.C.C.R.* At 934-35.
24. See *Infinity Order*, *supra* note 31, at 930, ¶ 5.
25. *Id.*
26. *Id.*
27. *Fox I*, 489 *F.3d* at 449.
28. *Pacifica Found., Inc.*, 2 *F.C.C.R.* 2698, at ¶ 13 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."). The *Infinity Order* also retreated from the safe harbor period by concluding that indecent speech was actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience, whether before or after 10:00 p.m. See *Infinity Order*, *supra* note 31, at 930-31. Broadcasters appealed the *Infinity Order* to the D.C. Circuit which rejected the FCC's push-back of the safe harbor until midnight because the agency "failed to adduce evidence or cause" to support the expanded restraint and remanded the matter for the FCC's reconsideration of an appropriate safe harbor period. *ACT I*, 852 *F.2d* at 1335. After two congressional attempts to mandate the safe harbor period and two additional trips to the D.C. Circuit, the safe harbor was ultimately returned to 10:00 p.m. to 6:00 a.m. See *Brown & Candeub*, *supra* note 4, at 1491-92 (describing the three *ACT* cases and congressional reactions).
29. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Indecency*, 16 *F.C.C.R.* 7999 (2001) [hereinafter *Policy Statement*].
30. *Id.* at 8002, ¶ 7.
31. *Id.* at 8002, ¶ 8.

## (32-58) End Notes

32. *Id.* At 8003, ¶ 10.
33. *Id.* at 8008, ¶ 17.
34. *Id.*
35. The song was “The Hands That Built America.” The film was *GANGS OF NEW YORK* (Miramax Films 2002).
36. See Susan Crabtree, *Banning the F-Bomb*, *DAILY VARIETY*, Jan. 14, 2004, at 66 (quoting Bono).
37. See Jim Rutenberg, *Few Viewers Object as Unbleeped Words Spread on Network TV*, *N.Y. TIMES*, Jan. 25, 2003, at B7.
38. See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order,
39. 18 F.C.C.R. 19,859, 19,859 & n.1 (2003) [hereinafter *Golden Globe I*].
40. See *id.* At 19860-61, ¶ 5.
41. *Id.* at 19861, ¶ 5.
42. *Id.* at 19861, ¶ 6.
43. See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4976, ¶ 3 (2004) [hereinafter *Golden Globe II*].
44. See *id.* At 4975, ¶ 3.
45. *Id.* at 4977, ¶ 6.
46. *Id.* at 4978, ¶ 8.
47. See, e.g., *Mr. Peter Branton*, 6 F.C.C.R. 610 (1991)(broadcast of repeated use of fuck by John Gotti found not indecent); *Entercom Buffalo License, LLC (WGR(AM))*, 17
48. F.C.C.R. 11997, 11999-12000 ¶¶ 7, 9-10 (2002) (finding use of “prick” and “piss” not indecent because words were not used to describe sexual or excretory acts or organs).
49. See Policy Statement, *supra* note 37, at 8003, at ¶ 10 (listing 3 factors).
50. *Golden Globe II*, *supra* note 50, at 4980, ¶ 12. The Commissioners conclusions on the other factors are also suspect. They stated that fucking was “explicit or graphic” because the “‘F-Word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language.” *Id.* at 4979, ¶ 9. In this context, the Commissioners repeat the error made in declaring all uses of fuck per se sexual. The final factor was met because “the use of the ‘F-Word’ here, on a nationally telecast awards ceremony, was shocking and gratuitous” without further explanation.
51. *Id.* 18 U.S.C. § 1464.
52. See Statement of Chairman Michael K. Powell, *Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*,
53. F.C.C.R. 4988, 4988 (2004) (noting this was the first time the profanity section was applied to “fuck” and stating that “today’s decision clearly departs from past precedent”).
54. *Golden Globe II*, *supra* note 50, at 4981, ¶ 14; see also Statement of Commissioner Kathleen Q. Abernathy, *Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4989, 4989 (2004) (“Rather, ‘profane’ language has historically been interpreted in a legal sense to be blasphemy.”).
55. *Golden Globe II*, *supra* note 50, at 4981, ¶ 13.
56. See *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).
57. See *Golden Globe II*, *supra* note 50, at 4981, ¶ 13 n.34 (citing Black’s last definition of profane).
58. See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (2006) [hereinafter *Omnibus Order*].

## (59-84) End Notes

59. In Section III.B. of the Omnibus Order, the FCC identified four programs that were indecent and profane, but the agency did not propose any forfeitures because the incidents predated the order in Golden Globe II. See *id.* At ¶¶ 100-145.
60. See *id.* At ¶ 101.
61. See *id.* at ¶ 112 & n.164.
62. See *id.* At ¶ 125.
63. See *id.* At ¶ 137.
64. *Id.* at ¶¶ 102, 107.
65. *Id.* at ¶¶ 138, 143.
66. See *id.* At ¶¶ 106, 120, 131, 141.
67. See *id.* At ¶¶ 104, 116, 129, 140.
68. See *id.* at ¶¶ 111, 124, 136, 145. It is this fundamental violation of due process— advanced notice that the government could punish one’s conduct—that provides the ultimate resolution of the Fox Litigation.
69. Fox and CBS filed a petition for review of the Omnibus Order in the Second Circuit. ABC filed a petition for review in the D.C. Circuit, which was then transferred to the Second Circuit and consolidated with the petition for review filed by Fox and CBS. See Fox I, 489 F.3d at 453.
70. On September 7, 2006, the Second Circuit granted the FCC’s request for remand and stayed enforcement of the Omnibus Order. The Commission was given sixty days to issue a final or appealable order, at which time the pending appeal would be automatically reinstated. See *id.*
71. See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006) [Remand Order].
72. *Id.* at ¶¶ 12-66.
73. *Id.* at ¶ 22.
74. *Id.* at ¶ 60.
75. *Id.* at ¶ 20.
76. 81 *Id.* At ¶¶ 53, 66.
77. *Id.* at ¶ 71.
78. *Id.* at ¶ 72.
79. *Id.* at ¶ 73.
80. *Id.* at ¶ 75.
81. The Second Circuit appeal of the Omnibus Order was automatically reinstated on November 8, 2006 under the terms of the original order granting the voluntary remand to the FCC. After the Remand Order, only the two Fox broadcasts were at issue. Fox then filed a petition for review of the Remand Order which was consolidated with the original appeal. The Second Circuit then granted the intervention of CBS Broadcasting Inc. (“CBS”) and NBC Universal Inc. and NBC Telemundo License Co. (collectively, “NBC”). ABC opted to forgo participation in this appeal. See Fox I, 489 F.3d at 453-54.
82. *Id.* at 454.
83. *Id.* at 455. The three-judge panel of the Second Circuit was composed of Rosemary Pooler, Pierre Leval, and Peter Hall. Judge Leval dissented because he believed the FCC gave a reasoned explanation for the change complying with the APA. See *id.* At 467-74 (Leval, J., dissenting).
84. Fox I, 556 U.S. At 513.

## End Notes

85. *Id.* at 517. The Court noted the FCC had “forthrightly acknowledged” that it had “broken new ground” in ruling that fleeting and nonliteral expletives could be deemed indecent. *Id.* The Court concluded that the FCC’s reasons for expanding the scope of its enforcement activity were entirely rational. Not only was it “certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words,” but the Court agreed that the FCC’s decision to “look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context- based approach” sanctioned in *Pacifica*. *Id.* at 517-18. Given that even isolated utterances can be made in pandering, vulgar, and shocking manners, and can constitute harmful first blows to children, the majority held that the FCC could “decide it needed to step away from its old regime where nonrepetitive use of an expletive was per se nonactionable.” *Id.* At 518.
86. *Id.* at 529.
87. *Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317, 327 (2d Cir. 2010). The court of appeals began by noting how the media world had changed since *Pacifica* with the rise of cable television, satellite broadcasts, and the Internet. *Id.* at 325-26. The uniquely pervasive presence of broadcast television no longer exists—“broadcast television has become only one voice in a chorus.” *Id.* at 326. Moreover, technological change such as V-chip technology has given parents the ability to decide which programs they will permit their children to watch. *Id.* In light of these changes, the Second Circuit saw no reason why strict scrutiny should not now apply. Nonetheless, the court was bound by controlling Supreme Court precedent, *Pacifica*. *Id.* At 327.
88. *Id.* at 330. The court rejected the idea that the FCC’s three-factor “patently offensive” test gave broadcasters fair notice. *Id.* Since the FCC’s test found “bullshit” was indecent because it was “vulgar, graphic and explicit,” while “dickhead” was not indecent because it was “not sufficiently vulgar, explicit, or graphic,” broadcasters hardly had notice of how the test would apply in the future. *Id.*
89. *Id.* at 331. The court observed: “that people will always find a way to subvert censorship laws may expose a certain futility in the FCC’s crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so.” *Id.*
90. *Id.*
91. *Id.* at 332.
92. *Id.*

## (93-112) End Notes

93. See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507 (2005).
94. *Fox II*, 613 F.3d at 333.
95. *Id.*
96. Examples included: CBS affiliates declining to air the Peabody Award-winning 9/11 documentary; a radio station cancelling a planned reading of Tom Wolfe's novel *I Am Charlotte Simmons*, based on a single complaint it received about the adult language in the book, because the station feared FCC action; and local broadcasters deciding not to invite controversial guests for fear that an unexpected fleeting expletive would result in fines. *Id.* at 334. The court noted that the indecency policy had even chilled programs that contained no expletives, but which contained reference to or discussion of sex, sexual organs, or excretion. *Id.* at 335. Consequently, the absence of reliable guidance in the FCC's standards chilled a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. *Id.* 104 404 Fed. Appx. 530 (2d Cir. 2011).
97. During the scene, in which the character was preparing to take a shower, a child portraying her boyfriend's son entered the bathroom. A moment of awkwardness followed. For a complete description of the scene, see *id.* at 533-34.
98. See *In re Complaints Against Various Television Licensees Concerning Their February 24, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 3147 (2008).
99. *Id.* at 3150.
100. *Id.* at 3153.
101. 404 Fed. Appx. At 534.
102. *Id.* at 535.
103. *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011).
104. *Fox II*, 132 S. Ct. at 2317-20.
105. *Id.* at 2318.
106. *Fox II*, 132 S. Ct. at 2320. Justice Ginsburg did write a one sentence concurrence in the judgment once again declaring *Pacifica* wrong when issued and in need of reconsideration. See *id.* at 2321 (Ginsburg, J., concurring in judgment).
107. *Id.* at 2320.
108. *Id.*
109. *Id.*
110. *Id.* Perhaps this is in response to the Court's statement in *Fox II* that the FCC is "free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." 132 S. Ct. at 2320.
111. 78 Fed. Reg. 23,563 (Apr. 19, 2013).
112. See *FCC Extends Pleading Cycle for Indecency Policy*, DA 13-1071, 2013 WL 1962346 (Enf. Bur. and OGC rel. May 10, 2013).

## (113-226) End Notes

<sup>113</sup> See Statement of FCC Commissioner Robert M. McDowell on the United States Supreme Court's Decision in *FCC v. Fox Television Stations, Inc.*, 2012 WL 2366332, at \*1 (FCC) (June 21, 2012).

<sup>114</sup> See Doug Halonen, *FCC to Back Away From a Majority of Its Indecency Complaints*, *The Wrap TV* (Sept. 24, 2012 @ 9:20 am), <http://www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766>.

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

<sup>116</sup> See Statement of Commissioner Robert M. McDowell Federal Communications Commission Before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Communications and Technology Oversight of the Federal Communications Commission, 2012 WL 6202231, \*8 (F.C.C.) (Dec. 12, 2012).

<sup>117</sup> See *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, DA 13-581, 2013 WL 1324503 (Enf. Bur. and OGC rel. Apr. 1, 2013).

<sup>118</sup> See *WBAI*, *supra* note 7, at 97, ¶ 9.

<sup>119</sup> *Pacifica*, 438 U.S. At 748.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 759.

<sup>122</sup> *Fox II*, 613 F.3d at 326; see Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 287, 288 (2012) (broadcast media no longer dominant force).

<sup>123</sup> Brief of the Cato Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom as Amici Curiae in Support of Respondents, *FCC v. Fox Television, Inc.*, 132 S. Ct. 2307 (2012) (10-1293), 2011 WL 5562515, at \*10-11; see Gamse, *supra* note 134, at 298 (noting fewer than 10% rely on broadcast).

<sup>124</sup> Brief of the Cato Institute, *supra* note 135, at \*11.

<sup>125</sup> See *Fox II*, 613 F.3d at 326; *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 *F.C.C.R.* 542, at ¶ 8 (2009).

<sup>126</sup> *Fox II*, 613 F.3d at 326; *In re Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video and Audio Programming*, 24

## (127-149) End Notes

- <sup>127</sup> F.C.C.R. 11413, at ¶ 126 (2009) [hereinafter CSVA Report] (“The number of suppliers of online video and audio is almost limitless.”).
- <sup>128</sup> Brief of the Cato Institute, *supra* note 135, at \*6.
- <sup>129</sup> See *Pacifica*, 438 U.S. At 749.
- <sup>130</sup> *Fox II*, 613 F.3d at 326; In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13171, at ¶ 11 (2009); Gamse, *supra* note 134, at 299 (“American children are now exposed to a wide range of media that extend well beyond just broadcast television.”).
- <sup>131</sup> *Id.*
- <sup>132</sup> *Id.*
- <sup>133</sup> *Pacifica*, 438 U.S. At 749.
- <sup>134</sup> *Id.* at 757 & n.1.
- <sup>135</sup> *Pacifica*, 556 F.2d at 34 & n.6 (Leventhal, J., dissenting).
- <sup>136</sup> *Id.* at 33.
- <sup>137</sup> See John P. Elwood, Jeremy C. Marwell & Eric A. White, FCC, Fox, and That Other F-Word, 2012 CATO SUP. CT. REV. 281, 300-04 (2012).
- <sup>138</sup> 47 U.S.C. § 303(x).
- <sup>139</sup> See CSVA Report, 24 F.C.C.R. 11413, at ¶ 11.
- <sup>140</sup> Brief of the Cato Institute, *supra* note 135, at \*14. These ratings are displayed prominently at the beginning of programs, in onscreen menus and interactive guides, and in local newspaper listings. *Id.* At \*15.
- <sup>141</sup> *Id.* at \*17; see Gamse, *supra* note 134, at 298-99 (“These pay-TV services typically include additional filtering capabilities for their customers. In fact, cable companies are legally bound to provide blocking devices to their customers upon request, and most do so for free.”).
- <sup>142</sup> *Id.*
- <sup>143</sup> *Id.*
- <sup>144</sup> *Id.* at \*12-13. Numerous software filtering and other tools are available, often as free downloads, and websites such as [www.GetNetWise.org](http://www.GetNetWise.org) provide information to help parents compare available tools. *Id.* at \*13.
- <sup>145</sup> *Id.* at \*15.
- <sup>146</sup> The percentage of households with a DVD player climbed from 13% in 2000 to 83% in 2007. It is estimated that two out of five U.S. households had a DVR last year, up from one in every five households in 2007 and one in every thirteen households in 2005. Nearly 90% of U.S. digital cable subscribers had access to VOD as of March 2007. *Id.* At \*16.
- <sup>147</sup> See Elwood, *supra* note 149, at 297-300.
- <sup>148</sup> *Fox I*, 556 U.S. at 519.
- <sup>149</sup> *Fox I*, 489 F.3d at 461.

## (150-165) End Notes

<sup>150</sup> See Clay Calvert & Matthew D. Bunker, Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?, 47 SAN DIEGO L. REV. 737, 743 (2010).

<sup>151</sup> Id. at 746-47. For example, “comprehensive studies of public swearing have emerged” pointing out the frequency of use of offensive words at between 0.3 to 0.7% of verbal output per day (an average of 60-90 offensive words out of the daily production of 15,000-16,000 words). See Timothy Jay, Do Offensive Words Harm People?, 15 PSYCHOL. PUB. POL’Y & L. 81, 89-90 (2009).

<sup>152</sup> See Jessica C. Collins, Note, The Bogeyman of “Harm to Children”: Evaluating the Government Interest Behind Broadcast Indecency Regulation, 85 N.Y.U. L. REV. 1225, 1244-61 (2010) (evaluating five possible harms to children).

<sup>153</sup> See Jay, supra note 164, at 92. In his dissent in Fox I, Justice Breyer also noted: “One review of the empirical evidence, for example, reports that ‘[i]t is doubtful that children under the age of 12 understand sexual language and innuendo; therefore it is unlikely that vulgarities have any negative effect.’” 556 U.S. at 564 (Breyer, J., dissenting) (quoting Kaye & Sapolsky, Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television, 2004 Mass Communication & Soc’y 429, 433 (Vol.7) (citing two studies)).

<sup>154</sup> See Jay, supra note 164, at 92. Two Presidential commissions on pornography and found little convincing evidence that offensive speech harmed normal adults. The one exception was for deleterious effects on children that were used to create pornographic images, but evidence is lacking that children are harmed by speech. Id. At 92-93.

<sup>155</sup> Id. at 93.

<sup>156</sup> See id. (citing the Henry Kaiser Foundation published reports). Other commentators see the same similarity. See Jennifer Smith, Comment, Education Works! How Broadcast Fleeting Expletives Stimulate Comprehensive Sex Education for our Youth, 49 HOUS. L. REV. 161, 195-96 (2012) (describing the negative effects of abstinence-only sex education policies in Texas).

<sup>157</sup> Justice Scalia espoused this view: “Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.” Fox I, 556 U.S. At 519. Professors Calvert and Bunker have taken Scalia to task for his position on the harm from indecent language. See Calvert & Bunker, supra note 163, at 742-55.

<sup>158</sup> See Calvert & Bunker, supra note 163, at 750.

<sup>159</sup> Id. at 754.

<sup>160</sup> Id. at 751.

<sup>161</sup> Id. at 752.

<sup>162</sup> Id. at 753/

<sup>163</sup> See Jay, supra note 164, at 90-91.

<sup>164</sup> See id. At 89-90.

<sup>165</sup> Id. at 92.

## (166-186) End Notes

- <sup>166</sup> Id. at 91.
- <sup>167</sup> Id. (citation omitted).
- <sup>168</sup> See, e.g., Sarah Herman, Note, The Battle for the Remote Control—Has the FCC Indecency Policy Worn Out Its Welcome in America’s Living Room?, 38 WASH. U. J.L. & POL’Y 357, 361-62 (2012) (claiming the FCC first exercised its authority to regulate indecent speech in the Pacifica case involving Carlin).
- <sup>169</sup> In re WUHY-FM, Eastern Education Radio, Notice of Apparent Liability, 24 F.C.C.2d 408, ¶ 2 (1970).
- <sup>170</sup> Id. at 409, ¶ 3. For excerpts from the broadcast provided by WUHY-FM, see id. At 416.
- <sup>171</sup> Id. At 410, ¶ 7.
- <sup>172</sup> Id.
- <sup>173</sup> Id. at 423 (Johnson, dissenting).
- <sup>174</sup> Id. at 418.
- <sup>175</sup> Id.
- <sup>176</sup> Id.
- <sup>177</sup> See Campbell, supra note 5, at 200 (describing Burch as the instigator).
- <sup>178</sup> Pacifica, 556 F.2d at 18 (Bazelon, J., concurring).
- <sup>179</sup> Pacifica, 438 U.S. At 730.
- <sup>180</sup> See Powe, supra note 8, at 461.
- <sup>181</sup> Jay, supra note 164, at 92.
- <sup>182</sup> Id.
- <sup>183</sup> Lili Levi, The Four Eras of FCC Public Interest Regulation, 60 ADMIN. L. REV. 813, 847 (2008).
- <sup>184</sup> See Pacifica, 556 F.2d at 23 n.16 (Bazelon, J., concurring) (doubting reliability of complaints).
- <sup>185</sup> See Clay Calvert, The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 about Speech, Censorship, Science and Public Policy, 41 CAL. W. L. REV. 325, 330 (2005). The FCC received only 111 total indecency complaints in 2000 and a slightly higher 346 complaints in 2001. Then there was a dramatic upsurge in 2002 (13,922), 2003 (202,032) and in 2004 an amazing 1,068,802 complaints. Id. at 329. PTC President Tim Winters disputes the accuracy of the statistics on the number of PTC complaints. See Clay Calvert & Robert D. Richards, The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with its President, Tim Winter, 33 Hastings Comm. & Ent. L.J. 293, 329 (2011)
- <sup>186</sup> Levi, supra note 196, at 847.

## (187-209) End Notes

- <sup>187</sup> WUHY-FM, 24 F.C.C.2d at 417.
- <sup>188</sup> Fox II, 613 F.3d at 334.
- <sup>189</sup> Id. 203 Id. At 334-35.
- <sup>190</sup> Courtney L. Quale, Hear an [Expletive], There an [Expletive], But[t] . . . The Federal Communications Commission Will Not Let You Say an [Expletive], 45 WILLAMETTE L. REV. 207, 257-58 (2008); see Nadine Strossen, Constitutional Law and Values—Version '08 (Not Necessarily an Upgrade), 53 N.Y.L. SCH. L. REV. 735, 740 (2009) (identifying examples of self-censorship).
- <sup>191</sup> WUHY-FM, 24 F.C.C.2d at 423 (Johnson, dissenting).
- <sup>192</sup> Id. at 417-18 (Cox, dissenting in part).
- <sup>193</sup> Pacifica, 438 U.S. at 776 (Brennan, J., dissenting).
- <sup>194</sup> Fox II, 613 F.3d at 333; see supra notes 100-102 and accompanying text.
- <sup>195</sup> See In re KBOO Found., 16 F.C.C.R. 10731, ¶ 1 (2001).
- <sup>196</sup> See id. At 10733, ¶ 8.
- <sup>197</sup> See In re KBOO Found., 18 F.C.C.R. 2472 (2003); Mira T. Olm, Note, Sex 24/7: What's the Harm in Broadcast Indecency?, 26 WOMEN'S RTS. L. REP. 167, 169-70 (2005) (discussing Jones matter).
- <sup>198</sup> See Olm, supra note 211, at 179 (arguing FCC standards are problematic and cause minority voices to be censored arbitrarily and irrationally).
- <sup>199</sup> Policy Statement, supra note 37, at 8002, ¶ 7.
- <sup>200</sup> 214 Id. At 8002, ¶ 8.
- <sup>201</sup> 215 Id. At 8003, ¶ 10.
- <sup>202</sup> Id.
- <sup>203</sup> See Golden Globe II, supra note 50, at 4978, ¶ 8.
- <sup>204</sup> See Golden Globe I, supra note 46, at 19860-61, ¶ 5.
- <sup>205</sup> See Pacifica Found., Inc., 2 F.C.C.R. 2698, at ¶ 13 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").
- <sup>206</sup> See Golden Globe I, supra note 46, at 19860-61, ¶ 5.
- <sup>207</sup> See Mr. Peter Branton, 6 F.C.C.R. 610 (1991) (broadcast of repeated use of fuck by John Gotti not indecent).
- <sup>208</sup> Entercom Buffalo License, LLC (WGR(AM)), 17 F.C.C.R. 11997, 11999-12000 ¶¶ 7, 9-10 (2002).
- <sup>209</sup> See Golden Globe I, supra note 46, at 19860-61, ¶ 5.

## (210-226) End Notes

- <sup>210</sup> Golden Globe II, *supra* note 50, at 4978, ¶ 8.
- <sup>211</sup> Omnibus Order, *supra* note 63, at ¶¶ 138, 143.
- <sup>212</sup> 226 403 U.S. 15 (1971).
- <sup>213</sup> *Id.* at 16.
- <sup>214</sup> *Id.* at 16-17.
- <sup>215</sup> *Id.* at 20.
- <sup>216</sup> *Id.* at 26.
- <sup>217</sup> *Id.*
- <sup>218</sup> Cohen provides two additional reasons for rejecting regulation relevant to the indecency debate. The first involves the problem of government line-drawing in determining which words are offensive. Justice Harlan asked, “How is one to distinguish this from any other offensive word?” 403 U.S. at 25. He then answered his own rhetorical question: “Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.” *Id.* The FCC’s struggle at classification of “fuck” and “shit” illustrates this difficulty. The second involves concern about government’s use of public morality “as a convenient guise for banning expression of unpopular views.” *Id.* at 26. The same concern exists with the FCC’s inconsistent application of its indecency restriction, such as concluding “fuck” in *Saving Private Ryan* is okay, but not in the documentary *The Blues*. 233 42 U.S.C. § 2000e-2(a)(1).
- <sup>219</sup> See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986).
- <sup>220</sup> Linguistic research proves that the *per se* rule is *per se* wrong.
- <sup>221</sup> See Jamie Lynn Cook, Comment, *Bitch v. Whore: The Current Trend to Define the Requirements of an Actionable Hostile Environment Claim in Verbal Sexual Harassment Cases*, 33 J. MARSHALL L. REV. 465, 479-80 (2000) (identifying a “sexual nature test”). 236 See *Hardin v. S.C. Johnson & Sons, Inc.*, 167 F.3d. 340, 345-46 (7th Cir. 1999).
- <sup>222</sup> See *Stewart v. Evans*, 275 F.3d 1126, 1131-34 (D.C. Cir. 2002).
- <sup>223</sup> See *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997); *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 n.8 (4th Cir. 2001) (accord).
- <sup>224</sup> See, e.g., *THE F-WORD* 117 (Jesse Sheidlower ed., 2d ed. 1999) (noting the initial citation as the poem attacking the Carmelite Friars of Ely and dating it as early as 1450- 1475).
- <sup>225</sup> *Id.* at 117-33 (identifying fourteen different verb uses); at 105-12 (listing ten separate noun uses); at 116 (defining “fuck” the adjective “describing, depicting, or involving copulation; pornographic; erotic—used before a noun”); at 141 (showing use as interjection); at 168-70 (noting adjective use of “fucking”).
- <sup>226</sup> See generally *id.* Jesse Sheidlower, who compiled the book, was the Principal Editor of the OED’s North American Editorial Unit. See Fred R. Shapiro, *The Politically Correct United States Supreme Court and the Motherfucking Texas Court of Criminal Appeals: Using Legal Databases to Trace the Origins of Words and Quotations*, in *LANGUAGE AND THE LAW* 367, 370 (Marlyn Robinson ed. 2003).

## (227-262) End Notes

- <sup>227</sup> For the curious, “absofuckinglutely” is an adverb meaning absolutely; “zipless fuck” is a noun meaning an act of intercourse without an emotional connection. See THE F-WORD, *supra* note 239, at 1, 272.
- <sup>228</sup> See Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1719 (2007).
- <sup>229</sup> See Alan Crozier, *Beyond the Metaphor: Cursing and Swearing in Ulster*, in 10 MALEDICTA 115, 122 (1988-89).
- <sup>230</sup> *Id.*
- <sup>231</sup> *Id.* at 122-23. *Fuck2* as a distinct word also has various uses as part of speech. It can be used as a noun as in “you’re lazy as fuck,” as a verb as in “I’m fucked if I know,” as an adjective as in “This engine’s fucked,” and as an adverb as in “You know fucking well what I mean.” *Id.* At 123.
- <sup>232</sup> *Id.* at 124.
- <sup>233</sup> Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 PERSP. ON PSYCHOL. SCI. 153, 155 (2009). The neuro-psycho-social (NPS) model of swearing is a comprehensive framework that specifies the conditions under which swearing is likely to occur based on a speaker’s neurological state, psychological status, and social sensitivity. *Id.* at 158. NPS can predict the probability of using a taboo word denotatively versus connotatively. For example, if one says “asshole,” the probability of using it connotatively to refer to a thoughtless person is .92, whereas the probability of using asshole denotatively to refer to the anal sphincter is only .03. *Piss* is used more equivocally with half of the uses denoting urination and half connoting anger (*piss me off*). See *id.* At 159.
- <sup>234</sup> See *id.* at 155 (citing studies).
- <sup>235</sup> *Pacifica*, 438 U.S. At 750. 251 *Id.* At 760-61.
- <sup>236</sup> See, e.g., *In re Application of Pacifica Found. For Renewal of License for Noncommercial Station WPFW(FM)*, 95 F.C.C.2d 750, 760, ¶¶ 16, 18 (1983) (holding three separate occasions using “motherfucker,” “fuck,” and “shit,” did not amount to “verbal shock treatment”).
- <sup>237</sup> See CREECH, *supra* note 30, at 180 (claiming the FCC found no actionable cases for indecent programming between 1975 and 1987); see also *supra* note 30, for examples of the Commission’s restraint.
- <sup>238</sup> See *Fox I*, 489 F.3d at 449.
- <sup>239</sup> See Policy Statement, *supra* note 37, at 8008, ¶17. 256 See *Golden Globe I*, *supra* note 46, at 19861, ¶6. 257 *Golden Globe II*, *supra* note 50, at 4980, ¶ 12.
- <sup>240</sup> 258 See *Fox I*, 556 U.S. at 512 (describing the Commission’s view that granting an automatic exemption for isolated or fleeting expletives unfairly forces viewers including children to take “the first blow” and would allow broadcasters “to air expletives at all hours of a day so long as they did so one at a time”).
- <sup>241</sup> 18 U.S.C. § 1464.
- <sup>242</sup> See TIMOTHY JAY, *WHY WE CURSE: A NEURO-PSYCHO-SOCIAL THEORY OF SPEECH* 191 (2000).

## (243-250) End Notes

<sup>243</sup> Statement of Commissioner Kathleen Q. Abernathy, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 2004 WL 540339 (F.C.C.), 19 F.C.C.R. 4989, 4989 (Mar. 18, 2004).

<sup>244</sup> Golden Globe II, supra note 50, ¶ 14.

<sup>245</sup> See Statement of Michael K. Powell, supra note 58.

<sup>246</sup> Golden Globe II, supra note 50, at 4981, ¶ 13.

<sup>247</sup> See Statement of Michael K. Powell, supra note 58. 266 465 F.2d 282 (7th Cir. 1972). 267

<sup>248</sup> Id. At 284-85.

<sup>249</sup> Id. at 286.

<sup>250</sup> See Golden Globe II, supra note 50, at 4981, ¶ 13 n.34 (citing Black’s last definition of profane).