

Unconstitutionality of Indecency Restrictions on Broadcast Television

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Since the advent of radio and television in the early 20th century, it has been the self-proclaimed role of the United States federal government to regulate broadcast airwaves. The Federal Communications Commission, created by the *Telecommunications Act of 1934*, is charged with this task. The act gives the FCC a broad range of responsibilities and powers. One such power is the authority to regulate radio communication, which was later amended to include television, as such transmissions are considered interstate and international commerce. Among others privileges, this authority allows the FCC to issue, as well as fine, withhold, revoke, and renew broadcast licenses. The authority to license, in turn, leads to the “authority to enforce statutory and regulatory provisions restricting obscenity, indecency and profanity,” (47 U.S.C. § 151), though the commission is prohibited “censoring program material and from interfering with broadcasters’ freedom of expression” (Federal Communications Commission, “Complaints Against Various Broadcast Licensees Regarding Their Airing of the ‘Golden Globe Awards’ Program,” 2004, p.2). The Supreme Court has repeatedly justified this stance, holding that the limited number frequencies give the government permission to issue licenses regulating who can broadcast, allowing the privilege only to a select few and denying it to the majority. Because of the uniqueness of the supposed scarcity of the airwaves, the Court ruled that this form of prior restraint is not a First Amendment violation, as long as the regulation is content neutral (*Red Lion v. FCC*, 1969).

However, in recent years, with the development of new technology that makes traditional broadcast television nearly obsolete in the United States, these standards are outdated, as well as unconstitutional. Cable programming, which for the purpose of this argument includes all subscription-based television (cable, satellite, and wireline), faces no restrictions on the type of programming it can air. It is an unconstitutional violation of the First Amendment right to free

speech to hold broadcast television networks to different standards than cable networks in regards to indecency, obscenity and profanity in television programming, and thus, such restrictions on broadcast television should be repealed.

Though sexual content receives protection under the First Amendment in all other forms of media, it is restricted in regards to radio and broadcast television. The current law bans the broadcast of “any obscene, indecent, or profane language by means of radio communication” (18 U.S.C. §1464). Obscenity, which is unprotected by the First Amendment, is never allowed, on broadcast or cable television (18 U.S.C. §1464, §1468). Indecency and profanity are, in part, protected by the First Amendment, and thus cannot be banned entirely. Instead, the FCC, along with the Supreme Court, has ruled that broadcasters are restricted from airing indecent and profane material during the hours of 6 a.m. to 10 p.m. local time, a time frame when children are most likely to be in the audience. The other time period of the day, from 10 p.m. to 6 a.m., is known as the safe harbor. During this time, broadcasters can air indecent and profane, but not obscene, material without fear of sanctions (Federal Communications Commission [FCC], “Obscenity, indecency & profanity,” 2011). The restrictions on broadcast television have never been extended to apply to cable television, primarily because it is subscription-based. Thus, viewers can control the content that comes into their homes, unlike broadcast television that is available to anyone (FCC, “Obscenity, indecency & profanity,” 2011).

While the rules seem simple enough, the problem lies in defining what constitutes obscenity, indecency and profanity. Currently, obscenity must meet a three-prong test: “(1) An average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; (3) The material, taken as a

whole, must lack serious literary, artistic, political or scientific value” (*Miller v. California*, 1973, p. 25). Indecent material is defined as: “language or material that, in context, depicts or describes sexual or excretory organs or activities, in terms patently offensive as measured by contemporary community standards for the broadcast medium,” (*FCC v. Pacifica*, 1978, p.732). To complicate matters, indecency is considered in context, on a case-by-case basis. To determine what is considered “patently offensive” the FCC assesses: “(1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock,” (FCC, “Obscenity, indecency & profanity,” 2011). Profanity is defined as: “words that are so highly offensive that their mere utterance in the context presented may, in legal terms, amount to a nuisance” (FCC, “Obscenity, indecency & profanity,” 2011).

There is an extensive legal history behind these current trends. One of the earliest court cases to deal with the definition of obscenity was the landmark case *Miller v. California* in 1973. In this case, the court upheld the state’s compelling interest in prohibiting obscene material and ruled that the First Amendment did not protect obscenity. The case resulted in the development of the Miller Test, the modern guidelines (as noted above) as to what constitutes obscene material.

While obscenity is not protected under the First Amendment in any media, only in broadcast media are there restrictions on profanity and indecency. *Red Lion Broadcasting Company v. Federal Communications Commission* touched upon the idea that broadcast was inherently different than other forms of media. The court ruled to uphold the FCC’s decision that both side of an issue must be given equal coverage on a broadcast station (*Red Lion v. FCC*,

1969). Their reasoning for doing so was heavily based on the idea of spectrum scarcity as defined in the earlier *NBC v. United States*. That is, radio communications' "facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another" (*NBC v. United States*, 1943, p.213). In *Red Lion*, the Supreme Court ruled that due to the scarcity of the radio spectrum and the limited number of available broadcast frequencies, the government reserved the right to regulate who could own broadcast licenses and what content they could air. According to the court, such action was not a violation of the First Amendment because since there were a limited number of licenses, broadcasters were obligated to reflect the views of all community members. Justice White, writing for the unanimous court, reasoned that due to spectrum scarcity it was "idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish" (*Red Lion v. FCC*, 1969, p. 389). The court ruled that such a restriction was an enhancement of the first amendment right to free speech, rather than a violation, by providing the opportunity for all sides to participate in a limited medium.

Nine years later, *Federal Communications Commission v. Pacifica Foundation* further defined the power of FCC to regulate content on broadcast communications, specifically in regards to the broadcast of indecent material. The court admitted that broadcasting has the most limited First Amendment protection. The court determined that broadcast radio and television have a "uniquely pervasive presence in the lives of all Americans" and that broadcast of "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home", violating their right to be left alone (p.749). In addition, the court ruled that because broadcast media is "uniquely accessible to children," (p.

750), the government can restrict “[p]atently offensive, indecent material” during certain times of the day. It was during this case that the Commission presented their modern definition of indecency, as described above, with the Court noting that while obscenity deals with speech of the prurient interest, indecency “refers to nonconformance with accepted standards of morality,” (p.740).

With the rise of subscription television in the following decades, several prominent cases dealt with restrictions on non-broadcast television. The *Cable Television Consumer Protection and Competition Act of 1992* acknowledged that the “cable television industry has become a dominant nationwide video medium”. Among other provisions, the act required cable companies to dedicate a certain amount of their channels to the broadcast of local television networks and programming. *Turner Broadcasting Systems v. FCC* questioned the First Amendment validity of such restrictions. While affirming the provisions of the act, the Supreme Court also held that the scarcity rationale does not apply to cable television and, unlike broadcast, all regulations upon it are subject to strict scrutiny (*Turner v. FCC*, 1994).

The Court upheld this view in *United States v. Playboy Entertainment Group, Inc.*, in specific reference to regulations on indecency. Playboy Entertainment Group challenged Section 505 of the *Telecommunications Act of 1996*, which, in an attempt to protect children from “signal bleed,” required cable operators to completely scramble or completely block channels “primarily dedicated to sexually-oriented programs” or to only air them during the safe harbor hours of 10 p.m. to 6 a.m. (*Telecommunications Act of 1996*, 1996). The Supreme Court overturned the restriction and ruled that restrictions on indecency on cable television:

can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government

interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit... It is rare that a regulation restricting speech because of its content will ever be permissible (p.813-818).

The Court also noted that, unlike broadcast, it would be unconstitutional to apply the safe harbor rules to cable television 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," (*United States v. Playboy*, 2000, p.807).

The capricious and vague policies of the FCC continue to be an issue for the courts. In their 2004 *Golden Globes Awards Order*, the FCC changed their long-standing policy on fleeting expletives, ruling that broadcast networks could now be fined for a single use of a vulgar word, even if the airing was unintentional and the word was not repeated. The Supreme Court ruled in a split 5-4 decision that the FCC's change of its long-standing policy and implementation of a new ban on fleeting expletives were not arbitrary. They declined to rule on the constitutionality of allowing the commission to censor broadcasts, remanding the case to the lower court (*FCC v. Fox*, 2009). In 2010, the Court revisited the case, this time, to address the constitutionality of FCC's new policy on fleeting expletives. The Supreme Court unanimously found that the FCC vague regulations on indecency were unconstitutional, overturning their previous decision. Writing for the court, Justice Kennedy noted: "because the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to these broadcasts were vague" (*FCC v. Fox*, 2012, p.2). However, the court reconfirmed the FCC's authority to act

in the interest of the general public in propagating regulations on decency standards, so long as they were non-vague, in accordance with the First Amendment (*FCC v. Fox*, 2012).

When television had a limited number of channels, the restrictions and concerns of the Scarcity Rationale were slightly more valid. But in this age of technology, broadcast television is no longer “uniquely pervasive”, as argued in *Pacifica*. As early as the mid-nineties, Supreme Court justices were finding that “cable and broadcast television differ little, if at all... [cable television] is as ‘accessible to children’ as over-the-air broadcasting, if not more so” (*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 1996, p.745). In 1980, two years after the *Pacifica* decision, only 20% of U.S. households had cable television (Comstock and Sharrer, 1999). Currently, about 90% of households in the United States are subscription-based television subscribers (Federal Communications Commission Media, 2012, p. 85). Broadcast television is no longer the dominating presence it once was. Under that rationale, it makes little sense to restrict broadcast more than cable. Children have almost as much access to cable television, which, by its unrestricted nature, has more “indecent” programming to which they could be exposed.

In addition, the recent federally mandated transition to digital television has made traditional over-the-air broadcast television virtually obsolete. In accordance with the *Digital Transition and Public Safety Act of 2005* and the *2009 DTV Delay Act*, by June 12, 2011 all analog television stations in the United States were required to broadcast exclusively digital over-the-air programming. The transition minimized the use of the electromagnetic spectrum. The main difference between analog and digital television (besides picture and sound quality) is the amount of bandwidth needed to broadcast a station. Digital channels take up much less bandwidth, allowing for multicasting, the broadcast of “several channels of digital programming

at the same time, using the same amount of spectrum required for one analog program” (Federal Communications Commission, “The Digital TV Transition: What is DTV”, n.d.). Using the bandwidth in this more effective manner frees up a great deal of the “scarce” broadcast airwaves, essentially rendering the concerns of *Red Lion* null and void.

The standards set forth in *Red Lion* and *Pacifica* are no longer technologically or socially relevant. The concepts of “spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast” (*Action for Children’s Television v. FCC*, 1995, p.673). In his separate opinion to the 2009 *FCC v. Fox Television Stations*, Justice Thomas noted that *Red Lion* and *Pacifica* were outdated, and openly advocated to overturn them, writing, “*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity... *Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution” (p. 1820-1821). These days, the distinctions between broadcast and cable television are very minimal, if not practically non-existent. Not holding traditional broadcasters to the same standards as cable curtails their First Amendment right to freedom of speech. The rationale that people “choose” to allow cable into their homes, and thus it should be given more First Amendment protection than broadcast, is also inherently faulty. If choice is such a factor in these regulations, it could also be argued that people with only broadcast television “choose” to own and watch TV, even though they know that sort of content is available.

Though the FCC and other special interest groups argue it is a necessary responsibility of the government to provide a haven of family-friendly programming on the public airwaves, it is not the role of the government to regulate what people watch in their own homes. In regards to

the protection of children, it is the responsibility and duty of parents to monitor what their children are watching on television, the same way they control their exposure to other media. In addition, the FCC's policy in restricting broadcast content out of concern for children fails to make any distinction between younger children and older teens, lumping all viewers under the age of 18 into the category of minors (Ruschmann, 37). Several courts have reinforced the *Butler v. Michigan* standard that the government cannot "reduce the adult population . . . to . . . only what is fit for children," (*Butler v. Michigan*, 1957, p. 384). Programming that is appropriate for a five-year-old is much different than programming appropriate for a seventeen-year-old. Restricting programming based on the fact that there might be minors in the audience, could possibly deprive older children from age-appropriate programming.

The FCC's authority to restrict speech is not in itself unconstitutional, as the courts have consistently upheld the power of the government to "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means" to do so (*Sable Communications v. FCC*, 1989, p.126). However, in the case of broadcast television and in light of recent technologies that allow for filtering of television content, prohibiting certain types of speech on broadcast is no longer the least restrictive means of doing so. These days, technology has made it increasingly easy for parents to monitor and restrict their children's viewing, on both broadcast and cable television. Since 2000, FCC has required that all new televisions thirteen inches and larger be equipped with a V-Chip, technology that allows parents to block programming they feel is inappropriate for their children. The V-chip is also included in all digital converter boxes. Cable and digital set-top boxes often have similar features (Federal Communications Commission, "V-Chip - Putting restrictions on what your children watch", 2011). In addition, cable operators are required, upon subscriber

request to “fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it” (47 U.S.C. §560), providing parents with another avenue of content restriction.

In general, indecency restriction is content-based and thus, in regards to cable television, must meet strict scrutiny. Yet, broadcast television is considered to have less First Amendment protection than any other media, despite the fact that “such regulations, if imposed on newspapers, other print media, or cable television, would be found to violate the First Amendment” (Berresford, 2005, p.6). Because regulations on broadcast television are not content-based, they are therefore not afforded the protection of strict scrutiny under the First Amendment; instead they only receive mid-level scrutiny. It is a violation of the First Amendment to hold one form of media to a lesser level of scrutiny than the others. In his concurrence to *Denver*, Justice Stevens admitted: “the text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we [the Supreme Court] have done so,” (*Denver v. FCC*, 1996, p.813). Different types of media should be held to the same level of First Amendment protection, just as all citizens receive equal protection under the law.

The FCC’s rules defining indecency, obscenity and profanity are incredibly vague, relying heavily on the idea of violating “contemporary community standards.” How can national broadcasters be expected to know what individual communities across the nation feel is “patently offensive”? Even if communities define their own standards, they would undoubtedly vary, making national programming impossible. In his 1964 concurrence to *Jacobellis v Ohio*, Justice Potter Stewart wrote the infamous phrase: “I know it when I see it”, in regards to what constitutes obscenity (*Jacobellis v. Ohio*, 1964, p.197). This attitude towards broadcast restrictions is one of the core reasons offensive broadcasts are so difficult to regulate. Without a

clear definition of what is considered improper, broadcasters cannot be expected to be able to follow the rules. It is irrational and unreasonable to fine and censor broadcasters when FCC guidelines are unclear and constantly changing. In his dissent to *Miller*, Justice Douglas argued that prosecuting people “for violating standards they cannot understand, construe, and apply...[was] a monstrous thing to do” (*Miller v California*, 1973, p.44). There is no strict standard on the actions that are viewed to be indecent because each incident is considered in context, on a case-by-case basis. This makes it nearly impossible for broadcasters to know what is allowed and what material will get them slapped with sanctions by the FCC. The FCC declines to specify certain words always considered unlawful, leaving broadcasters with no definite rules to follow. What *may* be considered profane in one case *may* be completely acceptable in another. Broadcasters have no way of knowing until after the fact, which unfairly forces broadcasters to guess the meaning of the FCC’s restrictions. As a way of avoiding expensive fines, potential loss of licenses, and time consuming legal battles, some networks may decide to play it completely safe, potentially curbing speech that would otherwise be legally protected.

Fining broadcasters retroactively severely chills speech, because broadcasters fear being fined for broadcasting inappropriate material when it may not be clear whether or not something is inappropriate. Citizens have an absolute right to receive information and ideas, regardless of their perceived social worth (*Stanley v. Georgia*, 1969). In addition, chilling such speech runs the risk of censoring speech referring to sexual organs and activities that has serious social value, such as discussions on rape or other sexual health issues. These problems with the FCC’s overbearing restrictions are becoming increasingly realized in the courts. In the Second Circuit opinion on the 2012 version of the Supreme Court case, *FCC v. Fox*, Judge Pooler, wrote, “to place any discussion of these vast topics at the broadcaster’s peril has the effect of promoting

wide self-censorship of valuable material which should be completely protected under the First Amendment” (*FCC v. Fox*, 2010, p.32).

If the FCC intends to continue uphold and promulgate these unconstitutional restrictions on broadcast television, clearer definitions of what is considered obscene or profane are desperately needed. Defining specific situations and words that are prohibited is the only fair way to impose restrictions on broadcasters that does not infringe on their First Amendment right to free speech and their Fifth Amendment right to due process. With clearer restrictions, broadcasters can know exactly how to comply with the regulations, thus somewhat lessening the infringement on their constitutional rights. In addition, restrictions on fleeting expletives, particularly in regards to live broadcasts, should be removed. Broadcasters should not be held responsible for individual citizens uttering expletives on live broadcasts. Though methods of censoring and bleeping are available, it is not possible to always stop them, nor should it be the broadcasters’ burden. If someone must be held responsible, then it should be the individual person who says the offending word, knowing that such conduct is against federal indecency rules. This would be no more a violation of free speech than the current rules on indecent and profane language.

Broadcast television should be held to the same standards as cable television; its content should not be further restricted. Laws restricting television content should be held under strict scrutiny equally and programming should be restricted based on the content of the messages conveyed, rather than the manner of transmission. The First Amendment right to free speech is one of the highest-regarded and fiercely protected freedoms of United States citizens. To curtail this right in any other form of media would be considered completely objectionable and the same should be true for broadcast television.

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