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## I. INTRODUCTION

The last decade has been tumultuous for print and broadcast media. Daily newspaper circulation continues to fall precipitously, magazines struggle to survive, and network television audiences keep shrinking.[1] On the other hand, cable news is prospering, mobile devices such as iPads and smart phones are "adding to people's news consumption,"[2] and many "new media" outlets appear to be thriving.[3] Despite the dynamism in the media industry, the Supreme Court under Chief Justice John Roberts has taken up relatively few First Amendment cases directly involving the media.[4] The Court has addressed a number of important

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1. *See* Amy Mitchell & Tom Rosenstiel, Pew Research Ctr.'s Project for Excellence in Journalism, *The State of the News Media 2012: Overview*, STATEOFTHEMEDIA.ORG (Mar. 19, 2012), http://stateofthemedia.org 2012/overview-4.

2. *Id.*

3. *Id.*

4. It is unclear how many certiorari petitions involving the media the Roberts Court has denied. Based on my survey of the Roberts Court's cases involving the First Amendment, I determined that the only cases directly involving the media are *FCC v. Fox Televisions Stations, Inc.* (*Fox I*), 556 U.S. 502 (2009), and *FCC v. Fox Television Stations, Inc.* (*Fox II*), 132 S. Ct. 2307 (2012), which ended up being decided on administrative-law and due-process grounds respectively, and *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). I discuss in the text of this essay what I consider the most significant Roberts Court decisions that indirectly implicate media interests, including *United States v. Alvarez*, 132 S. Ct. 2537 (2012), *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), *United States v. Stevens*, 130 S. Ct. 1577 (2010), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The Roberts Court has also heard several cases that implicate issues of concern to the mainstream media, including the ability to cover criminal trials, to obtain access to public documents, and to cover public officials. *Presley v. Georgia*, 130 S. Ct. 721 (2010), for example, was not a press case, or even a First Amendment case; but it has direct implications for press coverage of trials. In *Presley*, the Supreme Court in a per curiam opinion held that a criminal defendant's "Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors."

free speech cases since 2005, but thus far the only Roberts Court decisions directly involving the traditional media are the two rulings in *FCC v. Fox Television Stations*,[5] both of which avoided the looming First Amendment issue they contained, and the only decision involving "new media" is *Brown v. Entertainment Merchants Ass'n*.[6] Media lawyers, therefore, are still trying to gain insight into how the Roberts Court envisions the role of the institutional press and whether existing constitutional protections for the press might be eroded or strengthened in coming terms.

This essay, taking its cue from Erwin Chemerinsky's recent lecture, *Not a Free Speech Court*,[7] attempts to read the jurisprudential tea leaves to determine what lines of argument the media might use and how they might fare in future cases before the Roberts Court. Though the evidence

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*Id.* at 724. The Court found this result to be clearly dictated by its prior decisions holding that criminal defendants have a Sixth Amendment right to public suppression hearings and that the public has a First Amendment right to attend voir dire examination in criminal trials. *Id.* at 723. The Supreme Court reminded the lower court that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 725.

Another case that was a not-strictly-speaking press case also has implications for press access to government information. *Doe v. Reed*, 130 S. Ct. 2811, 2815 (2010), involved a Washington state referendum procedure, which allowed citizens to call a referendum vote on any bill passed by the legislature when a specified percentage of Washington voters signed a petition to do so. Opponents of same-sex marriage used the referendum procedure to attempt to reverse a state law known as the "everything but marriage" act. *Id.* at 2816. When proponents of same-sex-marriage rights sought access to the signed petitions under the Washington Public Records Act, two of the petition signers and a group called Protect Marriage Washington invoked their First Amendment rights and sought a preliminary injunction against disclosure. *Id.* The Court held that compelled disclosure of the names of those who signed petitions in a referendum context was constitutional, but left open the possibility that compelled disclosure might violate the First Amendment if disclosure would expose petition signers to harm. *Id.* at 2821.

Finally, the Supreme Court's 2012 decision in *Golan v. Holder*, 132 S. Ct. 873 (2012), has tremendous significance for copyright owners, publishers, and users because it permits millions of foreign works published after 1923 to be removed from the public domain and signals the Court's reluctance to impose First Amendment limitations on legislative expansion of copyrights. *Id.* at 900. The *Golan* decision allowed Congress to "restore[]" copyright protection to foreign works already within the public domain. *Id.* at 878. The Court rejected the argument that the restoration of works within the public domain to copyright protection violated the First Amendment, finding the relevant interest to be adequately protected by the doctrine of fair use and the idea–expression dichotomy in copyright law. *Id.* at 890. Justices Breyer and Alito, in dissent, argued that the Court's opinion gave short shrift to the First Amendment interests of U.S. audiences and did not serve copyright's traditional purpose of promoting the creation of new works. *Id.* at 907–08 (Breyer, J., dissenting).

5. *See Fox II*, 132 S. Ct. 2307; *Fox I*, 556 U.S. 502.

6. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729.

7. *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011).

is scanty, a number of patterns emerge from the Roberts Court's First Amendment decisions thus far, some which appear to be good for the media and some less positive. The good news is that the Roberts Court appears committed to protecting unpopular speech,[8] limiting the spread of "medium-specific" First Amendment doctrines to new media,[9] and broadly defining speech of public concern.[10] The bad news, at least for broadcasters, is that the Roberts Court is not yet ready to free them from the FCC's content-based regulatory oversight,[11] and the worst news for all media is that the Court appears to see the "Fourth Estate" as little more than a self-serving slogan bandied about by media corporations.[12]

## II. PROTECTING UNPOPULAR SPEECH

The media can take heart from the strength of the Roberts Court's commitment to protecting unpopular speech, though famed First Amendment attorney Floyd Abrams is waxing hyperbolic when he asserts that "*no* prior Supreme Court has been as protective as [the Roberts Court]"[13] in protecting unpopular speech. Abrams bases his assertion, no doubt, on decisions like *Snyder v. Phelps*,[14] which upheld the rights of the Westboro Baptist Church to protest at military funerals despite the pain inflicted on military families,[15] and *United States v. Stevens*,[16] which struck down a federal statute making it a crime to distribute videos depicting the illegal killing, wounding, or torture of animals.[17] Both *Snyder*[18] and *Stevens* affirm that the government may

8. *See* discussion *infra* Part II.

9. *See* discussion *infra* Part III.

10. *See* discussion *infra* Part IV.

11. *See* discussion *infra* Part V.

12. *See* discussion *infra* Part VI.

13. Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 8, 2012, at A25 (emphasis added).

14. Snyder v. Phelps, 131 S. Ct. 1207 (2011).

15. *Id.* at 1219.

16. United States v. Stevens, 130 S. Ct. 1577 (2010).

17. *Id.* at 1592. The *Stevens* case involved prosecution of a producer of dogfighting videos who did not himself participate in dogfights. *Id.* at 1583. He was prosecuted under a 1999 federal law that banned trafficking "depictions of animal cruelty," which Congress defined to include killings that violated federal or state law. *Id.* at 1582–84. The Court suggested that a statute "limited to crush videos [that is, sexual-fetish videos in which women in high heels crush small animals to death] or other depictions of extreme animal cruelty" might be constitutional, but that the statute in question was overbroad because it reached a substantial amount of constitutionally protected speech, *id.* at 1592, including "hunting-related" videos, magazines, television programs, and websites, *id.* at

not suppress distasteful speech, even when most citizens find it morally reprehensible and it offers little social value.

Though *Stevens* might be chalked up to Congress's sloppy drafting, the Court in *United States v. Alvarez* reaffirmed that the First Amendment protects even "speech we detest."[19] *Alvarez* struck down a federal statute making it a crime for a person to falsely claim that she received a military decoration or medal authorized by Congress.[20] Though the *Alvarez* Court was divided,[21] the decision affirmed that the government lacks the power to censor lies—even lies that offend patriotic values—absent a showing of significant harm.[22] Although most would hope that the media do not need protection for outright lies, the Court's decision is a comforting signal that the Roberts Court will protect unpopular speakers, regardless of their ideology.

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1589. Congress subsequently passed a narrower statute, the Animal Crush Video Prohibition Act of 2010, 18 U.S.C. § 48 (2012), which defines "animal crush video":

> any photograph, motion-picture film, video or digital recording, or electronic image that (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242); and (2) is obscene.

*Id.*

18. *See* discussion of *Snyder*, *infra* Part IV.

19. United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (plurality opinion).

20. *Id.* at 2542–43.

21. *Id.* at 2541. The Court held that the Stolen Valor Act was facially unconstitutional, with six Justices concluding that false statements are not "in a general category that is presumptively unprotected." *Id.* at 2546–47. The Justices split on the constitutional standard that governed the outcome. The Court's plurality opinion, joined by four Justices, applied strict or "exacting" scrutiny to the Act as a content-based restriction on speech. *Id.* at 2543. Although "[t]he Government's interest in protecting the integrity of the Medal of Honor is beyond question," the government could not show the Act was "actually necessary" to achieve that interest. *Id.* at 2549. The government showed no evidence that lies about military awards would dilute their meaning, and "counterspeech" can easily be deployed against false claims. *Id.* Moreover, "[a] Government-created database" listing soldiers who received medals or honors was a less restrictive alternative to criminalization of speech. *Id.* at 2551. The two Justices who joined the plurality in invalidating the Act differed as to the appropriate level of constitutional scrutiny of restrictions on false speech such as lies about military honors: they applied "intermediate scrutiny" or "proportionality" analysis and determined that the Act's harms to speech interest were "disproportionate" to its advancement of the government's interest in upholding the integrity of its military awards. *Id.* at 2551, 2556 (Breyer, J., concurring).

22. Even the dissenting Justices acknowledged that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2564 (Alito, J., dissenting).

## III. NO EXTENSION OF "MEDIUM-SPECIFIC" REGULATION

The principle that the government may not regulate speech because it offends many, or even most, citizens may be especially beneficial to "new media." The Court expressed its willingness to extend the principle to them[23] in *Brown v. Entertainment Merchants Ass'n*.[24] *Entertainment Merchants Ass'n* involved a constitutional challenge to a statute prohibiting sale or rental of "violent video games" to minors.[25] The state of California argued that the "interactive"[26] nature of violent video games justified restricting them from minors and provided media effects research purportedly showing that interactive or immersive media experiences can lead to harm.[27] The Court, however, rejected the argument that "medium-specific" characteristics of video games justified either relaxing First Amendment prohibitions on content-based regulation of speech or creating a new category of unprotected speech. Although the Court believed that video games serve First Amendment purposes[28] only fitfully, if at all, it nonetheless gave them full First Amendment protection, stating, "[W]e have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."[29] The Court found no constitutionally relevant distinction between video games and the "books, plays, and movies that preceded them."[30] Like these older media, video games also "communicate ideas—and even social messages—through many familiar literary devices" as well as "through features distinctive to the medium (such as the player's

23. *See* Robert Corn-Revere, *Moral Panics, the First Amendment, and the Limits of Social Science*, 28 COMM. LAW. 4, 4 (2011) (noting that the case involved "new communications technologies").

24. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

25. CAL. CIV. CODE §§ 1746–1746.5 (West 2009), *invalidated by Entm't Merchs. Ass'n*, 131 S. Ct. 2729. The statute made violations punishable by civil fines of up to $1,000, and defined violent video games as those which (a) involve a player "killing, maiming, dismembering, or sexually assaulting an image of a human being," but only when such depiction (b) "appeals to a deviant or morbid interest of minors," (c) is "patently offensive" for minors based on "prevailing community standards," and (d) the game as a whole lacks "serious literary, artistic, political, or scientific value for minors." CAL. CIV. CODE §§ 1746(d)(1)(A), 1746.3, *invalidated by Entm't Merchs. Ass'n*, 131 S. Ct. 2729.

26. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2737–38.

27. *Id.* at 2768–70.

28. According to the Court, the First Amendment's Speech Clause exists primarily "to protect discourse on public matters." *Id.* at 2733.

29. *Id.*

30. *Id.*

interaction with the virtual world)."[31] The Court acknowledged "the challenges of applying the Constitution to ever-advancing technology,"[32] but nonetheless affirmed what it referred to as the "most basic" First Amendment principle: government may not impose content-based limitations on expression except in the handful of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[33] The Court noted that throughout American history, critics have accused new entertainment forms and technologies enjoyed by minors of having pernicious effects, and it portrayed California's concern about video games as simply another misguided and moralistic attempt to censor children's media consumption.[34] The Court's suspicion of attempts to draw constitutional distinctions between new media and old should, on balance, benefit most media actors. However, those wishing to justify special constitutional protections for the institutional media based on their special role in checking governmental abuses of power should note that the Court's unwillingness to draw lines between entertainment and news media suggests it might not be receptive to such arguments.

31. *Id.*

32. *Id.*

33. *Id.* at 2735–37. In addition to refusing to apply medium-specific First Amendment principles to video games, the Court also refused to expand the categories of unprotected speech simply because the violent video games were "directed at children." *Id.* at 2731. In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Supreme Court expressed in dicta its unwillingness to create new medium-specific doctrines as follows: "We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Id.* at 891.

34. Ultimately, the Court declared the video game legislation unconstitutional because California had failed to "show a direct causal link between violent video games and harm to minors." *Entm't Merchs. Ass'n*, 131 S. Ct. at 2738. The media-effects research on which California relied was methodologically unsound. Moreover, if violent entertainment does harm children, there is no valid reason for "singl[ing] out the purveyors of video games for disfavored treatment" relative to, say, cartoonists or to allow minors access to such "dangerous, mind-altering material" on the say-so of a parent "or even an aunt or uncle." *Id.* at 2740. The Court found the legislation particularly unnecessary in light of the evidence on the record that the video-game industry already performed a great deal of self-policing by voluntarily refusing to sell to minors video games (voluntarily) labeled as appropriate only for mature audiences. The Court also found the legislation overinclusive to the extent it attempted to assist parents in controlling their children's access to violent fare, since it prevented access even by those children whose parents did not care whether they purchased such fare.

## IV. MATTERS OF PUBLIC CONCERN BROADLY DEFINED

The Roberts Court decision in the "free speech" case of *Snyder v. Phelps* is likely to be an unmitigated boon to media defendants litigating tort cases[35] in years to come. In *Snyder*, the Court took a broad view of what types of speech involve "matters of public concern," and thereby deserve enhanced First Amendment protections in tort cases.[36] *Snyder* involved a fringe religious group that protested at the funeral of a U.S. Marine killed in action in Iraq; the group sought to publicize its view that dead soldiers are America's punishment for tolerating homosexuality.[37] The soldier's father saw the protest on television later that evening and eventually sued and won substantial damages at trial for intentional infliction of emotional distress,[38] intrusion, and civil conspiracy.[39]

Despite the sympathetic plaintiff and despicable speech involved in the case, the Roberts Court held that the First Amendment shielded the speakers from tort liability because their speech touched a "matter of public concern."[40] The Court recognized that this inquiry was often

35. The determination of whether speech is of public or merely private concern has a significant effect on plaintiffs suing the media in cases involving defamation, invasion of privacy, or intentional infliction of emotional distress. Public officials and public figures who sue for defamation must prove actual malice. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (public figures); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (public officials). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court held that private-figure plaintiffs must prove at least negligence in order to recover for defamation and must prove actual malice to receive presumed or punitive damages. The Court's later decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), clarified that the constitutional fault standards announced in *Gertz* apply only in cases involving allegedly defamatory speech on matters of public concern. The First Amendment does not prohibit private-figure defamation plaintiffs suing on matters of only private concern from recovering presumed and punitive damages without a showing of actual malice. Indeed, the reasoning of *Dun & Bradstreet* suggested that states may impose strict liability on defendants who defame private-figure plaintiffs regarding matters of private concern. *See generally* LYRISSA LIDSKY & ROBERT G. WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 63–104 (2004). Whether speech is of public or merely private concern matters greatly in determining what a plaintiff must prove to recover against the media for invasions of privacy or for intentional infliction of emotional distress. *See* Fla. Star v. B.J.F., 491 U.S. 524 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1987); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975).

36. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1207 (2011).

37. *Id.* at 1213.

38. *Id.* at 1213–14. At trial, the father testified he was unable to separate thoughts of his son from the picketing, and experts attested that the father was suffering from severe depression that exacerbated his existing health problems. *Id.* at 1214.

39. *Id.* at 1214. A panel of the Fourth Circuit subsequently reversed the trial court. *Id.*

40. *Id.* at 1219.

outcome-determinative,[41] and its decision emphasized that "public concern" must be broadly defined: the Court conducted an "independent examination" of the "content, form, and context" of the speech to determine that it qualified for protection.[42] As to content, the signs expressed views on "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."[43] The context was a public protest, albeit outside a funeral,[44] and because the picketers were peaceful demonstrators on public property who caused no disruption, they were acting within their First Amendment rights, even though they exploited the funeral as a tactic to gain publicity. The Court therefore set aside the jury verdict against them, though emphasizing that its holding was "narrow" and "limited by the particular facts."[45]

## V. MEDIUM-SPECIFIC BROADCAST REGULATIONS REMAIN INTACT, FOR NOW

When surveying the Roberts Court's First Amendment jurisprudence, those who care about media issues must take the bitter with the sweet. What might have been the most significant media law case before the Supreme Court in recent memory is *FCC v. Fox Television Stations, Inc.*[46] The *Fox* case, which made its way to the

41. *Id.* at 1211. The Court stated, "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern." *Id.* at 1215. In doing so, the Court cited Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), which exempted defamatory speech on matters of purely private concern from the constitutional strictures that protect defamatory speech on matters of public concern, and Connick v. Myers, 461 U.S. 138 (1983), which limited government employers' power to discipline their employees for speech on matters of public concern.

42. More specifically, the Court "evaluate[d] all the circumstances of the speech, including what was said, where it was said, and how it was said." *Snyder*, 131 S. Ct. at 1216.

43. *Id.* at 1217.

44. *Id.*

45. *Id.* at 1220. Justice Alito wrote a passionate dissent, labeling the speech at issue a "vicious verbal assault." *Id.* at 1222 (Alito, J., dissenting). The First Amendment, wrote Alito, gave the speakers "almost limitless opportunities" to voice their opinions on "moral, religious, and political issues," but did not extend a license to exploit the funeral of a private citizen to attract public attention. *Id.*

46. *Fox I*, 556 U.S. 502 (2009). A week after this decision, the Court declined review of *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), in which the Third Circuit held that the FCC had improperly fined CBS for the "wardrobe stunt" that briefly exposed Janet Jackson's nipple during the 2004 Super Bowl halftime show. *Id.* at 209.

Court in 2009 and 2012, had the potential to upend the FCC's entire regime of broadcast indecency regulation, but the Court twice dodged addressing the First Amendment dimension of the case, leaving intact "medium-specific" First Amendment doctrines applicable only to broadcasters.[47] In both *Fox I* and *Fox II*, the Court went to great lengths to avoid First Amendment issues, deciding *Fox I* narrowly on administrative law grounds[48] and *Fox II* narrowly on due process grounds.[49] Nonetheless, the cases indicate that at least two Justices are ready to apply the same exacting scrutiny to content-based restrictions on broadcasters as they apply to other speakers, thus signaling that FCC's days policing indecency on the airwaves may be numbered.

To understand why the *Fox* cases involved a missed First Amendment opportunity, one must understand certain background developments. In 1978, the Supreme Court held in *FCC v. Pacifica Foundation*[50] that the First Amendment did not bar the FCC from regulating indecency in broadcasting,[51] even though content-based regulation of indecency in other media would surely be unconstitutional. *Pacifica* allowed the government to regulate broadcast indecency due to the distinctive characteristics of the broadcast medium, including its "pervasiveness" and accessibility to children.[52]

47. *See generally Fox II*, 132 S. Ct. 2307 (2012); *Fox I*, 556 U.S. 502.

48. *Fox I*, 556 U.S. at 522.

49. *Fox II*, 132 S. Ct. at 2320.

50. FCC v. Pacifica Found., 438 U.S. 726 (1978).

51. *Id.* at 741. The statutory authority for the FCC's regulation of indecency is Title 18 of the U.S. Code, which makes it unlawful to utter "any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464 (2012). The FCC enforces this provision primarily through forfeitures but also has authority to enforce it through license revocation. 47 U.S.C. § 312(a)(6).

52. Although the Court also cited spectrum scarcity as a justification for treating broadcasters differently than other media in *Pacifica*, 438 U.S. at 731, the Roberts Court cited only pervasiveness and accessibility to children as *Pacifica*'s rationales for giving broadcasters "the most limited First Amendment protection." *Fox II*, 132 S. Ct. at 2312 (quoting *Pacifica*, 438 U.S. at 748) (internal quotation marks omitted). In *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969), the Supreme Court focused on spectrum scarcity as the primary rationale for applying a different First Amendment standard to broadcasters and concluded that the government may require a broadcaster to act as a "fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Some have also cited the intrusiveness, power, and vividness of the broadcast medium as well as "public ownership" of the airwaves as justifications "for treating broadcast media differently than print media." *See* MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA LIDSKY, MASS MEDIA LAW: CASES AND MATERIALS 82–83 (7th ed. 2005) (listing justifications).

In 1987, the FCC began actively applying a "context-based approach" to indecency regulation and signaled that "isolated" instances of nudity or use of profanity would be less likely to garner sanctions than "repeated broadcasts of indecent material."[53] A 2001 FCC Order[54] reinforced that "fleeting" instances of indecent language were unlikely to generate a "finding of indecency," although the Order gave examples of fleeting language that might be indecent when combined with other factors.

The FCC's approach to isolated instances of expletives or nudity appeared to change course abruptly in 2003, when the agency issued an Order that held, in a case involving the unscripted use of the "F-Word" during live telecast of the Golden Globe Awards,[55] that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[56] The FCC subsequently "applied its new policy to fleeting expletives and fleeting nudity" that had aired on Fox and ABC,[57] respectively, prior to issuance of the Order.[58] Fox and other interveners first appealed to the U.S. Supreme Court in 2009 contending, among other arguments, that technological changes had eliminated the justification for applying "medium-specific" First

53. *Fox II*, 132 S. Ct. at 2313. In 1995, the FCC modified its indecency regulations to prohibit broadcasting of indecent material between 6:00 a.m. and 10:00 p.m. Restrictions on the Transmission of Obscene and Indecent Material, 60 Fed. Reg. 44,439 (Aug. 28, 1995) (codified at 47 C.F.R. § 73.3999 (2012)).

54. Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8008 (Apr. 6, 2001), *available at* http://www.fcc.gov/eb/Orders/2001/fcc01090.html. The Order clarified that in determining whether a broadcast is indecent, the FCC looks first to its subject matter and whether it describes or depicts sexual or excretory organs or activities; next, the FCC determines if the broadcast is patently offensive when measured by contemporary community standards. *Id.* at 8002. Context is important in determining offensiveness, and three factors are highly significant: the explicitness or graphic nature of the material; whether it "dwells on or repeats at length descriptions of sexual or excretory organs or activities"; and whether its nature is pandering or titillating. *Id.* at 8003.

55. The musician Bono exclaimed: "This is really, really, fucking brilliant. Really, really great," after his band U2 received an award for best original song. Gene Policinski, *Justices Set to Review Broadcast-Indecency Rules*, FIRST AMENDMENT CENTER (Jun. 27, 2011), http://www.firstamendmentcenter.org/justices-set-to-review-broadcast-indecency-rules.

56. Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4980 (2004).

57. Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broad. of the Program "NYPD Blue", 23 FCC Rcd. 3147 (2008).

58. *Fox II*, 132 S. Ct. at 2315.

Amendment doctrines to broadcasters.[59] The Court, however, rejected the invitation to address the First Amendment issues and held merely that the FCC's change of policy toward fleeting expletives was not arbitrary and capricious as a matter of administrative law.[60] On remand, the U.S. Court of Appeals for the Second Circuit struck down the entirety of the FCC's indecency policy on First Amendment grounds and subsequently vacated a forfeiture order against ABC for airing fleeting nudity on NYPD Blue.[61]

When the FCC appealed, the Supreme Court once again dodged the First Amendment issue, this time deciding that the FCC's sudden change in the way it interpreted its statutory mandate to police broadcast indecency violated the broadcasters' due process rights.[62] Specifically, the Court found that the new indecency policy was unconstitutionally vague *as applied* to Fox and ABC because they did not have "fair notice" that airing "a fleeting expletive or a brief shot of nudity"[63] would subject them to sanctions. In light of the due process violation, the Court found it "unnecessary to reconsider *Pacifica* at this time."[64] Although both Justice Ruth Bader Ginsburg and Justice Clarence Thomas concurred in the judgment, they would have overturned *Pacifica*,[65] with Justice Ginsburg writing that it "was wrong when it issued" and should now be overturned in light of "[t]ime, technological advances, and the Commission's untenable rulings in the cases now before the Court."[66]

Why did the Court forego the opportunity to revisit whether broadcasters receive less First Amendment protection from content-based regulation than other media? Some commentators have speculated that Justice Sonia Sotomayor's recusal may have left the Court split 4–4 on whether to overturn *Pacifica*,[67] and the Court ruled narrowly to avoid

59. *Fox I*, 556 U.S. 502, 506 (2009).

60. *Id.* at 520.

61. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 335 (2d Cir. 2010).

62. *Fox II*, 132 S. Ct. at 2320.

63. *Id.* at 2318.

64. *Id.* at 2320.

65. *Id.* at 2321 (Ginsburg, J., concurring). Justice Thomas had already signaled that *Pacifica* should be overturned in *Fox I*. *See Fox I*, 556 U.S. at 530 (Thomas, J., concurring).

66. *Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring).

67. *See* Joe Flint and David Savage, *Justices Decline To Address Bid To Overturn FCC Indecency Rules*, L.A. TIMES (Jun. 22, 2012), http://articles.latimes.com/2012/jun/22/business /la-fi-ct-court-indecency-20120622; Eugene Volokh, FCC v. Fox Television *Decided Narrowly on Lack-of-Fair-Notice Grounds*, VOLOKH CONSPIRACY (June 21, 2012, 11:31 AM),

issuing an opinion that would not bring unanimity or clarity.[68] Regardless, the Court's narrow decision leaves the FCC free to regulate indecency as long as its policy for doing so provides constitutionally sufficient notice of the prohibited conduct. Indeed, after the Court issued its ruling, commissioners of the FCC announced that they would continue to regulate broadcast indecency within the First Amendment parameters announced by the Court.[69] Whether this means the FCC will modify its policy in an attempt to bring clarity to this inherently murky realm or simply revert to its prior policy of ignoring fleeting expletives or nudity is unclear. What does seem clear is that future First Amendment challenges are certain, no matter what the FCC decides.

## VI. HOSTILITY TO THE FOURTH ESTATE

Probably the most important First Amendment case decided in the last decade was the Court's 5–4 decision in *Citizens United v. FEC*.[70] There, the Roberts Court held, among other things, that the government may not prevent corporations or unions from making independent political expenditures for "electioneering communications"—a term which includes advertisements criticizing or praising candidates for federal elective office.[71] *Citizens United* is best known for unleashing corporate spending during elections. From a media perspective, however, the decision is a mixed bag.

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http://www.volokh.com/2012/06/21/fcc-v-fox-television-decided-narrowly-on-lack-of-fair-notice-grounds (speculating that Justices Ginsburg, Thomas, Kennedy, and Kagan might have favored overruling *Pacifica* and that Justices Scalia, Alito, Breyer, and Roberts favored upholding it).

68. Although rare, 4–4 split ties can occur when Justices recuse themselves from time to time. When a 4–4 deadlock does occur, the case is not deemed to have set any sort of precedent; the Court simply announces that the Court is evenly divided and affirms the lower court decision that is under review. The decision has no precedential value; the affirmance is issued to afford finality for the litigants in that particular case. In the event of such a tie, the Court typically issues what is known as a per curiam decision. The opinion in such a decision is issued under the Court's name, as opposed to consisting of a majority and a minority opinion. *See, e.g.*, Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956) (analyzing various types of no-clear-majority decisions and considering their treatment by subsequent courts).

69. *See, e.g.*, Kristen Rasmussen, *Fox "Fleeting Expletives" Decision Does Little to Clear the Air in Regulation of Indecency*, NEWS MEDIA & L., Summer 2012, *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2012/fox-%E2%80%9Cfleeting-expletives%E2%80%9D-d.

70. Citizens United v. FEC, 130 S. Ct. 876 (2010).

71. *Id.* at 898. The Supreme Court in *Citizens United* overruled portions of *McConnell v. FEC*, 540 U.S. 93 (2003), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990).

On one hand, the majority in *Citizens United* is firmly committed to First Amendment libertarianism: the decision manifests a profound mistrust of government interference in the marketplace of ideas *produced by private ordering*.[72] The majority opinion attacked the underlying premise of most campaign finance reform legislation, including the legislation it struck down. Specifically, the Court disputed the premise that vast aggregations of wealth in the marketplace of ideas might distort the marketplace of ideas during federal elections.[73] The Court conceded that corporations and unions can transform economic power into political power, but it rejected this as a justification for government regulation of speech. It explained that such inequalities are inevitable,[74] and the government's attempt to "level" the power differential among speakers is dangerous. The public, not the government, has a "right and privilege to determine for itself what speech and speakers are worthy of consideration"[75] and to "judge what is true and what is false."[76] The libertarianism of *Citizens United* will often benefit media interests, at least to the extent it restrains government regulation of unpopular speech or speakers. Yet the Court's strong commitment to laissez faire in the marketplace of ideas has the potential to thwart media interests in cases in which they request government assistance to perform their constitutionally assigned roles, such as when they seek access to prisons, battlefields, or other government controlled places or information.

More worrisome from a media perspective are the extensive dicta in *Citizens United* suggesting that a majority of the Justices on the Roberts Court are deeply suspicious of the claim that the media play a special

72. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content." *Citizens United*, 130 S. Ct. at 882–83. This faith in the marketplace of ideas produced by private ordering is also seen in *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008) (political parties), and *Davis v. Federal Election Commission*, 554 U.S. 724 (2008) (wealthy individuals).

73. *Citizens United*, 130 S. Ct. at 904–05 (rejecting the "antidistortion rationale" underlying the Bipartisan Campaign Reform Act and stating that "political speech cannot be limited based on a speaker's wealth").

74. *Id.* at 905 ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech . . . .").

75. *Id.* at 899.

76. *Id.* at 907. From this standpoint, the attempt to regulate corporate and union political speech is an "unprecedented" attempt by a government censor, the Federal Election Commission, "to select what political speech is safe for public consumption by applying ambiguous tests." *Id.* at 896.

constitutional role in our democracy. This deep suspicion, even hostility, to the media's role as the "Fourth Estate" gives cause for concern that future decisions might erode the few "special rights" the media currently enjoy.[77] The majority in *Citizens United* justified their controversial decision to allow corporations to engage in electioneering partly by analogizing them to media corporations. After all, reasoned the Court, "media corporations" may distort political discourse, and "[t]here is no precedent"[78] permitting the Government to regulate them on this basis. Moreover, the Court found no basis for treating media corporations differently than non-media corporations: the "institutional press" has no "constitutional privilege beyond that of other speakers."[79] The Court further contended that the argument for special constitutional rights for the institutional press was particularly problematic because "the advent of the Internet and the decline of print and broadcast media" had blurred "the line between the media and others who wish to comment on political and social issues."[80]

Despite noting the "decline of print and broadcast media," the *Citizens United* majority emphasized that media corporations are powerful institutions wielding strong influence in society, particularly

77. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court gave both the public and press a right to attend criminal trials, but the Court suggested that where seating was limited, the press should be given preference due to its role as surrogate for the public. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court refused to extend special rights to the press not available to other citizens; however, the mere fact that the Court addressed the reporter's claims of testimonial privilege testifies to the strength of the argument that the Press Clause gives reporters newsgathering rights not provided by the Speech Clause of the First Amendment. Had the same claim been made by the average citizen, there is no doubt that it would have been summarily dismissed, instead of splitting the Supreme Court 5–4 as it did in *Branzburg*. Moreover, the majority opinion grudgingly yet explicitly acknowledged that "news gathering is not without its First Amendment protections," *id.* at 707, and "without some protection for seeking out the news, freedom of the press could be eviscerated," *id.* at 681. This acknowledgement, of course, conflicts with the Court's statement that the press receives no special immunity from the application of general laws. If newsgathering receives some degree of First Amendment protection, it also presumably must provide some immunity from generally applicable laws. Neither in *Branzburg* nor subsequent decisions does the Court give content to the newsgathering right. Nonetheless, *Branzburg*'s acknowledgement that newsgathering is an integral part of news dissemination at least hints that at some future point, the government might so encroach upon newsgathering rights that the Press Clause might be implicated.

78. *Citizens United*, 130 S. Ct. at 905.

79. *Id.* at 905 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).

80. *Id.* at 905–06.

during political campaigns.[81] Like non-media corporations, "media corporations accumulate wealth with the help of the corporate form, the largest media corporations have 'immense aggregations of wealth,' and the views expressed by media corporations often 'have little or no correlation to the public's support' for those views."[82] In other words, media corporations are elitist, wield political power and influence disproportionate to their public support, and are no more deserving of "special" protection than any other corporation.

In fact, the Court suggests that because "television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times,"[83] they run the risk of distorting public discourse and electoral outcomes even more than non-media corporations.[84] In the Court's view, powerful media corporations have the potential not only to "distort" electoral outcomes but to distort them in ways that favor their corporate parents.[85]

The *Citizens United* majority appears to view the "press" or "media" as comprised primarily of powerful corporate conglomerates whose chief mission is seeking profit through manipulation of the political process; these media conglomerates, in turn, preside over a "24-hour news cycle"[86] that is "dominate[d]" by "sound bites, talking points, and scripted messages."[87] The majority makes no mention of the role of the press in informing voters about candidates for elective office, apparently ignoring Justice Stevens's dissenting argument that "[t]he press plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse."[88] In effect, the majority treats the differences between media and non-media corporations as nonexistent: hence, both are entitled to pursue their economic interests through the political process. With this step, the Court seems to have gone beyond a "pragmatic view" of the press to a

81. *Id.*

82. *Id.* at 905 (citing *Austin*, 494 U.S. at 660).

83. *Id.*

84. *Id.* at 906.

85. *Id.*

86. *Id.* at 912.

87. *Id.*

88. *Id.* at 976 (Stevens, J., concurring in part and dissenting in part). In Justice Stevens's opinion (joined by Justices Ginsburg, Breyer, and Sotomayor), the history and text of the First Amendment "suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status." *Id.* at 951 n.57.

profound cynicism about the Fourth Estate. A majority on the Roberts Court apparently believes that the press as an institution can and must seek privileges through the political process; the Court, however, apparently sees no relevant differences between media corporations like NBC and non-media corporations like Wal-Mart: both peddle their wares to the public motivated solely by profit. Indeed, at times the Court's descriptions of the media seem to go beyond skeptical to antagonistic. Though *Citizens United* is not a press case, it certainly gives little cause for hope to those who argue that the First Amendment gives distinctive rights to the media under the Press Clause. [89]

## VII. CONCLUSION

This essay is modeled on Erwin Chemerinsky's 2011 published lecture entitled *Not a Free Speech Court*, in which Professor Chemerinsky attempted to gauge the Roberts Court's commitment to free speech protection from its decided cases.[90] This essay attempts to gauge the Court's commitment to press freedom, despite the paucity of press cases before the Court. Whereas Professor Chemerinsky based his predictions about the Court on decided free speech cases, this essay has been left to extrapolate how media litigants might fare before the Court from its strong commitment to First Amendment libertarianism in speech cases, its refusal to extend "medium-specific" First Amendment doctrines to video games in the single "press" case it has decided, its decision to twice dodge the issue of whether broadcast indecency regulation remains constitutional, and its dicta in its most famous free speech cases evincing hostility to the recognition of special rights for the media under the First Amendment's Press Clause. With such scant evidence, any predictions about the Roberts Court's likely path in "press cases" must be circumspect. Nonetheless, it seems safe to predict that this Court is unlikely to grant access rights or privileges more extensive than those the media presently enjoys. This Court also is unlikely to draw constitutional distinctions that give new media fewer First Amendment rights than old media enjoy, and media litigants should not expect a

89. *See, e.g.*, Sonja R. West, *Reawakening the Press Clause*, 58 UCLA L. REV. 1025, 1043–44 (2011) (arguing for the Supreme Court to recognize that the First Amendment gives the institutional press rights not available to other speakers, such as a privilege to protect the identity of confidential sources).

90. *See* Chemerinsky, *supra* note 7.

warm reception for the argument that the Press Clause provides rights not already protected by the Speech Clause.[91] Viewed from this perspective, the paucity of press cases decided by the Roberts Court does not look so bad.

91. *See* Seth Korman, Citizens United *and the Press: Two Distinct Implications*, 37 RUTGERS L. REC. 1, 2–3 (2010) ("[B]y affording all corporations the same rights as those granted the media, the decision at the same time seems to further enfeeble the Press Clause . . . .").