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Vague and Outdated FCC Indecency Policy Must be Altered

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JURIST Guest Columnist **Jeremy Lipschultz** of the **University of Nebraska at Omaha** says that in *FCC v. Fox Television Stations, Inc.*, it seems likely that the Supreme Court will not force the Federal Communications Commission to alter its vague and subjective indecency policy and will not overturn the outdated precedent established in *FCC v. Pacifica...*

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The **FCC v. Fox Television Stations, Inc.** case is the most recent iteration of an ongoing struggle to apply the US Supreme Court's flawed majority reasoning in **FCC v. Pacifica** — a 1978 decision that set in motion a scheme to try to protect children from broadcast profanity and nudity. While the channeling of such content to overnight hours seemingly protected some adult's **First Amendment** rights, I have argued for more than 20 years that the vague and subjective definitions promulgated by the FCC are

problematic.

In one research project during the 1990s, I compared radio content the Federal Communications Commission (FCC) found actionable and non-actionable. There was no significant difference in sexual and excretory references between the two because "shock jocks" often used innuendo rather than uttering expletives on the radio. By the time that so-called "fleeting expletives" slipped onto the television airwaves, the FCC seemed to shift course by attempting to regulate isolated profanities. At the same time, a Congress that had raised fines tenfold for each violation was clearly pressuring the FCC.

In 2008, I made the case that the FCC's 2001 policy statement was subjective because of disagreement about explicitness or graphic nature of depictions, what constitutes dwelling or repeated use and the contextual judgment of pandering or titillating for shock value. Howard Stern and Oprah both broadcast content about oral sexual practices of teens, but the FCC distinguished between the two contexts.

The Internet posed two even more serious challenges to the regulatory scheme. First, online forms made it very easy for lobbying groups to activate members in flooding the FCC with still unresolved complaints, and second, YouTube, Spotify and other online services offered children unfiltered content that could be shared on social media sites.

In the US Court of Appeals for the Second Circuit's first set of oral arguments for the case at hand, Fox's attorney Carter Phillips contended that the FCC's vague regulation policy cannot be consistent with the First Amendment: "if there's a bubble child out there and the child will be hugely disturbed by exposure to a single word, to me, that is utterly implausible." The same might be said for Janet Jackson's "nipple shield" or a naked woman's rear-end on NYPD Blue. The failed system has resulted in cycles of industry boundary testing, complaints over inadvertent airings and FCC attempts to justify its policies through strained reasoning.

Enter the current case before the Supreme Court and recent [oral arguments](#) [PDF]. The FCC relies upon licensing of the broadcast airwaves and "enforceable public obligations" to justify its policies. Justice Breyer narrowed his reading of the current case to a test of the 2001 FCC guidelines and the nudity broadcast rules. Justice Kagan, however, challenged the idea that previous cases had offered broadcasters clear guidance on types of offending body parts or length of broadcast time that would indicate a violation. Perhaps this explains why Solicitor General Donald Verrilli seemed to advance on the Court a legal theory that "dramatic departure from what's the norm" is how broadcasters and regulators would know when content is indecent.

Another pressing issue is the arbitrary and capricious enforcement of the rules on only radio broadcasters — not cable, satellite or Internet providers. This discriminatory policy should not be upheld because of what Justice Kennedy termed "public value in having a particular segment of the media with different standards." Justice Kennedy's perspective resonated with Justice Scalia: "Sign ... me up as supporting Justice Kennedy's notion that this has a symbolic value, just as we require a certain modicum of dress for the people that attend this Court and the people that attend other Federal courts."

Count me among those also disturbed by the following exchange between Fox lawyer Phillips and Justice Alito that offered the possibility of retaining the rules for radio only.

JUSTICE ALITO: Now, as to radio, what has changed?

MR. PHILLIPS: I'm not here -

JUSTICE ALITO: - to justify that? Well, could we hold that the policy is invalid as to - on First Amendment grounds as to TV but not as to radio?

MR. PHILLIPS: Absolutely, Your Honor, because there are fundamentally different media and there are different protections and the circumstances are different and the Court has recognized that media have to be evaluated individually.

Neither the justices nor lawyers before the court offered evidence that they

understand radio in an iTunes and Spotify age. To the contrary of the arguments, radio may be facing even tougher pressures to compete with other online media and should not be subjected to more stringent regulations.

Justice Alito sees "borrowed time" for broadcasters: "It is not going to be long before it goes the way of vinyl records and 8 track tapes," yet large media companies like Fox "will continue to make billions of dollars on their programs which are transmitted by cable and by satellite and by Internet." In sum, the justices seem to be ready to brush aside temporary rights of radio broadcasters and the minority of over-the-air audience members. There are real dangers in the Court anticipating the future. Movie viewing has been in decline since the 1940s, yet it changed rather than died.

Another problem arose when Justice Breyer was questioning the lawyer representing ABC about the depiction of a nude woman as seen by a child in an NYPD Blue episode, for he was comfortable passing a values judgment on the content: "it's about sexual awakening; they are showing a part of a nude woman, the viewer is supposed to put himself in the position of the boy who is seeing her, and the whole thing was titillating."

The arguments indicate that, as Justice Breyer observed, "We don't have to overrule *Pacifica*." It is unfortunate that there is a desire to cling to a past that is long-gone, if it ever existed. The so-called "values" are based upon a view that we should be more restrictive in sexual content than some other nations, at the same time that we are unrestrictive of violent content. As Justice Ginsburg observed, kids now often hear restricted words out on the street: "the children are not going to be shocked by them the way they might have been a generation ago."

It does not look as if the Court will overturn *Pacifica*, reexamine the legal standards of scrutiny (intermediate and strict) or focus on a fundamental First Amendment reading of the case before it. Justice Thomas, who in an earlier case seemed open to overturning the law of *Pacifica* because of technological change, gave no indication but might place the Court in a 4-4 deadlock (with Justice Sotomayor recusing herself). If so, a narrow decision may punt the case back to the FCC for another round. Neither broadcasters nor the public are served by outdated rules, fettered speech and assumptions about what it means to protect children in a free society. As I wrote in 2008, "New media technology appeared to make it impossible to protect children by simply restricting broadcasters."

*Jeremy Lipschultz is the Director of the School of Communication at the University of Nebraska at Omaha. He has written several articles on the subject of communication in a modern context and is the author of the book, **Broadcast and Internet Indecency: Defining Free Speech.***

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