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POPULAR FREE SPEECH SKEPTICISM AND THE BENEVOLENT RISE OF LIBERAL CENSORSHIP

*By John C. Wagner**

"We are losing our innocence about the First Amendment, but we will all be wiser, not to mention more humane, when that process is complete."[1]

"Censorship used to be a very dull subject. Aligned along predictable and venerable divisions separating liberals from conservatives, oriented toward ancient and well-rehearsed chestnuts such as obscenity and national security, the topic promised little analytic interest. In recent years, however, the landscape of censorship has altered dramatically. Now feminists in Indianapolis join with fundamentalist Christians to seek the regulation of pornography. Critical race theorists join with Jesse Helms to regulate hate speech. Advocates of abortion rights seek to restrict political demonstrations while conservative pro-life groups defend the freedom to picket."[2]

During the summer of 2005, ABC Television canceled plans to air "Welcome to the Neighborhood,"[3] a show in which 7 families compete to win a 3,300 square-foot home in a well-to-do suburb of Austin, Texas.[4] The competitors include an African-American family, a Korean family, a Latino family, a pair of Wiccans, two gay White-American men with an adopted African-American infant, a mom who works as a stripper, and a tattoo enthusiast couple.[5] The "White, Christian, Republican and close-minded" residents of the neighborhood doubled as both judges of the competition and gatekeepers of the community.[6] Hilarity was supposed to ensue. But for a hodgepodge of advocacy and interest groups, "Welcome to the Neighborhood" was no laughing matter.

The response of advocacy and interest groups to "Welcome to the Neighborhood" reflects a popular skepticism toward unbridled free speech that follows from the liberal academic critiques of free speech that came to prominence in the 1990s.

The National Fair Housing Alliance urged that the show "violates the spirit and intent of the federal Fair Housing Act,[7] which generally prohibits residents from choosing their new neighbors based on race, color, national origin, religion, sex, disability or parental status.[8] The Gay and Lesbian Alliance Against Defamation ("GLAAD") warned that "prejudice and discrimination in the first few episodes sent a problematic message."[9] An unlikely addition to the chorus of objections, conservative pundit Cal Thomas, wrote that the show "was a setup to perpetuate a stereotype, not about any of the classes favored by the left, but the White Christian as bigoted and close-minded."[10] Similarly, Gary Bauer's Family Research Council anticipated that the conservative Christian neighbors would come off as "overly judgmental buffoons."[11]

While the opposition of advocacy and interest groups shocked ABC executives,[12] this development should have come as no surprise. The response of advocacy and interest groups to "Welcome to the Neighborhood" reflects a popular skepticism towards unbridled free speech that follows from the liberal academic critiques of free speech that came to prominence in the 1990s. In this Article, I will first discuss how those critiques bear on the popular debate over media censorship today. Next, I will examine the "ideological drift" arising as politically opposed groups take up common cause in the censorship battles. I will conclude by exploring the irony of advocacy groups calling for media censorship, particularly with respect to "Welcome to the Neighborhood."

I. LIBERAL CENSORSHIP THEORY

By the 1990s, universal support for an expansive notion of free speech protection had waned among liberal constitutional scholars.[13] According to Richard Delgado, "[t]he prevailing First Amendment paradigm is undergoing a slow, inexorable transformation. ... The old, formalist view of speech as a near-perfect instrument for testing ideas and promoting social progress is passing into history. Replacing it is a much more nuanced, skeptical, and realistic view."[14] Historically, First Amendment protections helped disparate groups gain voice, influence, and power,[15] and the Amendment itself enabled liberal values and causes.[16]

Liberal First Amendment critics now argue that free speech protection is superseded by other values, so long as the government can reasonably claim that those values require the suppression of certain speech.[17] Such critics no longer accept, for instance, the idea that "free speech for the Klan is necessary to ensure free speech for blacks."[18] In this way, unlike previous censorship regimes which served conservative purposes, the new liberal censorship positions itself as a force that advances equality.[19]

Social constructionism provides the foremost liberal justification of speech regulation.[20] Because antisocial behavior is rooted in the socialization that one experiences in everyday life, this theory posits that governments should control factors contributing to socialization so that all members of society may flourish.[21] Social constructionists regard manifestations of oppression as less intractable than the ideologies that inspire or justify them.[22] Therefore, racist or sexist speech beckons regulation equal to or greater than that precipitated by racist or sexist ideology.[23] Charles Lawrence's interpretation of *Brown v. Board*

of Education[24] puts this theory into practice.[25] For Lawrence, *Brown* is about regulating the idea conveyed by segregation—namely, that African Americans were inferior.[26] By ending segregation, "*Brown* may be read as regulating the content of racist speech."[27] In that interpretation, Lawrence rejects the speech/conduct distinction of traditional First Amendment analysis[28] and argues that the Supreme Court should allow the government to eliminate similar racist messages in private speech.[29]

Another underpinning of liberal censorship is the civic republican notion that governments may foster liberal values by regulating wherever social values are inculcated.[30] Civic republicans locate the development of social values in both the traditionally private spheres as well as the public ones.[31] One proponent of this theory, Cass Sunstein, has written that "a democratic government should sometimes take private preferences as an object of regulation and control."[32]

Finally, liberal censorship theory incorporates "the notion that constitutional restrictions on the regulation of antisocial speech should be reduced substantially to permit the government to advance the competing goals of racial, gender, and social equality."[33] In this school of thought, the Thirteenth and Fourteenth Amendments support diminished First Amendment protection for speech that promotes inequality.[34] The government may then balance social values of free speech and equality.[35] Adherents of this perspective would "alter the constitutional equation by emphasizing values of equality much more heavily as a justification for imposing additional government restrictions on speech."[36]

Unprotected Speech

The Supreme Court has held that the First Amendment sets restrictions on offensive speech only in certain relatively extreme circumstances, such as when speech amounts to "fighting words"[37] or incitement to "imminent lawless action,"[38] or when sexual speech rises to the level of "obscenity."[39]

In *Chaplinsky v. New Hampshire*, the Court stated that "the right of free speech is not absolute at all times and under all circumstances"[40] and that some language, such as fighting words, plays so inessential a part in "any exposition of ideas, and are of such slight social value as a step to truth, that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[41] The Court's emergent "fighting words" doctrine focused on "what men of common intelligence would understand [to] be words likely to cause an average addressee to fight,"[42] and applied only to words spoken in face-to-face confrontation.[43]

Decisions after *Chaplinsky* have fleshed out the fighting words doctrine to include six requirements for its application in criminal statutes.[44] The statute can punish only extreme insults[45] and must not encompass constitutionally protected speech.[46] The statute must also be content-neutral; that is, not limited to a subset of language, but to all fighting words.[47] The language spoken must have a direct tendency to cause an imminently violent response by an average person[48] and must be addressed to an individual, not a group,[49] in face-to-face confrontation.[50]

In re Spivey presents a compelling use of the "fighting words" doctrine.[51] After repeatedly calling a fellow bar patron a "nigger,"[52] Spivey, a local district attorney, was kicked out of the Wrightsville, North Carolina bar,[53] and subsequently removed from office for "engaging in conduct prejudicial to the administration of justice and [for bringing] his office into disrepute."[54] Spivey's First Amendment claim for wrongful punishment of his constitutionally protected speech fell short in the North Carolina Supreme Court.[55] Applying the fighting words doctrine, the court found that the term 'nigger' warranted no constitutional protection because its very utterance inflicts injury or "tend[s] to incite an immediate breach of the peace."[56] The Court then stated what it saw as an obvious truth: "[A] white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him … to retaliate."[57] Indeed, "nigger" in such a context presents the perfect case of "fighting words" outside the scope of First Amendment protection.[58]

Diminished speech protection in the broadcast media is set forth in *Federal Communications Commission v. Pacifica Foundation*, involving the radio play of comedian George Carlin's "Filthy Words" monologue routine.[59] Due to the broadcast media's "uniquely pervasive presence in the lives of all Americans,"[60] and because offensive and indecent content over the airwaves may invade "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder,"[61] the Supreme Court held that broadcast media are entitled to the least First Amendment protection of any form of communication.[62] Answering Justice Brennan's dissent that a viewer can just turn off offensive programming upon finding it, the majority determined that such a remedy ignored the harm already established.[63] In his dissent, Justice Brennan viewed the majority as imposing its notions of propriety on the whole of the American people."[64] As he saw it, the majority joined "the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking,"[65] therefore remaining insensitive to the nation's cultural diversity.[66] This case demonstrated the Court's willingness to retract its usually broad First Amendment protection, but other dangers to free speech were on the horizon.

From Safeguards to Skeptics

The response of liberal advocacy and interest groups to "Welcome to the Neighborhood" invoked a free speech skepticism that has trickled down into the popular consciousness from liberal academic critiques of free speech. The National Fair Housing Alliance's concern that the television show could "give homeowners the idea that they can engage in discrimination and stereotyping of people protected by fair housing laws"[67] played into the social constructionist and civic republican thrust of liberal censorship theory. The argument follows that if "Welcome to the Neighborhood" socializes viewers with the promotion of

discrimination and stereotyping, then the antisocial behavior that follows should warrant the censoring of its source so that all members of society might flourish.

When GLAAD warned that it was "dangerous to let intolerance and bigotry go unchallenged for weeks at a time,"[68] it invoked the academic free speech critic's view of speech as "a threat to equality ... as a weapon to subjugate racial minorities, women, and members of other outsider groups."[69] The idea of television as dangerous speech effaces the speech/conduct barrier. Furthermore, it reflects a deep skepticism regarding the ability of viewers to make ethical judgments on their own.[70] This additional layer of skepticism in academic critiques sets "consumers" apart in the market place of ideas; they are not free actors capable of fair judgment.[71] Instead, they are considered so indoctrinated by the values of a corrupt system that they cannot exercise judgment free of the constraints of having been born and raised in a racist, sexist, and homophobic culture.[72]

Ideological Drift and Unlikely Coalitions

The apparent divisiveness of "Welcome to the Neighborhood" brought liberals and conservatives together.[73] Jack Balkin has tried to understand this type of development through his theory of "ideological drift."[74] Because "alliances between particular conceptions of rights and a particular political agenda are always contextual," we should not be surprised when historically liberal principles "drift" to serve conservative interests (or vice versa).[75] Balkin argues that business and other conservative interest groups are becoming increasingly adept at rephrasing arguments for property rights or traditional moral values in the First Amendment language of the Left.[76] The shifting political terrain creating these unlikely coalitions is evidenced in recent bipartisan alliances in the United States Senate. In January 2005, Republican Senator Sam Brownback and Democratic Senator Joe Lieberman introduced the Broadcast Decency Enforcement Act of 2005.[77] The Act proposed a tenfold increase over current fines on radio and television broadcasters who violate FCC indecency rules.[78] The legislation would have increased maximum fines to $325,000 and increase the penalty cap at three million dollars for a single incident.[79] These harsher penalties were meant "to give some teeth to the current fine structure so there [would] be meaningful deterrents to broadcasters who may air indecent or obscene broadcasts."[80] Senator Lieberman indicated that the media's inability to police itself to curb sex and violence spurred his co-sponsorship of the bill.[81]

In March 2005, Brownback and Lieberman joined Republican Senator Rick Santorum and Democratic Senator Hillary Rodham Clinton in introducing legislation funding new studies on the negative effects of the media on children's well being.[82] The Children and Media Research Advancement Act would have authorized $100 million over six years for the research.[83] Senator Lieberman co-sponsored the Act in part because "the effects of media on our children's health, education, and development are too important to go unasked and unanswered."[84]

In July 2005, Senator Hillary Clinton, announced that she would introduce legislation to keep violent and sexually explicit video games out of children's reach.[85] Clinton asserted that "the ability of our children to access pornographic and outrageously violent material on video games rated for adults is spiraling out of control."[86] The legislation proposed a prohibition on the sale of such video games to minors and fines of $5,000 on violators of the law.[87] Senator Clinton cited recent research from Indiana University School of Medicine showing links between exposure to violent video games and aggressive behavior in children.[88] This legislation was meant to help parents' ability to raise their children with the values they are trying to instill in them.[89]

The Irony of Liberal Censorship

In ABC's own words, "Welcome to the Neighborhood" stood for the proposition that, "while on the outside we may appear different, deep inside we share many common bonds."[90] This idea hardly seems like something that would upset liberals. Nevertheless, television critic Alessandra Stanley called the show "a ghastly social experiment tricked up as a fluffy summer reality show."[91] In the same breath, she also acknowledged the show as "fascinatingly wrongheaded" and lamented the "pity that viewers may never get a glimpse."[92] This is the irony that the show exposed.

Critics thought that the episodic and insensitive nature of the show was highly problematic, yet most conceded that the series as a whole promoted liberal values. The creators of the show "hoped that debunking stereotypes would trump the show's political incorrectness."[93] For the contestants, too, the filming of the program reinforced liberal values. *New York Times* writer Felix Gillette describes the African-American family's first encounter with their neighbors as a five-minute obligation that turned into a three-hour welcome.[94] At the end of the program's filming, one of the "White, Christian, Republican and closed-minded" neighbors observed that he had "learned not to make snap judgments about others" and that "[o]nce we got to know them [the contestants on the show], I can't say there was one family that we wouldn't have wanted here."[95] Of course, the irony of this conclusion is that no one will ever get to see it on television. The transformation of the "Neighborhood" will never be revealed. Hence, the strangest irony of all; the eminently liberal values presented at the show's conclusion will never reach the racist, sexist, and homophobic public only because of the liberal censorship prompted by both liberal and conservative advocacy and interest groups.

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[1] Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 170 (1994) (describing new attitude toward First Amendment).
[2] ROBERT C. POST, CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 1 (Robert C. Post ed., Getty Research Institute 1998) (discussing changing landscape).
[3] Felicia R. Lee, *ABC Drops Show After Complaints by Civil Rights Groups*, N.Y. TIMES, June 30, 2005, at C3, *available at* 2005 WLNR 10280540.
[4] *Id.*
[5] Howard Witt, *'Welcome to the Neighborhood': Roll out the unwelcome wagon*, CHI. TRIB., Aug. 2, 2005, at 7, *available at* 2005 WLNR 23471326 (describing the show's motley crew of contestants).
[6] Lisa de Morales, *ABC Faces Reality, Pulls Welcome Mat on 'Neighborhood,'* WASH. POST, June 30, 2005, *available at* 2005 WLNR 10270461 (describing judges of competing families on show).
[7] 42 U.S.C.A. § 3604 (2006).
[8] Press Release, National Fair Housing Alliance, New Show Exploits Housing Discrimination (June 23, 2005), *available at* http://www.civilrights.org/issues/housing/details.cfm?id=32621) (last visited Oct. 4, 2006) (giving explanations for objections to show).
[9] Press Release, Gay and Lesbian Alliance Against Defamation, GLAAD Responds to ABC's Shelving of 'Welcome to the Neighborhood' (June 30, 2005), *available at* http://www.glaad.org/media/archive_detail.php?id=3826) (last visited Oct. 4, 2006) (explaining GLAAD's position on show).
[10] Cal Thomas, *Welcome to the Neighborhood*, July 12, 2005, *available at* http://www.crosswalk.com/news/1339631.html?view=print (last visited Oct. 4, 2006) (expressing concerns about image of conservative Christians on show).
[11] Linda Orlando, *ABC Cancels "Welcome to the Neighborhood" Before Its First Show* (July 22, 2005), *available at* http://www.buzzle.com/editorials/text7-22-2005-73536.asp (last visited Oct. 4, 2006) (reporting on conservative organization's concerns about show).
[12] *Id.*
[13] Stephen G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 193 (1996) (noting that legal academics are increasingly willing to qualify their support for free speech); *see also* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 376 ("The left in the United States used to be solidly united around the overriding importance of protecting speech from governmental interference – proclaiming the necessity of protecting the speech we hate every bit as much as the speech we love. It's not that way anymore.").
[14] Delgado, *supra* note 1, at 170 (citations omitted) (discussing changing academic attitudes towards free speech); *see also* Balkin, *supra* note 13, at 376 ("An important realignment of political beliefs and attitudes is occurring in the United States. It is a sea change that may prove to be something rich, but at least for now is certainly something strange ... all around me I see the American left abandoning its traditionally libertarian positions ...").
[15] *See* Balkin, *supra* note 13, at 383 (listing abolitionists in 1840s, pacifists in 1910s, organized labor in 1920s and civil rights protesters in 1950s and 1960s respectively).
[16] *See* Balkin, *supra* note 13, at 383 (stating prominent historical notion).
[17] *See* Gey, *supra* note 13, at 194 (discussing consequences of liberal censorship approach).
[18] Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1505 (1996) (expressing position of critics). *But see* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (defending ACLU stance).
[19] *See* Gey, *supra* note 13, at 194-5 (commenting on how new liberal censorship promoters present themselves and their goals).
[20] *See* Gey, *supra* note 13, at 198 (commenting that this motif is the centerpiece of critical race, civic republican and feminist arguments against expansive notions of free speech).
[21] *See* Gey, *supra* note 13, at 198 (discussing flourishing in society).
[22] *See* Gey, *supra* note 13, at 199 (discussing manifestations of oppression).
[23] *See* Gey, *supra* note 13, at 199 (discussing racism and sexism).
[24] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregating schools on the basis of race violates the Equal Protection Clause). A year later, the Supreme Court issued another opinion directing the lower courts to take action to implement its prior decision. Brown v. Board of Educ., 349 U.S. 294 (1955).
[25] *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-40 (arguing for new interpretation of decision).
[26] *See id.* at 440 (recognizing that Brown's "badge of inferiority" on blacks communicates an injurious message).
[27] *See id.* at 440 (noting further that "as a regulation of racist speech, the decision is an exception to the usual rule that regulation of speech content is presumed unconstitutional).
[28] *See id.* at 444 ("Racism is both 100% speech and 100% conduct. Discriminatory conduct is not racist unless it also conveys the message of white supremacy . ... Likewise, all racist speech constructs the social reality that constrains the liberty of non-whites because of their race. By limiting the life opportunities of others, this act of constructing meaning also makes racist speech conduct.").
[29] *See id.* at 452 (stating that face-to-face racial insults [are] undeserving of constitutional protection).
[30] *See* Gey, *supra* note 13, at 210-1 (positing that a "common good" is determined after the deliberative process during which citizens exercise political empathy and choose a collaborative response).
[31] *See* Gey, *supra* note 13, at 212-3 (stating that values are developed at home).
[32] Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 13 (1991).
[33] *See* Gey, *supra* note 13, at 281 (1996) (detailing a balancing test between speech and equality).
[34] *See* Gey, *supra* note 13, at 281 (highlighting the theory that constitutional amendments "have carved out an area of speech about equality" and deserve reduced First Amendment protection).
[35] *See* Gey, *supra* note 13, at 281 (noting these two social values are very important but competing).
[36] *See* Gey, *supra* note 13, at 283 (explaining that postmodernists "see equality as a precondition to free speech, and [they] place more weight on the side of the balance aimed at the removal of the badges and incidents of slavery that continue to flourish in our culture") (citation omitted).
[37] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); *see also* Street v. New York, 394 U.S. 576, 592 (1969) (limiting Chaplinsky's scope by referring to "small class of 'fighting words").
[38] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that first amendment protects advocacy even of unlawful conduct, except where advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action).
[39] *See* Miller v. California, 413 U.S. 15, 24 (1973) (setting forth constitutional definition of obscenity as: "(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value") (citations omitted).
[40] *See* Chaplinsky, 315 U.S. at 571 (recognizing "certain well-defined and narrowly limited classes of speech" that have never implicated a constitutional problem) (citation omitted).
[41] *See id.* at 572 (stating that social interests outweigh free speech protection in certain circumstances, moreover, "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .").
[42] *See id.* at 573 (defining what Court means by fighting words).
[43] *See id.* (declaring that certain words when spoken constitute breach of peace, "including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats").
[44] *See* Thomas H. Moore, R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech, 71 N.C. L. REV. 1252, 1272-73 (1993) (outlining requirements for doctrine to apply).
[45] *See id.* at 1273 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).
[46] *See id.* at 1273 (quoting Gooding v. Wilson, 405 U.S. 518, 520-21 (1972)).
[47] *See id.* at 1273 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 2550 (1992)) (noting that singling out racist or sexist language is not allowed).
[48] *See id.* at 1273 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
[49] *See* Moore, *supra* note 44 at 1273 (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)).
[50] *See id.*at at 1273 (regarding confrontation).
[51] In re Spivey, 345 N.C. 404, 414, 480 S.E.2d 693, 698 (1997) (declaring the facts as a "classic case" of the doctrine, as the words incited an immediate breach of the peace not protected by federal or state constitutions).
[52] *See id.* at 408 (recounting that "Spivey loudly and repeatedly addressed a black patron, Mr. Ray Jacobs, using the derogatory and abusive racial epithet 'nigger'"); *see also* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 50 (Pantheon Books 2002) (recounting that Ray Jacobs

was a professional football player for the Denver Broncos who had played college football in North Carolina).
[53] *See* In re Spivey, 345 N.C. at 408 (recalling the facts of Spivey's evening).
[54] *See id.* (describing Spivey's removal from office).
[55] *See id.* at 414 ("He claims that this violated his constitutionally protected right to express his viewpoint. We disagree.").
[56] *See id.* (finding that 'nigger' falls within fighting words doctrine).
[57] *See id.* at 414-5 (finding that use of 'nigger' in this case clearly invokes fighting words doctrine because it was "intended by him to hurt and anger Mr. Jacobs and to provoke a confrontation with him").
[58] In re Spivey, 345 N.C. 404, 415, 480 S.E.2d 693, 698 (1997) (refusing to protect, under the First Amendment, Mr. Spivey's abusive verbal attack on Mr. Jacobs which gave rise to the inquiry removing him from office. Instead, when taken in context, his repeated references to Mr. Jacobs as a 'nigger' presents a classic case of the use of 'fighting words' tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina.).
[59] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 729 (1978) (describing facts of case).
[60] *See id.* at 748 (giving reasons for limited First Amendment protection of broadcast media).
[61] *See id.* (describing unique nature of broadcast media).
[62] *See id.* (recognizing that "each medium of expression presents special First Amendment problems") (citation omitted).
[63] *See id.* at 748-9 (analogizing such a remedy to running away from an assault "after the first blow").
[64] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 762 (1978) (Brennan, J., dissenting) (noting the majority patently misapplied fundamental First Amendment principles).
[65] *See id.* at 776-7 (Brennan, J., dissenting) (predicting the case to have the greatest impact on broadcasters and audiences who do not share in the majority's view of acceptable speech).
[66] *See id.* at 775 (Brennan, J., dissenting) (describing that "in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities").
[67] Press Release, National Fair Housing Alliance, New Show Exploits Housing Discrimination (June 23, 2005), *available at* http://www.civilrights.org/issues/housing/details.cfm?id=32621 (last visited Oct. 7, 2006).
[68] Press Release, Gay and Lesbian Alliance Against Defamation, GLAAD Responds to ABC's Shelving of 'Welcome to the Neighborhood' (June 30, 2005), *available at* http://www.glaad.org/media/archive_detail.php?id=3826 (last visited Oct. 7, 2006) (describing GLAAD's concern about problematic episodic nature of show).
[69] *See* Gey, *supra* note 13, at 282 (1996) (noting that free speech is not just an obstacle to solving the problems of racial inequality, it is also the problem, as courts have given too much deference to it when balanced with equality).
[70] *See* Lawrence, *supra* note 25, at 468 ("Racism is irrational and often unconscious. Our belief in the inferiority of non-whites trumps good ideas that contend with it in the market, often without our even knowing it. … Racism is ubiquitous. We are all racists.").
[71] *See* Lawrence, *supra* note 25, at 468 (noting that racism still remains the most active commodity in the American marketplace of ideas, which was founded on the notion of racial inferiority).
[72] *See* Lawrence, *supra* note 25, at 469 ("For the most part, we do not recognize the myriad ways in which the racism pervading our history and culture influences our beliefs.").
[73] *See supra* notes 3-10 and accompanying text.
[74] *See* Balkin, *supra* note 13, at 383 (identifying the drift that occurs when "positions that originally were espoused by radicals and later became mainstream or even conservative positions … become the orthodoxy of tomorrow, and, in the process, take on a quite different political valance").
[75] *See* Balkin, *supra* note 13, at 383 (noting the most common examples are "comparatively liberal principles that later serve to buttress comparatively conservative interests").
[76] *See* Balkin, *supra* note 13, at 384 (stating that the Ku Klux Klan, conservative political action committees (PACs) and R.J. Reynolds Tobacco all justify their activities in name of free speech).
[77] Press Release, Senator Sam Brownback, Brownback, Lieberman Reintroduce Decency Bill (Jan. 26, 2005), *available at* http://brownback.senate.gov/pressapp/record.cfm?id=230970&&year=2005& (last visited Oct. 7, 2006).
[78] *See id.* (recognizing the FCC "needs better tools to enforce broadcast decency laws").
[79] *See id.*
[80] *See id.* (quoting Senator Brownback).
[81] *See id.* ("In a media culture that increasingly pushes the envelope on sex and violence, the role of the FCC is to ensure that broadcasters do not cross that line of decency.").
[82] Press Release, Senator Sam Brownback, Brownback, Lieberman, Clinton and Santorum Call for Research into Effects of Media on Children (Mar. 9, 2005), *available at* http://brownback.senate.gov/pressapp/record.cfm?id=233697&&year=2005& (last visited Oct. 7, 2006) (stating that the proposed legislation authorized new research "into the effects of viewing and using all types of media, including television, computer games, and the Internet, on children's cognitive, social, physical and psychological development").
[83] *See id.*
[84] *See id.* (quoting Senator Lieberman). Two other Democratic Senators, Mary Landrieu (D-LA) and Dick Durbin (D-IL) also co-sponsored the bill.
[85] *See* Press Release, Senator Hillary Clinton, Senator Clinton Announces Legislation to Keep Inappropriate Video Games Out of the Hands of Children (July 14, 2005), *available at* http://clinton.senate.gov/news/statements/details.cfm?id=240603&& (last visited Oct. 7, 2006); *see also* Matt Bai, *Mrs. Triangulation*, N.Y. TIMES MAGAZINE, Oct. 2, 2005 (suggesting that Senator Clinton has never been as liberal as liberals suppose, or as liberal as conservatives fear).
[86] *See id.* (calling upon the FTC to take immediate action to determine the source of graphic content in the "Grand Theft Auto: San Andreas" video game).
[87] *See id.* (expecting the proposed penalty would "put some teeth" into video game ratings).
[88] *See id.* (noting the research is just the latest piece of evidence confirming the potentially damaging impact of these games on children).
[89] *See id.* (ensuring parents "have a line of defense" against violent and graphic video games and other content).
[90] *See* Lisa de Moraes, *supra* note 6 (restating ABC's intentions for the show).
[91] *See* Alessandra Stanley, *The TV Watch; 'Welcome': Whatever Was ABC Thinking?*, N.Y. TIMES, July 2, 2005, *available at* 2005 WLNR 10415665.
[92] *See id.* (acknowledging begrudging respect for show); *see also* Witt, *supra* note 5 (stating that as journalist and Austin "Neighborhood" resident since 2003, "it's a shame that America may never see this particular made-for-TV social experiment.").
[93] *See* Stanley, *supra* note 91 (noting how judges of show were "surprised and delighted" to learn that tattoo enthusiast couple voted for George W. Bush).
[94] *See* Felix Gilette, *In This Neighborhood, Reality TV Falls Short*, N.Y. TIMES, July 14, 2005, at F, *available at* 2005 WLNR 11013390.
[95] *See id.* (agreeing with his neighbors that the most difficult part of the show had been the requirement to reject six of the seven families.).