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INDECENCY FOUR YEARS AFTER *FOX TELEVISION STATIONS*: FROM BIG PAPI TO A PORN STAR, AN EGREGIOUS MESS AT THE FCC CONTINUES

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INTRODUCTION

In March 2015, the Federal Communications Commission (“FCC” or “Commission”) proposed fining a Roanoke, Virginia, television station a whopping \$325,000 for briefly “broadcasting extremely graphic and explicit sexual material, specifically, a video image of a hand stroking an erect penis.”¹ The offending content aired for three seconds on WDBJ Channel 7 during a 6:00 PM news segment about a former female porn star turned local volunteer rescue squad member.²

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1. WDBJ Television, Inc., 30 FCC Rcd. 3024, 3024 (Mar. 23, 2015) (notice of apparent liability).

2. *Id.* at 3025.

At first blush, the FCC's proposed indecency fine³ seems like a legal slam dunk. As media attorney Harry Cole wryly writes, "[e]rect penises (and the manipulation thereof) are well outside the range of conventional prime-time acceptability."⁴

However, a closer inspection of the facts suggests—and this article, in turn, argues—that it is much more complicated. Jeffrey Marks, the station's president and general manager, contends that "[i]nclusion of the image was purely unintentional"⁵ because it "was small and outside the viewing area of the video editing screen."⁶ The offending visual was taken from "a video screen grab of an adult website showing the subject of the report (who was neither nude nor engaged in sexual activity)."⁷ The image, in fact, would not have been visible in "the analog small-screen world of a prior generation."⁸

Nonetheless, in concluding the newscast was indecent under its current definition of that contested term,⁹ the FCC reasoned that: (1) "the depiction of the sexual manipulation of an erect penis was extremely graphic and explicit,"¹⁰ (2) the three-second duration of that image "was sufficient to attract and hold viewers' attention,"¹¹ and (3) "the stroking of an erect penis on a broadcast program is shocking."¹² These reasons align with a trio of factors the

3. Indecent speech is one of three categories of content the FCC may target for fines. See 18 U.S.C. § 1464 (Supp. II 2015) (providing that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.") (emphasis added).

4. Harry Cole, *FCC Flexes Its Indecency Muscle—Despite Long Hiatus and Unclear Standard*, COMMLAWBLOG (Mar. 27, 2015), <http://www.commlawblog.com/2015/03/articles/broadcast/fcc-flexes-its-indecency-muscle-despite-long-hiatus-and-unclear-standard-2/>.

5. Ralph Berrier Jr., *FCC Hits WDBJ With Proposed \$325,000 Indecency Fine*, ROANOKE TIMES (Mar. 23, 2015), http://www.roanoke.com/news/local/roanoke/fcc-hits-wdbj-with-proposed-indecency-fine/article_f9c2a1b6-0f9a-50a9-8f9b-d02c0f2079ac.html.

6. *Id.*

7. Scott R. Flick, *Indecency Meets Big-Screen TVs: FCC Proposes Mammoth \$325K Fine*, COMMLAWCENTER (Mar. 23, 2015), <http://www.commlawcenter.com/2015/03/indecency-meets-big-screen-tvs-fcc-proposes-mammoth-325k-fine.html>.

8. *Id.*

9. The FCC defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." See *infra* note 171 and accompanying text.

10. WDBJ Television, 30 FCC Rcd. at 3029.

11. *Id.*

12. *Id.*

FCC typically weighs to determine if a depiction of sexual organs or activities is “patently offensive” and, in turn, indecent.¹³

Travis LeBlanc,¹⁴ head of the FCC’s Enforcement Bureau, trumpeted the fine in a press release. “Our action here sends a clear signal that there are severe consequences for TV stations that air sexually explicit images when children are likely to be watching,” he proclaimed.¹⁵

The decision to fine the Roanoke station—and, in particular, to mete out “the largest fine ever for a single broadcast from a TV station”¹⁶—is startling for at least four reasons. First, former FCC Chairman Julius Genachowski in September 2012 directed the Commission to “focus its resources on the *strongest* cases that involve *egregious* indecency violations.”¹⁷ Three seconds of inadvertently airing, in the corner of the screen, a tiny image during the course of a news story arguably seems something far less than egregious. Compounding the problem, at least in terms of lack of notice to broadcasters, is that the FCC “has never described how its new ‘egregious’ standard works in practice.”¹⁸

13. As the FCC observed when issuing its proposed monetary forfeiture against the owners of the Roanoke station:

In assessing whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.” Three principle factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description or depiction; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience. In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive.

Id. at 3027 (footnotes omitted).

14. Before joining the FCC, LeBlanc served as (1) Special Assistant Attorney General of California and a senior advisor to Attorney General Kamala Harris; (2) an attorney in the U.S. Department of Justice’s Office of Legal Counsel during the Obama Administration; and (3) an attorney at Williams & Connolly LLP in Washington D.C. and Keker & Van Nest LLP in San Francisco. Travis LeBlanc, Chief, Enforcement Bureau, FCC (July 18, 2014), <https://www.fcc.gov/general/travis-leblanc-chief-enforcement-bureau>.

15. Press Release, Fed. Comm’n Comm’n, FCC Plans Maximum Fine Against WDBJ for Broadcasting Indecent Programming Material During Evening Newscast (Mar. 23, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332631A1.pdf.

16. James Eli Shiffer, *Full Disclosure*, STAR TRIB., Oct. 18, 2015, at 2B.

17. Doug Halonen, *FCC to Back Away From a Majority of Its Indecency Complaints*, THEWRAP (Sept. 24, 2012, 10:20 AM) (emphasis added), <https://www.thewrap.com/fcc-back-away-majority-its-indecency-complaints-57766/>.

18. Cole, *supra* note 4.

Second, in April 2013, the FCC sought public comment on whether the egregious enforcement policy should become a permanent practice for the Commission.¹⁹ In July of that same year, the FCC extended the comment period to August 2, 2013.²⁰ But as of late October 2016, the FCC still had failed to decide what to do on this question, thus leaving broadcasters without legal guidance and fair notice regarding what is indecent.

Third, the FCC had been dormant—but for three exceptions, each of which was resolved for an amount far smaller than \$325,000—in enforcing its indecency policy since June 2012.²¹ That is when the U.S. Supreme Court in *FCC v. Fox Television Stations, Inc.*²² passed on a prime chance to consider the First Amendment²³ issues raised by the FCC's indecency enforcement

19. John Eggerton, *FCC Seeks Comment on 'Egregious Complaint' Indecency Enforcement Regime*, BROAD. & CABLE (Apr. 1, 2013, 4:25 PM), <http://www.broadcastingcable.com/news/washington/fcc-seeks-comment-egregious-complaint-indecency-enforcement-regime/61255>; see also FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, 28 FCC Rcd. 4082 (Apr. 1, 2013) (public notice) [hereinafter *FCC Reduces Backlog*]. The notice for public comment was published in the Federal Register on April 19, 2013, thereby establishing May 20, 2013 as the deadline for filing comments, and June 18, 2013 as the deadline for filing reply comments; see FCC Seeks Comments on Adopting Egregious Cases Policy, 78 Fed. Reg. 23563 (Apr. 19, 2013).

20. FCC Extends Reply Comment Dates for Indecency Cases Policy, 28 FCC Rcd. 10130, 10130–31 (July 12, 2013) (public notice).

21. There have been only three indecency case resolutions since June 2012.

In November 2013, the FCC issued an order and reached a consent decree with Liberman Broadcasting, Inc. that included a \$110,000 voluntary payout by the broadcaster based upon allegedly indecent episodes of a Spanish-language television program called "Jose Luis." Liberman Broad., Inc., 28 FCC Rcd. 15397, 15401, 15404 (Nov. 14, 2013) (order and consent decree).

In April 2014, the FCC issued an order and reached a consent decree with the owners of a Carmel Valley, California radio station operating under the call sign KRXA (AM) for the relatively paltry sum of \$15,000 based upon alleged violations of both sponsorship identification and indecency laws. KRXA, LLC, 29 FCC Rcd. 3481, 3481 (Apr. 14, 2014) (order and consent decree).

In August 2014, the FCC issued an order and reached a consent decree with the owners of a Mirando City, Texas, radio station operating under the call sign KBDR (FM) for \$37,500 to resolve allegations that morning disc jockey "Danny Boy" on May 18, 2011, engaged in sexual language, including asking listeners, "[W]hat do you have to do to a woman in order to get a blowjob from her?" Border Media Bus. Trust, 29 FCC Rcd. 9488, 9488, 9491 (Aug. 11, 2014) (order and consent decree).

22. 132 S. Ct. 2307 (2012).

23. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-one years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*,

regime, including its 2004 decision to target so-called fleeting expletives.²⁴ It is into this chasm, created by the nation's highest court when it punted on the First Amendment questions in *Fox Television Stations*, into which the FCC stepped deeply in March 2015 with its WDBJ decision.

Fourth and finally, the decision to fine WDBJ was surprising because the content aired during a newscast, rather than an entertainment or sports program. One might have expected the FCC to defer to the news judgment of the broadcaster, especially because the story dealt with an issue of public concern—namely, the work of volunteer rescue responders—and the three-second image in question was peripheral to the overall story. Thus, the Roanoke incident is a far cry, factually speaking, from the FCC fining a San Francisco television station in 2004 for showing a penis during a morning news segment featuring members of the performance-art group “Puppetry of the Penis.”²⁵ That news segment featured interviews with two men who “appeared on camera wearing capes and discussed their stage show, in which they appear nude in order to manipulate and stretch their genitalia to simulate a wide variety of ‘installations,’ including objects, architecture, and people.”²⁶ The penis of one performer was exposed after a news host agreed to let the two men do a quick demonstration.²⁷ This seems far removed from the facts in the WDBJ incident, which involved a tiny screen-capture image that appeared in the context of a story about a volunteer responder.

It thus comes as no surprise that WDBJ station manager Jeffrey Marks responded to the FCC's action by proclaiming he was “disappointed that the FCC has decided to propose to fine WDBJ7 for a fleeting image on the very edge of some television screens

268 U.S. 652, 666 (1925).

24. For about a quarter-century after the U.S. Supreme Court's seminal indecency decision of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), “the FCC had treated fleeting expletives as an aspect of television that was beyond its reach to punish as indecent.” Toby Coleman, *Limiting Judges: Placing Limits on Judges' Power in Hard-look Review*, 88 U. DET. MERCY L. REV. 883, 884–85 (2011). But in 2004, Professors Terri Day and Danielle Weatherby wrote, “the FCC completely abandoned its long-standing policy of not sanctioning fleeting expletives.” Terri R. Day & Danielle Weatherby, *Bleeeeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469, 484 (2012).

25. *Young Broadcasting of San Francisco, Inc.*, 19 FCC Red. 1751, 1751–52, 1758 (Jan. 24, 2004) (notice of apparent liability).

26. *Id.* at 1752.

27. *Id.*

during a news broadcast.”²⁸ The station currently is fighting the proposed fine, and the National Association of Broadcasters (“NAB”) and the Radio Television Digital News Association (“RTDNA”) filed comments with the FCC vehemently objecting to the proposed forfeiture.²⁹ Specifically, those trade associations bluntly contend that by taking action against WDBJ, the FCC:

[I]nexplicably exacerbated its constitutionally suspect regulatory approach by proposing the highest indecency fine ever against a single station, which had inadvertently aired a fleeting sexual image in a newscast. Levying the maximum possible fine under the law in a case where the broadcast station indisputably did not purposefully air the image at issue is tantamount to imposing a sentence of life imprisonment for petty theft.³⁰

Using the WDBJ case as an analytical springboard, this article examines the tumultuous state of the FCC’s indecency enforcement regime more than three years after the Supreme Court’s June 2012 opinion in *Fox Television Stations*. Part I of this article briefly explores the missed First Amendment opportunities in *Fox Television Stations*, as well as some possible reasons why the Supreme Court chose to avoid the free-speech questions in that case.³¹ Part II addresses the FCC’s decision in September 2012 to target only egregious instances of broadcast indecency and, in the process, to jettison hundreds of thousands of complaints that had languished for years at the Commission.³² Part II reviews the FCC’s request for public comments in April 2013 regarding whether it should change or maintain its current indecency policies. Next, Part III analyzes the FCC’s March 2015 decision to fine WDBJ the maximum \$325,000, as well as the arguments made against that decision on appeal by WDBJ and others, including the NAB and RTDNA.³³ Finally, the article concludes by calling on the FCC to reverse its decision against WDBJ and, more importantly, to precisely clarify its policy regarding fleeting instances of indecency and to specifically define “egregious” indecency.³⁴

28. *FCC Intends to Fine WDBJ for Airing Sexually Explicit Image During 2012 Newscast*, WDBJ7 (Mar. 23, 2015), <http://www.wdbj7.com/news/local/fcc-intends-to-fine-wdbj-for-airing-sexually-explicit-image-during-2012-newscast/31969100>.

29. WDBJ Television, Inc., File Nos. EB-IHD-14-00016819 & EB-12-IH-1363 (2015).

30. *Id.* at 2.

31. *See infra* Part I.

32. *See infra* Part II.

33. *See infra* Part III.

34. *See infra* Part IV.

I. *FOX TELEVISION STATIONS* AND THE SUPREME COURT:
MINIMALISM, AVOIDANCE AND PASSING THE FIRST
AMENDMENT BUCK

In June 2011, the Supreme Court granted certiorari in *FCC v. Fox Television Stations, Inc.*³⁵ to consider “[w]hether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.”³⁶ A trio of incidents of alleged indecency provided the case’s factual foundation, with two pivoting on unscripted and fleeting utterances of “fuck” or “fucking” by celebrities during the Billboard Music Awards.³⁷

The case and questions presented by *Fox Television Stations* were important because the FCC’s decision to target fleeting expletives was relatively new, having started in only 2004³⁸ after years of allowing such language to escape its regulatory wrath.³⁹ The FCC’s new position to punish isolated expletives made the issue the “latest ‘cause celebre’ of both First Amendment advocates opposed to more government regulation of protected speech and crusaders seeking to protect children from alleged harm by ‘sanitizing’ broadcast media.”⁴⁰

Once certiorari was granted in *Fox Television Stations*, parties on both sides braced for the Court to address not only the fleeting expletives policy, but also the Commission’s entire indecency regime, vis-à-vis *FCC v. Pacifica Foundation*.⁴¹ But it was not to be.

35. 564 U.S. 1036 (2011), cert. granted 132 S. Ct. 2307 (2012).

36. *Id.* at 1036.

37. See *Fox Television Stations*, 132 S. Ct. at 2314. In accepting an award during the 2002 Billboard Music Awards, singer Cher stated “I’ve also had my critics for the last 40 years saying that I was on my way out every year. Right. So f*** ‘em.” *Id.* At the same awards show the next year, Nicole Richie queried during a brief dialogue with Paris Hilton, “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***** simple.” *Id.* The third incident centered on an episode of the scripted show *NYPD Blue*, which “showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.” *Id.*

38. See Day & Weatherby, *supra* note 24, at 484 (asserting that “[i]n 2004, the FCC completely abandoned its long-standing policy of not sanctioning fleeting expletives”).

39. See Coleman, *supra* note 24, at 884–85 (noting that for nearly twenty-five years after the Supreme Court’s seminal indecency ruling in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), “the FCC had treated fleeting expletives as an aspect of television that was beyond its reach to punish as indecent”).

40. Day & Weatherby, *supra* note 24, at 492.

41. See *id.* at 494 (stating that “*FCC v. Fox* may be the beginning of the end of *Pacifi-*

Justice Anthony Kennedy, writing for the seven-justice majority,⁴² bypassed the First Amendment matter and decided the case solely on the Fifth Amendment due process issue of fair notice.⁴³ Kennedy reasoned here that “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden.”⁴⁴ Because the FCC’s policy “at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent,”⁴⁵ the two networks could not be held liable for the content of the three broadcasts under consideration.⁴⁶

Kennedy briefly nodded to the importance of protecting expression, suggesting that adherence to due process standards is of heightened significance “[w]hen speech is involved.”⁴⁷ Yet, he sidestepped the First Amendment issue, finding that “[i]n light of the Court’s holding that the Commission’s policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.”⁴⁸

Although perhaps disappointing to First Amendment advocates and scholars, the ruling was not surprising. That is particularly true considering the Roberts Court’s general penchant for mini-

ca”).

42. *Fox Television Stations*, 132 S. Ct. at 2310. Justice Ruth Bader Ginsburg filed a concurring opinion and Justice Sonia Sotomayor recused herself, due to her previous service on the Second Circuit Court of Appeals, through which the case arose. *Id.* at 2320–21.

43. *Id.* at 2320. The Fifth Amendment to the U.S. Constitution provides, in relevant part, that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

44. *Fox Television Stations*, 132 S. Ct. at 2317.

45. *Id.* at 2318.

46. *Id.* at 2320.

47. *Id.* at 2317.

48. *Id.* at 2320. Kennedy’s entire evaluation of the First Amendment issue was five sentences long:

[B]ecause the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policy. It is argued that the Court’s ruling in *Pacifica* . . . should be overruled because the rationale of that case has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers. The Government for its part maintains that when it licenses a conventional broadcast spectrum, the public may assume that the Government has its own interest in setting certain standards. These arguments need not be addressed here. In light of the Court’s holding that the Commission’s policy failed to provide fair notice it is unnecessary to reconsider *Pacifica* at this time.

Id. (internal citations omitted).

malism⁴⁹ and its subscription to what Professor Caleb Nelson calls “the canon about avoiding constitutional questions.”⁵⁰

Minimalism, derisively dubbed by one commentator as “boil-the-frog gradualism”⁵¹ for its tendency to slowly change the course of jurisprudence, is more favorably described by Harvard Professor Cass Sunstein as “involv[ing] two principal features, narrowness and shallowness.”⁵² Sunstein, with whom minimalism is closely linked,⁵³ asserts that judges following this canon generally avoid “broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes.”⁵⁴ As Professor Tara Smith sums it up, “[m]inimalism is the view that courts should resolve cases by issuing narrow rulings that steer clear of broad principles and wide implications” and that “[w]hatever changes are effected through judicial rulings should be small and incremental, as judges should resolve as little as necessary in order to decide the dispute at hand.”⁵⁵

Beyond minimalism, one facet of the larger canon of constitutional avoidance⁵⁶ holds that “[t]he Court will not pass upon a

49. During his confirmation hearings in 2005, John Roberts famously declared that he perceived his job as a federal judge to be nothing more than that of an umpire “call[ing] balls and strikes.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts); see also John Elwood et al., *FCC, Fox, and That Other F-Word*, CATO SUP. CT. L. REV. 281, 305 (2012) (suggesting the *Fox Television Stations* decision “may simply reflect the Roberts Court’s (intermittent) judicial minimalism”).

50. Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 332 (2015).

51. Edward Whelan, *Boiling the Frog*, 57 NAT’L REV. 56, 56–57 (2005) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)).

52. Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1955 (2005).

53. Minimalism is “a term coined by Cass Sunstein (minimalism’s most prominent advocate).” Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 5 (2009).

54. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 9 (1999).

55. Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 352 (2010).

56. There are several discrete facets of constitutional avoidance. See *infra* note 58.

constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”⁵⁷ This sometimes is called the “last resort rule.”⁵⁸

Under this rule, the Court, as Justice Stephen Breyer asserted in 2007, should “adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions.”⁵⁹ That often is the position of the Court under the leadership of John Roberts, with Ronald Collins noting in 2012 that “[t]here’s a doctrine that this Court loves to preach called the Doctrine of Constitutional Avoidance. We don’t reach a Constitutional question unless we have to.”⁶⁰ While the Court in *Fox Televisions Station* certainly did address one constitutional question—the narrow due process issue—it clearly avoided the more difficult First Amendment issue.

Ultimately, minimalism and the principle of avoiding constitutional questions are closely related. Professor Charles Rhodes observes, for instance, that a “minimalist judge will seek to avoid a constitutional decision if possible, to decide cases in small, incre-

57. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Justice Louis Brandeis added that “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” *Id.*

58. See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) (noting that “[t]he ‘last resort rule’ dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis”). This position is distinct from other concepts that also fall under the broad umbrella of avoidance.

Professor Adrian Vermeule notes that avoidance applies to at least three distinct ideas: (1) procedural avoidance, in which federal courts “should order the issues for adjudication, or the rules that determine the forum in which a case should proceed, with an eye to obviating the need to render constitutional rulings on the merits”; (2) classical avoidance, which suggests that when courts must decide between two competing visions of what a law means, it should decide in such a way as to construe the law as constitutional; and (3) modern avoidance, the “last resort” doctrine often employed by the Roberts Court to circumvent constitutional questions altogether whenever possible. See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997). “The basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional.” *Id.* at 1949.

59. *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part and dissenting in part).

60. Alan B. Morrison et al., *Panel Discussion on Recent U.S. Supreme Court Free Speech Decisions & the Implications of These Cases for American Society*, 76 ALB. L. REV. 781, 809 (2012).

mental steps, and to respect the holdings (although not necessarily the dicta) in prior cases.”⁶¹

Minimalism and avoidance, in turn, have both pros and cons. Sunstein asserts that minimalism produces two primary benefits: “[f]irst, it is likely to reduce the burdens of judicial decision,” and second, it “is likely to make judicial errors less frequent and (above all) less damaging.”⁶² Diane Sykes, a judge on the U.S. Court of Appeals for the Seventh Circuit, echoes this sentiment. She asserts that “[n]arrow, shallow decisions reduce the risk and cost of error. Minimalist decisions are also said to be more pluralistic, demonstrating respect for diverse perspectives by leaving fundamental matters of principle unaddressed.”⁶³ In addition, Sykes notes that minimalism “claims to promote stability and predictability, to maintain flexibility for future courts, and to empower democratic deliberation by giving political decision-makers room to maneuver and respond to constitutional questions left open by the Supreme Court.”⁶⁴ Furthermore, Duke Professor Neil Siegel, quoting Sunstein, observes that the narrow-is-better canon “allows continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values. To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments.”⁶⁵

Despite such praise for minimalism and avoidance, the doctrines are subject to criticism.⁶⁶ Although constitutional avoidance “originated as a ‘cardinal principle’ of judicial self-restraint,” former U.S. Solicitor General and Georgetown Professor Neal Katyal along with his co-author Thomas Schmidt, contend that “[t]he avoidance canon enables—even demands—sloppy and cursory constitutional reasoning.”⁶⁷

61. Charles W. Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 6 (2011).

62. SUNSTEIN, *supra* note 54, at 4.

63. Diane S. Sykes, *Minimalism and Its Limits*, CATO SUP. CT. REV. 17, 19 (2015).

64. *Id.*

65. Siegel, *supra* note 52, at 1955 (quoting Sunstein, *supra* note 54, at ix-x).

66. See, e.g., ORIGINALISM: A QUARTER-CENTURY OF DEBATE 303 (Steven G. Calabresi ed., 2007) (quoting Charles Cooper for the proposition that Sunsteinian minimalism is nothing but a guise for deliberative, yet deliberate, “judicial activism”).

67. Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Su-*

Dual approaches, like those deployed by Justice Kennedy in *Fox Television Stations*, allow judges to refer in passing to one constitutional right—in *Fox Television Stations*, it was a passing reference to the First Amendment⁶⁸—without needing to deal with the constitutional repercussions of their decisions.⁶⁹ This technique allows potentially unconstitutional statutes to remain in effect indefinitely.⁷⁰ The legislature, according to Katyal and Schmidt, actually might “prefer to have the constitutional question adjudicated finally so that it knows the boundaries within which it may legislate.”⁷¹ Gunnar Seaquist contends that by engaging in avoidance-by-default and never establishing where such boundaries actually stand, the judiciary “acknowledges, either expressly or implicitly, the constitutional elephant in the room but forgoes any meaningful analysis of the merits and contours of the issue,” thus “cast[ing] an even greater pall of uncertainty over the legislature’s ability to enact laws in constitutionally sensitive areas.”⁷²

On a more basic level, critics of minimalism and avoidance also argue that when the judiciary fails to push back on laws of dubious constitutional validity and avoids tough decisions, it simply is not doing its job.⁷³ Critiquing Sunstein’s position, for example, Siegel suggests that by habitually avoiding constitutional matters, the Court dodges its duty to act as the “guardian of the fundamental rights of individuals,” a task that is “advanced most effectively through relatively broad and deep judicial decision-making, not through narrow and shallow opinions.”⁷⁴ Ultimately, Katyal and Schmidt conclude, “[t]he Court generally defends the avoidance canon as a species of judicial restraint. But the only

preme Court and Legal Change, 128 HARV. L. REV. 2109, 2112, 2122 (2015).

68. See *supra* note 47 and accompanying text (describing Justice Kennedy’s cursory First Amendment analysis in *Fox Television Stations*).

69. Katyal and Schmidt explain that “because a court can announce a constitutional principle without actually having to strike down a law, avoidance frees a court from the useful discipline of facing the real ramifications of that principle.” Katyal & Schmidt, *supra* note 67, at 2123.

70. *Id.* at 2118.

71. *Id.* at 2127.

72. Gunnar P. Seaquist, *The Constitutional Avoidance Canon of Statutory Construction*, 71 ADVOCATE 25, 27 (2015).

73. In effect, Katyal and Schmidt write, “avoidance allows the Court to make constitutional law without fulfilling its *Marbury* ‘duty’ to ‘say what the law is.’” Katyal & Schmidt, *supra* note 67, at 2126 (quoting *Marbury v. Madison*, 1 U.S. (1 Cranch) 137, 177 (1803)).

74. Siegel, *supra* note 52, at 2004.

thing the avoidance canon ‘avoids’ is the invalidation of a statute”⁷⁵—in many cases, perhaps, statutes that deserve invalidation.

For good or ill, the path-of-least-resistance approach taken by the Court in *Fox Television Stations* allowed it to abstain from a First Amendment discussion that clearly “would raise hard questions about the constitutionality”⁷⁶ of the FCC’s indecency policy.⁷⁷ In musing over the possible reasons why the Court declined to answer those hard questions,⁷⁸ UCLA Professor Eugene Volokh notes that “the Court agrees to hear a tiny fraction of the cases that it’s asked to take, and it generally takes them precisely to render decisions that are broadly applicable and thus worth the Court’s time.”⁷⁹ With its distinct overtones of minimalism and avoidance, was *Fox Television Stations*, then, really worth the Roberts Court’s time?

The Court’s reticence in *Fox Television Stations* may have been less due to an abiding faith in any constitutional principle than to a latent desire to avoid triggering a skirmish in the culture wars⁸⁰ or confronting the unenviable task of embracing or rejecting the FCC’s definition of “fuck.” Attorney Barry Chase, for instance,

75. Katyal & Schmidt, *supra* note 67, at 2164.

76. Nelson, *supra* note 50, at 334 (emphasis omitted).

77. See Katyal & Schmidt, *supra* note 67, at 2126 (articulating that an “avoidance decision [such as was the case in *Fox II*], will be less visible” and “[t]he prospect of public scrutiny and criticism of the decision will therefore operate as a less effective check”).

78. The Roberts Court has not always abided by its minimalistic creed of avoiding of hard questions. Critics of the Court often point, for example, to *Citizens United v. FEC*, 558 U.S. 310 (2010), as an example of “maximalism,” where the Court aggressively answered more than constitutionally necessary to adjudicate the case. See, e.g., Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 182 (2011) (arguing that “[i]n *Citizens United*, the Court reached out and decided an issue that was not before it,” thereby “fail[ing] to respect the most important principles of judicial process, such as . . . the avoidance canon”); see also LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 1 (2001) (“The [Supreme] Court has not invoked the avoidance doctrine consistently. It alternatively employs—or ignores—avoidance to achieve particular substantive outcomes.”).

79. Eugene Volokh, *FCC v. Fox Television Decided Narrowly on Lack-of-Fair-Notice Grounds*, VOLOKH CONSPIRACY (June 21, 2012), <http://volokh.com/2012/06/21/fcc-v-fox-television-decided-narrowly-on-lack-of-fair-notice-grounds/>.

80. See, e.g., Press Release, Parents Television Council, PTC Applauds Supreme Court for Siding with Decency Law (June 21, 2012), <http://www.parentstv.org/PTC/news/release/2012/0621.asp> (citing PTC president Tim Winter, who claimed *Fox Television Stations* as a victory for “[b]roadcast decency rules [that] have existed to protect children since the dawn of the broadcast medium”).

contends that the case smacks “of a judicial/political effort to avoid creating a firestorm among certain segments of the public who care deeply about their children being confronted with ‘Filthy Words.’”⁸¹

Additionally, Adam Liptak of *The New York Times* points out that “[t]he Supreme Court specializes in law, not lexicography.”⁸² Making normative judgments about the ostensible indecency of words is a divisive enterprise, prompting Justice John Harlan to famously opine in *Cohen v. California* that “one man’s vulgarity is another’s lyric.”⁸³ Harlan added that “it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”⁸⁴ Indeed, Christopher Wolfe contends that “the modern Court is reluctant to engage in making the distinctions necessary to maintain even a very limited public orthodoxy.”⁸⁵

Whatever the Court’s actual reasons for avoiding the contentious constitutional matters in *Fox Television Stations*, its rationale can only last so long before the Court finally confronts the application of First Amendment principles to current FCC policy. Sunstein suggests that the Court’s contemporary, minimalistic approach “leaves things open [and] will not foreclose options in a way that may do a great deal of harm,”⁸⁶ especially when “definitive rulings about the role of the First Amendment in an area of new communications technologies” hangs in the balance.⁸⁷

Even the most minimal steps, when aggregated over time, eventually lead closer to a constitutionally conclusive destination. This is especially true in the realm of indecency, given that both Justices Clarence Thomas and Ruth Bader Ginsburg expressed

81. Barry Chase, *The FCC’s Indecency Jurisdiction: A Stale Blemish on The First Amendment*, 39 OHIO N.U. L. REV. 697, 718 (2013).

82. Adam Liptak, *Must It Always be About Sex?*, N.Y. TIMES, Nov. 2, 2008, at WK4.

83. 403 U.S. 15, 25 (1971).

84. *Id.*

85. Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 80 (2000).

86. SUNSTEIN, *supra* note 54, at 4.

87. *Id.*

clear interest in revisiting *Pacifica Foundation*.⁸⁸ The only question now, it seems, is when this will occur.⁸⁹

Until that point is reached, the lack of clarity fostered by the Court's minimalistic and avoidance tendencies likely will perpetuate practical problems, not the least of which is that broadcasters today have "little real grasp of what is allowed and what is not."⁹⁰ The situation was so unclear after *Fox Television Stations* that former FCC chair Julius Genachowski was reduced to tweeting his views about indecency in late April of 2013, after baseball player David Ortiz, who is known as Big Papi, uttered the word "fucking" during a Boston Red Sox pre-game ceremony that was broadcast live.⁹¹

The speech-chilling vagueness of the current FCC indecency rules, when considered alongside the policy's over-inclusiveness, under-inclusiveness,⁹² and general archaicness,⁹³ make the matter a prime target for judicial review. As Robert Richards and David

88. See Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 604 ("When Justices at opposite ends of the judicial spectrum, such as Justices Ginsburg and Thomas, both call for the reevaluation of *Pacifica* and its special treatment of broadcast media, its days would seem to be numbered. Yet *Pacifica* is resilient. Despite multiple opportunities to revisit the case, the Supreme Court has chosen to evade the issue.").

89. See Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631, 634 (2013) (discussing Robert Lloyd's suggestion regarding *Fox Television Stations* that "[w]e will meet here again, the justices as good as said.").

90. *Id.* at 633 (quoting Edward Wyatt, *Can You Say That on TV? Broadcasters Aren't Sure*, N.Y. TIMES, June 22, 2012, at B6).

91. See Arthur S. Hayes, *Broadcast Indecency Now Adjudicated by Tweet*, USA TODAY, Apr. 25, 2013, at 10A.

92. It has been observed that:

[T]he FCC's indecency enforcement regime as it applies to fleeting expletives and isolated nudity is both overinclusive and underinclusive. It is overinclusive because it penalizes these alleged indecencies without any evidence that one four-letter word or an isolated glimpse of Janet Jackson's breast is harmful to children. It is underinclusive because the policy exempts, on a case-by-case basis, some of these same words and images if they are essential for artistic, educational, or newsworthy purposes.

Day & Weatherby, *supra* note 24, at 500.

93. See Richards & Weinert, *supra* note 89, at 662 (writing that technological advances and media-consumption habits since *Pacifica* have rendered the two primary rationales of the decision—pervasiveness of the broadcast medium and the protection of children—obsolete).

Weinert coyly noted, *Fox Television Stations* “arguably accomplished one thing for certain: ensuring that there will be” another such case.⁹⁴

II. INDECENCY AND THE FCC AFTER *FOX TELEVISION STATIONS*: TARGETING EGREGIOUS INCIDENTS, REQUESTING PUBLIC COMMENT AND DUMPING THOUSANDS OF AGING AND STALE COMPLAINTS

Following the Supreme Court’s failure in June 2012 to address the First Amendment issues in *Fox Television Stations*, the FCC took several steps regarding broadcast indecency. These measures included: (1) adding a new, interim wrinkle to its indecency policy; (2) discarding a backlog of indecency complaints; and (3) calling for public comment on its current policy, particularly as it affects isolated expletives. Those measures are described in that order below.

A. *Tentative Steps Toward a Shift in Policy*

In September 2012, then-Chairman Julius Genachowski announced that the FCC was “reviewing its indecency enforcement policy to ensure the agency carries out Congress’s directive in a manner consistent with vital First Amendment principles. . . . In the interim, [he] directed the Enforcement Bureau to focus its resources on *the strongest cases* that involve egregious indecency violations.”⁹⁵ This was the first signal that an official change in indecency policy might lie ahead. It also flowed naturally from Justice Kennedy’s closing observation in *Fox Television Stations* that “this opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.”⁹⁶

Genachowski’s September 2012 statement occurred at the same time the Department of Justice announced it was dropping a lawsuit “against Fox Broadcasting and four Fox-owned TV stations over a 2003 episode of the show *Married by America* that

94. *Id.* at 663.

95. See Cynthia Littleton, *DOJ Nixes Indecency Suit*, DAILY VARIETY, Sept. 24, 2012, at 12 (emphasis added).

96. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012).

featured strippers.”⁹⁷ It thus seemed like a more free-speech friendly indecency policy was in the offing.

By February 2013, however, no further word had come from the FCC. The silence caused an official from the Parents Television Council⁹⁸ (“PTC”) to speculate at the time that Genachowski was “trying to run out the clock”⁹⁹ before officially announcing his resignation from the FCC. “All indications are that Chairman Genachowski does not want to deal with this,” Dan Isett, director of public policy for the PTC, told a reporter from *The Hill*.¹⁰⁰

In contrast, a February 2013 editorial in *Broadcasting & Cable* magazine lauded Genachowski’s proposal “for ratcheting [the FCC] back from the brink of censorship.”¹⁰¹ It added that “playing national nanny is way down the list of the FCC under chairman Julius Genachowski.”¹⁰²

Genachowski, indeed, announced his resignation on March 22, 2013.¹⁰³ Perhaps reflecting his reluctance to tackle indecency head-on during his tenure, Genachowski’s resignation press release focused on his accomplishments with broadband policy and mobile technology.¹⁰⁴ It was silent, however, on indecency, despite *Fox Television Stations* having been decided on his watch.¹⁰⁵

Ten days later and with Genachowski having already announced his resignation, the initial waiting game would be over. On April 1, 2013, the FCC revealed both that it had jettisoned a

97. Alex Ben Block, *Justice Department Drops Fox Indecency Case Over Strippers on Reality Show*, HOLLYWOOD REP. (Sept. 21, 2012), <http://www.hollywoodreporter.com/thresq/married-america-fox-strippers-indecency-373034>.

98. The mission of the Parents Television Council is “[t]o protect children and families from graphic sex, violence and profanity in the media, because of their proven long-term harmful effects.” *The PTC Mission*, PARENTS TELEVISION COUNCIL, <http://w2.parentstv.org/main/About/mission.aspx> (last visited Dec. 16, 2016).

99. Brendan Sasso, *FCC Shows Little Interest in Policing Indecency on TV*, THE HILL (Feb. 03, 2013, 11:00 AM), <http://thehill.com/policy/technology/280679-fcc-shows-little-interest-in-policing-tv-indecency>.

100. *Id.*

101. Editorial, *Let’s Not Go There*, BROAD. & CABLE, Feb. 11, 2013, at 26.

102. *Id.*

103. Cecilia Kang, *FCC Chairman Announces Resignation*, WASH. POST (Mar. 23, 2013), https://www.washingtonpost.com/business/technology/fcc-chairman-announces-resignation/2013/03/22/c748f8a0-92f3-11e2-ba5b-550c7abf6384_story.html.

104. See Press Release, Fed. Commc’s Comm’n, Chairman Julius Genachowski Announces He Will Step Down From the Federal Communications Commission in Coming Weeks (Mar. 22, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-319730A1.pdf.

105. See *id.*

whopping one million aging indecency complaints and that it was seeking public comment regarding its indecency policy.¹⁰⁶ Those two developments are addressed below in Parts II.B and C.

B. *The Massive Dumping of Indecency Complaints*

While *Fox Television Stations* was working its way up to the Supreme Court, the FCC largely “put enforcement of broadcast indecency complaints on hold.”¹⁰⁷ Additionally, Genachowski had demonstrated “little interest in making broadcast indecency a priority.”¹⁰⁸ Indeed, as Eriq Gardner notes, Genachowski “moved the agency away from aggressive indecency policing of broadcast television.”¹⁰⁹

The result of this hands-off, wait-for-the-Court-to-rule approach was a burgeoning backlog of indecency complaints. Professor Christopher Fairman notes that by the time the Court finally resolved *Fox Television Stations* in June 2012, “the FCC had approximately 1.5 million indecency complaints pending, involving about 9,700 broadcasts.”¹¹⁰ That, however, would change rapidly.

Shortly after *Fox Televisions Stations*, the FCC reduced its backlog of indecency complaints by more than one million—a figure equaling 70 percent of all then-outstanding complaints.¹¹¹ In just six months—from September 2012 through February 2013—the Commission went from having 1.48 million complaints to about 465,000.¹¹²

The radical reduction happened for several reasons. As the FCC stated in an April 2013 press release, the dramatic drop occurred “principally by closing pending complaints that were beyond the statute of limitations or too stale to pursue, that in-

106. FCC Reduces Backlog *supra* note 19, at 4082.

107. Ted Johnson, *Election: Hollywood Awaits Decisions on Key Issues*, DAILY VARIETY, Nov. 5, 2012, at 1.

108. Ted Johnson, *Expletive Backlog*, DAILY VARIETY, Feb. 6, 2013, at 6.

109. Eriq Gardner, *FCC Head Julius Genachowski Confirms Departure to Staffers*, HOLLYWOOD REP. (Mar. 22, 2013), <http://www.hollywoodreporter.com/news/fcc-head-julius-genachowski-confirms-430426>.

110. Fairman, *supra* note 88, at 634.

111. FCC Reduces Backlog, *supra* note 19, at 4082.

112. Ted Johnson, *FCC Chair Proposes Policy to Focus Only on ‘Egregious’ Indecency Cases*, VARIETY (Apr. 1, 2013), <http://variety.com/2013/tv/news/fcc-chair-genachowski-fleet-ing-expletives-on-egregious-indecency-cases-1200331440>.

volved cases outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent.”¹¹³

Attorneys Gregg Leslie of the Reporters Committee for Freedom of the Press and Kristen Rasmussen of Dow Lohnes PLLC emphasize that these dismissals were “based, not on substantive evaluations of whether the material at issue is indecent under *FCC v. Fox*, but rather on a number of procedural grounds.”¹¹⁴ As such, the pair contend that “this process of filtering out the easy cases . . . does nothing to address the lingering questions about whether a particular broadcast can be ruled indecent post-*FCC v. Fox*.”¹¹⁵

The massive dumping of complaints drew sharp criticism in some quarters. Tim Winter, president of the PTC, directly linked the jettisoning of complaints to Genachowski’s proposal to target only egregious incidents of indecency addressed above in Part II.A. Winter asserted in April 2013 that “[t]he fact that the FCC already dismissed millions of complaints means a complete change in policy has been made without public input or approval from the rest of the Commission. This is an outrage.”¹¹⁶ Melissa Henson, then director of Grassroots Education and Advocacy for the PTC, added that some of the dumped complaints were only “stale because of the FCC’s inaction.”¹¹⁷ In other words, it was only the FCC’s own foot dragging that caused the complaints to grow stale in the first place, thus creating a ready-made excuse for them to be dumped.

That the PTC would worry about the dumped complaints seems particularly fitting. Attorney David Oxenford, who represents broadcasters, suggests that “[i]t may well be that many of the complaints that have been dismissed were ones filed by pres-

113. FCC Reduces Backlog, *supra* note 19, at 4082.

114. Gregg P. Leslie & Kristen Rasmussen, *FCC v. Fox: A Decision That Does Little to Clear the Air in Regulation of Fleeting Expletives in News Broadcasts*, 4 J.L. TECH. & INTERNET 353, 369 (2013).

115. *Id.* at 370.

116. Press Release, Parents Television Council, PTC Responds to FCC’s Proposal to Limit Broadcast Decency Enforcement (Apr. 1, 2013), <http://w2.parentstv.org/Main/News/Detail.aspx?docID=2771>.

117. Melissa Henson, *When Did the FCC Become a Lobbying Arm of the Entertainment Industry?*, PARENTS TELEVISION COUNCIL: TV WATCHDOG (Apr. 10, 2013), <http://w2.parentstv.org/blog/index.php/2013/04/10/when-did-the-fcc-become-a-lobbying-arm-of-the-entertainment-industry/>.

sure groups—submitting thousands of complaints against single incidents, while many of the protests by single individuals against individual stations are still pending.”¹¹⁸

C. *A Call for Public Comment Without Subsequent Action*

On April 1, 2013, the FCC began seeking public comment on whether to change “its current broadcast indecency policies or maintain them as they are.”¹¹⁹ Specifically, the Commission requested input on how it should regulate “isolated expletives,”¹²⁰ and it queried, by way of example, if it should “treat isolated (non-sexual) nudity the same as or differently than isolated expletives.”¹²¹

The notice was officially published in the *Federal Register* on April 19, 2013, thus establishing May 20, 2013 as the deadline for comment filing and June 18, 2013 as the deadline for replies.¹²² Those deadlines, however, proved short lived. They were soon extended until June 19, 2013 for comments and July 18, 2013 and replies after the NAB requested more time, due to the complex nature of the issues and the “need to consider the views of its members on the issues and the impact on stations and networks.”¹²³

The deadline for replies was later extended again—until August 2, 2013—upon a request by College Broadcasters, Inc.¹²⁴ That group claimed more time was needed because of “the substantial number of comments filed in the proceeding, the scope and com-

118. David Oxenford, *FCC Seeks Comments on Its Indecency Policy—How Should the Commission Enforce Its Policies After Last Year’s Supreme Court Ruling?*, BROADCAST L. BLOG (Apr. 3, 2013), <http://www.broadcastlawblog.com/2013/04/articles/fcc-seeks-comments-on-its-indecency-policy-how-should-the-commission-enforce-its-policies-after-last-years-supreme-court-ruling/>.

119. FCC Reduces Backlog, *supra* note 19, at 4082; *see also* 78 Fed. Reg. 23,563 (Apr. 19, 2013) (setting forth the official publication of the April 1, 2013 public notice, establishing May 20, 2013 as the deadline for written comments, and establishing June 18, 2013 as the deadline for reply comments).

120. FCC Reduces Backlog, *supra* note 19, at 4082.

121. *Id.* at 4082–83.

122. *Id.*; 78 Fed. Reg. at 23,563.

123. FCC Extends Pleading Cycle for Indecency Cases Policy, 28 FCC Rcd. 6566 (May 10, 2013) (public notice).

124. FCC Extends Reply Comment Dates for Indecency Cases Policy, 28 FCC Rcd. 10130 (July 12, 2013) (public notice).

plexity of the notice, and its own limited budgets and staffing constraints during the summer portion of the academic year.”¹²⁵

Ultimately, when the August 2, 2013 deadline expired, the FCC had received more than 102,000 comments and replies.¹²⁶ Although large, that figure pales in comparison to the more than four million comments received on its net neutrality policy.¹²⁷

Beyond requesting comments about the Commission’s indecency policy, however, the April 1, 2013 public notice also made explicit what Chairman Genachowski first suggested back in September 2012¹²⁸—namely, that the FCC since that time had focused its indecency efforts solely on “egregious cases.”¹²⁹ The notice also emphasized that the Commission’s Enforcement Bureau was “actively investigating egregious indecency cases”¹³⁰ and that Genachowski’s directive to concentrate “indecency enforcement resources on egregious cases remains in force” until a more complete record is established for the full Commission’s consideration.¹³¹

Predictably, the April 2013 formal announcement of targeting only egregious indecency cases drew a swift and stern rebuke from the PTC. PTC President Tim Winter blasted the move as “unnecessarily weaken[ing] a decency law that withstood a ferocious, ten-year constitutional attack waged by the broadcast industry.”¹³² Dan Isett, the PTC’s director of public policy, called the decision wrong as a matter of “both policy and process” because Genachowski “acted unilaterally, with no public input.”¹³³

But what about the official comments filed with the FCC? An August 2013 review by *Broadcasting & Cable* magazine indicates

125. *Id.*

126. Cheryl Wetzstein, *Viewers Express Outrage as FCC Considers Easing TV Indecency Standards*, WASH. TIMES (Aug. 4, 2013), <http://www.washingtontimes.com/news/2013/aug/4/viewers-express-outrage-at-fcc-considering-easing-/>.

127. Rebecca R. Ruiz & Steve Lohr, *F.C.C. Votes to Regulate the Internet as a Utility*, N.Y. TIMES, Feb. 27, 2015, at B1.

128. *See supra* Part II.A.

129. FCC Reduces Backlog, *supra* note 19, at 4082.

130. *Id.*

131. *Id.* at 4083.

132. Press Release, Parents Television Council, PTC Responds to FCC’s Proposal to Limit Broadcast Decency Enforcement (Apr. 1, 2013), <http://w2.parentstv.org/Main/News/Detail.aspx?docID=2771>.

133. Michael Overall, *Clarity Needed in FCC Rules*, TULSA WORLD, May 6, 2013, at A9.

that over-the-air (or terrestrial) broadcasters and their trade organizations are virtually unified in the belief that it is unfair to hold only them subject to indecency regulations while the Commission gives a free pass to cable channels and other modes of communication.¹³⁴ As the NAB argued in its June 19, 2013 filing with the FCC:

[W]ith regard to the government's concern that children may be exposed to adult-oriented or otherwise inappropriate material, there is *no principled way to focus solely on broadcast content*. Children in particular enjoy unfettered access to content via devices that they carry in their pockets and backpacks—access that usually involves no subscription or special parental involvement. In this environment, the constitutionality of a broadcast-only prohibition on indecent material is increasingly in doubt.¹³⁵

Perhaps more importantly, particularly as it affects the WDBJ newscast indecency case at the heart of this article, the RTDNA argued in its comments that “the Commission should immediately ameliorate the chilling impact on broadcast journalism by *exempting from indecency regulation language or visuals contained in news and public affairs programming*.”¹³⁶ In calling for a bona fide newscast exemption from indecency regulations, the RTDNA reasoned that:

[B]roadcast journalists face innumerable decisions, many of which must be made on a real-time or near-real-time basis, regarding which events warrant attention and how best to present them to viewers. Increasingly, broadcasters have to exercise creativity in order to keep audiences captivated due to the presence of ever-growing competition from cable and satellite news networks, not to mention Internet sources of news programming, and sometimes they may attempt to do so by utilizing creative, or even unorthodox, program formats that stray from the model of traditional “news.”¹³⁷

The RTDNA further asserts that “[t]he First Amendment compels the FCC to defer to broadcasters’ good faith judgment re-

134. See John Eggerton, *Indecent Exposure*, BROAD. & CABLE, July 8, 2013, at 24.

135. Comments of the National Association of Broadcasters at i, FCC Seeks Comment of Adopting Egregious Cases Policy, No. 13-86 (FCC June 19, 2013) (emphasis added), <http://www.nab.org/documents/filings/IndecencyReplyComments0802.pdf> [hereinafter Comments of the NAB].

136. Comments of the Radio Television Digital News Association at 19, FCC Seeks Comment of Adopting Egregious Cases Policy, No. 13-86 (FCC June 19, 2013) (emphasis added), <http://www.rtdna.org/uploads/files/RTDNA%20FCC%20Indecency%20Comments.pdf> [hereinafter Comments of the RTDNA].

137. *Id.* at 18.

garding when it may be appropriate to include expletives and nudity in order to convey messages or storylines to viewers and listeners.”¹³⁸ It emphasized that enforcing a “policy under which expletives and nudity in news and public affairs programs are considered actionable threatens to dilute the first-hand, eyewitness images, sounds and accounts unique to broadcast journalism, resulting in the receipt of *less* information by the public and concomitant harm to the public interest.”¹³⁹

As of late October 2016—more than two-and-a-half years after the deadline for public comments—the FCC had failed to take any action, and it had not proposed a new indecency policy. The Commission, in fact, had not even issued a statement describing why it was waiting so long.

With this in mind—and, particularly former Chairman Genachowski’s unilateral decision to target only egregious indecency cases and the RTDNA’s subsequent arguments that bona fide newscasts should be exempted from indecency sanctions—the article now turns to the *In re WDBJ Television, Inc.* case.

III. AN EGREGIOUS INTRUSION INTO THE NEWSROOM? EXAMINING THE PROPOSED FINE AGAINST WDBJ

This part analyzes and critiques the Notice of Apparent Liability (“NAL”) issued in March 2015 by the FCC against WDBJ Television, Inc. for airing during a newscast a small, fleeting image of a hand fondling an erect penis.¹⁴⁰ Initially, Part A provides a detailed description of the news segment at issue in the case, drawing on the facts as presented by both the television station and the FCC.

Part B describes the FCC’s reasons for declaring the segment indecent under its two-part indecency test, including the Commission’s analysis of the three key factors it takes into account in deciding whether a broadcast is patently offensive. Significantly, Part B emphasizes that while the FCC claims that examining the

138. *Id.* at 19.

139. *Id.* at 21.

140. See WDBJ Television, Inc., 30 FCC Rcd. 3024, 3026 (Mar. 23, 2015) (setting forth the NAL at issue).

“full context”¹⁴¹ in which content appears “is critically important,”¹⁴² its actual analysis in *In re WDBJ Television* completely decontextualized the 2.7-second image from the rest of the 190-second news story¹⁴³ about a public controversy in which it appeared. The image was incidental and peripheral to the overall story in terms of both where and for how long it appeared. Additionally, Part B asserts that the FCC’s analysis of all three patent-offensiveness factors was cursory and conclusory at best.

Finally, Part C highlights three key arguments against the FCC’s action made either or both by the attorneys for WDBJ in their official opposition to the NAL¹⁴⁴ and by the NAB and RTDNA in a joint statement filed with the Commission in July 2015.¹⁴⁵

A. *The Broadcast*

On July 12, 2012, as part of its “top story”¹⁴⁶ on the 6:00 PM newscast, Roanoke station WDBJ “broadcast an image of sexual activity involving . . . an erect penis being stroked.”¹⁴⁷ It was part of a segment centering on a retired adult film star who was volunteering as an emergency medical technician (“EMT”) in the Roanoke suburb of Cave Spring.¹⁴⁸

Miami-born actress Tracy Rolan appeared in more than 300 films between 2003 and 2012 under the name Harmony Rose.¹⁴⁹

141. *Id.* at 3027.

142. *Id.*

143. See Opposition of WDBJ Television, Inc. to Notice of Apparent Liability at 2, *In re WDBJ Television, Inc.*, Nos. EB-IHD-14-00016819 & EB-12-IH-1363 (FCC June 30, 2015) [hereinafter Opposition of WDBJ Television], https://rtdna.org/uploads/files/WDBJ%20Opposition%20to%20NAL%2006_30_15.pdf (noting that “[t]he image appeared for 2.7 seconds during a three minute and ten second story”).

144. *Id.*

145. Comments of the NAB, *supra* note 135 (setting forth the complete joint statement of the NAB and RTDNA).

146. WDBJ Television, 30 FCC Rcd. at 3025.

147. *Id.* at 3024.

148. See *id.* at 3025.

149. *Harmony Rose*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm1701090/> (last visited Dec. 16, 2016). Richard Arnold, chief executive officer of adult movie company Pure Play Media, once called Rose “one of the greatest performers of all time.” *Pure Play Media Releases Immoral ‘Titterific’ and ‘Fuck a Fan 8,’ AVN* (May 7, 2010), <https://avn.com/business/press-release/video/Pure-Play-Media-Releases-Immoral-Products-Titterific-Fuck-A-Fan-8-396095.html>.

In the *Huffington Post*'s words, she was experienced not only in "getting the blood flowing," but also in getting some local officials "hot and bothered" over her new vocation.¹⁵⁰ When WDBJ's story aired, Rolan already had passed a criminal background check and was working as an EMT "on a standard six-month probationary period after which the squad's members [would] vote and decide whether Rose becomes a permanent member."¹⁵¹

Public reaction,¹⁵² and that of at least one government official, to Rolan's new job drew WDBJ's attention. According to station president Jeffrey Marks, Rolan's:

[B]ackground and previous profession became controversial and residents of the community raised questions about whether she should be permitted to serve as an EMT. One stated concern was whether the former actress was continuing to benefit from sales of her films and thus from her allegedly improper former career. The County Fire Chief was sufficiently concerned to write to the County Attorney to ask whether her services should be terminated.

WDBJ's News Department determined that the controversy was of sufficient public interest to warrant coverage.¹⁵³

WDBJ thus aired a three-minute, twenty-second segment questioning "whether [Rolan] should be permitted to serve as an EMT."¹⁵⁴ The story was replete with all of the traditional trappings of solid reportage: (1) interviews with Rolan's EMT colleagues; (2) interviews with people Rolan had assisted as an EMT; (3) comments from people who questioned the propriety of her serving as an EMT; and (4) quotes from the fire chief and county attorney about Rolan.¹⁵⁵

150. *Ex-Porn Star Harmony Rose, AKA Tracy Rolan, Volunteers as EMT*, HUFFINGTON POST (July 14, 2012), http://www.huffingtonpost.com/2012/07/14/harmony-rose-porn-star-volunteer-rescue-squad_n_1671830.html.

151. *Harmony Rose Stirs Controversy as Volunteer EMT*, AVN (July 13, 2012), <http://business.avn.com/articles/video/Harmony-Rose-Stirs-Controversy-as-Volunteer-EMT-481834.html>.

152. Not all public discussion of her participation, however, was negative. As one Facebook user commented on WDBJ's online coverage of the matter before it was taken down, "[i]t's not like she was doing porn in the squad building." *Ex-Porn Star Harmony Rose*, *supra* note 150.

153. Opposition of WDBJ Television, *supra* note 143, at Appendix A, paras. 5–6.

154. *Id.*; WDBJ Television, 30 FCC Rcd. 3024, 3025.

155. Opposition of WDBJ Television, *supra* note 143, at Appendix A, (Mar. 23, 2015).

Perhaps more colorfully, the story also included images from the website of a distributor of her films,¹⁵⁶ as well as a video in which Rolan “appear[ed] to suck on her finger.”¹⁵⁷ Included along with this video were screen-grabs of the distributor’s surrounding website, which were “bordered on the right side by boxes showing video clips from other films” available from the distributor.¹⁵⁸

Alongside a screenshot from a page of Google search results for the name Harmony Rose—with blurred-out hyperlinks to active adult sites¹⁵⁹—one box “contain[ed] the image of sexual activity involving manipulation of an erect penis.”¹⁶⁰ This box occupied only about 1.7 percent of the entire TV viewing area and appeared in a corner for 2.7 seconds.¹⁶¹

WDBJ maintains that when the broadcast aired, it was converting its equipment for digital operation.¹⁶² Non-updated production and editing equipment “displayed only a 4 by 6 image” and “did not allow [the production team] to adjust the monitor to view parts of a widescreen image that were outside of the area shown in the monitor.”¹⁶³ Thus, when “access[ing] Internet material, [the equipment] did not enable the operator to see material that was not in the center of a website.”¹⁶⁴

According to WDBJ, because the row of boxes containing the explicit image appeared on the far right edge of the website, they could not be accessed by its journalists when downloading the images for the segment.¹⁶⁵ Furthermore, the boxes were not seen by the reporter and two managers “who reviewed the story before it was broadcast, since editorial review at WDBJ took place on the same editing equipment.”¹⁶⁶ Unfortunately, when the story

156. *Id.*

157. WDBJ Television, 30 FCC Rcd. at 3025.

158. *Id.*

159. Opposition of WDBJ Television, *supra* note 143, at Appendix A.

160. WDBJ Television, 30 FCC Rcd. at 3025.

161. Opposition of WDBJ Television, *supra* note 143, at 10.

162. *Id.* at 9.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 10.

was broadcast and viewed on widescreen television sets, the once-hidden boxes were suddenly visible.¹⁶⁷

Regardless of how or why the material made it past the production crew, WDBJ quickly “deleted the story from its online website [and] decided that the story would not be shown again in any other newscasts.”¹⁶⁸ Following complaints from offended viewers, the station also apologized for what it referred to as “the brief and inadvertent inclusion of unrelated material in its newscast.”¹⁶⁹

B. *The Notice of Apparent Liability*

Almost three years later, on March 23, 2015, the FCC issued a NAL proposing to fine the station’s owners \$325,000 for violating the Commission’s indecency standards.¹⁷⁰ The FCC defines indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”¹⁷¹ This definition breaks down into a two-part test: (1) Is there a depiction of sexual organs or activities?; and (2) If so, then is that depiction also patently offensive?

Regarding the first question, it was undisputed that the broadcast included the requisite subject matter because it depicted “a nude sexual organ, i.e., a penis . . . [and] sexual activity, i.e., a hand stroking an erect penis.”¹⁷² The controversy, therefore, focused solely on the second part of the test—whether the depiction was patently offensive.

The FCC assesses three key factors for patent offensiveness. They are “(1) the explicitness or graphic nature of the material; (2) whether the material is repeated or dwelled upon; and (3) whether it panders, titillates, or shocks.”¹⁷³ While considering these three factors, a 2001 FCC policy statement makes it clear that “the *full context* in which the material appeared is critically im-

167. *Id.* at 9–10.

168. *Id.* at 10.

169. *Id.*

170. WDBJ Television, 30 FCC Rcd. 3024, 3024 (Mar. 23, 2015).

171. See *supra* note 9 (providing a link for more information about the Commission’s indecency standards); Policy Statement, 16 FCC Rcd. 7999, 8000 (Apr. 26, 2001).

172. WDBJ Television, 30 FCC Rcd. 3024, 3028 (Mar. 23, 2015).

173. *Id.* at 3028–29.

portant.”¹⁷⁴ Context is key because every indecency case involves a “particular mix of these, and possibly other, factors.”¹⁷⁵

The NAL explained that the first factor—whether the material was explicit and graphic—was satisfied because “the video of the penis and manipulation thereof was shot at close range.”¹⁷⁶ Providing no explanation for why this fact “weighs heavily in our assessment of the factors concerning whether the material is patently offensive,”¹⁷⁷ the NAL cursorily asserted the image “was extremely graphic and explicit”¹⁷⁸ and left it at that.

Under the second factor—whether the material was repeated or dwelled upon—the NAL openly acknowledged the news segment “did not extensively dwell on or contain repetitions of sexual material.”¹⁷⁹ Nonetheless, the FCC found that the offending image was “not so brief as to preclude an indecency finding.”¹⁸⁰ The Commission supported this by pointing out that the 2.7-second image was long enough “to attract and hold viewers’ attention [and] several complainants note[d] that they viewed the material perfectly well.”¹⁸¹ In brief, the FCC’s logic was: if viewers can spot it, then it is long enough to punish.

Turning to the third factor—whether the content shocks, panders, or titillates—the FCC typically considers the “manner and purpose of a presentation,” the latter of which “can substantially affect whether it is deemed to be patently offensive as aired.”¹⁸² Yet, the NAL skated over the purpose analysis and instead contended that “[i]n evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster.”¹⁸³ The FCC basically defaulted to viewers’ reactions to find the material was shocking, rather than performing its own analysis. To wit, the FCC reasoned that “the material indeed shocked the audi-

174. 16 FCC Rcd. at 8002.

175. *Id.* at 8003.

176. WDBJ Television, 30 FCC Rcd. at 3029.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Policy Statement, 16 FCC Rcd. 7999, 8010 (Apr. 26, 2001).

183. WDBJ Television, 30 FCC Rcd. at 3029.

ence, as reflected in the complainants' disbelief that the Station aired" the image.¹⁸⁴ The FCC's logic here boils down to this—if a few viewers who complain are shocked, then so are we! Based on all three factors, the FCC thus declared the video to be "patently offensive as measured by contemporary community standards for the broadcast medium."¹⁸⁵

The NAL's declaration, however, is plagued by a pair of intertwined and recurring problems. The first is that the FCC untethered its analysis from established doctrinal moorings by decontextualizing its focus; the second is that its analysis is conclusory and self-referentially circular.

As described in the NAL itself, "full context" serves a substantial role in determining the result of the indecency test applied.¹⁸⁶ So without considering all the surrounding facts and circumstances, the test fails to properly measure the level of actionable indecency.

The first of the three patent-offensiveness factors examines the explicitness and graphicness of the content, but the NAL never defines what those terms mean or entail. Instead, it simply refers to a handful of viewer complaints and summarily concludes that the material was explicit and graphic—despite the fact that the "standard is that of an average broadcast viewer or listener,"¹⁸⁷ not the sensibilities of any individual complainant. Questions fill the void left by the NAL's silence: What is the standard of the average broadcast viewer watching a 6:00 PM local TV newscast? Is newsworthiness a mitigating factor for graphicness, or is it relevant on the third prong? Does the mere fact that a few viewers allege something make it so?

Applying the second factor—repeating or dwelling upon allegedly indecent material—is also troublesome. In prior cases, "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."¹⁸⁸ It is undisputed

184. *Id.*

185. *Id.* at 3030.

186. *Id.* at 3027.

187. WPBN/WTOM License Subsidiary, Inc., 15 FCC Rcd. 1838, 1841 (Jan. 14, 2015) (memorandum order and opinion).

188. Policy Statement, 16 FCC Rcd. 7999, 8008 (Apr. 26, 2001).

that the material was not repeated, and a 2.7-second clip within the context of a 200-second segment certainly seems both passing and fleeting.

Furthermore, the NAL's application of the third factor was, at times, circular and self-defeating. To find that the material titillated the audience simply because it depicted a sexual organ confuses titillation with the uncontested threshold prong of the indecency analysis regarding whether it depicts a sexual organ. It is well established that the video depicted a penis; whether it was intended to shock, pander, or titillate, however, is another matter that was virtually untouched by the Commission.

To the contrary, the story's newsworthiness, lack of focus on the objectionable material, brevity with which it was shown, and the station's haste to remove the material from its website and not re-air it, are much more indicative of an embarrassing mistake than the anticipatory desire to shock, pander, or titillate.

Finally, the Commission failed to contextualize the video within the entire news segment. The FCC's supposed "full context"¹⁸⁹ approach is not unique to indecency analysis. In obscenity prosecutions, for example, current doctrine requires the work in question to be examined as a whole.¹⁹⁰ Likewise, in libel cases, an ostensibly defamatory work must be examined contextually to ascertain liability.¹⁹¹ In the NAL, however, the Commission all but ignored the more than 98 percent of the segment that did not display sexual or excretory organs. Instead, it focused exclusively on an apparently accidental 2.7-second excerpt in which less than 2 percent of the screen depicted a sexual organ in the far corner of the screen.

189. *Id.* at 8002.

190. *See Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity as being "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, *taken as a whole*, do not have serious literary, artistic, political, or scientific value") (emphasis added).

191. *See, e.g., Levesque v. Doocy*, 560 F.3d 82, 88 (1st Cir. 2009) (stating that "a court should consider the context in which the challenged statement is made, viewing it within the communication as a whole").

C. *Key Arguments of WDBJ & the NAB/RTDNA in Opposition to the Notice of Apparent Liability*

Although the statements filed with the FCC in opposition to the NAL of both WDBJ and the NAB/RTDNA include multiple arguments, this part concentrates on perhaps the three most critical ones. They are addressed separately below.

1. An Unreasonable Intrusion into News Judgment and Editorial Discretion of Journalists

Today, the FCC today readily acknowledges on its website that it “cannot interfere with a broadcaster’s selection and presentation of material for the news.”¹⁹² This principle is far from new, having been recognized for decades by the United States Supreme Court.

More than twenty years ago, for instance, the Court remarked that “[t]he FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it ‘has no authority and, in fact, is barred by the First Amendment and [47 U.S.C. § 326]¹⁹³ from *interfering with the free exercise of journalistic judgment*.’”¹⁹⁴ Some two decades prior to that, the Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee* considered the powers delegated by Congress to the FCC under the Telecommunications Act of 1934.¹⁹⁵ It observed there “that Congress intended to permit private broadcasting to develop *with the widest journalistic freedom consistent with its public obligations*. Only when the interests of the public are found to outweigh the private jour-

192. *Consumer Guide: Complaints About Broadcast Journalism*, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/complaints-about-broadcast-journalism> (last visited Dec. 16, 2016).

193. This statute, adopted as part of the Telecommunications Act of 1934, provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (Supp. II 2015).

194. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *In re Hubbard Broad. Inc.*, 48 F.C.C.2d 517, 520 (F.C.C. 1974)) (emphasis added).

195. 412 U.S. 94, 97 (1973).

nalistic interests of the broadcasters will government power be asserted within the framework of the Act.”¹⁹⁶

There is, then, a more than forty-year tradition of the high Court valuing the importance of shielding broadcast journalism from FCC censorship. Preserving a wide range of journalistic discretion is, indeed, a necessary component of retaining a broad flow of information to the public. As the NAB and RTDNA argue on behalf of WDBJ in opposition to the FCC’s \$325,000 proposed fine, “the editorial judgment of broadcast licensees in presenting news . . . [is] at the core of the First Amendment’s free press guarantee.”¹⁹⁷

Indeed, the proposed fine against WDBJ under the FCC’s indecency enforcement powers directly butts up against First Amendment protection of broadcast journalism. The station thus argues that the FCC’s intimation that covering a matter of public controversy involving an adult film star is not fit for public consumption “is not an appropriate call for the government to make.”¹⁹⁸ It further asserts that the Commission cannot “legitimately substitute its news judgment for that of WDBJ.”¹⁹⁹ The NAB and RTDNA contend that if the fine is upheld, a pall of self-censorship will fall over broadcast journalists, who:

[W]ill have little choice but to steer far clear of matters of potential controversy and to cut back on live programming that poses any degree of risk, thus depriving viewers and listeners of coverage of important local and national news events. The result is the exact opposite of what the Constitution demands.²⁰⁰

What the Constitution demands—for the sake of both the public and news organizations—is robust public discourse on public controversies, even local ones about the propriety of permitting a former adult-movie actress to serve as an EMT. To paraphrase Justice John Marshall Harlan’s observation in *Cohen v. Califor-*

196. *Id.* at 110 (emphasis added).

197. Comments of the NAB, *supra* note 135, at 18 (quoting, in part, the Omnibus Indecency Order, 21 FCC Rcd. 2664, 2668 (Mar. 18, 2006) and making sure to “not suggest[] that WDBJ made an affirmative editorial decision to include in its newscast the fleeting image at issue”).

198. Opposition of WDJB Television, *supra* note 143, at 43.

199. *Id.*

200. Comments of the NAB, *supra* note 135, at 22.

nia,²⁰¹ the FCC has no right to cleanse public airwaves to the point where they are topically “palatable to the most squeamish among us,” and one “cannot indulge the facile assumption that [the FCC] can forbid particular [news stories] without also running a substantial risk of suppressing ideas in the process.”²⁰²

Providing the FCC discretion over which topics may be shown on TV news therefore is “not only an affront to journalistic freedom, but also offends the First Amendment in the same manner as would direct content regulation.”²⁰³ As the RTDNA contends, an FCC “policy under which expletives and nudity in news and public affairs programs are considered actionable threatens to dilute the first-hand, eyewitness images, sounds and accounts unique to broadcast journalism, resulting in the receipt of *less* information by the public and concomitant harm to the public interest.”²⁰⁴

2. Broadcasters Continue to Lack Clear Guidance and Fair Notice About What is Permissible

“Since *Pacifica*,” WDBJ’s opposition statement argues, “the Supreme Court repeatedly has reminded the government that it cannot regulate speech absent clear standards that limit administrative discretion.”²⁰⁵ What the Court has not done, however, as this article points out,²⁰⁶ is revisit *Pacifica*’s facial constitutionality.²⁰⁷ The result is that the Court’s avoidance of the First Amend-

201. 403 U.S. 15 (1971).

202. *Id.* at 25–26.

203. Comments of the NAB, *supra* note 135, at 6.

204. Comments of the RTDNA, *supra* note 136, at 21; FCC Seeks Comment on Adopting Egregious Cases Policy, Docket No. 13-86 (June 19, 2013), <http://www.rtdna.org/uploads/files/RTDNA%20FCC%20Indecency%20Comments.pdf>.

205. Opposition of WDBJ Television, *supra* note 143, at 38.

206. See *supra* note 48 and accompanying text (describing Fox Television Station’s lack of illumination on the matter of *Pacifica*’s constitutionality).

207. It is important to note, as the station does in its opposition to the proposed forfeiture, that the Supreme Court affirmed the holding (though not the rationale) of the Second Circuit in *Fox*, which bluntly stated that the Commission’s enforcement of indecency in light of *Pacifica* has been arbitrary and confusing. See *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 330–33 (2d Cir. 2010), *aff’d*, 132 S. Ct. 2307, 2320 (2012). Although the WDBJ’s lawyers acknowledge the Second Circuit’s ruling is not binding upon the FCC, they make the case that:

[T]he FCC cannot act as if the test it purports to apply in this case is free from constitutional doubt where it has been found to be seriously deficient by the only courts ever to review it in operation. The Commission must address

ment issue, when coupled with the Commission's oscillating and seemingly arbitrary application of its indecency standards, is befuddling to beleaguered broadcasters like WDBJ, who are left with scant guidance regarding what the FCC deems inappropriate.

Even prior to *Fox Television Stations*, the Commission's enforcement of its indecency policy was too often, in the Second Circuit's view, "arbitrary and capricious."²⁰⁸ Yet, as WDBJ emphasizes, developments since *Fox* only exacerbate this confusion.²⁰⁹ As discussed earlier,²¹⁰ the FCC recognized possible problems with its indecency policies and thus, in order "to ensure they are fully consistent with vital First Amendment principles," called for public comment.²¹¹ This action, WDBJ contends, was "an acknowledgement that [the FCC] owes licensees and the public a better explanation of its constitutional reasoning."²¹² But more than 100,000 public comments and two-plus years later, the FCC has failed to take action to clarify its enforcement rules and "has yet to answer its own questions for how its policies might be changed to be consistent with 'vital First Amendment principles.'"²¹³

What is perhaps even more troubling, especially in light of the Commission's discarding of more than one million complaints to focus only on the most "egregious cases," is that neither former Chairman Genachowski nor the notice itself defined what "egregious" means.²¹⁴ In the NAL against WDBJ, the station asserts that "[t]he Commission did not even attempt to explain how a miniature and inadvertent 2.7-second shot of a sexual organ could be deemed 'egregious.'"²¹⁵ It adds that "[a]dministrative agencies are not free to announce one policy and then, without discussion or analysis, follow a different one."²¹⁶

the constitutional issues that arise from the application of its indecency test in *this* case, and it is no answer to state only that *Pacifica* is still good law.

Opposition of WDBJ Television, *supra* note 143, at 24–25.

208. *Fox Television Stations*, 613 F.3d at 324.

209. See Opposition of WDBJ Television, *supra* note 143, at 25–27.

210. See *supra* Part II discussion.

211. FCC Reduces Backlog, *supra* note 19, at 4082.

212. Opposition of WDBJ Television, *supra* note 143, at 26.

213. *Id.* at 27.

214. See *id.* at 26–27, n.26; FCC Reduces Backlog, *supra* note 19, at 4082.

215. Opposition of WDBJ Television, *supra* note 143, at 27.

216. *Id.*

In summary, as the NAB argues, “[t]he FCC’s inconsistent treatment of similar material, unpredictable decisions, and random reversals do not comport with either bedrock First Amendment principles or section 326 of the Communications Act, both of which demand an exacting standard for regulating broadcast content.”²¹⁷ Without an exacting standard, Richards and Weinert observe, “[t]he resulting quagmire for broadcasters is trying to determine just what programming is acceptable and which shows, if aired, could place their licenses in jeopardy.”²¹⁸ The practical effect is self-censorship or, in the NAB’s words, “a ‘when in doubt, leave it out’ mentality.”²¹⁹ This chilling effect portends deleterious effects on press freedoms, as news organizations have essentially been told by the FCC to “air controversial content at your peril.”²²⁰

3. WDBJ Lacked the Requisite State of Mind (Scienter) to be Fined Under First Amendment Principles

In the 2015 true threats case of *Elonis v. United States*, the United States Supreme Court made it clear that “a defendant must be ‘blameworthy in mind’ before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like.”²²¹ The federal statute under which the FCC has the power to target indecency is criminal in nature, as it provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be *fin*ed *under this title or imprisoned not more than two years, or both*.”²²²

Yet in *WDBJ Television*, the FCC has apparently misunderstood a concept that is, in the words of the Supreme Court, “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”²²³ That is,

217. Comments of the NAB, *supra* note 135, at 17.

218. Richards & Weinert, *supra* note 89, at 664.

219. Comments of the NAB, *supra* note 135, at 21.

220. *Id.*

221. 135 S. Ct. 2001, 2009 (2015).

222. 18 U.S.C. § 1464 (Supp. II 2015) (emphasis added).

223. *Morissette v. United States*, 342 U.S. 246, 250 (1952).

a guilty act is nothing—except in rare strict-liability cases²²⁴—without the requisite guilty mind.

The necessary state of mind for the crime at issue for WDBJ is “willfulness,” defined by a telecommunications statute as “the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision” of this Act.²²⁵ Willfulness is a subjective state of mind that is often, in the words of crime scholar Joshua Dressler, “used as a synonym for ‘intentional.’”²²⁶ It is a harder burden for a prosecutor to prove than mere negligence, which is a *mens rea* category that, unlike willfulness, is an objective standard that “constitutes a deviation from the standard of care that a reasonable person would have observed in the actor’s situation.”²²⁷

Regarding the fleeting sexual image at heart of this article, the NAL declares that “[b]ased upon the evidence before us, we find that WDBJ apparently willfully violated . . . the Rules.”²²⁸ To illustrate willfulness, the Commission notes that a WDBJ employee “should have been more alert to what he was downloading for broadcast from a sexually explicit website, and we cannot absolve the Licensee of responsibility because its employee failed to notice what he was downloading and preparing for broadcast.”²²⁹

If anything, it would seem that the phrase “should have been more alert”—obsolescent editing equipment notwithstanding²³⁰—

224. Strict liability crimes, which require no scienter, have a “generally disfavored status.” *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978). Strict liability is especially frowned upon in cases implicating the First Amendment. *See Smith v. California*, 361 U.S. 147, 152 (1959).

225. 47 U.S.C. § 312(f)(1) (Supp. II 2015).

226. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 130 (7th ed. 2015).

227. *See id.* at 131 (continuing that “‘negligence’ constitutes *objective* fault: An actor is not blamed for a wrongful state of mind, but instead is punished for his morally blameworthy *failure* to . . . live up to the standards of the fictional ‘reasonable person.’”).

228. WDBJ Television, Inc., 30 FCC Rcd. 3024, 3033 (Mar. 23, 2015).

229. *Id.* The FCC continues its hapless attempt to prove one degree of scienter (willfulness) by describing what appears to be another degree of scienter (negligence) while using the language of yet a third degree of scienter: (knowingly). “[T]he Station knowingly used editing equipment whose viewing capability did not permit the editing staff to view the same content as the audience, and thus, the Licensee omitted appropriate safeguards.” *Id.*

230. WDBJ personnel maintain they had no way of actually seeing the margins of the video box until the story was broadcast. They were in the process of updating the equipment when the Harmony Rose story aired. Opposition of WDBJ Television, *supra* note 143, at 9–10. This scenario stands in stark contrast to the intent displayed in other indecency enforcement cases, such as the willfulness displayed by the news host who cogni-

is an objective assessment of reasonable care, which would place the action squarely within the confines of *negligence*, not *willfulness*. As WDBJ's attorneys argue, it would be particularly odd for the producers to have intentionally blurred out URLs to pornographic websites, yet willfully allow a pornographic image to make it on the air.²³¹ This fact, along with the station's swift removal of the broadcast from its website, points to apparent negligence at worst, but certainly not willfulness.

The FCC's blurring of the lines between willfulness and negligence, the NAB laments, has:

[D]istort[ed] the legal, as well as the common sense, understanding of the term "willful" to try to justify a maximum record penalty against WDBJ for unintentionally airing a sexual image for 2.7 seconds. The Commission's erroneously expansive view of willfulness in this case potentially would result in virtually all human errors, equipment failures, and unpredictable occurrences being treated as deliberate, intentional violations of federal law. . . . This draconian result, tantamount to a strict liability standard, will be felt in newsrooms across the country.²³²

With this trio of arguments against fining WDBJ for its unintentional broadcast of a fleeting, tiny sexual image—one that was peripheral to a legitimate news story—in mind, this article next concludes by encouraging the FCC to take several steps to remedy the situation.

CONCLUSION

The FCC's indecency actions since *Fox Television Stations* are erratic and capricious and, at least in WDBJ's case, satisfy no legitimate punitive rationale.²³³ For example, under retributive theory's demand for proportionality, the Commission's levying a rec-

zantly allowed men to manipulate their genitalia on live television. See *supra* notes 25–27 and accompanying text (explaining the “*Puppetry of the Penis*” incident).

231. Opposition of WDBJ Television, *supra* note 143, at 21 n.20.

232. Comments of the NAB, *supra* note 135, at 18–19, 22.

233. See DRESSLER, *supra* note 226, at 14–17 (explaining two general theories of punishment: retributivism and utilitarianism; retributivism is characterized by proportionality, which mandates that the punishment be comparable to the crime, and moral blameworthiness, which generally requires that criminal, anti-social behavior be manifested via scienter); see also Sylvia Rich, *Corporate Criminals and Punishment Theory*, 29 CAN. J.L. & JURIS. 97, 100 (2016) (describing how the concepts of proportionality and moral blameworthiness are ensconced in Western criminal thought).

ord-high \$325,000 fine for a brief, tiny, and inadvertent depiction of a sexual organ is, as the NBA argues, “tantamount to imposing a sentence of life imprisonment for petty theft.”²³⁴ In short, the punishment does not fit the ostensible crime.²³⁵

Nor does the fine comport with utilitarian punishment principles.²³⁶ In its gusto to squelch indecent speech by making an example of WDBJ, the Commission defeats the pragmatic goals of utilitarianism. That is because the sanction likely chills far more speech—in particular, more local news—than is necessary, thereby detrimentally affecting the “public interest”²³⁷ that Congress and the FCC demand broadcasters serve.²³⁸ As the NAB emphasized, the FCC’s arbitrary and heavy-handed indecency enforcement in recent years has “caused broadcasters to forego airing a broad range of programming, including coverage of political debates and memorial services of fallen soldiers”²³⁹—programming of undeniable public interest.

To rectify this situation and to comply with the strictures of the First Amendment, the FCC should take three practical steps. The first is narrowly directed at WDBJ, while the latter two more broadly affect the Commission’s indecency regime.

First, because it cannot explain—beyond circular and conclusory assertions in the NAL—why the news segment was patently offensive, the FCC should dismiss the WDBJ fine. The image appeared for only 2.7 seconds on less than 2 percent of the viewing area—an area not even visible to the editors during production—and was quickly taken offline. The Commission thus faces tre-

234. Comments of the NAB, *supra* note 135, at 2.

235. The second prong of retributive theory, moral blameworthiness, is likewise unmet in this case because evidence suggests that WDBJ lacked the requisite scienter for liability under the Commission’s current indecency policy. *See supra* notes 222–25 and accompanying text.

236. DRESSLER, *supra* note 226, at 16.

237. *See* 47 U.S.C. § 307(c)(1) (Supp. II 2015) (providing, in relevant part, that “[e]ach license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years” and that “a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that *public interest*, convenience, and necessity would be served thereby”) (emphasis added).

238. *See* Comments of the RTDNA, *supra* note 136, at 21 (making the case that the FCC’s actions result “in the receipt of less information by the public and concomitant harm to the public interest”) (emphasis omitted).

239. Comments of the NAB, *supra* note 135, at 20.

mendous difficulty proving the three-part test for patent offensiveness of (1) graphicness/explicitness, (2) repetition, and (3) shock/pander/titillation.²⁴⁰

Furthermore, as the RTDNA and NAB persuasively argue, the Commission's behavior is out of line for three important reasons. First, by implicitly telling the station that certain topics may or may not be fit for public consumption, the NAL unreasonably intrudes into news judgment and editorial discretion.²⁴¹ Second, it continues post-*Fox* ambiguity about what is not permitted on broadcast television, especially given former Chairman Julius Genachowski's suggestion that the FCC would only target the most egregious instances of indecency.²⁴² Finally, the NAL fundamentally misunderstands mens rea and essentially makes strict liability the default scienter—or lack thereof—for all indecency offenses.²⁴³

Examining the broader picture, the second step is for the FCC to definitively declare what its indecency policy is going forward. The Supreme Court in *Fox Television Stations* left “the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.”²⁴⁴ Although the FCC appeared poised to heed the Court's admonition to clarify its rules—by calling for public comment to help better align its policies with “vital First Amendment principles”²⁴⁵—more than three-and-a-half years of silence and legal limbo suggest the call was little but a tease. Despite the Commission's claim that fining WDBJ “sends a clear signal” to TV stations,²⁴⁶ it is doubtful that broadcasters are sensing much, if any, clarity.

240. See Opposition of WDBJ Television, *supra* note 143, at 14–21.

241. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 650 (1994) (describing how, as the Supreme Court has made clear, the FCC is “barred by the First Amendment . . . from interfering with the free exercise of journalistic judgment”).

242. See *supra* Part III.B.2 (describing the state of the FCC's indecency enforcement since *Fox Television Stations*).

243. See *supra* Part III.B.3 (explaining how the FCC's conclusory statement that the station's actions were done willfully—the requisite mental state for indecency—does not necessarily make it so; all evidence points to negligence, at most).

244. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. at 2307, 2320 (2011).

245. Littleton, *supra* note 95.

246. See *supra* notes 14–15 and accompanying text (describing, in part, the press release of Travis LeBlanc, head of the FCC's Enforcement Bureau).

In the wake of the Commission's dismissal of more than one million indecency complaints in order to "focus its resources on the strongest cases that involve egregious indecency violations,"²⁴⁷ the FCC's decision to exert voluminous energy punishing a local news broadcast for fleeting and inadvertent content leaves broadcasters with scant sense of what "egregious" means, or what they can show viewers.²⁴⁸ The inevitable result for TV stations is, in the words of the NAB, "to steer far clear of matters of potential controversy and to cut back on live programming that poses any degree of risk, thus depriving viewers and listeners of coverage of important local and national news events. This result is the exact opposite of what the Constitution demands."²⁴⁹

In the process of clarifying its policy to satisfy constitutional demands, a third recommended step is for the FCC to carve out a news exemption from its indecency regulations.²⁵⁰ Exempting news would be a welcome departure from the Commission's current enforcement policy which, the RTDNA contends, "threatens to dilute the first-hand, eyewitness images, sounds and accounts unique to broadcast journalism."²⁵¹

The practical problem with making a news exception to generally applicable indecency laws is, of course, determining precisely what constitutes *news*.²⁵² Fortunately, Congress and the FCC have shed some light on the matter by fashioning a "bona fide news" exemption in the equal-access realm.²⁵³ Although normally

247. Halonen, *supra* note 17.

248. See Comments of the NAB, *supra* note 135, at 17 (making the case that even since the edict of egregiousness, the Commission's "inconsistent treatment of similar material, unpredictable decisions, and random reversals do not comport with . . . bedrock First Amendment principles").

249. *Id.* at 22.

250. See Comments of the RTDNA, *supra* note 136, at 22–23, (contending that "[t]he only means through which to lift this cloud of uncertainty that strikes at the heart of the First Amendment is to exempt news and public affairs programming from indecency regulation").

251. *Id.* at 21.

252. See generally Clay Calvert, *What is News?: The FCC and the New Battle Over the Regulation of Video News Releases*, 16 COMMLAW CONCEPTUS 361, 367–70 (2008) (addressing the problems with defining news, asserting that "there is no concise or consistent definition of news identifiable by scholars and practitioners in the journalism field," and adding that this definitional "problem, at the operational level of journalism practice and scholarship, compounds the predicament the FCC faces at the legal level when it attempts to dictate to broadcast journalists the boundaries of news").

253. See 47 U.S.C. § 315(a) (Supp. II 2015); see also Akilah N. Folami, *Freeing the Press from Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must be*

broadcasters must provide an equal opportunity for airtime to all qualified political candidates, the bona fide news exemption excuses certain types of broadcasts from this requirement.²⁵⁴

For the purposes of equal access, the Commission weighs the following three factors when considering whether a broadcast is bona fide news: “(1) whether the program is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether the broadcaster’s or independent producer’s decisions on format, content, and participants are based on newsworthiness.”²⁵⁵ Borrowing this exemption and applying it to the realm of indecency would encourage the Commission to rightly protect disconcerting or potentially distasteful news—programming that, in the words of the RTDNA, has “long been heralded as the hallmark of our free society.”²⁵⁶

Ultimately, rather than waging war against WDBJ for accidentally airing a miniscule, 2.7-second clip in the corner of the screen, the FCC should remember that high-quality journalism necessarily features potentially offensive elements, and that the First Amendment demands breathing space for broad editorial discretion.²⁵⁷ By taking the three steps suggested above—jettisoning the WDBJ fine, clarifying its indecency policy, and creating a bona fide news exemption within it—the FCC can go a long way toward cleaning up the egregious mess left in the wake of *Fox Television Stations*.

Televised, 34 COLUM. J.L. & ARTS 367, 374 (2011) (observing that “the FCC gives deference in its current application of the bona fide newscast and news interview exemptions to broadcaster judgment”).

254. 47 U.S.C. § 315(a) (Supp. II 2015) (providing, in relevant part, that “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station”). The four exemptions to this rule include bona fide newscasts, news interviews, news documentaries and on-the-spot coverage of news. *Id.*

255. Request of ANE Prod. Inc., 26 FCC Rcd. 16148, 16149 (Nov. 28, 2011).

256. Comments of the RTDNA, *supra* note 136, at 21.

257. See *id.* at 23 (stating that “[b]roadcast journalists should no longer face the daily dilemma of sanitizing news coverage or risking the government’s wrath”).
