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## Excuse Me, Sir; You're Sitting in a No Cell Phone Pornography Section, You'll Have to Put That Away: May the FCC Regulate the Content of Wireless Broadband Transmissions

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# NOTES

## EXCUSE ME, SIR; YOU'RE SITTING IN A "NO CELL PHONE PORNOGRAPHY SECTION," YOU'LL HAVE TO PUT THAT AWAY: MAY THE FCC REGULATE THE CONTENT OF WIRELESS BROADBAND TRANSMISSIONS?

H. WILLIAM BESETH III\*

I.	INTRODUCTION .....	400
II.	DETERMINING THE SCOPE OF FCC AUTHORITY TO REGULATE INDECENCY .....	402
	A. <i>A History of Establishing FCC Statutory Authority</i> ....	402
	B. <i>The First Amendment and FCC Regulation</i> .....	409
III.	APPLYING THE REGULATORY SCOPE OF FCC AUTHORITY TO NEW COMMUNICATION TECHNOLOGIES .....	415
	A. <i>An Analysis of Wireless Broadband     Transmissions with a Comparison to Traditional     Broadcast Transmissions</i> .....	415
	1. A Statutory Approach .....	415
	2. The Application of Strict Scrutiny to Content Prohibitions of Wireless Broadband Transmissions .....	416
	B. <i>A Comparison of Wireless Broadband     Technology with Other New Communication     Technologies</i> .....	417
	1. Cable Television .....	417
	2. Satellite Radio and Television .....	418
	3. A Comparison .....	418
IV.	THE POLITICS OF FCC INDECENCY REGULATION .....	419
	A. <i>Various Anti-Indecency Media Groups and their     Influence on FCC Policy</i> .....	419
	1. Morality in Media, Inc. ....	420
	2. The American Family Association .....	421
	3. Similar Groups and the FCC's Reactions to them .....	421
	B. <i>Corporate America's Influence on FCC Policy</i> .....	423
V.	THE POSSIBLE EFFECTS OF WIRELESS CONTENT REGULATION BY THE FCC .....	423

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A. <i>The Effect on the Freedom of Speech</i> .....	424
B. <i>The Effect on Commerce</i> .....	425
VI. CONCLUSION.....	426

#### I. INTRODUCTION

The advent of new communication technologies has brought with it the classic struggle of who should regulate its content. Should the industry, the market, or the government regulate such content? Perhaps no one should. Various anti-indecency media groups have voiced their concern about wireless adult content.<sup>1</sup> Some groups suggest a complete ban of adult content on wireless devices, while others suggest the regulation of wireless content via the indecency standards of traditional radio or television broadcasting.<sup>2</sup>

One group, Morality in Media, Inc., has recommended in its formal Comment<sup>3</sup> to the Federal Communications Commission (FCC) that if the FCC chooses to allow cell phone use on commercial flights, a “smoking section” or something with a similar effect should be established to protect passengers from unwanted content.<sup>4</sup> This idea conjures up the bygone era of when the airlines permitted in-flight smoking. The proposal of a cell phone section for airline flights may provide the specter of regulation, but most likely, it will be as effective in protecting passengers from adult images as smoking sections were in protecting non-smoking passengers from secondhand smoke.<sup>5</sup>

Some commentators believe the regulation of wireless content on airplanes is just a disguised attempt to press the FCC into regulating all wireless content.<sup>6</sup> The main agenda of these anti-indecency media groups is to rid the airwaves, including cable and satellite, of all forms of so-called indecency.<sup>7</sup> If these groups are successful in creating a ban on wireless adult content on airplanes, then this precedent creates an opportunity to extend the ban beyond the airline setting. If that attempt is successful, then the ban could extend to other technologies that are currently protected from government regulation. The patent core issue is whether the scope of the FCC’s regulatory authority extends to the content of wireless broadband transmissions.

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<sup>1</sup>See Mark Rockwell, *Buckle Up, There’s Rough Air Ahead*, WIRELESS WEEK, Sept. 1, 2005 at 12.

<sup>2</sup>*Id.*

<sup>3</sup>Letter from Paul J. McGeady, Attorney, Morality in Media, to FCC (May 26, 2005), available at [http://fjallfoss.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi) (enter Morality in Media in the “filed on behalf of” field, then enter 5/26/2005 in the “search by specific date” field).

<sup>4</sup>*Id.* at 9.

<sup>5</sup>See *SecondHand Smoke: Unsafe in Any Amount*, HARV. MED. SCH. FAM. HEALTH GUIDE, Nov. 2004, <http://www.health.harvard.edu/fhg/updates/update1104c.shtml>.

<sup>6</sup>See Rockwell, *supra* note 1.

<sup>7</sup>See, e.g., American Family Association, <http://www.afa.net/pornography/internet.asp> (last visited Sept. 4, 2007); Morality in Media, Inc., <http://www.moralityinmedia.org> (follow “Radio/TV Indecency” hyperlink)(last visited Sept. 4, 2007); Parents Television Council, <http://www.parentstv.org> (follow “Current Campaigns” hyperlink, then follow “Broadcast Indecency” hyperlink)(last visited Sept. 4, 2007).

The Communications Act of 1934 (Communications Act) established the FCC as the authority to regulate wired and wireless communications in the United States.<sup>8</sup> Since 1934, the FCC and the technologies it regulates have changed dramatically.<sup>9</sup> Specifically, the regulation of broadcast indecency and obscenity has certainly seen significant changes over the years.<sup>10</sup> Title 18 of the United States Code, Section 1464 prohibits obscene or indecent speech by means of radio communication.<sup>11</sup> The question then becomes: Do broadband transmissions to wireless devices constitute radio communication that may be regulated by the FCC under § 1464?

The FCC has used § 1464 to enforce broadcast indecency of radio and television in landmark cases resolved by the United States Court of Appeals for the D.C. Circuit and by the United States Supreme Court.<sup>12</sup> In these cases, the courts established tests to determine indecency and what broadcast media the government may regulate.<sup>13</sup> In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, Chief Justice Burger recognized the difficulties of regulating broadcast content when he wrote: “The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.”<sup>14</sup> Wireless devices have evolved beyond the grasp of § 1464 and the FCC authority, leaving any attempt to regulate the content of wireless devices inadequate and precisely outmoded. The wished-for regulation of wireless content transmissions exceeds the boundaries of the FCC’s regulatory authority; therefore, the FCC regulations proposed by the anti-indecency

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<sup>8</sup>Communications Act of 1934, 47 U.S.C. § 151 (2006).

<sup>9</sup>Policing indecent content has proved to be more challenging as methods of communication evolve. Radio and television continue to be the media most highly regulated by the FCC, whereas the Internet has escaped the indecency parameters of the traditional forms of broadcast. See *Reno v. ACLU*, 521 U.S. 844 (1997)(holding law prohibiting transmission of indecent or patently offensive material to persons under 18 unconstitutional).

<sup>10</sup>In the past, the typical complaint received by the FCC dealt with indecent language aired on a radio or television broadcast. In addition to those typical complaints, the FCC now must deal with televised nudity and partial nudity, radio shock jocks, Internet pornography, and so forth. One dramatic change is the organized complaint filing effort of a few anti-indecency media groups. See discussion *infra* Part IV.A. Using the Internet, these groups communicate more efficiently with their members and are able to blitz the FCC with hundreds of thousands of complaints a year. See Jerry Del Colliano, *Report Says Nearly All FCC Indecency Complaints From Same Organization*, AUDIO VIDEO REVOLUTION, Jan. 6, 2005, <http://www.avrev.com/news/0105/6.indecency.html>. This high level of organization allows these groups to target one specific show or incident if they so desire. Some argue that these groups wield a significant amount of influence over FCC policy and have placed indecency issues in the national spotlight. *Id.*

<sup>11</sup>18 U.S.C. § 1464 (2006).

<sup>12</sup>See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*Act III*); *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (*Act II*); *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*Act I*).

<sup>13</sup>See cases cited *supra* note 12.

<sup>14</sup>*Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973).

media groups to regulate wireless content create a slippery slope on which the First Amendment rights of all forms of communication transmissions may fall.

This Note will argue that the scope of the FCC's authority to regulate traditional broadcast content does not extend to the content transmitted to wireless devices via broadband transmission. Part II of this Note provides a study of the key cases that characterize the scope of the FCC's statutory authority to regulate traditional broadcast content. Additionally, Part II presents a discussion of the First Amendment and the limits it imposes on the FCC's regulation of broadcast content. Part III evaluates whether content transmitted by new technologies fits into the regulatory scope of the FCC's authority according to the tests set forth in previous United States Supreme Court cases. Part IV briefly discusses the influence of politics on FCC policy. Finally, Part V presents the possible effects the regulation of wireless content by the FCC will have on the rights of free speech and commerce in the United States.

## II. DETERMINING THE SCOPE OF FCC AUTHORITY TO REGULATE INDECENCY

### A. *A History of Establishing FCC Statutory Authority*

The rapid growth of radio communications in the early 1900s prompted the United States government to adopt regulatory legislation, but all of these attempts left some major issues unresolved; chiefly, the separation of control within the government over radio communications.<sup>15</sup> The Communications Act unified the regulation of wired and wireless communications under one federal jurisdiction.<sup>16</sup> The philosophical structure behind the Act stems from eight key assumptions of the Radio Act of 1927.<sup>17</sup> The eight defining assumptions of the Radio Act of 1927 are:

- (1) The radio waves belong to the people.
- (2) Licensees must serve the public.
- (3) All of the public should receive benefits.
- (4) Not all applicants are eligible to receive a license.
- (5) Broadcasting has distinct features.
- (6) Broadcast expression is protected by the First Amendment.
- (7) The government maintains discretionary regulatory authority.
- (8) Governmental authority is not absolute.<sup>18</sup>

Additionally, Section 1 of the Communications Act precisely states its purpose:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through

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<sup>15</sup>See F. LESLIE SMITH, ET AL., *ELECTRONIC MEDIA AND GOVERNMENT: THE REGULATION OF WIRELESS AND WIRED MASS COMMUNICATION IN THE UNITED STATES* 33-41 (1995).

<sup>16</sup>47 U.S.C. § 151 (2006).

<sup>17</sup>SMITH, *supra* note 15, at 42-43.

<sup>18</sup>*Id.*

the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this [chapter].<sup>19</sup>

This combination of philosophy and purpose remains the fundamental framework for the regulation of broadcasting in the United States.<sup>20</sup> With the power now granted to the FCC by Congress, the FCC may regulate the broadcast content of radio and television transmissions.<sup>21</sup>

To begin a study of content regulation by the FCC, obscenity must be distinguished from indecency. In *Miller v. California*, the Supreme Court established three elements that must be satisfied for content to qualify as obscene:

- (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>22</sup>

If the content satisfies all three prongs of the *Miller* test, then the First Amendment does not protect the content if disseminated in any form.<sup>23</sup> In broadcasting, the distinction becomes unclear because § 1464 includes the words "obscene" and "indecent" in its stated definition by punishing anyone who "utters any obscene, indecent, or profane language by means of radio communication . . ."<sup>24</sup>

During the 1960s and 1970s, the FCC made many early attempts to regulate and define the term "indecent" so that a station would appeal to a federal court.<sup>25</sup> In 1970, the FCC made a concerted effort for judicial review of what the FCC

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<sup>19</sup>§ 151.

<sup>20</sup>SMITH, *supra* note 15, at 43.

<sup>21</sup>The Act has had several major changes, most of which allowed for the growth of the communications capabilities in the United States. Amendments to the Act have provided for the growth of television, cable, and commercial satellite use. These amendments have been necessary because the drafters of the original Act could not have prepared for the technologies yet to be developed. SMITH, *supra* note 15, at 44-45.

<sup>22</sup>*Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>23</sup>*Id.* at 36.

<sup>24</sup>18 U.S.C. § 1464 (2006).

<sup>25</sup>KIMBERLY ZARKIN, ANTI-INDECENCY GROUPS AND THE FEDERAL COMMUNICATIONS COMMISSION: A STUDY IN THE POLITICS OF BROADCAST REGULATION 36, 42 (2003).

considered indecent broadcasting.<sup>26</sup> One such attempt occurred when the FCC fined a radio station for broadcasting a taped interview with Jerry Garcia, the front-man for the rock band The Grateful Dead.<sup>27</sup> The fine was in response to two four-letter words that Garcia “frequently interspersed” in his comments during the interview.<sup>28</sup> The FCC concluded that the speech was indecent by stating: “[T]he speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the ‘public interest in the larger and more effective use of radio [.]’”<sup>29</sup> The radio station paid the \$100 fine leaving the FCC claim of indecency unchallenged.<sup>30</sup>

It was not until the landmark case of *FCC v. Pacifica Foundation* that the Supreme Court cleared up this distinction of what constitutes broadcast indecency, albeit very narrowly.<sup>31</sup> On October 30, 1973, at about two o’clock in the afternoon, a New York radio station, owned by Pacifica Foundation, aired a pre-recorded twelve minute monologue by George Carlin entitled “Filthy Words.”<sup>32</sup> The monologue discussed the seven dirty words one could not say on the public airwaves.<sup>33</sup> The FCC received only one complaint regarding the broadcast of Carlin’s monologue.<sup>34</sup> In response to the complaint, the FCC issued a declaratory order on February 12, 1975, finding the broadcast of Carlin’s monologue indecent.<sup>35</sup> Additionally, the order defined indecency as “language that describes, in terms patently offens[ive] as

<sup>26</sup>In *In re WUHY-FM*, the FCC stated:

We believe that a most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment. Thus, while we think that our action is fully consistent with the law, there should clearly be the avenue of court review in a case of this nature []. Indeed, we would welcome such review, since only in that way can the pertinent standards be definitively determined.

*In re WUHY-FM*, 24 F.C.C.2d 408, 415 (1970).

<sup>27</sup>*Id.* at 408.

<sup>28</sup>*Id.* at 409. Garcia used the words shit and fuck. *Id.*

<sup>29</sup>*Id.* at 410 (citation omitted).

<sup>30</sup>ZARKIN, *supra* note 25, at 42 (citing Don M. Gilmore et al., *The Regulation of Electronic Media*, in MASS COMMUNICATIONS LAW: CASES AND COMMENT 825-28 (1990)).

<sup>31</sup>See *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978).

<sup>32</sup>*Id.* at 729-30.

<sup>33</sup>*Id.* at 729. The seven dirty words, according to Carlin, are: shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. GEORGE CARLIN, *Filthy Words*, on OCCUPATION: FOOLE (Little David Records 1973).

<sup>34</sup>*Pacifica*, 438 U.S. at 730. Interestingly,

[t]he complaint was made by a Florida resident who lived outside the range of the station’s signal and who was a member of the national planning board of Morality in Media. His “young son” who was with him in the car when he heard the monologue was fifteen years old.

JEREMY HARRIS LIPSCHULTZ, BROADCAST INDECENCY: F.C.C. REGULATION AND THE FIRST AMENDMENT 42 (1997).

<sup>35</sup>*Pacifica*, 438 U.S. at 730, 732.

measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."<sup>36</sup> The FCC did not issue a fine against Pacifica but did place a copy of the order in the radio station's file.<sup>37</sup>

With support from the American Civil Liberties Union (ACLU), Pacifica sought judicial review of the order by appealing to the U.S. Court of Appeals for the D.C. Circuit.<sup>38</sup> The court of appeals reversed, concluding that the order represented censorship prohibited by 47 U.S.C. § 326<sup>39</sup> or, alternatively, that the order was unconstitutionally overbroad.<sup>40</sup> The Supreme Court granted *certiorari* on an appeal by the FCC.<sup>41</sup>

Written by Justice Stevens, the plurality opinion of the Court in *Pacifica* listed four issues to be decided:

- (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast";
- (2) whether the Commission's order was a form of censorship forbidden by § 326;
- (3) whether the broadcast was indecent within the meaning of § 1464; and
- (4) whether the order violates the First Amendment of the United States Constitution.<sup>42</sup>

Justice Stevens answered the two statutory questions separately, albeit he acknowledged the two provisions have a common origin.<sup>43</sup> Therefore, this section of the Note focuses on the statutory questions presented in issues (2) and (3), while the following section discusses the First Amendment question presented in issue (4).

*Pacifica* argued that § 326, which prohibits the censorship of broadcasts by the FCC,<sup>44</sup> denied the FCC any power to censor its broadcast content.<sup>45</sup> Justice Stevens made it clear in his opinion that § 326 had "never been construed to deny the Commission the power to review the content of *completed* broadcasts in the

<sup>36</sup>*In re Citizen's Complaint Against Pacifica Found. Station WBAI-FM*, 56 F.C.C.2d 94, 98 (1975).

<sup>37</sup>*Id.* at 99.

<sup>38</sup>ZARKIN, *supra* note 25, at 45-46.

<sup>39</sup>Section 326 provides:

Nothing in this Act 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.

42 U.S.C. § 326 (2006).

<sup>40</sup>*Pacifica Found. v. FCC*, 556 F.2d 9, 18 (1977).

<sup>41</sup>ZARKIN, *supra* note 25, at 47.

<sup>42</sup>*FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978).

<sup>43</sup>*Id.* at 735.

<sup>44</sup>§ 326.

<sup>45</sup>*Pacifica*, 438 U.S. at 734.



performance of its regulatory duties.”<sup>46</sup> Justice Stevens cited numerous cases decided by the Court of Appeals for the D.C. Circuit that consistently agreed with this construction of § 326.<sup>47</sup> He reached this conclusion after stating that “[section] 326 does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.”<sup>48</sup> After nullifying *Pacifica’s* § 326 censorship argument, Justice Stevens then dismissed the statutory question surrounding § 1464.<sup>49</sup>

The FCC recognized that several words used in Carlin’s monologue fell squarely within the FCC’s definition of indecency.<sup>50</sup> *Pacifica* took issue with the FCC’s definition of indecency, but agreed that the afternoon broadcast was patently offensive.<sup>51</sup> *Pacifica’s* position was that the broadcast was not indecent within the meaning of § 1464 because of the absence of prurient appeal.<sup>52</sup> Although *Pacifica* built a strong argument, Justice Stevens rejected *Pacifica’s* construction of § 1464.<sup>53</sup>

*Pacifica* asserted that the Court, in previous decisions, “construed the term ‘indecent’ in related statutes to mean ‘obscene,’ as that term was defined in *Miller*.”<sup>54</sup> Specifically, *Pacifica* referred to 18 U.S.C. § 1461<sup>55</sup> and the construction the Court gave § 1461 in *Hamling v. United States*.<sup>56</sup> *Pacifica* stressed the Court’s holding in *Hamling* that a disjunctive phrase contained in § 1461 is limited to mean obscene; therefore, the similar disjunctive phrase in § 1464 should also be limited to mean obscene, thereby necessitating the element of a prurient appeal.<sup>57</sup> With the absence

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<sup>46</sup>*Id.* at 735 (emphasis added).

<sup>47</sup>*See, e.g.,* Anti-Defamation League of B’nai B’rith v. FCC, 403 F.2d 169, 173-74, n.3 (D.C. Cir. 1968) (“[C]anceling the license of a broadcaster who persists in a course of improper programming . . . would not be prohibited censorship, . . . programs containing such material are grounds for denial of a license renewal”)(internal quotation marks omitted); KFKB Broad. Ass’n v. Fed. Radio Comm’n, 47 F.2d 670, 672 (D.C. Cir. 1931) (“[T]he commission has merely exercised its undoubted right to take note of appellant’s past conduct, which is not censorship”); *see also* Nat’l Ass’n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965); Bay State Beacon, Inc. v. FCC, 171 F.2d 826 (D.C. Cir. 1948).

<sup>48</sup>*Pacifica*, 438 U.S. at 738.

<sup>49</sup>*See id.* at 738-41.

<sup>50</sup>*Id.* at 739.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 741.

<sup>54</sup>*Id.* at 740.

<sup>55</sup>Section 1461 addresses “[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . .”

18 U.S.C. § 1461 (2006).

<sup>56</sup>*Pacifica*, 438 U.S. at 740; *see also* *Hamling v. United States*, 418 U.S. 87 (1974).

<sup>57</sup>*Pacifica*, 438 U.S. at 739-40.

of the prurient appeal element, the Court could not deem the broadcast indecent within the meaning of the statute.<sup>58</sup>

In response to *Pacifica's* contentions, Justice Stevens interpreted the plain language of § 1464.<sup>59</sup> He concluded that because the phrase “obscene, indecent, or profane”<sup>60</sup> was written in the disjunctive, each word must have a separate meaning.<sup>61</sup> He stated that “prurient appeal is an element of the obscene,” but described the term indecent according to Webster’s dictionary as, “nonconformance with accepted standards of morality.”<sup>62</sup> Justice Stevens reasoned that *Hamling's* construction of § 1461 did not relate to § 1464 by stating each statute applies to two different media.<sup>63</sup> He concluded by stating that “neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language . . . . [Therefore], we reject *Pacifica's* construction of the statute.”<sup>64</sup>

After the *Pacifica* ruling, the FCC has the statutory authority and judicial approval to pursue the regulation of indecency on the airwaves. The rule established by *Pacifica* was apparent for broadcasters: Avoid the “seven dirty words” to circumvent sanction by the FCC.<sup>65</sup> Surprisingly, the FCC was virtually silent in their mission to control broadcast indecency for the next ten years.<sup>66</sup> The silence stopped with the emergence of a new type of radio broadcaster known as the “shock jock.”<sup>67</sup> Complaints flooded the FCC in response to this style of “innuendo-laden humor.”<sup>68</sup> As a result, the FCC answered in 1987 with three crucial decisions pertaining to indecency standards.<sup>69</sup>

In April 1987, the FCC issued warnings to three separate radio stations for indecency violations.<sup>70</sup> By doing so, the FCC put these three stations and the rest of the broadcasting industry on notice of the new expansive reach of broadcast

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<sup>58</sup>*Id.* at 739-40.

<sup>59</sup>*Id.* at 739.

<sup>60</sup>§ 1464.

<sup>61</sup>*Pacifica*, 438 U.S. at 739-40.

<sup>62</sup>*Id.* at 740.

<sup>63</sup>*Id.* at 741 (“It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.”); *see also id.* at 741 n.17.

<sup>64</sup>*Id.* at 741.

<sup>65</sup>SMITH, *supra* note 15, at 363.

<sup>66</sup>*Id.*

<sup>67</sup>ZARKIN, *supra* note 25, at 49.

<sup>68</sup>*Id.* (citing Julia Reed, *Raunch ‘n’ Roll Radio is Here to Stay*, US NEWS & WORLD REPORT, May 4, 1987, at 52).

<sup>69</sup>*See In re Pacifica Found.*, 2 F.C.C.R. 2698 (1987); *In re Regents of U. of Cal.*, 2 F.C.C.R. 2703 (1987); *In re Infinity Broad.*, 2 F.C.C.R. 2705 (1987).

<sup>70</sup>*See sources cited supra* note 69.

indecent regulation.<sup>71</sup> The three broadcast companies cited by the FCC to illustrate the new policy of indecent regulation were the Pacifica Foundation, the Regents of the University of California, and Infinity Broadcasting.<sup>72</sup> The Pacifica “broadcast [contained] excerpts from a critically acclaimed play called *Jerker*,” which depicted a homosexual dying of AIDS and “included graphic descriptions of homosexual encounters.”<sup>73</sup> The Regents of the University of California broadcast played a song called *Makin’ Bacon* by the Pork Dukes that contained lyrics with a “significant amount of sexual innuendo.”<sup>74</sup> The Infinity broadcast was the infamous Howard Stern Show, which contained sexual “innuendo and *double entendre*.”<sup>75</sup>

The first order written by the FCC, which was against the Pacifica Foundation, stated:

[W]e take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the *Pacifica* standard so narrowly in the future. We find that the definition of indecent broadcast material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in *Pacifica*. Those particular words are more correctly treated as examples of, rather than a definitive list of, the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable to the broadcast medium, constitute indecency.<sup>76</sup>

This statement broadened the scope of indecent regulation well beyond the “seven dirty words” used by Carlin.<sup>77</sup> The FCC was now focusing on the *context* of broadcasts to determine if an indecent violation existed.<sup>78</sup>

Indecent regulation primarily consisted of FCC fines for the next decade and a half.<sup>79</sup> The period of “deregulation” had ended,<sup>80</sup> and broadcasters paid most of the fines imposed by the FCC.<sup>81</sup> The various broadcast companies paid the fines not

<sup>71</sup>ZARKIN, *supra* note 25, at 49.

<sup>72</sup>See sources cited *supra* note 69.

<sup>73</sup>ZARKIN, *supra* note 25, at 49 (*See In re Pacifica Found.*, 2 F.C.C.R. 2698, 2700).

<sup>74</sup>*Id.* (*See In re Regents of the U. of Cal.*, 2 F.C.C.R. 2703, 2703).

<sup>75</sup>*Id.* (*See In re Infinity Broad.*, 2 F.C.C.R. 2705, 2705 (1987)). Howard Stern is the most prominent target of the anti-indecency groups battle to rid the airwaves of indecency. Stern has become the poster-child of indecency in America and he is portrayed as the example of what is wrong with the content of broadcasting today. See sources cited *supra* note 7.

<sup>76</sup>*In re Pacifica Found.*, 2 F.C.C.R. 2698, 2699.

<sup>77</sup>See textual comment *supra* note 33.

<sup>78</sup>SMITH, *supra* note 15, at 363.

<sup>79</sup>ZARKIN, *supra* note 25, at 55-60 (discussing various cases where fines ranging from \$2,000 to \$600,000 were imposed).

<sup>80</sup>ZARKIN, *supra* note 25, at 55 (citing Caroline E. Mayer, *FCC Curbs Radio, TV Language; Agency Threatens Stations that are Sexually Explicit*, WASH. POST, Apr. 17, 1987, at A1).

<sup>81</sup>ZARKIN, *supra* note 25, at 59.

because they agreed with the FCC's determinations of indecency, but because of the opportunity of deregulated business expansion granted in the Telecommunications Act of 1996.<sup>82</sup> The FCC and indecency became national topics of discussion with the growth of the Internet, the airing of risqué television programs on cable, and most notably, the "Janet Jackson incident."<sup>83</sup> The FCC's statutory authority was no longer the primary issue: The First Amendment right of free speech with respect to broadcasting and new technologies came to the forefront of the debate.

### B. *The First Amendment and FCC Regulation*

The FCC's regulation of a medium of communication cannot exist if that regulation violates the First Amendment. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or the press."<sup>84</sup> First Amendment protection is not so absolute. The Court has upheld many laws prohibiting certain speech as constitutional.<sup>85</sup> Content and context are critical elements of First Amendment analysis, as Justice Holmes stated in *Schenck v. United States*:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of

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<sup>82</sup>*Id.* Howard Stern had accumulated over \$1.7 million in fines owed to the FCC by Infinity Broadcasting. *Id.* The CEO of Infinity, Mel Karmazin, vowed he would not pay the fines, preferring instead to compel the FCC into court. *Id.* However, the chance to expand the business proved too much and Infinity settled with the FCC by paying \$1.71 million in fines in exchange for a clean record. *Id.* Additionally, any indecency offenses committed in the future would be treated as "first" offenses. *Id.* at 55-60. Howard Stern had the last laugh. After years of combat with the FCC over indecency on terrestrial radio, Stern signed an extremely lucrative deal with Sirius Satellite Radio. Stern began broadcasting his morning show in January of 2006 without any oversight or censorship by the FCC. *See generally* Howard Stern website, <http://www.howardstern.com> (last visited Jan. 6, 2007), *see also* Jacques Steinberg, *Howard Stern Prepares for Life Without Limits*, N.Y. TIMES, Oct. 20, 2005, at E5.

<sup>83</sup> *FCC Chair Vows to Investigate Halftime Flash*, MSNBC, Feb. 4, 2004, <http://www.msnbc.msn.com/id/4131637>.

<sup>84</sup>U.S. CONST. amend. I.

<sup>85</sup>*See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (observing the commonsense differences between commercial speech and other types of speech); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (holding that a statutory classification is constitutional when it is based on the content of communication protected by the First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (treating libels against private citizens more severely than libels against public officials); *Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity receives no protection under the First Amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (allowing the government to prohibit speech that is calculated to provoke a physical fight).

such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>86</sup>

The FCC's authority stems directly from Article I, Section 8 of the United States Constitution.<sup>87</sup> Among the listed powers granted to Congress in Article I, Section 8 is the power to regulate interstate commerce pursuant to the Commerce Clause.<sup>88</sup> According to the Supreme Court, the term "commerce" is construed very broadly and includes electronic communications<sup>89</sup> and deems all radio communication interstate.<sup>90</sup> Congress used this power to pass the Communications Act, which created the FCC and gave it the authority to regulate radio and television transmissions.<sup>91</sup> The United States Supreme Court is the final arbiter in determining if the rules and regulations promulgated by the FCC pass constitutional muster and, specifically, if the rules violate the First Amendment.<sup>92</sup>

When the Court determines if a law prohibiting speech violates the First Amendment, one aspect the Court considers is the invasiveness of the communication to the listener.<sup>93</sup> In *Erznoznik v. City of Jacksonville*, the Court applied the invasiveness test to determine the constitutionality of a city ordinance prohibiting films containing nudity at drive-in theaters.<sup>94</sup> In striking down the ordinance as unconstitutional, Justice Powell wrote:

[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. . . .

. . . .

. . . [T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require

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<sup>86</sup>*Schenck v. United States*, 249 U.S. 47, 52 (1919) (citations omitted).

<sup>87</sup>U.S. CONST. art. I, § 8.

<sup>88</sup>U.S. CONST. art. I, § 8, cl. 3.

<sup>89</sup>*Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, at \*9 (1877).

<sup>90</sup>*Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933).

<sup>91</sup>47 U.S.C. § 151 (2006).

<sup>92</sup>U.S. CONST. art. III, § 2, cl. 1.

<sup>93</sup>*See, e.g., Reno v. ACLU*, 521 U.S. 844, 868 (1997) (reasoning that "[c]ommunications over the Internet do not invade an individual's home"); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) ("Cable television systems, including access channels, have established a uniquely pervasive presence in the lives of all Americans."); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>94</sup>*See Erznoznik*, 422 U.S. at 206, 211-12.

protection for the unwilling listener or viewer . . . [T]he burden normally falls upon the viewer to “avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”<sup>95</sup>

The invasiveness of the communication proves to be a critical factor in determining the constitutionality of a law prohibiting speech as it applies to different media of communication.<sup>96</sup> The Court continued to employ this test of invasiveness to the medium of radio in its analysis of the First Amendment issue in *Pacifica*.<sup>97</sup>

In *Pacifica*, the Court described two predominant factors that provide for the constitutional prohibition of speech in the broadcast medium: (1) the “uniquely [established] pervasive presence” of the broadcast media, and (2) the “unique[] accessib[ility]” of broadcasts to children.<sup>98</sup> The first factor distinguished the medium of broadcasting from other forms of speech<sup>99</sup> and conferred to it the least amount of First Amendment protection.<sup>100</sup> Justice Stevens wrote: “Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>101</sup> Consequently, the invasive character of broadcasting has allowed the FCC to regulate indecency on the radio and television without violating the First Amendment.<sup>102</sup>

The second factor, which is frequently given as the driving force behind indecency regulation,<sup>103</sup> also limited the amount of First Amendment protection afforded to broadcasting.<sup>104</sup> In *Pacifica*, the Court recognized “the government’s interest in the ‘well-being of its youth’ and in supporting ‘parents’ claim to authority in their own household’ justified the regulation of otherwise protected expression.”<sup>105</sup> Considering the “ease with which children may obtain access to broadcast material” and the concerns stated above, the Court found ample justification for “special treatment of indecent broadcasting.”<sup>106</sup> Thus, the protection of a child’s

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<sup>95</sup>*Erznoznik*, 422 U.S. at 209-11 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971) (citations omitted)).

<sup>96</sup>See cases cited *supra* note 93.

<sup>97</sup>See *Pacifica*, 438 U.S. at 748-50.

<sup>98</sup>*Id.* at 748-49.

<sup>99</sup>For example, the print medium receives more First Amendment protection than does the broadcast medium. Khaldoun Shobaki, *Speech Restraints for Converged Media*, 52 UCLA L. REV. 333, 337-38 (2004).

<sup>100</sup>*Pacifica*, 438 U.S. at 748.

<sup>101</sup>*Id.* (citing *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970)).

<sup>102</sup>See generally *Pacifica*, 438 U.S. 726; see also SMITH, *supra* note 15, at 46-47.

<sup>103</sup>See, e.g., cases cited *supra* notes 12, 85, 93.

<sup>104</sup>*Pacifica*, 438 U.S. at 749.

<sup>105</sup>*Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

<sup>106</sup>*Pacifica*, 438 U.S. at 750. *Pacifica*’s narrowness is illustrated by the Court’s determination that the prohibition of broadcast indecent speech is applicable only during times when children are the likely listeners of a broadcast. *Id.* at 749-50.

“psychological well-being”<sup>107</sup> permits the FCC to regulate the indecency of traditional broadcasts without violating the First Amendment, although “it must do so by narrowly drawn regulations.”<sup>108</sup>

In *Sable Communications of California v. FCC*, the Court distinguished the constitutionality of the prohibition of free speech as it applied to the protection of children in *Pacifica* from the prohibition of speech at issue in *Sable*.<sup>109</sup> In *Sable*, the FCC banned all indecent and obscene interstate commercial telephone messages, commonly known as “dial-a-porn,” under § 223(b) of the Communications Act.<sup>110</sup> The Court succinctly distinguished the FCC’s reliance on *Pacifica* as authority for the prohibition of indecent telephone messages.<sup>111</sup> First, the Court demonstrated that *Pacifica* did not involve a total ban on broadcasting indecency, as does the regulation in *Sable*.<sup>112</sup> Second, the Court used a “medium-specific” approach to distinguish the broadcast medium in *Pacifica* from the telephone pay service in *Sable*.<sup>113</sup>

In the latter approach, the Court concluded that the telephone communications at issue in *Sable* “are substantially different from the public radio broadcast at issue in *Pacifica*.”<sup>114</sup> Justice White noted several important distinguishing features of the dial-it medium: (1) “[T]he listener [must] take affirmative steps to receive the communication”; (2) “[t]here is no ‘captive audience’” or unwilling listener; (3) “a caller seeks and is willing to pay for the communication”; and (4) “a telephone call is not the same as turning on a radio.”<sup>115</sup> Based upon this medium-specific approach, the Court reaffirmed its position that “the government may not ‘reduce the adult population . . . to . . . only what is fit for children.’”<sup>116</sup> The Court held “there is no constitutional stricture against Congress’ prohibiting the interstate transmission of *obscene* commercial telephone recordings,”<sup>117</sup> but concluded that “§ 223(b) was not

<sup>107</sup>*Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>108</sup>*Id.* (citations omitted). In furtherance of this view, Justice White stated, “It is not enough to show that the government’s ends are compelling; the means must be carefully tailored to achieve those ends.” *Id.*

<sup>109</sup>*Id.* at 127-28.

<sup>110</sup>*Id.* at 117-18.

<sup>111</sup>*Id.* at 127.

<sup>112</sup>*Id.*

<sup>113</sup>*Id.* at 127-28.

<sup>114</sup>*Id.* at 127.

<sup>115</sup>*Id.* at 127-28.

<sup>116</sup>*Id.* at 128. (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957))).

<sup>117</sup>*Sable*, 492 U.S. at 125 (emphasis added). Justice Brennan, who concurred in Parts I, II and IV of the majority opinion, strongly dissented with regard to the criminal prohibition of obscene communication as it relates to the First Amendment. *Id.* at 133. Justice Brennan stated in his dissent:

In my view, however, 47 U.S.C. § 223(b)(1)(A)’s parallel criminal prohibition with regard to obscene commercial communications likewise violates the First Amendment. I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally

sufficiently narrowly drawn to serve that purpose [of prohibiting *indecent* messages] and thus violated the First Amendment.”<sup>118</sup>

Similarly, the Court applied the medium-specific approach in *Reno v. ACLU*, in which the Court distinguished new communication technologies from traditional broadcasting. When regulating speech that occurs in traditional broadcasting media, the Court will apply a lesser level of First Amendment scrutiny.<sup>119</sup> At issue in *Reno* was the constitutionality of the Communications Decency Act of 1996 (CDA) as it applied to the Internet.<sup>120</sup> In the majority opinion, Justice Stevens reiterated the District Court’s finding that “the Internet is ‘a unique and wholly new medium of worldwide human communication.’”<sup>121</sup> Justice Stevens qualified this finding by

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intolerable. In my judgment, “the concept of ‘obscenity’ cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms.”

. . . [T]he federal parties cannot plausibly claim that their legitimate interest in protecting children warrants this Draconian restriction on the First Amendment rights of adults who seek to hear the messages that Sable and others provide.

*Id.* at 133-35(citation omitted).

<sup>118</sup>*Id.* at 126 (emphasis added). The FCC continued to insist that without a total ban on indecency under § 223(b), the government would not achieve its interest in protecting children. *Id.* at 128-29. *Sable* contains an interesting passage whereby the Court *politely* asserts its authority to decide constitutional issues over the insistence of the FCC that the Court should defer to Congress’ conclusion:

To the extent that the federal parties suggest that we should defer to Congress’ conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment. Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.... The federal parties, however, also urge us to defer to the factual findings by Congress relevant to resolving the constitutional issue. Beyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law, our answer is that the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government’s interest in protecting minors.

*Id.* at 129 (citations & internal quotation marks omitted).

<sup>119</sup>*See Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>120</sup>*Id.* at 859-62. In *Reno*, two provisions of the CDA were specifically challenged. Section 223(a)(1)(B) criminalized the “knowing” transmission of “obscene or indecent” messages to any recipient under the age of 18. *Id.* at 859. Section 223(d) prohibited the “knowing” sending or displaying to a person under 18 of any message “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” *Id.* at 859-60.

<sup>121</sup>*Reno*, 521 U.S. at 850 (citing *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)). The Court noted that the District Court “made 410 findings, including 356 paragraphs of the parties’ stipulation and 54 findings based on evidence received in open court.” *Id.* at 849 n.2.



distinguishing the Internet and the CDA from the precedents discussed earlier in this Note.<sup>122</sup>

First, the Court described significant differences between the holdings of *Pacifica* and the CDA.<sup>123</sup> The Court focused on the lengthy history of the FCC's regulation of radio broadcasts and that radio broadcast "warnings could not adequately protect the listener from unexpected program content."<sup>124</sup> Justice Stevens reasoned that the Internet "has no comparable history," and the risk of accidental encounters with indecent material are "remote because a series of affirmative steps is required to access specific material" on the Internet.<sup>125</sup> Thus, the precedent set forth in *Pacifica* did not require the Court to uphold the CDA and allowed the Court to apply the standard of strict scrutiny in reviewing the provisions of the CDA as they applied to the First Amendment.<sup>126</sup>

Second, the Court distinguished the invasiveness of radio and television from the Internet by relying upon the distinctions expressed in *Sable*.<sup>127</sup> Based upon the District Court's findings that the Internet does not invade the home or computer screen "by accident," Justice Stevens pointedly stated: "[T]he Internet is not as 'invasive' as radio or television."<sup>128</sup> While Justice Stevens agreed with the "compelling interest [of the government] in protecting the . . . psychological well-being of minors," he did not sanction the government's complete ban on speech involving a different medium of communication from that of broadcasting.<sup>129</sup> The Court agreed with the District Court's conclusion that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."<sup>130</sup>

Lastly, the Government asserted that its interest in the growth of the Internet provided "an independent basis for upholding the constitutionality of the CDA."<sup>131</sup> The Government argued that the unregulated "indecent" and "patently offensive" content on the Internet was "driving countless citizens away from the medium

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<sup>122</sup>*Id.* at 866-70.

<sup>123</sup>*See id.* at 867.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*See id.* at 868. The Court also addressed the Government's argument that the precedent of *Renton v. Playtime Theatres, Inc.* should apply. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court upheld a zoning ordinance prohibiting adult movie theatres in residential neighborhoods. *Renton*, 475 U.S. at 53. In *Reno*, the Government attempted to argue that the CDA was a "cyberzoning" ordinance of the Internet. *Reno*, 521 U.S. at 868. Justice Stevens concluded that *Renton* did not apply because the CDA applied too broadly to the entire universe of the Internet and that the CDA was a "content-based blanket restriction on speech." *Id.*

<sup>127</sup>*Reno*, 521 U.S. at 869-70.

<sup>128</sup>*Id.* at 867, 869.

<sup>129</sup>*Id.* at 869-70.

<sup>130</sup>*Id.* at 870.

<sup>131</sup>*Id.* at 885.

because of the risk of exposing themselves or their children to harmful material.”<sup>132</sup> The Court discounted this argument by noting the “phenomenal” growth of the Internet and “governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.”<sup>133</sup> Justice Stevens concluded the opinion with the following comprehensive statement: “The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”<sup>134</sup>

The Court, through the precedents discussed above, has set forth various tests and approaches to determine the government’s ability to regulate speech and content disseminated via the gamut of communication media. Whether a statute allows regulation<sup>135</sup> or the First Amendment disallows regulation,<sup>136</sup> the Court has shown its reluctance to push new communication technologies into the regulatory scope of FCC authority.<sup>137</sup> The following discussion will analyze and compare wireless broadband transmissions with other communication technologies to determine if the FCC has the authority to regulate these transmissions by means of traditional broadcasts.

### III. APPLYING THE REGULATORY SCOPE OF FCC AUTHORITY TO NEW COMMUNICATION TECHNOLOGIES

#### A. *An Analysis of Wireless Broadband Transmissions with a Comparison to Traditional Broadcast Transmissions*

##### 1. A Statutory Approach

The anti-indecency media group Morality in Media, Inc. contends that if a signal is transmitted over radio airwaves, then it is a broadcast and therefore subject to the indecency standards set forth in § 1464.<sup>138</sup> Logically, this makes complete sense. Legally, however, this is not how the law regulating wireless transmissions is designed.<sup>139</sup> In 1993, Congress created the statutory classification that wireless broadband transmissions are “commercial mobile radio services” (CMRS).<sup>140</sup> Furthermore, § 1464 and this line of statutes are not applicable to CMRS.<sup>141</sup> Thus,

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<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

<sup>135</sup>*See supra* text accompanying notes 31-82.

<sup>136</sup>*See supra* text accompanying notes 92-134.

<sup>137</sup>*See, e.g.,* United States v. Playboy Entm’t Group, Inc., 529 U.S. 803 (2000); *Reno*, 521 U.S. 844 (1997); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996); Sable Comm’ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

<sup>138</sup>*See* Rockwell, *supra* note 1.

<sup>139</sup>*See* 47 C.F.R. §§ 20.1-20 (2005).

<sup>140</sup>*See* 47 C.F.R. § 20.9(10) (2005).

<sup>141</sup>*See* 47 C.F.R. § 20.15 (2005).

the FCC possesses no statutory authority to regulate the content of wireless broadband transmissions under the indecency standards of § 1464.<sup>142</sup>

If current statutory law does not regulate the content of wireless broadband transmissions, then in order for the government to have the authority to regulate such content, Congress will need to draft new legislation. Any power granted to the FCC by Congressional legislation, if challenged, must ultimately pass the Supreme Court's First Amendment scrutiny to be enforceable.<sup>143</sup> The following discussion will apply the tests set forth by the Supreme Court as described in Part II of this Note.

## 2. The Application of Strict Scrutiny to Content Prohibitions of Wireless Broadband Transmissions

To determine the constitutionality of a law regulating the content of a new medium of communication, the Court will use the medium-specific approach and consider the invasiveness of the medium.<sup>144</sup> Assuming, *arguendo*, the accessibility and use of wireless broadband transmissions as a medium of communication is most similar to the Internet, then the holding of *Reno v. ACLU* should apply.<sup>145</sup> In *Reno*, the Court relied on the invasiveness arguments of *Sable* to distinguish the Internet from radio and television.<sup>146</sup> Applying the analysis set forth by Justice White in *Sable* to wireless broadband transmissions should yield the same result as both *Sable* and *Reno*: (1) The listener (broadband user) must take affirmative steps to receive the communication; (2) there is no captive audience or unwilling listener (broadband user); (3) a caller (broadband user) seeks and is willing to pay for the communication; and (4) a telephone call (broadband connection to the Internet) is not the same as turning on a radio.<sup>147</sup> If broadband transmissions to wireless devices and the Internet are equivalent media of communication, then Justice Stevens' pointed statement from *Reno* holds true: "[T]he Internet is not as invasive as radio or television."<sup>148</sup>

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<sup>142</sup>*See supra* note 139.

<sup>143</sup>U.S. CONST. art. III, § 2, cl. 1.

<sup>144</sup>*See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>145</sup>Broadband transmissions are essentially data transmissions over specific radio frequencies that have the ability to send extremely large amounts of data. *See* JIANGZHOU WANG, *BROADBAND WIRELESS COMMUNICATIONS: 3G, 4G, AND WIRELESS LAN* ch. 1 (2001), available at <http://www.netlibrary.com>. These large amounts of data enable the user to transmit and receive high quality video and audio comparable to home Internet use. *See id.* The main benefit of broadband technology is that it allows users of hand-held devices to directly access and fully browse the Internet without sacrificing viewing quality. *See id.* Therefore, I argue the content transmitted over wireless broadband technology is equivalent to the Internet, and the ruling of *Reno v. ACLU* should apply to this medium.

<sup>146</sup>*Reno*, 521 U.S. at 869-70.

<sup>147</sup>*Sable*, 492 U.S. at 128.

<sup>148</sup>*Reno*, 521 U.S. at 869.

In addition to determining the invasiveness of a medium, the Court will consider the government's history of regulating the medium.<sup>149</sup> As Justice Stevens found in *Reno*, the Internet "has no comparable history" to that of radio.<sup>150</sup> The FCC's lengthy history of regulating the content of traditional broadcasts coupled with the "scarcity of available frequencies" and the "invasive nature" of broadcasting has provided a lower level of First Amendment scrutiny applicable to those traditional broadcasts.<sup>151</sup> Thus, with no history of FCC content regulation of wireless broadband transmissions, the Court may apply strict scrutiny when reviewing the provisions of a law regulating the content of wireless broadband transmissions as it applies to the First Amendment.<sup>152</sup>

The government's interest in protecting a child's "psychological well-being" is an accepted concept the Court utilizes when evaluating the constitutionality of a law that regulates speech.<sup>153</sup> However, the Court will not allow a total ban on protected First Amendment speech in order to protect a child from whatever perceived harm the speech may cause.<sup>154</sup> As with the Internet in *Reno*, a law banning the indecent content of wireless broadband transmissions would "reduce the adult population . . . to . . . only what is fit for children."<sup>155</sup> Therefore, relying on the precedent laid down in *Reno*, *Sable*, *Pacifica*, and *Erznoznik*, justification exists for the Court to strike down a law regulating the content of broadband wireless transmissions for violating the First Amendment under a standard of strict scrutiny.

#### *B. A Comparison of Wireless Broadband Technology with Other New Communication Technologies*

##### 1. Cable Television

The one medium of communication that bears a remarkable similarity to the broadcast medium is cable television. The Court extended the rule in *Pacifica* to cable television in *Denver Area Educational Telecommunications Consortium v FCC*.<sup>156</sup> In *Denver*, the Court held cable television to the lower standard of First Amendment protection that, until then, was uniquely afforded to broadcasting.<sup>157</sup> The plurality concluded that all of the factors of *Pacifica*, such as invasiveness, accessibility to children, and ineffectiveness of warnings, also applied to cable

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<sup>149</sup>*Id.* at 867.

<sup>150</sup>*Id.*

<sup>151</sup>*Id.* at 868.

<sup>152</sup>*Id.* at 867-68.

<sup>153</sup>*See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>154</sup>*See Reno*, 521 U.S. at 869-70.

<sup>155</sup>*Sable*, 492 U.S. at 128 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983)).

<sup>156</sup>*Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743-47 (1996).

<sup>157</sup>*Id.* at 744.

television.<sup>158</sup> This conclusion increased doubts as to whether the narrow holding in *Pacifica* applied only to broadcasting.<sup>159</sup>

Five short years later, the Court changed its mind in *United States v. Playboy Entertainment Group* which was a decision that granted cable television full First Amendment protection.<sup>160</sup> In rejecting the application of a lower standard of First Amendment review for cable television, which is closely related to broadcast television, it appears the Court has “foreclose[d] the possibility that *Pacifica* will have any applicability to . . . any other medium outside of broadcasting.”<sup>161</sup>

## 2. Satellite Radio and Television

Satellite radio and television also escape FCC indecency regulation for many of the same reasons that cable television is not subject to indecency regulation. Primarily, users of this medium must subscribe to and pay for the service.<sup>162</sup> For example, the FCC denied a petition from an FM radio station to apply the indecency standards of § 1464 to satellite radio because the statute does not apply to “services lacking the indiscriminate access to children that characterizes broadcasting.”<sup>163</sup> Thus, those who subscribe to satellite radio or television affirmatively choose to have the content transmitted into their home or vehicle, thereby negating the argument in *Pacifica* that the medium invades an individual’s home.<sup>164</sup>

## 3. A Comparison

Wireless broadband transmissions possess many similarities to the above technologies, but also one important difference. Like cable and satellite, wireless broadband is a pay service. It is a pay service that enables the user to connect directly to the Internet, which has survived its own challenges of government regulation as mentioned above.<sup>165</sup> The FCC possesses no authority to regulate wireless broadband because 47 C.F.R. §§ 20.1-20 do not treat these transmissions as a broadcast medium.<sup>166</sup> This is where the one difference of wireless broadband as compared to the other technologies exists: Radio frequencies transmit wireless

<sup>158</sup>*Id.* at 744-45.

<sup>159</sup>*FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

<sup>160</sup>*United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 811-14 (2000).

<sup>161</sup>Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 301 (2003).

<sup>162</sup>Adam Thierer, *New Worlds to Censor*, WASH. POST, June 7, 2005, at A23.

<sup>163</sup>Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, PROGRESS ON POINT (Progress & Freedom Found., Wash., D.C.) May 2005, at 5, <http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf> (citing Letter from W. Kenneth Ferree, Chief, Media Bureau to Saul Levine, Mt. Wilson FM Broadcasters, Inc., DA 04-3907 (Dec. 15, 2004)).

<sup>164</sup>*See* Thierer, *supra* note 162.

<sup>165</sup>*See Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>166</sup>*See supra* text accompanying notes 138-43.

broadband information.<sup>167</sup> Congress possesses the power to write new statutes<sup>168</sup> that could pull these frequencies into the broadcast realm and thereby rendering them subject to indecency standards.<sup>169</sup> However, strict scrutiny would apply to these new statutes under a First Amendment challenge.<sup>170</sup>

Currently, the FCC does not regulate transmitted indecency on any of the aforementioned media. The various industries related to these media have employed self-regulation as a means of controlling the amount of or access to indecency.<sup>171</sup> Recently, the cable and satellite industries took a major step regarding self-regulatory measures. The cable and satellite industries have announced that they will be offering “family-tier” program packages to subscribers of their respective services.<sup>172</sup> Pressure from anti-indecency media groups, Congress, and the FCC prompted these industries to offer these packages.<sup>173</sup>

The wireless industry, represented by the Cellular Telecommunications and Internet Association (CTIA), released its own set of guidelines to help inform the public of the type of content that is available through a carrier’s service.<sup>174</sup> These guidelines do not apply to any content accessible through the Internet.<sup>175</sup> These guidelines apply only to the content offered by the carrier.<sup>176</sup> Similar to the cable and satellite industry, the wireless industry proposed these guidelines in order to stave off attempts by the government and anti-indecency groups to initiate FCC regulation of their medium.<sup>177</sup>

#### IV. THE POLITICS OF FCC INDECENCY REGULATION

##### *A. Various Anti-Indecency Media Groups and their Influence on FCC Policy*

There are those who wish for the content regulation of wireless transmissions and those who do not. Regardless of the position taken, those opposing sides will attempt to influence the FCC and Congress to further their agenda through various

<sup>167</sup>See *supra* note 145.

<sup>168</sup>U.S. CONST. art. I, § 8, cl. 18.

<sup>169</sup>See 18 U.S.C. § 1464 (2000).

<sup>170</sup>See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

<sup>171</sup>See, e.g., Glen Garvin, *Horror Episode Too Graphic for Edgy Showtime Series*, MIAMI HERALD, Jan. 21, 2006, available at [http://www.montereyherald.com/mld/Miamiherald/entertainment/television/13676679.htm?source=rss&channel=miamiherald\\_television](http://www.montereyherald.com/mld/Miamiherald/entertainment/television/13676679.htm?source=rss&channel=miamiherald_television).

<sup>172</sup>See LaRue Cook, *Senators Debate How to Protect Kids from TV Indecency*, INFOZINE, Jan. 20, 2006, <http://www.infozine.com/news/stories/op/storiesView/sid/12481/>.

<sup>173</sup>See Cook, *supra* note 172; see also Corn-Revere, *supra* note 163, at 4.

<sup>174</sup>See Stephen Lawson, *Industry Group Fights Cell Phone Smut: CTIA Introduces Voluntary Pledge to Restrict Access to Adult Content*, PC WORLD, Nov. 10, 2005, <http://www.pcworld.com/news/article/0,aid,123484,00.asp>.

<sup>175</sup>*Id.*

<sup>176</sup>*Id.*

<sup>177</sup>*Id.*

methods. The following discussion briefly introduces some of the factions involved on both sides of the debate.

### 1. Morality in Media, Inc.

Founded in 1968 by Father Morton A. Hill, Morality in Media, Inc. (MIM) states that its mission is “to address two pressing moral and cultural [evils]: (1) The exploitation of obscenity in the marketplace; and (2) The erosion of decency standards in the media.”<sup>178</sup> MIM attempts to accomplish this mission by lobbying elected government officials, lobbying members of the FCC, filing complaints with the FCC, and promoting its philosophy to the public through its website and legal center.<sup>179</sup> MIM operates the National Obscenity Law Center in New York City that it founded in 1976.<sup>180</sup> The appointment to a pair of indecency commissions by Presidents Lyndon Johnson and Ronald Reagan is an example of Father Hill’s and MIM’s access to the government regarding indecency policy.<sup>181</sup>

The networking, organization, and resources that MIM possesses have continually placed them at the forefront of the fight against indecency in America.<sup>182</sup> MIM excels at using its knowledge of the law to try to influence government and FCC policy on indecency.<sup>183</sup> Although MIM makes many headlines and has direct contact with numerous lawmakers and FCC officials,<sup>184</sup> their attempt to regulate and abolish indecency in the media has waned<sup>185</sup> as it is in direct conflict with the Supreme Court’s First Amendment precedent.<sup>186</sup> Thus, only a change in the Supreme Court’s application of the First Amendment to different media of communication will enable MIM to accomplish its goals.

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<sup>178</sup>ZARKIN, *supra* note 25, at 64. *See also* Morality in Media, Inc., <http://www.moralityinmedia.org>.

<sup>179</sup>*See* ZARKIN, *supra* note 25, at 63-71 (discussing the history of the organization).

<sup>180</sup>ZARKIN, *supra* note 25, at 65. *See also* Morality in Media, Inc., <http://www.moralityinmedia.org> (from the MIM “Home Page” follow the “About Us” hyperlink).

<sup>181</sup>*See* ZARKIN, *supra* note 25, at 64-66. MIM was directly involved with, if not responsible for, *Pacifica*. *Id.* at 68-69. The one complaint about Carlin’s monologue came from a member of MIM’s national planning board. *Id.* at 68-69. MIM also submitted an amicus brief in the *Pacifica* case. *Id.* at 69. In addition, “MIM advised a woman in Philadelphia on how to prepare one of the complaints” to the FCC that initiated the three April 1987 decisions discussed previously. *Id.* at 69. For further examples of MIM’s contributions to indecency regulation, see ZARKIN, *supra* note 25, at 63-127 and MIM’s website, <http://www.moralityinmedia.org>.

<sup>182</sup>*See* ZARKIN, *supra* note 25, at 68; *see also* Morality in Media, Inc., <http://www.moralityinmedia.org>.

<sup>183</sup>*See* ZARKIN, *supra* note 25, at 65-66 (MIM’s National Obscenity Law Center is “a clearinghouse of information on the law of obscenity”).

<sup>184</sup>*Id.* at 68-71 (MIM met with FCC commissioners to pressure enforcement).

<sup>185</sup>*Id.* at 69.

<sup>186</sup>*See supra* text accompanying notes 93-134 (discussing Supreme Court precedent).

## 2. The American Family Association

Don Wildmon founded the American Family Association (AFA) in 1977 to promote “family values” and to educate people “on the influence of television and other media - including pornography - on our society.”<sup>187</sup> AFA claims to have nearly three million supporters,<sup>188</sup> and its primary tactic against indecency is the economic boycott.<sup>189</sup> Through these boycotts, the AFA has had more success against individual companies than they have had in changing indecency policy within the FCC.<sup>190</sup> Consequently, the AFA has received many headlines comparable to those of MIM,<sup>191</sup> but likewise, the AFA has been unable to make significant changes to the FCC’s regulation of indecency.<sup>192</sup>

## 3. Similar Groups and the FCC’s Reactions to them

Other groups with a similar agenda to that of MIM and AFA are the Parents Television Council (PTC) and Concerned Women for America (CWA).<sup>193</sup> The president of the PTC, Brent Bozell, believes any self-regulation by the entertainment industry is flawed because the industry downplays what is indecent for the sake of advertising dollars.<sup>194</sup> Mr. Bozell therefore believes the device known as the “V-chip”<sup>195</sup> is flawed because it blocks programming that is deemed indecent by the

<sup>187</sup>See American Family Association, <http://www.afa.net/about.asp>.

<sup>188</sup>*Id.*

<sup>189</sup>See ZARKIN, *supra* note 25, at 81.

<sup>190</sup>*Id.* at 81-82. AFA has boycotted and threatened to boycott many different companies for various “indecency” motivated reasons. AFA successfully threatened a boycott against the Matchbox toy company to halt the production of a Freddy Krueger doll. See ZARKIN, *supra* note 25, at 77-78 (citing *Saturday Ticker*, CHICAGO TRIBUNE, Oct. 21, 1989, Business 8). AFA also has boycotted companies that are pro-homosexual. See ZARKIN, *supra* note 25, at 78. AFA targeted the Disney Corporation for extending insurance benefits to employee’s homosexual partners and for allowing a “Gay Day” at its parks. *Id.* (citing Deborah Kovach Caldwell, *Dissin’ Disney: Boycott Effort Intensifies*, NEWS AND REC., Dec. 28, 1997, at D2; Deborah Kovach Caldwell, *Disney Under Fire Again*, NEWS AND OBSERVER, Nov. 7, 1997, at E1; Marla Dickerson, *Christian Group Escalates Boycott Against Disney*, L.A. TIMES, July 2, 1996, at D1; Gayle White, *Southern Baptists vs. Disney; Is the Boycott Working?*, ATLANTA J. AND CONST., Mar. 7, 1998, at O1; *Groups Join Baptists Boycott of Disney*, ADVOCATE, July 13, 1996, at 1E;).

<sup>191</sup>See ZARKIN, *supra* note 25, at 63-127.

<sup>192</sup>*Id.* For example, AFA was unable to persuade the FCC to stop Infinity Broadcasting from acquiring more stations that would in turn air the Howard Stern show. *Id.* at 80.

<sup>193</sup>See Parents Television Council, <http://www.parentstv.org> (last visited Sept. 7, 2007); Concerned Women for America, <http://www.cwfa.org/main.asp> (last visited Jan. 6, 2007).

<sup>194</sup>See Cook, *supra* note 172.

<sup>195</sup>The V-chip, which is “embedded in all new TV sets” sold in the United States, has the ability to “block specific programming.” *Id.* The purpose of the V-chip is to allow individuals, namely parents, to voluntarily block unwanted or indecent programming in order to protect children from exposure to such programs. Thomas Hazlett, *Requiem for the V-Chip: A Relic of the Last Battle Over Indecency on TV*, SLATE, Feb. 13, 2004, <http://www.slate.com/id/2095396/>. The television industry prefers the V-chip and self-



network studios, not the FCC.<sup>196</sup> As a result, the PTC, along with the CWA, lobbied the FCC and Congress to promote the idea of the “family-friendly programming packages.”<sup>197</sup> Although Congress and the FCC did not mandate the availability of the family tier,<sup>198</sup> for several years the FCC steadily pressured the cable and satellite industry to provide this option to its subscribers.<sup>199</sup> In January of 2006, the three largest cable television companies and the two primary satellite television providers announced they would be providing a family-friendly tier package for users of their respective services.<sup>200</sup>

While self-regulatory measures appear to be making progress, FCC indecency sanctions have declined. The year 2004 produced record fines imposed by the FCC of \$7.9 million for broadcast indecency violations, whereas the FCC did not issue any fines for indecency violations in the year 2005.<sup>201</sup> This fact prompted statements from the PTC expressing disappointment in the FCC’s enforcement of broadcast indecency.<sup>202</sup> The PTC believes that the inaction by the FCC may encourage broadcasters to air indecent content on television without the fear of fines imposed by the FCC.<sup>203</sup> In response, the FCC states it will act soon on pending complaints.<sup>204</sup> Additionally, the FCC hired a former board member of the CWA as a special advisor in the Office of Strategic Planning and Policy Analysis.<sup>205</sup> This move may usher in a new era of indecency regulation and now provides the anti-indecency media groups with an insider as a member of the FCC hierarchy.

Despite these various groups’ successes and failures to influence and change FCC indecency policy, corporate America may wield even greater power than the aforementioned groups.

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regulation as opposed to the FCC regulating network programming. John Eggerton, *FCC Hacks Away at V-Chip: Commission Argues It’s Obligated to Protect Kids From Profanity*, BROADCASTING & CABLE, Dec. 11, 2006, <http://www.broadcastingcable.com/article/CA6398661.html>.

<sup>196</sup>See Cook, *supra* note 172.

<sup>197</sup>See Corn-Revere, *supra* note 163, at 2 (citations omitted).

<sup>198</sup>*Id.* at 4.

<sup>199</sup>Ken Belson & Geraldine Fabrikant, *Cable Relents on Channels for the Family*, N.Y. TIMES, Dec. 13, 2005, at C1.

<sup>200</sup>*Id.*

<sup>201</sup>Amy Schatz, *Why Indecency, Once Hot at FCC, Cooled*, WALL ST. J., Nov. 16, 2005., at B1; see also John Eggerton, *FCC Indecency Actions a No Show*, BROADCASTING & CABLE, Dec. 30, 2005, <http://www.broadcastingcable.com/article/CA6295524.html?display=Breaking+News>.

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

<sup>204</sup>*Id.*

<sup>205</sup>See Todd Shields, *FCC Hires Conservative Indecency Critic*, MEDIaweek, Aug. 8, 2005, [http://mediaweek.com/mw/news/recent\\_display.jsp?vnu\\_content\\_id=1001010563&imw=Y](http://mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1001010563&imw=Y).

### B. Corporate America's Influence on FCC Policy

The anti-indecency media groups' specific agenda is to abolish indecency in broadcasting, while corporate America's only agenda is to make money. Corporations truly do not possess a profound interest in whether a First Amendment violation occurs. In order for corporate America to succeed with its agenda, it must prevent government regulation of its respective industries as much as possible. Establishing self-regulatory measures is one method to keep the government from regulating one's industry.<sup>206</sup> Another common and effective method is to lobby Congress and the FCC.<sup>207</sup>

Whoever possesses the most money usually lobbies most effectively.<sup>208</sup> Compared to the anti-indecency media groups, the enormous corporations involved in the cable, telecommunications, and Internet industries clearly have the ability to spend more time and money lobbying Congress and the FCC. To illustrate, the telephone and cable companies are currently attempting to lobby Congress to weaken communication laws in order to operate and control the Internet more like a private network.<sup>209</sup> This may allow for unregulated content on the Internet, but it will also limit who may partake in placing content on the Internet or who may access this content.<sup>210</sup> If there is too much regulation, then ideas are suppressed. If there is too little regulation, then major corporations may determine which ideas are viewed.<sup>211</sup> Internet accessibility may ultimately be determined according to how Congress chooses to regulate the Internet's access network, either by keeping it neutral or making it private.<sup>212</sup> Accordingly, this decision will directly affect both commerce and the freedom of speech.

### V. THE POSSIBLE EFFECTS OF WIRELESS CONTENT REGULATION BY THE FCC

The regulation of wireless content by the FCC through a traditional broadcast lens will have a tremendous chilling effect on free speech and commerce in the United States. The Supreme Court, the FCC, the anti-indecency groups, and corporate America each have an objective to secure in addressing the issue of

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<sup>206</sup>See *supra* text accompanying notes 171-77.

<sup>207</sup>J. Nicholas Hoover, *Google, Telecom Execs Stir Up the Internet Access Debate On Capitol Hill*, CHANNELWEB NETWORK, Feb. 7, 2006, <http://www.crn.com/it-channel/179102100> (noting that "several Internet big shots [and] telecommunications industry representatives" went to Capitol hill for a "looming fight").

<sup>208</sup>See RONALD KESSLER, *INSIDE CONGRESS: THE SHOCKING SCANDALS, CORRUPTION AND ABUSE OF POWER BEHIND THE SCENES ON CAPITOL HILL* 98-126 (1997).

<sup>209</sup>See Jeff Chester, *The End of the Internet?*, THE NATION, Feb. 1, 2006, available at <http://www.thenation.com/doc/20060213/chester>; Anush Yegyzarian, *Tech. gov: A Gated Internet: The Companies Who Build and Control the Internet's Pipes Want To Control the Content Over Those Pipes, Too*, PC WORLD, Feb. 2, 2006, <http://www.pcworld.com/news/article/0,aid,124558,00.asp>.

<sup>210</sup>See Chester, *supra* note 209.

<sup>211</sup>*Id.*

<sup>212</sup>See Yegyzarian, *supra* note 209.

wireless content regulation. Finding a solution that appeases all parties without stifling free speech or commerce is presumably unattainable.

*A. The Effect on the Freedom of Speech*

To regulate the content of wireless broadband transmissions is to regulate content on the Internet.<sup>213</sup> The predominant use of wireless broadband is to connect to the Internet through handheld devices. The CTIA estimates the number of wireless subscribers in the United States at 242 million.<sup>214</sup> The Internet has become and continues to progress as the primary global communication medium. Thus, regulating the content of wireless broadband transmissions is an indirect method of regulating content on the Internet.<sup>215</sup>

In *Reno*, the Court struck down a law that regulated indecent content on the Internet.<sup>216</sup> The Court stated that a “content-based regulation of speech . . . raises special First Amendment concerns because of its obvious chilling effect on free speech.”<sup>217</sup> Wireless and Internet media essentially have the ability to transmit all forms of communication, including telephone, newspapers, magazines, television, music, movies, photographs, etc. By regulating wireless transmissions to protect minors, the government would be regulating all media of communication, thereby suppressing “a large amount of speech that adults have a constitutional right to receive and to address to one another.”<sup>218</sup>

The enactment of a law regulating the indecent content of wireless broadband transmissions would create a precedent that could extend regulation to other, if not all, media of communication. The First Amendment freedom of speech cannot be placed upon this slippery slope. The fundamental right of freedom of speech maintains our democratic society by allowing every individual to express his or her thoughts, beliefs, and values irrespective of any other individual’s approval or agreement with those expressions.

The unlimited communication capabilities of wireless broadband and the Internet “can hardly be considered a scarce expressive commodity.”<sup>219</sup> As the Court in *Reno* noted, “the content on the Internet is as diverse as human thought.”<sup>220</sup> The Court continued: “In evaluating the free speech rights of adults, we have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’”<sup>221</sup> If strict scrutiny does not apply to any law attempting to regulate the content of wireless broadband transmissions, then Americans’ speech

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<sup>213</sup>See *supra* note 145.

<sup>214</sup>Cellular Telecommunications and Internet Association, <http://www.ctia.org> (last visited Jan. 6, 2007).

<sup>215</sup>See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

<sup>216</sup>See *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>217</sup>*Id.* at 871-72.

<sup>218</sup>*Id.* at 874.

<sup>219</sup>*Id.* at 870.

<sup>220</sup>*Id.*

<sup>221</sup>*Id.* at 874 (citing *Sable Commc’ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

may be reduced to what the government construes to be appropriate and decent. The Court has recognized that “regardless of the strength of the government’s interest’ in protecting children, [t]he level of discourse reaching a mailbox [or handheld wireless device] simply cannot be limited to that which would be suitable for a sandbox.”<sup>222</sup>

### B. The Effect on Commerce

FCC regulation of wireless broadband content would have an economic effect on every type of entity and organization from government and business to the individual. Decisions made by the FCC and Congress regarding regulation of this expanding technology are critical. Not only is there the obvious loss of money if regulation ensues, but the competitiveness of the United States in the global economy is at stake.<sup>223</sup>

The United States government stands to gain an immediate financial windfall based on the demand for wireless broadband. The FCC is scheduled to begin the sale of wireless licenses on June 29, 2006 and continue to do so through 2009.<sup>224</sup> The Bush Administration projects to raise \$25 billion from the sale of licenses.<sup>225</sup> In the long term, no one has projected the possible tax revenue generated from the tens of millions of future users of wireless broadband, let alone the tax revenue from the commerce conducted over these networks. The regulation of content on wireless broadband does not appear to be in the best financial interest of the government.

When the FCC addresses wireless broadband issues, it has conflicting internal goals. The FCC’s chief, Kevin Martin, believes “[i]t is critical that consumers have unfettered access to the Internet and all the services it provides.”<sup>226</sup> Mr. Martin also stated in a recent interview that “[t]he changes that are occurring in telecommunications today are affecting every aspect of the way people are interacting.”<sup>227</sup> He argued that “getting affordable broadband service to every household must be the commission’s top priority.”<sup>228</sup> Finally, he noted that “we’re going to see quite dramatic changes, but what’s critical for all of those changes is increasing connections, increasing connection speeds and making sure it’s ubiquitously and affordably done for everyone in the country. And increasingly that

<sup>222</sup>*Id.* at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

<sup>223</sup>An FCC study recently showed that the United States ranked “only No. 16 among the world’s most broadbanded countries.” See Jon Fine, *Old Media’s Mobile Future: Traditional Content Will Survive, But It Will Keep Morphing*, BUSINESSWEEK ONLINE, Jan. 16, 2006, [http://www.businessweek.com/magazine/content/06\\_03/b3967047.htm?campaign\\_id=rss\\_magzn](http://www.businessweek.com/magazine/content/06_03/b3967047.htm?campaign_id=rss_magzn). Additionally, the possible media uses of mobile phones have hardly been tapped in the United States. *Id.*

<sup>224</sup>See Jeremy Pelofsky, *Bush Budget Sees \$25 bln in Wireless Sales*, REUTERS, Feb. 6, 2006, <http://www.reuters.com/article/topNews/idUSN0542558220070205>.

<sup>225</sup>*Id.*

<sup>226</sup>See David Benjamin, *New FCC Head Says He’ll Steer Clear of Politics*, EE TIMES, Jan. 7, 2006, <http://www.eetimes.com/conf/ces/showArticle.jhtml?articleID=175802469&kc=5023>.

<sup>227</sup>See James S. Granelli, *At FCC, Broadband Access Is Chief Issue*, L.A. TIMES, Dec. 19, 2005, at C1, available at <http://www.freepress.net/news/12927>.

<sup>228</sup>*Id.*

it's even done wirelessly."<sup>229</sup> However, Mr. Martin and the FCC still have to answer to requests for increasing indecency regulation that directly opposes the expansion of wireless broadband. To address these indecency matters Mr. Martin states his "goal is to make sure the concerns of parents get addressed, and I've always thought there's a variety of ways that we could end up doing that."<sup>230</sup> Without stating the specific ways, it appears Mr. Martin and the FCC will focus on wireless expansion, and then address the indecency concerns.

The businesses that are in position to capitalize on the growth of wireless broadband include those who will provide the access, those who will make the devices, and those who will provide the content. In order for the government to receive \$25 billion for the sale of licenses, it is obvious that large access providers must be willing to pay for these licenses.<sup>231</sup> In addition to access costs to the wireless broadband network, users may need to pay for content, which is unlike traditional Internet use.<sup>232</sup> The pay-for-content aspect of wireless broadband may be a new source of revenue for traditional media companies.<sup>233</sup> Therefore, the regulation of wireless broadband content will adversely affect consumer demand for wireless use and result in reduced revenue for the government and business as well as investment in the technology.

## VI. CONCLUSION

Under current statute and application of Supreme Court precedent and methods of analysis, the FCC has no authority to extend traditional broadcast indecency regulations to wireless broadband content. The Supreme Court has not applied the rule set forth in *Pacifica* to media of communication other than traditional broadcast radio and television. As technology continues to integrate media of communication, the line between traditional broadcast and other media will continue to blur. Possibly, this line will blur to a point where there will be no line and only wireless broadband communications exist. If that occurs, *Pacifica* may have no place in indecency analysis. Conversely, *Pacifica* may be revived and control indecency analysis if there exists only one primary medium of communication.

To regulate wireless broadband in its infancy as the anti-indecency groups desire will impede the growth of this technology and infringe upon the First Amendment rights of all Americans. The United States must be able to compete globally with this emergent technology. Consequently, Congress and the FCC must strike a delicate balance in fostering and cultivating wireless broadband. On one hand, the Supreme Court must protect the First Amendment rights of Americans from overreaching regulation. On the other hand, the current policy of deregulation

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Some of the access companies expected to bid on the wireless licenses are Verizon and T-Mobile. See Pelofsky, *supra* note 224.

<sup>232</sup> See Fine, *supra* note 223.

<sup>233</sup> According to a study of youths in South Korea, who have the most technologically advance media habits, "they will spend \$2.6 billion for mobile media in 2006 and \$2.9 billion in '07." *Id.* This could be a boon for newspapers, magazines, and television networks whose use has declined in recent years because of cable and the Internet. *Id.*

among communication companies presents its own set of harms to avoid. “The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.”<sup>234</sup> Perhaps Justice Burger’s foreshadowing statement places the issue in perspective.

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<sup>234</sup>Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 102 (1973).