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## The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation

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## Cover Page Footnote

Associate, Weil, Gotshal & Manges LLP. J.D., Northwestern University School of Law; M.B.A., Kellogg Graduate School of Management. I would like to thank Bob Lebailly, Professor Rachel Davis Mersey, and Professor Jim Speta for their invaluable guidance on this project. I am also very grateful to Professor Michael P. Smith and the Media Management Center for providing the funding that made the study possible.

# The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation

Nick Gamse\*

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## INTRODUCTION

In the thirty-plus years since *FCC v. Pacifica Foundation*<sup>1</sup> revolutionized content-based broadcast regulation, much has changed. Although broadcast television was recognized as a dangerously pervasive medium in 1978,<sup>2</sup> it is no longer the dominant force that it once was, with the vast majority of Americans now paying for subscription television services like cable or satellite.<sup>3</sup> While the *Pacifica* Court strove to support parents in their struggle to protect their children from pervasive inappropriate content by upholding the Federal Communication Commission's content regulation,<sup>4</sup> technological developments like the V-Chip, cable boxes, DVRs, and satellite boxes have afforded modern parents various self-help alternatives.

Many critics have argued that changes like these in the convergent media environment have obviated any need for the Supreme Court to evaluate the constitutionality of broadcast speech regulations with special deference, or so-called "intermediate scrutiny."<sup>5</sup> They contend that broadcast restrictions should instead be evaluated like all other content-based media regulation, with "strict scrutiny."<sup>6</sup> Some have suggested that no content-based television regulation could pass constitutional muster under a strict scrutiny test because new self-help media filters like the V-Chip necessarily present a less restrictive means

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<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> *Id.* at 748.

<sup>3</sup> NIELSEN, TELEVISION AUDIENCE 2009 1 (2010), available at [http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/04/TVA\\_2009-for-Wire.pdf](http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/04/TVA_2009-for-Wire.pdf). See also Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, FCC 10-196, ET Docket No. 10-235 at 38 (Nov. 30, 2010) (statement of Julius Genachowski, Chairman, FCC) (noting that "less than 10% of Americans receive broadcast television only through over-the-air spectrum signals").

<sup>4</sup> See *infra* note 30 and accompanying text.

<sup>5</sup> See, e.g., Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373, 389-90 (2009).

<sup>6</sup> See *id.*

of controlling indecent or profane speech.<sup>7</sup> These arguments have found welcome ears in some courts, most notably the Second Circuit. Upon hearing *Fox v. FCC* on remand from the Supreme Court, the court pulled no punches in forcefully arguing that changes in the technology landscape should unravel any special First Amendment status for broadcast speech restrictions.<sup>8</sup>

Unfortunately, both law review articles and judicial opinions that have lobbied against content-based broadcasting regulation have generally neglected to offer specific empirical evidence to support their positions. These critics tend to focus on how new technology might be used in theory rather than how it is actually used in practice. This approach is problematic. If the Supreme Court is to uproot three decades of its broadcast speech precedent (as it will have the opportunity to do when it decides the next iteration of *Fox v. FCC* this term),<sup>9</sup> it should do so on the basis of specific empirical data that directly address the status of the bedrock governmental interest from *Pacifica*: parental control over their children's exposure to pervasive content.<sup>10</sup> Thus, it is critical to understand precisely how the changes in media consumption and technology have affected these parents and their perceptions of control. It is equally important to empirically distinguish between the efficacies of the alternatives that the Court would consider under a strict scrutiny analysis: one regime based on media filters and another based on regulation. Without such empirical

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<sup>7</sup> Indeed, this was precisely the position taken by the Fox television stations in the Supreme Court's most recent indecency case, *FCC v. Fox Television Stations, Inc.* ("*Fox II*"), 129 S. Ct. 1800 (2009). Brief of Respondent at 45–48, *Fox II*, 129 S. Ct. 1800 (2009) (No. 07-582) ("The availability of the V-Chip renders the FCC's content-based regulation of indecent speech on broadcast television unconstitutional."). Law review articles have also advanced this argument. See, e.g., Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 303 (2003).

<sup>8</sup> *Fox Television Stations, Inc. v. FCC* ("*Fox III*"), 613 F.3d 317, 325–27 (2d Cir. 2010).

<sup>9</sup> The Court agreed to hear argument specifically on the question of whether the FCC's indecency regime is constitutional. *FCC v. Fox Television Stations, Inc.* ("*Fox IV*"), 131 S. Ct. 3065 (2011). Oral argument occurred just before this article was printed on January 10, 2012. *No. 10-1293: Proceedings and Orders*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1293.htm> (last visited Jan. 1, 2012).

<sup>10</sup> See *infra* note 30 and accompanying text.

considerations, it is impossible to accurately determine which alternative is the less restrictive method of protecting children (or whether the Federal Communications Commission (FCC) has less restrictive ways of accomplishing its mandate).

This study is the first to use actual survey data to examine how technology has changed the perspectives of parents. With generous funding from the Media Management Center at Northwestern University,<sup>11</sup> I conducted an original survey of 575 American parents to better understand their perspectives on the intersection between television regulation and media filter technology. Parental views are fundamental to the indecency inquiry because they are at the core of the First Amendment carve-out for the content-based regulation of television broadcasting. The survey results offer clear empirical support for the argument that the FCC's content-based regulation of indecent and profane content should be deemed unconstitutional.

Broadcast television is no longer a uniquely pervasive threat to parental control over what their children watch on television. The survey data reveal that there is no statistically significant difference in perceptions of control between parents who consume only broadcast television in their homes and those who receive their television through some other means of distribution (such as cable or satellite). Moreover, there is not a statistically significant difference between these two groups of parents in their perceptions of how much exposure their children have to inappropriate content on television. In other words, the data show that parents do not perceive an underlying practical need for regulations of broadcast speech to be measured with any less scrutiny than regulations on other media. It is not a uniquely pervasive medium.

Second, parents overwhelmingly report that media filter technology like the V-chip is at least an equally effective substitute for government regulation of inappropriate content. This is a

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<sup>11</sup> The Media Management Center is Northwestern University's media education and research entity, and is affiliated with the Kellogg School of Management and the Medill School of Journalism, Media, Integrated Marketing Communications. *See About the Media Management Center*, NORTHWESTERN UNIV., <http://www.mediamanagementcenter.org/about.asp> (last visited Nov. 10, 2011).

striking finding that could justify the eradication of the FCC's authority to regulate television content at all. Although most parents would like to rely on a multifaceted defense comprised of both technology and regulation, that position stands at odds with the Supreme Court's strict scrutiny jurisprudence. If media filters are just as effective as regulation at achieving the government's interest of helping parents control what their children see, then the regulations should be deemed unconstitutional abridgements of the First Amendment.

This paper will proceed as follows. Section I briefly summarizes content-based broadcast regulation in this country and contrasts it with how other televised content is treated under the First Amendment. Next, Section II introduces the survey procedures. The results are presented and analyzed in Section III, with tables appended to this paper.

## I. TECHNOLOGY, BROADCAST TELEVISION, AND THE FIRST AMENDMENT

### A. *The First Amendment and Broadcast Television*

Congress created the FCC under the Communications Act of 1934, with a broad mandate to regulate broadcasting in the public interest.<sup>12</sup> Congress specifically tasked the FCC with the responsibility of imposing penalties for "obscene, indecent, or profane language."<sup>13</sup> However, the Act also included a provision

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<sup>12</sup> Communications Act of 1934 § 1, 47 U.S.C. § 151 (1937); MORTON I. HAMBURG & STUART N. BROTMAN, COMMUNICATIONS LAW AND PRACTICE § 2.01[2] (Release 30 2011).

<sup>13</sup> Communications Act of 1934 § 303(m)(4), 326, 501-02, 47 U.S.C. §§ 303(m)(1)(D), 326, 501-02 (2006); *see also* 18 U.S.C. § 1464 (2006) ("Whoever 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."). The FCC defines "indecent" content 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." FCC, OBSCENE, INDECENT, AND PROFANE BROADCASTS 1, available at <http://transition.fcc.gov/cgb/consumerfacts/obscene.pdf> (last visited Nov. 14, 2011). Profane content is "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Id.* However, it should be noted that the FCC's definition is the subject of pending Supreme Court litigation. *See* Edward Wyatt, *Justices Agree to Consider FCC Rules on Indecency*,

against censorship,<sup>14</sup> underscoring the inherent tension between the First Amendment and content-based broadcasting regulation.<sup>15</sup> Because obscenity has long been held to be devoid of any constitutional protection,<sup>16</sup> the First Amendment battle is waged primarily over regulation concerning indecency and profanity.

The First Amendment justification for this content-specific regulation has changed over time. For many years, broadcast speech was given special status amidst First Amendment concerns related to spectrum scarcity.<sup>17</sup> However, the spectrum scarcity idea quickly became an anachronism in broadcast regulation,<sup>18</sup> especially with the proliferation of cable<sup>19</sup> and satellite technologies, and, more recently, digital television. The Court has

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N.Y. TIMES, June 28, 2011, at B3, *available at* [http://www.nytimes.com/2011/06/28/business/media/28fcc.html?\\_r=1&scp=1&sq=Justices%20Agree%20to%20Consider%20FCC%20Rules%20on%20Indecency&st=cse](http://www.nytimes.com/2011/06/28/business/media/28fcc.html?_r=1&scp=1&sq=Justices%20Agree%20to%20Consider%20FCC%20Rules%20on%20Indecency&st=cse).

Obscene content must meet a three pronged test:

- (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.

*Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations omitted).

<sup>14</sup> Communications Act of 1934 § 326, 47 U.S.C. § 326 (2006)

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.

*Id.*

<sup>15</sup> The two clauses have generally been interpreted together to imply that the FCC may not impose prior restraint, but can issue fines for obscene, indecent, or profane speech. *FCC v. Pacifica Found.*, 438 U.S. 726, 736–38 (1978).

<sup>16</sup> *Miller*, 413 U.S. at 36–37 (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)) (“[W]e reaffirm the *Roth* holding that obscene material is not protected by the First Amendment”). *But see* MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 68–72 (1984) (generally critiquing the rationale behind the Court’s obscenity jurisprudence).

<sup>17</sup> 3 RODNEY A. SMOLLA & MELVILLE B. NIMMER, *SMOLLA & NIMMER & NIMMER ON FREEDOM OF SPEECH* § 26:3 (2011).

<sup>18</sup> *See* LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 200–08 (1987).

<sup>19</sup> *See id.* at 239–47.



acknowledged criticism of the scarcity doctrine,<sup>20</sup> and while it appears to have abandoned the theory, it has not explicitly done so.<sup>21</sup>

In 1978, the Court defined its current stance on content-based broadcast regulation in the landmark case of *FCC v. Pacifica Foundation*.<sup>22</sup> The case presented the Court with an opportunity to determine whether the FCC had the authority to regulate the broadcast of George Carlin's "Filthy Words" monologue on the basis of indecency alone.<sup>23</sup> The FCC emphasized that it only intended to regulate indecent content that aired at a time when there was a "reasonable risk" that children might hear it.<sup>24</sup> Writing for the majority, Justice Stevens upheld the Commission's restriction of speech in this context.<sup>25</sup> In so doing, he presented two new rationales for why broadcast speech deserved more limited First Amendment protection than speech communicated through other mediums (namely print).

First, the Court emphasized the "uniquely pervasive presence" of broadcast media in American society.<sup>26</sup> The Court found the threat of invasion of privacy into the home to be compelling, especially because, practically, it was difficult for consumers to heed content warnings when they sporadically tuned in and out.<sup>27</sup> Second, the Court found that children were especially vulnerable to the broadcast medium because it was so readily available and could corrupt them "in an instant."<sup>28</sup> The Court was sympathetic to the difficulties that parents had maintaining "authority in their

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<sup>20</sup> See *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) (acknowledging "increasing criticism" of spectrum scarcity, and requesting further input from Congress or the FCC on the issue).

<sup>21</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting) (emphasizing that the majority "refrain[ed] from relying on the notion of 'spectrum scarcity'" to reach its conclusions); SMOLLA & NIMMER, *supra* note 17, § 26:22.

<sup>22</sup> *Pacifica*, 438 U.S. at 729–38.

<sup>23</sup> *Id.* at 729.

<sup>24</sup> *Id.* at 732 (quoting *Pacifica Found.*, 56 F.C.C. 2d 94, 98 (1975)).

<sup>25</sup> *Id.* at 751.

<sup>26</sup> *Id.* at 748.

<sup>27</sup> *Id.* at 748–49. This position has been interpreted as a rejection of the argument that consumers could simply turn off programming that they found offensive. SMOLLA & NIMMER, *supra* note 17, § 26:22.

<sup>28</sup> *Pacifica*, 438 U.S. at 749.

own household[s]” which were infiltrated by such a pervasive medium.<sup>29</sup>

Over time, it has become clear that *Pacifica*’s core interest was a firm commitment to helping parents control the upbringing of their children in the face of the pervasive cultural force of broadcast television.<sup>30</sup> Indeed, the Court’s desire to protect children from “harmful” speech was manifested in several of *Pacifica*’s contemporary cases.<sup>31</sup> While the *Pacifica* Court was careful to qualify that its nuisance rationale was limited and heavily contextual,<sup>32</sup> subsequent cases maintained a firm commitment to protecting children. In *Sable Communications of California, Inc. v. FCC*,<sup>33</sup> the Court underscored *Pacifica*’s focus on children, and ignored any concerns related to negative effects on the adult population.<sup>34</sup> This treatment led some to speculate that the Court would never approve a 24-hour bar on indecent speech, since that would move beyond the protection-of-childhood-innocence rationale that was paramount in the *Pacifica* decision.<sup>35</sup> Indeed, that hypothesis was borne out through the *Action for Children’s Television* cases, where the D.C. Circuit prevented Congress from compelling the FCC to regulate indecency twenty-four hours a day.<sup>36</sup> Instead, the court mandated that the agency must allow indecent broadcasts during a “safe

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<sup>29</sup> *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

<sup>30</sup> See J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1136–39 (1996) (arguing that parental control is really at the core of the pervasiveness and scarcity rationales, and is the only reason that could justify separate treatment for broadcasting); Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from “Indecent” Speech*, 11 WM. & MARY BILL RTS. J. 671, 683 (2003) (writing that the state’s interest in supporting parental control has “proven entirely uncontroversial”).

<sup>31</sup> See SMOLLA & NIMMER, *supra* note 17, § 26:23 (discussing these cases).

<sup>32</sup> *Pacifica*, 438 U.S. at 750.

<sup>33</sup> 492 U.S. 115 (1989).

<sup>34</sup> *Id.* at 127–28.

<sup>35</sup> See SMOLLA & NIMMER, *supra* note 17, § 26:24 (discussing generally *Sable Commc’ns v. FCC*, 492 U.S. 115 (1989)).

<sup>36</sup> See *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1509–10 (D.C. Cir. 1991).

harbor” period between 10:00 PM and 6:00 AM, when children are likely sleeping.<sup>37</sup>

The Court’s *Pacifica* decision was steeped in the notion that the broadcast medium was unique, and deserved less First Amendment protection than other media.<sup>38</sup> Later cases have clearly articulated the lower degree of protection that broadcast speech receives under the First Amendment. In *Turner Broadcasting System, Inc. v. FCC* (“*Turner P*”), the Court described its standard of review for content-based restrictions on broadcast speech as “less rigorous” than its standards for other media.<sup>39</sup> Commentators have generally described this standard as “intermediate” scrutiny.<sup>40</sup> The Court has stated that it will uphold a restriction on broadcast speech so long as the regulation is “narrowly tailored to further a substantial government interest,”<sup>41</sup> a threshold that is significantly lower than the strict scrutiny inquiry used for other media.<sup>42</sup>

#### B. Cable and Satellite Television

Content-based regulations on multichannel video programming distributors (“MVPDs”) offering cable, fiber, and satellite television have always been treated differently than restrictions on broadcast speech. In *United States v. Playboy Entertainment Group*, the Court drew a bright line between broadcast and cable television specifically in the context of indecency regulation.<sup>43</sup> Rather than revert to *Pacifica*’s intermediate scrutiny test, the Court applied a strict scrutiny standard to determine whether sexually-oriented cable channels could constitutionally be required to scramble their transmissions or limit transmission to hours when

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<sup>37</sup> *Action for Children’s Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc).

<sup>38</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (explaining that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection”).

<sup>39</sup> 512 U.S. 622, 637 (1994).

<sup>40</sup> SMOLLA & NIMMER, *supra* note 17, § 26:27 (discussing this “intermediate” standard of review for broadcasting).

<sup>41</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

<sup>42</sup> *See infra* Section I.B.

<sup>43</sup> *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000).

children would not be watching (10 PM to 6 AM).<sup>44</sup> Under a strict scrutiny analysis, the government must show that its regulation is the “least restrictive means” of “promot[ing] a compelling Government interest.”<sup>45</sup>

In making its strict scrutiny assessment, the *Playboy* Court repeatedly emphasized that media filtering technology associated with cable could achieve the government’s compelling interest of helping parents keep inappropriate content from their children.<sup>46</sup> The “key difference” between cable and broadcast television in the case was that “[c]able systems have the capacity to block unwanted channels on a household-by-household basis.”<sup>47</sup> The Court ruled that such technology was critically important to its First Amendment inquiry because it could support parents while still allowing willing consumers to partake in the speech that they desired to receive.<sup>48</sup> It summarily concluded that “targeted blocking is less restrictive than banning,”<sup>49</sup> and deemed the scrambling restriction unconstitutional.<sup>50</sup>

Notably, the Court has used similar filter-based logic to knock down regulations on Internet speech.<sup>51</sup> While the Court has not

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<sup>44</sup> *Id.* at 808, 813.

<sup>45</sup> *Id.* at 813 (citing *Sable Commc’ns. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>46</sup> *Id.* at 815.

<sup>47</sup> *Id.* It is worth noting that the Court has offered slightly different rationales for distinguishing cable in the content-neutral context. In *Turner I*, a case that dealt with the Cable Act’s content-neutral must-carry provision, the Court focused on the “inherent limitations that characterize the broadcast medium,” harkening back to the original scarcity justification for regulating broadcast speech. 512 U.S. 622, 638–39 (1994). The Court distinguished that there were no significant limits on the number of cable channels, and no threat of signal interference. *Id.* at 639.

<sup>48</sup> *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000) (“[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt.”).

<sup>49</sup> *Id.* This very statement is now being used by some commentators to challenge whether any content-based regulation on broadcast television is permissible. See *infra* Section II.C.

<sup>50</sup> *Id.* at 827.

<sup>51</sup> *Id.* at 814 (“[T]he mere possibility that user-based Internet screening software would ‘soon be widely available’ was relevant to our rejection of an overbroad restriction of indecent cyberspeech.” (quoting *Reno v. ACLU*, 521 U.S. 844, 876–77 (1997))).

heard an indecency case regarding either satellite or fiber-delivered television, it is reasonable to expect that they would also receive strict scrutiny treatment because they offer similar filtering capabilities.<sup>52</sup> Although the FCC has not traditionally attempted to enforce the Telecommunications Act indecency regulations against MPVDs (including cable),<sup>53</sup> the issue is not entirely moot because Congress could simply legislate content-based restrictions on those services as well. Indeed, there was a significant push to do so as recently as 2005 (in the wake of the Janet Jackson imbroglio).<sup>54</sup> Of course, any such attempt would surely receive a prompt challenge in court, and the government would be required to show that the regulation was the least restrictive means of achieving its compelling interest.

### C. *The Emerging Quagmire: Broadcast Meets New Media Technology*

The question of whether the government can continue to regulate broadcast speech more strictly than it can speech distributed via other mediums has been called the “most important First Amendment problem in the context of broadcast regulation.”<sup>55</sup> Modern technologies have helped create a convergent media marketplace in which traditional media lines are blurred and in which media filters like those discussed in *Playboy* are widely available to parents, even for broadcast television. A brief discussion of those changes will be helpful to more fully

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<sup>52</sup> See John C. Quale & Malcom J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite*, 60 FED. COMM. L.J. 37, 65–66 (2007) (arguing that any content-based regulation on DBS would likely be weighed with a strict scrutiny standard, making it unlikely that any indecency regulation could be upheld).

<sup>53</sup> FCC, *Regulation of Obscenity, Indecency and Profanity*, FCC.GOV (last reviewed/updated Mar. 1, 2011, 6:05 PM), <http://www.fcc.gov/eb/oip/> (noting that the agency has traditionally only enforced the Telecommunication Act’s indecency provisions against broadcasters).

<sup>54</sup> See Frank Ahrens, *Senator Bids to Extend Indecency Rules to Cable*, WASH. POST, Mar. 2, 2005, at E1, available at <http://www.washingtonpost.com/wp-dyn/articles/A64548-2005Mar1.html>; Lisa de Moraes, *CBS to FCC: Halftime Show Finale Was a Surprise to Us, Too*, WASH. POST, Nov. 9, 2004, at C07, available at <http://www.washingtonpost.com/wp-dyn/articles/A35448-2004Nov8.html>.

<sup>55</sup> SMOLLA & NIMMER, *supra* note 17, § 26:4.

address the overarching question of whether the FCC can still justifiably regulate otherwise protected televised speech.

Perhaps the most significant development, at least insofar as the First Amendment is concerned, is one that is now over ten years old. Under the Telecommunications Act of 1996, Congress mandated that all televisions larger than thirteen inches sold after January 1, 2000 must include a V-chip.<sup>56</sup> The V-chip technology works with TV ratings in a manner that allows parents to block shows that they disfavor (based on the shows' ratings).<sup>57</sup> Nevertheless, while a V-chip is available in the vast majority of televisions currently in use, only a very small number of consumers actually utilize the technology. One 2007 study found that while over eighty-two percent (82%) of parents had a V-chip-equipped television, more than half weren't even aware their TVs actually included V-chips, and only sixteen percent (16%) had ever actually used one.<sup>58</sup>

Other important changes have also occurred in the media environment. First, the percentage of families that use broadcast signals for their television has plummeted. Fewer than ten percent (10%) of families rely on broadcast transmissions for their television.<sup>59</sup> Instead, the vast majority of consumers now receive their television transmissions via MVPDs like cable and satellite.<sup>60</sup> These pay-TV services typically include additional filtering capabilities for their customers.<sup>61</sup> In fact, cable companies are

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<sup>56</sup> Telecommunications Act of 1996 § 551, 47 U.S.C. § 303(w) (2006).

<sup>57</sup> FCC, *V-Chip: Viewing Television Responsibly*, FCC.GOV, <http://www.fcc.gov/vchip/> (last updated July 8, 2003). The rating system was established as an industry initiative by the National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America. *Id.* The ratings are as follows (increasing in severity): TV-Y, TV-Y7, TV-G, TV-PG, TV-14, TV-MA. *Id.*

<sup>58</sup> VICTORIA RIDEOUT, KAISER FAMILY FOUNDATION, PARENTS, CHILDREN & MEDIA: A KAISER FAMILY FOUNDATION SURVEY 9–10 (June 2007).

<sup>59</sup> NIELSEN, *supra* note 3, at 1.

<sup>60</sup> *Id.*

<sup>61</sup> Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM.LAW CONSPECTUS 431, 473 (2007) (“Parental controls are usually just one button-click away on most cable and satellite remote controls and boxes.”). See generally TVBOSS, [www.thetvboss.org](http://www.thetvboss.org) (last visited Nov. 17, 2011) (demonstrating a television industry initiative that catalogs the various parental control options for cable and satellite customers); *Parental Controls*, TV PARENTAL

legally bound to provide blocking devices to their customers upon request,<sup>62</sup> and most do so for free.<sup>63</sup>

Second, American children are now exposed to a wide range of media that extend well beyond just broadcast television. One recent study found that children ages eight to eighteen spend more than seven and a half hours per day consuming media, during which time they take in a whopping ten hours and forty-five minutes worth of content (through multitasking).<sup>64</sup> While video is still the largest portion of their media consumption (four hours and twenty-nine minutes per day), more than forty percent (40%) of that video content is not traditional television; it “is either pre-recorded or watched on such other platforms as computers, DVDs, cell phones, or iPods.”<sup>65</sup>

Some prominent judicial opinions have explicitly suggested that because of these changes in technology and media consumption, broadcast regulations no longer merit special First Amendment treatment. This position was recently advanced by Justice Thomas in his concurring opinion in *Fox v. FCC*,<sup>66</sup> and even more forcefully asserted by the Second Circuit when it heard the same case on remand.<sup>67</sup> The case dealt with the FCC’s punishment of “fleeting expletives,” or unscripted profanity that is transmitted during live broadcasts.

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GUIDELINES, <http://www.tvguidelines.org/parentalcontrols.htm> (last visited Nov. 17, 2011) (offering similar information).

<sup>62</sup> 47 U.S.C. § 544(d)(2) (2006) (“In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.”).

<sup>63</sup> *Images Children See on the Screen: Hearing Before the H. Subcomm. on Telecomms. & the Internet*, 110th Cong. 3 (2007) (statement of Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association), available at <http://www.ncta.com/DocumentBinary.aspx?id=602> (stating that “leading cable companies” serving more than 85% of the cable subscribers in the country had agreed to provide blocking technology for free).

<sup>64</sup> VICTORIA RIDEOUT, ULLA G. FOEHR & DONALD F. ROBERTS, KAISER FAMILY FOUNDATION, *GENERATION M<sup>2</sup>: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 2* (2010).

<sup>65</sup> *Id.* at 11.

<sup>66</sup> *Fox II*, 129 S. Ct. 1800, 1820 (2009) (Thomas, J., concurring).

<sup>67</sup> *Fox III*, 613 F.3d 317, 325 (2d Cir. 2010).

Although Justice Scalia declined to address the First Amendment issue in the majority opinion,<sup>68</sup> Justice Thomas forcefully did so in his concurrence. He questioned the very authority of the FCC to continue to regulate the content of broadcast programming. He argued, as he had previously in *Denver Area*,<sup>69</sup> that there was no textual basis to alter First Amendment protections across different media.<sup>70</sup> Perhaps accepting that this textual interpretation had not carried favor with the rest of the Court, he proceeded to lay out a new argument as well: that “dramatic technological advances ha[d] eviscerated” the need for the Court to treat broadcast speech differently.<sup>71</sup> He specifically took aim at both the scarcity and pervasiveness justifications, writing that the broadcast spectrum was no longer scarce, and that broadcast television was no longer uniquely pervasive since it had become just a small component of a multifaceted media landscape.<sup>72</sup>

On remand, the Second Circuit took the baton from Justice Thomas, pausing for a lengthy tangent to question whether the Supreme Court’s longstanding *Pacifica* doctrine should still be valid.<sup>73</sup> The court specifically highlighted the advent of new

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<sup>68</sup> The majority ruled that the FCC’s decision to begin treating fleeting expletives as actionable under its indecency policy was neither arbitrary nor capricious. *Fox II*, 129 S. Ct. at 1812. The Court declined to address the lurking First Amendment issue because the Second Circuit had not “definitively rule[d] on the constitutionality of the Commission’s orders.” *Id.* at 1819.

<sup>69</sup> *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in part and dissenting in part).

<sup>70</sup> *Fox II*, 129 S. Ct. at 1820–21 (Thomas, J., concurring).

<sup>71</sup> *Id.* at 1821.

<sup>72</sup> *Id.* at 1821–22.

<sup>73</sup> *Fox III*, 613 F.3d 317, 325–27 (2d Cir. 2010). The arguments presented by the Second Circuit closely mirrored similar ones that it made in its initial opinion prior to rehearing by the Supreme Court. *See Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 465–66 (2d Cir. 2007), *rev’d on other grounds*, 129 S. Ct. 1800 (2009)

[I]t is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television. . . . If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC’s robust oversight.

*Id.*



media filters since the *Pacifica* decision came down in 1978, noting that “technological changes have given parents the ability to decide which programs they will permit their children to watch.”<sup>74</sup> In no uncertain terms, the court found that these technologies outmoded any need for broadcast speech to be given special First Amendment status. The court explained, “[w]e can think of no reason why [the Supreme Court’s] rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available.”<sup>75</sup> Although the court was not in a position to overturn the Supreme Court’s *Pacifica* precedent,<sup>76</sup> this lengthy denunciation of the doctrine in dicta was nevertheless an important shot across the bow of the Court’s broadcast jurisprudence. The Court apparently took notice, granting certiorari in late June 2011.<sup>77</sup>

Criticism regarding the lack of synthesis between modern technology and the Court’s broadcast speech doctrine has not been confined to judicial opinions. Several articles have similarly contested that the nation’s broadcast policy is woefully behind the times, and that the advent of the Internet and digital media filters should allow broadcast speech to be deregulated. These arguments can be separated into two distinct camps. Some critics argue, as did Justice Thomas and the Second Circuit, that broadcast regulations should no longer be weighed with special intermediate scrutiny, but instead deserve treatment under the more rigid strict scrutiny test.<sup>78</sup> Others go one step further, contending that the proliferation of media filters like the V-chip inherently presents a less restrictive means of protecting children from indecent content.<sup>79</sup> These critics believe that any FCC content-based

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<sup>74</sup> *Fox III*, 613 F.3d at 326.

<sup>75</sup> *Id.* at 327.

<sup>76</sup> *Id.*

<sup>77</sup> See generally *Fox IV*, 131 S. Ct. 3065 (2011).

<sup>78</sup> See, e.g., May, *supra* note 5, at 389–90 (writing that the Court should give broadcasters the same First Amendment strict scrutiny protections as other media sources).

<sup>79</sup> See, e.g., Balkin, *supra* note 30, at 1155 (suggesting that because the V-chip gives parents the ability to “protect” their children from unwanted television, “the government should henceforth be forbidden from engaging in other content-based regulation of

indecenty regulation cannot survive a strict scrutiny test and consequently should be deemed unconstitutional.

Surprisingly, there is little empirical data to support these conclusions.<sup>80</sup> Both Justice Thomas and the Second Circuit spoke of technological change in general terms, but did not offer any specific evidence about how those changes actually impacted the control that parents had over indecent content, especially the minority of parents who choose to have only broadcast television in their homes. In order to properly determine if the Court should continue to recognize broadcast television as a unique medium, there must be some empirical consideration of how parents with broadcast television feel about their level of control relative to other parents. Similarly, there should be an empirical consideration of self-help technology alternatives like the V-chip in order to make a decision about less restrictive methods of achieving the government's compelling interest under the strict scrutiny test.

At first blush, language from the *Playboy* decision seems to suggest that the courts should *not* be concerned with how self-help media filters are actually adopted or used for strict scrutiny analysis. In identifying cable boxes as a less restrictive means to control signal bleed from indecent programming, the Court stated,

It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative

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violence and indecenty in the broadcast media"); Yoo, *supra* note 7, at 305 (arguing that "the V-chip constitutes a less restrictive means sufficient to render any ban on indecent speech unconstitutional"); Elizabeth H. Steele, Note, *Examining the FCC's Indecency Regulations in Light of Today's Technology*, 63 FED. COMM. L.J. 289, 307-10 (2010) (calling for total indecenty deregulation); *see also* Editorial, *Content Regulation: An Indecent Proposal*, THE ECONOMIST, Jul. 21, 2005, at 54, available at <http://www.economist.com/node/4198412> (arguing that indecenty regulation should be abandoned entirely, in light of self-help technology and countervailing concerns about government censorship).

<sup>80</sup> Justice Scalia underscored this gap in his majority opinion in *Fox II*. While declining to address the First Amendment issues that were present in the case, he noted that the Second Circuit did not "demand empirical evidence" to support its pervasiveness argument. 129 S. Ct. 1800, 1819 (2009).

would be ineffective; and a court should not presume parents, given full information, will fail to act.<sup>81</sup>

This striking passage has not gone unnoticed and has been cited in subsequent decisions and law review articles arguing that self-help media filters must be recognized as a less restrictive means of controlling indecent content.<sup>82</sup> However, a more careful analysis shows why it is wrong to interpret the *Playboy* decision to mean that the mere existence of any media filters presents a *de facto* bar against government media indecency regulation; empirical data must be considered if it is available.

To start, it is clear that the *Playboy* Court was willing to examine data in order to determine whether blocking technology could be construed as a “plausible” or “effective” alternative to regulation.<sup>83</sup> The Court’s statement that it would not make assumptions about consumer behavior was largely driven by the fact that the government failed to provide it with any comparative evidence that went beyond mere “anecdote and supposition.”<sup>84</sup> The Court lamented that “[t]he record [was] silent as to the comparative effectiveness of the two alternatives.”<sup>85</sup> Under the strict scrutiny standard, the government had a burden to show that its regulation was a less restrictive means of achieving the compelling interest of protecting children, a burden that it failed to meet.<sup>86</sup> But its failure should by no means be construed to imply that it did not have the ability to present evidence about the extent

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<sup>81</sup> United States v. *Playboy Entm’t Grp.*, 529 U.S. 803, 824 (2000).

<sup>82</sup> See, e.g., *Fox I*, 489 F.3d 444, 465–66 (2d Cir. 2007), *rev’d on other grounds*, 129 S. Ct. 1800 (2009); Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 773 n.167 (2003); Yoo, *supra* note 7, at 303–04.

<sup>83</sup> See *Playboy*, 529 U.S. at 824; see also *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (suggesting that the proper test is “whether the challenged regulation is the least restrictive means among available, effective alternatives”). This language from *Ashcroft* serves as further proof of the Court’s willingness to consider evidence about the efficacy of the various proposed means of achieving the compelling interest.

<sup>84</sup> *Playboy*, 529 U.S. at 822, 824.

<sup>85</sup> *Id.* at 826.

<sup>86</sup> *Id.*

to which the alternatives were more or less restrictive, or more or less effective at achieving the compelling interest at stake. It did.

Other recent cases similarly support the conclusion that the Court should rely heavily upon empirical evidence when evaluating the constitutionality of speech regulations. A comparison to the Court's treatment of must-carry restrictions in *Turner I*<sup>87</sup> and *Turner II*<sup>88</sup> is illustrative. In *Turner I*, the Court determined that the record was insufficient for it to make a proper assessment of whether must-carry provisions were constitutional under intermediate scrutiny.<sup>89</sup> It therefore remanded the case to the District Court for the District of Columbia for additional fact-finding.<sup>90</sup> With more data to consider in *Turner II*, the Court reviewed the expanded record to determine "whether the must-carry provisions were designed to address a real harm, and whether those provisions [would] alleviate [that harm] in a material way."<sup>91</sup> In sum, the *Turner* cases suggest that courts should rely on empirical data for both intermediate and strict scrutiny First Amendment determinations, and should not hesitate to remand if the factual record does not provide sufficient information.<sup>92</sup>

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<sup>87</sup> *Turner I*, 512 U.S. at 622 (1994).

<sup>88</sup> *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180 (1997).

<sup>89</sup> *Turner I*, 512 U.S. at 667–68

Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

*Id.*

<sup>90</sup> *Id.* at 668.

<sup>91</sup> *Turner II*, 520 U.S. at 195.

<sup>92</sup> See Note, *Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2319 (1998). To the extent that Congress has provided specific interpretations of data in support of content-neutral regulations, the Court will frequently heed those interpretations. See *Turner II*, 520 U.S. at 224 ("We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination."). Justice Breyer expounded upon this point in his recent *Brown* dissent, arguing that the Court has a history of deferring to the factual findings of the legislature, and contending that the

Finally, it should be a matter of common sense that courts would be willing to evaluate data regarding competing alternatives under a strict scrutiny assessment. It would be illogical to ignore reliable data that could help to make a more informed comparison between technology and the regulation it might supplant,<sup>93</sup> at least when such data is available.<sup>94</sup> After all, there are scores of conceivable reasons why a media filter might not be deemed an effective alternative to regulation: it might be inordinately complex to use, prohibitively expensive to procure, or obscure and unavailable for widespread use. The point is that any honest analysis of the extent to which new technology can be an adequate substitute for content regulation must consider data about its adoption and efficacy in practice.

## II. METHODS

In early 2011, I delivered an online survey to a random sample of 575 parents who had children under the age of eighteen living at home. The survey included questions on a range of topics related to technology and media regulation. Parents are the most appropriate survey target for this kind of analysis because they are the population that *Pacifica* aimed to assist; the government interest at stake deals directly with facilitating parental control over their children's exposure to indecent media.<sup>95</sup> The

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Court should have done so in the case of regulations regarding violent video games. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2770 (2011) (Breyer, J., dissenting). But his was the minority view in that case. The majority decision tilted in the other direction, suggesting that the Court will instead make its own independent assessment of the data. *Id.* at 2738–39 (discussing the shortcomings of California's factual showing regarding video game violence).

<sup>93</sup> See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 8 (1998) (arguing that the Court's constitutional jurisprudence would be more aligned with reality if there were closer attention paid "to the likely consequences of its decisions and to the empirical assumptions underlying its doctrines").

<sup>94</sup> See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 21 (1998) (describing "the lack of an empirical footing" as the "Achilles heel of constitutional law," but noting that in some cases, "ignorance is irremediable").

<sup>95</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978) (underscoring the government's interest "in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household'") (quoting *Ginsberg v. New York*, 390 U.S. 629, 637–41 (1968)). See also Balkin, *supra* note 30, at 1137–39 (explaining the fundamental

government has no interest in regulating indecent content that parents *want* their children to see.<sup>96</sup> Thus, parents are the front-line arbiters and are best able to gauge how pervasive television content is to children in modern American homes, and whether self-help technology like media filters is an effective solution to keep this unwanted indecent content at bay.

Although the sample was random, whites were overrepresented in the respondent population. Eighty-two percent (82%) of respondents identified as white. Because there was a statistically significant relationship between race and perspectives on media regulation for some questions, I weighted the data to reflect a more representative racial distribution.<sup>97</sup>

I then analyzed the data, frequently employing the Pearson Chi Square test. This test is one of the most common methods of statistical analysis used to evaluate the probability that the connection between two categorical variables is due to an actual relationship and not the product of random chance.<sup>98</sup> The survey had a margin of error of plus or minus four percent (+/- 4%).<sup>99</sup>

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importance of parental control in justifying content-based regulation for broadcast media).

<sup>96</sup> United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811 (2000) (noting that "the Government disclaims any interest in preventing children from seeing or hearing [Playboy's programming] with the consent of their parents").

<sup>97</sup> The data were weighted so that the racial breakdown was sixty-five percent (65%) white and thirty-five percent (35%) non-white, consistent with the most recent Census data available. U.S. Census Bureau, *B03002. Hispanic or Latino Origin by Race, 2009 American Community Survey*, CENSUS.GOV, [http://factfinder.census.gov/servlet/TTable?\\_bm=y&-ds\\_name=ACS\\_2009\\_1YR\\_G00&-\\_geoSkip=0&-CONTEXT=dt&-mt\\_name=ACS\\_2009\\_1YR\\_G2000\\_C03002&-redoLog=false&-\\_skip=0&-geo\\_id=01000US&-\\_showChild=Y&-format=&-\\_lang=en&-toggle=ACS\\_2009\\_1YR\\_G2000\\_C03002](http://factfinder.census.gov/servlet/TTable?_bm=y&-ds_name=ACS_2009_1YR_G00&-_geoSkip=0&-CONTEXT=dt&-mt_name=ACS_2009_1YR_G2000_C03002&-redoLog=false&-_skip=0&-geo_id=01000US&-_showChild=Y&-format=&-_lang=en&-toggle=ACS_2009_1YR_G2000_C03002) (last visited Nov. 15, 2011). This weighting had a marked effect on the political affiliation of the respondents. Although the survey originally yielded twenty-nine percent (29%) Republican, twenty-nine percent (29%) Democrat, and twenty-three percent (23%) Independent, after the racial weighting, the breakdown shifted to twenty-five percent (25%) Republican, thirty-five percent (35%) Democrat, and twenty-two percent (22%) Independent. For more background on weighting in survey research, see ALAN BUCKINGHAM & PETER SAUNDERS, *THE SURVEY METHODS WORKBOOK: FROM DESIGN TO ANALYSIS* 119 (2004).

<sup>98</sup> BUCKINGHAM & SAUNDERS, *supra* note 97, at 241.

<sup>99</sup> As with all studies, the margin of error fluctuates with each specific question, especially those that were only answered by a subset of the total sample.

The numbers that follow in Part IV generally are percentages of valid responses only, excluding responses such as “don’t know” and “prefer not to answer.”<sup>100</sup>

### III. RESULTS AND ANALYSIS

#### A. *Should Restrictions on Broadcast Speech be Subject to Strict Scrutiny?*

The first important question to answer is whether broadcast television is still the unique medium it was in 1978 when the Court decided *Pacifica*. The empirical answer appears to be that it is not. Several different metrics from this study suggest that broadcast should no longer be singled out for its privileged degree of intermediate scrutiny.

First, there was no statistically significant relationship between television delivery type and parental satisfaction with control over unwanted television content.<sup>101</sup> In other words, parents do not seem to think that broadcast television is a uniquely pervasive medium, relative to other delivery channels (cable, satellite, or fiber). There was only an eight percent (8%) difference in satisfaction with control between parents who received their television signal only via broadcast (“broadcast parents”),<sup>102</sup> and those who received it via other means (“non-broadcast parents”); seventy-seven percent (77%) and eighty-five percent (85%) were

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<sup>100</sup> I have noted instances where the percentage of non-valid responses was over ten percent (10%).

<sup>101</sup> See *infra* Table 1. Note that the racial weighting may have had a disproportionate effect on this result because all non-white respondents who received broadcast signals said that they were satisfied or very satisfied with their control. If the comparison is made without weighting, then the relationship is significant at the ten percent (10%) level, but is still arguably insubstantial, as there is only a ten percent (10%) difference in satisfaction with control. Furthermore, there is not a statistically significant difference between whites and non-whites in satisfaction with control across all television delivery channels, which suggests that the skewed response to that particular question among the non-white broadcast set was just an enigma.

<sup>102</sup> Eleven percent (11%) of respondents in this study reported that they received the television signal in their homes via broadcast. However, some of these respondents also used other delivery mechanisms for their television content. Seven percent (7%) of respondents stated that they relied upon broadcast only for their television.

satisfied, respectively.<sup>103</sup> Thus, the study suggests that the perception of parental control is nearly identical between parents whose children watch programming that is regulated by the FCC and those whose children watch programming that is not.<sup>104</sup>

Second, there was no statistically significant relationship between television delivery type and parental concerns about inappropriate content exposure. Broadcast parents did not have significantly unique concerns about the amount of adult language, sexual content, or violent content to which their children were exposed on television, whether taken individually or grouped together as “inappropriate content.”<sup>105</sup> In fact, the differences in ratings were so small that the results for some of these comparisons were about as statistically insignificant as can possibly be calculated.<sup>106</sup> Furthermore, these parental feelings were not merely similar across *television* delivery alternatives; the percentages of concerned parents from my study were comparable

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<sup>103</sup> See *infra* Table 1. On the other hand, there was a statistically significant relationship between television delivery type and parental satisfaction with the government’s regulation of unwanted programming. Parents who received broadcast only were much more likely to be dissatisfied with the government’s regulation of television programming. However, it would be inappropriate to answer the First Amendment question based on opinions regarding regulatory satisfaction; that would be akin to putting the cart before the horse. The *Pacifica* logic is based upon notions of parental control, so responses regarding their perceptions of control should be determinative here.

<sup>104</sup> The FCC currently only imposes content-based fines on broadcasters. FCC, *Regulation*, *supra* note 52 (“With respect to cable and satellite services, Congress has charged the Commission with enforcing the statutory prohibition against airing indecent programming ‘by means of radio communications.’ The Commission has historically interpreted this restriction to apply to radio and television broadcasters, and has never extended it to cover cable operators. In addition, because cable and satellite services are subscription-based, viewers of these services have greater control over the programming content that comes into their homes, whereas broadcast content traditionally has been available to any member of the public with a radio or television.”).

<sup>105</sup> See *infra* Table 2. Overall, seventy-eight percent (78%) of parents were concerned or very concerned about exposure to violent content, eighty-one percent (81%) about exposure to sexual content, and seventy-three percent (73%) about exposure to adult language.

<sup>106</sup> See *infra* Table 2. For instance, the Fisher’s Exact test result for violent content was 0.999999999999786, implying that there is only a 0.0000000000324% chance that the data support a finding of a relationship between television delivery and concerns about television exposure to violence.



to those from a recent Kaiser study that asked parents about *all* media exposure (including, for example, the Internet).<sup>107</sup>

Thus, while the FCC continues to impose fines on broadcasters under the guise that the medium is pervasive and is uniquely accessible to children, the statistics suggest that broadcast television has truly become a homogenous part of the media landscape. The longstanding *Pacifica* principle that broadcasting is different lacks any significant empirical support among parents in this study. Therefore, if the Supreme Court were to hear a challenge to content-based restrictions on broadcast television, it should close the book on *Pacifica* and its special intermediate scrutiny carve-out, and apply a traditional strict scrutiny test instead.

*B. Are Media Filters like the V-chip a Less Restrictive Means of Achieving the Government's Interests in Regulating Broadcast Speech?*

Having established that regulations on broadcast television should be evaluated using strict scrutiny, the logical next question is whether the proliferation of media filters like the V-chip presents a less restrictive means than regulation to protect children from indecent or profane television content. The empirical answer from this study is a nuanced yes. While parents would generally prefer to have both media filters and government regulation, they admit that the filters are just as effective as regulation by itself. Therefore, if asked to apply a strict scrutiny test, the Court should rule that it is unconstitutional for the FCC to continue to regulate either indecency or profanity on television.

As a preliminary matter, the data support earlier findings that the V-chip suffers from inadequate public awareness and adoption.<sup>108</sup> Only fifty-nine percent (59%) of respondents had heard of the V-chip before taking this survey. While eighty-six

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<sup>107</sup> See RIDEOUT, *supra* note 58, at 24 (reporting that eighty percent (80%) of parents were somewhat concerned or very concerned about exposure to violent content, seventy-seven percent (77%) about sexual content, and seventy-seven percent (77%) about adult language).

<sup>108</sup> KAISER FAMILY FOUNDATION, PARENTS AND THE V-CHIP 2001: A KAISER FAMILY FOUNDATION SURVEY 1 (2001); RIDEOUT, *supra* note 58, at 9–10.

percent (86%) of respondents had purchased a TV since January 1, 2000 (when the V-chip rule went into effect), only thirty-eight percent (38%) of them knew that their TV had a V-chip, and only 15% of them reported that their family had ever actually used the V-chip. These figures are especially striking considering that when the device was first conceived, seventy-two percent (72%) of Americans said they would use a V-chip “often” or “once in awhile” if they had the technology.<sup>109</sup> Comparing these numbers to those from Kaiser’s 2007 study, it seems that general awareness of the V-chip has decreased (from seventy percent (70%) to fifty-nine percent (59%)), although the usage percentages are still approximately the same among those with equipped televisions.<sup>110</sup> Those who actually use their V-chip technology are quite content; ninety-eight percent (98%) of respondents who had used a V-chip said it was either “somewhat useful” or “very useful” in helping them filter inappropriate content from their children.<sup>111</sup> But the overarching problem remains: with the majority of Americans unaware that their TVs have V-chip technology, it is a stretch to believe that the V-chip alone is a realistic alternative to regulation.

However, the V-chip does not exist in a vacuum, and many other media filters have sprung up in its wake. More than sixty-three percent (63%) of the survey respondents reported that they had some other filtering device that they could use to block unwanted programming (whether a cable box, DVR, satellite box, or something else).<sup>112</sup> In contrast to the V-chip’s poor usage, seventy-one percent (71%) of cable box owners had used their devices, along with seventy-seven percent (77%) of DVR owners, sixty-three percent (63%) of satellite box owners, and thirty-four

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<sup>109</sup> JEFFREY D. STANGER & NATALIA GRIDINA, ANNENBERG PUBLIC POLICY CENTER, *MEDIA IN THE HOME 1999: THE FOURTH ANNUAL SURVEY OF PARENTS AND CHILDREN* 24 (1999).

<sup>110</sup> See *RIDEOUT*, *supra* note 58, at 19; *infra* Table 3. It appears as though V-chip awareness may have peaked in 2007. This is likely attributable at least in part to growth of media filter alternatives (such as DVRs).

<sup>111</sup> See *infra*, Table 4.

<sup>112</sup> This figure does not include another ten percent (10%) of respondents who were not sure. Excluding those respondents, over seventy-three percent (73%) said they had another filtering device.

percent (34%) of owners with some other filtering device.<sup>113</sup> Moreover, seventy percent (70%) of cable box owners found their device to be at least a “somewhat useful” means of blocking programming that they did not want their children to see, along with seventy percent (70%) of DVR owners, sixty-seven percent (67%) of satellite box owners, and forty-seven percent (47%) of other device owners.<sup>114</sup> Thus, these separate devices were used much more widely than the V-Chip, although they were also found to be less helpful. This is likely due to the fact that the devices are less utility-focused than the V-chip because they are not designed solely for the purpose of filtering unwanted programming.

Nevertheless, in spite of their prevailing satisfaction with filter technology, the majority of respondents stated that they still wanted the government to continue to regulate broadcast content. More than sixty-five percent (65%) wanted continued regulation of obscenity and indecency, and more than sixty percent (60%) wanted continued regulation of profanity.<sup>115</sup> Only about eighteen percent (18%) of respondents thought that the government should relax obscenity and indecency restrictions because of technology, and only about twenty-one percent (21%) for profanity; the remainder thought regulations should be relaxed for other reasons.<sup>116</sup> Broadcast television users did not have significantly different responses to these questions than the MPVD users.

Most importantly however, eighty-one percent (81%) of respondents thought that technology like the V-chip was an equally effective or better alternative to government regulation for controlling the programming that they did not want their children to watch.<sup>117</sup> This finding is damning for content-based broadcast

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<sup>113</sup> See *infra* Table 4.

<sup>114</sup> See *infra* Table 4.

<sup>115</sup> See *infra* Table 5. The number of invalid responses was particularly high for this line of questions; nearly twelve percent (12%) of respondents did not have an opinion on this subject. For a hypothesis as to why that might be the case, see *infra* Section IV(c).

<sup>116</sup> See *infra* Table 5.

<sup>117</sup> See *infra* Table 6. As with the prior data, there was a high number of invalid responses because a significant number of respondents (17%) answered “don’t know.” It is important to remember that these responses were given in a world in which the government does regulate. To some extent, that might implicate the extent to which these individuals are able to fully envision the implications of a world devoid of regulation. On

regulation. The parents that *Pacifica* strove to assist seem to think that its regulatory progeny is less effective than less-restrictive self-help media filter alternatives.

The strong response to this question is especially noteworthy when considered in light of prior research that has shown that a significant majority of adults believe that parents, rather than the federal government, should be primarily responsible for screening inappropriate content from their children.<sup>118</sup> It appears that parents now have the technological capability, and the resulting burden, to do so.<sup>119</sup>

Some may find this answer to be incongruent with the pro-regulation survey responses discussed above. On one hand, most parents say that they want continued content-based government regulation of broadcast television,<sup>120</sup> in spite of new media filter technology. On the other hand, the vast majority of parents say that the new technologies are at least as effective as government regulation.<sup>121</sup> This tension is reflective of the extent to which majoritarian parental perspectives stand at odds with the minority-protective First Amendment strict scrutiny test. While parents may have an “any means necessary” mentality when it comes to protecting their children from objectionable content, that position is incongruent with the “least restrictive means” standard used by the Supreme Court. Put another way, content-based restrictions could always inch cumulatively closer towards fulfilling a compelling government goal, but the Supreme Court’s First Amendment strict scrutiny test imposes a limit. The Court explained this distinction in *Ashcroft*:

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the other hand, respondents might have been aware that cable and satellite programming is not regulated for indecency or profanity.

<sup>118</sup> PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, NEW CONCERNS ABOUT INTERNET AND REALITY SHOWS: SUPPORT FOR TOUGHER INDECENCY MEASURES, BUT WORRIES ABOUT GOVERNMENT INTRUSIVENESS 2 (Apr. 19, 2005), <http://people-press.org/reports/pdf/241.pdf>. The margin in this particular study was about twenty-to-one.

<sup>119</sup> Bell, *supra* note 81, at 778 (noting that “each time that courts . . . limit state action, they impose on each of us the responsibility for adopting the new and improved self-help technologies that render such state action obsolete”).

<sup>120</sup> See *supra* note 115 and accompanying text.

<sup>121</sup> See *supra* note 117 and accompanying text.

The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.<sup>122</sup>

Because parents recognize that media filters like the V-Chip are a more effective method of controlling objectionable television content, and because the V-Chip and other media filters are now widely available, the regulatory alternative of content-based penalties should be considered unconstitutional.

### *C. Improving Media Filters*

In looking for a more robust understanding of parental perspectives on technology and media regulation, one concept to consider is what I term "consumer transparency." The television filters and regulations that are most successful are those that are obvious or transparent to consumers through their ordinary TV consumption. The media filters and regulations that are less obvious appear to be less helpful.<sup>123</sup>

The consumer transparency hypothesis can offer insight into several different aspects of this survey. For instance, a significant majority of respondents were familiar with the national TV rating system. About seventy-eight percent (78%) thought that the ratings were a good idea. This could be because the ratings have a high degree of consumer transparency because they appear at the start of every TV show. In contrast, there is less consumer

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<sup>122</sup> Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

<sup>123</sup> It is important to note that the data do not dispositively support a consumer transparency theory. This is simply a hypothesis intended to bring some cohesion to the survey results.

transparency about who actually sets the ratings; only forty-four percent (44%) of the survey respondents correctly answered that the television industry bears that responsibility. This regulatory ambivalence (or apathy) was also evident in some questions asking for perspectives about regulation. Throughout the study, significantly more respondents answered “don’t know” to questions about regulation than to those about respondent behavior or perceptions of control.

The consumer transparency hypothesis extends to devices as well. In spite of the fact that the V-chip is the most widely-distributed media filter (included in virtually every television on the market since 2000),<sup>124</sup> it is far from being the most well-known. Significantly more parents were familiar with media filter devices that are required for ordinary operation of a television (such as a cable box) than the less-obvious V-chip that has continued to remain shrouded from consumers.

The hypothesis can also help to explain consumer responses regarding the intricacies and regulation of television delivery systems. For example, the differences between the broadcast and cable viewing experiences are largely imperceptible.<sup>125</sup> Although the *Playboy* Court distinguished between delivery systems by noting that cable companies can filter their signals on a household-by-household basis,<sup>126</sup> that difference is not obvious to the viewer. Nearly twenty-five percent (25%) of cable customers in the survey did not know that they could request that a channel to be cut off by their service provider. Furthermore, most cable customers have no input on the basic set of channels they receive due to the cable industry’s tiered pricing structure. The lack of a transparent difference between delivery systems could be one reason why

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<sup>124</sup> FCC, *supra* note 57.

<sup>125</sup> Michael K. Powell, Comm’r, FCC, The Public Interest Standard: A New Regulator’s Search for Enlightenment, American Bar Association 17th Annual Legal Forum on Communications Law (Apr. 5, 1998), *available at* <http://transition.fcc.gov/Speeches/Powell/spmkp806.html> (“Technology has evaporated any meaningful distinctions among distribution medi[a], making it unsustainable for the courts to segregate broadcasting from other medi[a] for First Amendment purposes. It is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set.”).

<sup>126</sup> *See supra* note 47 and accompanying text.

fifty-three percent (53%) of the parents responded that the government should regulate broadcast and cable in the same way,<sup>127</sup> and why there were no substantive differences across delivery systems in parental perception of unwanted content.<sup>128</sup> On a basic level, television consumption is largely homogenous across delivery systems.

If the FCC's content-based regulations are ultimately deemed unconstitutional, there will likely be an even stronger private demand for media filters. Parents want to take control of filtering, and are concerned about the amount of exposure that their children have to undesirable content. The most effective media filters will likely be the ones that are conspicuous within normal consumer television use. Similarly, consumers will be more likely to understand regulations that are based on principles of consumer transparency.

#### CONCLUSION

When the Supreme Court has the opportunity to re-evaluate content-based broadcast regulation, the justices should turn to empirical evidence to help answer two critical First Amendment questions. First, is broadcast television still so uniquely pervasive that parents lack control over the content that their children watch? The results from this study strongly suggest that it is not; parents in broadcast households do not have significantly different perceptions of control than parents in households with MPVD services. Therefore, the age of *Pacifica* is over, and intermediate scrutiny should be abandoned in the broadcast context.

Second, are media filters an effective, less restrictive means of helping these parents control inappropriate content on television from reaching their children? The data show that parents overwhelmingly believe media filter technology is an effective alternative to government regulation. And self-help technology is

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<sup>127</sup> In fact, another twenty-two percent (22%) of respondents believed that the government should regulate cable more than it currently does, although not as strictly as broadcast.

<sup>128</sup> See *supra* Section IV.A.

clearly less restrictive on speech than content-based broadcast regulation. Therefore, indecency regulation cannot stand up to a strict scrutiny test.

One important lesson to take from this analysis is that empirical studies can offer critical insights about the propriety of media regulation. To that end, there are many avenues for future study. It would be useful to perform a mixed-mode survey to build upon these results, and protect against the inherent kinds of bias that are included with any kind of single-medium study (in this case, the Internet). Given that the number of broadcast-only households is dwindling, it could also be appropriate to do a more focused study that would target that population specifically. Such studies could help the Court achieve a more robust understanding of real-world implications when balancing the efficacy of government speech interests against self-help technology.

#### APPENDIX

##### A. Table 1 – Satisfaction with Control Over Unwanted Content

Question: How satisfied are you with your ability to control your children's access to TV programming that you don't want your children to watch?

	Broadcast Only	Cable, Fiber, Satellite, or Multiple
Satisfied	77%	85%
Not Satisfied	23%	15%

N: 526

Fisher's Exact Sig.: 0.224



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Question: How satisfied are you with the government's regulation of programming that you don't want your children to watch?

	Broadcast Only	Cable, Fiber, Satellite, or Multiple
Satisfied	41.7%	61.5%
Not Satisfied	58.3%	38.5%

N: 478

Fisher's Exact Sig: 0.022

*B. Table 2 – Pervasiveness of Unwanted Content*

Question: How concerned are you that your children are being exposed to too much . . . Violent content on television?

	Broadcast Only	Cable, Fiber, Satellite, or Multiple
Not Concerned	22.2%	21.6%
Concerned	77.8%	78.4%

N: 545

Fisher's Exact Sig: 1.000

Sexual content on television?

	Broadcast Only	Cable, Fiber, Satellite, or Multiple
Not Concerned	22.2%	18.3%
Concerned	77.8%	81.7%

N: 544

Fisher's Exact Sig.: 0.512

## Adult language on television?

	Broadcast Only	Cable, Fiber, Satellite, or Multiple
Not Concerned	27.8%	27.4%
Concerned	72.2%	72.6%

N: 544

Fisher's Exact Sig.: 1.000

Question: How much inappropriate content do you think your children are exposed to on TV?

	Broadcast Only	Cable, Fiber, Satellite, or Multiple
A Lot	27%	25%
Some	38%	44%
Only a Little	22%	24%
None at All	14%	7%

N: 536

Pearson's Chi Square Sig.: 0.428

## C. Table 3 – V-Chip Usage

Question: Have you or another adult in your household ever programmed your V-Chip to block shows you don't want your children to watch?

	2011 (This Study)	2007 (Kaiser)	2004 (Kaiser)	2001 (Kaiser)
Yes, Have Used V-Chip	12%	16%	15%	7%
No, Have Not Used V-Chip / Not Sure	38%	21%	20%	12%

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Not Aware TV Has V-Chip	36%	45%	39%	21%
Did Not Purchase New TV Since 1/1/00	14%	18%	26%	60%

N: 560

*D. Table 4 - Usefulness of Media Filters*

Question: Some people have TV parental controls other than the V-chip that allows them to block certain shows or channels . . . How often do you use these other devices?

	Cable Box	DVR	Satellite Box	Other
Use	71%	77%	63%	34%
Never use	29%	23%	37%	66%
N	276	304	258	202

Question: How useful have these screening devices been in blocking programming that you don't want your children to watch?

	V-Chip	Cable Box	DVR	Satellite Box	Other
At least somewhat useful	98%	70%	70%	67%	47%
N	69	234	237	189	141

*E. Table 5 – Future Television Content Regulation*

Question: Some people say that the availability of content filtering technology like the V-chip means that the government should not need to continue to regulate broadcast TV programming for \_\_\_\_, regardless of filtering technology like the V-chip. How do you think technology like the V-chip should affect broadcast regulations for \_\_\_\_.\*

	Obscenity	Indecency	Profanity
Gov't Should Relax Regs b/c of Tech	18%	18%	21%
Gov't Should Relax Regs for Other Reasons	14%	15%	16%
Gov't Should Continue to Regulate	67%	67%	63%
TOTAL	100%	100%	100%
N	468	469	475

\*Respondents were presented with FCC definitions for obscenity, indecency, and profanity. For those definitions, *see supra* note 14.

Note: A significant number of respondents (about 12%) answered “don’t know” for each of these questions.

*F. Table 6 – Technology as an Alternative to Regulation*

Question: To what extent do you believe that technology like the V-chip is an effective alternative to government regulation of TV programming that you don’t want your children to watch?

Much more effective	15%
More effective	30%
Equally effective	36%
Less effective	14%
Much less effective	5%

N: 456

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Note: A significant number of respondents (about 17%) answered “don’t know” for this question.