

# FCC'S INDECENCY REGULATION: A Comparative Analysis of Broadcast and Online Media

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## ABSTRACT

Lawmakers and the Federal Communications Commission (FCC) have implemented policies, many at the urging of special interest groups and parents, aimed at restricting content on broadcast television and radio and the Internet in the interest of protecting children. Through comparative analysis, this research studies the FCC broadcast regulations and online regulations to determine how indecency standards are applied in both mediums and whether there is common ground. The study finds that the courts accepted arguments for broadcasting that resembled a public interest approach, but for the Internet, accepted arguments that included public interest and marketplace approaches.

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## INTRODUCTION

One of the mysteries of the regulation of broadcast and online media is how the intent of the U.S. Constitution, so well developed and enforced in

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the regulation of print media, has been neglected in the electronic revolution. Regulation is a natural response to new media. Communications policy should promote and maintain competitive and efficient industry.<sup>1</sup> However, with technology quickly developing, newer media are sometimes subjected to stricter control than older media. This Article will address and analyze legislation, regulations, and federal case law concerning broadcast media and online content. It will also evaluate whether the Federal Communications Commission's (FCC) attempt at regulating indecency can ever withstand First Amendment scrutiny.

Regulation has become a response to perceived technical problems. In his *Technologies of Freedom*, Ithiel de Sola Pool examined three recognized models of communications regulation: print, common carrier, and broadcast.<sup>2</sup> The print model, applicable to speech and the press, was based primarily on legal precedents that have guaranteed freedom of communication since the eighteenth century. Pool wrote that the courts understand the press and have a long tradition of protecting it from government repression. The courts recognized that in cases involving freedom of speech or of the press, the First Amendment must be interpreted with the broadest possible scope.

Far from the print model, the third domain of communications—broadcasting—has been highly regulated by the U.S. Congress and the courts. In the 1920s, the available frequencies for broadcasting appeared to have reached their limit. Increasing the number of allocated frequencies, which was 89, would increase congestion and lead to increased signal interference. Therefore, based on the shortage of frequencies in the spectrum, Congress became convinced that frequency regulation was essential. Broadcasters and regulators want to maintain their oligopoly. As new, non-frequency broadcast communications arise, like cable television, the concern of scarcity or shortage of frequencies should lessen and thereby weaken, if not eliminate, arguments for broadcast regulation. The scarcity argument offers the foundation for all areas of broadcast regulation.<sup>3</sup> However, in the current technological environment of cable, satellite, and online communications, Samoriski, Huffman, and Trauth claim that scarcity does not prevail.<sup>4</sup> Former FCC Chairman Reed Hundt disagrees. Hundt wrote that technological developments have strengthened the argument for regulation in areas such as indecency.<sup>5</sup> He said that

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1 See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); Philip M. Napoli, *The Unique Nature of Communication Regulation: Evidence and Implication for Communication Policy Analysis*, 43 J. BROAD. AND ELECTRONIC MEDIA 565 (1999); ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983).

2 See POOL, *supra* note 1.

3 *Id.* at 193.

4 Jan H. Samoriski et al., *The V-chip and Cyber Cops: Technology vs. Regulation*, 2 COMM. L. & POL'Y 143 (1997).

5 Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1119 (1996).

when *FCC v. Pacifica Foundation* was decided in 1978, the Court recognized that adults had sources other than the broadcast media for gaining access to indecent materials, so restrictions on broadcast media were not particularly burdensome. At this time, there were no video stores and almost no premium cable channels. Technology provided the market with more indecent speech as the number of premium cable channels increased over time, making it easier to justify regulation.<sup>6</sup>

A variety of media over the decades have been blamed for lowering the public's cultural tastes, increasing rates of delinquency, contributing to moral deterioration, lulling the masses into political superficiality, and suppressing creativity.<sup>7</sup> For over a decade, the Internet has faced those very concerns, prompting a wave of legislative and judicial activity. The Internet has generated public anxiety concerning children<sup>8</sup> since children tend to be early adopters and therefore are on the forefront of new technology use.<sup>9</sup>

Lawmakers and the FCC have implemented policies, many at the urging of special interest groups and parents, aimed at restricting content on broadcast television and radio and the Internet in the interest of protecting children. Such coercive efforts have raised serious First Amendment concerns.<sup>10</sup> Some argued that if the FCC and Congress went along with suggestions made by strong special interest groups such as Action for Children's Television (ACT), broadcasters' freedom to create programs would be hindered.<sup>11</sup> These same First Amendment issues have plagued online content. Congress spent fifteen years drafting and passing regulation aimed at protecting children from harmful and indecent content on the web. Most of the proposed regulation was struck down by lower federal courts or the U.S. Supreme Court for violating the First Amendment.<sup>12</sup>

Through a comparative analysis, this Article will study the FCC's broadcast regulations and its online regulations to determine how indecency standards are applied in both media and whether there is common ground. The overarching questions that will guide the legal analysis are:

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6 *Id.*

7 MELVIN L. DEFLEUR & SANDRA BALL-ROKEACH, THEORIES OF MASS COMMUNICATION (5th ed. 1989).

8 Myron Orleans & Margaret C. Laney, *Children's Computer Use in the Home*, 18 SOCIAL SCIENCE COMPUTER REVIEW 56, 57 (2000).

9 See SONIA LIVINGSTONE, YOUNG PEOPLE AND THE NEW MEDIA (2002).

10 Christopher Stern, *Kids TV Plan Spells Controversy for Hundt*, 125 BROADCASTING & CABLE 43 (1995).

11 Robert Corn-Revere, *Mixed Messages on the First Amendment*, see *id.* at 43.

12 *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) [hereinafter *Ashcroft 2004*]; *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); *Ashcroft v. ACLU*, 535 U.S. 564, 586 (2002) [hereinafter *Ashcroft 2002*]; *Reno v. ACLU*, 521 U.S. 844 (1997); *ACLU v. Gonzalez*, 478 F. Supp. 2d 775, 821 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003).

- 1: Are the arguments for regulation equally applicable to broadcast radio or television and the Internet?
- 2: What direction should broadcast and Internet policy take with developing technology?

First, this Article will address the FCC's evolution from the *Pacifica* standard to the *Golden Globes Order*. Second, this Article will analyze legislation, regulations, and federal case law concerning online content. Finally, this Article will evaluate whether the FCC's attempt at regulating indecency can ever withstand First Amendment scrutiny.

## I. CURBING INDECENT CONTENT ON BROADCAST RADIO AND TELEVISION

Per Sections 307 and 309 of the Communications Act of 1934, broadcasters are to serve “the public interest, convenience, and necessity.”<sup>13</sup> The public interest prong has long been debated and tested, especially in content regulation. Content-based restrictions on broadcast radio and television must satisfy strict scrutiny to be declared constitutional.<sup>14</sup> Strict scrutiny requires that a statute serve a compelling interest, be narrowly tailored to achieve that interest, and be the least restrictive means of advancing that interest.<sup>15</sup> In *Ginsberg v. New York*, the Supreme Court held that there is a compelling interest in protecting the physical and psychological wellbeing of minors.<sup>16</sup>

The Supreme Court has long recognized that each medium of expression presents unique First Amendment problems. In *Pacifica*, the Court noted the uniquely pervasive presence of broadcast radio as part of the rationale for regulating that type of content. At issue was whether a twelve-minute monologue titled “Filthy Words,” aired at two in the afternoon, was indecent within the meaning of 18 U.S.C. § 1464 (“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”).<sup>17</sup> The Commission identified several words that referred to excretory or sexual activities or organs and stated that the repetitive and deliberate use of such words in an afternoon

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13 Communications Act of 1934, 47 U.S.C. § 307 (2004); Communications Act of 1934, 47 U.S.C. § 309 (2018).

14 *FCC v. League of Women Voters*, 468 U.S. 364, 375–76 (1984); *U.S. v. Playboy*, 529 U.S. 803, 811–13 (2000) (holding that regulation proscribing indecent content on cable television was content-based restriction of speech subject to strict scrutiny); *Sable Commc'ns v. FCC*, 429 U.S. 115, 126 (1989) (holding that indecency regulation of telephone messages was content-based restriction subject to strict scrutiny); *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (holding that indecency regulation of the Internet was a content-based restriction subject to strict scrutiny).

15 *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

16 *Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968).

17 *FCC v. Pacifica*, 438 U.S. 726, 738–39 (1978).

broadcast for which children are in the audience was patently offensive. In a 5–4 decision, the Court agreed with the FCC's determination that the broadcast was indecent. Also, the Court said, “[t]he law generally speaks to channeling behavior more than actually prohibiting it.”<sup>18</sup> Channeling indecent content to times of the day during which children are less likely to be in the audience can be a less restrictive means of regulating indecent speech.

The channeling method was later used in television through the work of Action for Children's Television (ACT), a special interest group that wanted better programming and fewer commercials during children's programs. ACT also wanted quality media content for children and as much regulation of indecent speech as the Constitution allowed.<sup>19</sup> The group fought for a safe harbor to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast. After eight years of litigation, a constitutionally sound safe harbor time frame was established: 10:00 p.m. to 6:00 a.m.<sup>20</sup> It remains in effect today.

In addition to channeling, the courts have upheld the mandatory installation of V-chips on televisions with screens larger than thirteen inches to curb indecent content on television.<sup>21</sup> A V-chip is a device that allows parents or caregivers to block television programming that is not suitable for children. It works with the television ratings system: Programs are assigned a rating, allowing parents or caregivers to block out programming with ratings they feel are not suitable for children.<sup>22</sup> The Telecom Act was a major rewrite of the Communications Act of 1934. The 1996 act classified electronic media services into categories: broadcasting, cable, and common carrier. Newer media and technologies, such as the Internet and World Wide Web, were also addressed in the 1996 act. The act relaxed many rules and regulations that once prohibited telephone companies, cable systems, and broadcasters from providing the same services.

In 2008, Congress passed the Child Safe Viewing Act, which “directed the FCC to study the existence and availability of advanced blocking technologies parents can use to protect children from indecent or objectionable video or audio programming.”<sup>23</sup> The Commission examined current blocking technologies and ratings systems used in various electronic media, including television, cable and satellite, wireless devices, and the internet. The FCC also encouraged

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18 *Id.* at 731.

19 Naeemah Clark, *The Birth of an Advocacy Group*, 30 JOURNALISM HIST. 66 (2004).

20 *Action for Children's Television v. FCC*, 58 F.3d 654, 664 (D.C. Cir. 1995).

21 Telecommunication Act of 1996, Pub. L. No. 104, 110 Stat. 56 (1996).

22 FEDERAL COMM'NS COMM'N, CONSUMER GUIDE: THE V-CHIP: OPTIONS TO RESTRICT WHAT YOUR CHILDREN WATCH ON TV (2017), <https://www.fcc.gov/consumers/guides/v-chip-putting-restrictions-what-your-children-watch> [<https://perma.cc/RLT7-YW5G>].

23 *Id.*

the development, deployment, and use of such technology.<sup>24</sup> The Act only required the FCC to explore available technologies, not to make policy regulating content.

## II. *FCC v. FOX I AND II*

It took two Supreme Court cases to determine if the FCC's *Golden Globes Order*, evolving from the *Pacifica* standard for fleeting expletives, was a violation of the First Amendment.

In a 1978 Memorandum Opinion and Order, the FCC interpreted the Supreme Court ruling in *Pacifica* narrowly to define indecent language as language that is both repetitive and descriptive.<sup>25</sup>

In 1987 and 1988, the FCC's interpretation of indecent language evolved beyond repetitive, but still "preserved the distinction between literal and non-literal (or 'expletive') uses of evocative language."<sup>26</sup>

The FCC received complaints that KPFK-FM in Los Angeles aired two separate programs, "Shocktime America" and "Jerker," that included sexually explicit language.<sup>27</sup> In a 1987 Memorandum Opinion and Order, the Commission expanded their earlier narrow definition of comedian George Carlin's seven words, described in *Pacifica*, to be used 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>28</sup>

In 1988, after the Commission expanded its definition of indecency, several broadcast entities and public interest groups, through three cases, challenged the definition of indecency as unconstitutionally vague.<sup>29</sup> The District of Columbia Court of Appeals found that the FCC's expanded definition of indecency was "virtually the same definition articulated in the order reviewed by the Supreme Court in the *Pacifica* case" and did not address whether the definition was not on its face unconstitutionally vague.<sup>30</sup> Thus the D.C. Court of Appeals found that "under governing precedent, the FCC's definition of indecent broadcast material, though vagueness is inherent in it, is not constitutionally defective."<sup>31</sup>

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24 See FED. COMM'NS COMM'N, FCC 09-69, IN THE MATTER OF IMPLEMENTATION OF THE CHILD SAFE VIEWING ACT (2009).

25 *FCC v. Fox Television Stations*, 556 U.S. 502, 507 (2009) [hereinafter *Fox I*]; In Re Application of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, Bos., Mass., 69 F.C.C.2d 1250, 1254 (1978).

26 *Id.* at 507-08.

27 In the Matter of Pacifica Found., Inc. d/b/a Pacifica Radio L.A., Cal. Licensee of KPFK-FM L.A., Cal., 2 F.C.C. Rcd. 2698, 2698 (1987).

28 *Id.* at 2699.

29 *Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988).

30 *Id.* at 1339.

31 *Id.* at 1344.

More than a decade later, FCC regulations emphasized that the full context in which the expression appears must be taken into account in deciding whether a use is indecent.<sup>32</sup>

In 2004, the Commission broadened the scope of existing regulation and declared for the first time that a “nonliteral (expletive) use of the F- and S-words could be actionably indecent, even if the word was used only once.”<sup>33</sup>

During the 2003 Golden Globe Awards, Bono, upon winning an award for Best Original Song, hollered emphatically, “this is really, really f\*\*\*ing brilliant.”<sup>34</sup> Initially the FCC’s Enforcement Bureau deemed the comment *not* indecent because the use of the word did not describe in “context, sexual or excretory organs or activities and . . . the utterance was fleeting and isolated.”<sup>35</sup> The full Commission reversed the staff ruling and deemed that the F-word “is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language,”<sup>36</sup> even when used in a fleeting and nondescriptive manner.<sup>37</sup>

The FCC acknowledged that prior Commission and staff actions did not consider isolated or fleeting use of the F-word as indecent and actionable, but explicitly ruled that “any such interpretation is no longer good law.”<sup>38</sup> This ruling became known as the *Golden Globes Order*.

During the 2002 Billboard Music Awards, Cher stated, “I’ve also had critics for the last forty years saying that I was on my way out every year. Right. So f\*\*\* ’em.” During the 2003 Billboard Music Awards, Nicole Richie asked the audience, referring to her Fox television show, “Why do they even call it *The Simple Life*? Have you ever tried to get cow s\*\*\* out of a Prada purse? It’s not so f\*\*\*ing simple.”<sup>39</sup>

In 2006, the FCC released Notices of Apparent Liability for these two incidents and several others. It did not assess fines; however, Fox appealed the notice, claiming that the *Golden Globe Order* should not apply. The network argued that the FCC changed its policy without reasoned explanation and was “arbitrary or capricious” in its enforcement, and that the order violated the network’s First Amendment rights.<sup>40</sup> The FCC responded that “both broad-

32 In the Matter of Industry Guidance On the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 F.C.C. Rcd. 7999, 8002 (2001).

33 In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Air-ing of The “Golden Globe Awards” Program, 19 F.C.C. Rcd. 4975, 4980 (2004) [herein-after *Golden Globes Order*].

34 *Id.* at 4975–76.

35 *Id.* at 4976.

36 *Id.* at 4979.

37 *Id.*

38 *Id.* at 4980.

39 *Fox I*, *supra* note 25, at 510.

40 *Id.* at 516.

casts under review would have been actionably indecent under the staff rulings and Commission dicta in effect prior to the *Golden Globes Order*.<sup>41</sup>

This appeal became *Fox I*, the first influential Supreme Court Case on the *Golden Globe Order*. Fox argued that the narrow scope of the Supreme Court's ruling in *Pacifica* would prohibit the broadening of the FCC policy on indecency, but the Court stated that "we have never held that *Pacifica* represented the outer limits of permissible regulation."<sup>42</sup> The Court found that the Commission's new enforcement policy was neither arbitrary nor capricious and that the reasons for expanding the scope of its enforcement policies of indecency were entirely rational.<sup>43</sup> The Court in *Fox I* also pointed out that "technological advances have made it easier for broadcasters to bleep out offending words[,] further support[ing] the Commission's stepped up enforcement policy," suggesting that violators are able to police themselves and that sanctions may be warranted if they do not.<sup>44</sup>

However, the Court in *Fox I* refused to address the First Amendment issue and remanded that back to the Second Circuit. The Court pointed out it is the court of "final review, 'not of first view.'" <sup>45</sup>

Even though the two incidents involving Cher and Nicole Richie did not result in fines for Fox, the network was concerned the reprimand would hurt its reputation within the industry and with advertisers. ABC was also cited and fined by the FCC for showing the bare buttocks and a side view of actress Charlotte Ross's breast on a 2003 episode of *NYPD Blue* for approximately seven seconds.<sup>46</sup>

The Supreme Court did eventually address the First Amendment concerns brought up in *Fox I* in its 2012 *Fox II* decision. The Second Circuit previously found the entire FCC policy vague and thus unconstitutional.<sup>47</sup> The appeals court found the policy "failed to give broadcasters sufficient notice of what would be considered indecent."<sup>48</sup> After analyzing several Commission rulings, the appeals court found the policy inconsistent because on occasion, the Commission found the "fleeting use of those words not indecent provided they occurred during a bona fide news interview or were 'demonstrably essential to the nature of an artistic or educational work.'" <sup>49</sup> The court found that there was ample evidence that the policy forced broadcasters to choose between not airing controversial programs or risk massive fines and

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41 *Id.* at 512.

42 *Id.* at 522.

43 *Id.* at 517.

44 *Id.* at 518.

45 *Id.* at 529.

46 *FCC v. Fox Television Stations*, 567 U.S. 239, 247 (2012) [hereinafter *Fox II*].

47 *Id.* at 242.

48 *Id.* at 244.

49 *Id.*

jeopardizing their licenses. This hard choice, the Second Circuit found, had led to a chill in the exercise of protected speech rights.<sup>50</sup>

Justice Kennedy, writing for an 8–0 majority (Justice Sotomayor abstained) upheld the Second Circuit decision in these three incidents. However, the Court stated that this decision was narrow in scope because it was decided on fair-notice grounds under the Due Process Clause and the Court chose not to address the First Amendment implications, letting the Second Circuit ruling stand.<sup>51</sup>

As of this writing, the FCC Guidelines on Obscene, Indecent and Profane Broadcasts state:

The FCC has defined broadcast indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” Indecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity. The courts hold that indecent material is protected by the First Amendment and cannot be banned entirely. FCC rules prohibit indecent speech on broadcast radio and television between 6 a.m. and 10 p.m., when there is reasonable risk that children may be in the audience.<sup>52</sup>

### III. ATTEMPTED GOVERNMENTAL REGULATION OF ONLINE CONTENT

#### A. *The Act of 1996*

The Communications Decency Act (CDA), part of the Telecommunications Act of 1996 (Telecom Act), criminally prohibited the transmitting, by a telecommunications device, any obscene or indecent material to anyone under eighteen years of age. Further, the CDA prohibited the use of an interactive computer service to transmit communications that, in context, depict or describe, in terms “patently offensive” as measured by contemporary community standards, sexual or excretory activities or organs.<sup>53</sup>

These sections of the CDA were challenged before the Supreme Court in *Reno v. American Civil Liberties Union*.<sup>54</sup> In a 7–2 decision, the Court ruled that the “indecent transmission” and “patently offensive display” provisions violated the First Amendment, as the regulations amounted to content-based blanket restrictions.<sup>55</sup>

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50 *Id.* at 252.

51 *Id.* at 257.

52 FED. COMM’NS COMM’N, CONSUMER GUIDE: OBSCENE, PROFANE AND INDECENT BROADCASTS (2017), <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> [<https://perma.cc/24GQ-2F2C>].

53 Communications Decency Act of 1996, 47 U.S.C. § 223 (1996) (amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 652, 110 Stat. 56 (1996)).

54 *Reno*, 521 U.S. at 844.

55 *Id.*

## B. *Children's Online Protection Act (COPA)*

In response to the *Reno* decision concerning the CDA, Congress passed the Child Online Protection Act (COPA) on October 21, 1998.<sup>56</sup> COPA applied only to content for “commercial purposes,” unlike the CDA, and targeted pornography on the Internet by prohibiting material that is harmful to minors, as measured by contemporary community standards. While COPA applied to significantly less material than the CDA, COPA, like the challenged provisions of the CDA, was eventually struck down by the courts as well.<sup>57</sup>

## C. *Ashcroft and the American Civil Liberties Union*

At issue in *Ashcroft 2002* was whether the government’s reliance on contemporary community standards to determine whether material on the World Wide Web was harmful to minors violated the First Amendment.<sup>58</sup> In an 8–1 decision, the Court held COPA’s reliance on community standards to identify material that was harmful to minors did not, by itself, render COPA facially overbroad or in violation of the First Amendment.

The Supreme Court remanded *Ashcroft* back to the Third Circuit, which deemed COPA unconstitutional, holding that the Act was substantially overbroad in failing to serve a compelling government interest.<sup>59</sup> It placed “significant burdens on Web publishers’ communication of speech that is constitutionally protected as to adults . . . . In so doing, COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children’s exposure to material that is obscene for minors.”<sup>60</sup> The Supreme Court agreed to revisit the COPA case.

In a 5–4 decision in 2004, the Supreme Court held that the Third Circuit was correct to prohibit the enforcement of COPA because it violates the First Amendment.<sup>61</sup> The district court’s primary reason for granting the initial preliminary injunction had been the proposal by the plaintiffs that filtering and blocking software is a less restrictive alternative to the statute, and the government had not shown it would disprove the plaintiffs’ contention at trial. The Supreme Court found that blocking and filtering software is a less restrictive means of curbing children’s access to harmful material on the Internet. Thus, the Court found government had not shown that there are no “less restrictive alternatives” to COPA, and that there was a potential for extraordinary harm and a serious chilling of protected speech if the law went into effect. The Court remanded the case back to the lower courts.

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56 Child Online Protection Act, 47 U.S.C. § 231 (1998).

57 See *Ashcroft 2002*, 535 U.S. at 564; *Ashcroft 2004*, 542 U.S. at 656; *Gonzalez*, 478 F. Supp. 2d at 775; *Mukasey*, 534 F.3d at 181.

58 *Ashcroft 2002*, 535 U.S. at 564.

59 *Ashcroft*, 322 F.3d at 240.

60 *Id.* at 276.

61 *Ashcroft 2004*, 542 U.S. at 656.

In a matter of two years, the Supreme Court went from a nearly unanimous decision (8–1 in *Ashcroft 2002*) to a split decision (5–4 in *Ashcroft 2004*) on this issue. The Court, between the *Ashcroft* cases, had decided a case centering on regulating content in public libraries. Filtering and blocking software was at the heart of the Children’s Internet Protection Act (CIPA) and *U.S. v. American Library Association*, decided in 2003, in which the Court responded favorably to the filtering technology discussed in the *Ashcroft* cases.<sup>62</sup>

In *ACLU v. Gonzales*, the District Court for the Eastern District of Pennsylvania found that COPA violated the First Amendment and issued a permanent injunction against the enforcement of COPA.<sup>63</sup> The district court found that COPA was not narrowly tailored to a compelling government interest and that the statute was impermissibly vague and overbroad. The court also noted that the U.S. Attorney General failed to meet his burden of showing that COPA is the least restrictive and most effective means of achieving the compelling interest.<sup>64</sup> Once again the United States appealed the district court’s decision.

The Third Circuit upheld the district court’s decision that COPA violated the First Amendment since it was not the most effective means of achieving the compelling interest of keeping children from visiting certain websites.<sup>65</sup> Attorney General Michael Mukasey appealed to the Supreme Court, but his petition was denied.<sup>66</sup> After defending COPA for over ten years, the Justice Department was defeated.

#### D. *Children’s Internet Protection Act (CIPA)*

CIPA was enacted by Congress in 2000 to address concerns about access to the Internet and other platforms in schools and libraries.<sup>67</sup> CIPA required schools to adopt a policy of monitoring online activities of minors. Also, it required schools and libraries to adopt policies addressing (1) access by minors to inappropriate content; (2) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (3) unauthorized access; (4) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (5) restrictions on minors’ access to material harmful to them. CIPA did not require the tracking of Internet use by adults or minors. Finally, under CIPA, schools and libraries would not receive the discounts offered by the “E-Rate” program (telephone discounts that make Internet access more affordable to schools and libraries) unless they

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62 Children’s Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000); *Am. Library Ass’n*, 539 U.S. at 194.

63 *Gonzalez*, 478 F. Supp. 2d at 775.

64 *Id.*

65 *Mukasey*, 534 F.3d at 181.

66 *Id.*

67 Children’s Internet Protection Act, Pub. L. No. 106–554, 114 Stat. 2763 (2000).

certify that they have certain Internet safety measures in place. These measures include a way to block or filter pictures that are obscene and contain pornography.<sup>68</sup>

On May 31, 2002, CIPA was unanimously ruled unconstitutional by the District Court for the Eastern District of Pennsylvania. The three-judge panel held that the statute was unconstitutional because the mandated use of blocking or filtering technology on all computers would result in blocked access to substantial amounts of constitutionally protected speech. The court found that public libraries can—and many do—use the following less restrictive alternatives: filters offered as a choice for parents to use for their own children at the public library, education and Internet training courses, enforcement of Internet use policies, and placement of terminals, use of privacy screens or utilization of recessed monitors.<sup>69</sup>

In June 2003, the Supreme Court upheld CIPA in a 6–3 decision, deciding not only that it is constitutional for public libraries to install filtering software, but that if libraries did not they would lose funding. The Court held that (1) Internet access in public libraries was neither a traditional nor a designated public forum; (2) forum analysis and precise judicial scrutiny were incompatible with public libraries' expansive discretion to consider content in making collection decisions; (3) any concerns over filtering software's alleged tendency to erroneously “overblock” access to constitutionally protected speech were dispelled by the ease with which library patrons could disable the filtering software; (4) Congress could reasonably impose limitations on its Internet assistance program because public libraries normally excluded pornographic material from their collections; (5) filters did not violate the First Amendment rights of library patrons; and (6) CIPA was an appropriate exercise of Congress's spending power and did not impose an unconstitutional burden on public libraries that received federal assistance for Internet access.<sup>70</sup>

In 2011, the Protecting Children in the Twenty-First Century Act Amendment was added to CIPA. The amendment required schools to educate minors about appropriate online behavior, including “interacting with other individuals on social networking websites and in chat rooms, and cyberbullying awareness and response.”<sup>71</sup>

#### E. *Dot Kids Implementation and Efficiency Act of 2002*

In yet another effort to keep children safe online, Congress passed the Dot Kids Implementation and Efficiency Act of 2002, which established a

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68 *Id.*

69 *Am. Library Ass'n*, 539 U.S. at 194.

70 *Id.*

71 FED. COMM'NS COMM'N, CONSUMER GUIDE: CHILDREN'S INTERNET PROTECTION ACT (CIPA) (2015), [https://transition.fcc.gov/Bureaus/Cable/News\\_Releases/1998/nrcb8003.html](https://transition.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html) [<https://perma.cc/GZ7V-8P7R>].

children's section of the Internet, comparable to a children's section of the library, where children would be safe from pornography, pedophiles, and violence. The act created a new, second-level Internet domain within the United States country code domain, .kids.us, which would only be available to those websites the content of which is suitable for minors.<sup>72</sup>

The guidelines for the new domain outlined five existing standards that would be applied: (1) compliance with existing laws, regulations, relevant voluntary standards; (2) indecency standards for the airwaves; (3) the Children's Television Act of 1990 educational broadcasting requirements; (4) a privacy standard in compliance with COPA,<sup>73</sup> and (5) compliance with the advertising standards set by the Children's Advertising Unit.<sup>74</sup>

Dot Kids had limited success as there was little awareness of the program or its features.<sup>75</sup> On July 27, 2012, the domain space was suspended indefinitely.

#### IV. RESULTS AND ANALYSIS

This Article, through a comparative analysis, will examine the FCC's broadcast regulations and its online regulations to determine how indecency standards are applied in both media and whether there is common ground.

The first question is whether the same regulatory arguments could be equally applied to broadcast radio and television and the Internet. The courts accepted those regulatory arguments that suggest the least restrictive means of protecting children from indecent content on broadcast radio, television, and the Internet. Except CIPA, content regulation on the Internet tends to lean towards the marketplace approach. For example, the stringent regulatory measures suggested by the CDA and COPA did not pass constitutional muster because they were overbroad. The amount of speech restricted under the CDA and COPA was more than what was needed to promote the government's interest in protecting children from harmful material on the Internet. CIPA, on the other hand, was accepted by the Court. CIPA offers and mandates filtering software as a means of blocking out or controlling harmful material, and since the filters could be disabled if patrons asked librarians to disable them, the control of content was put in the hands of the consumer, not

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72 See Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, 116 Stat. 2766 (2002); Alice G. McAfee, *Creating Kid-Friendly Web Space: A Playground Model for Internet Regulation*, 82 TEX. L. REV. 201, 201-24 (2003).

73 Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 (2006). COPPA was designed to protect the privacy of children who use the internet. COPPA also required web sites to collect a credit card number or other proof of age before allowing internet users to view material deemed "harmful to minors."

74 Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, 116 Stat. 2766 (2002).

75 Cheryl B. Preston, *Zoning the Internet: A New Approach to Protection Children Online*, BYU L. REV. 1417, 1461 (2007).

the government. The application of CIPA was also limited to public libraries and schools.

Broadcast radio and television are subjected to more content regulation than the Internet. The courts accepted those arguments for broadcast regulation that followed the public interest approach. The FCC fought for a more restrictive safe harbor that allowed indecent material for only six hours per day on commercial stations and two hours per day for noncommercial stations that ended their broadcast day at midnight; however, the courts mandated the Commission adopt a uniform safe harbor for both commercial and noncommercial stations. The courts found that allowing indecent material from 10:00 p.m. to 6:00 a.m.—the uniform safe harbor—would not jeopardize the public interest, nor would it infringe upon the First Amendment rights of broadcasters.

The Supreme Court in *Fox I* found that the reasoned evolution of FCC guidelines was acceptable, but in *Fox II*, the Court upheld an appellate court decision that the application of the existing guidelines was too vague for broadcasters to know if they were in violation.

With regard to the question of whether the arguments are equally applicable to broadcasting and the Internet, the answer is yes and no. The courts accepted arguments for broadcasting that resembled a public interest approach, but for the Internet, accepted arguments that included public interest and marketplace approaches. There is a component of both approaches in the current regulatory scheme for the Internet.

One argument that is applied equally to broadcast radio and television and to the Internet is the prohibition of blanket content-based restrictions of speech to protect children from indecent content. The Supreme Court struck down the CDA and COPA because the statutes were overbroad. The First Amendment rights of adults would have been violated under the two statutes. The courts recognized that indecent material qualifies for First Amendment protection regardless of merit. The court also noted that even though such material may have a negative impact on children, adults still have a right to access it.

Another argument equally applied is channeling. Channeling has been accepted by the courts as a less restrictive means of regulating indecency regulation both in broadcast and on the Internet. The courts accepted the government's public interest arguments and upheld channeling to protect children from indecent content. The courts also noted, in the Actions for Children's Television cases, that channeling does not infringe upon the rights of adults to indecent content online or over the airwaves. Before the Internet, filtering software, and the V-Chip, the government could only apply channeling to broadcast radio and television. But now, the Internet and the V-Chip offer new means of channeling to protect children from indecent content. CIPA and kids.us are examples of channeling on the Internet. CIPA mandates Internet filters on computers in libraries and schools so that indecent content is channeled

away from children. Content that is deemed appropriate for children could be channeled to kids.us, though it is not a government mandate. The concept of channeling was first introduced in *Pacifica*, eighteen years before the V-Chip was mandated in the 1996 Telecom Act. The V-Chip allows parents to channel indecent content away from children. While it is mandated by the government to be installed by television manufacturers, parents are not required to use it.

With the equivalencies in broadcast and Internet regulation established, the next question is the direction broadcast and Internet policy should take with developing technologies. In response to the changing technological landscape, Congress passed the Telecom Act in 1996. The convergence of telecommunications, computing, and traditional media in a digital world necessitated the modernization and reconstruction of the regulatory framework surrounding mass media. Part of the Telecom Act was the creation of V-chip technology. The V-chip fulfills the requirements of Section 551 of the act, which requires the FCC to determine whether video programming distributors “(1) have established acceptable voluntary rules for rating video programming that contains sexual, violent or other indecent material about which parents should be informed before it is displayed to children and; (2) have agreed voluntarily to broadcast signals that contain such ratings.”<sup>76</sup> The Child Safe Viewing Act, passed in 2008, instructed the FCC to take another look at the V-chip and other existing blocking technologies that parents could use to protect children from objectionable video or audio programming across devices.<sup>77</sup> The act only required the Commission to explore available technologies, not make policy regarding such content regulation. With the implementation of the act and the losing streak in the courts, it seems that Congress has given up the fight for additional content regulation legislation and realized that more regulation is not necessary in a technologically advanced society.

The FCC agreed. In April 2001, the Commission issued a policy statement, *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*.<sup>78</sup> Then-Commissioner Harold Furchtgott-Roth wrote: “Today, the video marketplace is rife with an abundance of programming, distributed by several types of content providers.”<sup>79</sup> He also wrote, “[i]n my judgment, as alternative sources of programming and distribution increase, broadcast content restrictions must

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76 FED. COMM’NS COMM’N RECORD, GN 98-3, COMMISSION FINDS INDUSTRY VIDEO PROGRAMMING RATING SYSTEM ACCEPTABLE (1998), [https://transition.fcc.gov/Bureaus/Cable/News\\_Releases/1998/nrcb8003.html](https://transition.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html) [<https://perma.cc/2AZ6-88NP>].

77 Child Safe Viewing Act of 2007, Pub. L. No. 110-452, 122 Stat. 5025 (2008).

78 FED. COMM’NS COMM’N RECORD, FCC 01-90, INDUSTRY GUIDANCE ON THE COMMISSION’S CASE LAW INTERPRETING 18 U.S.C. § 1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY (2001), <https://www.fcc.gov/document/industry-guidance-commissions-case-law-interpreting-18-usc-section-1464-and-enforcement> [<https://perma.cc/5M9J-UZB3>].

79 *Id.* at 22.

be eliminated.” He concluded with the following: “Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue.”<sup>80</sup>

The Supreme Court also addressed technological regulatory measures as less restrictive in several cases. In *ACLU v. Reno* in 2000, the Third Circuit, in affirming the district court’s decision to issue a preliminary injunction against COPA, recognized that due to technological limitations there might not be other means by which harmful material on the Internet and World Wide Web would be constitutionally restricted.<sup>81</sup>

In *ACLU v. Ashcroft* in 2003, the appellate court examined the use of blocking and filtering software as a less restrictive alternative. The district court noted, as did the appellate court, that blocking and filtering technology may not be perfect, but it appeared to be a logical alternative and, at the very least, as effective as the COPA statute.<sup>82</sup>

In *Ashcroft 2004*, the Supreme Court once again heard arguments concerning COPA. The Court noted the changes in the technological landscape since the first COPA case, *ACLU v. Reno* in 1997. The Court wrote the following:

Since the passage of COPA, Congress has enacted additional laws regulating the Internet in an attempt to protect minors. For example, it has enacted a prohibition on misleading Internet domain names, in order to prevent Web site owners from disguising pornographic Web sites in a way likely to cause uninterested persons to visit them. It has also passed a statute creating a “Dot Kids” second-level Internet domain, the content of which is restricted to that which is fit for minors under the age of 13.<sup>83</sup>

In *Ashcroft 2004*, the Court supported filters as a less restrictive means than the statute at issue. The Court said that promoting the use of filters nearly eliminates the potential chilling effect because filters do not condemn as criminal a category of speech. In addition, the Court said that filters may be more effective than COPA. For instance, filters can be applied to all forms of online communications, like email, not just those communications available via the Web. The Commission on Child Online Protection, a blue-ribbon commission enacted by Congress in the COPA statute, confirmed that filtering software may very well be more effective than COPA. The Commission found that filters are more effective than age-verification requirements. The Court in *Ashcroft 2004* pointed out that the government-appointed commission concluded the opposite of the government’s argument favoring the COPA statute over filter and blocking software. Finally, the Court noted that the factual record did not reflect the current technological reality, a serious flaw in any case involving the Internet because “the technology of the Internet evolves

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80 *Id.* at 23.

81 *Reno*, 217 F.3d at 166, 172.

82 *Ashcroft*, 322 F.3d at 240.

83 *Ashcroft 2004*, 542 U.S. at 663.

at a rapid pace.”<sup>84</sup> The Court acknowledged that five years had passed since COPA was first argued and technology had since changed greatly. The case was remanded with instructions for the district court to take account of the changed legal landscape and supplement the factual record to reflect current technological realities.<sup>85</sup>

Filtering software was also at the heart of the CIPA statute and *American Library Association*,<sup>86</sup> in which the Supreme Court upheld CIPA, endorsing the statute’s approach to Internet access in schools and libraries. The Court said that any concerns over filtering and blocking software’s alleged tendency to wrongly “overblock” access to constitutionally protected speech were dismissed by the ease with which library patrons could have the software disabled. Hence, public libraries’ use of Internet filtering software does not violate their patrons’ First Amendment rights.

Future regulatory approaches for both broadcast and the Internet should take a marketplace approach. The government should use current technology, such as the V-chip and Internet filtering and blocking software, to protect children from indecent content on the airwaves and the Internet, rather than impose further regulation. This technology allows the consumer, not the government, to make their own content choices.

## CONCLUSION

For over a decade, Congress has attempted to impose content-based regulations on the Internet via the CDA, COPA, and CIPA. Only CIPA survived constitutional scrutiny. CIPA is the closest the courts have come to permitting content regulation on the Internet. The result of the CIPA case (*American Library Association*) was unexpected, as the Supreme Court had struck down other content-based statutes related to the Internet in *Reno v. ACLU* in 1997, *Ashcroft 2002*, and *Ashcroft 2004*.<sup>87</sup>

It was not until 2007 in *ACLU v. Gonzales*, four years after the CIPA case, that filters were finally acknowledged to be a less restrictive alternative to government regulation.<sup>88</sup> The district court noted that filters are available to everyone, and that many Internet service providers provide filters at no extra cost. The court also noted that in addition to content filtering capabilities, filtering products have additional tools to help parents control their children’s Internet activities. Finally, the court noted that filtering products block Web pages originating not only in the United States, but also outside the U.S.<sup>89</sup> While filters are not a completely foolproof means to protect children from

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84 *Id.* at 671.

85 *Id.* at 673.

86 539 U.S. at 194.

87 *Ashcroft 2004*, 542 U.S. at 659; *Ashcroft 2002*, 535 U.S. at 565; *Reno*, 521 U.S. at 844.

88 *Gonzalez*, 478 F. Supp. 2d at 813.

89 *Id.*

inappropriate content and activities online, they are the most effective and least restrictive means to serve Congress's compelling interest. And as noted in CIPA, filters would not infringe the First Amendment rights of adults as COPA would have.

The government has taken some proactive legislative measures with statutes such as the Dot Kids Implementation and Efficiency Act of 2002, which created kids.us for Internet content that is suitable for children.<sup>90</sup> Whether an Internet publisher chose to put their website on kids.us was strictly voluntary. The government simply created a new place for children on the Internet, a form of channeling, and a tool for parental monitoring. Congress passes laws that are in the public interest, and kids.us protected the public interest by providing a safe area on the Internet and World Wide Web for children. However, this effort was met with limited success, and the site was suspended indefinitely in 2012.

While the issue of regulating indecent or harmful speech online has become more settled, the FCC continues to employ vague language in its policy for obscene and indecent broadcasts. Its policy raises two questions. First, how does one define "contemporary community standards for the broadcast medium"? A network broadcast would include the entire United States, and the Supreme Court has noted in obscenity rulings that community standards vary throughout the country.

COPA drew on the three-part obscenity test from *Miller v. California* requiring jurors to apply "contemporary community standards" in assessing material.<sup>91</sup> The Supreme Court held in *Ashcroft 2002* that COPA's reliance on contemporary standards does not by itself render the statute substantially overbroad for First Amendment purposes. However, the Court expressed no view as to whether the statute suffered from substantial overbreadth for reasons other than its use of community standards, whether the statute was unconstitutionally vague, or whether COPA survived strict scrutiny. With the exception of Justice Stevens, the justices favored a national standard with respect to the Internet.<sup>92</sup> But the issue has not been addressed since the Warren Court and the *Miller* decision. *Miller*, a decision made over forty years ago, has been the standard by which obscenity cases are decided and may be showing its age. Back in 1973, the standard applied to media that differ in a fundamental way from the Internet and World Wide Web. Yet no one is willing to admit that the *Miller* test is out of date. With rapid technological advances, the old laws of the previous century seem obsolete. If there must be regulation, it should be applicable to today's media. For instance, when cable television boomed in the 1980s, the FCC regulated as needed with the Cable Communications Policy

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90 Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317 (2002).

91 413 U.S. 15 (1973).

92 *Ashcroft 2002*, 535 U.S. at 585-90.

Act of 1984. It did not apply broadcast standards to a medium that was clearly distinct from free over-the-air broadcast television.

In regard to a national standard, the parties in *Ashcroft 2002* disputed the nature of the community standards that jurors would be instructed to apply when assessing whether works appeal to the prurient interest of minors and are patently offensive with respect to minors. The respondents contended that jurors would evaluate material using their local community standards.<sup>93</sup> But communities on the Internet do not have geographic borders. Though most of the justices favored a national standard, they were not sure how to apply it to the Internet.<sup>94</sup>

If a national “community standard” is defined, then jurors would have to be instructed to apply the standard in relevant cases. Obviously, national jury instructions would have to be written specifically for the national standard.

Second, the FCC guidelines state: “In making obscenity, indecency and profanity determinations, context is key. The FCC staff must analyze what was actually aired, the meaning of what was aired and the context in which it was aired.” But how does one define “context?” One could argue this uncertainty still leaves networks without a clear idea of what is considered indecent.

Ultimately, there remain fundamental differences between the regulations applied to Internet content and those applied to the traditional broadcast media. Broadcast radio and television are regulated via the public interest approach. Channeling provides some leeway for indecent content on the airwaves. The eight-hour safe harbor offers a mild compromise to previous suggestions of a twenty-four-hour ban and six-hour ban of indecent content over the airwaves. Future regulatory approaches for both broadcast radio and television should take more of a marketplace approach. Instead of imposing further regulation, the government should use existing technology, such as the V-Chip and Internet filters, as a means of channeling to protect children from indecent content on the airwaves and online. For the Internet, the Supreme Court thought that filters and blocking software were adequate for public libraries and schools. That sentiment resonated with lower courts, which acknowledged that filters are adequate in private homes. The online community has consistently shunned government attempts to regulate content on the Internet. The regulation proposed by the U.S. government for the Internet would have destroyed much of the Internet’s value, not just by limiting the freedom of Internet users to express themselves, but also by trying to impose a regulating structure on the entire Internet. For both broadcast and Internet-based media, technology such as filters and the V-chip can allow adequate protection of minors while preserving the First Amendment rights of the public.

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93 *Id.* at 576–79.

94 *Id.*

