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THE COLUMBIA  
SCIENCE & TECHNOLOGY  
LAW REVIEW

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VOL. XIV

STLR.ORG

SPRING 2013

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ARTICLE

BOOKS, VIDEO GAMES, AND FOUL-MOUTHED HOLLYWOOD  
GLITTERATAE: THE SUPREME COURT AND THE TECHNOLOGY-  
NEUTRAL INTERPRETATION OF THE FIRST AMENDMENT<sup>†</sup>

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*For more than fifty years, members of the Court have disputed whether core First Amendment principles apply equally to all methods of communication. That is, whether technological neutrality is a component of First Amendment doctrine. In *Citizens United v. FEC*, where the Court struck down a restriction on corporate or union sponsored candidate advocacy distributed via broadcast, cable or satellite, Justice Kennedy issued one of the Court's strongest statements in favor of technological neutrality. Yet, in *FCC v. Fox Television Stations, Inc.*, which in 2012 presented the Court the opportunity to revisit the diminished First Amendment status of broadcasting, the Court, per Kennedy, punted and instead found that three FCC indecency actions violated the due process clause of the Fifth Amendment. Whether the First Amendment's protection of broadcasting should be strengthened, in light of changing technological and market features, was postponed for another day. One reading of Fox's avoidance of First Amendment questions is that among the eight justices participating in the case, there were not five votes in favor of recasting the constitutional status of broadcasting. Hence, *Citizens United* may be more about the primacy of political speech than a new commitment to technological neutrality.*

*The Supreme Court's cases involving content-regulation tied to a communication technology are a doctrinal mess. One line of cases, which this Article denotes as technology based, emphasizes the "peculiar problems" of a*

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method of communication as justification for content-based regulation. Foremost in this line of cases are *Red Lion Broadcasting Co. v. FCC* and *FCC v. Pacifica Foundation*, where the Court upheld broadcast content regulations that are unacceptable in other media. A second line of cases, denoted as technology neutral, posits that the First Amendment's hostility to content regulation overrides legislative claims about the distinctive qualities of a communication medium. The most contemporary example of this type of case is *Brozen v. Entertainment Merchants Association*, where the Court in 2011 rejected California's assertion that the interactive nature of video games justified restricting children's access to violent video games. In the second line of cases, claims about "peculiar problems" are pushed to the background and the focus is on basic principles such as the invalidity of content discrimination. As this Article reveals, *Brozen* is not truly a video game decision; it is a decision about the constitutional status of violent portrayals. *Brozen* is the paradigmatic technology-neutral analysis.

This Article shows *Citizens United* and *Brozen* offer a useful template for addressing technology-specific restrictions. Courts are ill-equipped to assess rapidly changing media markets. Rather than engage in a sham dialogue about "peculiar problems," this Article advocates a distinct approach that disfavors content regulation. The Court's focus should be on first principles instead of transitory facts.

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## INTRODUCTION

“[W]hatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”

Justice Scalia, writing for the Court in *Brown v. Entertainment Merchants Association*.<sup>1</sup>

“We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.”

Justice Alito, concurring in *Brown*.<sup>2</sup>

For more than fifty years, members of the Supreme Court have disagreed about whether core First Amendment principles apply equally to all methods of communication. That is, they have disagreed about whether technological neutrality is a component of First Amendment doctrine. In *Citizens United v. FEC*,<sup>3</sup> the Court issued one of its strongest statements in favor of technological neutrality. That case originally concerned amendments to federal election law that had restricted the distribution of certain corporate- or union-sponsored political speech by means of broadcast, cable, or satellite communications.<sup>4</sup> Writing for the majority, Justice Kennedy explained that “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. . . . The First Amendment does not permit Congress to make these categorical distinctions.”<sup>5</sup>

Yet, in contrast to the boldness it had displayed in *Citizens United*, in *FCC v. Fox Television Stations, Inc.*<sup>6</sup> (*Fox II*), the Court punted and avoided the fundamental question of First Amendment technological neutrality. In that case, the Court had been squarely presented with the opportunity to reconsider the historically

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1. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2733 (2011).

2. *Id.* at 2742 (Alito, J., concurring in the judgment).

3. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

4. *Id.* at 887.

5. *Id.* at 912-13.

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

diminished First Amendment status of broadcasting.<sup>7</sup> Instead, the Court sidestepped the issue and found that three FCC indecency actions violated the due process clause of the Fifth Amendment.<sup>8</sup> Whether full First Amendment protection should be restored to broadcasting, in light of changing technological and market features, was postponed for another day. In the meantime, the government retained a unique authority to regulate broadcast indecency.

Frankly, the Supreme Court's cases involving content-regulation tied to a communication technology are a doctrinal mess. One line of cases emphasizes the "peculiar problems" of a method of communication as justification for content-based regulation.<sup>9</sup> Foremost in this line of technology-based cases are *Red Lion Broadcasting Co. v. FCC*<sup>10</sup> and *FCC v. Pacifica Foundation*.<sup>11</sup> In both these cases, the Court upheld the type of content regulations it has found to be patently unacceptable in

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7. See, e.g., *id.* at 2312 (explaining that existing precedent had given broadcasting only "the most limited First Amendment protection" with respect to so-called indecent content, because "broadcast media have established a uniquely pervasive presence in the lives of all Americans" and "broadcasting is uniquely accessible to children, even those too young to read.") (citations omitted).

8. *Id.* at 2320 (holding that regardless of whether or not the latest iteration of the FCC's indecency policy comports with the First Amendment, its application to the particular broadcasts at issue could not be tolerated because the FCC's vague standards had not given the broadcasters fair notice of what content the FCC now claimed the authority to prohibit). See also *id.* at 2317 ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . [This principle] requires the invalidation of laws that are impermissibly vague.") (citations omitted).

9. The phrase originates in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (holding that, while peculiar problems of a particular medium might permit some variation in the precise rules that apply to a particular medium, expression by means of motion pictures is included within the free speech guaranty of the First Amendment, and striking down a film licensing and censorship regime under which a government bureaucrat was effectively granted standardless discretion to ban any motion picture he deemed "sacrilegious").

10. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969) (upholding federal content-based regulation of broadcasters, requiring, *inter alia*, that broadcasters comply with the FCC's "fairness doctrine" in their coverage of controversial public issues).

11. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (upholding federal content-based regulation of broadcast indecency under which regime a broadcaster could face penalties enforced by the FCC for the broadcast of non-obscene but patently offensive depictions or descriptions of sex and excretion).

other media.<sup>12</sup> These precedents create an apparently absurd legal framework that allows the government greater power to regulate certain content depending on the technological medium connecting the speaker and audience. For example, under the Court's precedents, a video of George Carlin's "Filthy Words" stand-up comedy monologue would be fully protected by the First Amendment from government indecency regulation if disseminated by means of cassette tape, DVD, cable, satellite, or the Internet, but not if broadcast by radio waves.<sup>13</sup>

In direct conflict with such cases, a second line of cases posits that the First Amendment's hostility to content regulation overrides any legislative claims about the distinctive qualities of a particular medium of communication. The most recent example of this type of technology-neutral case is *Brown v. Entertainment Merchants Association*.<sup>14</sup> In *Brown*, the Court was faced with a California state law that restricted the sale or rental of certain "violent video

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12. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down state law that regulated newspapers, requiring that, *inter alia*, newspapers provide free reply space to any political candidate whose personal character or official record is attacked by the newspaper, even though the Court had previously upheld substantially similar federal regulation of broadcasters under *Red Lion*); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down sweeping federal internet-indecency law as overly broad, even though the Court had previously upheld government regulation of broadcast indecency in *Pacifica*); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000) (applying strict scrutiny and least restrictive means analysis to strike down a federal law regulating transmission of certain kinds of non-obscene sexual content over cable television, even though the Court's ruling in *Pacifica* allows government broad discretion to regulate similar content on broadcast television).

13. See, e.g., *Pacifica*, 438 U.S. at 774-75 (Brennan, J., dissenting) ("My Brother Stevens also finds relevant to his First Amendment analysis the fact that '[a]dulterals who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words.' My Brother Powell agrees[.] . . . : The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases the medium may well be the message. . . . Both those desiring to receive Carlin's message over the radio and those wishing to send it to them are prevented from doing so by the Commission's actions. Although, as my Brethren point out, Carlin's message may be disseminated or received by other means, this is of little consolation to those broadcasters and listeners who, for a host of reasons, not least among them financial, do not have access to, or cannot take advantage of, these other means.") (citations omitted).

14. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011).

games” to minors.<sup>15</sup> Among other arguments it advanced in support of its law, California claimed that the interactive nature of video games posed “special problems.”<sup>16</sup> The Court addressed this as an argument that California’s content-based regulation of video games should therefore not be subjected to the strict judicial scrutiny normally required by the First Amendment.<sup>17</sup> The Court summarily rejected this claim made by California in a single paragraph<sup>18</sup> and proceeded to apply strict scrutiny to strike down the law.<sup>19</sup> In this second line of technology-neutral cases, claims about the perceived “peculiar problems” of a particular medium are pushed to the background; the focus is instead on basic free speech principles such as the highly suspect nature of any content-based regulation of protected speech.<sup>20</sup> In that sense, the central holding of *Brown* is not really about video games at all; rather, it is

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15. See *id.* at 2732-33 (describing the particular contours of California’s law) (citing California Assembly Bill 1179 (2005), Cal. Civ.Code Ann. §§ 1746–1746.5 (West 2009)). The law also required that the packaging of video games captured by the statutory definition of “violent video game” be labeled with an “18.” *Id.*

16. *Id.* at 2737.

17. The Court addresses this aspect of California’s argument in the section of its opinion immediately prior to its application of strict scrutiny to the law. See *id.* at 2737-38. In other words, it was a threshold issue considered by the Court as it determined the appropriate degree of judicial scrutiny the First Amendment demanded in the matter before it.

18. *Id.* at 2737-38 (“California claims that video games present special problems because they are ‘interactive,’ in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least . . . 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. . . . [A]ll literature is interactive. [T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.”) (citations omitted).

19. *Id.* at 2738 (“Because the [law] imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard . . . [which] California cannot meet[.]”).

20. See *Burstyn*, 343 U.S. at 503 (stating that, even though a particular medium may present peculiar problems, “the basic principles of freedom of speech and the press . . . do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.”).

primarily a decision about the First Amendment protections afforded to violent content generally, and the need to subject content-based speech regulations to strict judicial scrutiny. *Brown*, then, is the paradigmatic technology-neutral analysis.

Among current members of the Court, Justices Thomas and Breyer offer two diametrically opposing views on the technological neutrality issue. On one hand, Thomas has long noted that the text of the First Amendment itself “makes no distinctions among print, broadcast, and cable media,”<sup>21</sup> and has recently claimed that technological changes have “eviscerated” the factual assumptions underlying *Red Lion* and *Pacifica*.<sup>22</sup> On the other hand, Justice Breyer has generally been the most willing of current members of the Court to accept and defer to legislative justifications advanced in support of content-based regulation of a particular communication medium. For example, his plurality opinion in *Denver Area Educational Telecommunications Consortium v. FCC*,<sup>23</sup> like Justice Stevens’ *Pacifica* opinion, displays a combination of: (1) a pronounced preference for a flexible approach to the First Amendment that varies with the features of a particular medium,<sup>24</sup> and (2) a credulous willingness to accept with minimal or no challenge the factual claims presented by the

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21. *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in judgment in part and dissenting in part).

22. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 531 (2009) (Thomas, J. concurring). See also *id.* at 530 (Thomas, J. concurring) (“*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.”).

23. *Denver Area*, 518 U.S. 727 (1996) (plurality opinion) (addressing the constitutionality of various aspects of federal regulation of certain cable channel and system operators).

24. See, e.g., *id.* at 740-41 (“Over the years, this Court has restated and refined the[] basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application. This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, . . . but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems.”) (citations omitted); see also *id.* at 818 (Thomas, J., concurring in judgment in part and dissenting in part) (“In the process of deciding not to decide on a governing standard, Justice Breyer purports to discover in our cases an expansive, general principle permitting government to ‘directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.’ This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted.”) (citations omitted).

government regarding the purported “peculiar problems” of a medium.<sup>25</sup>

Both of these tendencies of Breyer’s deferential technology-based approach were again on display in his dissent in *Brown*. For example, Breyer had been convinced that video games could be distinguished from films or books, because “[a] typical video game involves a significant amount of physical activity” when compared to passively watching a movie or reading a book.<sup>26</sup> Therefore, “[v]ideo games combine physical action with expression,”<sup>27</sup> so, instead of applying traditional strict scrutiny “mechanically,”<sup>28</sup> Breyer announced he would apply an ad hoc alternative standard that would weigh a variety of factors, including the harm to “speech-related interests” and the government’s justification.<sup>29</sup> At the same time, though, and despite a significant disagreement among social scientists regarding the effects of violent video

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25. For example, in *Denver Area* Breyer states that cable television, like broadcast television, is especially “accessible to children,” has a “pervasive presence in the lives of all Americans,” and “confron[ts]” the viewer “in the ‘privacy of the home’ with ‘little or no prior warning.’” *Id.* at 744-45 (quoting *Pacifica*, 438 U.S. at 747-48). In support of these conclusions, Breyer cites a book presenting survey data in which respondents self-report, for example, the amount of time they and their children spend watching television, and whether the watching is planned with a TV guide. *Id.* (citing Heeter & Greenberg, *Cableviewing* (1988)). More so than any new factual evidence, however, Breyer’s conclusions in *Denver Area* analogizing cable to broadcast were based on Stevens’ assumptions in *Pacifica*, which were not based on any kind of empirical evidence. *See, e.g., Pacifica*, 438 U.S. at 748, 749 (citing nothing for the factual propositions that, relative to other media, broadcast media are uniquely “pervasive” and “accessible to children”).

26. *Brown*, 131 S. Ct. at 2767 (Breyer, J., dissenting). On that logic, though, many other traditional speech activities also include a non-trivial degree of physical activity. For example, even if it is conceded that turning the pages of a book doesn’t count, what about writing a book by hand or keyboard? Painting a picture? Playing a musical instrument? Acting in a play? Under Breyer’s approach, because these activities combine speech with physical activity, more permissive review of content-based regulations would be appropriate.

27. *Id.* at 2765.

28. *Id.*

29. *Id.* (“Like the majority, I believe that the California law must be ‘narrowly tailored’ to further a ‘compelling interest,’ without there being a ‘less restrictive’ alternative that would be ‘at least as effective.’ I would not apply this strict standard ‘mechanically.’ Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying ‘compelling interests,’ the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, ‘the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide.’”) (citations omitted).

games,<sup>30</sup> Justice Breyer claimed the Court should defer to the legislature's conclusion that violent video games are harmful to children.<sup>31</sup> In other words, at the core of Breyer's technology-based approach is a marked degree of deference to the legislature.

Although Justices Thomas and Breyer have presented opposing views on the technological neutrality of the First Amendment, this issue does not cleanly split the Court on stereotypically conservative-liberal lines. For example, Justice Scalia's opinion for the Court in *Brown* was joined by three members of the Court's liberal bloc, Justices Ginsburg, Sotomayor, and Kagan. And, in his concurring opinion in *Brown*, Justice Alito, joined by Chief Justice Roberts, criticized the majority for dismissing the judgment of legislators "who may be in a better position than we are to assess the implications of new technology."<sup>32</sup> In her concurrence in *Fox II*, Justice Ginsberg declared that *Pacifica* was "wrong" when it was issued, adding that changing technology and the FCC's "untenable" indecency rulings warranted reconsideration of broadcasting's status.<sup>33</sup> Of course, as mentioned above, Justice Thomas had made similar statements, including in his concurrence in *Fox I* where he argued that "*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their

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30. The majority opinion in *Brown* soundly rejected the studies California cited in support of its law, for example. *See Brown*, 131 S. Ct. at 2739 ("The State's evidence is not compelling . . . [The studies California relies on] have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). Instead, [n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.' They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game. Even taking for granted [the studies' proponents'] conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media.") (citations omitted).

31. *Brown*, 131 S. Ct. at 2770 (Breyer, J. dissenting) ("Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature's conclusion that the video games in question are particularly likely to harm children. . . . The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all.") (citations omitted).

32. *Id.* at 2742 (Alito, J., concurring in the judgment).

33. *Fox II*, 132 S. Ct. at 2321 (Ginsberg, J., concurring in the judgment).

continued validity.”<sup>34</sup> As these voting configurations reveal, the problems of technological neutrality in the realm of the First Amendment are complex and nuanced, and jurists who frequently agree on other legal matters often wind up on opposite sides of the issue when faced with a government attempt to regulate content in particular media.

Furthermore, reading the opinions advanced by members of the Court in these types of cases, it becomes apparent that they have no principled methodology for assessing the purported “peculiar problems” of a particular medium of communication. Instead, whether or not a particular medium actually presents “peculiar problems” appears to be merely a conclusory statement that apparently reflects the weight of other constitutional considerations entirely – considerations such as judicial deference to the legislature on one hand, or the inherently suspect nature of content-based regulations on the other. For example, in *Times Film Corp. v. Chicago*, the Court, by a 5-4 vote, invoked the “peculiar problems” phrase while approving a motion picture licensing scheme without explaining why motion pictures should be treated differently than other forms of expression.<sup>35</sup> “It is not for this Court to limit the State in its selection of the remedy it deems most effective” to protect society from the dangers of obscenity, the majority stated in generous deference to the local government.<sup>36</sup> Chief Justice Warren dissented, joined by free-speech stalwarts Justices Black, Douglas and Brennan, warning that the majority was using the “peculiar problems” phrase as a talisman.<sup>37</sup> To Warren, the First Amendment’s animosity to censorship was so strong there was no “constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune.”<sup>38</sup>

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34. *Fox I*, 556 U.S. at 530 (Thomas, J. concurring).

35. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (upholding a local ordinance requiring the submission of motion pictures for review by city officials prior to exhibition, which licensing regime was apparently adopted with the primary purpose of preventing the screening of obscene films). The constitutional holding in *Times Film Corp.* was expressly qualified by *Freedman v. Maryland*, which struck down a similar licensing regime that lacked sufficient procedural safeguards. See 380 U.S. 51, 58-59 (1965).

36. *Times Film*, 365 U.S. at 50.

37. *Id.* at 76 (Warren, C. J., dissenting) (“[Although it] invo[kes] [the] talismanic phrase[,] [t]he Court, in no way, explains why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship[.]”) (citations omitted).

38. *Id.* at 51. Warren feared the decision presented the danger of censorship for every form of communication and noted that during oral

Something very similar is going on when members of Court, in upholding the government's actions, point enthusiastically to alternative avenues of expression left untouched by a content-based restriction that is limited to a particular medium or media. Just as with "peculiar problems," there is apparently no principled analysis that is consistently applied. Rather, in some cases, Justices seem to just assume that the alternatives are adequate,<sup>39</sup> essentially adding an additional makeweight to the scales in support of the government's content-based regulation regime; in other cases, they dismiss the alternatives out of hand, a conclusion that follows inexorably from the outcome-determinative presumption that content-based prohibitions are not justified by "showing that speakers have alternative means of expression."<sup>40</sup>

For example, in *FEC v. Wisconsin Right to Life (WRTL)*,<sup>41</sup> a warm-up to *Citizens United*, Justice Souter's dissent argued that while corporations might be prohibited from referring to

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argument, counsel for Chicago "could make no meaningful distinction between the censorship of newspapers and motion pictures." *Id.* at 76.

39. See, e.g., *Denver Area*, 518 U.S. at 745 (as a factor that militated in favor of upholding a federal law permitting limited content-based regulation of certain local access channels by the cable system operators, Justice Breyer argues that regulation of indecent content on leased access cable channels would still allow willing viewers to access the same sort of content on videotape, in theaters, and on other cable channels); *Pacifica*, 438 U.S. at 750 n.28 (as a factor that mitigates any burden on free speech caused by federal content-based regulation of broadcast media, Justice Stevens noted adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear the indecent words prohibited by the FCC); cf. *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting) (arguing the First Amendment did not entitle members of Westboro Baptist Church to immunity from private claims for intentional infliction of emotional distress, because, *inter alia*, although they had "almost limitless opportunities to express their views," they had deliberately decided to stage a protest outside a private funeral and "launch[ed] vicious verbal attacks" at a private figure "at a time of intense emotional sensitivity.").

40. *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 541 n.10 (1980) ("Although a [content-neutral] time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.") (citations omitted).

41. *FEC v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449 (2007) (holding that a provision of federal election law prohibiting the use of corporate and union general treasury funds to finance certain "electioneering communications" was unconstitutional as applied to issue-advocacy advertisements, which do not expressly advocate the election or defeat of a specific candidate, or serve as the functional equivalent of such express candidate advocacy).

candidates in ads disseminated via broadcast, cable, or satellite media, they were free to use print or Internet communications instead.<sup>42</sup> He offered no analysis to explain why these media would be substitutes for the media subjected to government regulation. Nevertheless, he argued that their availability favored upholding the challenged law.

In opposition, Chief Justice Roberts said that Souter's suggestion was entirely "too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads[,] and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness."<sup>43</sup> Yet Roberts offered no explanation of how he found broadcasting to be more "effective" than other media. It seems that, more than anything else, Roberts' conclusion about the irrelevance of alternative media reflects his presumption against laws foreclosing certain media to political speakers. This presumption would play a prominent role in *Citizens United*.

As that case originally came before the Court, the primary statutory provision at issue restricted certain corporate- and union-sponsored political speech disseminated by means of broadcast, cable, and satellite communications.<sup>44</sup> But then the case took a dramatic turn at oral argument. There, in response to questions from the bench regarding the limits of the government's justifying rationale,<sup>45</sup> the Deputy Solicitor General claimed that Congress

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42. *WRTL*, 551 U.S. at 521 (Souter, J., dissenting) ("[A] nonprofit corporation, no matter what its source of funding, is free to pelt a federal candidate like Jane Doe with criticism or shower her with praise, by name and within days of an election, if it speaks through a newspaper ad or on a Web site, rather than a 'broadcast, cable, or satellite communication[.]'" (citing 2 U.S.C. § 434(f)(3)(A)(i) (2000 ed., Supp. IV)).

43. *Id.* at 477 n.9 (citations omitted).

44. *Citizens United*, 130 S. Ct. at 887 (Certain amendments to federal law prohibited corporations and unions from using general treasury funds to make any "electioneering communication," which is "any broadcast, cable, or satellite communication" that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election.") (quoting 2 U.S.C. § 441b(b)(2) (2006 ed.), 2 U.S.C. § 434(f)(3)(A)).

45. Transcript of Oral Argument I at 26-27, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205) (Alito, J.) ("Do you think the Constitution required Congress to draw the line where it did, limiting this to broadcast and cable and so forth? What's your answer to [opposing counsel's] point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book? Would the Constitution permit the restriction of all of those as well?").

could at its discretion also extend this law to include books and other media.<sup>46</sup> Furthermore, the Deputy Solicitor General went on to assert that corporate- and union-sponsored express candidate advocacy in *any* form of communication, including books, was actually *already* prohibited by another, more general provision of the federal election laws.<sup>47</sup> This was part of the Federal Election Campaign Act (FECA), and predated the new electioneering communication prohibition immediately before the Court.<sup>48</sup> Either way, the government's position was that it could constitutionally reach the tainted content in any media that carried it. The government's claim of this vast power to control political communication was extraordinarily troubling to the Court and transformed the case. As the Court later ruled, this "brooding power" to threaten any and all media simply could not be reconciled with the First Amendment.<sup>49</sup>

This Article argues that *Citizens United* and *Brown* offer a useful template for addressing technology-specific restrictions of speech. Rather than engaging in a sham dialogue about the "peculiar problems" of particular media, the author advocates an approach that focuses on first principles instead of transitory facts.<sup>50</sup> The most basic of those foundational principles is that, with the very limited exception of obscenity and certain other historically unprotected categories of speech, the First Amendment requires that content-based regulations of speech must be subjected to strict judicial scrutiny. Courts should reject the camouflage offered by the extremely malleable technology-based approach, adopt the more doctrinally consistent technology-neutral approach, and fully engage in a traditional First Amendment review of government's content-based regulations of protected speech.

In the immediately following Part II, this Article will first analyze *Citizens United*, with special attention to the impact of the government's initial claim of the power to restrict political speech in the form of a book. Unpacking the conflicting opinions of Justice Kennedy (writing for the majority) and Justice Stevens (writing in dissent) in that case, the Article will show that Justice

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46. *Id.* at 27.

47. *Id.* at 29; see 2 U.S.C. § 441b(a) (prohibiting certain corporate and union funded indirect expenditures in relation to any federal election), *invalidated by Citizens United*, 130 S. Ct. 876 (2010).

48. See Transcript of Oral Argument I at 29, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

49. *Citizens United*, 130 S. Ct. at 904.

50. *Fox I*, 556 U.S. at 531-32 (Thomas, J., concurring).

Stevens' technology-based, deference-to-the-legislature approach provides little protection for free speech as compared to Justice Kennedy's more robust judicial review. Part III will then turn to the *Brown* decision as the most recent and exemplary case showcasing a bold technology-neutral approach. Though billed in the popular press as the "violent video game case," this Article shows that *Brown* was much more about violent content than it was about video games. Part IV turns to examine the outlier presented by the Court's decision in *Pacifica*, which continues to permit the government a unique and peculiar censorial power to regulate indecent content on broadcast media. Finally, in Part V, the Article concludes that, despite the strong technology-neutral positions adopted in *Citizens United* and *Brown*, the Court is apparently not yet ready to abandon *Pacifica* and provide broadcasters the full protection of the First Amendment.

### I. *CITIZENS UNITED* AND POLITICAL SPEECH

To seasoned Supreme Court observers, it was an astonishing moment.<sup>51</sup> During the initial March 2009 oral argument in *Citizens United*, the Deputy Solicitor General claimed it would be within Congress's power to ban a book.<sup>52</sup> This assertion would not

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51. See, e.g., Adam Liptak, *Justices Consider Interplay Between First Amendment and Campaign Finance Laws*, N.Y. Times, Mar. 25, 2009, at A16 (stating that several of the justices "reacted with incredulity" to answers from a government lawyer about the scope of Congressional authority to limit political speech), [available at http://www.nytimes.com/2009/03/25/washington/25scotus.html](http://www.nytimes.com/2009/03/25/washington/25scotus.html); Robert Barnes, *Justices May Trim Campaign Advertising Law*, Wash. Post, Mar. 25, 2009, at A2 (government's lawyer "rattled" the justices by asserting that Congress had broad power to restrict political speech), [available at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032400137.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032400137.html); Tony Mauro, *Top Court Reviews 'Hillary, the Movie'*, USA Today, Mar. 26, 2009, at 10A (stating it was a "pivotal moment that clearly upset the court"), [available at http://www.hillarythemovie.com/press/press\\_usatoday\\_2009.html](http://www.hillarythemovie.com/press/press_usatoday_2009.html); Jeffrey Toobin, *Annals of Law: Money Unlimited*, New Yorker, May 21, 2012, at 40 (stating that "a single question changed the case, and perhaps American history"), [available at http://www.newyorker.com/reporting/2012/05/21/120521fa\\_fact\\_toobin?currentPage=all](http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin?currentPage=all).

52. Technically, books would not be prohibited per se; rather, corporations and unions could be prohibited from using general treasury funds to pay for books containing express advocacy under the government's reading of the statute. Transcript of Oral Argument I at 29 & 33, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205). Members of the Court, though, kept referring to the banning or prohibition of books, prompting Deputy Solicitor General

be out of place in an obscenity case,<sup>53</sup> but it was especially jarring in a political speech case. Theodore Olson, counsel for Citizens United, later said it was *the* turning point, the moment when he thought a big win was possible.<sup>54</sup> After the government's attorney matter-of-factly stated that Congress could also extend its regulations to additional media such as the Internet if it chose to do so, Justice Alito succinctly responded to the claim: "That's pretty incredible."<sup>55</sup>

*Citizens United* had initially presented a set of fairly narrow statutory issues dealing with relatively arcane provisions of the federal elections and campaign finance laws.<sup>56</sup> Citizens United, a non-profit corporation, produced a documentary movie about then Senator Hillary Clinton, who was at that time a candidate in the Democratic Party's 2008 Presidential primary elections.<sup>57</sup> The movie was highly critical of Clinton.<sup>58</sup> Citizens United released the movie in theaters and on DVD, but the group "wanted to increase distribution by making it available through video-on-demand."<sup>59</sup> Citizens United found a cable company that was prepared to make the movie available on its video-on-demand ("VOD") channel, for

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Stewart to say "I do want to make clear that if by prohibition you mean ban on the use of corporate treasury funds, then yes, I think it's absolutely clear under *Austin*, under *McConnell* that the use of corporate treasury funds could be banned . . ." *Id.* at 33.

53. See, e.g., *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1956) (upholding the constitutionality of state law authorizing seizure and destruction of obscene materials); *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is not within the area of constitutionally protected speech); see also *Miller v. California*, 413 U.S. 15 (1973) (establishing a three prong obscenity test that permits outright prohibition of sexually explicit works that: (1) appeal to the prurient interest, (2) depict or describe certain statutorily defined sexual conduct in a patently offensive way, and (3) lack serious literary, artistic, political or scientific value).

54. Tony Mauro, *Risky Strategy Leads to Big High Court Win*, Nat'l L. J., Jan. 25, 2010, available at <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202439436524>.

55. Transcript of Oral Argument I at 27, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

56. As Jeffrey Toobin wrote, the case initially presented narrow questions about whether McCain-Feingold applied to documentaries sponsored by non-profit corporations shown through video on demand. "There did not seem to be a lot riding on the outcome." Toobin, *supra* note 51.

57. See *Citizens United*, 130 S. Ct. at 886-87.

58. *Id.*

59. *Id.* at 887 ("Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program.").

a payment of \$1.2 million.<sup>60</sup> Citizens United wanted to go ahead and pay for the VOD placement, and to air a series of short television advertisements for the movie.<sup>61</sup> The ads would include short, pejorative statements about Clinton, and would run on broadcast and cable television.<sup>62</sup>

The obvious obstacle was a new addition to federal elections law. The “electioneering communication” provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibited corporations and unions from using their general treasury funds to make certain candidate-related independent expenditures.<sup>63</sup> More specifically, an electioneering communication is “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days before a primary election, or 60 days before a general election, for the office sought by the candidate.<sup>64</sup> Relevant FEC regulations further provided that, for purposes of the electioneering communication definition, “[b]roadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.”<sup>65</sup> The case, it seemed, was likely to turn on statutory interpretation, on whether Citizens United’s movie and the VOD technology were captured by the statutory definition and regulatory interpretation of “electioneering communication.”<sup>66</sup> If any constitutional issues were reached, it was assumed that the

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60. *Id.*

61. *Id.*

62. *Id.*

63. 2 U.S.C. § 441b(a), (b) (2006), *invalidated by Citizens United*, 130 S. Ct. 876 (2010). The statutory regime allowed corporations and unions to use separately segregated funds to finance such political speech. *Id.* However, “[t]he moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.” *Citizens United*, 130 S. Ct. at 887 (citing 2 U.S.C. § 441b(b)(2)).

64. 2 U.S.C. § 434(f)(3)(A) (2006).

65. 11 CFR § 100.29(b)(1) (2006).

66. *See Citizens United*, 130 S. Ct. at 889 (“Citizens United contends that § 441b does not cover [the movie], as a matter of statutory interpretation, because the film does not qualify as an ‘electioneering communication.’ . . . Citizens United . . . argues that [the movie] was not ‘publicly distributed,’ because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household—not 50,000 or more persons.”).

Court would at most accept a narrow as-applied challenge to the restrictions, an approach previously taken in *WRTL*.<sup>67</sup>

The initial oral argument, though, unsettled the Court and transformed the case. In a highly unusual move, the Court announced<sup>68</sup> it wanted an additional set of briefs and a second round of oral arguments to consider whether it should overturn two precedents, *Austin v. Michigan Chamber of Commerce*<sup>69</sup> and *McConnell v. FEC*,<sup>70</sup> which had previously upheld similar restrictions on political speech by corporations and unions.

When *Citizens United* was reargued in September 2009, the government had a new answer about books. Prompted by the Court's hostile reaction to the first oral argument, then-Solicitor General Elena Kagan announced that her office had "considered the matter very carefully" and concluded that although the pre-existing FECA statutory provision proscribing union and corporate express advocacy of federal candidates facially applied to books,<sup>71</sup> any attempt to restrain books would be met with a "quite good" as-applied challenge.<sup>72</sup> Moreover, Kagan consoled, the Federal

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67. *Fed. Elections Comm'n v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449 (2007) (holding that the restrictions on "electioneering communications" could not constitutionally be applied to speech that, while captured by the statutory definition, was not express advocacy or the functional equivalent of express advocacy for or against a specific candidate).

68. 129 S. Ct. 2893 (2009). For a behind the scenes look at the internal dynamics affecting this decision, see Toobin, *supra* note 51.

69. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876 (2010). *Austin* upheld a state law that generally prohibited certain political speech by corporations, notwithstanding certain exceptions to the prohibition. *Id.* at 655-56. Among other rationales advanced by the Court, the Court based its ruling in part on the contention that "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption." *Id.* at 658.

70. *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United*, 130 S. Ct. 876 (2010). "McConnell decided that [section] 441b(b)(2)'s definition of an 'electioneering communication' was facially constitutional insofar as it restricted speech that was 'the functional equivalent of express advocacy' for or against a specific candidate." *Citizens United*, 130 S. Ct. at 889 (citing *McConnell*, 540 U.S. at 206).

71. See 2 U.S.C. § 441b(a) (2006) ("It is unlawful for . . . any corporation . . . , or any labor organization, to make . . . [an] expenditure in connection with" certain federal elections), *invalidated by Citizens United*, 130 S. Ct. 876 (2010) (holding that while restrictions on direct contributions are constitutional, the statute's prohibition on independent expenditures in connection with an election are not).

72. Transcript of Oral Argument II at 65, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205). There is less force to Kagan's claim about books than

Election Commission had never applied the restriction to books.<sup>73</sup> Chief Justice Roberts “bristled”<sup>74</sup> at Kagan’s claim, remarking, “[W]e don’t put our First Amendment rights in the hands of FEC bureaucrats[.]”<sup>75</sup> Justice Alito added, “In light of your retraction, I have no idea where the government would draw the line with respect to the medium that could be prohibited.”<sup>76</sup> Theodore Olson, counsel for Citizens United, seized on the government’s changing position in his rebuttal, stating: “The words that I would leave with this Court are the Solicitor General’s. The government’s position has changed. The government’s position has changed as to what media might be covered by congressional power to censor and—and ban speech by corporations.”<sup>77</sup> This change left corporations uncertain as to the media covered by federal election laws, Olson said.<sup>78</sup>

Given the tenor of the oral arguments, it was no surprise that Justice Kennedy’s *Citizens United* majority opinion relied upon the uncertainty created by the Government’s litigating position as a factor justifying the examination of the facial validity of the

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appears at first blush. During the first oral argument, the Deputy Solicitor General claimed that a 500-page book that included at the end the statement “Vote for X” would be express advocacy and subject to the general Federal Election Campaign Act (FECA) prohibition. Transcript of Oral Argument I at 29, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08–205). When Kagan appeared before the Court, she stated that the prior example would not meet the definition of express advocacy. Transcript of Oral Argument II at 68, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08–205). This leaves open the prospect that a book which could be classified as containing express advocacy would be subject to statutory prohibition. *See also id.* at 68 (“One cannot imagine very many books that would meet the definition of express advocacy as this Court has expressed that.”).

73. Justice Scalia was not impressed: “So you’re . . . a lawyer advising somebody who is about to come out with a book and you say don’t worry, the FEC has never tried to send somebody to prison for this. The statute covers it, but don’t worry, the FEC has never done it. Is that going to comfort your client? I don’t think so.” Transcript of Oral Argument II at 67, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08–205).

74. Adam Liptak, *Day at Supreme Court Augurs a Victory on Political Speech, But How Broad?*, N.Y. Times, Sept. 10, 2009, at A28, available at <http://query.nytimes.com/gst/fullpage.html?res=9807E3DF1231F933A2575AC0A96F9C8B63&pagewanted=all>

75. Transcript of Oral Argument II at 66, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08–205).

76. *Id.*

77. *Id.* at 77.

78. *Id.* at 82.

challenged provision.<sup>79</sup> Nor was it surprising that the majority found the possible prohibition of political books to be disconcerting, writing that “[t]his troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.”<sup>80</sup> And, in a highly provocative statement that revealed the Court’s strong aversion to laws targeting political speech, Justice Kennedy’s majority opinion announced that the Court overruled its own precedents and that the First Amendment could not permit Congress to restrict the media used for political speech.<sup>81</sup>

In dissent, Justice Stevens argued that the “electioneering communication[s]” provision left open alternative media, such as websites and the print media.<sup>82</sup> Echoing Solicitor General Kagan’s claim, Stevens suggested that any FEC attempt to apply election law to books or blogs would be met with an as-applied challenge.<sup>83</sup> In other words, in contrast to a majority that saw no limiting principle that would prevent the government from expanding its regulatory regime to any and all media if tolerated in the specific circumstance of broadcast, cable, and satellite communications, Stevens seemed to think that there would be constitutionally

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79. *Citizens United*, 130 S. Ct. at 894 (explaining reasons for examining the facial validity of 2 U.S.C. § 441b, the specific statutory provision at issue in the case).

80. *Id.* at 904.

81. *Id.* at 913 (“*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. . . . Section 441b’s restrictions on corporate independent expenditures are therefore invalid[.] . . . Given our conclusion we are further required to overrule the part of *McConnell* that upheld [the electioneering communication provision’s] extension of § 441b’s restrictions on corporate independent expenditures.”) (citations omitted). *See also id.* at 916-17 (“When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. Under *Austin*, though, officials could have done more than discourage its distribution—they could have banned the film. After all, it, like [Citizens United’s movie], was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force. . . . Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design. Some . . . might consider [the movie] to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation’s course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make.”) (citations omitted).

82. *Id.* at 943 (Stevens, J., dissenting).

83. *Id.* at n.31.

relevant differences between media that would stop such expansion. But he did not explain why there should be some sort of special exemption for books, why the First Amendment would tolerate censorship of a documentary movie but not a book. If the same substantive message were at issue (e.g. direct candidate advocacy or its functional equivalent), why would the First Amendment protect its dissemination through something called a “book” but not through any number of other channels of communication otherwise available to modern communicators?

*A. Why Are Books Sacred?*

“You think you can walk on water with your books. Well, the world can get by just fine without them.”

Ray Bradbury, *Fahrenheit 451*<sup>84</sup>

A generation before *Citizens United*, Chief Justice Burger wrote, “A book seems to have a different and preferred place in our hierarchy of values, and so it should be.”<sup>85</sup> While certainly a popular sentiment,<sup>86</sup> if books were to receive “different and preferred” treatment in the area of the First Amendment, as Justice Stevens suggested in *Citizens United*, on what constitutionally significant basis would such distinction be grounded? Textually,

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84. Ray Bradbury, *Fahrenheit 451* 143 (Simon & Schuster Classic Edition, 2003) (1953). Bradbury’s classic novel depicts a dystopian future society in which an authoritarian government aggressively hunts down and burns books, while a complacent populace mindlessly consumes broadcast mass media, also tightly controlled by government authorities.

85. *Kaplan v. California*, 413 U.S. 115, 119 (1973) (considering, but ultimately rejecting, the proposition that books lacking pictorial content cannot be obscene). Burger continued with a caveat, however, noting that, “[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.” *Id.* at 119-20.

86. See also United States Department of Justice, Attorney General’s Commission on Pornography, Final Report 382 (1986) (noting the “special prominence of the printed word” in free speech law), available at <http://www.communitydefense.org/lawlibrary/agreport.html>; Theodore Dalrymple, *Of Bibliophilia and Biblioclasts*, New English Rev., Nov. 2008 (“Books . . . have an almost sacred quality in any case: it is necessary only to imagine someone ripping the pages out of a cheap and trashy airport novel one by one to prove to oneself that this is so. If we saw someone doing it, we should shudder, and think him a barbarian, no matter the nature of the book. The horror aroused by book burnings is independent of the quality of the books actually burnt.”), available at [http://www.newenglishreview.org/custpage.cfm/firm/28194/sec\\_id/28194](http://www.newenglishreview.org/custpage.cfm/firm/28194/sec_id/28194).

the First Amendment confers neither special status upon books, nor diminished status upon other means of communication. Furthermore, various other forms of media, such as newspapers, magazines, and pamphlets, for example, have had as venerable and rich a tradition as books in the political and cultural history of the United States.<sup>87</sup> The author speculates that the generally privileged stature of books in American courthouses is due to a subjective perception of their cultural significance held by those on the bench. Quite simply, judges love books. As federal Judge Denise Cote recently wrote, “there can be no denying the importance of books and authors in the quest for human knowledge and creative expression, and in supporting a free and prosperous society.”<sup>88</sup> Cote quoted Emily Dickinson, who memorably wrote of books and reading in the following manner:

There is no Frigate like a Book  
To take us Lands away,  
Nor any Coursers like a Page  
Of Prancing Poetry—  
This Traverse may the poorest take  
Without oppress of Toll—  
How frugal is the Chariot  
That bears a Human soul.<sup>89</sup>

In contrast to the gushing appreciation that judges have for books, it is far less likely that a judge would wax so eloquently about, say, broadcast television’s role in the romanticized “quest for human knowledge.” Indeed, as will be argued below, broadcasting is instead embedded in a set of legal and cultural expectations that limit its First Amendment status, and thereby expose speech disseminated by broadcast to a degree of regulation that could never be tolerated in the sacred realm of books.<sup>90</sup>

Books serve as tangible cultural symbols of two hard-won freedoms: the freedom to publish and the concomitant freedom to read. Books are embedded in a cultural and legal history that overcame the once-accepted practices of book banning and

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87. Consider the New York Times, Harper’s Weekly, or Thomas Paine’s Common Sense, for example. Or, for that matter, the Federalist Papers.

88. *United States v. Apple, Inc.*, 2012 U.S. Dist. LEXIS 127034 at \*23 (S.D.N.Y. Sept. 5, 2012).

89. Emily Dickinson, “There is no Frigate Like a Book,” *available at* <http://www.poets.org/viewmedia.php/prmMID/19730>.

90. See *infra* Part IV.

burning.<sup>91</sup> Today, as a culture, we celebrate the freedom to read and the power of literature through events such as “Banned Books Week.”<sup>92</sup> Our society now recoils with horror at the deliberate destruction of books and libraries. Indeed, Ray Bradbury, author of *Fahrenheit 451*, the classic tale of a totalitarian government’s book burning, was inspired by his view of books and libraries as “cornerstones” of civilization.<sup>93</sup> Similarly, Rebecca Knuth wrote:

The sadness and fear in eyewitness accounts [of book burnings] convey a sense that the destruction of texts signifies not only the immediate breakdown of order and peace, but also a compromised future. The victims’ sense of loss, shared by many throughout the world, is tied to the perception that books and libraries are the living tissue of culture; the burning of books . . . thus violates ideals of truth, beauty, and progress—and civilization itself.<sup>94</sup>

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91. For many years the seal of the New York Society for the Prevention of Vice featured an image of “top-hatted gentleman purposefully throwing a pile of books into a blazing bonfire . . .” This image was removed from the society’s annual reports in the mid-1930s. P. Boyer, *Purity in Print: Book Censorship in America From the Gilded Age to the Computer Age* 245 (2002). The seal is reprinted in *id.* as illustration two, and appears between pages 98 and 99.

92. “Banned Books Week . . . is an annual event celebrating the freedom to read and the importance of the First Amendment. Held during the last week of September, Banned Books Week highlights the benefits of free and open access to information while drawing attention to the harms of censorship by spotlighting actual or attempted book bans across the United States.” American Library Association, *Banned Books Week: Celebrating the Freedom to Read*, <http://www.ala.org/ala/issuesadvocacy/banned/bannedbooksweek/index.cfm> (last visited March 20, 2013).; *see also* Banned Books Week, <http://www.bannedbooksweek.org>.

93. Stephen Miller, *Remembrances, Ray Bradbury 1920-2012, Author of Classic ‘Fahrenheit 451’*, Wall St. J., June 7, 2012, at A4; *see also* Anne Lamott: *By the Book*, N.Y. Times, Nov. 25, 2012, at BR8 (Lamott states that “holding a printed book in my hands can be a sacred experience—the weight of the paper, the windy sound of pages turning, like a breeze. To me, a printed book is like a cathedral or a library or a beach—holy space.”), *available at* [http://www.nytimes.com/2012/11/25/books/review/anne-lamott-by-the-book.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/25/books/review/anne-lamott-by-the-book.html?pagewanted=all&_r=0).

94. Rebecca Knuth, *Libricide: The Regime-Sponsored Destruction of Books and Libraries in the Twentieth Century* 1 (2003); *see also* Matthew Fishburn, *Burning Books* 74 (2008) (quoting Guy Stern who wrote of Nazi book burnings, “if you have any respect for the mere idea of books, what they stand for in life, if you believe in paper and print, you cannot burn any page of any book. Even if you are freezing.”).

Most famously, Milton wrote in *Areopagitica*, “who kills a man kills a reasonable creature, God’s image; but he who destroys a good book kills reason itself.”<sup>95</sup>

During the early twentieth century American attitudes toward what could be expressed in print shifted dramatically.<sup>96</sup> In World War II, the government of the United States seized upon Nazi book burning as a propaganda point, emphasizing Americans had the freedom to read books burned by Nazis.<sup>97</sup> The government claimed that “books are weapons in the war of ideas.”<sup>98</sup> As President Roosevelt stated in 1942, “Books cannot be killed by fire.”<sup>99</sup> The shift in public attitudes toward what could be expressed in print paralleled the judiciary’s expansion of First Amendment rights. The type of government ban that once caused Joyce’s *Ulysses* to be seized as illegal contraband at the border increasingly became unthinkable.<sup>100</sup>

The typical censorship battles that have affected books in the United States have not involved the sort of political election advocacy ultimately at issue in *Citizens United*. Instead, most censorship of books in American has traditionally been about controversial sexual content that authorities have deemed to be morally corrupting<sup>101</sup> or offensive,<sup>102</sup> and have therefore most

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95. J. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644), available at <http://www.bartleby.com/3/3/>.

96. Boyer, *supra* note 91, at 270.

97. See Matthew Fishburn, *Burning Books* xvi-xvii, illustration 4 (2008) (poster stating that “Ten years ago: The Nazis Burned These Books . . . but Free Americans Can Still Read Them”).

98. See *id.* at xvi-xvii, illus. 5 (World War II era poster, emblazoned with a message from then-President Franklin Roosevelt that states that “People die, but books never die. . . . No man and no force can take from the world the books that embody man’s eternal fight against tyranny. In this war, . . . books are weapons.”).

99. *Id.* at 109 (quoting FDR’s letter to the American Booksellers Association, Apr. 23, 1942).

100. *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934) (holding that the book *Ulysses* is not obscene and that its seizure by a US customs officer was improper).

101. See, e.g., Paul S. Boyer, *Purity in Print: The Vice Society Movement and Book Censorship in America* 99-127 (1968) (describing the 1920s “Clean Books” crusade waged by the New York Society for the Suppression of Vice, which took efforts that included exerting private pressure on the publishing industry, and lobbying the government to enact and prosecute more aggressive obscenity laws to regulate the content of books).

102. Despite the landmark 1934 *Ulysses* ruling, government hostility to novels exploring sexual themes would persist for a generation, see, e.g., *Grove*

ferently tried to keep out of the hands of minors.<sup>103</sup> Most recently, public school libraries<sup>104</sup> and school textbooks<sup>105</sup> have

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*Press, Inc. v. Gerstein*, 378 U.S. 577 (1964) (reversing lower court obscenity determination for *Tropic of Cancer*); *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960) (*Lady Chatterley's Lover* held to be not obscene); *Attorney General v. A Book Named "Naked Lunch"*, 218 N.E.2d 571 (Mass. 1966) (novel not obscene due to literary value), until *Miller v. California* established that no book could be prosecuted for obscenity unless it lacked "serious literary, artistic, political or scientific value." 413 U.S. 15, 24-25 (1973). Obscenity prosecutions for the written word have since become vanishingly rare. But see Neil A. Lewis, A Prosecution Tests the Definition of Obscenity, *New York Times*, Sep. 28, 2007, available at [http://www.nytimes.com/2007/09/28/us/28obscene.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/09/28/us/28obscene.html?pagewanted=all&_r=0) (describing the obscenity prosecution of an author, Karen Fletcher, of purely text based sexually-explicit stories, and noting that "there has not been a successful obscenity prosecution in the [United States] that did not involve drawings or photographs since [1973]"); Paula Reed Ward, *Afraid of Public Trial, Author to Plead Guilty in Online Obscenity Case*, *Pittsburgh Post Gazette* (May 17, 2008 12:00am), <http://www.post-gazette.com/stories/local/uncategorized/afraid-of-public-trial-author-to-plead-guilty-in-online-obscenity-case-394368/> (reporting that Fletcher ultimately plead guilty to the obscenity charges brought against her).

103. Under *Ginsberg v. New York*, the Supreme Court has allowed the government greater leeway to regulate the sale of explicit sexual content that, while not legally obscene, is "harmful to minors." 390 U.S. 629 (1968) (upholding the constitutionality of a statute regulating the sale of pictures that are "harmful to minors," in the criminal prosecution of a shopkeeper who sold two "girlie magazines" to a 16-year-old boy). The basic idea is that certain material might be obscene "as to minors," although not obscene for adults. *Id.*; see *Brown*, 131 S. Ct. at 2735 ([*Ginsberg*] approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child. We held that the legislature could 'adju[s]t the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of . . . minors.'" And because "obscenity is not protected expression," the New York statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children 'was not irrational.')" (citations omitted).

104. See, e.g., *Island Trees Sch. Dist. v. Pico*, 457 U.S. 853 (1982) (limiting the power of school boards to remove books from school libraries by holding that, *inter alia*, "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.')" (citations omitted).

105. See, Joan Delfattore, *What Johnny Shouldn't Read: Textbook Censorship in America* (1992) (discussing six federal court cases that involve attempts by religious groups to censor the content of elementary and secondary school textbooks). As Tebbel wrote, "it is obvious that the struggle against censorship began almost with the issuing of the first book in American and there appears to be no prospect that it will ever end. Only changes of emphasis and cyclic waves of repression characterize its history." John Tebbel, *A History of*

become the frontlines for policing children's access to books not sufficiently morally or ideologically pure. And although there *have* been episodes of censorship targeting the political content of books, such as during the height of Cold War-era McCarthyism, these efforts were aimed at books promoting threatening political ideologies;<sup>106</sup> books promoting particular political candidates running for election to public office have not been the targets of censors in America. Instead, the idea that a book could be banned and its author punished for advocating for the election or defeat of a particular politician is wildly outside this tradition.

But, through *Austin*<sup>107</sup> and *McConnell*,<sup>108</sup> the Court had sustained certain restrictions on corporate political advocacy, accepting the government's argument that that such advocacy harmed the political process.<sup>109</sup> In both cases, mass media advertisements were obviously on the forefront of the minds of the Justices,<sup>110</sup> and in neither case did the Court consider how similar such speech restrictions would fare if applied to books. However, in hindsight, the rationale accepted by the Court in those cases in support of the government's position was in no way limited to television attack ads and could be logically extended to any other media, including books.<sup>111</sup> Thus, in *Citizens United*, when the

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Book Publishing in the United States 653 (1981). *See also id.* at 402 (noting the shifting targets of censorship from the 1920s to the 1970s).

106. Boyer, *supra* note 91, at 282-87 (describing the McCarthyite assault on politically suspect books and authors and the government's Smith Act prosecutions); John Tebbel, *Between Covers: The Rise and Transformation of Book Publishing in America* 455-58 (1987) (describing Cold War era attacks on the publishing industry).

107. *Austin*, 494 U.S. 652 (1990).

108. *McConnell*, 540 U.S. 93 (2003).

109. "[T]he *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Citizens United*, 130 S. Ct. at 903 (citing *Austin*, 494 U.S. at 660).

110. *See, e.g., McConnell*, 549 U.S. at 122-132 (discussing television ads financed by corporate money as the problem to which Congress was responding in enacting the relevant provisions regulating political speech); *Austin*, 494 U.S. at 656 (describing that the speech immediately at issue in the case was a print advertisement supporting a specific candidate that a corporation sought to place in a local newspaper using its general treasury funds).

111. *See Citizens United*, 130 S. Ct. at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale [of

government suggested its censorship power could reach books, the Court was presented with a new question: Does the interest in protecting “democratic integrity”<sup>112</sup> from the allegedly malicious effects of the disfavored content trump the special status of books? The members of the Court seemed to have answered with a solid no. And even the government, speaking through Solicitor General Kagan, seemingly conceded that an attempt to regulate books would be problematic and could be met with a good as-applied challenge.<sup>113</sup> Justice Stevens accepted the government’s position at face value,<sup>114</sup> but what constitutional principle would support different treatment for a book? Would it be because books lack dangerous attributes, such as the immediacy of broadcasting,<sup>115</sup> that justify regulation? Or is this because books have not actually been used for candidate advocacy?

Either justification for differential treatment of books, though, would be problematic because both are based on arbitrary distinctions and transitory facts. If a special constitutional status afforded books were based on the perception that books currently are not actually vehicles for candidate advocacy, or lack certain dangerous characteristics of other media (e.g. “immediacy”), then that that proposition would be built on a foundation of sand that may be eroded by rapid changes in the book market and the nature of books. Media forms change quickly, and politicians adapt to those changes. Old technology, such as the sound truck, which at one time was an “indispensable . . . [and] accepted method of political campaigning,”<sup>116</sup> is replaced by newer forms,

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*Austin*] were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. . . . [T]he Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books.”).

112. *WRTL*, 551 U.S. at 522 (Souter, J., dissenting).

113. Transcript of Oral Argument II at 65, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08–205).

114. *Citizens United*, 130 S. Ct. at 943 n.31 (Stevens, J., dissenting).

115. See, e.g., *McConnell v. FEC*, 251 F.Supp.2d 176, 572-73 (D.D.C. 2003) (Kollar-Kotelly, J.) (finding that newspaper advertisements are not as effective as advertisements broadcast on radio or television, and thus do not pose a comparable problem, because, *inter alia*, newspapers are more passive, less immediate, and less likely to generate action).

116. See *Saia v. New York*, 334 U.S. 558, 560-61 (1948) (explaining that sound trucks are “the way people are reached” and that loudspeakers are “indispensable instruments of effective public speech” as the Court struck down a city ordinance that forbid use of such technology without the permission of the Chief of Police, who was granted sole and standard-less discretion to grant or

such as text messaging,<sup>117</sup> social media outlets such as Facebook and Twitter,<sup>118</sup> and advertisements in video games.<sup>119</sup> Recent developments in e-book publishing may likewise alter the role of books in political campaigns.

### B. *The Changing Book Market*

Solicitor General Kagan announced in the second *Citizens United* oral argument that the government's position had changed, arguing that, even if the statute establishing restrictions on express candidate advocacy did seem to "apply, on its face, to other media[.]" the FEC had never actually attempted to apply it to a book, and that "there would be [a] quite good as-applied

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deny requests); see also *Kovacs v. Cooper*, 336 U.S. 77, 81, 88-89 (1949) (noting that the frequent use of sound trucks and loudspeakers generally has "brought forth numerous municipal ordinances" and upholding a content-neutral noise ordinance "bar[ring] sound trucks from broadcasting in a loud and raucous manner on the streets").

117. See FEC AO 2012-17 (June 11, 2012) (authorizing candidates to receive campaign contributions via text message).

118. See, e.g., Richard Parker, *Social and Anti-Social Media*, N.Y. Times (Nov. 15, 2012, 9:16 PM), <http://campaignstops.blogs.nytimes.com/2012/11/15/social-and-anti-social-media/>. Parker notes that in the 2012 presidential campaign, "[i]rreversible change in the country's demography collided with irresistible change in the consumption of media. While older white males get their information from television[,] the people who made a difference are on Twitter, Tumblr and smart phones generally." *Id.* See also Amy Schatz, *In Hot Pursuit of the Digital Voter*, Wall St. J. (Mar. 24, 2012, 8:09 PM), <http://online.wsj.com/article/SB10001424052702303812904577299820064048072.html> (online political advertising is expected to reach \$160 million in 2012, more than seven times what it was in 2008); Jennifer Steinhauer, *After Being Burned in '08, Republicans Embrace Twitter Hard for '12*, N.Y. Times, Oct. 24, 2011, at A16, available at <http://www.nytimes.com/2011/10/25/us/politics/after-being-burned-in-08-republicans-embrace-twitter-hard-for-12.html?pagewanted=all?src=tp> (describing the use of social media by Republicans in Congress). New technology is also changing news coverage of political campaigns. See, e.g., Keach Hagey, *Online Media Will Star at the Conventions*, Wall St. J., Aug. 20, 2012, available at <http://online.wsj.com/article/SB10000872396390444233104577597870434505042.html> (noting that broadcast networks will have extensive live Web video stream coverage of the major party conventions, and that Time magazine has partnered with Foursquare so that mobile device users can unlock content when they get to certain locations in Tampa and Charlotte, sites of the major party conventions).

119. Sami Yenigun, *Presidential Campaigns Rock the Gamer Vote*, NPR Special Series: The Message Machine (Oct. 1, 2012, 4:18 PM), <http://www.npr.org/2012/10/01/162103528/presidential-campaigns-rock-the-gamer-vote>.

challenge” if it ever did.<sup>120</sup> Kagan also told the Court that, in contrast to audio-video content delivered by broadcast, cable or satellite transmissions, no one in Congress or the FEC had ever claimed that “books pose any kind of corruption problem.”<sup>121</sup> When Chief Justice Roberts asked about the government’s position on pamphlets as opposed to books,<sup>122</sup> Kagan responded, “I think . . . a pamphlet would be different. A pamphlet is pretty classic electioneering[.]”<sup>123</sup> Kagan was referring to the historical use of pamphlets as a means of political and social advocacy, to influence the opinions of the electorate and outcomes of elections.<sup>124</sup> The underlying assumption implicit in the distinctions she articulated, then, is that books have *not* historically been a vital form of candidate advocacy, and moreover, that books inherently lack the sorts of characteristics that make other media a “corruption problem.” The development of e-books, as well as changing campaign practices, however, are disintegrating these implicit presumptions, undermining the technology-based approach to the First Amendment articulated by Kagan for the government in *Citizens United*.

In an antitrust suit filed in 2012 against Apple and five publishers,<sup>125</sup> the Department of Justice claimed technology “has brought a revolutionary change to the business of publishing and selling books, including the dramatic explosion” in sales of e-books.<sup>126</sup> The demise of once-prominent book retailer Borders<sup>127</sup>

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120. Transcript of Oral Argument II at 64-68, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

121. *Id.* at 67.

122. *Id.* at 66.

123. *Id.* at 66.

124. Pamphlets and similar print materials have played an important historical role as vehicles for public discourse. *See, e.g., Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938) (“[Pamphlets and leaflets] indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest.”); *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 359-71 (1995) (Thomas, J., concurring in the judgment) (discussing the historic role of anonymous pamphleteering); *Talley v. California*, 362 U.S. 60, 64 (1960) (stating that anonymous pamphlets, leaflets, and brochures have played an important role in the progress of mankind).

125. According to the DOJ’s allegations, Apple’s introduction of the iPad and iBookstore in 2010 created “a perfect opportunity” for Apple and five publishers to illegally conspire to raise e-book prices, according to the Department of Justice’s recent antitrust suit. Competitive Impact Statement at 5, *United States v. Apple, Inc.*, No. 12 CV 2826 (S.D.N.Y. Apr. 11, 2012).

126. Complaint at 2, *Apple, Inc.*, No. 12 CV 2826 (S.D.N.Y. Apr. 11, 2012); *see also* Thomas Catan, *Critics of E-Books Lawsuit Miss the Mark, Experts Say*,

and the struggles of its as-yet surviving competitor Barnes & Noble<sup>128</sup> underscore the dramatic changes sweeping the book industry as sales of traditional books decline and e-book sales increase rapidly.<sup>129</sup> E-book sales have jumped to \$2.07 billion in 2011,<sup>130</sup> up from \$62 million in 2008.<sup>131</sup> In fact, in the first quarter of 2012, e-book sales reportedly beat print sales, generating \$282

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Wall St. J., Apr. 23, 2012, available at <http://online.wsj.com/article/SB10001424052702303978104577359741232993860.html>; L. Gordon Crovitz, *Justice Department Bites Apple*, Wall St. J. Apr. 23, 2012, available at <http://online.wsj.com/article/SB10001424052702303513404577357891071400670.html>. Recently, a federal judge approved a settlement with three of the largest book publishers. *United States v. Apple, Inc.*, 2012 U.S. Dist. LEXIS 127034 (S.D.N.Y. Sept. 5, 2012). See generally Chad Bray & Jeffrey A. Trachtenberg, *E-Books Pricing Settlement Announced*, Wall St. J., Sept. 7, 2012, at B3, available at <http://online.wsj.com/article/SB10000872396390443819404577635534214396076.html>.

127. Joseph Checkler & Jeffrey A. Trachtenberg, *Bookseller Borders Begins a New Chapter . . . II*, Wall St. J., Feb. 17, 2011, available at <http://online.wsj.com/article/SB10001424052748703373404576147922340434998.html> (stating that Borders will close stores and focus on e-books).

128. Martin Peers & Jeffrey A. Trachtenberg, *Barnes & Noble Seeks Next Chapter*, Wall St. J., Jan. 6, 2012, available at <http://online.wsj.com/article/SB10001424052970203513604577142481239801336.html> (stating that rapid technological change has transformed the company “from a dominant retailing force that left smaller booksellers quaking in fear to a struggling giant grasping for a plan to ensure its long-term relevance to the publishing industry”); see also Julie Bosman, *The Bookstore’s Last Stand*, N.Y. Times, Jan. 29, 2012 at BU4 (describing Barnes & Noble’s effort to address e-books while preserving its bookstores), available at <http://www.nytimes.com/2012/01/29/business/barnes-noble-taking-on-amazon-in-the-fight-of-its-life.html?pagewanted=all>.

129. Mike Spector & Jeffrey A. Trachtenberg, *One Chapter Closes*, Wall St. J., Jul. 20, 2011, at B1 (describing the seismic shift in the publishing industry); Jeffrey A. Trachtenberg, *As New One Is Opening*, Wall St. J., July 20, 2011, at B1 (describing Barnes & Noble as reinventing itself as a seller of book downloads, reading devices, and apps as “reading moves ever faster from hardcovers and paperbacks to electronic gadgets”); Jeffrey A. Trachtenberg, *Barnes & Noble Cuts Nook Prices*, Wall St. J., Aug. 13, 2012, available at <http://online.wsj.com/article/SB10000872396390444318104577585641575515580.html> (describing Barnes & Noble as becoming a consumer-electronics company).

130. Jeffrey A. Trachtenberg, *Book Rivals Explore Deal*, Wall St. J., Oct. 26, 2012, at B1, available at <http://online.wsj.com/article/SB10001424052970204076204578078781931624960.html>.

131. Peers, *supra* note 128.

million in sales, compared to \$230 million for print.<sup>132</sup> Giants of the digital economy, including Amazon, Barnes & Noble, Apple, and now Google, are all vying to be the leading e-book retailer.<sup>133</sup> Moreover, there is vigorous competition in the market for portable devices to read e-books. Devices such as Amazon's Kindle Fire, Apple's iPad, Barnes & Noble's Nook, and Google's Nexus 7 allow users to carry entire libraries of e-books with them wherever they go.<sup>134</sup> With sixty-five million tablets sold in 2012—sales figures representing nearly a four-fold increase over 2011—industry leaders have identified the emerging e-book trend as an opportunity to realize further gains.<sup>135</sup>

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132. Alexandra Alter, *Your E-Book is Reading You*, Wall St. J., Jun. 29, 2012, at D1, available at <http://online.wsj.com/article/SB10001424052702304870304577490950051438304.html>. E-books now account for ten percent of the general interest fiction and non-fiction books sold in the United States and are predicted to reach twenty-five percent within two or three years. Complaint at 9, *Apple, Inc.*, No. 12 CV 2826 (S.D.N.Y. Apr. 11, 2012). That said, however, e-book sales may be slowing down. See Nicolas Carr, *Don't Burn Your Books—Print Is Here to Stay*, Wall St. J., Jan. 5, 2013, at C2, available at <http://online.wsj.com/article/SB10001424127887323874204578219563353697002.html> (claiming that early adopters fueled the explosive growth of e-books and new adopters may be difficult to come by).

133. Amazon dominates the market in 2012 with a 60% market share, followed by Barnes & Noble with 27% and Apple with 10%. Shira Ovide & Jeffrey A. Trachtenberg, *Microsoft Hooks Onto Nook*, Wall St. J., May 1, 2012, at B1, available at <http://online.wsj.com/article/SB10001424052702303916904577375502392129654.html>. See also Jeffrey A. Trachtenberg, Jessica Vascellaro & Amir Efrati, *E-Book Push Seeks To Rewrite Market*, Wall St. J., Dec. 1, 2010, <http://online.wsj.com/article/SB20001424052748704369304575632602305759466.html>; Amir Efrati, Mary Lane & Russell Adams, *Google Elbows Apple, Woos Publishers*, Wall St. J., Feb. 17, 2011, <http://online.wsj.com/article/SB10001424052748703373404576148142926860706.html>.

134. See Jeffrey A. Trachtenberg, *Barnes Plans New Tablets*, Wall St. J., Sept. 26, 2012, at B4, available at <http://online.wsj.com/article/SB10000872396390444083304578018771281030066.html>; Greg Bensinger, *Amazon Stirs Up a Price War*, Wall St. J., Sept. 7, 2012, at B3, available at <http://online.wsj.com/article/SB10000872396390443819404577635353137059304.html>; Ovide, *supra* note 133; Stu Woo & Jeffrey A. Trachtenberg, *Amazon Fights the iPad With "Fire,"* Wall St. J., Sept. 29, 2011, at B1, available at <http://online.wsj.com/article/SB10001424052970204138204576598670632549928.html>.

135. See Alexandra Alter, *Blowing Up the Book*, Wall St. J., Jan. 20, 2012, available at <http://online.wsj.com/article/SB10001424052970204468004577169001135659954.html>.

E-books have also enabled traditional publishers to innovate and experiment with stand-alone digital works beyond the traditional publishing process.<sup>136</sup> Most saliently here, traditional books require a relatively long and costly physical production and distribution timeline, and so, as a result, books are less suitable as forms of advocacy where speed and flexibility are crucial, such as shortly before an election.<sup>137</sup> In contrast, e-books are much more cheaply and quickly produced and distributed,<sup>138</sup> and could therefore be a more effective channel for pre-election advocacy. For example, in 2011, Broadside Books, an imprint of publisher HarperCollins, launched a line of \$2 mini e-books called “Voices of the Tea Party,”<sup>139</sup> featuring short essays from 5,000 to 7,000 words in length.<sup>140</sup> As the *Wall Street Journal* reported, “The venture is the latest example of how low-cost, fast-to-market digital technology is creating new publishing opportunities that otherwise would have little economic appeal in the traditional paper-and-ink

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ml. See also Greg Bensinger, *The E-Reader Revolution: Over Just As It Has Begun?*, Wall St. J., Jan. 4, 2013, at B1, available at <http://online.wsj.com/article/SB10001424127887323874204578219834160573010.html> (noting the shift from e-readers to tablet computers).

136. See Alter, *Blowing Up the Book*, *supra* note 135.

137. Brief of Amici Curiae Hachette Book Group, Inc. et al. at 16, *Citizens United*, 558 U.S. 310 (2010) (No. 08-205) (“the significant investment of time required for the creation, production and distribution of books renders them an inherently less immediate and potent medium for the communication of electoral advocacy shortly before an election.”) (footnote text and citations omitted). See also Michael Wolf, *Could e-books be a game-changer for 2012 Presidential candidates*, Gigaom (Nov. 25, 2011, 1:00 PM), <http://gigaom.com/2011/11/25/could-e-books-be-a-game-changer-for-2012-presidential-candidates/> (describing paper books as “the slow train to the voter”).

138. See Jeffrey A. Trachtenberg, *Digital Technology Helps Create Platform for Political ‘Pamphlets’*, Wall St. J., Apr. 12, 2011, at B7, available at <http://online.wsj.com/article/SB10001424052748703433004576256963857740004.html>; Julie Bosman & Jeremy W. Peters, *In E-Books, Publishers Have Rivals: News Sites*, N.Y. Times, Sept. 19, 2011, at B1, available at <http://www.nytimes.com/2011/09/19/business/media/in-e-books-publishing-houses-have-a-rival-in-news-sites.html?pagewanted=all&r=0> (noting that by making e-books that are usually shorter, cheaper to buy and more quickly produced than the typical book, and that newspaper and magazine publishers are redefining what an e-book is and who gets to publish it.).

139. The publisher’s website for the Voices of the Tea Party series is available at <http://www.broadsidebooks.net/voices-of-the-tea-party/>.

140. See Emily Esfahani Smith, *Can New E-Book Series Help Spread Tea Party Message?*, The Blaze (April 26, 2011, 6:01pm), <http://www.theblaze.com/stories/2011/04/26/can-new-e-book-series-help-spread-tea-party-message/>.

book world.”<sup>141</sup> Also in 2011, Amazon launched “Kindle Singles” as a platform to release works ranging in length from 5,000 to 30,000 words and priced between 99 cents and \$4.99.<sup>142</sup> Programs like these offer new opportunities for individual authors to self-publish their work for little cost and without the sponsorship of a traditional publisher.<sup>143</sup>

Digital publishing is also breaking down the walls between different media, creating new opportunities for traditional companies and new experiences for consumers. Newspaper and magazine publishers are finding that the proliferation of e-readers has helped them find new outlets for their work. In turn, their involvement is changing the nature of e-books. For example, in 2011 the world’s largest trade book publisher, Random House, partnered with a journalism organization, Politico, to produce the “Politico Bookshelf,”<sup>144</sup> offering works on politics and current events written by Politico journalists.<sup>145</sup> During the course of the

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141. Trachtenberg, *Digital Technology Helps*, *supra* note 138. The short production schedule of e-book publishing is amazing to authors who have published in the traditional book form. Taylor Branch, a Pulitzer Prize winning author of a historical trilogy on Martin Luther King, recently authored a lengthy essay on college sports in the Atlantic magazine. A 25,000 word e-book version of the article was also produced as an e-book. Branch “emerged from the process astounded by the technology—the e-book went from manuscript form to published in two days.” Jorge Castillo, *After Leaving Football, a Historian Emerges as an N.C.A.A. Critic*, N.Y. Times, Oct. 25, 2011, at B13, available at <http://www.nytimes.com/2011/10/26/sports/ncaafotball/historian-taylor-branch-delivers-critical-view-of-ncaa.html?pagewanted=all>.

142. Trachtenberg, *Digital Technology Helps*, *supra* note 138. In 2012, Amazon also launched “Kindle Serials,” short stories published in episodes that download as the episodes are released. Julie Bosman, E-Books *Expand Beyond Their Potential With Serialized Fiction*, N.Y. Times, Oct. 1, 2012, at B6.

143. See, e.g., John D. Sutter, *Self-published e-book author: 'Most of my months are six-figure months'*, CNN (updated Sep. 7 2012 1:08pm), <http://www.cnn.com/2012/09/07/tech/mobile/kindle-direct-publish>; Rebecca J. Rosen, *Authors of Kindle Singles Are Raking in Tens of Thousands of Dollars*, The Atlantic (Mar. 12 2012 3:01PM), <http://www.theatlantic.com/technology/archive/2012/03/authors-of-kindle-singles-are-raking-in-tens-of-thousands-of-dollars/254368/>; Robert Niles, One more option for self-published journalists: Talking with Will Bunch about Kindle Singles, USC Annenberg Online Journalism Review (Nov. 1, 2011), <http://www.ojr.org/p2028/>.

144. Politico’s ebook store is available at <http://www.politico.com/bookshelf/>.

145. See Keach Hagey, *POLITICO, Random House to publish digital campaign books*, POLITICO (Jun. 26 2011 9:01PM), <http://www.politico.com/news/stories/0611/57806.html>; Keach Hagey, *POLITICO, Random House launch online bookstore, Politico-On Media*, POLITICO (October 19, 2011),

Republican primary and Presidential elections of 2012, Politico launched “Playbook 2012,” a series of short e-books providing timely coverage of campaign events.<sup>146</sup> Likewise, magazine publishers, such as Vanity Fair and The New Yorker, are bundling previously published articles together as e-books, in response to and organized around major news events.<sup>147</sup> The low cost and speed at which these types of e-books can be produced and distributed means that they will be well-suited for commentary on fast-changing political races, and could very well emerge as a potent form of candidate advocacy in the near future. That is, just as candidates have rapidly adopted social media, such as Twitter,<sup>148</sup> as a tool in their election campaigns, they may also adopt e-books as a means to communicate with the electorate.<sup>149</sup>

Developments in e-book technology are also changing what it means to “read a book.” For one, enhanced e-books now allow readers of fictional works to interact with the storyline and influence the course of events in ways and to a degree never possible in print.<sup>150</sup> The leading publisher of this type of e-book,

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[http://www.politico.com/blogs/onmedia/1011/Politico\\_Random\\_House\\_launch\\_online\\_bookstore.html](http://www.politico.com/blogs/onmedia/1011/Politico_Random_House_launch_online_bookstore.html) (last visited Mar. 7, 2013).

146. Politico published two of these e-books before and during the Republican Primary Elections, see Politico Playbook 2012: The Right Fights Back (Nov. 30 2011), Politico Playbook 2012: Inside the Circus (Apr. 3. 2012), and one shortly before the November 2012 presidential election. See Politico Playbook 2012: Obama’s Last Stand (Aug. 20 2012) (published on August 20, 2012, immediately prior to the November election).

147. Bosman & Peters, *supra* note 138.

148. Ashley Parker, *In Nonstop Whirlwind of Campaigns, Twitter Is a Critical Tool*, NY Times, Jan. 28, 2012, at A15, available at [http://www.nytimes.com/2012/01/29/us/politics/twitter-is-a-critical-tool-in-republican-campaigns.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/29/us/politics/twitter-is-a-critical-tool-in-republican-campaigns.html?pagewanted=all&_r=0).

149. Such a move has largely already beginning to take place with e-book releases of candidate-authored books, which have become an important campaign strategy. Candidates have “long written books to add gravitas, or a personal element, to their campaigns,” but never have “commercialism and campaigning been quite so intertwined” as in the 2012 presidential election. Patrick O’Connor, *Book Tours Follow Campaign Trail*, Wall St. J., Dec. 9, 2011, at A5, available at <http://online.wsj.com/article/SB10001424052970203413304577086382547766306.html>. Candidates now promote their books on their campaign websites and use donor lists and other campaign data to market them. See FEC AO 2011-12 (Feb. 17, 2011) (setting guidelines for use of donor lists for candidate book marketing), available at <http://saos.nictusa.com/aodocs/1170614.pdf>.

150. See Alter, *Your E-Book is Reading You*, *supra* note 132. That said, readers of a certain generation might find these enhanced e-books quite similar to the choose-your-own-adventure books of an earlier age. See, e.g., *Brown*, 131 S.Ct. at 2738 (describing the interactive nature of choose-your-own adventure

Coliloquy, was founded on the belief that digital fiction “can push the boundaries of how we think about narrative and storytelling.”<sup>151</sup> By allowing readers to make choices affecting characters and plotlines,<sup>152</sup> Coliloquy believes its e-books create “an incredibly fluid and immersive story-telling experience.”<sup>153</sup> For example, in Coliloquy’s enhanced e-book entitled *Fluid*, “readers must make critical decisions that lead them down one of over 500 different pathways through [a] sprawling contemporary exploration of good, evil, and the fluid core of humanity.”<sup>154</sup> “Just as in life, readers cannot go back and change their minds once a decision is made. Every choice leads to repercussions, ensuring that every reading experience is completely different.”<sup>155</sup> These interactive e-books blur the distinction between “book” and “video game.”<sup>156</sup> If, for example, “reading a book” and “playing a video game” both involve reading text and making decisions about how the main character progresses down a branched storyline, by what logic would it be constitutionally relevant that one work was sold with the label “book,” and the other “video game”? Is the only difference that a book is purely text?

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novels); *Interactive Digital Software Assn. v. St. Louis County*, 329 F.3d 954, 957–958 (8th Cir. 2003) (“In fact, some books, such as the pre-teen oriented “Choose Your Own Nightmare” series (in which the reader makes choices that determine the plot of the story, and which lead the reader to one of several endings, by following the instructions at the bottom of the page) can be every bit as interactive as video games.”).

151. *About*, Coliloquy (2013), <http://www.coliloquy.com/about>.

152. For example, in “Parish Mail,” a young adult mystery set in New Orleans, “readers can decide whether the teenage protagonist solves crimes by using magic or by teaming up with a police detective’s cute teenage son. Readers of ‘Great Escapes,’ an erotic romance series . . . can customize the hero’s appearance and the intensity of the love scenes.” Alter, *Your E-Book is Reading You*, *supra* note 132

153. *About*, Coliloquy (2013), <http://www.coliloquy.com/about>.

154. *Fluid*, Coliloquy (2013), <http://www.coliloquy.com/products/fluid>.

155. *Id.*

156. Several genres of video games would seem to be quite similar to these kinds of interactive enhanced e-books, for example, various subcategories of “adventure” and “role-playing” games, at their core involve choosing between a limited set of decisions at a series of nodes that are nested within a large, branched story narrative. *See, e.g.*, Richard Moss, *A truly graphic adventure: the 25-year rise and fall of a beloved genre*, *Ars Technica* (Jan 27, 2011), <http://arstechnica.com/gaming/2011/01/history-of-graphic-adventures/>; Jason Schreier, *Review: ‘Visual Novel’ Nine Hours Mixes Gripping Drama*, *Spotty Prose*, *Wired* (Jan 10, 2011), <http://www.wired.com/gamelife/2011/01/nine-hours-nine-persons-nine-doors/>.

If so, that distinction is also on the way out, because in addition to seizing upon the added interactive potential of enhanced e-books, publishers are increasingly embedding video, audio and other content within e-books.<sup>157</sup> For example, one of the first enhanced e-books of its kind, Rick Perlstein's *Nixonland*, featured twenty-seven historic video segments produced by CBS News embedded alongside the original text.<sup>158</sup> A more advanced e-book, Al Gore's *Our Choice*,<sup>159</sup> is described by its publisher as melding the former vice president's "narrative with photography, interactive graphics, animations, and more than an hour of engrossing documentary footage."<sup>160</sup> The work includes a "new, groundbreaking multi-touch interface" that allows the reader to experience multimedia content "seamlessly."<sup>161</sup> These early examples mark the beginning of an entirely new medium in which text is merely one component of a larger multimedia experience. In this way, multi-media enhanced e-books also stretch the definition of what constitutes a "book." If you can buy something the seller calls a "book," but you can read it on a digital device, and the text of the "book" is interspersed with videos and is hyperlinked to allow you to skip around at will, how is that different from an app or a website?<sup>162</sup> For that matter, if a "book" has moving pictures, sound, and text displayed on a screen, and the book is a digital file that can be delivered to the reader's device through the airwaves or wires, what is the relevant constitutional

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157. Jeffrey Trachtenberg, *Testing Enhanced E-Books*, Wall St. J, Nov. 25, 2010, at B5, available at <http://online.wsj.com/article/SB10001424052748703730304575632654146880096.html>.

158. Lauren Indvik, *Traditional Publishers Release Enhanced E-books for iPhone and iPad*, Mashable (July 30, 2010), <http://mashable.com/2010/07/30/nixonland-enhanced-ebook/>.

159. Al Gore, *Our Choice: A Plan to Solve the Climate Crisis* (2011).

160. Push Pop Press – Al Gore's *Our Choice*, Push Pop Press (2011), available at <http://pushpoppress.com/ourchoice/>.

161. *Id.* The publisher breathlessly continues that you, the reader, can "[p]ick up and explore anything you see in the book; zoom out to the visual table of contents and quickly browse through the chapters; reach in and explore data-rich interactive graphics." *Id.*

162. Carla King, *A Self-Publisher's Primer to Enhanced E-Books and Book Apps*, Mediashift (August 12, 2010), <http://www.pbs.org/mediashift/2010/08/a-self-publishers-primer-to-enhanced-e-books-and-book-apps224.html> (last visited March 7, 2013) ("In a nutshell, an e-book is a digital snapshot of a book, an enhanced e-book adds multimedia and interactive features as interruptions to the linear story, and a book app is based on a book but acts more like a game with multiple pathways that require the user to interact instead of simply scrolling and clicking.").

difference between that and Citizens United's documentary movie? What logic would be left to support the proposition that the First Amendment would allow disparate treatment of these two works? Of course there is none, and precedent allowing the regulation of one arbitrary category would clearly support the almost inevitable expansion of the censorship to the other. The *Citizens United* majority recognized and responded to this threat.

A sharp line of questioning by Chief Justice Roberts and Justices Kennedy and Alito exposed the expansive scope of the government's claimed authority during the first *Citizens United* oral argument. There Alito asked, if the government could impose its restrictions on a movie delivered by broadcast, satellite or cable television, could it likewise restrict distribution via other delivery means – for example through the Internet, or by physical DVDs available for order, rental, or borrowing from a library or commercial service.<sup>163</sup> The Deputy Solicitor General replied that it could.<sup>164</sup> In other words, the category of “express advocacy and its functional equivalent” was ultimately defined without reference to any particular means of distribution. Seizing upon that exchange, Kennedy keenly observed that text of the challenged BCRA electioneering communications provision on its face clearly *would* apply to a book if the book were digitally disseminated through broadcast, cable, or satellite.<sup>165</sup> In response, the Deputy Solicitor General acknowledged that such distribution of a book would be barred if paid for by a corporation's general treasury funds.<sup>166</sup> Pressed on the point by Roberts, the Deputy Solicitor General acknowledged that the government's theory would allow it to extend its restrictions to publishing a traditional print book, or holding a sign in park, or to any speech at all, if such speech were paid for with corporate treasury funds and including the disfavored “electioneering” content.<sup>167</sup> Despite Kagan's later efforts to demark some limits to the reach of the government's purported power,<sup>168</sup> her deputy's sweeping claims stuck with the *Citizens United* majority. As Chief Justice Roberts wrote in his concurring opinion, the government “asks us to embrace a theory of the First Amendment that would allow [content-based] censorship not only

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163. Transcript of Oral Argument I at 26-27, *Citizen's United*, 130 S. Ct. 876 (2010) (No. 08-205).

164. *Id.*

165. *Id.* at 28-29.

166. *Id.*

167. *Id.* at 30-33.

168. *Id.* at 64-67.

of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern.”<sup>169</sup>

C. *Judicial Assessment of Legislative Choices Affecting Political Speech*

As discussed in Part I.A above, Justice Kennedy’s *Citizens United* majority opinion displayed no interest in looking to the characteristics of particular media to determine whether they justify special regulation. Instead, he responded in-kind to the government’s ultimately content-based theory, concluding that the restrictions on political speech of the type at issue there were unconstitutional, even though the government had only targeted a narrow range of media with its definition of electioneering communications.

By contrast, the approach taken by Justices Stevens and O’Connor in *McConnell* deferred to legislative decisions to target particular media,<sup>170</sup> while Stevens’ dissent in *Citizens United* suggested that certain media such as books might receive relatively greater protection in an as-applied challenge, without explicitly explaining the basis for this distinction.<sup>171</sup> The two positions are in obvious conflict: when can the government regulate the same content in one medium but not another? There is not a principled methodology behind the Stevens approach, which draws arbitrary and transitory distinctions between different media. The same could be said of Kennedy’s approach, which declines to engage with the idea that one medium could be constitutionally distinguishable from another. Instead, both Stevens and Kennedy operate from presumptions about the permissibility or impermissibility of laws regulating the content of speech. That said, this section explicates the views of Kennedy and Stevens and

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169. *Citizens United*, 130 S. Ct. at 917 (2010) (Roberts, C.J., concurring).

170. *McConnell*, 540 U.S. at 207 (finding that Congress’s decision to limit the scope of its electioneering communications restrictions to broadcast, cable, and satellite communications, while omitting print and Internet communications, was adequately explained by the legislative and litigation records, and holding that the statute was therefore not rendered underinclusive, since “televized election-related ads” were “the phase of the problem which seem[ed] most acute to the legislative mind”) (citations omitted).

171. Justice Stevens doubted that the challenged provision could be read as extending to books and the Web, but identified these media as meriting an as-applied challenge should it apply, but did not indicate his reasons for this conclusion, other than by noting that the government had said so in oral argument. *Citizens United*, 130 S. Ct. at 943 n.31 (Stevens, J., dissenting).

concludes that Stevens' approach ultimately offers little protection to free expression.

### 1. Creating an Exemption for Video-on-Demand

The *Citizens United* majority was troubled by what it saw as the government's assertion of a practically limitless authority to regulate political advocacy speech in any and all media.<sup>172</sup> As noted above, Justice Stevens attempted to defuse these fears by suggesting that a strong as-applied challenge could be brought for media such as books.<sup>173</sup> How the factions in the Court would have analyzed such an as-applied challenge is illustrated by the treatment of video-on-demand (VOD)<sup>174</sup> in *Citizens United*. First, some background is in order.

During the 1990s, corporations and unions sponsored a "virtual torrent"<sup>175</sup> of candidate-centered issue advertising,<sup>176</sup> primarily on broadcast television.<sup>177</sup> Federal election law at that time allowed corporations and unions to spend general treasury funds on issue advertising that referred to candidates, provided such advertisements did not use the so-called magic words such as "vote for" or "vote against."<sup>178</sup> But Congress found that the majority of

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172. *Id.* at 897.

173. *Id.* at 943 n.31 (Stevens, J., dissenting).

174. "Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program." *Id.* at 887.

175. *McConnell*, 540 U.S. at 127 n.20, 207 (2003) (stating that amount spent by corporations and unions on issue advertising rose from \$150 million in the 1996 election to over \$500 million in the 2000 election).

176. *McConnell*, 251 F. Supp. 2d 176, 605-11 (D.D.C. 2002) (Kollar-Kotelly, J., memorandum opinion) (discussing the use of corporate funded issue advocacy to effect federal elections).

177. The litigation record in *McConnell* is replete with generic references to broadcasting, *see, e.g.* 251 F. Supp. 2d at 647 (stating that "the uncontroverted testimony of experts . . . is that broadcast advertising is the most effective form of communicating an electioneering message"), but the dominant theme in the legislative record is the prevalence of television advertising. *See, e.g.*, S. Rept. 105-167 Vol. 5 at 7521-7524 (repeated references to televised ads).

178. This was due to narrowing statutory constructions by the Court that limited the relevant prohibition on independent expenditures on political advertisements to only those ads that expressly advocate the election or defeat of a specific candidate for federal office. *See, e.g., Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("[A]n expenditure must constitute 'express advocacy' in order to be subject to the prohibition of [2 U.S.C.] § 441b."); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52, 67 n.80 (1976) (restricting the application of the provision at issue to "communications

these issue ads were in fact intended to affect candidate elections, and responded by enacting the “electioneering communication” provision of BCRA in 2002.<sup>179</sup> The new law prohibited corporations or unions from using general treasury funds to pay for any broadcast, cable, or satellite communication that: (1) referred to a candidate running in a federal election, (2) was targeted at the relevant electorate, and (3) was made within the relevant pre-election time period.<sup>180</sup> Until narrowed by the Court’s *WRTL* ruling to reach only those ads that were the “functional equivalent of express advocacy,”<sup>181</sup> the BCRA provision prohibited even advertisements that only tangentially mentioned a federal candidate’s name.<sup>182</sup>

When Citizens United released its anti-Hillary Clinton documentary *Hillary: The Movie* shortly before the 2008 presidential primaries, it was able to do so via theaters and on DVD without violating the federal election laws.<sup>183</sup> However, the non-profit corporation’s plan to also release its 90-minute film on cable via VOD seemed to run afoul of BCRA’s “electioneering communication” ban as the statute was written and applied by the FEC.<sup>184</sup> Among other arguments, Citizens United argued its VOD movie could be distinguished from broadcast, cable, or satellite television ads, that whatever legislative record that justified regulation of the later did not support regulation of the former, and therefore the BCRA provision could not constitutionally be applied

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containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

179. *McConnell*, 251 F. Supp. 2d at 591-92, 606-08 (D.D.C. 2002) (Kollar-Kotelly, J., memorandum opinion).

180. See 2 U.S.C. §§ 441b(b)(2), 434(f)(3)(A) (2002). Specifically, for a federal primary, such “electioneering communications” are restricted for the 30-day period prior to the election, while for a federal general election, the time period increases to 60 days. 2 U.S.C. § 434(f)(3)(A)(II).

181. *WRTL*, 551 U.S. at 470 (2007) (holding that BCRA’s prohibition on electioneering communications could not constitutionally be applied to issue-advocacy advertisements, and could instead only be constitutionally applied to advertisements that were express candidate advocacy or its functional equivalent).

182. *McConnell*, 540 U.S. at 206 (2003) (“[I]n the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates.”).

183. *Citizens United*, 130 S. Ct. at 887.

184. *Id.* at 888.

to the VOD movie.<sup>185</sup> Although Congress included cable in the BCRA provision, the argument went, VOD via cable was in its infancy in 2002, and, moreover, Congress was focused on short television advertisements, not feature-length documentaries.<sup>186</sup> Citizens United argued that the voluminous BCRA legislative record and the *McConnell* litigation record contained “*not one word* about feature length documentaries, much less feature-length films distributed through Video On Demand to citizens who request them.”<sup>187</sup> Furthermore, such a VOD movie “has a lower risk of distorting the political process than do television ads.”<sup>188</sup> Therefore, the reasons justifying the regulation of corporate funded advertisements on broadcast, cable, and satellite television did not apply to a documentary movie distributed to willing viewers.

The Court conceivably could have accepted Citizens United’s argument and held that the statutory prohibition could not constitutionally be applied to the movie because the government lacked a sufficiently compelling interest, even if the prohibition of television ads was justified. Alternatively, the Court could have interpreted the statute to avoid the constitutional issue altogether, by holding that the statute’s definition of “electioneering communication” simply did not capture a feature-length documentary distributed to willing viewers at their request through VOD.<sup>189</sup> Construing the statutory prohibition narrowly in this manner would have permitted the Court to avoid the contentious constitutional issues, but the Court was not interested in this approach. Instead, Justice Kennedy’s majority opinion refused to

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185. See *id.* at 890; Brief for the Appellant at 22, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205); Reply Brief for Appellant at 8, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

186. *Citizens United*, 130 S. Ct. at 937 (2010) (Stevens, J. dissenting).

187. Reply Brief for Appellant at 6, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

188. *Id.* at 22; *id.* at 8. See also, *McConnell*, 251 F. Supp. 2d at 646 (D.D.C. 2002) (Kollar-Kotelly, J., memorandum opinion).

189. Note, however, that in response to Citizens United’s position, the FEC countered that VOD is no different from buying infomercial time on a broadcast television network; because, just like any television ad, the movie uses “the power of the visual medium to promote a message.” Brief for the Appellee FEC at 11, *Citizens United*, 130 S.Ct. 876 (2010) (No. 08-205). See also *id.* at 23-26. But wouldn’t that logic also apply to the movie when it was shown in theaters and offered on DVD? The government was advancing a rationale of dangerously broad application.

carve out an ad-hoc statutory exemption for facts before it,<sup>190</sup> thus squarely teeing up the constitutional issues.

Furthermore, according to Kennedy, the matter before the Court could not be satisfactorily resolved as a mere as-applied challenge.<sup>191</sup> If it were, future litigants who had chosen different communicative means would require the judiciary to determine acceptable or unacceptable outlets for political speech, and this process would raise “substantial questions” as to the courts’ lawful authority.<sup>192</sup> In an important passage, Kennedy wrote, “Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”<sup>193</sup> This process of drawing and redrawing constitutional lines would require substantial litigation and the interpretative process would create a chilling effect on protected speech.<sup>194</sup> Any “fine distinctions” drawn by the judiciary would be questionable in any event, especially in light of the rapidity of technological change.<sup>195</sup> Instead of the judiciary repeatedly engaging in intensely factual evaluations of the characteristics and

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190. He also refused to adopt other narrowing statutory constructions advocated by Citizens United and *amici*, such as the claim that the group could be granted an exemption for “nonprofit corporate political speech funded overwhelmingly by individuals.” *Citizens United*, 130 S. Ct. at 891. The consistent theme was that litigating each of these claims would chill speech due to the expensive and time-consuming litigation process. *See, e.g., id.* at 892 (“Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. . . . We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.”) (citations omitted).

191. *Citizens United*, 130 S. Ct. at 892 (“[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*.”) (citations omitted).

192. *Citizens United*, 130 S. Ct. at 890 (2010).

193. *Id.* at 891.

194. Citizens United had ultimately been unable to distribute “Hillary: The Movie” via VOD while it awaited determination of its claims about BCRA’s inapplicability to VOD. Brief for the Appellant at 10, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205).

195. *Citizens United*, 130 S. Ct. at 891.

features of various media, Kennedy stated that First Amendment standards “‘must give the benefit of doubt to protecting rather than stifling speech.’”<sup>196</sup> In other words, the Court was signaling that the choice of message and medium is not for Congress or the courts, but for political speakers.

In dissent, Justice Stevens sought to avoid the broad constitutional issues at all costs,<sup>197</sup> listing at least three narrower grounds of decision the majority could have applied to do so.<sup>198</sup> For example, the majority could have construed the BCRA provision not to apply to VOD because “a feature-length video-on-demand film looks so unlike the types of electoral advocacy Congress has found deserving of regulation[.]”<sup>199</sup> This approach is filled with uncertainties and inconsistency, because a court would have to determine what the legislative record reveals, a rather murky enterprise as legislative records are not always clear.<sup>200</sup> There is also an inherent looseness in the “looks so unlike” standard Stevens suggests. Granted, a movie distributed via VOD may be distinguished from a short advertisement<sup>201</sup> in that the former requires that the audience willingly seek out the presentation while the other may be described as being pushed

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196. *Id.* at 891 (quoting *WRTL*, 551 U.S. at 469).

197. Justice Stevens criticized the majority for failing to abide by a cardinal principle of judging, that “‘if it is not necessary to decide more, it is necessary not to decide more.’” *Id.* at 937 (Stevens, J., dissenting) (citations omitted).

198. *See id.*

199. *Id.* at 938 (Stevens, J., dissenting). Theodore Olsen told the Court that 90-minute documentaries were “not the sort of thing” that Congress sought to prohibit. Transcript of Oral Argument I at 4, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205). Stevens also argued that the majority “could have ruled, on statutory grounds, that a feature-length film distributed through [VOD] does not qualify as an ‘electioneering communication’ under [the statute.]” *Citizens United*, 130 S. Ct. at 937.

200. *See* Antonin Scalia, *A Matter of Interpretation*, 36 (1998) (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody. . . . The variety and specificity of result that legislative history can achieve is unparalleled.”).

201. During the first oral argument, Olson reiterated that there was a distinction between 90-minute presentations and shorter presentations. Transcript of Oral Argument I at 15-16, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205). Justice Souter, however, stated that if the content of the presentation was “express advocacy,” the distinction “between 90 minutes and 1 minute, either for statutory purposes or constitutional purposes, is a distinction that I just cannot follow.” *Id.* at 21-22. Olson responded that the record showed Congress was concerned with short advertisements. *Id.* at 22.

upon the unwilling.<sup>202</sup> But, as the FEC argued, both television commercials and movies via VOD use the “power” of a visual medium.<sup>203</sup> Stevens did not say which attributes would be determinative. Is it the length of the presentation, the steps viewers must go through to access the movie, or its visual nature? And how would a court assess the visual “power” of a film distributed via VOD?

Stevens also argued that the Court’s sweeping invalidation of the statute was improper in light of its narrow and limited effect on speech. In addition to merely limiting the source of funds that could be used,<sup>204</sup> Stevens argued, the law did not impose a serious burden on expression, in part because corporations and unions could use alternative media such as “the Internet, telephone, and print advocacy.”<sup>205</sup> It is unclear why Stevens found these media to be adequate substitutes for the media proscribed by BCRA. And if these really are adequate substitutes, by what logic does the government ignore them? Would not the same rationales justifying regulation of political speech on broadcast, cable, or satellite television likewise justify regulation of alternative media that are effective substitutes of the former?

Also cutting against Stevens’ suggestions is his rather generous definition of the problem Congress sought to solve. He broadly defined the interrelated interests threatened by corporate expenditures under the rubric of “democratic integrity.”<sup>206</sup>

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202. Brief of Amici Curiae Hachette Book Group et al., at 15, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205) (describing televised political ads as bombarding unwilling recipients). Judge Kollar-Kotely claimed that when viewers “opt-in” to see a National Rifle Association webcast, they are unlike an undecided voter watching a televised sitcom and viewing a thirty-second issue advertisement critical of Al Gore. *McConnell*, 251 F. Supp. 2d at 646 (D.D.C. 2003) (Kollar-Kotely, J., memorandum opinion). “The risk of corrupting the political process is much more powerful in the latter example than in the former.” *Id.* The notion that radio and television audience members are unwilling recipients has been disputed by Justice Brennan. See *infra* text accompanying notes 353 – 356.

203. Brief for the Appellee FEC at 11, *Citizens United*, 130 S.Ct. 876 (2010) (No. 08-205).

204. *Citizens United*, 130 S. Ct. at 942-43 (Stevens, J., dissenting).

205. *Id.* at 943 (Stevens, J., dissenting). He also found that corporations and unions could channel candidate-related expression on broadcasting, cable, and satellite through PACs. *Id.* at 943-44 (Stevens, J., dissenting).

206. *Citizens United*, 130 S. Ct. at 963 (Stevens, J., dissenting) (quoting *WRTL*, 551 U.S. at 522 (Souter, J., dissenting)). As Justice Souter wrote, “Neither Congress’s decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the

Moreover, he declared that courts should adopt a stance of “presumptive deference” to the legislature in the area of campaign finance.<sup>207</sup> As a practical matter then, Stevens’ approach would seem to be unlikely to lead to any judicially-crafted exemptions from campaign finance/political speech statutes even if Kagan’s “quite good” as-applied challenges were brought. Finally, even if these challenges were not utterly hopeless endeavors, fact-intensive as-applied challenges would inevitably be an expensive, time-consuming, and highly uncertain process for speakers. These concerns are reflected in the majority’s rejection of a narrow disposition, and lay behind its conclusion that such an approach would inevitably lead to an intolerable chilling of speech.<sup>208</sup>

## 2. Facial Validity

Justice Kennedy’s analysis of the facial validity of the political speech restrictions at issue in *Citizens United*, like his position on as-applied challenges, recognized the rapid technological change and the “creative dynamic” inherent in freedom of expression.<sup>209</sup> He noted:

Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, [the statute] would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical

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more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions.” *WRTL*, 551 U.S. at 522. Of course, Justice Kennedy disagreed, limiting corruption to quid pro quo arrangements. *Citizens United*, 130 S. Ct. at 909.

207. *See id.* at 969 (Stevens, J., dissenting).

208. *Id.* at 889 (“In addition to the costs and burdens of litigation, this result would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. . . . Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”).

209. *Citizens United*, 130 S. Ct. at 912.

distinctions based on the corporate identity of the speaker and the content of the political speech.<sup>210</sup>

To Kennedy, political speakers should not have to circumvent “onerous restrictions” to exercise First Amendment rights.<sup>211</sup> Nor should the public have to do so in order to hear the messages of these speakers.

At its core, then, Kennedy’s *Citizens United* opinion expresses the belief that individuals, not government, best determine what sources of political speech are of value.<sup>212</sup> “When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear,” Kennedy wrote, “it uses censorship to control thought.”<sup>213</sup> “This is unlawful[,]” he continued, because “[t]he First Amendment confirms the freedom to think for ourselves.”<sup>214</sup> If the public must be free to listen and think for themselves, the corollary, then, is the proposition that the government may not restrict how political speakers convey their messages to the electorate. The Kennedy approach avoids any dialogue with Congress as to whether a restriction is adequately supported by a legislative record, or has tailoring flaws such as being under- or over-inclusive. Instead, it is for speakers and audiences to define the shape of political discourse, free from Congressional intervention. Stated differently, the First Amendment does not allow Congress to fine-tune the flow of political discourse.

Another foundational underpinning of Kennedy’s opinion is the belief that the First Amendment was “premised on mistrust of governmental power[.]”<sup>215</sup> Accordingly, courts must approach laws regulating political speech with skepticism and subject them to strict scrutiny.<sup>216</sup> Just as Congress is prohibited from disfavoring

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210. *Id.* at 913.

211. *Id.* at 912.

212. *See, e.g., id.* at 898 (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.”) (citations omitted).

213. *Id.* at 908.

214. *Id.*

215. *Citizens United*, 130 S. Ct. at 898.

216. *See, e.g., Citizens United*, 130 S. Ct. at 898 (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove

certain subjects or viewpoints or from discriminating among speakers,<sup>217</sup> Congress's claimed authority to regulate a speaker's choice of medium would present a "brooding governmental power [that] cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure."<sup>218</sup> A prudent communicator who sought an advisory opinion from the FEC, an agency whose "business is to censor,"<sup>219</sup> faced a process analogous to the 16th- and 17th-century English licensing laws the First Amendment was designed to prohibit.<sup>220</sup> This could not be tolerated by the First Amendment, even though a well-counseled speaker may have avoided the wrath of the FEC by carefully selecting newspaper or website ads instead of television ads. The majority was not about to grant the government free reign to regulate political speech in one medium because it had, in its infinite largess, decided to leave other media unregulated for the time being.

This position taken by the *Citizens United* majority contrasts with the extreme deference to Congress displayed by the majority in *McConnell*, one of the earlier cases *Citizens United* expressly overruled.<sup>221</sup> There, BCRA's supporters claimed that the law appropriately focused narrowly on the broadcast, cable and

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that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.')

217. See, e.g., *Citizens United*, 130 S. Ct. at 898 ("the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.") (citations omitted).

218. *Id.* at 904.

219. *Id.* at 906 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965)).

220. See *id.* at 895-96 ("This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. . . . As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak . . . . These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.") (citations omitted).

221. *McConnell v. FEC*, 540 U.S. 93 (2003) overruled by *Citizens United*, 130 S. Ct. 876 (2010).

satellite media,<sup>222</sup> while its opponents argued that the law was fatally under-inclusive because it left untouched other media such as the Internet and newspapers.<sup>223</sup> In *McConnell*, five members of the Court found that the record compiled by Congress adequately explained the legislative choice, and that reform may be implemented “one step at a time, addressing [first] . . . the phase of the problem which seems most acute to the legislative mind.”<sup>224</sup> In rejecting the facial challenge to the constitutionality of the “electioneering communication” provision, the Court found the vast majority of so-called “sham”<sup>225</sup> issue ads had the purpose of influencing the electorate,<sup>226</sup> even if the ads did not “urge the viewer to vote for or against a candidate in so many words[.]”<sup>227</sup>

The *McConnell* Court essentially expressed no interest in the differences among the media affected by BCRA and consequently did not engage in any meaningful scrutiny of the lines drawn by Congress.<sup>228</sup> Certainly broadcast television is the dominant outlet for political communication,<sup>229</sup> but the law also reached cable and

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222. *McConnell*, 540 U.S. at 207-08 (stating that Congress may focus on “the phase of the problem which seems most acute to the legislative mind”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976)).

223. See *McConnell*, 540 U.S. at 207. See also *McConnell v. FEC*, 251 F. Supp. 2d 176, 370-71 (D.D.C. 2003) (Henderson, J., concurring in the judgment in part and dissenting in part) (“[T]o the extent issue advertising may corrupt federal candidates, it is no less corrupting when disseminated through exempted print and electronic channels.”).

224. *McConnell*, 540 U.S. at 207 (quoting *Buckley*, 424 U.S. at 105). Justices Stevens and O’Connor coauthored the portion of the opinion examining the “electioneering communication” provision. They were joined by Justices Souter, Ginsberg and Breyer.

225. *Id.* at 185.

226. *Id.* at 206.

227. *Id.* at 193.

228. *Id.* at 207 (“The records developed in this litigation and by [Congress] adequately explain the reasons for this legislative choice. Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money.”) (citations omitted).

229. Recently, in adopting a rule requiring large market broadcast television stations affiliated with the top four broadcast networks (ABC, CBS, Fox and NBC) to post online documents concerning political advertising, the FCC defended its decision to not apply the requirement to other media such as radio because broadcast television is the dominant form of political advertising. See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations at n.337, FCC 12-44 (Apr. 27, 2012). See also PQ Media, Actual U.S. Political Media Spending Hit Record \$4.55 Billion in 2010, Up 8% from 2008 & 45% versus 2006, Despite Lack of

satellite television, as well as radio.<sup>230</sup> These are all distinct advertising vehicles with different geographic reaches and audience demographics; furthermore, they are all actually used far less frequently for political advertising than broadcast television.<sup>231</sup> For example, in 2012 broadcast television is projected to receive \$5.6 billion for political ads; cable, in contrast, is projected to receive \$0.94 billion, while radio is projected to receive \$0.82 billion.<sup>232</sup> Even if Congress were correct that broadcast television “sham” issue-advertising was potentially harmful to the electoral process, it would not necessarily follow that media used far less frequently for that purpose would pose the same problems.

On the other hand, if cable and radio are potentially harmful, the *McConnell* Court did not question why Congress chose to omit, for example, newspapers, a medium in which political advertising revenues exceed those of cable and radio.<sup>233</sup> The *McConnell* Court also displayed no concern for the rapid pace of change in media markets and usage that would undermine the static lines drawn by Congress. As an example, the Internet has

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Presidential Election; Campaign Media Spending Forecast to Exceed \$5.6 Billion in 2012 (Dec. 15, 2010), <http://www.pqmedia.com/about-press-20101215-pcms2010.html> (broadcast television receives 75% of political advertising dollars).

230. See 2 U.S.C. § 434(f)(3)(A) (2006) (defining an “electioneering communication[s]” as certain “broadcast, cable, or satellite communication[s]”); 11 C.F.R. § 100.29(b)(1) (2006) (for purposes of the electioneering communication definition, “Broadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system”).

231. See, e.g., Joseph R. Dominick, et al, *Broadcasting, Cable, The Internet and Beyond: An Introduction to Modern Electronic Media* 151-71 (6th ed. 2008) (describing the different markets and advertising strategies used in radio, broadcast television and cable).

232. Borrell Associates, *Political Advertising: The Flood of 2012* at 5 (March 2012). To further illustrate the disparity between broadcast television and cable, in the 2008 elections, of the political advertising expenditures on television platforms, broadcast television received 92.2% while cable received 7.8 %. See PQ Media, *Actual U.S. Political Media Spending Hit Record \$4.55 Billion in 2010, Up 8% from 2008 & 45% versus 2006, Despite Lack of Presidential Election; Campaign Media Spending Forecast to Exceed \$5.6 Billion in 2012* (Dec. 15, 2010), <http://www.pqmedia.com/about-press-20101215-pcms2010.html>.

233. Borrell Associates estimated that during the 2008 elections, political advertising revenue for newspapers was \$0.54 billion as compared to \$0.46 billion for cable. *Political Advertising*, *supra* note 232. Another analyst estimated that in 2012 direct mail and Internet political advertising revenues exceeded those of radio. Wells Fargo Securities Equity Research Department, *Media: Update on Political Ad Spend Thru 10/27* at 10 (Nov. 9, 2012) [hereinafter cited as Wells Fargo].

grown rapidly in recent years as a forum for political advertising and some analysts estimate that in 2012 websites received more political advertising revenue than did radio.<sup>234</sup> Indeed, under BCRA and the FEC regulations, audio or visual political ads delivered through the Internet to a computer or mobile phone would apparently have escaped regulation, while the dissemination of the same content through a radio or television broadcast could have resulted in federal prosecution.<sup>235</sup>

Instead of considering any of these factors in a more critical approach to the statute, the *McConnell* Court deferred entirely to Congress's legislative judgment that the "torrent" of corporate- and union-sponsored television advertising was *potentially* harmful.<sup>236</sup> This slavish deference prompted Justice Kennedy to criticize the majority's credulous acceptance of the government's factual predicates as "antithetical" to the strict scrutiny demanded by the First Amendment.<sup>237</sup> Strict scrutiny, of course, requires the government prove that its law "furthers a compelling interest and is narrowly tailored to achieve that interest."<sup>238</sup> In *McConnell*, Kennedy argued that such strict scrutiny would not permit "outlawing speech on the ground that it might influence an election, which might lead to greater access to politicians by the sponsoring organization, which might lead to actual corruption or

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234. Wells Fargo, *supra* note 233.

235. See, e.g., 11 C.F.R. § 100.29(b)(1) (2006) (for purposes of the electioneering communication definition, "Broadcast, cable, or satellite communication means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system").

236. See *McConnell*, 540 U.S. at 337 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("the Government and intervenor-defendants cannot dispute the looseness of the connection between [the law] and the Government's proffered interest in stemming corruption. At various points in their briefs, they drop all pretense that the electioneering ban bears a close relation to anticorruption purposes. Instead, they defend [the law] on the ground that the targeted ads 'may influence,' are 'likely to influence,' or 'will in all likelihood have the effect of influencing' a federal election. The mere fact that an ad may, in one fashion or another, influence an election is an insufficient reason for outlawing it. I should have thought influencing elections to be the whole point of political speech.") (citations omitted).

237. *McConnell*, 540 U.S. at 337 (Kennedy, J., concurring in the judgment in part and dissenting in part).

238. *Citizens United*, 130 S. Ct. at 882 (quotation omitted).

the appearance of corruption.”<sup>239</sup> Such “attenuated causation,” Kennedy argued, could not suffice under strict scrutiny.<sup>240</sup>

Despite all the skirmishing about the media lines drawn by Congress, then, the most important issue dividing Kennedy and Stevens in both *McConnell* and *Citizens United* was the definition of corruption and the quantum of evidence the Court would require in support. Stevens defined corruption broadly, claiming it took many forms.<sup>241</sup> As corporations grew “more and more adept” at crafting issue-ads to help or harm a candidate, he claimed that “these nominally independent expenditures began to corrupt the political process in a very direct sense.”<sup>242</sup> Independent expenditures became interchangeable with direct contributions in their capacity to generate “*quid pro quo* arrangements.”<sup>243</sup> Therefore, in Stevens’ eyes, there was ample justification to support Congress’s attempt to fight this corruption with its regulation of speech, which was really quite modest because, *inter alia*, it was limited to speech transmitted over only the most corrupting media.

In contrast, Justice Kennedy disputed the corrupting influence of independent expenditures in both his separate opinion in *McConnell* and his majority opinion in *Citizens United*. In *McConnell*, he found the claim that an ad may influence an election to be an “insufficient reason for outlawing it.”<sup>244</sup> In *Citizens United*, Kennedy bluntly held that independent expenditures do not “give rise to [*quid pro quo*] corruption or the appearance of [such] corruption.”<sup>245</sup> Therefore, in Kennedy’s eyes, the government had no legitimate justification to regulate the political speech at issue, regardless of whether it only regulated some media while exempting others.

In sum, Part II argued that *Citizens United* took a decidedly technologically neutral stance as it struck down the government’s

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239. *McConnell*, 540 U.S. at 336-37 (Kennedy, J., concurring in the judgment in part and dissenting in part).

240. *McConnell*, 540 U.S. at 337 (Kennedy, J., concurring in the judgment in part and dissenting in part). *See also* 251 F. Supp. 2d at 325 (Henderson, J., concurring in part in the judgment and dissenting in part) (stating that none of the evidence materially supports the proposition that corporate and union disbursements for issue advocacy corrupt or appear to corrupt federal candidates).

241. *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting).

242. *Id.* at 965.

243. *Id.*

244. *McConnell*, 540 U.S. at 336 (Kennedy, J., concurring in the judgment in part and dissenting in part).

245. *Citizens United*, 130 S. Ct. at 909.

attempt to regulate the dissemination of certain political speech through disfavored media. In the eyes of the Court, any rationale that would let the government regulate the political speech at issue in *Citizens United* if it were disseminated on television or radio would allow the government to do the same in books, newspapers, or in any other media. Thus, it was irrelevant that the government was only asking the Court to approve the former in the immediate case. This Article next explores whether this technological neutrality principle applies to other categories of speech, or whether it is peculiar to the kind of political speech at issue in *Citizens United*. First, Part III assesses the treatment of violent content. Part IV then looks at the problem of “indecent” sexual content and broadcasting.

## II. BROWN AND VIOLENT VIDEO GAMES

**Justice Ginsberg:** [I]f you are supposing a category of violent materials dangerous to children, then how do you cut it off at video games? What about films? What about comic books? Grimm’s fairy tales? Why are video games special? Or does your principle extend to all deviant, violent material in whatever form?

**Mr. Morazzini:** No, Your Honor.<sup>246</sup>

In *Brown*, the Court rejected California’s attempt to restrict minors’ access to certain “violent video games.” More specifically, the California law in question defined a “violent video game” as any video game in which “the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being,” if those acts are depicted in manner that (1) “a reasonable person . . . would find appeals to a deviant or morbid interest of minors,” (2) is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and (3) “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors[.]”<sup>247</sup> Video games captured by this definition<sup>248</sup> would be prohibited from being sold or rented to minors.<sup>249</sup>

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246. Transcript of Oral Argument at 5, *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011) (No. 08-1448).

247. Cal. Civ. Code Ann. § 1746(d)(1) (West 2006), *invalidated by Brown*, 131 S. Ct. 2729 (2011).

248. The language of the statute was obviously adapted from Supreme Court precedent that had defined a category of explicit sexual content that was unprotected by the First Amendment, *see Miller v. California*, 413 U.S. 15 (1973) (establishing the legal standard for identifying constitutionally unprotected

Opponents of the law challenged it under the First Amendment. They claimed that there were no relevant differences between video games and other media, such as movies, books, and cartoons, and no logical reason to treat them differently.<sup>250</sup> Therefore, if violent content in video games were a problem, then the same would be true for violent content in movies, books, cartoons, and anywhere else. Because there would be no logical principle to limit the content-based restriction to just video games, opponents argued, sustaining the contested statute would open the door to government censorship for violent content in other media as well.<sup>251</sup> This would be a dramatic expansion of government

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obscenity), and that had established that certain sexually explicit material that, while not legally obscene, could be regulated by the government as “harmful to minors.” See *Ginsberg v. New York*, 390 U.S. 629 (1968) (establishing the idea that sexually explicit speech could be obscene “to minors,” even though not obscene to adults).

249. Cal. Civ. Code Ann. §§ 1746–1746.5 (West 2006). The law would also require that the packaging of such violent video games be labeled with an “18.” *Id.* However, as the majority opinion in *Brown* points out, the law would not stop minors from possessing violent games nor prevent parents or other adults from buying such games and letting minors play them. See *Brown*, 131 S. Ct. at 2740. (“The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices.”).

250. See Brief of Amici Curiae Entertainment Consumers Association et al. in Support of Respondents at 22–23, *Brown*, 131 S. Ct. 2729 (2011) (No. 08–1448) (arguing that there is no reason to distinguish video games from other media because they seem more interactive, because “all media – books, plays, movies, television, internet websites, or other forms of expression – strive to be interactive in the sense of engaging the consumer as fully as possible.”). See also Brief of Amici Curiae ID Software LLC in Support of Respondents at 19, *Brown*, 131 S. Ct. 2729 (2011) (No. 08–1448) (arguing that no aspect of video games, including interactivity, undermines that claim to full First Amendment protection); Brief for the Int’l Game Developers Association et al. in Support of Respondents at 5, *Brown*, 131 S. Ct. 2729 (No. 08–1448) (arguing that video games are “complex works of narrative performance art—just like movies, television shows, and theatrical drama.”).

251. Brief for the Motion Picture Association of America et al. in Support of Respondents at 18, *Brown*, 131 S. Ct. 2729 (2011) (No. 08–1448) (stating that if depictions of violence are excluded from First Amendment protection, “such a principle could not logically be limited to the particular medium of video games”); Brief for the Reporters Committee for Freedom of the Press et al. in Support of Respondents at 32, *Brown*, 131 S. Ct. 2729 (2011) (No. 08–1448) (stating that if violent video games cannot be sold to minors, there will be little standing in the way of prohibiting newspapers from being sold to minors because they contain violent content).

ensorship and a sizeable carve-out from the First Amendment. Furthermore, unlike restrictions on sexual content,<sup>252</sup> there has been no longstanding tradition of restricting minors' access to depictions of violence.<sup>253</sup> Upholding California's regulation of violent content, then, would necessarily require the Court to create a sweeping new exception to the First Amendment.

In defense of its law, California countered, however, that the level of graphic violence in video games was without historical parallel<sup>254</sup> and could be described as "obscene violence."<sup>255</sup> Moreover, California argued that the interactive nature of video games posed a special risk to minors.<sup>256</sup> Therefore, supporters of the law argued, the regulation at issue only dealt with the very special problem of video games where extremely violent content

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252. Under controlling Supreme Court precedent, certain explicit sexual materials are legally obscene and are not protected by the First Amendment. *Miller v. California*, 413 U.S. 15 (1973). This unprotected status is based upon a history and tradition of obscenity regulation in Anglo-American law that predated and continued beyond the enactment of the First Amendment, *Roth v. United States*, 354 U.S. 476 (1957), and not upon an ex post judgment regarding the social value of obscene speech. *United States v. Stevens*, 130 S. Ct. 1577 (2010). Because obscene content is unprotected by the First Amendment, the government can, for example, prohibit its sale without being subjected to the strict scrutiny content-based censorship normally faces from the Court. *Miller v. California*, 413 U.S. 15 (1973). Furthermore, even where sexually explicit material is not obscene with respect to adults and is therefore not unprotected by the First Amendment, the government may prohibit the sale of such material to minors if it would be obscene from the perspective of a minor. *Ginsberg v. New York*, 390 U.S. 629 (1968).

253. See, e.g., Brief of Respondents at 19-23, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448) (arguing that there is no tradition of regulating violent content that comes anything close to the historical regulation of obscenity, and that, to the contrary, "depictions of violence have played a central and celebrated role in literature") (citing, inter alia, Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. Chi. L. Rev. 1857, 1866 (2007) ("[I]mages of violence are a fundamental part of our history, culture, and politics.")).

254. Petitioners' Brief at 43, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448) (arguing that the realism of video games adds to the "violent, horrific nature of many video games available to minors").

255. Petitioners' Reply Brief at 4, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448) (California added that the games covered by the Act cannot be "fairly analogized to the types of speech that have been historically protected. . . . [T]he video games subject to the Act's restrictions have no historic parallel other than obscenity."); but see *Brown*, 131 S. Ct. at 2734-2735 ("Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of sexual conduct[.]' . . . [V]iolence is not part of the obscenity that the Constitution permits to be regulated.") (citations omitted).

256. Petitioner's Brief at 55, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448).

overlapped with potent new interactive technology, and comparisons to hypothetical regulation of other media were inappropriate.<sup>257</sup> Although California disclaimed any interest in extending its restrictions to other media and other disfavored content, members of the Court clearly feared the possibility of ever-expanding censorship. Justice Scalia asked during the oral argument, “[W]hat’s next after violence? Drinking? Smoking? Movies that show smoking can’t be shown to children? . . . [A]re we to sit day by day to decide what else will be made an exception from the First Amendment?”<sup>258</sup>

To that end, California argued that there was something special and unique about violent video games that would permit the state to prohibit their sale to minors. California relied heavily on *Ginsberg v. New York*<sup>259</sup> and the proposition that states have the discretion to regulate material deemed harmful to minors.<sup>260</sup> In *Ginsberg*, the Court held that different standards of obscenity may be applied for minors. Under this reasoning, the Court sustained a statute restricting the sale of certain sexually explicit materials, even where the sale of the same to adults could not be constitutionally prohibited.<sup>261</sup> In *Brown*, California analogized its law to the law at issue in *Ginsberg* and emphasized the purported

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257. See, e.g., *Brown*, 131 S. Ct. at 2748-51 (Alito, J., concurring in the judgment) (recounting the gory details and interactive possibilities of various violent video games, both real and hypothetical, and suggesting that video games that combine extreme violence and realistic interactivity may make such video games very different from traditional forms of media in their potentially harmful effect on minors who play them).

258. Transcript of Oral Argument at 16, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448).

259. *Ginsberg v. New York*, 390 U.S. 629 (1968). See Petitioners’ Brief at 12, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448), (stating that the *Ginsberg* ruling “is equally applicable to regulations on minors’ access to offensively violent material”).

260. Petitioners’ Brief at 8, *Brown*, 131 S. Ct. 2729 (2011) (“[T]he Act must be upheld so long as it was not irrational for the California legislature to determine that exposure to the material regulated by the statute is harmful to minors.”).

261. Specifically, in *Ginsberg*, the Court upheld the conviction of Defendant under a statute that prohibited the sale to minors of, *inter alia*, any picture that (A) depicts nudity or sexual conduct, and (B) is “harmful to minors” because it (1) “predominantly appeals to the prurient, shameful or morbid interest of minors,” (2) is “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,” and (3) is “utterly without redeeming social importance for minors.” *Ginsberg*, 390 U.S. at 632, 633 (emphasis added); see also *id.* at 645 (Appendix A) (reproducing the text of the relevant statute).

harmful effects of violent video games.<sup>262</sup> California stressed the unique technological features of video games, arguing for example that the realism and interactivity of video games justify unique regulation.<sup>263</sup> Justice Alito signaled at oral argument a willingness to engage this issue, stating that the new medium of interactive video games “presents a question that could not have been specifically contemplated at the time when the First Amendment was adopted.”<sup>264</sup> Other Justices, however, continually questioned whether video game violence could be separated from depictions of similar content in other media.<sup>265</sup>

Furthermore, *Ginsberg* was embedded in a deep tradition of restricting sexual materials<sup>266</sup> and was framed by the concept of obscenity, an established historical category of sexually explicit speech that does not receive First Amendment protection.<sup>267</sup> Even as California sought to analogize its law to the statute upheld in *Ginsberg*, its effort to create a new category of unprotected expression ran directly into the much more recently decided *United States v. Stevens*.<sup>268</sup> In *Stevens*, a federal statute restricted the creation, sale, or possession of certain defined “depiction[s] of

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262. Counsel for California argued, for example, that “[w]here New York was concerned with minors’ access to harmful sexual material outside the guidance of a parent, California is no less concerned with a minor’s access to a deviant level of violence that is presented in a certain category of video games that can be no less harmful to the development of minors.” Transcript of Oral Argument at 1, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448).

263. See Petitioners’ Brief at 43, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448) (elaborating that the realism of video games adds to the “violent, horrific nature of many video games available to minors”).

264. Transcript of Oral Argument at 37, *Brown*, 131 S. Ct. 2729 (No. 08-1448).

265. See, e.g., *id.* at 7 (Justice Sotomayor noting a study which found the “effect of violence is the same for a Bugs Bunny episode as it is for a violent video [game]”).

266. As Justice Kennedy stated at oral argument, “for generations there has been a societal consensus about sexual material . . . . But you are asking us to go into an entirely new area where there is no consensus, no judicial opinions.” Transcript of Oral Argument at 14, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448); see also *Brown*, 131 S. Ct. at 2746 (Alito, J., concurring in the judgment)(By the time of this Court’s landmark obscenity cases in the 1960’s, obscenity had long been prohibited, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.”)(citations omitted).

267. *Ginsberg v. New York*, 390 U.S. 629, 635 (1968) (“Obscenity is not within the area of protected speech or press.”) (citing *Roth v. United States*, 354 U.S. 476, 485 (1957)).

268. *United States v. Stevens*, 130 S. Ct. 1577 (2010).

animal cruelty.”<sup>269</sup> In defense of the law, the government had advanced the “startling and dangerous” proposition that application of an ad hoc balancing test weighing “the value of the speech against its societal costs” would suffice to determine whether a category of speech should receive any First Amendment protection.<sup>270</sup> Under that theory, then, low-value speech that caused negative social effects and thereby failed the balancing test would be unprotected like obscenity.<sup>271</sup> Soundly rejecting the government’s proposition, the Court held that the “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits”<sup>272</sup> and that the legislature has no “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”<sup>273</sup>

California’s arguments proved fruitless, and Justice Scalia’s majority opinion, joined by Justices Kennedy, Ginsburg, Sotomayor and Kagan, placed the case within the *Burstyn* framework: “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do

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269. See 18 U.S.C. § 48. “A depiction of ‘animal cruelty’ is defined as one ‘in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,’ if that conduct violates federal or state law where ‘the creation, sale, or possession takes place.’” *Stevens*, 130 S. Ct. 1577, 1583 (2010) (quoting 18 U.S.C. sec 48(c)(1)). The statute expressly exempted any such depiction that had “serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 18 U.S.C. §48(b).

270. *Id.* at 1585 (2010).

271. *Id.* (“The [government’s] claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a First Amendment Free Zone.”) (quotation omitted).

272. *Id.* (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document ‘prescribing limits, and declaring that those limits may be passed at pleasure.’”) (citation omitted).

273. *Id.* at 1586 (2010). The attorney for the Entertainment Merchants Association, respondents in *Brown*, used similar language at oral argument. See Transcript of Oral Argument at 36, *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), (Smith, att’y for respondents) (describing the *Stevens* holding as a statement that Congress “doesn’t have a freewheeling authority to create new exceptions to the First Amendment”).

not vary' when a new and different medium for communication appears."<sup>274</sup> Thus, the key issue was whether violent content, regardless of the delivery method, was an unprotected category of expression. The question of whether video games posed unique problems was forced into the background.<sup>275</sup> In essence, then, *Brown* says more about violent content than it does about video games. The result would have been the same if California had targeted violent films instead of video games. In fact, the opinion is strikingly bereft of any discussion of the cultural significance, context and role of video games in American society.<sup>276</sup> Instead, the predominant theme is the rich heritage and cultural acceptance of violent content in entertainment.<sup>277</sup>

As in *Stevens*, the Court began by rejecting California's attempt to create a new category of unprotected expression,<sup>278</sup> explaining that *Stevens* had held that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."<sup>279</sup> Unlike established categories of unprotected speech that have traditionally been subject to restriction, there was simply no such longstanding tradition of restricting either violent content or children's access to such violent content.<sup>280</sup> Quite the contrary, even children's *books*, a word Scalia italicized for emphasis, "contain no shortage of gore" such as Grimm's Fairy Tales in

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274. *Brown*, 131 S. Ct. at 2733 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

275. California did not contest that video games were entitled to First Amendment protection. Hence, it was no surprise that the Court found that, "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection." *Id.* at 2733.

276. See Brief for International Game Developers Association et al. as Amici Curiae Supporting Respondents at 9, *Brown*, 131 S. Ct. 2729 (2011) (No. 08-1448) (describing the cultural significance of video games).

277. See *Brown*, 131 S. Ct. at 2736 (citing examples of classic literature and children's stories that contain violence).

278. *Id.* at 2735 (stating that California's attempt "to create a wholly new category of content-based regulation that is permissible only for speech directed at children" is "unprecedented and mistaken").

279. *Id.* at 2734.

280. *Id.* at 2736 ("California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none.").

which “Hansel and Gretel (children!) kill their captor by baking her in an oven.”<sup>281</sup>

“This [was] not to say,” Scalia noted, “that minors’ consumption of violent entertainment has never encountered resistance.”<sup>282</sup> Other media, such as motion pictures and comic books, had faced “a long series of failed attempts” to restrict the portrayal of violence, he wrote.<sup>283</sup> If anything, though, these failed attempts of would-be censors caught up in the moral panic *du-jour* simply demonstrated the utter lack of any historical or traditional consensus that violent content was beyond the protection of the First Amendment. It also showed that California’s claims about the terrifying dangers of video games were nothing new; its predecessors had said much the same about comic books, radio, television, and movies.<sup>284</sup>

Nor could California simply opt out of the strict scrutiny required by the First Amendment by making its violent video game law look like an obscenity regulation.<sup>285</sup> “Our cases have been clear,” Scalia wrote, “that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking,

281. *Id.* at 2736. Likewise, “[h]igh-school reading lists are full of similar fare. Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding’s *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered by *other children* while marooned on an island.” *Id.* at 2736-37 (emphasis original); see also *id.* at 2745 (Alito, J., concurring in the judgment) (“For better or for worse, our society has long regarded many depictions of killing and maiming as suitable features of popular entertainment, including entertainment that is widely available to minors.”).

282. *Id.* at 2741.

283. *Id.* (“In the [late] 1800’s, dime novels depicting crime and ‘penny dreadfuls’ (named for their price and content) were blamed in some quarters for juvenile delinquency. . . . When motion pictures came along, they became the villains instead. . . . Radio dramas were next . . . Many in the late 1940’s and early 1950’s blamed comic books for fostering a ‘preoccupation with violence and horror’ among the young, leading to a rising juvenile crime rate. . . . But efforts to convince Congress to restrict comic books failed. . . . And, of course, after comic books came television and music lyrics.”) (citations omitted); see also *id.* at 2735 (noting that in *Winters v. New York*, 333 U.S. 507 (1948), the Court rejected a state effort to restrict magazine portrayals of “bloodshed, lust or crime.”).

284. *Id.* at 2741 (explaining that “California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors”).

285. *Id.* at 2734 (“As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. ”) (quotation and citations omitted).

but only *depictions of sexual conduct*.”<sup>286</sup> “[S]peech about violence is not obscene,”<sup>287</sup> and futile attempts to “shoehorn speech about violence into obscenity” by parroting some of the phrases from the Court’s obscenity jurisprudence<sup>288</sup> are rejected.<sup>289</sup>

Before subjecting the law to strict scrutiny, the Court gave short shrift to California’s claim that the interactive aspect of video games posed special problems. First, the Court found this feature was not new, citing a 1969 “choose-your-own-adventure” book that allowed readers to make plot decisions, and described interactive participation as “more a matter of degree than of kind.”<sup>290</sup> Quoting an earlier opinion by Judge Richard Posner, the Court asserted that “all literature is interactive. [T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.”<sup>291</sup> Second, although there were cultural and intellectual differences between reading Dante and playing *Mortal Kombat*, these were not *constitutional* differences. “Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than *The Divine Comedy*, and restrictions upon them must survive strict scrutiny,” Justice Scalia wrote.<sup>292</sup>

Having established that California’s law was content-based regulation of protected speech, the Court applied strict scrutiny.<sup>293</sup> In order to survive the strict scrutiny, California would have to demonstrate that the statute was both justified by a compelling interest and narrowly tailored to further that interest.<sup>294</sup> In *Brown*, the Court found that California’s law was neither sufficiently narrowly tailored<sup>295</sup> nor supported by a compelling state interest.<sup>296</sup>

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286. *Id.* (citations and internal quotation marks omitted) (emphasis added).

287. *Id.* at 2735.

288. For example, “patently offensive” or “lacks serious literary, artistic, political or scientific value.” See *Miller*, 413 U.S. at 23.

289. *Brown*, 131 S. Ct. at 2734.

290. *Id.* at 2738.

291. *Id.* (quoting *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (granting a preliminary injunction enjoining enforcement of a city ordinance attempting to limit minors’ access to certain defined violent video games, finding that the ordinance was likely unconstitutional under the First Amendment).

292. *Id.* at 2737 n.4.

293. *Id.* at 2738.

294. *Id.*

295. *Id.* at 2741-42. (“California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control

With respect to the latter, the Court found that California failed to prove that violent video games cause minors to act aggressively.<sup>297</sup> Moreover, the small effects allegedly attributable to violent video games were characterized by the Court as “indistinguishable from effects produced by other media.”<sup>298</sup> Even when read generously in favor of the government’s position, the studies “show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.”<sup>299</sup> This is not the kind of evidence sufficient to support a content based-

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their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. . . . As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.”).

296. *Id.* at 2738 (“The [government] must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. . . . California cannot meet that standard.”) .

297. *Id.* at 2739 (“The State’s evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.”) (citations omitted).

298. *Id.* (“California’s argument relied heavily upon the work of Dr. Craig Anderson, who testified in a similar case that “the ‘effect sizes’ of children’s exposure to violent video games are ‘about the same’ as that produced by their exposure to violence on television. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny . . . or when they play [non-violent] video games . . . rated “E” (appropriate for all ages).” (emphasis original).

299. *Id.* at 2739. Scalia continued, explaining that “[o]ne study, for example, found that children who had just finished playing violent video games were more likely to fill in the blank letter in “explo\_e” with a “d” (so that it reads “explode”) than with an “r” (“explore”).” *Id.* at 2739 n7 (citations omitted). “The prevention of this phenomenon, which might have been anticipated with common sense, is not a compelling state interest.” *Id.*

regulation of speech, because to pass strict scrutiny, the government “must specifically identify an ‘actual problem’ in need of solving[.]”<sup>300</sup>

Furthermore, given the similar effects produced by cartoons, movies, books and video games, California’s decision not to extend its restriction to other media meant the law was “wildly underinclusive,” which raises doubts about whether the “government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”<sup>301</sup> California had provided no persuasive reason why it had singled out video games for disfavored treatment, and this alone was enough to defeat the law.<sup>302</sup> At the same, the fact that California allowed children access to this purportedly “dangerous mind-altering material” as long as a parent or other adult was involved undercut the validity of the state’s claimed interest in preventing harm to minors.<sup>303</sup> “That is not how one addresses a serious social problem,” Justice Scalia wrote.<sup>304</sup> Finally, even if California took the fallback position that its law was really just about “helping concerned parents control their children,” then the law was “seriously overinclusive because it abridges the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime.”<sup>305</sup> For all these reasons, California’s violent video game law couldn’t withstand strict scrutiny.

While the majority found the law failed strict scrutiny, Justice Alito, joined by Chief Justice Roberts, concurred in the judgment because he found the law to be unconstitutionally vague.<sup>306</sup> Setting aside First Amendment issues, Alito would have invalidated the statute on due process grounds for failing to “give people of

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300. *Id.* at 2738 (citations omitted).

301. *Id.* at 2740 (citations omitted).

302. *Id.* (“Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.”) (citations omitted).

303. *Id.* at 2739.

304. *Id.*

305. *Id.* at 2741-42 (2011).

306. *Id.* at 2742 (Alito, J., concurring in the judgment).

ordinary intelligence fair notice of what is prohibited.”<sup>307</sup> The California law, according to Alito, did “not define ‘violent video games’ with the ‘narrow specificity’ that the Constitution demands.”<sup>308</sup> As a result, a person of ordinary intelligence would not have fair notice as to what video games would and would not be captured by the statutory definition.<sup>309</sup> Without “express[ing] any view on whether a properly drawn statute would or would not survive First Amendment scrutiny[,]” Alito concluded that California’s law could not stand.<sup>310</sup>

Although he ultimately thought California’s law intolerable, Alito also criticized the majority’s more aggressive approach. Alito argued that the Court’s “sweeping” opinion meant that practically no regulation of minors’ access to violent video games would ever be allowed, a proposition he disagreed with due to the potential dangers posed by the interactive nature of video games.<sup>311</sup> The Court was “too quick[.]” he thought, to dismiss the possibility that the experience of playing video games was “very different from anything that we have seen before.”<sup>312</sup> Instead of “squelch[ing] legislative efforts to deal with what is perceived by some to be a significant and developing social problem,”<sup>313</sup> Alito argued that the Court should more receptive to these legislative efforts. Indeed, Alito urged that “[w]e should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology.”<sup>314</sup>

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307. *Id.* at 2743 (Alito, J., concurring in the judgment) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

308. *Id.* at 2743 (Alito, J., concurring in the judgment).

309. *Id.*

310. *Id.* at 2746.

311. *Id.* at 2748-49.

312. *Id.* at 2748. Alito believed the “strikingly realistic” experience of interactive games, *id.*, and the “astounding” level of violence differed from reading because only an “extraordinarily imaginative reader who reads a description of a killing . . . will experience that event as vividly as he might if he played the role of the killer in a video game.” *Id.* at 2750. He concluded, “[w]hen all of the characteristics of video games are taken into account, there is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie.” *Id.* at 2751. The Court should not “hastily dismiss” the judgment of legislators, who may be in a better position to assess the implications of new technology. *Id.* at 2742.

313. *Id.* at 2742.

314. *Id.*

Justice Breyer's dissenting opinion also advocated deference to legislative judgment.<sup>315</sup> Although he claimed to apply strict scrutiny, Breyer called for a less "mechanical" approach,<sup>316</sup> because video games combine physical action with expression,<sup>317</sup> the burden imposed by the law was modest,<sup>318</sup> and the regulation involved minors.<sup>319</sup> Therefore, Breyer's ad hoc balancing approach was far less demanding than the majority's version of strict scrutiny. The practical difference between these approaches was most apparent in Breyer's reluctance to second-guess the legislature's determination that violent video games were harmful to minors. In sharp contrast to the majority, Breyer concluded that certain studies supported California's specific focus on video games,<sup>320</sup> even though he also acknowledged that there were competing studies reaching different conclusions.<sup>321</sup> He admitted a lack of social science expertise to "say definitively who is right."<sup>322</sup> Nonetheless, he found sufficient grounds in the studies to defer to the legislature's conclusion that violent video games are likely to harm children.<sup>323</sup>

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315. *Id.* at 2770 (Breyer, J., dissenting).

316. *Id.* at 2766 (proposed test asks whether the statute "works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide") (quoting *Playboy*, 529 U.S. at 841 (Breyer, J., dissenting)).

317. According to Justice Breyer, "pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie." *Id.* at 2766-67.

318. *Id.* at 2771.

319. *Id.* at 2762.

320. *Id.* at 2768 (citing studies that say "the closer a child's behavior comes, not to watching, but to *acting* out horrific violence, the greater the potential psychological harm").

321. *Id.* at 2769.

322. *Id.* ("I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.").

323. *Id.* at 2770 (Breyer, J., dissenting). ("This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases. The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all.") (citations omitted). Justice Scalia dismissed Justice Breyer's comments by stating that Breyer's admission that he could not say which studies were right or wrong undercut his conclusion about the appropriateness of the California law. *Id.* at 2739 n.8.

The contrast between Justice Scalia's approach and that of Justices Alito and Breyer is arresting. The Alito and Breyer approaches would apparently sustain laws even where the proof is at best uncertain. In contrast, Scalia's insistence on "the degree of certitude that strict scrutiny requires"<sup>324</sup> treats violent content as fully protected expression and ensures that laws aimed at the effects of media violence are effectively dead on arrival. Scalia's opinion sends a clear message to legislatures: media violence, like other social problems, such as encouraging anti-Semitism or spreading a political philosophy hostile to the Constitution, "cannot be addressed by governmental restriction on free expression."<sup>325</sup>

Recall that one of the foundations of *Citizens United* was distrust of governmental power. That theme reappears in *Brown*, with Justice Scalia quoting a 2000 opinion in which Justice Kennedy wrote that esthetic and moral judgments about art and literature "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."<sup>326</sup> Furthermore, as Justice Scalia notes, the Court has long recognized the difficulty and danger in attempting to distinguish politics from entertainment.<sup>327</sup> Consequently, no matter how disgusting the California legislature found violent content to be, the video game law was but "the latest episode in a long series of failed attempts to censor violent entertainment for minors."<sup>328</sup> Furthermore, outside of the narrowly defined category of obscenity, disgust is not a "valid basis for restricting expression," Scalia wrote.<sup>329</sup> To the contrary, the disgust that some may feel toward the violence depicted in video games highlighted the "precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may

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324. *Id.* at 2739 n.8.

325. *Id.*

326. *Id.* at 2733 (quoting *Playboy*, 529 U.S. at 818 (holding that provision requiring cable operators to scramble sexually explicit channels during certain hours was a violation of the First Amendment)). Interestingly, Justice Scalia himself dissented in *Playboy*, arguing that the statute in question was aimed at businesses engaged in "the sordid business of pandering" sexual materials. 529 U.S. at 831 (quoting *Ginsberg v. United States*, 383 U.S. at 467 (holding that in close First Amendment cases evidence of pandering may be probative)).

327. *Id.* at 2733 (explaining that the Court "ha[s] long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try").

328. *Id.* at 2741.

329. *Id.* at 2738; see also *id.* at 2736 ("No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.") (citations omitted).

be the real reason for governmental proscription.”<sup>330</sup> That kind of censorship simply could not be squared with the most basic of First Amendment principles, that “[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>331</sup>

*Citizens United* and *Brown* stand for the proposition that content-based regulations of speech must be subjected to strict scrutiny, even when the government limits the reach of its regulation to particular media it claims are especially harmful. In both cases, the Court was very skeptical of the government’s claim that particular media could be convincingly distinguished from other media: the rationales put forth by the government could be logically extended to other media. In other words, a decision endorsing the government’s propositions would provide a launching pad for ever-expanding content regulation. Thus, the Court’s primary focus was on the content at issue. Essentially, the Court’s skepticism of governmental claims about a particular technology advanced the principle of technological neutrality. However, in Part IV, we see a lone exception to that principle, where the Court has paradoxically allowed content regulation of broadcasting that is not tolerated in any other media.

### III. FOX I, FOX II, AND BROADCAST INDECENCY

In a 2010 opinion, the Court of Appeals for the Second Circuit surveyed the many ways in which the media landscape had changed since the Supreme Court’s seminal 1978 *Pacifica* decision, noting that “[t]he past thirty years ha[ve] seen an explosion of media sources,” such as cable, satellite, and Internet distribution of video programming; broadcast television had become “only one voice in the chorus.”<sup>332</sup> Additionally, technological changes, such as the V-chip, provided parents with the ability to control which television programs their children watch.<sup>333</sup> In light of these developments, the Court of Appeals could think of no reason why strict scrutiny should not apply to restrictions on broadcast programming.<sup>334</sup> Nevertheless, the appellate court was “bound by Supreme Court precedent, regardless of whether it reflects today’s

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330. *Id.* at 2738.

331. *Id.* at 2733 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)) (internal quotation marks omitted).

332. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 326 (2d Cir. 2010), *vacated*, 132 S.Ct. 2307 (2012).

333. *Id.* at 327.

334. *Id.* at 327.

realities.”<sup>335</sup> That precedent required a different result, and only the Supreme Court could say otherwise

Twice in recent years, broadcasters have given the Court the opportunity to do so, arguing that *Pacifica* has been eviscerated by technological developments and that the FCC’s broadcast indecency censorship regime should not be tolerated by the First Amendment. Both times, the Court declined the invitation to reconsider *Pacifica* and sidestepped the issue. In the first round, *Fox I*, the Court refused to address constitutional questions and instead focused on whether a change in the FCC indecency policy violated the Administrative Procedure Act (APA).<sup>336</sup> The Court held that the FCC’s change in policy did not run afoul of the APA’s arbitrary and capricious standard, and remanded the case to the Second Circuit for further proceedings.<sup>337</sup> In the second round, *Fox II*, the case came back to the Court squarely presenting constitutional questions.<sup>338</sup> The *Fox II* Court addressed only due process questions, deferring to another day the question of whether *Pacifica*’s diminished protection for broadcasting remains valid.<sup>339</sup> Both *Fox I* and *Fox II* show the Court to be deeply divided about the continuing validity of *Pacifica*.

#### A. *Pacifica* and “Filthy Words”

“Now the word shit is okay for the man. At work you can say it like crazy. Most figuratively, get that shit out of here, will ya? I don’t want to see that shit anymore. I can’t cut that shit, buddy. I’ve had that shit up to here. I think you are full of shit myself.”

George Carlin, “Filthy Words”<sup>340</sup>

It was well settled, Justice Stevens wrote for a five-member majority in *Pacifica*, that the First Amendment has a “special

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335. *Id.* See also *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (“[I]t is increasingly difficult to describe broadcast television as uniquely pervasive and uniquely accessible to children[.]”).

336. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 529-30 (2009) (withholding judgment on the constitutionality of the FCC’s actions, given that the Second Circuit did not definitely rule on the constitutional implications of the Commission’s policies, and holding merely that the FCC’s actions were not arbitrary and capricious under the APA).

337. *Id.* at 530.

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

339. *Id.* at 2320 (observing that “because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policies”).

340. *FCC v. Pacifica Foundation*, 438 U.S. 726, 752-53 (1978) (appendix).

meaning” in the broadcasting context.<sup>341</sup> Indeed, in prior cases such as *Red Lion Broadcasting*, the Court had accepted without question the “factual predicate” of spectrum scarcity as the rationale for limited content-based regulation of broadcast media.<sup>342</sup> This spectrum scarcity rationale and the government’s special role in licensing use of frequencies allowed it authority to regulate the content of broadcast speech in a way that could never be tolerated in other media.<sup>343</sup> In *Pacifica*, however, the Court adopted entirely new rationales that were both completely independent from the limited spectrum scarcity rationale of *Red Lion*.

In *Pacifica*, the Court was asked to review the FCC’s power to regulate “indecent” broadcasts.<sup>344</sup> The case centered around the radio airing of George Carlin’s “Filthy Words,” a 12-minute stand-up comedy monologue in which Carlin listed seven words “you couldn’t say on the public . . . airwaves” and proceeded to use them in a series of humorous colloquialisms.<sup>345</sup> The FCC, in response to a complaint concerning the broadcast,<sup>346</sup> issued a

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341. *Id.* at 742 n.17 .

342. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 399 n. 26 (1969). In *Red Lion* the Court upheld the government’s so called “fairness doctrine,” which required that broadcasters “must give adequate coverage to public issues” and that “[such] coverage must be fair in that it accurately reflects the opposing views.” *Id.* at 377. The Court essentially reasoned that because the government had broad authority to regulate and license the use of particular broadcast frequencies, the government was also empowered to impose content-based regulations upon licensees, for the public benefit. *Id.* at 390.

343. “[T]he First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize[.]” *Pacifica*, 438 U.S. at 748 (citing *Miami Herald v. Tornillo*, 418 U.S. 241 (1974)). However, “it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism.” *Pacifica*, 438 U.S. at 748 (citing *Red Lion*, 395 U.S. 367 (1969)). See also *id.* at 724 (noting that “although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve ‘the public interest, convenience, and necessity.’”) (citations omitted).

344. *Id.* at 729. The FCC located an authority to do so in a statutory provision that forbid the use of “any obscene, indecent, or profane language by means of radio communications,” and another provision which required the FCC to “encourage the larger and more effective use of radio in the public interest.” *Id.* at 731.

345. *Id.* at 729. The majority opinion notes that Carlin is a “satiric humorist” and that “the transcript of the recording [of his performance], . . . , indicates frequent laughter from the audience.” *Id.*

346. Apparently, two weeks after the monologue was aired, “a man, who stated that he had heard the broadcast while driving with his young son, wrote a

declaratory order informing the radio station that it “could have been the subject of administrative sanctions” for airing the monologue.<sup>347</sup> The FCC’s memorandum opinion expressed an intention to regulate the broadcasting of “indecent” language, and stated that “[t]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.”<sup>348</sup>

In his majority opinion upholding the FCC’s power to regulate broadcast indecency, Justice Stevens advanced two new rationales for government regulation of broadcast media: broadcasting’s “unique pervasiveness” and “unique[] accessibility to children.”<sup>349</sup> These rationales were not really factual statements, but instead appeared to indicate the value preferences of the majority. As Justice Brennan wrote in a dissenting opinion, “[d]ispassionate analysis, removed from individual notions as to what is proper and what is not,” showed the new rationales did not support restrictions on broadcasting.<sup>350</sup> The so-called dispassionate analysis of Justice Brennan, however, was equally premised on outcome-determinative first principles.

Justice Stevens’ claim about broadcasting’s pervasiveness is derived from a belief that the privacy interests of unwilling recipients are superior to the free speech rights of speakers and willing recipients. Of pervasiveness, he wrote: “Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>351</sup> Stevens framed the case as

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letter complaining to the [FCC].” *Id.* at 730. When the complaint was forwarded to the radio station by the FCC, the radio station explained that the “the monologue had been played during a program about contemporary society’s attitude toward language and that, immediately before its broadcast, listeners had been advised that it included ‘sensitive language which might be regarded as offensive to some.’” *Id.* at 730.

347. *Id.* at 730.

348. *Id.* at 731-732 (citation omitted).

349. *Id.* at 748-50.

350. *Id.* at 764 (Brennan, J., dissenting).

351. *Id.* at 748 (majority opinion). *See also Pacifica*, 438 U.S. at 759 (Powell, J., concurring in part and concurring in judgment) (“Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home).

involving an intruder who invaded the home, assaulting the listener with “unexpected program content.”<sup>352</sup>

In contrast, another way of looking at the privacy interests was presented by Justice Brennan in dissent. Justice Brennan agreed with Justice Stevens that the privacy interest of an individual in her own home was substantial and deserved significant protection.<sup>353</sup> However, even when in the home, an “individual’s actions in switching on and listening” to communications directed to the public at large do not implicate fundamental privacy interests.<sup>354</sup> Instead, the affirmative steps taken by the listener were “more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse.”<sup>355</sup> Likewise, since the individual has the ability to turn off the radio with minimal effort, there is no real threat to the individual’s privacy interest from offensive material on the airwaves.<sup>356</sup> In other words, Brennan seemed to be starting from exactly the opposite presumption: how could the First Amendment allow unwilling listeners to use government to censor public discourse?<sup>357</sup>

The discussion of the second rationale, broadcasting’s “unique accessibility to children,” was framed by *Ginsberg*. In his opinion, Justice Stevens cited *Ginsberg* as a key precedent that justified special treatment of indecent broadcasting.<sup>358</sup> In *Ginsberg*, as discussed above, the Court held that the government had a legitimate interest in restricting the sale to minors of sexually explicit materials that were deemed to be obscene for minors on

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352. *Id.* at 748. As a matter of fact, the listener whose complaint had precipitated the FCC action against the Pacifica radio station had been listening to the radio while driving in his car with his minor son. *Id.* at 730 (majority opinion). Furthermore, the *Pacifica* focus on in-home listening seems especially quaint now as 64% of all radio listening in 2011 took place somewhere other than the home. Arbitron, *Radio Today 2011: How America Listens to Radio* 107 (2011).

353. *Pacifica*, 438 U.S. at 764 (Brennan, J., dissenting).

354. *Id.* at 764-65.

355. *Id.* at 765.

356. *Id.* at 765.

357. *Id.* at 765-66 (“Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the ‘off’ button, it is surely worth the candle to preserve the broadcaster’s right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, . . . , is clearly . . . ‘to burn the house to roast the pig.’”) (citations omitted).

358. *Id.* at 749.

the basis of their “prurient appeal” to minors.<sup>359</sup> In *Pacifica*, by contrast, the Court was faced with a broadcast that was sexually-oriented but which did not rise to the level of obscenity, even under *Ginsberg*’s more lenient obscene-for-minors standard.<sup>360</sup> Specifically, the comedy monologue lacked any “prurient appeal,” an essential element of the legal definition of obscenity.<sup>361</sup> In fact, the FCC’s definition of indecency in *Pacifica* omitted any reference to prurient appeal at all.<sup>362</sup> Despite the distinction between obscenity’s prurient appeal and indecency’s lack thereof, Stevens still equated the government’s interest in protecting children from indecent broadcasts as equal to the interest in protecting children from obscenity.<sup>363</sup> Likewise, it was of at most passing concern to Stevens that the definition of indecency might capture speech with “serious literary, artistic, political, or scientific value,”<sup>364</sup> a category of speech that is protected even when sexually explicit and patently offensive.<sup>365</sup> The unstated premise underlying all this was that parents do not adequately supervise their children’s in-home consumption of broadcast media.<sup>366</sup> In other words, for Stevens, the government had a special interest in promoting the “well-being of its youth” and in “supporting parents’ claim to authority in their own household.”<sup>367</sup>

Among other objections to the protect-the-children rationale, Justice Brennan argued in dissent that the majority’s professed

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359. *Ginsberg v. New York*, 390 U.S. 629, 633 (1968).

360. *Pacifica*, 438 U.S. at 729.

361. *Id.* at 739-40.

362. *Id.*

363. *Id.* at 750.

364. *See, e.g., id.* at 767 (Brennan, J., dissenting) (noting that under controlling precedent, even when a work appeals to the prurient interest of minors, a work is not obscene unless, taken as a whole, it lacks serious literary, artistic, political, or scientific value) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

365. *See id.* at 743 (“It is true that the [FCC]’s order may lead some broadcasters to censor themselves. At most, however, the [FCC]’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. . . . Invalidating any rule on the basis of its hypothetical application to situations not before the Court is ‘strong medicine’ to be applied ‘sparingly and only as a last resort.’ We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.”) (citations omitted)

366. The FCC overtly acknowledged the lack of parental supervision when it stated that “children have access to radios and in many cases are unsupervised by parents.” *Id.* at 731 n. 2.

367. *Id.* at 750. (citing *Ginsberg*, 390 U.S. at 639, 640) (quotations omitted).

concern for parental rights actually demanded the opposite result.<sup>368</sup> As Brennan read the cases, the Court's precedents protecting the "the time-honored right of a parent to raise his child as he sees fit" stood for the basic principle that "parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children."<sup>369</sup> "As surprising as it may be to individual Members of th[e] Court," Brennan wrote, some parents may "actually find Mr. Carlin's unabashed attitude toward the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."<sup>370</sup> Furthermore, Brennan identified in Stevens' approach "a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities."<sup>371</sup> Instead of granting the power to regulate speech in the hands of government elites, Brennan remarked that he would rather "place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand."<sup>372</sup>

This was not a dispute about evidence, as there was no factual record showing, for example, the frequency with which audience members inadvertently confront unexpected sexual content or how often parents did not supervise children's broadcast consumption. Nor was there any proof children's exposure to indecent broadcasts was harmful.<sup>373</sup> Instead, this was and always has been a dispute about value preferences. Brennan, on one hand, feared that FCC action in this arena would "permit majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority."<sup>374</sup> Stevens, on the

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368. *See id.* at 769-770.

369. *Id.* at 769-70 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, (1925)) (emphasis original)

370. *Id.* at 770 (Brennan, J., dissenting).

371. *Id.* at 775.

372. *Id.* at 772.

373. *See id.* at 749 (noting that Pacifica's broadcast "could have enlarged a child's vocabulary [of indecent words] in an instant" but citing no proof for that supposition, nor explaining why the government had any legitimate interest in preventing such a development).

374. *Id.* at 766 (Brennan, J., dissenting). And, for that matter, what of adults who would like to listen to the radio? The majority's rationales taken to their extreme would have the effect of "reduc[ing] the adult population . . . to

other hand, saw broadcast media as uniquely invasive and capable of harming youth.<sup>375</sup> Furthermore, Stevens did not see the speech at issue in *Pacifica* as being particularly important to protect: the sexual and excretory language at issue in *Pacifica* was low-value speech at the “periphery of First Amendment concern” and speakers engaged in “serious communication” could express their ideas with less offensive language.<sup>376</sup> Conversely, Brennan thought the rationales accepted by Stevens, if “[t]aken to their logical extreme . . . could justify the banning from radio of a myriad of literary works, novels, poems, and plays” as well as candid political speech and even portions of the Bible.<sup>377</sup>

Despite Justice Stevens’ adoption of these expansive new rationales for regulation of broadcast media, the majority still emphasized the narrowness of the FCC’s action<sup>378</sup> and Justice Powell’s crucial concurrence pointed out that the FCC could be expected to proceed cautiously.<sup>379</sup> For nine years after *Pacifica*, the FCC emphasized it would only punish repetitive use of the indecent words in Carlin’s monologue and found no broadcasts deserving sanctions.<sup>380</sup> But in 1987, the FCC developed a broader contextual analysis that examined the “explicitness or graphic nature” of the material, the extent to which there was repetition, and whether the material was presented to “pander” or “shock.”<sup>381</sup> Yet from the late 1980s until the early 2000s, indecency fines were

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[hearing] only what is fit for children.” *Id.* at 769 (Brennan, J., dissenting)(citation omitted).

375. *Id.* at 748-49.

376. *Id.* at 743 & n.18. These views were joined only by Burger and Rehnquist. *Id.* at 729.

377. *Id.* at 770-71 (Brennan, J., dissenting).

378. *Id.* at 734 (stating “order was ‘issued in a specific factual context’: questions concerning possible action in other contexts were expressly reserved for the future”); *id.* at 750 (describing limited context of the ruling).

379. *Id.* at 762 n.4 (Powell, J., concurring in part and concurring in the judgment).

380. See *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S.Ct. 2307, 2313 (2012) (“From 1978 to 1987, the Commission did not go beyond the narrow circumstances of *Pacifica* and brought no indecency enforcement actions.”)(citations omitted); see also *In re Application of WGBH Educ. Foundation*, 69 F.C.C.2d 1250, 1254 (1978) (Commission declaring it “intend[s] strictly to observe the narrowness of the *Pacifica* holding”).

381. Industry Guidance on Broadcast Indecency, 16 F.C.C.R. 7999 (2001); see *Fox II*, 132 S.Ct. at 2313 (“In 1987, the Commission determined it was applying the *Pacifica* standard in too narrow a way. It stated that in later cases its definition of indecent language would “appropriately includ[e] a broader range of material than the seven specific words at issue in [the Carlin monologue].”) (citations omitted).

still rare and generally a small amount;<sup>382</sup> the biggest fines targeted a handful of radio “shock jocks,” such as Howard Stern, who made explicit and crude discussions of sex the dominant theme of their programs.<sup>383</sup>

Then, under Republican leadership in the early 2000s, the FCC’s interest in punishing indecency markedly increased.<sup>384</sup> Significantly, it announced in 2004 that a single use of the word “fuck” could be indecent,<sup>385</sup> and that a brief visual depiction of nudity could also be indecent.<sup>386</sup> The FCC also aggressively changed the way it calculated fines.<sup>387</sup> Previously, the agency applied fines on a per program basis.<sup>388</sup> Under its new policy, the FCC began treating each licensee’s broadcast of the same program

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382. See FCC Indecency Fines, 1970-2004, available at <http://www.washingtonpost.com/wp-srv/business/graphics/web-fcc970.html>; Frank Aherns, *Delays, Low Fines Weaken FCC Attack on Indecency*, Wash. Post, Nov. 10, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/09/AR2005110902078.html>.

383. See FCC Indecency Fines, 1970-2004, *supra*, note 382; Jonathan D. Salant, *Clear Channel Dumps Shock Jock Stern After FCC Fine*, Union-Tribune San Diego, Apr. 9, 2004, available at [http://www.utsandiego.com/uniontrib/20040409/news\\_1b9stern.html](http://www.utsandiego.com/uniontrib/20040409/news_1b9stern.html).

384. See Frank Aherns, *The Price for On-Air Indecency Goes Up*, Wash. Post, Jun. 8, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700287.html>.

385. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards,” 19 F.C.C.R. 4975 (2004) (“While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law”).

386. Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of Super Bowl XXXVII Halftime Show, 19 F.C.C.R. 19230 (2004) (finding that although the exposure of Ms. Jackson’s bare breast was only for 19/32 of a second, the nudity was designed to “pander to, titillate and shock the viewing audience” and thus the brevity of the exposure was not dispositive).

387. See Lili Levi, First Amendment Center, *The FCC’s Regulation of Indecency*, First Reports Vol. 7 No. 1 20 (Apr. 2008), available at [http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi\\_final\\_.pdf](http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FirstReport.Indecency.Levi_final_.pdf).

388. See *e.g.*, Mr. Michael J. Faherty Executive Vice President-Radio, 6 F.C.C.R. 3704 (1989) (applying forfeiture of \$10,000 total for five separate airings of indecent material); see also *e.g.*, Citicasters Co. Licensee, WXTB(FM), 13 F.C.C.R. 15381 (1998) (applying forfeiture of \$4,000 total for two separate airings of indecent material).

as a separate violation.<sup>389</sup> Thus, every network affiliate that broadcast an indecent program would face liability.<sup>390</sup> Finally, Congress in 2006 increased the maximum penalty the FCC can impose per indecency violation by tenfold, from \$32,500 to \$325,000.<sup>391</sup>

*B. Foul-Mouthed Glitteratae from Hollywood*

“I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck ‘em.”

Cher, appearing at the 2002  
Billboard Music Awards<sup>392</sup>

“Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”

Nicole Richie, appearing at the  
2003 Billboard Music Awards<sup>393</sup>

The last decade also saw a marked rise in the number of complaints filed with the FCC. During 2001, the FCC received only 346 complaints about broadcast indecency.<sup>394</sup> Well-organized campaigns by special interest groups opposed to the perceived epidemic of indecency on television began to markedly increase the number of complaints filed at the agency.<sup>395</sup> For example, the

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389. See 19 F.C.C.R. at 19240 (assessing against Viacom the statutory maximum of \$27,000 for each of the 20 subsidiaries that aired the offending subject material for a total of \$550,000).

390. See *ABC, Inc. v. FCC*, 404 Fed. Appx. 530 (2d Cir. 2011) (vacating FCC penalty of \$27,500 on each of forty-four ABC-affiliated television stations).

391. Pub. L. No. 109-235, 120 Stat. 491 (2006) (amending 47 U.S.C. § 503(b)(2)).

392. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 510 (2009). Actually, in its published opinion, the Roberts Court used “f\*\*\*” and “s\*\*\*,” a marked departure from *Pacifica*’s reprinting of the Carlin monologue with words spelled completely.

393. *Id.*

394. See Kent R. Middleton & William E. Lee, *The Law of Public Communication* 433 (2013 update ed. 2012). See also FCC, *Indecency Complaints and NALs: 1993-2004*, available at <http://transition.fcc.gov/eb/oip/ComplStatChart.pdf>

395. Counsel for Fox Television Stations referred to “thousands and thousands of ginned-up computer-generated complaints . . . .” Transcript of Oral Argument at 26, *FCC v. Fox Television Stations, Inc., (Fox II)*, 132 S. Ct. 2307 (2012) (No. 10-1293). An example of an on-line complaint form may be found at [www.parentstv.org](http://www.parentstv.org).

FCC received some 237,215 letters of protest<sup>396</sup> when its enforcement bureau ruled in October 2003 that Bono's isolated expletive—"This is really, really fucking brilliant" — uttered in a non-literal manner during a live broadcast was not indecent.<sup>397</sup> Under intense political pressure,<sup>398</sup> the full commission reversed its enforcement bureau and ruled in March 2004 that the word "fuck" has an inherently sexual nature and even an isolated use was presumptively indecent.<sup>399</sup> In 2006, in a case involving Nicole Richie's expletive, the Commission ruled that the isolated use of shit, "one of the most offensive words in the English language," was also presumptively indecent.<sup>400</sup> These and subsequent pronouncements created great uncertainty among broadcasters as the FCC also found that isolated expletives were generally acceptable in bona fide news programming<sup>401</sup> and that repetitive usage of "fuck" and "shit" could be acceptable if "integral" to a program.<sup>402</sup>

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396. See Middleton & Lee, *supra* note 394.

397. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe" Awards, 18 F.C.C.R. 18859 (Enf. Bur. 2003). Under then-existing FCC policy, fleeting expletives were not punishable, especially where the usage did not literally describe sexual or excretory activities. See, e.g., Anne Marie Squeo, *A Job for Solomon: Was Bono's Blurt a Verb or Modifier?*, Wall St. J., Mar. 11, 2004, at A1, available at <http://online.wsj.com/article/SB107896625981052125.html>.

398. *Fox I*, 556 U.S. at 523 n.4.

399. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe" Awards, 19 F.C.C.R. 4975 (2004) ("[The FCC] deliver[s] a loud and clear decree that gratuitous broadcasts of the F-word will not be tolerated on our airwaves.").

400. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) ("[The FCC] find[s] that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.").

401. *Id.* at ¶¶ 67-73.

402. See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 at 5(2005) (finding that use of "fuck" and "shit" in the film *Saving Private Ryan* was not "gratuitous" or "intended or used "to pander, titillate or shock," but was instead "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations. Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers. In short, the vulgar language here was not gratuitous and could not have been deleted without materially altering the broadcast.").

These aspects of the FCC's broadcast indecency policy first came before the Court in *Fox I*. There, by a 5-4 vote, the Court held that the FCC's new enforcement policy concerning isolated expletives was not arbitrary or capricious under the Administrative Procedure Act (APA), reversing the Second Circuit ruling to the contrary.<sup>403</sup> Because the Second Circuit had only held that the FCC policy violated the APA and did not definitively rule on any constitutional questions, the Supreme Court likewise declined to do so.<sup>404</sup> Nonetheless, many of the briefs filed with the Court were filled with constitutional arguments<sup>405</sup> and constitutional questions and arguments permeated the oral argument.<sup>406</sup> As Justice Ginsburg remarked, temporary resolution of the issues immediately before the Court on the basis of the APA ignored the big First Amendment elephant in the room.<sup>407</sup>

Nonetheless, the Justices gave plenty of hints at how they may ultimately come down on the First Amendment questions. Justice Scalia tipped his hand during the oral argument when he claimed that the presentation of expletives in broadcast programs created a sense that this language was "normal in polite company" and these programs created a "coarsening" effect.<sup>408</sup> In his opinion for the

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403. *Fox I*, 556 U.S. at 529.

404. *Id.*

405. See, e.g., Brief of Respondents NBC Universal, Inc. et al. at 33, *Fox I*, 556 U.S. 502 (2009) (No. 07-582) (it can no longer be claimed that broadcasting is uniquely pervasive); Brief for Respondent Fox Television Stations, Inc. at 43, *Fox I*, 556 U.S. 502 (2009) (No. 07-582) (technological developments, like the V-Chip, now provided less-restrictive alternatives to the FCC's content-based regulation); Brief for the Petitioners at 22, *Fox I*, 556 U.S. 502 (2009) (No. 07-582) (broadcasting is still pervasive); Brief of Amicus Curiae Time Warner Inc. at 10, *Fox I*, 556 U.S. 502 (2009) (No. 07-582) (books, magazines and the Internet are also pervasive and accessible to children, but that does not justify indecency regulations); Reply Brief Amicus Curiae of Morality in Media, Inc. at 31, *Fox I*, 556 U.S. 502 (2009) (No. 07-582) (the advent of cable TV, satellite TV, the Internet and other media "has made a parent's job tougher, not easier").

406. See, e.g., Transcript of Oral Argument at 15-18, *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502 (2009) (No. 07-582) (discussion of broadcasting's diminished protection under the First Amendment and the continuing validity of the *Pacifica* rationales); *id.* at 37-38 (First Amendment plays a special role in the APA context); *id.* at 47-48 (discussion of heckler's veto); *id.* at 51 (discussion of the V-chip).

407. See Transcript of Oral Argument at 27, *Fox I*, 556 U.S. 502 (2009) (No. 07-582). See also *Fox I*, 556 U.S. at 545 (Ginsburg, dissenting) ("there is no way to hide the long shadow the First Amendment casts over what the [FCC] has done).

408. See Transcript of Oral Argument at 49-50, *Fox I*, 556 U.S. 502 (2009) (No. 07-582) (Salia, J.) ("You do, indeed, [hear those words every time you go to a ballgame,] but you don't have them presented as something that is . . .

majority, he decried “foul-mouthed glitteratae from Hollywood”<sup>409</sup> and wrote that the FCC could reasonably conclude that “the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.”<sup>410</sup> There was no need for more stringent review of the FCC’s action under the APA, as any “chilled references” to sexual and excretory material lie at the periphery of First Amendment concern.<sup>411</sup>

Of the separate opinions, Justices Thomas and Ginsburg most openly expressed a willingness to revisit *Pacifica*. Distinct treatment of broadcasting, Justice Thomas wrote, “lacks any textual basis in the constitution” and relies upon a set of “transitory facts” rather than first principles.<sup>412</sup> The factual assumptions underlying broadcasting’s diminished status have been eviscerated by “dramatic technological advances” so that broadcasting was no longer uniquely pervasive or uniquely accessible to children.<sup>413</sup> Justice Ginsburg described *Pacifica* as “tightly cabined” and expressed concern that indecency regulation affected words that are unpalatable to some, but commonplace for others.<sup>414</sup> Moreover, she feared the FCC’s action affected usage of words to convey an emotion or intensify a statement, rather than describe sexual or excretory organs.<sup>415</sup>

Justice Breyer’s dissenting opinion also read *Pacifica* narrowly.<sup>416</sup> For Breyer, the agency failed to adequately explain the need for the change from the old policy, suggesting that the

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normal in polite company, which is what happens when it comes out in . . . television shows. This is a coarsening of manners . . . that is produced . . . by the shows. So . . . you know, . . . I am not persuaded by the argument that people are more accustomed to hearing these words than they were in the past.”).

409. *Fox I*, 556 U.S. at 527.

410. *Id.* at 529-30.

411. *Id.* at 529.

412. *Id.* at 531-32 (Thomas, J., concurring).

413. *Id.* at 533. These “dramatic changes in factual circumstances” might well support a departure from precedent under the prevailing approach to *stare decisis*. *Id.* at 534.

414. *Id.* at 546 (Ginsburg, J., dissenting).

415. *Id.* Justice Stevens likewise believed that *Pacifica* narrowly restricted indecency to instances where words were used to describe sex or excrement in a repetitive manner. “As any golfer who has watched his partner shank a short approach shot knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent.” *Id.* at 543 (Stevens, J., dissenting).

416. *See id.* at 554.

FCC's only "answer to the question, 'Why change?'" is, "We like the new policy better."<sup>417</sup> Most importantly, Breyer noted the absence of empirical support for the FCC's indecency policy.<sup>418</sup> For example, the FCC claimed its new policy offered better protection to children from the "first blow" of broadcast indecency.<sup>419</sup> But Breyer noted that the agency had not even discussed studies suggesting that children under the age of twelve do not understand sexual language and innuendo,<sup>420</sup> an empirical result that clearly undermined the FCC's position about the harm caused by any "first blow."<sup>421</sup> The failure to discuss this "or any other such evidence, while providing no empirical support at all that favors its position," weakened the "logical force" of the FCC's conclusion, Justice Breyer wrote.<sup>422</sup>

Justice Scalia disclaimed any such need for empirical evidence, writing that it "suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives."<sup>423</sup> Congress had made the determination that indecent material is harmful to children, and the Court accepted that judgment in *Pacifica* without any "quantifiable" support.<sup>424</sup> An astute reader will have observed that, relative to *Brown*, Scalia and Breyer have essentially switched sides on this issue.<sup>425</sup> Welcome to the bizarre world of broadcast indecency.

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417. *Id.* at 567 (Breyer, J., dissenting).

418. *Id.* at 564. ("The FCC points to no empirical (or other) evidence to demonstrate that it previously understated the importance of avoiding the 'first blow' delivered by broadcast indecency before viewers (including children) can change the channel).

419. *Id.*

421. *Id.* at 564 (citing Kaye & Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, Mass Communication & Society (Vol. 7) 429, 433, (2004).

421. *Id.* at 564 (citing Kaye & Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, Mass Communication & Society (Vol. 7) 429, 433, (2004).

422. *Id.*

423. *Id.* at 519.

424. *Id.* (Scalia noted the difficulty of obtaining data, stating that one cannot demand a study in which some children are exposed to indecent broadcasts and others are not).

425. See *infra* notes 295-300 & 315-325.

*C. Vague Policies and Fair Notice*

“[T]he way that this policy seems to work, it’s like nobody can use dirty words or nudity except Steven Spielberg and that there’s a lot of room here for FCC enforcement on the basis of what speech they think is kind of nice and proper and good.”

Justice Kagan<sup>426</sup>

On remand following the Supreme Court’s narrow ruling in *Fox I*, the Second Circuit found the FCC’s entire indecency enforcement policy to be void for vagueness.<sup>427</sup> After reviewing various FCC enforcement actions, the appellate court wrote that “[t]here is little rhyme or reason to these decisions and broadcasters are left to guess whether an expletive will be deemed ‘integral’ to a program or whether the FCC will consider a particular broadcast a ‘*bona fide*’ news interview.”<sup>428</sup> According to this view, the FCC’s decisions created serious chilling effects by depriving broadcasters of fair notice.

The government appealed to the Supreme Court, asserting that the FCC’s nuanced policy, emphasizing context, was preferable to a blanket ban on words such as fuck.<sup>429</sup> It argued that broadcast licensees were “highly sophisticated” entities that could reasonably discern, based on prior FCC rulings, when explicit language was punishable.<sup>430</sup> Therefore, the specter of chilling effects would be illusory, or in the least, not nearly as serious as portrayed by the Second Circuit. Moreover, the government claimed, broadcasting still retained special characteristics, such as accessibility to children, which justified indecency regulation.<sup>431</sup> Parental control devices, such as the V-chip, were not effective; the V-chip does not work with radio and the television ratings on which it depends were frequently inaccurate, the government argued.<sup>432</sup>

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426. Transcript of Oral Argument at 53-54, *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307 (2012) (No. 10-1293).

427. *Fox TV, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010) (“We now hold that the FCC’s policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here.”).

428. *Id.* at 332.

429. Brief for the Petitioners at 20, *Fox II*, 132 S.Ct. 2307 (2011) (No. 10-1293).

430. *Id.* at 19-20.

431. *Id.* at 22.

432. *Id.* at 23.

Broadcasters mounted a two-pronged counter-attack: first, repeating the vagueness challenge that had prevailed at the Second Circuit and second, arguing that the media landscape had changed dramatically since 1978's *Pacifica* ruling, thoroughly undermining any foundations that had once supported that decision.<sup>433</sup>

In support of the first, broadcasters cited as contradictory various FCC rulings on explicit language, noting the FCC's reasoning in these cases was opaque.<sup>434</sup> The agency merely asserted that certain explicit language was "integral" to *Saving Private Ryan*, for example, without providing "any indication of when or how this exception applies other than at the FCC's caprice."<sup>435</sup> No amount of sophistication "enables broadcasters to predict in advance the FCC's post hoc divination" of whether a broadcast was indecent.<sup>436</sup> In short, vagueness and the ensuing chilling effect on free speech are real concerns where broadcasters are left with few tools to determine indecency *ex ante*.

In support of the second, the broadcasters claimed that children today access a wide range of media outlets, such as cable, featuring sexually-explicit content; at the same time, the V-chip and other technologies allow parents to assert more control than was imaginable in 1978.<sup>437</sup> *Pacifica*'s foundations were built on "sand," the broadcasters argued, and the Court should restore to broadcasting the First Amendment protection available to other media.<sup>438</sup> Other media have become equally pervasive as television, they argued, but the current system arbitrarily treats the same speech differently based solely on the medium of delivery from speaker to listener.<sup>439</sup>

During the oral argument, several Justices indicated their discomfort with overturning *Pacifica*.<sup>440</sup> Justice Kennedy

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433. Brief of Respondents Fox Television Stations, Inc., et al. at 13-15, *Fox II*, 132 S.Ct. 2307 (2011) (No. 10-1293).

434. *Id.* at 43-47.

435. *Id.* at 45-46.

436. *Id.* at 48.

437. *Id.* at 21-23.

438. *Id.* at 17-18.

439. See, e.g., Transcript of Oral Argument at 27-28, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293) (counsel for the broadcasters argued that "what has happened over the 30 years with respect to the broadcast side of television is a very fundamental change. Cable is now equally pervasive. Cable is now equally accessible to TV, satellite equally accessible to TV.").

440. See Robert Barnes, *Supreme Court weighs technology, culture in FCC Power to Monitor Airwaves*, Wash. Post (Jan. 10, 2012), [http://articles.washingtonpost.com/2012-01-10/politics/35438642\\_1\\_airwaves-fcc-networks](http://articles.washingtonpost.com/2012-01-10/politics/35438642_1_airwaves-fcc-networks) (stating that the Justices "seemed reluctant to find that any government

wondered if there was any value in having “a particular segment of the media with different standards than other segments . . . . Just because it’s an important symbol for our society that we aspire to a culture that’s not vulgar . . . in a very small segment?”<sup>441</sup> Justice Scalia chimed in: “sign me up as supporting Justice Kennedy’s notion that this has a symbolic value, just as we require a certain modicum of dress for the people that attend this Court . . . . [T]hese are public airwaves, the government is entitled to insist upon a certain modicum of decency.”<sup>442</sup> Chief Justice Roberts thought the broadcaster’s argument about the proliferation sexual content on other media outlets, such as cable, “cuts both ways.”<sup>443</sup> There were “800 channels” where people could turn for nudity, the Chief Justice claimed.<sup>444</sup> “All we are asking for,” Roberts said before correcting himself, “what the government is asking for, is a few channels” without nudity and the “‘S’ word, the ‘F’ word.”<sup>445</sup> Meanwhile, Justice Breyer was searching for a narrower path than the broadcasters were seeking: “Does this case in front of us really call for the earthshaking decision that you all have argued for . . . in the briefs?”<sup>446</sup>

Oddly, the most cautious voice was that of Justice Kennedy. He feared that the “inevitable consequence” of overturning *Pacifica* was that “every celebrity or want to be celebrity that’s interviewed can feel free to use . . . one of these words. We will just expect it as a matter of course, if you prevail.”<sup>447</sup> Solicitor General Verrilli drew upon this fear in in his rebuttal, stating “the risk of a race to

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control over broadcast indecency was forbidden by the First Amendment”); Adam Liptak, *TV Decency Is a Puzzler for Justices*, N.Y. Times, Jan. 11, 2012, at B1 (“there seemed to be little sentiment for a sweeping overhaul of the current system”), *available at* <http://www.nytimes.com/2012/01/11/business/media/supreme-court-weighs-relevance-of-decades-old-broadcast-decency-rules.html>.

441. Transcript of Oral Argument at 18, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293).

442. *Id.* at 22. *But see Cohen v. California*, 403 U.S. 15 (overturning as unconstitutional under the First Amendment the conviction, for the offense of disturbing the peace, of Defendant, who had worn a jacket bearing the words “Fuck the Draft” into a courthouse, where women and children were present).

443. Transcript of Oral Argument at 28, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293).

444. *Id.*

445. *Id.*

446. *Id.* at 44.

447. *Id.* at 34-35. *See also id.* at 29 (Justice Alito asks if a ruling in favor of broadcasters will result in “seeing a lot of people parading around in the nude” in broadcasts).

the bottom is real . . . .”<sup>448</sup> And, drawing upon the views of Justice Scalia expressed in the earlier *Fox I* oral argument, the Solicitor General argued that allowing expletives on broadcast television portrays their use as “an appropriate means of communication” in a way that doesn’t happen “when your 13-year-old brother . . . or some bully in the schoolyard is saying it to you.”<sup>449</sup>

Despite all the discussion in the briefs and during the oral argument about the meaning of the First Amendment in the broadcasting context, the Court in *Fox II* took a path that avoided any resolution of First Amendment questions. The Court ruled 8-0 that, as applied to the broadcasts at issue, the FCC failed to give Fox and ABC fair notice that fleeting expletives and momentary nudity could be found indecent.<sup>450</sup> FCC indecency policy at the time of Fox’s broadcasts of the awards shows containing the isolated expletives of Cher and Nicole Richie required repetition of expletives. Similarly, when ABC in 2003 aired an episode of *NYPD Blue* containing seven seconds of nudity, FCC policy treated fleeting nudity as not indecent. Sanctioning the earlier broadcasts under the FCC’s new policies adopted in 2004 failed to give broadcasters fair notice of what is prohibited.<sup>451</sup> In other words, even if the FCC could punish broadcasters for fleeting expletives and nudity in the future, it could not do so here.

Justice Kennedy made three observations about the narrow scope of the ruling. First, despite the arguments put forward by the broadcasters and the government, resolving the case on due process grounds meant it was “unnecessary to reconsider *Pacifica* at this time.”<sup>452</sup> Second, as the Court held that the broadcasters lacked notice that their broadcasts could be found indecent, it was unnecessary to consider the constitutionality of the FCC’s current indecency policy under the First Amendment.<sup>453</sup> Third, the

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448. Transcript of Oral Argument at 53, *Fox I*, 556 U.S. 502 (2009) (No. 07–582).

449. Transcript of Oral Argument at 23-24, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293).

450. *Fox II*, 132 S. Ct. at 2318, 2320.

451. *Id.*

452. *Id.* at 2320.

453. *Fox II*, 132 S. Ct. at 2320. Chief Justice Roberts might be thought to have tipped his hand on the constitutionality of the fleeting images policy in his concurring opinion in the Janet Jackson “wardrobe malfunction” case, *FCC v. CBS Corporation*, 132 S. Ct. 2677 (2012) (Roberts, C.J., concurring in the denial of certiorari). Chief Justice Roberts noted that the broadcast reached “millions of impressionable children” and that “a picture is worth a thousand words . . . .” *Id.* at 2678.

decision left the FCC free to modify its current indecency policy “in light of the public interest and applicable legal requirements.”<sup>454</sup> In other words, the Court decided the case without resolving anything of substance.

Why did the Court avoid addressing *Pacifica*?<sup>455</sup> The most likely explanation is tied to the recusal of Justice Sotomayor.<sup>456</sup> Her recusal created the possibility of a 4-4 split which would leave intact the Second Circuit’s ruling voiding the FCC’s entire indecency policy.<sup>457</sup> Although Sotomayor’s views on this issue are

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454. *Fox II*, 132 S. Ct. at 2320.

455. Only Justice Ginsburg addressed the correctness of *Pacifica*, saying it was “wrong” when it was issued, and that “[t]ime, technological advances, and the [FCC]’s untenable rulings” show why it should be reconsidered. *Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring in the judgment). In a speech delivered shortly before the *Fox II* ruling was announced, Justice Ginsburg wryly suggested that the justices’ popular culture knowledge may have been lacking: “The Paris Hiltons of this world, my law clerks told me, eagerly await this decision . . . It is beyond my comprehension, I told my clerks, how the F.C.C. can claim jurisdiction to ban words spoken in a hotel on French soil.” Adam Liptak, *For Now, 2 Networks Win Ruling on Decency*, N.Y. Times, June 22, 2012, at B1, available at [http://www.nytimes.com/2012/06/22/business/media/justices-reject-indecency-fines-on-narrow-grounds.html?\\_r=0](http://www.nytimes.com/2012/06/22/business/media/justices-reject-indecency-fines-on-narrow-grounds.html?_r=0) (online version published on June 21, 2012 under the headline “*Supreme Court Rejects F.C.C. Fines for Indecency*”).

456. *Fox II*, 132 S. Ct. at 2320. Justice Sotomayor had been a judge on the Court of Appeals for the Second Circuit bench when the decision under appeal was being considered, so she did not participate in the Supreme Court proceedings. See e.g., Case Files: Federal Communications Commission v. Fox Television Stations, Inc., SCOTUSblog, <http://www.scotusblog.com/case-files/cases/federal-communications-commission-v-fox-television-stations-inc/> (last visited Feb. 23, 2013).

457. Based on *Fox I* and the comments raised during the *Fox II* oral argument, the most likely votes against retaining *Pacifica* would be Thomas, Ginsburg and Kagan. The most likely votes for retaining *Pacifica* would be Roberts, Scalia, and Alito. The most difficult votes to predict are those of Kennedy and Breyer. Kennedy has a firm commitment to free expression, but his comments during the *Fox II* oral argument betrayed some sympathy for the government’s objective. See, e.g., Transcript of Oral Argument at 34-35, *Fox II*, 132 S.Ct. 2307 (2011) (No. 10-1293) (“But isn’t the . . . inevitable consequence, or this precise consequence that you’re arguing for on this fleeting expletive portion of this case, that every celebrity or want-to-be celebrity that’s interviewed can feel free to use . . . one of these words? We will just expect it as a matter of course, if you prevail. Isn’t that the necessary consequence of this case? . . . [I]sn’t it inevitable that this will happen?”). Justice Breyer expressed reservations about the empirical support for the FCC’s policy in *Fox I*. 556 U.S. 502, 547 (2009) (Breyer, J., dissenting.) (“The FCC points to no empirical (or other) evidence to demonstrate that it previously understated the importance of avoiding the ‘first blow’ [of indecent content.] Like the majority, I do not believe that an agency must always conduct full empirical studies of such

unknown, without her participation, it seems that there would not be five votes in favor of either overturning or retaining *Pacifica*. Thus, the one point that all participating Justices could agree upon was that the FCC's shift deprived broadcasters of fair notice. Given that it took five months for the Court to issue its very brief boilerplate opinion, it is fair to speculate that there was a protracted dialogue among the justices to avoid a 4-4 split.<sup>458</sup>

Even though the approach taken by the Court contrasts sharply with *Brown* and *Citizens United*, *Fox II* should not be seen as signaling a renewed interest in deciding First Amendment cases in the narrowest possible manner. For example, in *Knox v. Service Employees International Union*, a First Amendment case argued and decided on the same dates as *Fox II*, the Court issued a broad opinion limiting the power of unions to collect mandatory fees from non-members to fund the union's political activities.<sup>459</sup> According to Justice Sotomayor, the *Knox* majority proceeded "quite unnecessarily, to reach significant constitutional issues not contained in the questions presented, briefed, or argued."<sup>460</sup> Indeed, if anything, the Roberts Court appears to have a penchant

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matters. . . . But the FCC could have referred to, and explained, relevant empirical studies . . . ."). However, during the oral argument in *Fox II* he looked for a narrower path. See Transcript of Oral Argument at 31-32, *Fox II*, 132 S.Ct. 2307 (2011) (No. 10-1293) ("We don't have to overrule *Pacifica*. . . . [Y]ou made that argument in the Second Circuit. What I'm fishing with. . . is, do we have to reach that . . . argument? . . . [I]t's . . . very, very broad."). Both could have gone either way on this issue, but Kennedy's stronger commitment to free expression makes him more likely to overcome his reservations and vote to abandon *Pacifica*, especially with the availability of technologies like the V-chip. See, e.g. *United States v. Playboy Entm't. Group, Inc.*, 529 U.S. 803, 826 (2000) (Kennedy, J.) (stating that the "history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."). Eugene Volokh speculates that Ginsburg, Kagan, Kennedy and Thomas would have voted to overturn *Pacifica*; voting to retain *Pacifica* would be Roberts, Scalia, Alito and Breyer. Eugene Volokh, *FCC v. Fox Television Decided Narrowly on Lack-of-Fair-Notice Grounds*, The Volokh Conspiracy (June 21, 2012, 11:31 a.m.), <http://www.volokh.com/2012/06/21/fcc-v-fox-television-decided-narrowly-on-lack-of-fair-notice-grounds/>.

458. See Eugene Volokh, *FCC v. Fox Television Decided Narrowly on Lack-of-Fair-Notice Grounds*, The Volokh Conspiracy (June 21, 2012, 11:31 a.m.), <http://www.volokh.com/2012/06/21/fcc-v-fox-television-decided-narrowly-on-lack-of-fair-notice-grounds/> ("if the Justices just wanted to write a narrow opinion like this, they probably could have done it pretty quickly, especially given their unanimity on the narrow lack-of-fair-notice question").

459. *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012).

460. *Id.* at 2297 (Sotomayor, J., concurring in the judgment).

for aggressively engaging the First Amendment, issuing bold, decisive rulings one way<sup>461</sup> or the other.<sup>462</sup>

A broader ruling in *Fox II* would have been necessary if a majority of participating justices thought the case presented a serious threat to the First Amendment. Consider *Citizens United*, where the majority perceived the prevailing precedent, *Austin*,<sup>463</sup> as posing a threat to First Amendment rights generally, even outside its specific factual context.<sup>464</sup> In contrast, *Pacifica* has been narrowly confined to the broadcasting context and the Court has actually rejected its application to telephone services,<sup>465</sup> the

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461. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (holding that the First Amendment barred plaintiff from pursuing a claim for intentional infliction of emotional distress against defendants, who had peacefully and lawfully protested near the funeral of plaintiff's son with signs celebrating his death and criticizing America and the Catholic Church, because defendants' speech was, *inter alia*, about matters of public concern), *United States v. Alvarez*, 132 S. Ct. 2537 (U.S. 2012) (holding that the government could not criminalize the making of false statements about having received the Congressional Medal of Honor or certain other military honors, where the overly broad statutory prohibition was premised on mere falsity alone); *United States v. Stevens*, 559 U.S. 460 (2010) (striking down law prohibiting certain patently offensive depictions of animal cruelty, although the statute expressly exempted any such depiction with serious religious, political, scientific, educational, journalistic, historical, or artistic value); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (striking down a prescription confidentiality law that which restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down a public election campaign financing system under which publically funded candidates would receive disbursements based upon expenditures by their privately funded opponents).

462. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (holding that a statute prohibiting the provision of material support or resources to certain foreign organizations that engage in terrorist activity could be constitutionally applied even to persons who provide training about international human rights law or nonviolent political advocacy); *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that a public high school student could be suspended for displaying a banner with the message "BONG HiTS 4 JESUS" at a school-sanctioned and school-supervised event, because the banner could be reasonably interpreted as promoting illegal drug use).

463. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

464. *Citizens United*, 130 S. Ct. at 923 (2010) (Roberts, C.J., concurring) (stating that *Austin* is difficult to confine to its facts, "and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly . . . the cost of giving it *stare decisis* effect are unusually high."). See also *id.* at 905 (Kennedy, J.) (stating that *Austin's* anti-distortion rationale could produce the "dangerous, and unacceptable, consequence" of banning political speech by media corporations).

465. *Sable Communications v. FCC*, 492 U.S. 115 (1989) (holding that a ban on indecent interstate commercial telephone communications violated the

Internet,<sup>466</sup> and cable.<sup>467</sup> Secondly, the *Citizens United* Court believed it was confronting conflicting lines of precedent: “a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”<sup>468</sup> With *Pacifica*, there are no conflicting lines of precedent treating broadcasting like other media. There is, of course, *Burstyn*, but as *Brown* demonstrates, that precedent appears to only come into play when fully protected speech is at issue.

Even if the *Fox II* Court had addressed the arguments about *Pacifica*, the anti-free-speech value preferences displayed during the oral argument likely would have reemerged. Take, for example, the argument that broadcast television is no longer uniquely pervasive. The statistics are undeniable: only a small portion of households currently have standard broadcast antennas, while eighty-seven percent of households are cable or satellite subscribers.<sup>469</sup> Yet, Chief Justice Roberts responded to this change by asserting that the proliferation of “800 channels” available to those interested in profanity and nudity *increased* the need for a set of broadcast channels free of indecency,<sup>470</sup> or else at least decreased any harm to free speech that the restrictions might otherwise create. This turns *Pacifica* on its head: instead of justifying indecency regulation with broadcasting’s unique pervasiveness, the so-called pervasiveness of cable channels with nudity is now claimed as a justification for restricting the freedom of broadcasters. This veritable Catch 22 is especially rich because

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First Amendment because prohibiting adult access to telephone messages which are indecent but not obscene exceeds what is necessary to serve the compelling governmental interest in limiting the access of minors to such messages).

466. *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that a ban on transmission of “indecent” or certain “patently offensive” communications to minors violated the First Amendment because of the over-breadth and vagueness of the statute).

467. *Playboy*, 529 U.S. 803 (2000) (holding that restricting transmission of cable television channels primarily dedicated to sexually oriented programming violated the First Amendment).

468. *Citizens United*, 130 S. Ct. 876 at 903 (2010).

469. Although later data puts this percentage at eighty-nine percent – see In Re Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 24 F.C.C.R. 11,413, ¶ 11 (Aug. 31, 2009) – both parties in *Fox II* cited the eighty-seven percent figure. See Brief of Respondents Fox Television Stations, Inc., et al. at 18, *Fox II*, 132 S.Ct. 2307 (No. 10-1293); Brief for the Petitioners at 44, *Fox II*, 132 S. Ct. 2307 (No. 10-1293).

470. Transcript of Oral Argument at 28, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293).

Roberts wrote in his concurring opinion in *Citizens United* that the *stare decisis* effect of a particular precedent is diminished “when the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.”<sup>471</sup>

Just as Roberts’ positions in *Citizens United* and *Fox II* are at odds, so too are Scalia’s positions in *Brown* and *Fox II*. Take, for example, the broadcasters’ argument that children’s access to indecent words and sexual material in other media means that the government’s regulation of broadcasting is wildly underinclusive.<sup>472</sup> Scalia’s opinion in *Brown* made essentially the same argument with regard to California’s regulation of violent content in video games. There, the underinclusiveness would have been determinative and fatal on its own, because such underinclusiveness “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”<sup>473</sup> Scalia took the opposite stance in *Fox I* and *Fox II*, where, he asserted at oral argument, there was a special government interest in policing the airwaves to maintain the appropriate level of decorum, lest profanity and nudity teach bad manners and coarsen society.<sup>474</sup> Simply stated, Justice Scalia believed that indecent language was just not appropriate on broadcasting. This position seemed to have little to do with technology attributes of broadcasting like spectrum scarcity or accessibility, and much more to do with the Justice’s own cultural expectations.

Scalia took it one step further when, at oral arguments, he expressed strong support for the idea that the FCC’s content-based

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471. *Citizens United*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring).

472. See, e.g., Brief of Respondents Fox Television Stations, Inc., et al. at 33, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293). (“Singling out broadcasters for indecency enforcement in an attempt to shield children from momentary exposure to indecent words or images is not just ill-tailored to achieve that asserted interest; it is quixotic. Children today are exposed to potentially offensive words and images from a vast array of sources other than broadcast television. They can encounter such words or images on non-broadcast channels; in books and magazines; on the Internet, DVDs, or video games; on playgrounds, at sporting events, or simply upon overhearing an adult conversation.”).

473. Brief of Respondents Fox Television Stations, Inc., et al. at 33, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293) (citing *Brown*, 131 S.Ct. at 2740).

474. See, e.g., Transcript of Oral Argument at 50-51, *Fox I*, 556 U.S. 502 (2009) (No. 07-582).

regulation of broadcast television had important symbolic value.<sup>475</sup> According to this view, although the government could do little to prevent private citizens from using foul language themselves, it could promote politeness by banning such content from broadcasting.<sup>476</sup> This would be a truly extraordinary and expansive rationale in the context of First Amendment rights; if endorsed by the Court, this perverse argument would tremendously expand the government's censorship power. First of all, factual questions such as whether there is proof of actual harm to children from exposure to expletives, and the efficacy of alternatives, such as the V-chip, would be readily bypassed by this symbolic value argument. Secondly, the symbolic value argument also appears to be limitless. Certainly there is symbolic value in restricting the political speech of profit-seeking corporations simply as a symbol that as a society we aspire to a political dialogue that has not been vulgarized by business interests.<sup>477</sup> Likewise, barring the sale of interactive violent video games sends a message to children that violent conduct is not appropriate behavior.<sup>478</sup> Similarly, there is symbolic value in punishing false claims about the receipt of military medals simply as a symbol that as a society we value telling the truth, or that we honor our military veterans.<sup>479</sup> But the First Amendment demands more. Or at least it does outside of the realm of broadcast indecency regulation.

There is also something quaint about the focus on broadcast indecency, a throwback to a world that is rapidly shrinking, especially in the lives of children. As a major study of media in the lives of children eight to eighteen recently found, mobile and online media have changed the amount of time children spend watching television and *how* they watch it.<sup>480</sup> The amount of time

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475. Transcript of Oral Argument at 22, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293) (“[S]ign me up as supporting Justice Kennedy’s notion that this has a symbolic value, just as we require a certain modicum of dress for the people that attend this Court and the people that attend other Federal courts. It’s a symbolic matter. And if this is – if these are public airwaves, the government is entitled to insist upon a certain modicum of decency.”)

476. See, e.g., Transcript of Oral Argument at 22-23, *Fox II*, 132 S. Ct. 2307 (2011) (No. 10-1293); Transcript of Oral Argument at 49-50, *Fox I*.

477. *Citizens United*, 130 S. Ct. 876 (2010).

478. *Brown*, 131 S.Ct. 2729 (2011).

479. *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (striking down federal statute punishing false statements made about having received certain US military decorations or medals).

480. See Victoria Rideout, Ulla G. Foehr & Donald F. Roberts, Kaiser Family Foundation, *Generation M2: Media in the Lives of 8-to18-Year-Olds* 3, 15-17 (Jan. 2010) available at <http://www.kff.org/entmedia/upload/8010.pdf>

spent watching regularly scheduled programming on a television set has declined, while daily television consumption has increased due to viewing television via the Internet, on cell phones, and iPods.<sup>481</sup> Yet of these distribution methods, only broadcast television is subject to indecency regulation. Given this trend, there is something odd about a regulatory structure that purports to prioritize the well-being of children in a delivery system that is becoming less important to children. This is not to say that the answer is to regulate indecency across all delivery platforms. It is to say that indecency is not a problem for the government to solve, to borrow from Justice Scalia's *Brown* opinion.<sup>482</sup> As the Court in *Playboy* wrote, "[w]hat the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."<sup>483</sup>

#### D. Epilogue

There appears to be little appetite in the Obama administration to address the issue of broadcast indecency.<sup>484</sup> In the first official

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(finding that, when compared to data gathered in earlier studies, survey respondents reported watching more television, but that this consisted of more on-demand television and less live programming).

481. *Id.*

482. See also Robert M. O'Neil, *Indecency, the First Amendment and the FCC*, 60 Fed. Comm. L. J. 12 (2008) (expressing concern at the prospect of indecency regulation being extended beyond broadcast television); Reed Hundt, *Regulating Indecency: The Federal Communications Commission's Threat to the First Amendment*, 4 Duke L. & Tech. Rev. 1 (2005) (former FCC chairman arguing that the FCC's indecency "crackdown" threatens free expression and diversity); Jennifer E. Jones, *The Discriminatory Effect of Protecting America's Children*, 3 Mod. Am. 3 (2007) (arguing that FCC indecency prosecutions, while purporting to protect children, in fact just impose cultural homogeneity on broadcasting).

483. *Playboy*, 529 U.S. at 818.

484. The impact of the FCC chairman's party affiliation on broadcast indecency enforcement is significant. In the period 1969-2004, when the FCC was headed by a Republican, there were 53 proposed fines; under Democratic leadership the FCC proposed 39 fines. The average proposed fine during the tenure of Republican chairmen was \$98,667, while the average proposed fine when a Democrat chaired the agency was \$39,096. See *Graphic: The FCC vs. Indecency*, Wash. Post (Nov. 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/custom/2005/10/28/2005102800826.html>. This data does not include actions, such as a proposed fine of \$3.6 million for an episode of "Without A Trace," taken by the FCC during 2006-2008 when Republican

action in response to *Fox II*, the Department of Justice on September 21, 2012 dropped efforts to collect a fine from Fox for a 2003 program that featured whipped cream, spanking and pixilated images of topless strippers.<sup>485</sup> FCC chair Julius Genachowski announced that he had directed the agency's enforcement bureau to "focus its resources on the strongest cases that involve egregious indecency violations."<sup>486</sup> Accordingly, the agency on April 1, 2013 announced that it had recently reduced its backlog of pending indecency complaints by dismissing more than one million complaints, principally by closing cases that were beyond the statute of limitations, contained insufficient information, or were foreclosed by precedent.<sup>487</sup> The agency also announced it was seeking public comment on whether it should make changes to its indecency policies or maintain them as they are.<sup>488</sup> Under Genachowski, who became FCC chairman in 2009, the agency's enforcement bureau has yet to find a single program to be indecent.<sup>489</sup> For the foreseeable future, and unless the political climate changes dramatically, then, it seems unlikely that the Court will soon be presented with another opportunity to revisit *Pacifica*. In the mean-time, *Pacifica* remains controlling precedent, even as its rationales become increasingly anachronistic and untenable in the face of technological and marketplace changes.

#### IV. RECONCILING CITIZENS UNITED, BROWN, AND FOX

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Kevin Martin was chair. See, e.g., Amy Schatz, *FCC Levies Record Indecency Fine on CBS Show*, Wall St. J., (Mar. 16, 2006), <http://online.wsj.com/article/SB114245387453999194.html>.

485. Amy Schatz, *U.S. Drops Efforts to Collect 2003 Indecency Fine from Fox*, Wall St. J. (September 21, 2012, 6:45 PM) <http://online.wsj.com/article/SB10000872396390444165804578010831575210340.html>.

486. *Id.*

487. *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, DA 13-581, (Apr. 1, 2013).

488. *Id.*

489. During Genachowski's tenure, the agency's Enforcement Bureau issued one Notice of Apparent Liability for Forfeiture triggered by an indecency complaint, but the basis for the NAL was Fox's failure to respond to an FCC letter of inquiry. See *Fox Television Stations, Inc., Notice of Apparent Liability for Forfeiture*, No. EB-10-IH-1831 (Enf. Bur. June 3, 2010).

One of the dominant themes in both *Citizens United* and *Brown* is distrust of government. Yet several Justices in the *Fox I* and *Fox II* oral arguments feared the prospect of broadcasters unchained from government regulation. Simply stated, this view says that broadcasters who deviate from majoritarian standards do not deserve or cannot be trusted with full First Amendment protection. That is a startling proposition given the protection afforded the members of the Westboro Baptist Church<sup>490</sup> and myriad others who deviate from social norms.<sup>491</sup>

This Article began by noting the strong statements about technological neutrality made by Justice Kennedy in *Citizens United*. By placing *Citizens United* alongside *Fox I* and *II*, the following is made clear: political speech is too important to be restricted by government, even on broadcast television; on the other hand, indecent content on broadcast television is apparently too dangerous to be left unregulated. The hyperbole surrounding the fear of broadcasters is shown by the Solicitor General, who warned ominously in *Fox I* that, if the broadcast networks won, Big Bird could drop the “F-bomb” on Sesame Street.<sup>492</sup> American broadcast television would become a dystopian wasteland, and no family could turn on a television to any channel without risking being “bombarded” by indecent language.<sup>493</sup> It did not matter that broadcasters were merely seeking the same First Amendment protections enjoyed by cable television, or that cable television includes a wide variety of family-friendly channels and programs

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490. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (providing First Amendment protection to those who protest near military funerals claiming the deaths are God’s punishment for American immorality).

491. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537 (U.S. 2012) (overturning the conviction of defendant who had publically made false statements about having received the Congressional Medal of Honor); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that public figure plaintiff could not pursue tort claims against defendant for publishing an outrageous and insulting parody ad, because, although the parody might be patently offensive and even intended to inflict emotional distress, because the parody could not reasonably be interpreted as stating actual facts about the public figure plaintiff); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that defendant’s conviction for burning an American flag at a protest rally could not be tolerated by the First Amendment); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (holding that defendants could not be prosecuted for burning a cross on a black family’s lawn because the “fighting words” ordinance he allegedly violated was content-based in that it only prohibited certain speech on the basis of the viewpoint expressed).

492. Transcript of Oral Argument at 18, *Fox I*, 556 U.S. 502 (2009) (No. 07–582).

493. *Id.*

that are generally free from “indecent” without any government intervention. Because, the Solicitor General argued, there’s a “societal expectation [about broadcast media] that has grown up . . . since *Pacifica*. And it would be a remarkable thing” to move to a world in which broadcast media were treated like other media.<sup>494</sup>

But the *Pacifica* rationales for broadcast regulation were not convincing in 1978 and are even less defensible today, in a world in which even children have access to an array of textual and audiovisual content through cable and satellite television, computers, and even mobile phones. In fact, if the “pervasive” and “accessible to children” rationales of *Pacifica* had any legs, they would actually allow the government to expand its indecency regulations to other media. The fact that the Court, when faced with government attempts to do just that, has struck down the laws in question, betrays the doctrinal weakness of *Pacifica*.<sup>495</sup> And yet, regardless of dramatic changes to the modern media marketplace over the last 35 years, *Pacifica* remains undisturbed. Why is this? It has something to do with the very specific overlap of broadcasting and indecent sexual content. Social norms about proper language and behavior on broadcast media remain deeply embedded among some members of the Court. But outside this one area, a different norm carries the day: the First Amendment’s strong presumption against any attempt to regulate speech on the basis of content.

As *Citizens United* and *Brown* show, the significance of technology questions recedes when fully protected expression is at issue. For example, this Article demonstrates that *Brown* is more about violent content than video games. Likewise, *Citizens United* was primarily about political speech, not television ads. In both cases, the government’s content regulation would have faced strict scrutiny, regardless of the particular medium or media the government chose to target. This is the teaching of *Burstyn*, that the protections of the First Amendment do not vary with a speaker’s choice of medium or technology, and that the government does not get a free pass if it targets a medium that is not ink on paper.

But, judicial inertia is not easily overcome. Recall that California defended its video game law by claiming that it was

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494. *Id.*

495. See, e.g., *Playboy*, 529 U.S. 803 (2000) (cable television); *Reno v. ACLU*, 521 U.S. 844 (1997) (internet); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989) (telephonic communications).

similar to an obscenity restriction. Justice Kennedy made the following comment during the *Brown* oral argument:

The problem is, is that for generations there has been a societal consensus about sexual material. Sex and violence have both been around for a long time, but there is a societal consensus about what's offensive for sexual material and there are judicial discussions on it. . . . But you're asking us to go into an entirely new area where there is no consensus, no judicial opinions.<sup>496</sup>

In contrast, the broadcasters in *Fox II* were trying to get the Court to abandon a regulatory structure described by Justice Kagan as "something that's very historically grounded." She added,

We've had this for decades and decades that the broadcast is—the broadcaster is treated differently. It seems to work and . . . it seems to be a good thing that there is some safe haven, even if the old technological bases for that safe haven don't exist anymore. So why not just keep it as it is?<sup>497</sup>

As was emphasized during the *Fox I* oral argument, there are community standards, or social expectations, that have "grown up" around broadcasting.<sup>498</sup> Upending those expectations would be a dramatic move, perhaps as dramatic as suddenly allowing government free rein to ban the sale of violent entertainment to minors. In *Citizens United* the Court was faced with a choice similar to that faced by the court in *Fox I* and *Fox II*. There, where it chose the bold move of overruling precedent, the majority was confronting a content-based restriction on political speech, supported by a justification which would allow the government to expand its censorship to a logical extreme that would include not only television, but even books and everything in-between. In contrast, in *Fox II*, the government sought to regulate indecent sexual content, which while protected, is not perceived to be of the

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496. Transcript of Oral Argument at 14-15, *Brown*, 131 S. Ct. 2729 (2009) (No. 08-1448).

497. Transcript of Oral Argument at 26, *Fox II*, 132 S.Ct. 2307 (2011) (No. 10-1293).

498. Transcript of Oral Argument at 14-15, 18, *Fox I*, 556 U.S. 502 (2009) (No. 07-582).

same high value as political speech. Furthermore, *Pacifica* had been tightly cabined to broadcasting and posed no realistic threat of supporting the spread of government censorship to other media. Against this background, Kagan's position took the day: even if *Pacifica* is wrong, it hasn't caused much harm, so why not just keep it as it is? No sense rocking the boat and upsetting the social expectations of the broadcast audience and politicians in the name of logical or doctrinal consistency.

This Article began by noting the incoherence in the Court's assessment of technology-based content regulations. The promise of *Citizens United* and *Brown* is undercut, perhaps temporarily, by the *Fox I* and *Fox II* cases. But the promise of a reading of the First Amendment that treats all media as equally important, that regards the speaker and audience interplay as one that should not be restricted by the government, and disfavors governmental efforts to channel speech to preferred outlets and away from dangerous outlets, is worth pursuing. That principle was overlooked in the *Fox* decisions. The First Amendment properly protects a speaker's choice of medium of communication, just as surely as it protects the content of communication.