



## Still 'Dirty' After All These Years

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Thirty years ago this week, the Supreme Court handed down its landmark First Amendment decision, *FCC v. Pacifica Foundation*. Spurred by a Pacifica Foundation radio station airing George Carlin's infamous "seven dirty words" monologue, a splintered 5-4 court held that the Federal Communications Commission (FCC) was justified in levying fines on broadcasters who aired indecent content during daytime and early evening hours.

The logic behind *Pacifica* has always been shaky. The so-called "pervasiveness" concept articulated in *Pacifica*—the notion that broadcasting was "uniquely pervasive" and an "intruder" in the home, and therefore demanded special, artificial content restrictions—is easily contradicted by the fact that no one forces parents to bring televisions or radios into their homes.

*Pacifica's* pervasiveness rationale has been eroded by modern media developments. If the goal was to protect children from potentially objectionable content, then *Pacifica* is hopelessly out of touch with modern marketplace realities. In a world of media abundance and technological convergence, children simply consume less broadcast. A 2006 Bolt Media survey found that almost 80 percent of 16- to 18-year-olds were unable to name the "Big Four" TV broadcast networks. For today's youth, it's all about social networking, video games, instant messaging, YouTube, podcasts, and digital downloads.

*Pacifica's* pervasiveness rationale fails today for another reason: New content screening and tailoring technologies have empowered parents to better dictate what their families see and hear. The *Pacifica* opinion argued that broadcast signals represent an "intruder" in the home because "prior warnings cannot completely protect the listener or viewer from unexpected program content."

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The viewing or listening experience used to be a passive affair and—with the exception of the off button—consumers had very few “parental controls” at their disposal. Today, by contrast, parents have the tools to control what their children watch (even if the children “tune in and out” at will), and parents have abundant “prior warnings” about program content thanks to the existence of industry rating and labeling systems, independent review sites, electronic program guides, and so on. Parents can block content they consider objectionable by using the V-Chip embedded in every television, set-top box blocking controls offered by every cable and satellite company, widely-available online filtering and screening tools, and many other media monitoring and blocking tools on the market today.

Better yet, since *Pacifica*, the rise of a new class of time-shifting media technologies—VCRs and DVD players, personal video recorders, and various computer-based tools—has given families the ability to accumulate digital libraries of preferred programming in line with their values and then determine, *in advance*, what their children will be allowed to see or hear.

Brushing aside this shifting media landscape and the wealth of new “user empowerment” technology, the FCC has become more aggressive in its enforcement of the indecency standard to the point where the agency has threatened to fine networks for airing a single slip-of-the tongue profanity. Fox Television took the FCC to court over the new aggressive policy and won in a case now pending before the Supreme Court. Although the case may not be decided on constitutional grounds, the networks and their supporters squarely call into question the continued viability of *Pacifica*.

Critically, in the past twelve years the Supreme Court has consistently held that “parental empowerment” tools, such as the V-chip and set-top boxes, are a constitutionally “less restrictive” alternative to direct government censorship. In the context of the Internet and satellite video delivery, the fact that parents have tools to control their children’s access to content means the government is no longer at liberty to substitute itself for the parents. As the lower court hearing the Fox case noted in its decision against the FCC, “technological advances may obviate the constitutional legitimacy of the FCC’s robust oversight” of broadcast speech.

The “media-as-intruder” logic of *Pacifica* fails; parents can accurately tailor media experiences to their individual household preferences. As society and First Amendment jurisprudence adjusts to a world of technological convergence and choice *Pacifica* should and will continue to wither in relevance, to be replaced by the use of parental empowerment tools and robust First Amendment protections.