FCC v. Fox and the Future of the First Amendment in the Information Age

*By Adam Thierer**

On November 4th, 2008, the Supreme Court heard oral arguments in the potentially historic free speech case of *Federal Communications Commission v. Fox Television Stations, Inc.* This case, which originated in the Second Circuit Court of Appeals, deals with the FCC's new policy for "fleeting expletives" on broadcast television. The FCC lost and appealed to the Supreme Court. By contrast, the so-called "Janet Jackson case"—*CBS v. FCC*—was heard in the Third Circuit Court of Appeals. The FCC also lost that case and has also petitioned the Supreme Court to review the lower court's ruling.

These two cases reflect an old and odd tension in American media policy and First Amendment jurisprudence. Words and images presented over one medium—in this case broadcast television—are regulated differently than when transmitted through any other media platform (such as newspapers, cable TV, DVDs, or the Internet). Various rationales have been put forward in support of this asymmetrical regulatory standard. Those rationales have always been weak, however. Worse yet, they have opened the door to an array of other regulatory shenanigans, such as the so-called Fairness Doctrine, and many other media marketplace restrictions.[1]

Whatever sense this arrangement made in the past, technological and marketplace developments are now calling into question the wisdom and efficacy of the traditional broadcast industry regulatory paradigm. This article will explore both the old and new rationales for differential First Amendment treatment of broadcast television and radio operators and conclude that those rationales: (1) have never been justified, and (2) cannot, and should not, survive in our new era of media abundance and technological convergence.

I. Process vs. Substance: Which Will the Court Address?

The Second and Third Circuit cases have been preoccupied with procedural issues, the Administrative Procedures Act (APA) in particular. To varying degrees, both the FCC and the broadcast industry plaintiffs have been dancing around the substantive First Amendment issues at stake. The broadcasters aim to prove that the FCC went too far, too fast in expanding broadcast indecency regulations and fines to cover "fleeting expletives" (*FCC v. Fox*) and fleeting images (*CBS v. FCC*). The FCC says it was justified in taking action in those cases and that the courts should defer to its judgment.

The Supreme Court may resolve these cases on those narrow procedural grounds and punt the substantive First Amendment issues to another day. But the days of punting fundamental issues down the road will soon come to an end. The First Amendment—at least as the FCC and the courts read it today—is a house divided; a veritable jurisprudential Twilight Zone in which identical words and images are being regulated in completely different ways depending on the mode of transmission. Leading media law scholars have noted that a regulator viewing the same program on six different screens in the same room would not be able to determine the regulatory treatment of each screen until they determine how the signal had been transmitted to each one.[2] That is because, as the authors of another communications law book note, "The central problem is that communications law has always been based on different rules for different media" and "different levels of First Amendment protection. Unfortunately, this no longer reflects technological reality."[3] And as Randolph May noted in *Engage* last October, classifying services and determining free speech rights based on technical characteristics or functional features—what he calls "techno-functional constructs"—no longer makes practical sense or is legally justifiable.[4]

Indeed, this current distribution channel-based legal arrangement will grow increasing unsustainable as more and more media content migrates to unregulated platforms and as media platforms and technologies converge. The rise of "convergence culture" will be the undoing of the rationales that have traditionally been offered in defense of regulating broadcast spectrum and speech differently than all other platforms.[5] Those three rationales are: (1) Scarcity; (2) Public ownership / licensing; and (3) "Pervasiveness." Scarcity and public ownership will be discussed only briefly since the pervasiveness rationale is at the heart of most modern battles over speech regulation, as is the case in *FCC v. Fox* and *CBS v. FCC.*

II. Scarcity

Spectrum "scarcity" has long been held out as the *sine qua non* for broadcast radio and television regulation in America. Generally speaking, the scarcity rationale for regulation states that because more people want spectrum licenses than are available, government can and should impose special obligations on those who possess such licenses.

Spectrum scarcity was used to justify the broadcast licensing scheme enshrined in the Radio Act of 1927 and Communications Act of 1934. Supreme Court decisions such as *NBC v. United States* (1943)[6] and *Red Lion Broadcasting Co. v. FCC* (1969)[7] then made the scarcity rationale sacrosanct, and legitimized comprehensive government regulation of broadcasters in the process.

While scarcity is the primary rationale for regulation of the broadcast spectrum and corresponding content controls, it is a very weak one. Even if spectrum is scarce, that fact hardly makes the case for government control. Every natural resource is inherently scarce in some sense. For example, there is only so much coal, timber, or oil on the planet, but that does not mean government should own or license those resources. In the 1986 D.C. Circuit case *Telecommunication Research & Action Center v. FCC*, the case that overturned the FCC's "Fairness Doctrine," then-Judge Robert Bork argued that, "All economic goods are scarce… Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt

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to use a universal fact as a distinguishing characteristic leads to analytical confusion."[8]

While some resources are more abundant or scarce in nature than others, most economists agree that property rights, pricing mechanisms, contracts, and free markets provide the most effective way to determine who values resources most highly and allocate them efficiently. In fact, the government created artificial scarcity within the spectrum by exempting it from market trading and the pricing system.[9] Simply stated, government ownership and control of spectrum exacerbates, rather than solves, the scarcity problem. As Ithiel de Sola Pool, author of *Technologies of Freedom*, explained in 1983: "The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity."[10]

Importantly, if outlet scarcity is the determining factor, why isn't the FCC regulating newspapers? In 1991, Jonathan Emord, author of *Freedom, Technology and the First Amendment*, noted that "[I]t is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment."[11] For example, the number of broadcast TV and radio stations in America has doubled since *Red Lion* was decided in 1969, while daily newspapers have been in a steady state of decline since that time.[12] Daily newspapers are now more "scarce" than broadcast television stations, but they have not received diminished First Amendment rights.[13]

Moreover, practically speaking, even if scarcity was once a legitimate concern within the broadcast sector, it certainly is not today considering the cornucopia of media choices at the public's disposal.[14] With the rise of the multichannel video marketplace (cable and satellite TV), satellite radio, DVDs, mobile media, and the Internet and online video, "scarcity is the last word that would come to mind in regard to the vast array of communications outlets available today," concludes *Chicago Tribune* columnist Steve Chapman.[15] Indeed, to the extent citizens bemoan anything today it is information overload, not information scarcity.

Thus, scarcity—of outlets or opinions—is an outmoded justification for differential treatment of the broadcast platform.

III. Public Ownership / Licensing

The continued existence of the FCC's licensing regime for electromagnetic spectrum leads to oft-repeated claims that broadcast spectrum is "owned by the American people" or "belongs to the American people." Therefore—or so this line of reasoning continues—any set of rules can be adopted for broadcasting (for both economic and content-related purposes) that Congress or the FCC deem appropriate, since they are acting on behalf of "the people."[16] Speech regulation is one of the ways the FCC exercises that control.

But this logic does not hold in other licensing situations. Government licensure does not diminish speech rights for citizens when they obtain a driver's license, or the rights of doctors when they get a license to practice medicine. Similarly, "A lawyer needs a license to practice law, yet the government does not force a lawyer to spend equal time defending clients of opposite views," notes Bruce Fein, a former general counsel at the FCC.[17] "It is patently absurd to suggest that a license requirement in an industry is enough to allow the taking away of First Amendment rights," he argues.[18]

Nor does government ownership of an asset confer unbounded powers of speech suppression. Governments own parks, libraries, buildings and other property, but that does not lessen the speech rights of those who reside on or use that government property.[19] Others have argued that the very act of licensing broadcasters in general is unconstitutional. Matthew Spitzer, for example, has argued that, "the First Amendment must be read so as to prevent the government from owning all of the spectrum" since absolute government ownership of spectrum gives the government far too much control over private electronic communication.[20] Spitzer likens the situation to a hypothetical Federal Paper Commission that has been given control over all uses of paper and ink and the ability to license newspapers "in the public interest." Such an enactment would clearly offend the First Amendment as an unjust government encroachment upon the rights of the press. But that is essentially the system that governs broadcasting in America today.

Moreover, broadcast spectrum is nothing like a public park or a town square. Broadcast licenses are owned by private entities and are traded on the open market for significant sums of money. The vast majority of TV and radio licenses have traded hands a least once; many have been sold multiple times. Broadcasters also sell shares in their companies on the stock market and have private shareholders. These facts distinguish broadcasting from public property.

The "People's Airwaves" argument has also been thoroughly discredited by the FCC itself in a 2005 report by John W. Berresford, a staff attorney with the FCC's Media Bureau, who also called the scarcity rationale into question.[21] Berresford's report argued that:

> Most likely, some newspapers and musical instruments are made from trees that grew on government land. No one would claim that they are therefore made of The People's Wood and that the federal government may regulate the content of those newspapers or require that the music played on the instruments address controversial public issues and express differing views.…

Finally, even if the airwaves did belong to the people, the same cannot be said of traditional broadcasters' land, transmitters, buildings, studio equipment, personnel, and audiences gained through years of sending out popular content. Those things belong exclusively to the broadcasters and their shareholders.[22]

For these reasons, the "people's airwaves" argument is not a valid excuse for differential treatment of the broadcast spectrum or broadcast speech.

IV. Pervasiveness

A fresh excuse for asymmetrical regulation of broadcasting was concocted in the late 1970s: "pervasiveness." Unfortunately, in a creative bit of judicial activism, it was the Supreme Court that dreamed up this theory and gave it legitimacy. In *FCC v. Pacifica Foundation* (1978), the famous "seven dirty words" case, the Supreme Court held that:

Of all forms of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting is the *uniquely pervasive presence* that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive. Broadcasting, moreover, is *uniquely accessible to children*.[23]

The staying power of this rationale has proven formidable. After *Pacifica*, the courts moved to adopt a "channeling" or "safe harbor" approach to indecency regulation, requiring that broadcasters wait until after 10:00 p.m. to air potentially objectionable content. In *Action for Children's Television v. FCC III* (1995), the U.S. Court of Appeals for the D.C. Circuit held that the FCC could impose restrictions on broadcast indecency between the hours of 6:00 a.m. and 10:00 p.m.[24]

But the pervasiveness rationale suffers from several shortcomings.

A. "Intruder" or Invited Guest?

The most obvious problem with the logic of "pervasiveness" is that it assumes parents are fundamentally incapable of controlling broadcast media. In holding the broadcast signals were uniquely pervasive and an "intruder" in the home, the *Pacifica* Court forgot that signals are worthless without a receiving device. And those receiving devices—television sets and radios—do not walk into the home uninvited. Parents put them there.

Once parents bring these devices into the home, it should not absolve them of their responsibility to monitor how their children use them. After all, parents do not bring other products home—such as cars, weapons, liquor, or various chemicals—and then expect the government to assume responsibility from there. But that is essentially the logic that the Supreme Court used in *Pacifica* to justify broadcast television and radio regulation.

This "media-as-invader" logic is particularly faulty considering how much effort and money adults must expend to bring media devices into the home. Over-the-air broadcast programming may be "free," but the devices needed to receive those signals are not. The same logic applies to newer media technologies. Cable television, for example, requires a monthly subscription that averages over $40 per month for expanded basic service.[25] And connecting to the Internet requires the purchase of a computer and a monthly Internet access service account.

Ironically, it is print media (newspapers, weekly readers, magazines, etc.) that are probably the most accessible to average Americans—many at little or no cost—and yet print outlets are accorded the most stringent First Amendment protections. It seems much more likely that a free, community-based weekly newspaper, delivered to one's doorstep without even asking for it, is more of an "intruder" than the television set, cable set-top box, or Internet connection, which cost significant sums and take more effort to bring into the home.[26] As former FCC Chairman Michael Powell argued in a 1998 speech, "The TV set attached to rabbit ears is no more an intruder into the home than cable, DBS, or newspapers for that matter. Most Americans are willing to bring TVs into their living rooms with no illusion as to what they will get when they turn them on."[27]

B. Are Parents Powerless?

The pervasiveness rationale for broadcast regulation also fails because parental controls, rating systems, and content tailoring technologies make it easier than ever before for parents to manage media in their homes and in the lives of their children.[28] It is impossible to consider video programming an "intruder" in the home when tools exist that can help parents almost perfectly tailor viewing experiences to individual household preferences.

When Justice Stevens argued in *Pacifica* that broadcast signals represented an "intruder" in the home, he supported that claim by noting that "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[29] While that may have reflected the state of technology at the time, it is completely at odds with modern realities, at least for television. In 1978, the viewing experience was a more passive affair and consumers had very few ways to control that experience unless they turned off the television altogether. Today, by contrast, viewers (including parents) have the tools to "tune in and out" at will, and they have abundant "prior warnings" about program content thanks to the existence of ratings, program information, and electronic program guides.

And it is not just the V-Chip, which lets parents filter broadcast programs by rating.[30] For the 86 percent of Americans who subscribe to cable and satellite television, their set-top boxes come equipped with advanced video screening technology.[31] More importantly, new video technologies, such as DVD players, digital video recorders (DVRs) and video on demand (VOD) services, are changing the way households consume media and are helping parents better tailor viewing experiences to their tastes and values.[32] These tools help parents restrict or tailor the viewing experience *in advance* according to their values and preferences. Parents can amass an archived library of only the programming they wish their children to consume.

Of course, this is less true for over-the-air *radio* programming, which remains difficult for parents to block or filter. But broadcast radio is increasingly dominated by talk radio and most youngsters consume audio over alternative devices and platforms. There are some ways parents can better control audible media over digital platforms such as iTunes and satellite radio, which can designate and block some content as "explicit."[33]

These developments have profound implications for debates over the regulation of broadcast programming. As noted below, as parents are given the ability to more effectively manage their family's viewing habits and experiences, it will lessen—if not completely undercut—the need for government intervention on their behalf. It allows us to move away from the more paternalistic notion of "community standards"-based regulation, and toward a family-based "household standard."

C. What Happens When Everything is Pervasive?

Whatever legitimacy *Pacifica's* "pervasiveness" logic might have once had as a motivating factor for the unique regulatory treatment of broadcasting, it is being completely undercut by modern marketplace developments. As NBC noted in a filing before the Second Circuit U.S. Court of Appeals in late 2006:

> The nearly 30 years since *Pacifica* have similarly eviscerated the notion that broadcast content is "uniquely accessible to children" when compared to other media. The availability of alternative media sources is even more pronounced with respect to younger generations than with adults…

Like all media content, broadcast programming is accessible by children to some degree, but certainly it is no longer *uniquely* available when compared to the countless other avenues through which children up to age 18 receive information. These technological developments have doctrinal significance. Now that *Pacifica*'s underpinnings have been undermined, there is no reasoned basis for treating content-based restrictions on the speech of broadcasters differently than content-based restrictions on other speakers.[34]

The FCC's Berresford agrees:

> If new media are now as pervasive and invasive as only traditional broadcasters once were, should the new media's content be supervised as only the latter have been? To expand such supervision to the new media would risk reducing adults to only content fit for children—a failing of potentially Constitutional dimensions. It may be, on the contrary, that the spread of new media, with hundreds of new channels, should cause regulation of indecency in traditional broadcasting to end. If what is pervasive today is hundreds of channels and billions of web pages, no one channel, show, or page is as pervasive as the Big Networks' shows were in the heyday of their three-member oligopoly.[35]

In other words, in a world of technological convergence and media abundance, *everything is equally pervasive*. It is illogical to claim that broadcasting holds a unique status among all the competing media outlets and technologies in the marketplace. And even if some broadcast stations and programs continue to fetch a large number of viewers/listeners, this cannot be the standard by which lawmakers determine a medium's First Amendment treatment. The danger with such a "popularity equals pervasiveness" doctrine is that it contains no limiting principles.[36] If Congress can regulate content on a given media platform whenever 51 percent of the public bring it into their homes, then the First Amendment will become an empty vessel. Indeed, it would mean that cable television, DVD players, and the Internet could be regulated today since more than 50 percent of U.S. households have access.[37]

Indeed, critics of *Pacifica* have long pointed out that the fundamental problem with pervasiveness as the linchpin of modern broadcast regulation is that it is overly-broad and could be applied to any media outlet that was randomly determined by regulators to be particularly pervasive in our lives or "uniquely accessible to children." It turns children into the equivalent of a "constitutional blank check."[38] Author Jonathan Wallace warned of this "specter of pervasiveness" in a 1998 Cato Institute report on the subject:

> [T]he logic of pervasiveness could apply to cable television, the Internet, and even the print media. If such logic applies to any medium, it could apply to all media. In this way, the pervasiveness doctrine threatens to curtail severely the First Amendment's protection of freedom of speech.[39]

At least so far, there has been no support from the courts for extending regulation to new media outlets using this rationale. Early attempts to regulate content on cable television have been uniformly rejected by the courts.[40] Similarly, when congressional lawmakers sought to impose restrictions on the Internet in the mid-1990s, the Supreme Court rejected the effort. In striking down the Communications Decency Act's effort to regulate indecency online, the Supreme Court declared in *Reno v. ACLU* (1997) that a law that places a "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving" the same goal.[41] And several lower courts have rejected regulation of video game content on similar grounds.[42]

What is most interesting about these recent Internet and video game decisions is that the same logic could be applied to broadcasting. Indeed, as noted, many "less restrictive alternatives" are available to parents today to help them shield their children's eyes and ears from content they might find objectionable, regardless of what that content may be.

D. The Move from "Community Standards" to "Household Standards"

If it is the case that families now have the ability to effectively tailor media consumption to their own preferences—that is, to craft their own "household standard"—the regulatory equation should also change. Regulation can no longer be premised on the supposed helplessness of households to deal with broadcast content flows if families have been empowered to make content determinations for themselves.

In fact, in another recent decision, the Supreme Court confirmed that this would be the new standard to which future government enactments would be held. In *United States v. Playboy Entertainment Group* (2000),[43] the Court struck down a law that required cable companies to "fully scramble" video signals transmitted over their networks if those signals included any sexually explicit content. Echoing its earlier holding in *Reno v. ACLU,* the Court found that less restrictive means were available to parents looking to block those signals in the home. Specifically, the Court argued that

> [T]argeted blocking [by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.[44]

More importantly, the Court held that

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.[45]

This is an extraordinarily high bar the Supreme Court has set for policymakers wishing to regulate modern media content. Not only is it clear that the Court is increasingly unlikely to allow the extension of broadcast-era content regulations to new media outlets and technologies, but it appears certain that judges will apply much stricter constitutional scrutiny to *all* efforts to regulate speech and media providers in the future, including broadcasting. As Geoffrey R. Stone of the University of Chicago School of Law has noted

> The bottom line, then, is that even in dealing with material that is "obscene for minors," the government cannot *directly* regulate such material... Rather, it must focus on empowering parents and other adults to block out such material at their own discretion, by ensuring that content-neutral means exist that enable individuals to exclude constitutionally protected material they *themselves* want to exclude. Any more direct regulation of such material would unnecessarily impair the First Amendment rights of adults.[46]

Thus, the courts have largely foreclosed government regulation of most other media platforms outside of broadcasting and placed responsibility over what enters the home squarely in the hands of parents. This makes the pervasiveness rationale for asymmetrical broadcast regulation even more difficult to justify.

E. What about Reversing the Pervasiveness Test?

With the "pervasiveness" rationale becoming increasingly archaic and indefensible, some have suggested flipping the justification on its head to preserve asymmetrical regulation of the broadcast spectrum. That is, while the traditional pervasiveness test focused on the ubiquity and supposed intrusiveness of broadcast signals, the new standard would focus on broadcasting as the only safe haven from the other types of media, which are actually now more pervasive in the lives of children than broadcasting.

For example, during oral arguments in *FCC v. Fox*, U.S. Solicitor General Gregory Garre suggested that the government actually had a *stronger* case today when it regulates broadcasting because there are so many other unregulated platforms where kids might see or hear objectionable media. As Garre argued:

> We actually think that the fact that there are now additional mediums like the Internet and cable TV, if anything, underscores the appropriateness of a lower First Amendment standard or safety zone for broadcast TV, because Americans who want to get indecent programming can go to cable TV, they can go to the Internet.[47]

It is important not to lose sight of the fact that Garre and the FCC are conceding that broadcast pervasiveness, as traditionally understood, is increasingly moot. Nonetheless, they wish to preserve the regulatory authority the pervasiveness doctrine sanctions to ensure broadcasting remains under the yoke of regulation.

Garre and the FCC are asking the Court to once again engage in creative judicial activism to concoct a fresh legal rationale for differential First Amendment treatment of broadcasters. Instead of closing the book on *Pacifica's* misguided contortion of the First Amendment, this proposal seeks to turn the old rationale on its head in an attempt to prop up an unjust regulatory construct. In doing so, this proposal to reinvent pervasiveness would make a mockery of the rule of law. For the past 30 years, broadcasters have been told they are second-class citizens in the eyes of the First Amendment because they were "pervasive" and "uniquely accessible." Now that their hegemony is being eroded rapidly by a myriad of media competitors who are actually *more* pervasive, broadcasters are now being told they must remain shackled by special restrictions. In other words: Damned if you do, damned if you don't! In essence, there is no way for broadcasters to escape regulation and gain full First Amendment protection, even though their competitors remain largely free of such burdens.

V. Will the Sky Fall Absent Government Regulation?

Practically speaking, what is driving efforts to continue asymmetrical regulation of broadcasting is the fear that, without it, broadcast television and radio would become a veritable den of iniquity. But such Chicken Little scenarios are highly unlikely to develop because of ongoing viewer and advertiser pressure. Broadcast television and radio broadcasters seek a *mass* audience. While cable and satellite networks have the luxury of targeting certain demographic niches or specialized interests, broadcasters do not. Broadcasters have to ensure their product appeals to as many people as possible to attract and retain large audiences and a steady flow of advertising dollars to support their significant programming expenditures.

Thus, broadcasters must be more cautious than cable or satellite programmers to ensure they do not alienate large portions of their viewing or listening audience. "In a free marketplace, whether broadcast or print, advertisers and subscribers will not eagerly support materials, whether delivered on the air or on the doorstep, that are as likely to offend as to attract potential customers," noted former Reagan Administration FCC Chairman Mark Fowler and FCC advisor Daniel L. Brenner in 1982.[48]

Consider newspapers. *The New York Times* and *The Washington Post* are fully protected by the First Amendment and free to publish "indecent" material whenever they wish, even on page one if they so desire. But they never do. These print media outlets understand that reader and advertiser loyalty is vital to their ongoing success and that publishing explicit material or coarse language in their pages would likely offend a significant portion of their audience. Similarly, even those television and radio broadcasters who might want to push the envelope a bit more in the absence of regulation know that they have to be careful to strike the right balance or else they run the risk of losing viewers and advertisers.

In fact, we have evidence that this is already the case. There is currently nothing stopping broadcasters from airing whatever programming they choose after 10:00 p.m. at night, since the FCC's "safe harbor" ends at that time. Why is it, then, that broadcasters are not airing soft-core pornography or vulgar programming at 10:00 each night? It is because broadcasters know there would be hell to pay with their audience and advertisers if they did. Just because a broadcast company *can* run something does not mean they will. In this way, audience and advertiser pressure can provide a strong check on broadcast content determinations.

In conclusion, there are no justifications left to prop up *Red Lion, Pacifica*, or any of the traditional rationales for asymmetrical regulation of broadcasters. As Randolph May noted in *Engage* recently, "With the revisiting of [those cases], the Court can establish a new First Amendment paradigm for the electronic media… much more in keeping with the Founders' First Amendment vision."[49] The Supreme Court should take the opportunity to do so in the *Fox* and *CBS* cases.

Endnotes

1 For an inventory of these various media regulations, see Brian Anderson & Adam Thierer, A Manifesto for Media Freedom (2008).

2 Harvey L. Zuckman, et. al, Modern Communications Law (1999), at 153.

3 T. Barton Carter, et. al, Mass Communications Law (2000), at 600.

4 Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, Engage, Oct. 2008, at 109.

5 Henry Jenkins, founder and director of the MIT Comparative Media Studies Program and author of *Convergence Culture: Where Old and New Media Collide*, defines convergence as "the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behavior of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want." Henry Jenkins, Convergence Culture: Where Old and New Media Collide (2006), at 2.

6 NBC v. United States, 319 U.S. 190 (1943).

7 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

8 Telecomm. Research & Action Center v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

9 "[I]t can be argued that the spectrum was scarce because demand exceeded supply. This is almost invariably the case when a good with value is given away for free. If a market price had been assigned to spectrum from the start (which in effect is done when licenses are bought and sold later on), then it would be no more or less scarce than are pencils, VCRs or Lexus automobiles. Moreover, it may have been put to better uses initially if those who obtained it had to pay for it." Benjamin M. Compaine, "Distinguishing Between Concentration and Competition," *in* Benjamin M. Compaine and Douglas Gomery, eds., Who Owns the Media? Competition and Concentration in the Mass Media Industry, (2000), 557.

10 Ithiel de Sola Pool, Technologies of Freedom (1983), at 141. "Clearly it was policy, not physics, that led to the scarcity of frequencies. Those who believed otherwise fell into a simple error in economics," Pool concluded.

11 Jonathan Emord, Freedom, Technology and the First Amendment (San Francisco: Pacific Research Institute, 1991), at 284.

12 Adam Thierer, Media Myths: Making Sense of the Debate over Media Ownership (Washington, D.C.: The Progress & Freedom Foundation, 2005), at 20-21, http://www.pff.org/issues-pubs/books/050610mediamyths.pdf

13 "Because daily newspapers are much more scarce than are radio and television choices, should there be a fairness doctrine for the *New York Times*?" George Will, *Broadcast 'Fairness' Fouls Out,* Wash. Post, Dec. 7, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/12/05/AR2008120503194.html.

14 Adam Thierer and Grant Eskelsen, *Media Metrics: The True State of the Media Marketplace* (Washington, D.C.: The Progress & Freedom Foundation, 2008), http://www.pff.org/mediametrics.

15 Steve Chapman, *You* Will *Watch the Debates*, Chic. Tribune, Oct. 15, 2000, at 19.

16 *See Red Lion* at 389-90.

17 Bruce Fein, *First Class First Amendment Rights for Broadcasters*, Harv. J. Law & Pub. Pol'y 10, 1 (1997), at 84.

18 *Id.*

19 "When dealing with streets, parks, or other traditional [public] fora, the First Amendment precludes the government from doing as it pleases with its property. Instead, the government many 'own' the streets and parks in the sense that it can regulate traffic, control hours of parking, and so forth, but it many not, in general, control the content of what is expressed there or impose unreasonable time, place, or manner regulations on such expression." Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. Law Rev. (1989), at 1033.

20 Spitzer, *supra* at 1042.

21 John W. Berresford, "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed," Federal Communications Commission, *Media Bureau Staff Research Paper*, 2005-2, March 2005, at 19, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf.

22 *Id.* at 19.

23 FCC v. Pacifica Foundation, 438 U.S. 726, 727-8 (1978) (emphasis added).

24 Action for Children's Television v. FCC III, 59 F. 3d 1249, (D.C. Cir. 1995).

25 "Industry Overview," National Cable & Telecommunications Association, *available at* http://www.ncta.com/Docs/PageContent.cfm?pageID=86.

26 "[B]roadcast signals may even be less intrusive than printed expression which may be perceived while blowing by as litter on a street, laying on a coffee table, or being displayed in a newsrack." Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 Wake Forest Law Review 1 (1995), at 41.

27 "Willful Denial and the First Amendment," *Remarks by Michael K. Powell before the Media Institute*, April 22, 1998, *available at* http://www.fcc.gov/Speeches/Powell/spmkp808.html

28 *See* Adam Thierer, *Parental Controls and Online Child Protection: A Survey of Tools and Methods* (Washington, DC: The Progress & Freedom Foundation, 2009).

29 *Pacifica* at 748.

30 *See* www.fcc.gov/vchip and www.thetvboss.org

31 A comprehensive survey of the content controls that cable television providers make available to their subscribers can be found on the National Cable and Telecommunications Association's (NCTA) "Control Your TV" website. http://controlyourtv.org.

32 *See* Adam Thierer, "Parental Control Perfection? The Impact of the DVR and VOD Boom on the Debate over TV Content Regulation" by, Progress & Freedom Foundation, *Progress on Point* 14.20, October 2007, http://www.pff.org/issues-pubs/pops/pop14.20DVRboomcontentreg.pdf.

33 Thierer, *supra* note 38, at 67-69.

34 *Brief for Intervenors NBC Universal, Inc. and NBC Telemundo License Co.,* U.S. Court of Appeals for the Second Circuit, Docket Nos. 06-1760-AG, 06-2750, November 22, 2006, at 55-6. (emphasis in original).

35 Berresford, *supra* note 18, at 29.

36 I have addressed the dangers of "popularity equals pervasiveness" notions elsewhere. *See* Adam Thierer, *Thinking Seriously about Cable and Satellite Censorship: An Informal Analysis of S. 616, The Rockefeller-Hutchison Bill*, Progress & Freedom Foundation *Progress on Point* no. 12.5, April 2005, www.pff.org/issues-pubs/pops/pop12.6cablecensorship.pdf; Adam Thierer, *Moral and Philosophical Aspects of the Debate over A La Carte Regulation*, Progress & Freedom Foundation *Progress Snapshot* 1.23, December 2005, www.pff.org/issues-pubs/ps/ps1.23alacarte.pdf.

37 Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio*, Progress & Freedom Foundation *Progress on Point* 12.8, May 2005, http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf.

38 Lawrence H. Winer, "Children Are Not a Constitutional Blank Check," *in* Robert Corn-Revere, ed., Rationales and Rationalizations (Washington, D.C.: The Media Institute, 1997), at 69-123.

39 Jonathan D. Wallace, *The Specter of Pervasiveness:* Pacifica*, New Media, and Freedom of Speech*, Cato Institute *Briefing Paper*, No. 35, February 12, 1998, http://www.cato.org/pubs/briefs/bp-035es.html. Similarly, Pool noted of *Pacifica* that, "This aberrant approach… could be used to justify quite radical censorship." Pool, *supra* note 10, at 134.

40 Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D.C. Utah 1985), *aff'd sub nom. Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.* 480 U.S. 926 (1987); Cruz v. Ferre, 755 F.2d 1415, 1419 (11th Cir. 1985); Denver Area Educational Telecommunications Consortium v.

FCC, 518 U.S. 717 (1996); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

41 Reno v. ACLU, 521 U.S. 844 (1997). *See also* Ashcroft v. ACLU, 535 U.S. 564 (2002) upholding an injunction against the Child Online Protection Act (COPA), which also sought to regulate underage access to material deemed "harmful to minors."

42 *See* Adam Thierer, *Fact and Fiction in the Debate over Video Game Regulation*, Progress & Freedom Foundation *Progress Snapshot* 13.7, March 2006, www.pff.org/issues-pubs/pops/pop13.7videogames.pdf

43 United States v. Playboy Entertainment Group, 529 U.S. 803 (2000).

44 *Id.* at 815.

45 *Id.* at 824.

46 Geoffrey R. Stone, "The First Amendment Implications of Government Regulation of 'Violent' Programming on Cable Television," National Cable and Telecommunications Association, October 15, 2004, at 10, www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2881.

47 Transcript of oral arguments in *FCC v. Fox*, U.S. Supreme Court, No. 07-582, November 4, 2008, at 17-18, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-582.pdf.

48 Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Texas Law Review 2 (1982), 230.

49 May, *supra* note 4, at 113.