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Constitutional Law and Values—Version '08 (Not Necessarily an Upgrade)

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NADINE STROSSEN

Constitutional Law and Values—Version '08 (Not Necessarily an Upgrade)

ABOUT THE AUTHOR: Nadine Strossen is a professor of law at New York Law School and former president of the American Civil Liberties Union. This is an edited version of the oral presentation that Professor Strossen made on April 2, 2008, at the New York Law School Faculty Presentation Day, Dinner Session, “Constitutional Law and Values.” Most of the footnotes were prepared by Professor Strossen’s Chief Aide, Steven Cunningham (NYLS ’99), based on her guidance and with the assistance of her Research Assistant Joshua Shoenfeld (NYLS ’10). Accordingly, Steven Cunningham bears both the credit and the responsibility for the footnotes.

This essay concerns a very current and unanticipated constitutional development from March 17, 2008. On that date, the Supreme Court surprised constitutional law experts when it decided to review the government's power to ban so-called "indecent" expression in the broadcast media¹ for the first time since the Court's only prior ruling on point: its 1978 decision in the case of *Federal Communications Commission v. Pacifica*.²

It was surprising that the Court granted the *certiorari* petition in this case, which is called *Fox Television Stations v. Federal Communications Commission*, since the ruling at issue, by the U.S. Court of Appeals for the Second Circuit, was based on a narrow issue of administrative law.³ Specifically, the Second Circuit held that the Federal Communications Commission ("FCC") had not provided a sufficient explanation for its dramatic new crackdown on broadcast "indecenty"⁴ in the wake of the infamous "wardrobe malfunction" at the televised 2004 Super Bowl game, which one commentator called "a tempest in a C-cup!"⁵

If you have not been following these new broadcast censorship measures closely, I do not think you could imagine how extreme they are. The FCC has been imposing record-breaking fines on broadcasters even for the fleeting, spontaneous use of a single four-letter word in a clearly non-sexual context.⁶ For example, the FCC condemned a documentary film about blues musicians, which was made by Martin Scorsese and broadcasted by an educational television station, because some of the artists being interviewed uttered what the FCC discreetly calls the "f-word" or the "s-word."⁷ The FCC even ruled that the news program, *The Early Show*, had committed "indecenty" because during a live interview, a guest used the word "bullshitter"; the FCC stressed that its censorship rules contain "no exemption [for news]."⁸

The FCC's new zero tolerance approach is so extreme that it even has been condemned by some former officials of the FCC itself; officials who had supported

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1. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); see also Linda Greenhouse, *Justices Take Up On-Air Vulgarity Again*, N.Y. TIMES, Mar. 18, 2008, at A16.
 2. 438 U.S. 726 (1978).
 3. See 489 F.3d 444.
 4. *Id.* at 462.
 5. Liz Langley, *Consider Context: Out-of-Place and You're Out of Line*, ORLANDO SENTINEL, Apr. 27, 2007, at 6. See generally *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008) (vacating the FCC's orders imposing a monetary forfeiture under 47 U.S.C. § 503(b) for the broadcast of "indecent" material in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, and remanding for further proceedings consistent with the opinion). Although the CBS decision involved other aspects of the FCC's regime governing broadcast "indecenty" than those at issue in the *Fox* case, and although both circuit court rulings were based on non-constitutional grounds, ultimately both cases involve the same fundamental First Amendment principles, which this essay addresses.
 6. See *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) (memorandum opinion and order).
 7. John Eggerton, *FCC 'Whitewashing' Blues, Says Scorsese*, BROADCASTING & CABLE, May 8, 2006, <http://www.broadcastingcable.com/article/CA6332444.html?display=Breaking+News>.
 8. *Fox Television Stations*, 489 F.3d at 454, 458, 463 (2d Cir. 2007), *cert granted*, 76 U.S.L.W. 3496 (Mar. 17, 2008) (No. 07-582).

prior FCC limits on broadcast indecency. Yet, even they felt impelled to denounce the recent repression as “a radical . . . censorship crusade that will . . . chill . . . all but the blandest . . . program fare.”⁹

In the *Fox* case that the Supreme Court just agreed to review, Fox and the other broadcast networks had also challenged the FCC’s sweeping new restrictions on statutory and First Amendment grounds, but the Second Circuit did not need to resolve those issues because it struck down the new rules on narrower administrative law grounds. That said, the Second Circuit’s opinion did include a section, explicitly labeled “dicta,” that noted the substantial First Amendment problems with the FCC’s ramped-up restrictions.¹⁰ But the Supreme Court rarely reaches issues that the lower courts have not addressed fully on the merits.¹¹

Nonetheless, the U.S. Solicitor General, on behalf of the FCC, strongly urged the High Court to hear the *Fox* case, stressing its extremely important constitutional implications.¹² The Solicitor General argued to the Supreme Court that the Second Circuit’s ruling “strikes at the heart of” the entire “broadcast indecency regulatory framework.”¹³ He argued that the Second Circuit’s decision “effectively nullifies” the federal statute that bars “indecent” expression over the airwaves and that it defies the Supreme Court’s 1978 *Pacifica* ruling, which had upheld that statute.¹⁴

In short, the U.S. government invited the Supreme Court to re-examine not only the specific FCC rules at issue in the *Fox* case itself, but also the broad fundamental underlying First Amendment questions about whether the broadcast media should continue to be relegated to second-class status under the First Amendment. The Court could thus use this case for a long overdue re-examination of whether it should continue to enforce *Pacifica*’s ban on “indecent” expression from broadcasting, even though, post-*Pacifica*, the Court has held that such expression is constitutionally protected in every other medium.¹⁵

I will briefly outline the core First Amendment problems that mar not only the FCC’s new crackdown on broadcast “indecency,” but also any restriction on any sexually-oriented expression in any medium. I want to stress the insoluble First Amendment problems with any censorial regime in this area, no matter what adjective is used for the targeted expression—for example, “indecent,” “offensive,” “obscene,” or “pornographic.”

9. Brief of Former FCC Officials as Amici Curiae in Support of Petitioners and in Support of a Declaration That Indecency Enforcement Violates the First Amendment at 1, *Fox Television Stations*, 489 F.3d 444 (No. 06-5358).

10. *Fox Television Stations*, 489 F.3d at 462 n.12.

11. *See, e.g.*, *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973).

12. *See* Petition for Writ of Certiorari, *Fox Television Stations*, 128 S. Ct. 1647 (No. 07-582).

13. *Id.* at 28.

14. *Id.* at 29.

15. *See, e.g.*, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (cable television); *Reno v. ACLU*, 521 U.S. 844 (1997) (Internet); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (cable television); *Sable Commc’ns v. FCC*, 492 U.S. 115 (1989) (dial-a-porn).

These First Amendment problems arise no matter how the stigmatizing term is defined and no matter what the government's goal is—for example, protecting children or women or so-called “traditional family values.” The inevitable First Amendment flaw with any such regulatory regime flows from the fact that, in our wonderfully diverse society, we all have widely divergent ideas, values, and tastes, especially about what sexual expression we find positive or negative for ourselves and our own children. Therefore, we cannot responsibly delegate these inherently personal choices to anyone else, including government officials or our fellow citizens.

Let me describe a cartoon that well captures this reality: it shows three people in an art museum looking at a classic nude female torso, a fragment of an ancient sculpture minus limbs. Each viewer's reaction is shown in an air bubble. The first one thinks, “Art!”; the second thinks, “Smut!”; and the third thinks, “An insult to amputees!”

In such an inescapably subjective, value-laden area, it is inherently impossible to come up with clear guidelines. For example, for the past half-century, the Supreme Court has tried but failed to come up with objective standards for defining constitutionally unprotected obscenity.¹⁶ The most famous line in the Court's many unsuccessful efforts came from former Justice Potter Stewart, when he candidly admitted: I cannot define it, “[b]ut I know it when I see it.”¹⁷ The problem, though, is that every judge, along with everyone else, sees a different “it”!

That fact was well-stated by another highly respected former Justice, John Marshall Harlan, a distinguished graduate of our own law school (class of 1924).¹⁸ As Justice Harlan put it, “One [person's] vulgarity is another's lyric.”¹⁹ We individuals even have different perspectives about whether any given expression has any sexual content at all. This is captured by the old joke about the man who sees every inkblot his psychiatrist shows him as wildly erotic. When his psychiatrist says to him, “You're obsessed with sex,” the man answers: “What do you mean I'm obsessed? You're the one who keeps showing me all these dirty pictures.”!!!

The problem with such irreducibly vague concepts is that enforcing officials will necessarily exercise their unfettered discretion according to their own subjective tastes, or those of politically powerful community members. In consequence, the enforcement patterns will be arbitrary at best, discriminatory at worst. At best, which particular expression will be deemed off limits will be completely unpredictable. This causes what courts call a “chilling effect” because when no one wants to run the risk of criminal prosecution, people may well self-censor, not engaging in expression

16. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.3.4.2 (3d ed. 2006).

17. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

18. James F. Simon, *Foreword: The New York Law School Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1 (1991).

19. *Cohen v. California*, 403 U.S. 15, 25 (1971).

that might be deemed unacceptable by the powers that be.²⁰ That self-censorship not only violates the free speech rights of all those who were deterred from speaking; it also deprives all the rest of us of the chance to hear valued expression, including constitutionally protected speech.²¹

To illustrate this inherent problem, I would like to cite some of the FCC's recent rulings enforcing its new zero-tolerance policy, which is the direct focus of the *Fox* case.

Again, the FCC maintains that it may punish even a single, spontaneous use of a four-letter word, even when it has no sexual connotation, and even if it is part of a program with serious value.²² However, the FCC has stressed that it will not always punish such a word, since it has to exercise its discretion to take into account the entire context in which the suspect word was uttered.²³

This compounds the First Amendment problems, by leading to arbitrary, unpredictable results. Let me cite some examples of recent FCC rulings enforcing these new policies, which were all included in a single recent order.²⁴ The FCC held that "bullshit" was indecent, but that "dick" and "dickhead" were not indecent. It held that "fuck 'em" was indecent, but that "up yours" and "kiss my ass" were not indecent. It held that non-explicit suggestions of teenagers' sexual activity in general were indecent, but that explicit discussions of specific teen sexual practices were not indecent.²⁵ As I noted earlier, the FCC held that blues musicians' uses of "fuck" and "shit" in Martin Scorsese's documentary film were indecent, but it held that actors' uses of the very same words in the fictional film *Saving Private Ryan* were not.²⁶

In response to these inevitably erratic rulings, no wonder we have seen so much self-censorship in broadcasting lately. For example, before the FCC issued the order that decreed *Saving Private Ryan* was not subject to its "fleeting expletive" ban, many television stations had cancelled their planned airing of *Saving Private Ryan* on

20. See *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Socialist Workers Party v. Attorney Gen. of the U.S.*, 419 U.S. 1314, 1318 (1974).

21. *Ashcroft v. ACLU*, 542 U.S. 656; *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Playboy Entm't Group*, 529 U.S. 803; *Reno v. ACLU*, 521 U.S. 844; *Denver Area Educ. Telecomm.*, 518 U.S. 727; *Sable*, 492 U.S. 115.

22. *In re Golden Globe Awards*, 19 F.C.C.R. 4975.

23. *In re Complaints Regarding Various Television Broad.* Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) (notices of apparent liability and memorandum opinion and order).

24. *In re Complaints Regarding Various Television Broad.* Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13,299 (2006) (order).

25. See Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co. at 9, *Fox Television Stations*, 128 S. Ct. 1647 (No. 07-582) (bullshit was initially found to be indecent but was later overturned); Frank Ahrens, *FCC Dismisses 36 Indecency Complaints As Not 'Patently Offensive'*, WASH. POST, Jan. 25, 2005, at E01; *FCC Says Swearing on TV Is OK—Sometimes*, ASSOCIATED PRESS, Nov. 7, 2006, <http://www.msnbc.msn.com/id/15607715/>.

26. *Fox Television Stations*, 489 F.3d at 463.

Veteran's Day because they reasonably feared that the FCC would find it indecent.²⁷ Likewise, a PBS station cancelled a historical documentary about Marie Antoinette because it contained sexually suggestive drawings.²⁸ Given the government's zero tolerance approach toward any use of any of the taboo words, a Vermont public radio station even barred a state senate candidate from a political debate. The station manager feared that the candidate might do on air what he had done during a previous live debate; he had lost his temper and called two audience members "shits."²⁹

I will cite just a couple more examples of the rampant self-censorship that is, sadly, a rational response to the FCC's arbitrary, subjective rulings. I have chosen two that should be of special significance to all those with close ties to New York City. One arose on October 3, 2007, which marked the fiftieth anniversary of the landmark court decision that found poet and publisher Lawrence Ferlinghetti not guilty of obscenity for publishing Alan Ginsberg's famous poem, "Howl."³⁰ The Pacifica Radio station in New York City, WBAI, had been planning to commemorate the golden anniversary of this historic case—in which the ACLU represented Ferlinghetti, I am proud to say—by broadcasting a recording of Ginsberg reading the poem.³¹ Ironically though, WBAI was forced to cancel these plans. Given the FCC's draconian new fines of \$325,000 for each taboo word, "Howl" contains more than enough such words to obliterate WBAI's \$4 million budget.³²

The final example I will cite to illustrate the deep chill that the FCC has caused should especially resonate with those close to Ground Zero. CBS affiliates pulled a documentary about the 9/11 terrorist attacks, which showed actual footage of shocked onlookers watching the Twin Towers crash down. Not surprisingly, many of them were exclaiming in horror, but the documentary was pulled because some of the horrified exclamations included four-letter words.³³

I do not mean to single out the FCC unfairly. To the contrary, my point is that these kinds of arbitrary rulings will necessarily be issued by any government officials enforcing any restriction on any sexual expression, given the inevitable vagueness of any regulations in this inherently subjective area.

27. Ann Oldenburg, *Some Stations Shelved 'Private Ryan' Amid FCC Fears*, USA TODAY, Nov. 11, 2004, available at http://www.usatoday.com/life/television/news/2004-11-11-private-ryan_x.htm.

28. Colin Mahan, *PBS Beheads Marie Antoinette*, TV.COM, Sept. 26, 2006, <http://www.tv.com/story/6484.html>.

29. Philip Baruth, *VT Senate Debate Turns, Well, Batsbit-Crazy*, VT. DAILY BRIEFING, Oct. 18, 2006, <http://www.vermontdailybriefing.com/?m=200610&paged=2>.

30. See Patricia Cohen, *Howl in an Era That Fears Indecency*, N.Y. TIMES, Oct. 4, 2007, at E3; see also *People v. Ferlinghetti* (1957), as reprinted in ALLEN GINSBURG, *HOWL* 173–74 (Barry Miles ed., Harper & Row, Publishers 1986) (1956).

31. Cohen, *supra* note 30.

32. Press Release, Am. Civil Liberties Union, *ACLU 'Howls' Against FCC Destroying the Best Poems of a Generation* (Oct. 3, 2007), <http://www.aclu.org/freespeech/censorship/32060prs20071003.html>.

33. See Larry Neumeister, *Some CBS Affiliates Worry Over 9/11 Doc*, ASSOCIATED PRESS, Sept. 3, 2006, <http://www.cbsnews.com/stories/2006/09/03/ap/entertainment/mainD8JTJSE80.shtml>.

The unguided discretion that is required to enforce such vague concepts as “offensive” or “indecent” or “obscene” is also likely to be exercised in a discriminatory fashion, singling out expression that is produced by, or appeals to, individuals or groups who are relatively unpopular or powerless. Indeed, recent obscenity prosecutions have targeted expression of lesbian and gay sexuality, as well as rap music by young African-American men.³⁴ Likewise, the FCC’s crackdowns on broadcast indecency have disproportionately singled out non-mainstream, counter-cultural expression. One recent example is the song “Your Revolution” by feminist rap artist Sarah Jones.³⁵

I would like to conclude on an upbeat note by quoting one of my favorite philosophers, Woody Allen. He was once coming to the end of a speech, and he told his audience: “I’d like to end with something positive, but I can’t think of anything positive to say. Would you settle for two negatives?!” Well, I actually have two major positives!

First, in a line of recent cases, the Supreme Court consistently has struck down restrictions on sexual expression in all new media, despite the government’s arguments that these media should be relegated to the same second-class status as broadcast.³⁶ In these recent cases, the Court has rejected the very same rationale that it had accepted for broadcast restrictions back in the 1978 *Pacifica* case, to shield children from certain sexual expression.³⁷ Rather, in these recent cases, the Court consistently has held that the goal of shielding children from such expression does not justify depriving adults of access to it.³⁸ Although the Court has not yet directly reconsidered or overturned *Pacifica* itself, in every subsequent case, the Court has read that precedent very narrowly.³⁹ Accordingly, the Court has rejected restrictions on sexual expression on telephones (in the context of “Dial-A-Porn”),⁴⁰ cable television,⁴¹ and

34. See Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 2–3, 18 (2007).

35. Dan Odenwald, *Commissioners Seek Crackdown on Indecency*, CURRENT, July 16, 2001, <http://www.current.org/radio/radio0113indecency.html>.

36. See *Ashcroft v. ACLU*, 542 U.S. 656 (Internet); *Free Speech Coal.*, 535 U.S. 234 (virtual child pornography); *Playboy Entm’t Group*, 529 U.S. 803 (cable television); *Reno v. ACLU*, 521 U.S. 844 (Internet).

37. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

38. See *Free Speech Coal.*, 535 U.S. at 252 (virtual child pornography); *Playboy Entm’t Group*, 529 U.S. at 819 (cable television); *Reno v. ACLU*, 521 U.S. at 846 (internet); *Sable*, 492 U.S. at 126–27 (dial-a-porn).

39. *Reno v. ACLU*, 521 U.S. at 870; *Sable*, 492 U.S. at 127 (representing cases in which *Pacifica* was considered an “emphatically narrow” holding).

40. *Sable*, 492 U.S. 115.

41. *Playboy Entm’t Group*, 529 U.S. 803.

on the Internet.⁴² These recent decisions have been joined by Justices from across the ideological spectrum, including even John Paul Stevens, the author of *Pacifica*.⁴³

The second major positive development is the Supreme Court's historic 2003 decision in *Lawrence v. Texas*.⁴⁴ Not only did the Court strike down the statute at issue, Texas's discriminatory ban on same-gender sodomy, but the Court based its holding on broad-ranging rationales, which should sound the death-knell for all laws that restrict other personal and private conduct by consenting adults, including their consumption of sexual expression.⁴⁵ Most importantly, the Court expressly held that laws cannot constitutionally be based only on majoritarian views about morality.⁴⁶ This holding provoked a fierce tirade in Justice Scalia's strident dissent. He rightly recognized that this holding should doom a whole host of laws far beyond the discriminatory anti-sodomy laws that were at issue in *Lawrence* itself. Justice Scalia's list of "endangered laws" expressly includes anti-obscenity laws.⁴⁷ While this sweeping potential was the cause of Justice Scalia's *consternation*, for civil libertarians it is cause for *celebration*. As he wrote:

State laws [that are only based on moral choices include laws] against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.⁴⁸

The 1973 decision *Paris Adult Theater I v. Slaton*, upholding the obscenity exception, ruled that this exception was justified to preserve the "moral tone" of the community.⁴⁹ Therefore, Justice Scalia was absolutely right in his *Lawrence* dissent when he said that the majority's rationale would warrant overturning the obscenity exception. In fact, one lower court ruling has held precisely that, *Lawrence* does spell the death-knell for anti-obscenity laws.⁵⁰ In that important ruling, federal judge Gary Lancaster, in following *Lawrence*, wrote: "[O]bscenity statutes [unconstitutionally] burden an individual's fundamental right to possess, read, observe, and think about what [they] choose in the privacy of [their] own home."⁵¹ While an appellate court

42. *Reno v. ACLU*, 521 U.S. 844.

43. Justice Stevens joined all the cited opinions. Furthermore, he wrote the majority opinion in *Reno v. ACLU*. *Id.* at 848. In *Sable*, he joined Justice Brennan's concurrence to parts I, II, and IV and dissent to part III of the Court's opinion. *Sable*, 492 U.S. at 116.

44. 539 U.S. 558 (2003).

45. *See id.* at 564–606.

46. *Id.* at 577–78; *id.* at 583 (O'Connor, J., concurring).

47. *Id.* at 590 (Scalia, J., dissenting).

48. *Id.*

49. 413 U.S. 49, 68–69 (1973). In holding that "obscene material has no protection under the First Amendment," the Court recognized the broad powers of states to protect the public environment. *Id.*

50. *U.S. v. Extreme Assocs.*, 352 F. Supp. 2d 578, 590–91 (W.D. Pa. 2005).

51. *Id.* at 595–96.

overturned that ruling, it did not do so because it disagreed with Judge Lancaster's reading of *Lawrence*. Rather, the appellate court concluded that only the Supreme Court itself should directly apply its *Lawrence* holding to the obscenity context.⁵² I am cautiously optimistic that, before long, the Supreme Court will do just that.

I will conclude with a passage from one of the most important First Amendment opinions ever written, not only on the specific subject I have been addressing, but also in general. That opinion, written by New York Law School alumnus Justice John Marshall Harlan, was in the case of *Cohen v. California* in 1971.⁵³ Since *Cohen* upheld free speech specifically for the "f-word," it should weigh heavily against the FCC's new zero tolerance approach toward that very word. We should follow Justice Harlan's enlightened approach in *Cohen* for all expression in all media, including broadcast. The *Cohen* case arose during the Vietnam War, and the Court upheld the right of a young man, Paul Cohen, to wear, inside a courthouse, a jacket on which he had written a message that was very offensive to many people, not only because it contained the "f-word," but also because of its larger point. Specifically, Paul Cohen's jacket proclaimed: "Fuck the draft."⁵⁴

Notably, Justice Harlan was a conservative Republican who had been appointed by a Republican president. Many conservatives want to limit government's power over our private lives, leaving up to us decisions about what we say, what we see, and what our own young children see, instead of letting the government dictate these matters to us. Justice Harlan eloquently explains why denying government such censorial power is essential not only for individual liberty, but also for our democratic society. So I will let him have the last word. As he wrote:

[The right of free expression] is designed and intended to remove governmental restraints from . . . public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that . . . such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the . . . individual dignity and choice upon which our political system rests.⁵⁵

52. U.S. v. Extreme Assocs., 431 F.3d 150, 161 (3d Cir. 2005).

53. 403 U.S. 15 (1971).

54. *Id.* at 16.

55. *Id.* at 24.