

2008

The Fleeting Expletives Case

Timothy Zick

William & Mary Law School, tzick@wm.edu

Repository Citation

Zick, Timothy, "The Fleeting Expletives Case" (2008). *Popular Media*. 188.
https://scholarship.law.wm.edu/popular_media/188

- Concurring Opinions - <http://www.concurringopinions.com> -

The Fleeting Expletives Case

Posted By [Timothy Zick](#) On September 26, 2008 @ 10:48 am In [First Amendment](#) | [4 Comments](#)

In preparation for a Supreme Court Preview [event](#) ^[1] here at William & Mary, I've been reading the briefs in [FCC v. Fox](#) ^[2], the so-called "fleeting expletives" case. I am to serve as one of the "justices" at our simulated oral argument (the Supreme Court will hear argument on November 4), in which Erwin Chemerinsky and Tom Goldstein will be advocates. The case is presented to the Court as a run mine administrative law case. For those not familiar with the case, it involves review of the FCC's decision in 2004 to sanction broadcast of even isolated or inadvertent ("fleeting") expletives. The policy change seems to have been animated by fleeting utterances of variations of the words "fuck" and "shit" by Bono, Cher, Nicole Richie, and a host of "shock jocks." At the risk of having myself recused, I want to briefly address what Fox refers to in its merits brief as "the 800 pound gorilla in the corner of the room" — whether the FCC's indecency regime comports with the First Amendment.



In its "contextual" enforcement since the change of policy, the FCC has held that the use of expletives in *Saving Private Ryan* and on a morning news program were not indecent, while the use of expletives in a documentary on the blues was sanctionable. In any other context, of course, this sort of regime would raise serious and likely fatal First Amendment problems. That it does (or may) not in the broadcast context is owing to the Court's decision in [FCC v. Pacifica Foundation](#) ^[3] (1976), which narrowly permitted the FCC to move the "verbal shock treatment" of the Carlin "Filthy Words" monologue and other "indecent" expression into a "safe harbor" (10 p.m. to 6 a.m.) when children would be less likely to be listening and watching. If the First Amendment is the "800-pound gorilla," *Pacifica* is the elephant in the room in the pending case. Its limited grant of authority to the FCC was largely premised on (1) the "uniquely pervasive presence" of broadcast media and (2) the fact that broadcast content was "uniquely accessible to children." But today neither of these premises seems factually correct. Cable, Internet, and other media are as or likely more "pervasive" than broadcast, and all are accessible to children. In addition, technologies like the V-Chip would seem to offer less restrictive alternatives to the expansive indecency regime now used by the FCC. Finally, as Fox notes, several decisions subsequent to *Pacifica* have invalidated indecency standards very similar to the one enforced by the FCC. For these and other reasons, in the final portion of its brief Fox argues that the FCC's present indecency regime violates the First Amendment.

I think there is some merit to Fox's arguments, although the Court need not and likely will not go this far in the pending case should it decide to reject the FCC's policy change. But is it time to go even further, and overrule *Pacifica*? I've always had some trouble accepting the Court's rationale in *Pacifica*, including the notion that the broadcast of certain words is akin to an unavoidable "assault." But at this point the decision seems like a glaring anachronism. I admit that in a world slathered with so many forms of indecency, there is an argument for preserving at least this one safe haven or zone of decency. And I have no sympathy for the networks if, as some suspect, their challenge is based on a perceived competitive disadvantage with cable in the race to the cultural bottom. But would broadcast really devolve into an expletive free-for-all if the FCC stopped policing for "indecent" words? (It didn't in the decades leading up to the FCC's policy change.) With so many communication/entertainment options and filtering technologies available, is occasionally indecent language on broadcast stations still a substantial concern? To how many people? (Nearly all of the 234 complaints in the Bono incident were mass-generated by a single group.) In the end, I'm just not sure that the FCC's regime, including its most recent regulatory "swear jar" approach, is worth the candle. I wonder what others, particularly parents, think.

[Update: According to a [recent survey](#) ^[4], 39% would *extend* indecency restrictions currently applicable to cable and satellite television.]

Article printed from Concurring Opinions: <http://www.concurringopinions.com>

URL to article:

http://www.concurringopinions.com/archives/2008/09/the_fleeting_ex.html

URLs in this post:

[1] event: <http://web.wm.edu/law/ibrl/supremecourt.shtml>

[2] FCC v. Fox: <http://www.youtube.com/watch?v=QdCsup3zqyA>

[3] FCC v. Pacifica Foundation: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=726>

[4] recent survey: <http://www.firstamendmentcenter.org/commentary.aspx?id=20533>

Copyright © 2010 Concurring Opinions. All rights reserved.