

NEITHER REALISTIC NOR CONSTITUTIONALLY SOUND: THE PROBLEM OF THE FCC'S COMMUNITY STANDARD FOR BROADCAST INDECENCY DETERMINATIONS

Abstract: The Federal Communications Commission exercises the power to regulate the broadcast of constitutionally protected indecent speech under a standard upheld by the U.S. Supreme Court in its 1978 decision in *FCC v. Pacifica Foundation*. In the thirty years since that decision, however, the FCC has pursued an increasingly idiosyncratic application of the *Pacifica* test that disposes with local community standards as the legal benchmark of indecency. In doing so, the FCC's approach rejects the judicial sources that originally legitimized the *Pacifica* indecency test, conflicts with the statutory authority by which the FCC regulates broadcasting generally, and contradicts the Court's specific and more recent rulings on indecency in the context of other media. In its upcoming review of *Fox Television Stations, Inc. v. FCC*, the Court will have an opportunity to correct the anomalies of the FCC's broadcast indecency regime. The Court should require that the FCC refer to local community standards in making its indecency determinations and bring the Commission's exercise of this authority into line with governing principles of First Amendment law.

INTRODUCTION

The U.S. Supreme Court's recent grant of certiorari to review the 2007 decision by the U.S. Court of Appeals for the Second Circuit in *Fox Television Stations, Inc. v. FCC* gives the Court its first chance to consider the constitutionality of government regulation of indecent broadcast speech since its 1978 decision in *FCC v. Pacifica Foundation*.¹ In *Fox*, the Second Circuit vacated an order of the Federal Communications Commission (the "FCC" or the "Commission") that sanctioned a group of television broadcasters for violating an FCC policy prohibiting the broadcast of "fleeting expletives" as indecent speech.² Because the Sec-

¹ See *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647, 1647 (2008) (granting certiorari). See generally *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

² See 489 F.3d at 447. Under the FCC's policy, the broadcast of an isolated, offensive term could result in a sanction. *Complaints Against Various Broad. Licensees Regarding*

ond Circuit's ruling in *Fox* overturned the order only on the ground that the Commission's "fleeting expletive" policy represented an arbitrary and capricious change in policy in violation of the Administrative Procedure Act, the court's holding did not reach the constitutional challenges to the FCC's indecency regime raised by the appeal.³ Nevertheless, the court in *Fox* followed its holding with twelve pages of discussion it openly acknowledged as unnecessary to its decision.⁴ The opinion went on to review a number of these challenges and to conclude that the arguments under which the Supreme Court has historically permitted the FCC to regulate indecent broadcast speech may no longer be viable.⁵ The Supreme Court's decision to accept the *Fox* appeal suggests that, in its first review of a broadcast indecency case in thirty years, the Court will address the constitutional challenges the Second Circuit acknowledged but did not decide.⁶

The Supreme Court first confirmed the FCC's constitutional authority to regulate indecent broadcast speech in 1978 in *Pacifica*.⁷ By a 5-to-4 margin, the *Pacifica* decision reversed the ruling of the Court of Appeals for the District of Columbia Circuit and held that the FCC was authorized to regulate the broadcast of indecent language in radio communications and to sanction broadcasters for violations of its newly formulated regulatory policy under the previously neglected provisions of 18 U.S.C. § 1464.⁸ Though a similar content-based, gov-

Their Airing of the "Golden Globes Awards" Program (*Golden Globes*), 19 F.C.C.R. 4975, 4980 (2004). The rock star Bono's exclamation upon receiving an award that "this is really, really fucking brilliant" resulted in the first instance of the FCC's exercise of this new policy. See *id.* at 4976 n.4. This reversed a long-standing policy under which passing and isolated uses of such language would not constitute indecency. See *Fox*, 489 F.3d at 451; *Golden Globes*, 19 F.C.C.R. at 4980; Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency (2001 *Indus. Guidance*), 16 F.C.C.R. 7999, 8003 (2001).

³ See *Fox*, 489 F.3d at 447. On nearly identical reasoning, the U.S. Court of Appeals for the Third Circuit vacated an FCC order assessing penalties to CBS television stations for the fleeting broadcast of an image of the performer Janet Jackson's exposed breast during the 2004 Super Bowl Halftime Show. See *CBS Corp. v. FCC*, No. 06-3575, slip op. at 6 (3rd Cir. 2008). Consistent with the Second Circuit's ruling on the FCC's "fleeting expletives" policy in *Fox*, the Third Circuit held in *CBS* that the FCC's newly introduced practice of including "fleeting images" within the scope of actionable indecency represented an arbitrary and capricious change in policy and therefore was invalid under the Administrative Procedure Act. *Id.* at 49; see *Fox*, 489 F.3d at 447.

⁴ See *Fox*, 489 F.3d at 462-74.

⁵ See *id.*

⁶ See *id.*

⁷ 438 U.S. at 751.

⁸ See 18 U.S.C. § 1464 (2000) (prohibiting the utterance of any "obscene, indecent, or profane language by means of radio communication"); *Pacifica*, 438 U.S. at 751.

ernmental restriction on speech would have been held presumptively invalid in any other context, the Court explained that the unique characteristics of the broadcast medium warranted a relaxed standard of First Amendment scrutiny and held that the FCC's policy implementing this authority did not impermissibly burden First Amendment rights of free expression.⁹ The decision has long been criticized by First Amendment scholars as an unjustified endorsement of government controls on private speech.¹⁰

Less obvious and less frequently discussed than the uncertain rationale or problematic doctrine of *Pacifica* are the complications that have resulted from the definition of indecency introduced by the FCC in that case and apparently endorsed by the Supreme Court in the *Pacifica* ruling.¹¹ The FCC's order in *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)* (*Pacifica Order*), which was ultimately affirmed by the Supreme Court in *Pacifica*, defines indecency as language that "in terms patently offensive as measured by contemporary community standards for the broadcast medium, [describes] sexual or

⁹ See *Pacifica*, 438 U.S. at 741 n.17 ("[I]t is well settled that the First Amendment has a special meaning in the broadcast context."); *id.* at 748, 750-51. But see *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (establishing generally that content-based regulations are "presumptively invalid"). Precisely what measure of relaxation the Court intends in its scrutiny of broadcast regulation is not perfectly clear. See *Fox*, 489 F.3d at 464 (recognizing some tension in the law regarding the level of First Amendment scrutiny appropriate to broadcast speech). Most likely, it means that restrictions on broadcast speech will be subject to an intermediate level of scrutiny and upheld when the restriction is narrowly tailored to serve a substantial governmental interest, while a similar restriction in another context would require a compelling governmental interest. See *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 (1984). It may also mean that restricting certain kinds of speech or compelling certain other kinds of speech—burdens that would be judged too substantial in any other context—will be allowed because of the purportedly unique aspects of broadcast speech. See *id.* at 380; *Pacifica*, 438 U.S. at 748-50; *Red Lion Broad. v. FCC*, 395 U.S. 367, 388-89 (1969); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943); *Network Programming Inquiry*, 25 Fed. Reg. 7291, 7292-93 (FCC Aug. 3, 1960).

¹⁰ See generally Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359 (2005); Joshua B. Gordon, *Pacifica Is Dead. Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451 (2006); Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMM'LAW CONSPICUOUS 431 (2007); Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221 (1996); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

¹¹ See 438 U.S. at 745 (establishing that the question in the case is whether the broadcast of material that is indecent according to the FCC's definition may be regulated by the agency); see also *Citizen's Complaint Against Pacifica Found. Station WBAI (FM)* (*Pacifica Order*), 56 F.C.C.2d 94, 97 (1975), *rev'd sub nom. Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978) (introducing the FCC's standard for evaluating indecency in the context of finding a violation by WBAI-FM).

excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."¹²

The immediate effect of the FCC's definition was to distinguish indecency for the first time from the narrower category of obscenity, which the Court had previously established must depict explicitly sexual conduct in a patently offensive way and must be characterized by an appeal to prurient interest.¹³ The *Pacific* Order's indecency definition, however, was crafted from the Court's own, earlier definition of obscenity, and thus the two categories are related by law, much as they are connected in popular understanding.¹⁴

The Court in *Pacific* was silent on the FCC's adoption of "contemporary community standards for the broadcast medium" as a legal benchmark for offensiveness.¹⁵ As a result, lower courts have hesitated to consider challenges to the FCC's reliance on it.¹⁶ In the context of obscenity law, which is the original, judicial source of the community standard, the Court has a long history of insisting that determinations of offensiveness be made by reference to a local community, however broadly conceived.¹⁷ More recently, the Court has extended that view—and its presumption that such a formulation contributes meaningfully to First Amendment protections—to its evaluation of statutes regulating indecent content in nonbroadcast media, such as tele-

¹² *Pacific Order*, 56 F.C.C.2d at 97. The text of the FCC's definition has remained unchanged since originally issued; however, the Commission has given periodic elaborations and illustrations of its application of the rule to specific circumstances, particularly since its decision in 1987 to extend enforcement beyond the specific facts of *Pacific*. See generally *Golden Globes*, 19 F.C.C.R. 4975; *2001 Indus. Guidance*, 16 F.C.C.R. 7999; *Infinity Broad. Corp. of Pa. (Infinity)*, 3 F.C.C.R. 930 (1987).

¹³ See *Miller v. California*, 413 U.S. 15, 24 (1973). One of the holdings of *Pacific* is that, at least in the context of broadcasting, indecent speech may be distinguished from obscene speech. See 438 U.S. at 741. Both categories are determined to be offensive by contemporary community standards, but for speech to be found to be obscene, it must appeal to prurient interest and also lack serious literary, artistic, political, or scientific value. Compare *id.*, with *Miller*, 431 U.S. at 24.

¹⁴ See *infra*, notes 110–123 and accompanying text.

¹⁵ See generally 438 U.S. 726.

¹⁶ See *Fox*, 489 F.3d at 465; *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988). Among the constitutional challenges noted by the court of appeals but not decided in *Fox* was the appellants' argument that "the FCC's 'community standards' analysis is arbitrary and meaningless." See *Fox*, 489 F.3d at 454. Even while acknowledging itself as bound by the precedent of *Pacific*, the *Fox* court expressed great skepticism that the FCC's indecency test would now survive a First Amendment challenge. See *Fox*, 489 F.3d at 464–66.

¹⁷ See *Miller*, 413 U.S. at 30, 37; see also *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 124–25 (1989); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Hamling v. United States*, 418 U.S. 87, 106 (1974).

phone messaging services (i.e., "dial-a-porn"), cable television, and the Internet.¹⁸ The FCC, by contrast, has long insisted that in regulating broadcast content, the community on which it relies in determining a standard of offensiveness is "not a local one" and therefore "does not encompass any particular geographic area."¹⁹ The FCC asserts that the community contemplated by its standard instead reflects "a broader standard for broadcasting generally," a circumlocution that seems to establish a national standard without naming it as such.²⁰

Over time, the FCC's idiosyncratic use of the contemporary community standards benchmark has given rise to both constitutional and regulatory conflicts.²¹ First, the FCC's ever-evolving interpretation and application of the community standard has resulted in sharp inconsistencies between the FCC's use of the standard and the constitutional purpose for which the Court originally adopted the standard in the context of obscenity.²² Second, the FCC has applied the community standard to indecency determinations in a manner that directly conflicts with the statutory authority under which it regulates broadcasting generally, resulting in a fundamental conflict with its own internal regulatory policies and practices.²³

The recent history of Supreme Court decisions resolving challenges to statutes that import *Pacifica's* definition of indecency and its reliance on contemporary community standards in order to regulate indecency in other media evidence the Court's continuing disposition to depend upon local communities as the best guarantee of the constitutional protection due to controversial speech.²⁴ Accordingly, its rulings in these cases also display the Court's great reluctance to endorse

¹⁸ See *Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564, 583 (2002); *Reno v. ACLU*, 521 U.S. 844, 874 n.39, 877-78 (1997); *Denver Area Telecomm. Consortium v. FCC*, 518 U.S. 727, 753, 763 (1996); *Sable*, 492 U.S. at 124-25.

¹⁹ 2001 *Indus. Guidance*, 16 F.C.C.R. at 8002.

²⁰ *Infinity*, 3 F.C.C.R. at 933. Commissioner Jonathan Adelstein, for one, has recently admitted that the Commission's repeated assertion that the applicable standard is "not a local one" but based "on a broader standard for broadcasting generally" means that "the Commission applies a national indecency standard." See *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show (Super Bowl)*, 21 F.C.C.R. 2760, 2785 (2006) (statement of Commissioner Adelstein).

²¹ See *infra* notes 229-271 and accompanying text.

²² See *infra* notes 253-265 and accompanying text.

²³ See Paul J. Feldman, *The FCC and Regulation of Broadcast Indecency: Is There a National Broadcast Standard in the Audience?*, 41 FED. COMM. L.J., 369, 396-98 (1989); see also *infra* notes 249-252 and accompanying text.

²⁴ See *Ashcroft I*, 535 U.S. at 583; *Reno*, 521 U.S. at 874 n.39, 877-78; *Denver Area*, 518 U.S. at 753, 763; *Sable*, 492 U.S. at 124-25.

any standard that purports to derive its authority from the views of a "national" community.²⁵ These recent decisions shed considerable light on how the Court would rule today on a challenge to the FCC's conception of community standards in the context of broadcast indecency.²⁶ With its decision to grant review of the Second Circuit's *Fox* decision, the Court now has an opportunity to address the question directly.²⁷

This Note argues that in a broad-based review of the FCC's broadcast indecency policy, the Supreme Court should insist that the FCC rely upon the standards of the local community in which the allegedly indecent material was broadcast in making its determination whether a particular broadcast may be considered patently offensive and thus a violation of § 1464.²⁸ Such a rule would (1) establish general conformity between obscenity and indecency evaluations in all adjudicatory contexts; (2) establish consistency between the FCC's indecency practices in the broadcast context and the Court's requirements of indecency standards for other media; (3) bring the FCC's indecency policy into harmony with the terms of the statutory authority and the policies and practices under which the FCC regulates broadcasting generally; and (4) bring this element of broadcast regulation more closely into line with the Court's First Amendment jurisprudence.²⁹

Part I of this Note reviews the origin of the FCC's statutory authority to regulate radio and television broadcasting generally and broadcast content specifically and notes the primary value that localism holds in establishing the Commission's regulatory practices and policies under this authority.³⁰ Part II examines the history of the Supreme Court's adoption of contemporary community standards as a constitutionally required element in obscenity determinations and explains the Court's rationale for relying on varying local communities rather than a single national community as the source of such standards.³¹ Part III traces the FCC's adoption of the basic terms and framework of the Court's obscenity definition in formulating its own

²⁵ See *Ashcroft I*, 535 U.S. at 583; *Reno*, 521 U.S. at 874 n.39, 877-78; see also *Sable*, 492 U.S. at 125-26. But see *Ashcroft I*, 535 U.S. at 587 (O'Connor, J., concurring) (advocating for the introduction of a national standard for application to the Internet); *id.* at 590 (Breyer, J., concurring) (arguing that the Congress intended the application of a national standard under the statute at issue).

²⁶ See *infra* notes 170-228 and accompanying text.

²⁷ See *Fox*, 128 S. Ct. at 1647 (granting certiorari).

²⁸ See *infra* notes 269-271 and accompanying text.

²⁹ See *infra* notes 230-271 and accompanying text.

³⁰ See *infra* notes 35-64 and accompanying text.

³¹ See *infra* notes 65-109 and accompanying text.

definition of indecency in the FCC's 1975 *Pacifica Order* and highlights the distinctions the FCC has attempted to draw over time between its practices and the Court's application of its obscenity standard.³² Part IV reviews the Court's continuing commitment to the use of local community standards by examining its recent rulings on indecency regulation in other, nonbroadcast electronic media and by considering the jurisprudential commitments these rulings reveal.³³ Part V considers the practical and constitutional consequences of the failure of the FCC's indecency policy to meet the Court's requirements and recommends that the Court remedy these conflicts by requiring the FCC to adopt a practice of determining indecency through meaningful consultation of local standards.³⁴

I. LOCALISM AS A VALUE IN FCC REGULATORY PRACTICES

In the 1920s and 1930s, the rapid, unregulated growth of radio broadcasting produced a disorder of competing uses, resulting in a level of technical interference that threatened the successful development of broadcasting as a viable means of mass communication.³⁵ In order to remedy this perceived crisis, the Communications Act of 1934 authorized the Federal Communications Commission (the "FCC" or the "Commission") to license and regulate radio and television broadcast stations to serve the "public convenience, interest, or necessity."³⁶ Under this grant, the Supreme Court has ruled Congress "gave the Commission not niggardly but expansive powers,"³⁷ including the authority not only to address technical and engineering matters, such as determining broadcast signal coverage areas, but also to regulate program content in order to promote the "larger and more effective use of radio in the public interest."³⁸ FCC regulation of broadcasting under this grant applies almost entirely at the level of the individual radio or television station, each of which is licensed under FCC regulations to a

³² See *infra* notes 110–169 and accompanying text.

³³ See *infra* notes 170–228 and accompanying text.

³⁴ See *infra* notes 230–271 and accompanying text.

³⁵ See *Red Lion Broad. v. FCC*, 395 U.S. 367, 388 (1969); *Nat'l Broad. Co. v. FCC*, 319 U.S. 190, 210–15 (1943) (rehearsing a complete history of early federal schemes to regulate broadcasting and the eventual resolution provided in the Communications Act of 1934).

³⁶ See 47 U.S.C.A. § 307(a) (West 2001 & Supp. 2008).

³⁷ See *Nat'l Broad.*, 319 U.S. at 219.

³⁸ See 47 U.S.C. § 303(g) (2000); *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 377 (1984); *Red Lion*, 395 U.S. at 388–89; *Nat'l Broad.*, 319 U.S. at 217, 226.

particular, local community the Commission designates as its "community of license."³⁹

The FCC's regulation of program content operates in two manners: first, prescriptively, by requiring the broadcast of programming that is asserted or determined to be of value to the broadcaster's community of license and therefore consistent with the public interest;⁴⁰ and second, proscriptively, by prohibiting the broadcast of programming that is asserted or determined to be harmful to the public interest.⁴¹ Both methods of regulation rely on local determination of the needs, interests, and tastes of the population that is served by the licensee's broadcast signal, and both depend on monitoring and enforcement mechanisms that operate locally as well.⁴²

In justifying its prescriptive programming requirements, the FCC has consistently explained that the grant of a broadcast license obligates the licensed station to program principally for the benefit of its designated community of license.⁴³ The essential requirement of the public interest standard, therefore, consists of "a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes,

³⁹ See 47 U.S.C. § 303(d), (h) (granting the FCC the power and duty to determine the location of classes of stations or individual stations and to establish areas or zones to be served by any station); *id.* § 307(a), (b) (authorizing the FCC to grant broadcast licenses in service to public convenience, interest, or necessity and requiring that distributions of licenses be made "among the several States and communities" in a manner that will produce a fair, efficient, and equitable distribution); 47 C.F.R. § 73.1120 (2008).

By way of example, under the FCC's licensing scheme, the maximum signal permitted to an analog FM radio station produces a circular coverage pattern with a diameter of 114 miles; the maximum signal permitted to an analog VHF television station produces a circular coverage pattern with a diameter of 160 miles. See 47 C.F.R. § 73.211 (2008) (specifying classifications for FM radio stations); *id.* § 73.614 (specifying classifications for television stations).

⁴⁰ See *League of Women Voters*, 468 U.S. at 377; *Red Lion*, 395 U.S. at 389; see also *Deregulation of Radio (Radio Deregulation Order)*, 84 F.C.C.2d 968, 978-79, 987-92 (1981); *Network Programming Inquiry*, 25 Fed. Reg. 7291, 7294-96 (FCC Aug. 3, 1960). See generally *Primer on Ascertainment of Community Problems by Broadcast Applicants (Ascertainment Primer)*, 27 F.C.C.2d 650 (1971).

⁴¹ See 18 U.S.C. § 1304 (2000) (prohibiting the broadcast of lotteries or numbers games); 18 U.S.C.A. § 1343 (West 2001 & Supp. 2008) (fraud by radio); 18 U.S.C. § 1464 (2000) (obscene, indecent, or profane utterance); 47 U.S.C. § 303(m)(1)(D)(1) (granting the FCC power to suspend a broadcaster's license for the transmission of false or deceptive signals or communications); see also *Network Programming Inquiry*, 25 Fed. Reg. at 7293.

⁴² See *infra* notes 53-64 and accompanying text.

⁴³ See *Broadcast Localism*, 23 F.C.C.R. 1324, 1327 (2008); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations (Television Deregulation Order)*, 98 F.C.C.2d 1075, 1084 (1984); *Radio Deregulation Order*, 84 F.C.C. 2d at 989; *Network Programming Inquiry*, 25 Fed. Reg. at 7294, 7295.

needs, and desires of his community or service area."⁴⁴ To fulfill its statutory obligation to grant local broadcast licenses in accordance with the public interest, the FCC conditions license grants, modifications, transfers, and renewals on a satisfactory demonstration by licensees of their efforts to determine these local needs and to satisfy them by the delivery of responsive programming.⁴⁵ The FCC gave its most complete expression to what the public interest requires of licensees in this regard in its 1960 *Programming Statement*, which also adopted formal ascertainment procedures requiring licensees to compile demographic data and conduct polling in their communities of license and the surrounding geography to authenticate their efforts to identify pressing community needs.⁴⁶

In the 1980s, as part of a general movement toward federal deregulation, the FCC eliminated the requirement that licensees submit formal documentation of the investigations called for by the *Programming Statement*, but it maintained the requirement that licensees regularly report to the Commission both their determination of community needs and the programming broadcast in response to these needs.⁴⁷ In January 2008, the FCC concluded a four-year Localism in Broadcasting review intended to enhance localism by finding ways to improve programming targeted to local needs and interests.⁴⁸ Among the actions following from its review are a return to some of the reporting requirements eliminated under deregulation and a proposal that licensees be obligated to conduct quarterly meetings with a board of community advisors

⁴⁴ Network Programming Inquiry, 25 Fed. Reg. at 7294, 7295–96.

⁴⁵ See 47 U.S.C. § 307(a), (d); *Radio Deregulation Order*, 84 F.C.C.2d at 990–92.

⁴⁶ See Network Programming Inquiry, 25 Fed. Reg. at 7296. This formal ascertainment procedure developed from the broad charge of the FCC's 1960 Network Programming Inquiry, which instructed licensees to make a "canvass of the listening public who will receive the signal and who constitute a definite public interest figure" and to consult with representative community leaders who could "bespeak the interests which make up the community." See 25 Fed. Reg. at 7296. The FCC eventually codified the steps necessary to fulfill these obligations in its *Ascertainment Primer*, a "how-to" manual for satisfying the ascertainment and reporting requirements promulgated in the Network Programming Inquiry. See generally *Ascertainment Primer*, 27 F.C.C.2d 650.

⁴⁷ See *Television Deregulation Order*, 98 F.C.C.2d at 1089–90; *Radio Deregulation Order*, 84 F.C.C.2d at 991–92. The FCC explained that the philosophy of the *Radio Deregulation Order* was consistent with that expressed in the 1960 Network Programming Inquiry: the "bed-rock obligation" of "public interest" consisted in delivering programming to "serve the specific interests" of the broadcaster's community of license. *Radio Deregulation Order*, 84 F.C.C.2d at 978.

⁴⁸ See generally *Broadcast Localism*, 23 F.C.C.R. 1324.

to determine the needs and interests of their communities of license.⁴⁹ The long history of this detailed regulatory framework governing local program needs confirms that under both statutory grant and established policy, localism has always been conceived of as an essential element of the FCC's regulation of content in the public interest.⁵⁰

FCC regulations proscribe a range of content types deemed to be harmful to the public interest.⁵¹ The most substantial category is the area of obscene, indecent, or profane utterances prohibited under 18 U.S.C. § 1464.⁵² The FCC exercises its authority to proscribe harmful program content in a manner that reflects the fundamentally local nature of its regulatory authority and policies as well, notwithstanding its rejection of a local standard for the purposes of its indecency definition under § 1464.⁵³ The FCC, for instance, does not independently monitor broadcasts for indecent material.⁵⁴ Instead, it considers only documented complaints of indecent broadcasting received from the public.⁵⁵ Under the FCC's general practice, even though an individual complaint regarding local broadcast of network-produced material might be considered evidence that indecent material has been broad-

⁴⁹ See *id.* at 1329, 1336; see also Standardized and Enhanced Disclosure Requirements for Television Broad. Licensee Public Interest Obligations, 23 F.C.C.R. 1274, 1274, 1290 (2008).

⁵⁰ See *Broadcast Localism*, 23 F.C.C.R. at 1327 (noting that the FCC's broadcast regulatory framework is designed to foster a system of local stations that respond to the unique concerns and interests of the audiences within their stations' respective service areas); *Radio Deregulation Order*, 84 F.C.C.2d at 986-87.

⁵¹ See, e.g., 18 U.S.C. § 1464 (2000) (authorizing penalties for the broadcast of obscene, indecent, or profane language); 47 C.F.R. § 73.3999 (establishing FCC rules necessary for the enforcement of 18 U.S.C. § 1464); see also 18 U.S.C. § 1304 (prohibiting the broadcast of lotteries or numbers games); 18 U.S.C.A § 1343 (prohibiting fraud by radio).

⁵² 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). Penalties for violation of § 1464 may reach \$325,000 for a single incident or \$3,000,000 for a continuing, single event. 47 U.S.C.A. § 503 (b)(2)(C)(ii) (West 2001 & Supp. 2008). The FCC may suspend a broadcast license for violation of § 1464. 47 U.S.C. 303 (m)(1)(o) (2000). The FCC may also revoke a broadcast license for violation of § 1464. 47 U.S.C. § 312(a)(6); see also Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program (*Golden Globes*), 19 F.C.C.R. 4975, 4982 (2004) (warning that serious multiple violations of the FCC's indecency rule may lead to the commencement of revocation proceedings). Finally, violation of § 1464 is grounds for denying a renewal of a broadcast license because such a denial may be in the public interest. 47 U.S.C.A. § 307(c)(1) (West 2001 & Supp. 2008).

⁵³ See *infra* notes 149-169 and accompanying text.

⁵⁴ Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency (2001 *Indus. Guidance*), 16 F.C.C.R. 7999, 8015 (2001).

⁵⁵ See *id.*

cast by all licensees across the country who have transmitted the network programming, the FCC will investigate only those licensees whose broadcasts to their communities have generated written complaints to the FCC.⁵⁶

Likewise, the FCC assesses sanctions for violations of its proscriptive programming requirements only at the level of the broadcast licensee operating within an individual community of license.⁵⁷ This aspect of the FCC's locally determined regulatory framework is manifest in the FCC rulings contested in the 2007 case decided by the U.S. Court of Appeals for the Second Circuit, *Fox Television Stations, Inc. v. FCC*.⁵⁸ In the rulings at issue in *Fox*, the FCC had issued orders finding that television licensees who had broadcast "fleeting expletives" in network programming within their licensed communities, rather than the national, corporate network producing the programming, had violated the prohibition against the utterance of indecent language contained in 18 U.S.C. § 1464.⁵⁹ Thus, the parent corporation operating the Fox Television Network itself faced no FCC sanction or liability, but Fox subsidiaries holding individual broadcast licenses as owned and operated affiliates of the network did, as did independently-owned affiliates of the Fox Network who broadcast the programming provided by the network but took no role in its production.⁶⁰

Given the FCC's regulatory focus on the individual broadcast licensee operating within a distinct, local community, it is peculiar that the Commission's recent, high-profile indecency rulings appear to rely

⁵⁶ See *id.* See generally *Infinity Broad. Corp. of Pa. (WYSP)*, 2 F.C.C.R. 2705 (1987). Commissioner Jonathan Adelstein has expressed his disagreement with the FCC's general practice of finding violations of § 1464 by network affiliates only in those communities in which the broadcast has been the subject of a viewer complaint. See *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show (Super Bowl)*, 21 F.C.C.R. 2760, 2784-85 (2006) (statement of Commissioner Adelstein).

⁵⁷ See *Golden Globes*, 19 F.C.C.R. at 4982 (finding violations by individual broadcast licensees for the airing of network-produced programming).

⁵⁸ See 489 F.3d 444, 451-52 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); *Golden Globes*, 19 F.C.C.R. at 4982.

⁵⁹ See 18 U.S.C. § 1464; 47 U.S.C.A. § 503(b)(2) (establishing forfeitures for violation of 18 U.S.C. § 1464 by broadcast licensees); *Fox*, 489 F.3d at 451-52; *Golden Globes*, 19 F.C.C.R. at 4975-76, 4984-87; see also *Complaints Regarding Various Television Broadcs. Between Feb. 2, 2002 and Mar. 8, 2005 (Omnibus Order)*, 21 F.C.C.R. 2664, 2665, 2720-21 (2006) (applying liability under the FCC's "fleeting expletive" policy to individual broadcast licensees for incidents similar to that addressed in the *Golden Globes* proceeding).

⁶⁰ See *Omnibus Order*, 21 F.C.C.R. at 2665, 2720-21; *Golden Globes*, 19 F.C.C.R. at 4975-76, 4984-87.

so strongly on the national nature of the telecasts at issue.⁶¹ The FCC's 2004 order in *Golden Globes*, for instance, insists that it was particularly "shocking and gratuitous" that the word "fucking" was broadcast on a "nationally telecast awards ceremony."⁶² Likewise, the FCC's 2006 order in *Super Bowl* found the sexually charged halftime show performance at issue in that proceeding particularly culpable because it had been broadcast "to a nationwide audience."⁶³ These recent orders appear to suggest that if either of these broadcasts had been transmitted to a single community, the material at issue would somehow have resulted in a less egregious violation, or perhaps none at all, but such a conclusion is clearly at odds with the logic of the FCC's enforcement practices and the statutory authority under which the FCC applies them.⁶⁴

II. ORIGINS OF THE CONTEMPORARY COMMUNITY STANDARD

The U.S. Supreme Court first endorsed the use of "contemporary community standards" as a benchmark for obscenity determinations in *Roth v. United States* in 1957.⁶⁵ *Roth's* primary holding was that obscenity does not fall within the area of constitutionally protected speech or press.⁶⁶ Its other significant contribution was, necessarily, to advance a legal definition of obscenity that lower courts could rely on in applying statutes prohibiting obscenity.⁶⁷ The appellant in *Roth* had been convicted of distributing obscene materials in violation of 18 U.S.C. § 1461, which provides criminal penalties for the mailing of material that is "obscene, lewd, lascivious . . . [or] filthy."⁶⁸ The jury in *Roth* had been instructed to determine the obscenity of the questioned material by considering its effect "upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. . . . You may ask yourselves does it offend the common conscience of the community by present-day standards."⁶⁹

⁶¹ See *Super Bowl*, 21 F.C.C.R. at 2771; *Golden Globes*, 19 F.C.C.R. at 4979.

⁶² See *Golden Globes*, 19 F.C.C.R. at 4979 (emphasis added); see also *id.* at 4989 (statement of Commissioner Abernathy) ("[U]se of the 'f-word' on a nationally telecast awards ceremony is shocking, gratuitous, and offensive.").

⁶³ See *Super Bowl*, 21 F.C.C.R. at 2771.

⁶⁴ See *id.*; *Golden Globes*, 19 F.C.C.R. at 4979; see also 47 U.S.C. § 1464.

⁶⁵ 354 U.S. 476, 489–90 (1957).

⁶⁶ *Id.* at 485.

⁶⁷ *Id.* at 489–90.

⁶⁸ 18 U.S.C. § 1461 (2000); *Roth*, 354 U.S. at 480.

⁶⁹ 354 U.S. at 490.

In approving the trial court's instruction, the *Roth* court explicitly rejected a competing approach that had judged the offensiveness of sexually oriented material by its effect upon particularly susceptible persons.⁷⁰ In *Roth*, the Court held that such a test was unconstitutionally restrictive of freedoms of speech and of the press because it potentially excluded from circulation material "legitimately treating with sex" as a worthy matter of human interest and public concern simply because the material in question might be harmful or offensive to an unrepresentative minority unusually affected by frank treatment of sexually oriented content.⁷¹ *Roth's* reliance on a broadly conceived contemporary community standard thus aimed to protect potentially controversial speech for the benefit of the wider community against the prohibitions of an especially sensitive or intolerant minority—against what would later come to be referred to as the "heckler's veto."⁷²

The Supreme Court struggled over the next sixteen years to resolve the unspecified details of *Roth's* application.⁷³ During this period, the Court debated what sort of community *Roth* and the Constitution required as the source of contemporary community standards.⁷⁴ This was the central point of dispute, for example, in the Court's conflicting

⁷⁰ See *id.* at 489. As noted by the Court, the "susceptible persons" approach followed the nineteenth century British precedent of *R v. Hicklin*, (1868) 3 Q.B. 360, 371. See *Roth*, 354 U.S. at 489.

⁷¹ See 354 U.S. at 487, 489.

⁷² See *Ashcroft v. ACLU* (*Ashcroft I*), 535 U.S. 564, 590 (2002) (Breyer, J., concurring in part and concurring in the judgment); *Reno v. ACLU*, 521 U.S. 844, 880 (1997); *Roth*, 354 U.S. at 487, 489. For a useful history of jurisprudential origins of the concept of contemporary community standards, see Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 30–32 (2004). Cenite points out that the benchmark of a contemporary community standard was first introduced to U.S. obscenity law by Judge Learned Hand in 1913. See *id.* at 30–31.

⁷³ See *Miller v. California*, 413 U.S. 15, 22 (1973). Because no majority of the Court was able to agree in this interim period on a standard more specific than the two basic holdings advanced by *Roth*, the Court was obliged to engage in repetitive, case-by-case reviews of obscenity prosecutions, reversing convictions only when at least five members of the Court, applying their separate tests, found the material in question to be unprotected by the First Amendment. See *id.* at 22 n.3. The Court decided thirty-one cases in this ad hoc manner. See *id.*; see also *Redrup v. New York*, 386 U.S. 767, 770–71 (1967) (inventorying the variety of views among the members of the Court at that moment). See generally *Memoirs v. Massachusetts*, 383 U.S. 413 (1965); *Jacobellis v. Ohio*, 378 U.S. 184 (1963); *Manual Enters. v. Day*, 370 U.S. 478 (1961); *Smith v. California*, 361 U.S. 147 (1959); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684 (1959).

⁷⁴ See *Manual Enters.*, 370 U.S. at 488 (Harlan, J., announcing the judgment of the Court). Compare *Jacobellis*, 378 U.S. at 192, 194–95 (Brennan, J., announcing the judgment of the Court), with *id.* at 200 (Warren, C.J., dissenting).

opinions in the 1964 case of *Jacobellis v. Ohio*.⁷⁵ In *Jacobellis*, the Court reversed the conviction of a movie theater manager who had been prosecuted under a state obscenity statute for the possession and exhibition of a sexually explicit foreign film.⁷⁶ Although six members of the Court concurred in the judgment to reverse the conviction, the case produced four separate opinions, and none received the endorsement of more than two justices.⁷⁷

The main point of disagreement in *Jacobellis* was whether *Roth* permitted deference to prevailing community standards in the judicial district in which the case had been tried or whether it required reliance on some notion of a uniform, national community standard.⁷⁸ The repeated argument of Justice Brennan in his opinion announcing the judgment of the Court was that contemporary community standards must reference a consistent, national standard: "It is, after all, a national Constitution we are expounding."⁷⁹ A work judged not to be obscene against the liberal national standard Justice Brennan envisioned would be protected against contrary determinations in any smaller, less tolerant community.⁸⁰ As a result, the protections of the First Amend-

⁷⁵ Compare *Jacobellis*, 378 U.S. at 192, 194-95 (Brennan, J., announcing the judgment of the Court), with *id.* at 200 (Warren, C.J., dissenting).

⁷⁶ See *id.* at 185-87 (Brennan, J., announcing the judgment of the Court).

⁷⁷ See *id.* at 185-96; *id.* at 196-97 (Black, J., concurring); *id.* at 197 (Stewart, J., concurring); *id.* at 197-98 (Goldberg, J., concurring). The film in question had been shown to favorable reviews and some critical acclaim in major cities across the United States, and the evidence of its obscenity was limited to one explicit love scene in its final reel. See *id.* at 196. According to one report, "the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed." *Id.* at 197-98.

⁷⁸ Compare *id.* at 192, 194-95 (Brennan, J., announcing the judgment of the Court), with *id.* at 200 (Warren, C.J., dissenting).

⁷⁹ See *id.* at 195 (Brennan, J., announcing the judgment of the Court).

⁸⁰ See *Jacobellis*, 378 U.S. at 193-94 (Brennan, J., announcing the judgment of the Court). Justice Brennan argued that a consistent, national standard would guarantee some certainty to a content producer offering to distribute potentially controversial material in a new market that he would not subject himself to the risk of prosecution or reduced constitutional protection through his failure to discern the peculiar standards of a local community with which he might not be familiar. See *id.* More broadly, a consistent, national standard would also protect the interests of citizens wishing to access such material who might constitute minorities within more restrictive communities, as well as the collective interests of more permissive communities who might otherwise be deprived of material deemed obscene elsewhere by the caution of producers or distributors reluctant to risk prosecution by "testing the variation" among communities. See *id.* Justice Brennan's rejection of a local standard is thus analogous to the *Roth* Court's rejection of the "particularly susceptible persons" consideration of *Hicklin*: such standards fail to offer the degree of protection required by the Constitution because they are both too unpredictable and too restrictive. See *id.* at 193-95; *Roth*, 354 U.S. at 475-76.

ment would not vary according to local differences, and it would be beyond the power of a state to prohibit the consumption by its citizens of materials to which the Constitution provides a right of access.⁸¹

As the disposition of *Jacobellis* itself demonstrated, however, reliance on the application of a national standard for the evaluation of obscene material ultimately requires reference, at least in the event of a judicial appeal, to a centralized panel authorized to act as national tastemakers.⁸² Hoping to avoid just that result, Chief Justice Warren took a position diametrically opposed to Justice Brennan's in his dissent in *Jacobellis*.⁸³ The purpose of the Court in hearing a case such as *Jacobellis*, Warren argued, should be to establish a set of principles in the law that may be applied by lower courts and legislatures and not merely to rule on the alleged obscenity of an individual film or book.⁸⁴ The Court was therefore required to produce a rule that was susceptible to local application.⁸⁵

The debate over the application of community standards to obscenity prosecutions was finally settled nine years later by the Court's 1973 opinion in *Miller v. California*, which established a controlling legal definition of obscenity that a majority of the Court concluded would satisfy constitutional requirements and also permit practical application by lower courts.⁸⁶ The appellant in *Miller* had been con-

⁸¹ See *Jacobellis*, 378 U.S. at 194 (Brennan, J., announcing the judgment of the Court).

⁸² See *id.* at 190. Brennan's opinion in *Jacobellis* in fact insisted on this by asserting that in its review of obscenity challenges the Court could not rely on determinations made by judges or juries because they were likely to have made reference only to the standards of the particular, local community in which the case arose or was tried; instead, the Court was obliged to make its own, independent judgment of whether the material involved was constitutionally protected. See *id.*

⁸³ See *id.* at 200, 202 (Warren, C.J., dissenting).

⁸⁴ See *id.* at 202-03. Aside from the administrative burden such an arrangement would impose on the Court, questions naturally arose as to the appropriateness or competency of the nine Justices to "set standards and to supervise the private morals of the Nation." See *Kingsley*, 360 U.S. at 690 (Black, J., concurring). Justice Black, for one, believed the Court to be "about the most inappropriate Supreme Board of Censors that could be found." *Id.*

⁸⁵ See *Jacobellis*, 378 U.S. at 200, 202 (Warren, C.J., dissenting). Chief Justice Warren's dissent in *Jacobellis* argued further that the Court's own failure to settle upon a standard for obscenity likely meant that there was "no provable 'national standard,'" with the consequence that reference to a national standard would provide no more clarity or consistent protection, and likely less, than reliance on determinations made by individual communities varying in their tastes and preferences. See *id.* at 200. Chief Justice Warren argued, therefore, that enforcement of *Roth*'s rule should be committed to state and federal courts operating by reference to local community standards and with local determinations of obscenity subject to review by the Court only on a finding of insufficient evidence. See *id.* at 202.

⁸⁶ See 413 U.S. at 24, 33-34.

victed of mailing sexually explicit material in violation of a California statute that largely incorporated the obscenity definition provided by *Roth*.⁸⁷ At trial, the jury had been instructed to rely upon "contemporary community standards of the State of California" in determining whether the material at issue constituted obscenity, and the appellant objected on appeal that the constitutional standard required by *Roth* and subsequent cases was a national one.⁸⁸

The Supreme Court affirmed the judgments of the California courts in *Miller* and held that reliance by the jury on the "contemporary community standards of the State of California" in making its determination served the protective purpose of *Roth* and was also constitutionally satisfactory.⁸⁹ In his majority opinion, Chief Justice Burger advanced two rationales to support the use of varying local standards rather than a single, national standard in obscenity determinations.⁹⁰ First, local standards were practically determinable: they were largely questions of fact and therefore accessible and familiar to citizens and jurors of actual, local communities.⁹¹ A national standard, by contrast, was "hypothetical and unascertainable."⁹² The nation was simply too big and diverse to permit such a single formulation, and it was unclear that any consensus on such questions existed.⁹³ As a result, requiring a state court to structure its obscenity proceedings around a national standard of obscenity would be "an exercise in futility."⁹⁴

The second advantage a rule of local standards offered over a national standard was the protection it provided to individual choice.⁹⁵ The *Miller* opinion thus made a constitutional merit of the variation Justice Brennan had warned against in *Jacobellis*, announcing that diversity of tastes and attitudes among communities across the country was, in fact, a virtue protected by the First Amendment.⁹⁶ Differences of this sort, the Court concluded, should not be strangled by "the absolutism

⁸⁷ See *id.* at 16-18, 23; see also *Memoirs*, 383 U.S. at 418 (specifying the elements of the Court's legal standard for obscenity at that moment, which the California statute had incorporated, but without making explicit its reliance on a national standard).

⁸⁸ *Miller*, 413 U.S. at 31.

⁸⁹ *Id.* at 33-34.

⁹⁰ See *id.* at 30, 33.

⁹¹ See *id.* at 30.

⁹² *Id.* at 31. In *Miller*, Chief Justice Burger noted that his conclusion expanded on the arguments Chief Justice Warren had made in his dissent in *Jacobellis*. See *supra* note 84 and accompanying text.

⁹³ See *Miller*, 413 U.S. at 30.

⁹⁴ See *id.*

⁹⁵ See *id.* at 32 n.13, 33.

⁹⁶ See *id.* at 33.

of imposed uniformity" that would potentially apply under a national community standard administered by the federal judiciary.⁹⁷ In terms emphasizing cultural differences broadly attributable to varying regional identities, the opinion declared that it was "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."⁹⁸

In a further recognition of the value of choice, the *Miller* Court insisted that in failing to allow for variation in tastes among communities, a uniform national standard would pose a danger to free expression at least as great as would reliance on varying local standards because under a national standard it was inevitable that materials found tolerable in some places but not under the national standard would be unavailable to communities that found them acceptable.⁹⁹ This is the flip-side of the risk Justice Brennan had presumed to address by advocating a national standard in *Jacobellis*.¹⁰⁰ Since *Miller*, the Court has maintained the view that protection of the discretion of the audience—freedom of choice—is the primary constitutional value secured by contemporary community standards.¹⁰¹ Its decisions conclude that the possibility of denying a receptive, individual community access to content potentially subject to prohibition under a national standard poses a greater risk to free expression than penalizing a speaker who offends an unexpectedly strict local standard.¹⁰²

⁹⁷ See *id.* As early as *Roth* in 1957, Justice Harlan expressed similar concern over the "deadening uniformity" that he feared would result from nationwide "federal censorship" under statutes similar to § 1464. See 354 U.S. at 506–07 (Harlan, J., concurring in part and dissenting in part).

⁹⁸ See *Miller*, 413 U.S. at 32.

⁹⁹ See *id.* at 32 n.13. Choice had emerged as a critical First Amendment value in Supreme Court decisions well before *Miller's* introduction of an acceptable definition of obscenity. See *Manual Enters.*, 370 U.S. at 488 (Harlan, J., announcing the judgment of the Court); *Roth*, 354 U.S. at 506 (Harlan, J., concurring in part and dissenting in part). As early as its 1962 decision in *Manual Enterprises*, the Court had recognized that any rule was "intolerable" if its effect was to deny to some communities access to content those communities had by their own standards deemed acceptable. See 370 U.S. at 488 (Harlan, J., announcing the judgment of the Court); see also *Roth*, 354 U.S. at 506 (Harlan, J., concurring in part and dissenting in part).

¹⁰⁰ See 378 U.S. at 193 (Brennan, J., announcing the judgment of the Court).

¹⁰¹ See *Ashcroft I*, 535 U.S. at 580–81; *Reno*, 521 U.S. at 877–78; *Denver Area Telecomm. Consortium v. FCC*, 518 U.S. 727, 753, 763 (1996); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 124–26 (1989); see also *Ashcroft I*, 535 U.S. at 612 (Stevens, J., dissenting).

¹⁰² See *Ashcroft I*, 535 U.S. at 580–81; *Reno*, 521 U.S. at 877–78; *Denver Area*, 518 U.S. at 753, 763; *Sable*, 492 U.S. at 124–26; see also *Ashcroft I*, 535 U.S. at 612 (Stevens, J., dissenting).

In addition to resolving the community standards question, the *Miller* Court announced a three-part test to define obscenity for application in state prosecutions that remains the Court's test today:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰³

The Court has subsequently held that both the "prurient interest" element of part (a) and the "patently offensive" element of part (b) are to be judged by reference to contemporary community standards.¹⁰⁴ The question of whether the work as a whole lacks serious value, however, is held to be an objective one, to be considered from the perspective of a reasonable person and so not dependent upon the degree of local acceptance a work may have achieved.¹⁰⁵

Cases surfacing in the immediate jurisprudential wake of *Miller* clarified remaining nuances of the contemporary community standards benchmark.¹⁰⁶ For example, in 1974 in *Hamling v. United States*, the Supreme Court concluded that, although a national standard is, according to *Miller*, "hypothetical and unascertainable," it is still not a constitutional requirement that some smaller geographic area be explicitly substituted in issuing jury instructions.¹⁰⁷ All that is required is that a juror be permitted to draw upon knowledge of the "community or vicinage" from which he or she comes in making the essential determination.¹⁰⁸ Furthermore, according to the Supreme Court in *Jenkins v. Georgia*, decided the same year, the Constitution does not require that juries be instructed to make reference to a hypothetical, statewide

¹⁰³ 413 U.S. at 24 (citation omitted). In two companion cases announced the same day as *Miller*, the Court explicitly adopted the *Miller* standard for use in prosecutions under federal obscenity prosecutions as well. See *United States v. Orito*, 413 U.S. 139, 145 (1973); *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 130 (1973).

¹⁰⁴ See *Smith v. United States*, 431 U.S. 291, 300-01 (1977).

¹⁰⁵ See *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987); *Miller*, 413 U.S. at 34.

¹⁰⁶ See *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Hamling v. United States*, 418 U.S. 87, 104-05 (1974).

¹⁰⁷ See *Hamling*, 418 U.S. at 104-05 (holding that no such precise geographic area as an actual state geography is required in jury instructions as a matter of law).

¹⁰⁸ See *id.* at 105.

community: instead, juries may make determinations simply by relying on the understanding of the community from which they come, which potentially allows for an even narrower conception of community than that provided for in the statewide reference endorsed in *Miller*.¹⁰⁹

III. THE FCC'S ADOPTION OF CONTEMPORARY COMMUNITY STANDARDS

A. *The Origins of Broadcast Indecency in the Pacifica Order*

In December, 1973, six months after the Supreme Court's decision in *Miller v. California*, the Federal Communications Commission (the "FCC" or the "Commission") received a listener's written complaint concerning the afternoon broadcast on WBAI-FM in New York of a pre-recorded, twelve-minute monologue by the comedian George Carlin consisting substantially of expletives—"the words you couldn't say on the public . . . airwaves," according to Carlin's routine, "the ones you definitely couldn't say."¹¹⁰ It was unclear what regulatory response, if any, the FCC could make.¹¹¹ Although under 18 U.S.C. § 1464 the Commission had long held the apparent authority to issue sanctions for the broadcast of "obscene, indecent, or profane language by means of radio communication," the power had rarely been used and, at least with respect to indecency, had never been put to a constitutional test by a reviewing court.¹¹² To begin with, it had not yet been established that

¹⁰⁹ See 418 U.S. at 157.

¹¹⁰ See *Citizen's Complaint Against Pacifica Found. Station WBAI (FM) (Pacifica Order)*, 56 F.C.C.2d 94, 94-95 (1975), *rev'd sub nom. Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). The *Pacifica Order* characterized the Carlin monologue, accurately, as "almost wholly devoted to the use of such words as 'shit' and 'fuck,' as well as 'cocksucker,' 'motherfucker,' 'piss' and similar terms. *Id.* at 95.

¹¹¹ See WUHY-FM, E. Educ. Radio Notice of Apparent Liability (*WUHY Notice*), 24 F.C.C.2d 408, 412 (1970) (noting in the context of issuing a forfeiture notice for the broadcast of "indecent" language that the FCC could find "no precedent, judicial or administrative" for its action).

¹¹² See 18 U.S.C. § 1464 (2000); *WUHY Notice*, 24 F.C.C.2d at 412, 414. The statute provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both." 18 U.S.C. § 1464. Prior to evaluating the WBAI-FM listener complaint, the FCC had issued only one previous sanction for an indecent broadcast, and that had come only three years earlier in its 1970 *WUHY Notice*. See 24 F.C.C.2d at 412. In that proceeding, the FCC reviewed WUHY-FM's broadcast of a taped interview in which Jerry Garcia, a member of the Grateful Dead, repeatedly interspersed his comments and reflections with the expletives "fuck" and "shit" in order to determine if the hour-long broadcast should be penalized as indecent broadcast speech. *Id.* at 408, 412. Proceeding cautiously and relying on the Court's developing obscenity jurisprudence in *Roth* and the subsequent cases that strug-

indecent language was truly distinguishable from obscene language under the statute,¹¹³ and since the WBAI-FM broadcast lacked an appeal to "prurience," it could not be argued that it was obscene.¹¹⁴ This uncertainty was of course further complicated by the fact that in the unsettled period between *Roth v. United States* in 1959 and *Miller* in 1973, it had even been unclear what the Court would consider to be obscene language.¹¹⁵ The FCC's eventual response to the WBAI-FM complaint, issued in its 1975 order in *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)* (*Pacifica Order*), was the Commission's effort to settle these open issues and to assert its authority under § 1464 in a manner consistent with the Court's holding in *Miller*, which had been issued less than two years earlier.¹¹⁶

The *Pacifica Order* began by acknowledging that the term indecent had never been authoritatively construed by the courts, but it noted several lower court opinions entertaining the proposition that inde-

gled to clarify *Roth's* meaning, the Commission suggested, in *WUHY Notice*, that in the broadcast field, material should be considered indecent if it is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value." See *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Roth v. United States*, 354 U.S. 476, 489 (1957); *WUHY Notice*, 24 F.C.C.2d at 412. *WUHY Notice*, however, provided no discussion of whether community standards should be considered on a local or a national basis or by reference to some other distinction. See 24 F.C.C.2d at 412. Finding that the broadcast in question violated its broad standard, the FCC issued the *WUHY-FM* licensee a nominal \$100 fine, but the Commission was so uncertain of its authority under § 1464 that it openly welcomed a judicial review of its action since it believed that only by judicial review could the "pertinent standards" be determined. *Id.* at 414. The challenge never came.

For a useful review of the limited circumstances prior to 1975 in which the FCC had acted under § 1464's prohibition against the transmission of obscene and profane speech, see Michael S. Sundermeyer, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579, 591-99 (1975).

¹¹³ See *Pacifica*, 438 U.S. at 740-41; *Pacifica Order*, 56 F.C.C.2d at 97; *WUHY Notice*, 24 F.C.C.2d at 412. The respondent in *Pacifica* argued that obscenity and indecency are indistinguishable under federal regulatory statutes and cited as authority Justice Harlan's opinion in *Manual Enterprises v. Day*, which asserted that, in the context of restrictions on the transmission of sexually explicit material in the U.S. mail under 18 U.S.C. § 1461, use of the terms "lewd, lascivious, indecent, filthy or vile" must be taken as a whole to have a meaning clearly limited to "the obscene." See *Pacifica*, 438 U.S. at 740; *Manual Enters. v. Day*, 370 U.S. 478, 482 (1962) (Harlan, J., announcing the judgment of the Court). The FCC had considered this question and answered it the other way in issuing its order against WBAI-FM. See *Pacifica Order*, 56 F.C.C.2d at 97; see also *WUHY Notice*, 24 F.C.C.2d at 412.

¹¹⁴ See *Pacifica Order*, 56 F.C.C.2d at 97; see also *WUHY Notice*, 24 F.C.C.2d at 412 (agreeing that the Jerry Garcia interview at issue in that proceeding was not obscene because it did not make a dominant appeal to prurience or sexual matters).

¹¹⁵ See *Miller v. California*, 413 U.S. 15, 20 (1973) (noting the "somewhat tortured history" of the Court's obscenity decisions in this period); *id.* at 22 n.3; *Redrup v. New York*, 386 U.S. 767, 770-71 (1967).

¹¹⁶ See 18 U.S.C. § 1464; *Pacifica Order*, 56 F.C.C.2d at 94, 97.

cency had a meaning separate from obscenity in connection with § 1464 and therefore could be regulated in its own right.¹¹⁷ More crucially, the *Pacifica Order* explained that because the definition of indecency the Commission had hesitatingly relied upon in its sole, previous action under § 1464 had depended on the Court's then-existing definition of obscenity, *Miller's* recent revision to obscenity law now necessitated a reformulation of the Commission's conception of indecency.¹¹⁸

The *Pacifica Order* cast its definition of indecency by tailoring *Miller's* definition of obscenity in two principal ways.¹¹⁹ First, the order eliminated the requirement that the offending material appeal to the "prurient interest," thus expanding the embrace of indecency beyond content appealing primarily to the lustful appetite to encompass matters relating to sexual or excretory acts or organs generally.¹²⁰ Second, for situations in which there is a reasonable chance that children may be in the audience, the *Pacifica Order* dispensed with the provision of *Miller* that prohibited material could be redeemed if it could be found to hold literary, artistic, political, or scientific value.¹²¹ Merit will not redeem the merely indecent because the FCC's definition presumes that children should always be shielded from content that falls within its scope.¹²² On the remaining consideration of patent offensiveness, the *Pacifica Order* modified *Miller's* contemporary community standards benchmark only by inserting the qualifier "for the broadcast medium."¹²³

This reference to a particular standard "for the broadcast medium" appears to follow from notions expressed elsewhere in the *Pacifica Order* that, because of the medium's distinctive characteristics of

¹¹⁷ See 18 U.S.C. § 1464; *Pacifica Order*, 56 F.C.C.2d at 97. These three cases concerned criminal prosecutions brought by federal district attorneys, not by the FCC, for obscene, indecent, or profane speech transmitted in two-way radio communication. See *United States v. Smith*, 467 F.2d 1126, 1130 (7th Cir. 1972); *Tallman v. United States*, 465 F.2d 282, 286, 287 (7th Cir. 1972); *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966). Judge Tamm was critical of the FCC's use of these cases to support the distinction in his opinion invalidating the FCC's policy when the controversy was before the Court of Appeals for the District of Columbia Circuit. See *Pacifica Found. v. FCC (Pacifica Appeal)*, 556 F.2d 9, 15 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

¹¹⁸ See 18 U.S.C. § 1464; *Pacifica Order*, 56 F.C.C.2d at 94, 97.

¹¹⁹ Compare *Miller*, 413 U.S. at 24, with *Pacifica Order*, 56 F.C.C.2d at 97. Under the *Pacifica Order's* definition, indecency is language that "in terms patently offensive as measured by contemporary community standards for the broadcast medium [describes] sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience." 56 F.C.C.2d at 97.

¹²⁰ See *Pacifica Order*, 56 F.C.C.2d at 97.

¹²¹ See *id.*

¹²² See *id.*

¹²³ *Id.*

ubiquity and intrusiveness, broadcast content may be evaluated by a standard more restrictive than that applied to other media.¹²⁴ The *Pacifica Order* provided no explicit discussion as to whether the relevant community to be considered in an indecency evaluation is local or national.¹²⁵ But given the degree to which the order depended on and invoked *Miller* as authority, it is difficult to imagine that the Commission intended to ignore *Miller's* assessment that attempts to determine a national standard would be both constitutionally unsound and "an exercise in futility."¹²⁶

Moreover, the FCC's efforts in the *Pacifica Order* to situate its newly announced indecency policy within the context of its broader regulatory practices and responsibilities imply that community standards should always be applied with reference to the specific, local community served by the individual broadcast licensee.¹²⁷ The Commission, for instance, noted that it was issuing the *Pacifica Order* not only pursuant to the prohibition against the broadcast of indecent speech in 18 U.S.C. § 1464, but also under its broad statutory obligation to promote the larger and more effective use of radio in the public interest under 47 U.S.C. 303(g).¹²⁸ This directly ties the FCC's regulation of indecency to the goals and policies justifying the Commission's statutory grant of regulatory authority.¹²⁹ Moreover, as the Commission went on to explain by directly citing its 1960 *Programming Statement*, its application of the public interest criterion in the context of programming regulation had always required as its principal criterion a consideration of the "needs, interests and tastes" of the individual "community" each broadcaster is licensed to serve.¹³⁰

¹²⁴ See *id.* at 96-97 (explaining that, in view of broadcasting's intrusiveness and accessibility to children, government content restrictions should not be subject to the same constitutional analysis that might be appropriate for other, less intrusive forms of expression).

¹²⁵ See *Pacifica Order*, 56 F.C.C.2d at 97, 98.

¹²⁶ See *Miller*, 413 U.S. at 30, 32. The assumption that, under *Miller*, broadcast indecency should properly be considered by reference to variable local standards certainly seems to underlie Commissioner Quello's remark that broadcast of the Carlin monologue would be unacceptable "[u]nder contemporary community standards anywhere in this country." See *Pacifica Order*, 56 F.C.C.2d at 101 (statement of Commissioner Quello).

¹²⁷ See 56 F.C.C.2d at 99.

¹²⁸ See 18 U.S.C. § 1464; 47 U.S.C. § 303(g) (2000) (charging the FCC with the task of generally encouraging "the larger and more effective use of radio in the public interest"); *Pacifica Order*, 56 F.C.C.2d at 99.

¹²⁹ See 47 U.S.C. § 303(g); *Pacifica Order*, 56 F.C.C.2d at 99.

¹³⁰ See *Pacifica Order*, 56 F.C.C.2d at 99 (citing Network Programming Inquiry, 25 Fed. Reg. 7291 (FCC Aug. 3, 1960)).

Under the definition introduced in the *Pacifica Order*, the FCC determined that WBAI-FM's broadcast had violated § 1464.¹³¹ *Pacifica Foundation*, the licensee of WBAI-FM, appealed the Commission's order to the U.S. Court of Appeals for the District of Columbia Circuit.¹³² The court of appeals reversed the Commission's order, holding that the FCC's ruling constituted censorship of protected speech and that the rule announced in the *Pacifica Order* was overbroad and vague.¹³³ The U.S. Supreme Court, however, reversed this decision in 1978 in *FCC v. Pacifica Foundation*.¹³⁴

In upholding the FCC's authority to regulate the content of broadcast speech in *Pacifica*, the Court extended a long line of decisions that permitted government controls on broadcast speech, including government licensing of speakers and prescriptive and proscriptive content regulation, that would be clearly impermissible in any other context.¹³⁵ These earlier cases had established, and *Pacifica* confirmed, that the same phenomenon of spectrum scarcity that seemed to require content-neutral government licensing of radio spectrum if broadcasting were to function effectively at all also provided a constitutionally acceptable basis for the FCC's regulation of broadcast program content.¹³⁶ "[O]f all forms of communication," the Court noted, "it is

¹³¹ See 18 U.S.C. § 1464; *Pacifica Order*, 56 F.C.C.2d at 98. Recognizing that the finding represented a change in policy, the Commission declined to impose a monetary sanction in its declaratory order. *Pacifica Order*, 56 F.C.C.2d at 98. The Commission did note that the order would be associated with the station's license file and would weigh in its determination of appropriate sanctions in any subsequent complaint. *Id.*

¹³² *Pacifica Appeal*, 556 F.2d at 12. *Pacifica Appeal* thus brought the judicial review that *WUHY Notice* had looked for but never received. See *WUHY Notice*, 24 F.C.C.2d at 414.

¹³³ See *Pacifica Appeal*, 556 F.2d at 18. Among the more trenchant criticisms of the court of appeals was Judge Bazelon's observation that the Commission's method of determining contemporary community standards was "chimerical": "The Commission never solicited a jury verdict or expert testimony. Nor did it rely on polls or letters of complaint. The Commission simply recorded its conclusion that the words were indecent . . ." *Id.* at 23 (Bazelon, J., concurring).

¹³⁴ 438 U.S. at 751.

¹³⁵ See *id.* at 748-50; *Red Lion Broad. v. FCC*, 395 U.S. 367, 388-89 (1969); *Nat'l Broad. v. FCC*, 319 U.S. 190, 226 (1943); see also *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376, 380 (1984) (extending this same rationale in a case that followed *Pacifica*). This line of Supreme Court decisions has received particular criticism from at least one commenter. See Chen, *supra* note 10, at 1402-19.

¹³⁶ See *Red Lion*, 395 U.S. at 389 ("There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."); *Nat'l Broad.*, 319 U.S. at 226 ("Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of

broadcasting that has received the most limited First Amendment protection."¹³⁷ *Pacifica* in fact asserted two new but related grounds for this expanding regulatory regime: the Court held that government restrictions on indecent broadcast speech were justified because of the "uniquely pervasive presence" broadcasting holds in the culture and because the medium invades the home where it is "uniquely accessible" to children.¹³⁸

In upholding the Commission's action to sanction WBAI-FM under § 1464 in *Pacifica*, the Supreme Court did not address the question of whether the FCC should apply local or national standards in making indecency determinations.¹³⁹ The question of the appropriate community standards on which to base indecency determinations (and in fact the entire matter of the FCC's scope of authority under § 1464) lay un-

expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.").

For a useful analysis of the history and logic of broadcasting's reduced protections under the First Amendment, see generally William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539 (1978). The scarcity rationale has been frequently criticized as an inappropriate or illegitimate basis on which to distinguish among media in determining requisite levels of First Amendment protection. See, e.g., Donald E. Lively, 35 B.C. L. REV. 1067, 1074 (1994) (broadly dismissing reliance on scarcity as representing "a misplaced concern and a principal discredit to medium-specific [constitutional] analysis.").

¹³⁷ *Pacifica*, 438 U.S. at 748.

¹³⁸ See *id.* at 748-49. Over the past thirty years, the uniqueness of broadcasting on these two counts has been strongly questioned, and *Pacifica* more generally has been faulted as perpetuating a constitutional "balkanization" of First Amendment jurisprudence under which broadcast radio and television are illogically and unfairly accorded diminished First Amendment protection relative to all other forms of communication. See Chen, *supra* note 10, at 1394; Yoo, *supra* note 10, at 248, 249, 293-94. The doctrinal limitations of *Pacifica* may be undeniable when one observes that the Court has declined to extend *Pacifica*'s standard of relaxed scrutiny to its consideration of content-based regulation of cable television or the internet, media that many contemporary observers find at least as "pervasive" and "invasive" as broadcast radio and television. See Chen, *supra* note 10, at 1436-37; Yoo, *supra* note 10, at 298-301.

Time and technological development has in any event worked against the argument of uniqueness advanced by *Pacifica*, at least with respect to broadcast television: today eighty-six percent of American households receive television broadcasts by cable or satellite subscription services. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); see also Yoo, *supra* note 10 at 279-83. The FCC may not restrict or sanction the delivery of indecent programming delivered to the household by cable broadcast because provisions requiring cable operators to honor channel blocking requests from individual households provide a less restrictive means of accomplishing the same goal of restricting access to such programming by children. See *United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000).

¹³⁹ See 18 U.S.C. § 1464. See generally *Pacifica*, 438 U.S. 726.

contested for the next decade because the FCC did not find another broadcast indecent until 1987.¹⁴⁰

B. The FCC's Expansion of its Indecency Regime

In the decade following the Supreme Court's *Pacifica* decision, the FCC's indecency policy operated on the understanding that only broadcasts that used the specific words at issue in *Pacifica* in a context closely resembling that of the Carlin monologue broadcast by WBAI-FM would be found indecent.¹⁴¹ In 1987, however, responding to a perceived increase in objectionable broadcasts and concluding that such a restricted enforcement policy was inconsistent with its duties under § 1464, the FCC expanded the scope of what might be found indecent to include material that violated the Commission's generic definition of indecency, whether or not it closely resembled the specifics of the Carlin monologue at issue in *Pacifica*.¹⁴² This change in practice commenced with the FCC's 1987 order in *Infinity Broadcasting Corp. of Pennsylvania (WYSP)*, which found a violation by WYSP-FM's broadcast of the Howard Stern Show.¹⁴³ In *WYSP*, the FCC rejected the assertion by Infinity Broadcasting that the Stern broadcast could not be found indecent because it dealt only in sexual innuendo and did not employ the specific, offensive words at issue in *Pacifica*.¹⁴⁴ The Commission insisted that a view so strictly limiting its authority under § 1464 was untenable.¹⁴⁵ Instead, the FCC maintained, each case requires a review of the words broadcast and the context in which they were broadcast in order to decide whether the Commission's indecency test has been met.¹⁴⁶

Six months later, in response to requests by individual broadcasters, industry trade groups, and other affected parties to clarify the new policy adopted under *WYSP* and to explain its application of the generic *Pacifica* definition, the FCC issued a new order, *Infinity Broadcasting Corp. of Pennsylvania (Infinity)*, to outline more fully its view of

¹⁴⁰ See 18 U.S.C. § 1464; *Infinity Broad. Corp. of Pa. (WYSP)*, 2 F.C.C.R. 2705, 2709 (1987).

¹⁴¹ See *Pacifica*, 438 U.S. at 750 (emphasizing the narrowness of its holding); *id.* at 755-56 (Powell, J., concurring); *Fox*, 489 F.3d at 448; *Infinity Broad. Corp. of Pa. (Infinity)*, 3 F.C.C.R. 930, 930 (1987); *WYSP*, 2 F.C.C.R. at 2705.

¹⁴² See 18 U.S.C. § 1464; *Infinity*, 3 F.C.C.R. at 930, 931-32; *WYSP*, 2 F.C.C.R. at 2706.

¹⁴³ 2 F.C.C.R. at 2705-06.

¹⁴⁴ See *id.* at 2705.

¹⁴⁵ See 18 U.S.C. § 1464; *WYSP*, 2 F.C.C.R. at 2706.

¹⁴⁶ See *WYSP*, 2 F.C.C.R. at 2705-06.

the relevant standards.¹⁴⁷ *Infinity* reflected not only an expansion of the range of what might fall under the FCC's regulation of indecent content but also a substantial revision to the philosophy and legal reasoning that underlay the *Pacifica Order* twelve years earlier.¹⁴⁸

With respect to the FCC's indecency definition itself, *Infinity* explicitly rejected the local community as the authoritative source of contemporary community standards.¹⁴⁹ In explaining its evaluation of "contemporary community standards for the broadcast medium," the FCC deliberately turned away from the certainty of *Miller* and announced that, with respect to indecency violations under its application of § 1464, "[t]he determination reached is . . . not one based on a local standard, but one based on a broader standard for broadcasting generally."¹⁵⁰ To justify this apparent divergence from *Miller*, the FCC relied on an idiosyncratic reading of the Supreme Court's opinion in *Hamling v. United States*, which had been issued the year after *Miller*, in 1974.¹⁵¹ According to the FCC, *Hamling* did not just provide that a community smaller than an individual state could be referenced by a jury to establish the appropriate standards; instead, *Hamling* allowed the FCC to dispense with considerations of geography altogether.¹⁵² In making this claim, the FCC depended heavily on the assertion in *Hamling* that *Miller's* rejection of a national community standard in obscenity determinations did not require the substitution of some other "smaller geographical area" as a point of reference in jury instructions.¹⁵³ In fact, the FCC claimed, this meant that no reference to any "precise geographic area" was required at all.¹⁵⁴

Infinity explains that in place of the standards of a geographically identifiable community, the FCC Commissioners rely upon their own informed judgment as to whether "an average broadcast viewer or listener"—a member of the contemporary broadcast community—would find questioned material patently offensive.¹⁵⁵ In making this determi-

¹⁴⁷ See *Infinity*, 3 F.C.C.R. at 931.

¹⁴⁸ See *id.* at 933.

¹⁴⁹ See *id.*

¹⁵⁰ See 18 U.S.C. § 1464; 3 F.C.C.R. at 933.

¹⁵¹ See *Hamling v. United States*, 418 U.S. 87, 104-05 (1974); *Infinity*, 3 F.C.C.R. at 933; see also Feldman, *supra* note 23 at 386-87 (criticizing the FCC's reading of *Hamling* as strained and not legitimate).

¹⁵² See *Infinity*, 3 F.C.C.R. at 933.

¹⁵³ See *Hamling*, 418 U.S. at 104; *Infinity*, 3 F.C.C.R. at 933.

¹⁵⁴ *Infinity*, 3 F.C.C.R. at 933; see *Hamling*, 418 U.S. at 104.

¹⁵⁵ See *Infinity*, 3 F.C.C.R. at 933.

nation, they draw on their knowledge of the views of the average viewer or listener, as well as their "expertise in broadcast matters."¹⁵⁶

Broadcasters and civil liberties groups immediately challenged the FCC's expansion of its indecency regime under *Infinity in Action for Children's Television v. FCC* in 1988 (*ACT I*).¹⁵⁷ In that case, the U.S. Court of Appeals for the District of Columbia Circuit held that, although it could consider other elements of the Commission's new policy, as a lower court it was precluded from considering challenges relating to the FCC's definition of indecency itself because the U.S. Supreme Court had given broad endorsement to it in *Pacifica*.¹⁵⁸

Since issuing *Infinity*, the FCC has maintained the position that the standards to be used in evaluating the offensiveness of broadcast indecency are not local or otherwise determinable by reference to a particular geographic area, but are instead those held by a more general "broadcast community."¹⁵⁹ In responding to administrative challenges to this interpretation, it has relied primarily on the general endorsement of the *Pacifica* decision and the consequent refusal of the D.C. Circuit to reconsider its definition in *ACT I*.¹⁶⁰ Additionally, the Commission now actively attempts to obscure the origins of its policy in *Miller* by maintaining that *Miller* governs only obscenity cases and is therefore "inapplicable to indecency, particularly broadcast indecency."¹⁶¹

¹⁵⁶ See *id.*; see also *Infinity Radio Licensee, Inc.*, 19 F.C.C.R. 5022, 5026 (2004) (explaining that the Commissioners keep abreast of contemporary community standards for the broadcast medium through "constant interaction" with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens).

¹⁵⁷ See *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1338-39, 1344 (D.C. Cir. 1988). The challenge resulted in three more rulings over a period of seven years, each of which confirmed the position that the Supreme Court's decision in *Pacifica* precluded a finding that the FCC's indecency definition was unconstitutional. See *Action for Children's Television v. FCC (ACT IV)*, 59 F.3d 1249, 1253 (D.C. Cir. 1995); *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 659 (D.C. Cir. 1995); *Action for Children's Television v. FCC (ACT II)*, 932 F.2d 1504, 1508 (D.C. Cir. 1991).

¹⁵⁸ See *ACT I*, 852 F.2d at 1338-39, 1344; see also *ACT III*, 58 F.3d at 659; *ACT II*, 932 F.2d at 1508.

¹⁵⁹ See *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show (Super Bowl)*, 21 F.C.C.R. 2760, 2762 n.17 (2006); *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency (2001 Indus. Guidance)*, 16 F.C.C.R. 7999, 8002 (2001); *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 (2000); *Liability of Sagittarius Broad. Corp. (Sagittarius)*, 7 F.C.C.R. 6873, 6876 (1992).

¹⁶⁰ See *2001 Indus. Guidance*, 16 F.C.C.R. at 8000; *Sagittarius*, 7 F.C.C.R. at 6876.

¹⁶¹ See *Sagittarius*, 7 F.C.C.R. at 6876. This assertion ignores the direct reliance on *Miller* explicit in the *Pacifica Order*. See *Pacifica Order*, 56 F.C.C.2d at 94, 97. In something of a contradiction given this assertion, the FCC simultaneously argues by citation to a footnote to

C. *The Issue of Institutional Capacity*

In the twenty-one years since it issued *Infinity*, the FCC has never explained why, against the presumption of *Miller*, the standard it insists upon for indecency determinations must be "not a local one."¹⁶² The single insight the Commission has allowed on this question arose in the closely related context of an obscenity determination in the FCC's 1988 order in *Video 44*, an obscure ruling in which the FCC dismissed a challenge to the license renewal of a television broadcaster accused of violating § 1464 by its transmission of obscene programming under a subscription broadcast arrangement.¹⁶³ Rejecting claims by the licensee that *Miller* required the Commission to rely on local community standards in evaluating the obscenity charge, the FCC explained that differing institutional capacities justified the use of differing adjudicatory standards.¹⁶⁴ *Miller* and its progeny, the FCC explained, developed a focus on local standards within the context of a judicial system capable of using local fact finders in criminal prosecutions of obscenity.¹⁶⁵ By contrast, the *Video 44* obscenity determination arose in the context of an administrative action by a national agency that did not have access to any similar means of local fact finding.¹⁶⁶ At least in the judgment of

the 1977 U.S. Supreme Court opinion in *Smith v. United States* that, under *Miller*, the First Amendment does not require the employment of a purely local standard in obscenity cases in any event. See *Sagittarius*, 7 F.C.C.R. at 6876 (citing *Smith v. United States*, 431 U.S. 291, 304 n.11 (1977) (noting that *Miller* held only that states could not be compelled to adopt a national standard and expressing "no view" as to whether state or federal legislation may require reference to a national standard)). Even the noncommittal posture of the footnote may conflict with earlier case law: *Hamling* read *Miller* to establish "as a matter of constitutional law" that a juror may draw on knowledge of the "community or vicinage" from which he comes in applying contemporary community standards. See *Hamling*, 418 U.S. at 105. This view also seems to ignore the direct exhortation in *Miller* that obscenity is to be determined by applying contemporary community standards, "not 'national standards.'" See 413 U.S. at 37.

Paul Feldman further notes that even if the footnote in *Smith* leaves open the question of whether the standard might be reformulated to reference a national standard, it also indicates that it would be the role of Congress, not a regulatory agency, to change the standard in federal statutes. See Feldman, *supra* note 22, at 388.

¹⁶² See 2001 *Indus. Guidance*, 16 F.C.C.R. at 8002; *Infinity*, 3 F.C.C.R. at 933.

¹⁶³ See 18 U.S.C. § 1464; *Video 44* (*Video 44 II*), 3 F.C.C.R. 757, 758-59 (1988). For an extended discussion of the history and implications of the *Video 44* proceedings, see Feldman, *supra* note 23, at 389-92.

¹⁶⁴ *Video 44 II*, 3 F.C.C.R. at 758-59.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* The FCC considered but rejected alternative means of making a factual determination of local community standards, such as the use of expert testimony, because these were, in its view, "highly burdensome and of dubious reliability." See *Video 44* (*Video 44 I*), 103 F.C.C.2d 1204, 1206 (1986).

the FCC, this difference distinguished its *Video 44* review from the circumstances of the *Miller* line of cases and consequently relieved the Commission of *Miller's* requirements, permitting the FCC instead to apply a "broader contemporary community standard for broadcasting generally" in making a determination where an obscenity violation might be charged.¹⁶⁷ Because *Infinity* and the Commission's subsequent indecency orders all consistently adopt the "broader contemporary community standard for broadcasting generally" justified in *Video 44*, one may assume that the argument concerning institutional incapacity explains the Commission's reasoning with respect to indecency as well.¹⁶⁸ In any event, local fact finding plays no part in the adjudication of indecency complaints under § 1464, either in the Commission's administrative review or in the course of the appeals process relied upon by those aggrieved by a Commission ruling.¹⁶⁹

¹⁶⁷ See *Video 44 II*, 3 F.C.C.R. at 758. Unstated but implicit in *Video 44 II* is the recognition expressed in the FCC's contradictory response to the same challenge less than two years earlier that the Commission was practically reduced to its conclusion by the lack of any institutional "mechanism" resembling a local jury for establishing legitimate local community standards. See *Video 44 I*, 103 F.C.C.2d at 1206. *Video 44 I* took the institutional incapacities of the FCC as a reason for exercising regulatory restraint in the face of potentially compromised First Amendment rights. See *id.* (concluding that, as the FCC could not rely on the determination of a local jury familiar with local community standards, appropriate care for the First Amendment rights of licensees and the public dictated that the FCC leave enforcement of § 1464's prohibition against obscenity to the discretion of local prosecutors subject to the judgment of local juries). Changing its position in *Video 44 II*, the FCC took these same incapacities as a justification for failing to provide the First Amendment protections that were properly due, thus privileging considerations of administrative convenience over First Amendment rights. See *Video 44 II*, 3 F.C.C.R. at 758-59. The result seems constitutionally unsatisfactory. See Feldman, *supra* note 23 at 392; see also *Pacifica Appeal*, 556 F.2d at 23 (Bazelon, J., concurring) (criticizing the FCC's "national" standard as "chimerical" because it did not rely on a jury verdict, expert testimony, polls, or letters of complaint).

¹⁶⁸ See *Video 44 II*, 3 F.C.C.R. at 759; *Infinity*, 3 F.C.C.R. at 933. In fact, the *Video 44* proceeding and the WYSP proceeding, which ultimately led to the *Infinity* ruling, moved simultaneously through the FCC administrative review process, and the respondents in each case referenced the orders resulting from the other proceeding. See *Video 44 II*, 3 F.C.C.R. at 758; WYSP, 2 F.C.C.R. at 2705 n.8.

¹⁶⁹ See 18 U.S.C. § 1464; 47 U.S.C. §§ 402(a), 503(b)(3)-(4) (2000); *ACT IV*, 59 F.3d at 1253-56 (explaining the two routes open to a licensee interested in appealing an FCC sanction under § 1464); see also *AT&T Corp. v. FCC*, 323 F.3d 1081, 1083 (D.C. Cir. 2003). As the *ACT IV* court pointed out, in practice the exclusive means by which the FCC imposes a forfeiture for violation of 18 U.S.C. § 1464 is under 47 U.S.C. § 503(b)(4). *ACT IV*, 59 F.3d at 1253. As the court's discussion reveals in *ACT IV*, the disincentives built into the FCC's enforcement scheme mean that no broadcaster sanctioned under § 1464 ever goes to trial on the merits of an FCC indecency determination. *Id.* at 1254. The sole fact finding process is therefore the Commission's own administrative proceedings, and orders are contested only to courts of appeals. *Id.* at 1253-54. Even in the unusual event that a broad-

IV. THE MEANING AND VALUE OF CONTEMPORARY COMMUNITY STANDARDS IN RECENT U.S. SUPREME COURT DECISIONS

The U.S. Supreme Court has not decided a case concerning broadcast indecency since *FCC v. Pacifica Foundation* in 1978.¹⁷⁰ Over the last three decades, however, the Court has established a substantial body of jurisprudence specifying the constitutional requirements of obscenity and indecency regulations when they are applied to other, nonbroadcast media, including telephone messaging services (i.e., "dial-a-porn"), cable television, and the Internet.¹⁷¹ These decisions provide two important guidelines for the consideration of contemporary community standards in the context of broadcast indecency regulation.¹⁷² First, as discussed in Section A of this Part, they establish that what may have been, by the narrowest reading, only an allowance in the Court's 1973 decision in *Miller v. California* has now become an interpretive rule with positive constitutional weight: in the application of statutes governing obscenity and indecency, the offensiveness of any questioned material must be evaluated according to the standards of the local community in which the inquiry arises.¹⁷³ Second, as explained in Section B of this Part, the Court's rulings on content regulation over the last twenty years march in a consistent direction: toward the requirement that decision making about controversial content be

caster subject to the licensing authority of the Commission refused to pay a forfeiture issued by the FCC and thus forced a trial in connection with a civil recovery action, the statutory scheme makes no allowance for a jury trial, the essential fact finding mechanism in determining contemporary community standards in the context of obscenity. See 47 U.S.C. § 504(a) (2000); see also *Miller*, 413 U.S. at 30.

¹⁷⁰ See generally 438 U.S. 726 (1978).

¹⁷¹ See generally *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656 (2004) (considering the constitutionality of regulating certain forms of indecent expression on the Worldwide Web); *Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564 (2002) (same); *United States v. Playboy Entm't Group*, 529 U.S. 803 (1999) (evaluating federal restrictions on the transmission of indecent cable television programming on commercial cable channels); *Reno v. ACLU*, 521 U.S. 844 (1997) (examining the constitutionality of federal restrictions on the transmission of indecent content by means of the Internet); *Denver Area Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996) (considering federal restrictions on the transmission of indecent programming over certain public access cable channels); *Sable Commc'ns. of Cal. v. FCC*, 492 U.S. 115 (1989) (evaluating the constitutionality of statutes banning the transmission of obscene or indecent messages by means of a national "dial-a-porn" service).

¹⁷² See *infra* notes 173-228 and accompanying text.

¹⁷³ See *Ashcroft I*, 535 U.S. at 580, 583; *Reno*, 521 U.S. at 874 n.39, 877-78; *Denver Area*, 518 U.S. at 753, 763; *Sable*, 492 U.S. at 124-25; *Miller v. California*, 413 U.S. 15, 33, 37 (1973); see also *Ashcroft I*, 535 U.S. at 607 n.3 (Stevens, J., dissenting) (explaining that "contemporary community standards" is a term of art that has taken on a particular meaning in light of Court precedent).

placed beyond the reach of government-backed, blanket prohibitions and as close as possible to the "user end" of any medium.¹⁷⁴ By requiring that content regulations reflect the particular judgments of the individual communities they affect or, proceeding further, by placing control over such decisions directly in the individual citizen, the Court has consistently affirmed the principle that among the fundamental purposes of the First Amendment is its protection of choice.¹⁷⁵

A. *The Interpretation of Contemporary Community Standards in Other Media*

In *Denver Area Educational Telecommunications Consortium v. FCC*, decided in 1996, the Supreme Court evaluated the constitutionality of three provisions of the Cable Television Consumer Protection and Competition Act of 1992 that permitted private operators of local cable television systems to restrict the transmission of indecent or "patently offensive" content.¹⁷⁶ The FCC had provided a definition of indecent content under the statute by importing the language of its 1975 order in *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM) (Pacifica Order)*.¹⁷⁷ Although the case resulted in a fractured decision that produced a majority opinion only with respect to one of the three judgments, the opinions consistently interpreted "contemporary community standards" under the challenged provisions as referring to the varying standards of individual, local communities subject to the Act's

¹⁷⁴ See *Ashcroft II*, 542 U.S. at 667; *Playboy*, 529 U.S. at 814–15, 818; *Reno*, 521 U.S. at 877–78; *Denver Area*, 518 U.S. at 754, 756–58; *Sable*, 492 U.S. at 130–31. Offering the model of the Internet as the highest example of this kind of openness, Jim Chen characterizes this approach as subscribing to an "end-to-end" logic of free speech jurisprudence. See Chen, *supra* note 10, at 1364, 1454 (explaining that end-to-end design drives all intelligence within a network or communications system to its edges "where speakers generate ideas and audiences respond").

¹⁷⁵ See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 465 (2d Cir. 2007) (noting that the Court's recent First Amendment decisions go beyond a mere "mechanistic" application of strict scrutiny to rely in part on "a notional pillar of free speech—namely, choice"), *cert. granted*, 128 S. Ct. 1647 (2008); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[I]t is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

¹⁷⁶ See *Denver Area*, 518 U.S. at 734–36.

¹⁷⁷ See *id.* (explaining that the standard prescribed by the FCC measured offensiveness by contemporary community standards of "the cable viewing community"); *Citizen's Complaint Against Pacifica Found. Station WBAI (FM) (Pacifica Order)*, 56 F.C.C.2d 94, 97 (1975), *rev'd sub nom. Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

content controls.¹⁷⁸ On this understanding, the Court upheld section 10(a) of the statute, which granted the operator of a local cable system a right to prevent the transmission of indecent programming on certain channels leased by third parties.¹⁷⁹ The Court reasoned that because section 10(a) required reasonable judgment in restricting such programming, a system operator would be constrained from blocking transmission of content that was not indecent according to local community standards.¹⁸⁰ If a local court had declined to find similar material patently offensive, the Court explained, or if a local authority overseeing public access channels had indicated that such material was not offensive, a cable operator would have no reasonable basis to claim the programming was indecent by the standards of that community, and therefore an operator would be unable to deny the programming to a community where it would find a receptive audience.¹⁸¹ Following the reasoning of *Denver Area*, then, local courts and similar panels of local decision makers are authoritative sources of contemporary community standards for cable television broadcasts because these groups express the judgment of the individual, local community to which a restriction potentially applies.¹⁸²

The Court's insistence on the value of local decision making in enforcing contemporary community standards emerges with particular clarity in its refusal to resolve the tension that has arisen between the national distribution enabled by newer forms of electronic media and the rule of localism embodied in *Miller*.¹⁸³ In 1989, in *Sable Communications of California v. FCC*, the Court upheld the constitutionality of a federal statute banning the interstate transmission of obscene commercial telephone messages (i.e., "dial-a-porn") under the rule it had announced in 1957 in *Roth v. United States* that obscene speech is not protected by the First Amendment.¹⁸⁴ Because under the statute a commercial provider of sexually explicit messages could be prosecuted in any community in which its transmissions might be found obscene, the appellant in *Sable* had argued that the law subjected its nationally avail-

¹⁷⁸ See *Denver Area*, 518 U.S. at 753, 763.

¹⁷⁹ See *id.* at 753.

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.* at 753, 763 (applying the same reasoning to invalidate section 10(c) of the challenged statute because it permitted private cable system operators to contravene the programming decisions of locally constituted boards).

¹⁸³ See *Ashcroft I*, 535 U.S. at 580, 583; *Reno*, 521 U.S. at 874 n.39, 877-78; *Sable*, 492 U.S. at 125-26.

¹⁸⁴ See *Sable*, 492 U.S. at 124; *Roth v. United States*, 354 U.S. 476, 485 (1957).

able service to a national standard of obscenity as the content of the messages it provided would now be subject to prohibition according to the standards of the nation's least tolerant community.¹⁸⁵ The Court rejected this argument, holding that the Constitution poses no barrier to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others, particularly when, as here, screening technology would permit a message provider to tailor its messages, on a selective basis, to the standards of the individual communities it chose to serve.¹⁸⁶ *Sable* thus reflected the Court's continuing commitment to reliance on a local determination of contemporary community standards, even when these standards are applied to a medium that is national in scope.¹⁸⁷

In 1997, in *Reno v. ACLU*, the Court once again considered, in the context of indecency, the burden that the use of local standards might place on content distributed through a nationally focused medium.¹⁸⁸ In *Reno*, the Court held that two provisions of the Communications Decency Act of 1996 (the "CDA"), intended to protect minors from exposure to indecent material on the Internet, unconstitutionally abridged the First Amendment's guarantee of free speech because they did not employ the least restrictive means possible but instead imposed an "open-ended" prohibition on protected speech.¹⁸⁹ Like the cable television provisions at issue in *Denver Area*, the CDA imported the exact language of the *Pacifica Order* to define indecent content.¹⁹⁰

¹⁸⁵ See *Sable*, 492 U.S. at 124.

¹⁸⁶ See *id.* at 125-26; see also *Hamling v. United States*, 418 U.S. 87, 106 (1974) (holding that the fact that distributors of allegedly obscene materials may be subjected to varying community standards as a consequence of distributing their materials into multiple federal judicial districts does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity).

¹⁸⁷ See *Sable*, 492 U.S. at 124-25. The Court went on to note, in language directly relevant to the issue of contemporary community standards in broadcasting under the regulations of 18 U.S.C. § 1464, that the statute challenged in *Sable* "no more establishes a 'national standard' of obscenity than do federal statutes prohibiting the mailing of obscene materials or the broadcasting of obscene messages." *Id.*

¹⁸⁸ See generally 521 U.S. 844.

¹⁸⁹ See *id.* at 877, 879.

¹⁹⁰ See Communications Decency Act (the "CDA") of 1996, Pub. L. No. 104-104, §§ 501-502, 110 Stat. 56, 133-36, *invalidated by Reno v. ACLU*, 521 U.S. 844 (1997) (criminalizing the transmission of obscene or indecent messages to any recipient under eighteen years of age and prohibiting the knowing sending or displaying to a person under eighteen years of age of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs"); see also *Pacifica Order*, 56 F.C.C.2d. at 97.

Central to the Court's holding in *Reno* was its judgment that the CDA's reliance on contemporary community standards as a benchmark of offensiveness posed a particular risk when combined with the nationwide accessibility of the Internet.¹⁹¹ Because standards vary by community, but material on the Internet is available nationally, the CDA's indecency definition effectively allowed a finding of "patent offensiveness" by the nation's least tolerant community to suppress a large amount of speech that adults in more tolerant communities had a right to receive and to address to one another.¹⁹² The Court's invalidation of the CDA thus depended on its acceptance that under the borrowed *Pacific* indecency definition, contemporary community standards must mean standards determined by a local community.¹⁹³ When applied to a medium that, in contrast to the telephone message service of *Sable*, could not be effectively "blocked" to prevent distribution to less tolerant communities, the CDA's reliance on local standards imposed just the sort of burden that the Court had sought to eliminate by advocating a rule of varying local community standards for obscenity determinations in its 1973 decision in *Miller*.¹⁹⁴ To adopt the language of *Miller*, the *Reno* Court in effect concluded that it was "neither realistic nor constitutionally sound" to require that the people of "Las Vegas, or New York City" be limited to public depictions found acceptable by "the people of Maine or Mississippi."¹⁹⁵

Taking the Court's broad criticisms of the CDA to heart, when Congress next attempted to regulate indecent content on the Internet with the Child Online Protection Act of 1998 ("COPA"), it substantially narrowed the reach of its efforts.¹⁹⁶ Most significantly, COPA aban-

¹⁹¹ See *Reno*, 521 U.S. at 877-78.

¹⁹² See *id.* at 874, 877-78.

¹⁹³ See *id.* at 877-78. The Court in fact makes a point of tracing the statute's "contemporary community standards language" directly to *Miller* in order to dismiss the government's assertion that the CDA was intended to establish a uniform national standard of content regulation. See *id.* at 874 n.39.

¹⁹⁴ See *id.* at 877-78; *Miller*, 413 U.S. at 32. *Miller* noted the risk inherent in a national standard that material found tolerable in some places but not under the national criteria would, as a result, be unavailable where it would be acceptable. See 413 U.S. at 32 n.13; see also *Manual Enters. v. Day*, 370 U.S. 478, 488 (1962) (condemning as "intolerable" any standard that would deny some sections of the country access to material, there deemed acceptable, simply because it is considered offensive to community standards prevailing in another part of the country).

¹⁹⁵ See *Reno*, 521 U.S. at 877-78; *Miller*, 413 U.S. at 32.

¹⁹⁶ See 47 U.S.C. § 231 (2000), held unconstitutional by *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *aff'g* *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), on remand from *Ashcroft II*, 542 U.S. 656; *Ashcroft I*, 535 U.S. at 569-70. In contrast to the CDA, the Child Online Protection Act ("COPA") applied only to material posted on the Worldwide Web,

doned the broad indecency definition of the *Pacifica Order* and fashioned a more limited definition of indecency that relied closely on the narrow obscenity definition established in *Miller*, thereby substantially reducing the amount of material encompassed by its restrictions.¹⁹⁷ Following *Miller*, however, COPA provided (as the CDA had) that the critical determination of patent offensiveness would be determined by reference to contemporary community standards.¹⁹⁸

In 2002, in *Ashcroft v. ACLU* (*Ashcroft I*), the Supreme Court reversed a decision of the U.S. Court of Appeals for the Third Circuit to uphold a preliminary injunction restraining enforcement of COPA.¹⁹⁹ A plurality of the Court determined that, in the context of a facial challenge, COPA's reliance on contemporary community standards to identify indecent content on the Worldwide Web that is harmful to minors did not, by itself, render the statute overbroad under the First Amendment.²⁰⁰ According to the plurality, this was true even though the effect of COPA was to apply varying local standards to content transmitted by

covered only communications made for commercial purposes, and restricted only material "harmful to minors." Compare COPA, 47 U.S.C. § 231, with CDA, 110 Stat. at 133-36.

¹⁹⁷ See *Ashcroft I*, 535 U.S. at 570, 578-79. COPA modified *Miller*'s three elements to specify that prurience and patent offensiveness would be judged "with respect to minors" and that material violating these first two elements would be redeemed only if the work taken as a whole had serious literary, artistic, political, or scientific value "for minors." 47 U.S.C. § 231(e)(6), held unconstitutional by *Mukasey*, 534 F.3d 181, aff'g *Gonzales*, 478 F. Supp. 2d 775, on remand from *Ashcroft II*, 542 U.S. 656; *Ashcroft I*, 535 U.S. at 570. The effect of the definition was to extend COPA's coverage somewhat beyond the "obscene" to reach what was otherwise only legally "indecent" because it technically covered an area of content that extended marginally beyond what may be found obscene under *Miller*. See *Ashcroft I*, 535 U.S. at 578-79; see also *Ashcroft II*, 542 U.S. at 679-80 (Breyer, J., dissenting) (acknowledging that the definition of harmful material in COPA "read literally, insofar as it extends beyond the legally obscene, could reach only borderline cases"). COPA introduced the term "harmful material" to refer to this narrow slice of indecent content, presumably in order to distinguish it from the broader field of indecency as a whole. See *Ashcroft I*, 535 U.S. at 579 (observing that, in contrast to indecency, the "harmful material" restricted under COPA must appeal to the prurient interest, which requires that it be in some sense erotic).

¹⁹⁸ See 47 U.S.C. § 231(e)(6), held unconstitutional by *Mukasey*, 534 F.3d 181, aff'g *Gonzales*, 478 F. Supp. 2d 775, on remand from *Ashcroft II*, 542 U.S. 656; *Ashcroft I*, 535 U.S. at 570.

¹⁹⁹ *Ashcroft I*, 535 U.S. at 586.

²⁰⁰ See *id.* at 585; see also *Sable*, 492 U.S. at 126 (holding that under a statute prohibiting the transmission of obscene telephone messages, it did not violate the First Amendment to require the national distributor of such messages to conform to standards that might vary by community, particularly when the message provider is free to tailor its messages to the communities it chooses to serve).

a national (or international) medium whose distribution could not be directed only to communities open to receiving controversial content.²⁰¹

Although the result of the Court's ruling in *Ashcroft I* was to some degree a reversal of *Reno*, its understanding and application of community standards with respect to Internet indecency are consistent with the earlier opinion.²⁰² In both cases, the community standard to be applied in the indecency determination is local.²⁰³ *Ashcroft I* conflicts with *Reno* only because it concludes, for purposes of resolving a facial challenge, that requiring a speaker disseminating material to a national audience to observe varying community standards does not, by itself, violate the First Amendment.²⁰⁴ The Court was helped to this result by the narrowness of COPA's scope of coverage.²⁰⁵ Indeed, the Court reconciled the apparent conflict between the two cases by explaining that the enormous breadth of material potentially encompassed by the indecency definition of the CDA at issue in *Reno* had the effect of magnifying the impact caused by differences in community standards across the country but that this problem was eliminated by the tighter limits of COPA's definition.²⁰⁶ In neither case, however, did the Court express any doubt that the relevant community from which to draw standards for indecency determinations is the local community; in fact, it is the certainty of this rule as it intersects with the national or nonlocal nature of the medium at issue in *Reno* and *Ashcroft I* that gives rise to the legal challenges the Court must in each case resolve.²⁰⁷

²⁰¹ See *Ashcroft I*, 535 U.S. at 585. The plurality opinion explicitly recognized that due to technological limitations, and unlike the commercial telephone message operator of *Sable*, a Web publisher is unable to control the geographic distribution of his or her communications. See *id.* at 575, 595-96 (Kennedy, J., concurring) (noting that "it is easy and cheap to reach a worldwide audience on the Internet . . . but expensive if not impossible to reach a geographic subset," and therefore a Web publisher in a more tolerant community, interested in speaking only to his neighbors, may find that "an eavesdropper in a more traditional, rural community" has become "the arbiter of propriety on the Web").

²⁰² Compare *Ashcroft I*, 535 U.S. at 583-85, with *Reno*, 521 U.S. at 877-78, 885.

²⁰³ See *Ashcroft I*, 535 U.S. at 575, 583-84; *Reno*, 521 U.S. at 874 n.39, 877-78.

²⁰⁴ See *Ashcroft I*, 535 U.S. at 578, 585. The ruling thus appears to work a revision to the logic of *Sable* because, in the context of the Worldwide Web, the risk to the content provider of varying local standards cannot be mitigated by careful blocking to prevent distribution to less tolerant communities. See *id.* at 575 n.6, 582; *Sable*, 492 U.S. at 125-26. But see *Ashcroft I*, 535 U.S. at 582 (opinion of Thomas, J.) (asserting that the operator's ability to block transmission of calls to particular areas was not the basis of the Court's decision in *Sable* but only referenced as "a supplemental point").

²⁰⁵ See *Ashcroft I*, 535 U.S. at 578, 585.

²⁰⁶ See *id.* at 578.

²⁰⁷ See *id.*; *Reno*, 521 U.S. at 874 n.39, 877-78. The three justices not joining the plurality opinion in *Ashcroft I* but concurring in the result also recognized that *Miller* and its progeny require that the term "contemporary community standards," whether applied

B. *Contemporary Community Standards and the First Amendment Value of Choice*

In his dissent in *Ashcroft I*, Justice Stevens reminded the Court that its traditional reliance on local community standards to differentiate between permissible and impermissible speech has historically protected the interests of audience members as much as the interests of speakers.²⁰⁸ Reliance on varying community standards protects the interests of audience members by allowing people to "self-sort" based on their preferences: selecting a community in which to live is one way a citizen chooses the sort of content that he or she is willing to tolerate or prohibit.²⁰⁹ This is one manner in which the Court's dedication to local community standards supports the Court's larger commitment to choice as a critical component of First Amendment rights.²¹⁰

Choice exercised on the terms Justice Stevens describes can operate only if the law permits and upholds the varying decisions about content made by juries or similar representative bodies charged with applying the standards of the individual, local communities whose views they represent.²¹¹ The Court struck down a second provision of the ca-

under indecency or obscenity statutes, requires a local determination. See *Ashcroft I*, 535 U.S. at 597 (Kennedy, J., concurring in the judgment) (acknowledging that the national variation in community standards imposes "a particular burden" on Internet speech); *id.* at 605-06 (Stevens, J., dissenting) (observing that the effect of criminalizing a particular communication under the illiberal community standards of just a handful of destinations will be to prohibit transmission of the message to the millions of Americans with access to the Internet who may wish to receive such a communication). But see *id.* at 587 (O'Connor, J., concurring in part and concurring in the judgment) (advocating the introduction of a national standard for application to the Internet); *id.* at 590 (Breyer, J., concurring in part and concurring in the judgment) (arguing that Congress intended the application of a national standard under the statute at issue).

²⁰⁸ See 535 U.S. at 612 (Stevens, J. dissenting). By aggregating community values, these standards protect speakers by providing some predictability as to what constitutes offensive speech and guaranteeing that controversial speech will not be subject to prohibitions imposed by the least tolerant members of society. See *id.*

²⁰⁹ *Id.* ("Those who abhor and those who tolerate sexually explicit speech can seek out like-minded people and settle in communities that share their views on what is acceptable for themselves and their children.").

²¹⁰ See *Ashcroft II*, 542 U.S. at 667; *Playboy*, 529 U.S. at 814, 818; *Reno*, 521 U.S. at 877-78; *Denver Area*, 518 U.S. at 754, 756-58, 763; *Sable*, 492 U.S. at 130-31; *Fox*, 489 F.3d at 465. Moral and aesthetic judgments about art, literature, and popular culture "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *Playboy*, 529 U.S. at 818. This repeats the observation of the Court in *Cohen* that "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." 403 U.S. at 25.

²¹¹ See *Denver Area*, 518 U.S. at 753, 763; *Sable*, 492 U.S. at 126; *Miller*, 413 U.S. at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring

ble television statute at issue in *Denver Area* precisely because it violated this rule.²¹² Section 10(c) of the statute had authorized an individual cable system operator to prevent transmission of indecent programming over public access channels that had previously been subject to supervision only by community boards established by municipalities holding rights to such channels under long-standing cable franchise agreements.²¹³ Because these bodies were, like a jury, a reliable source of contemporary community standards, their approval of programming expressed a decision by the local community that such content was acceptable.²¹⁴ A programming veto imposed by a cable operator exercising the right provided by section 10(c) would therefore contravene the judgment of a locally accountable body making content decisions in a manner consistent with *Miller*.²¹⁵ The result would be to prohibit delivery of programming to citizens wishing to receive such content and residing in a community where it had been deemed acceptable, a consequence *Miller* presumed to prohibit by establishing the unique standard of the individual community as the effective gauge of acceptability.²¹⁶

Where possible, the principle of choice that underwrites the Court's endorsement of local standards requires that decisions about controversial content be pushed even further out, beyond the collective judgment of the local community and into the hands of the individual citizen making his or her own decision independent of any government limitation or restriction.²¹⁷ In *Reno*, for instance, the Court was helped to its conclusion that the CDA did not employ the least restrictive means possible to protect minors from exposure to indecent material on the Internet by its observation that "user-based software" was rapidly being introduced that would allow parents to filter offensive material according to their own judgment and control.²¹⁸ In 2004, two years after *Ashcroft I*, the Court extended this rea-

that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.").

²¹² See 518 U.S. at 763.

²¹³ See *id.* at 760-62.

²¹⁴ See *id.* at 763.

²¹⁵ See *id.*; *Miller*, 413 U.S. at 30.

²¹⁶ See *Denver Area*, 518 U.S. at 763; *Miller*, 413 U.S. at 32 & n.13. This decision making is consistent with the reasoning under which the Court upheld § 10(a) of the same statute. See *supra* notes 176-182 and accompanying text.

²¹⁷ See *Ashcroft II*, 542 U.S. at 667; *Playboy*, 529 U.S. at 814-15, 818; *Reno*, 521 U.S. at 877; *Denver Area*, 518 U.S. at 754, 756-58; *Sable*, 492 U.S. at 130-31; see also Chen, *supra* note 10, at 1364, 1454 (explaining that an end-to-end model of networked communication, typified by the Internet, offers the greatest degree of user-based decision making).

²¹⁸ See 521 U.S. at 876-77.

soning in *Ashcroft v. ACLU* (*Ashcroft II*) when it addressed COPA on new grounds and affirmed a preliminary injunction against the statute under the view that COPA placed an impermissible burden on constitutionally protected speech.²¹⁹ The filtering software anticipated in *Reno* was widely available by the time of *Ashcroft II*, and the Court concluded that it provided a less restrictive and more effective means of protecting children from harmful material than the blanket prohibitions of COPA.²²⁰ The primary reason that software filters are a superior solution to the CDA, or even to the more narrowly tailored COPA, is because they allow selective, household-by-household restrictions on content at "the receiving end" rather than "universal restrictions at the source."²²¹ Adults who are interested in material that is indecent but not obscene may thus freely choose to access this material without the interference of government regulation.²²²

The Court's decisions with respect to the desirability of receiving end decision-making in the context of the Internet in *Ashcroft II* and *Reno* are consistent with its contemporary holdings on the regulation of indecent content in the context of cable television and telephone "dial-a-porn" service.²²³ Although the Court upheld the statutory provision prohibiting the transmission of obscene telephone messages in *Sable*, for instance, in the same opinion it invalidated a companion provision that established a blanket ban on messages that were not obscene but only indecent and therefore protected under the First Amendment.²²⁴ In 2000, in *United States v. Playboy Entertainment*, the Court struck down a similar provision of the Telecommunications Act of 1996 that required cable television operators providing subscription channels dedicated to sexually oriented programming to restrict their transmission of such channels to nighttime hours.²²⁵ In each case, the Court allowed that the

²¹⁹ See *Ashcroft II*, 542 U.S. at 667, 670.

²²⁰ See *id.* at 667–68.

²²¹ See *id.*

²²² See *id.*

²²³ See *Playboy*, 529 U.S. at 815; *Denver Area*, 518 U.S. at 756–58; *Sable*, 492 U.S. at 130–31.

²²⁴ See *Sable*, 492 U.S. at 126, 130–31.

²²⁵ See 529 U.S. at 806–07, 827. The statute required that cable operators limit this programming to "safe harbor" nighttime hours if their technical facilities did not allow them to scramble the signal in a manner that would guarantee that the programming would not be intermittently received by nonsubscribing households where children might be present. See *id.* at 806–07. Since the majority of cable facilities could not satisfy the scrambling requirement, operators were obliged to conform to the statute's time-channeling provision, with the effect that no household in an affected service area could receive the covered programming for two-thirds of the day, whether or not the household or the viewer wanted to do so. See *id.* at 807. This was a burden that significantly restricted "communication be-

government had a legitimate interest in protecting children from exposure to indecent content, but in neither did it find the legislation sufficiently narrowly drawn to serve that purpose without infringing on the rights of adults wishing to access such content.²²⁶ The Court found that both situations might have been addressed under approaches that restricted access to adults on a user-by-user or household-by-household basis, thus leaving discretion in the hands of the individual citizen rather than placing control over content in the federal government.²²⁷ Where reliance on the discretion of the individual citizen presents an effective solution to a government purpose, the *Playboy* Court stated, the Constitution requires that government refrain from imposing centralized control and defer to individual choice: moral and aesthetic judgments about art, literature, and popular culture "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."²²⁸

V. CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE FCC'S USE OF COMMUNITY STANDARDS

A. *Inconsistencies Raised by the FCC's Use of Contemporary Community Standards*

The arguments the Federal Communications Commission (the "FCC" or the "Commission") has relied on since rejecting local community standards in indecency determinations in 1987, in *Infinity Broadcasting Corp. of Pennsylvania (Infinity)*, in favor of "a broader standard for

tween speakers and willing adult listeners," the Court concluded. *See id.* at 812. Citing *Reno* and *Sable*, the Court found the burden impermissible given the fully effective and less restrictive alternative of requiring cable operators to provide complete "blocking" of scrambled channels in response to consumer requests on a household-by-household basis. *See id.* at 814-15.

In *Denver Area*, the Court struck down the third challenged provision of the statute on the same reasoning applied in *Playboy*. *See Denver Area*, 518 U.S. at 756-58. Section 10(b) required cable system operators to block access to indecent programming on leased access channels, providing that the channels could be unblocked only after a subscriber's written request for access. *See id.* at 753. According to the Court, the provision removed autonomy of decision making from potential viewers of the affected programs and was unduly burdensome when the alternative of providing interested subscribers with cable "lock-boxes" to restrict the programming would accomplish the same goal of protecting children from sexually explicit programming. *See id.* at 756-58.

²²⁶ *See Playboy*, 529 U.S. at 815; *Sable*, 492 U.S. at 130-31.

²²⁷ *See Playboy*, 529 U.S. at 815; *Sable*, 492 U.S. at 130-31.

²²⁸ *See Playboy*, 529 U.S. at 818; *see also Cohen*, 403 U.S. at 25 ("[I]t is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

broadcasting generally"²²⁹ cannot be squared with the Supreme Court's treatment of contemporary community standards as they apply to indecency regulations in nonbroadcast media.²³⁰ Over the last twenty years, the Court has clearly established that the directive of its 1973 decision in *Miller v. California* applies to indecency determinations.²³¹ The FCC's assertion that the *Miller* speaks only to obscenity and is inapplicable to indecency therefore can no longer be maintained.²³² Yet the FCC remains intransigent.²³³ This posture is indefensible when one considers that the Court's determination of the meaning of contemporary community standards for indecency regulation has repeatedly arisen in its review of statutes that import the very language relied upon by the FCC, and originally formulated in its 1975 order in *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM) (Pacifica Order)*,²³⁴ to define broadcast indecency under 18 U.S.C. § 1464.²³⁵

The FCC has attempted to maintain the legitimacy of its aberrant interpretation by asserting that the Supreme Court's decision to uphold its action in *FCC v. Pacifica Foundation* in 1978 served as a broad endorsement of the Commission's broadcast indecency definition as a whole, thereby making any part of it unassailable under principles of stare decisis.²³⁶ But the Court's *Pacifica* decision did not consider the

²²⁹ Infinity Broad. Corp. of Pa. (*Infinity*), 3 F.C.C.R. 930, 933 (1987).

²³⁰ See *Ashcroft v. ACLU (Ashcroft I)*, 535 U.S. 564, 580, 583 (2002); *Reno v. ACLU*, 521 U.S. 844, 874 n.39, 877-78 (1997); *Denver Area Telecommc'ns Consortium v. FCC*, 518 U.S. 727, 753, 763 (1996); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 124-25 (1989); *Miller v. California*, 413 U.S. 15, 33, 37 (1973); see also *Ashcroft I*, 535 U.S. at 607 n.3, 612 (Stevens, J., dissenting).

²³¹ See *Ashcroft I*, 535 U.S. at 580, 583; *Reno*, 521 U.S. at 874 n.39, 877-78; *Denver Area*, 518 U.S. at 753, 764; *Sable*, 492 U.S. at 124-25; *Miller*, 413 U.S. at 33, 37; see also *Ashcroft I*, 535 U.S. at 607 n.3, 612 (Stevens, J., dissenting).

²³² See *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency (2001 Indus. Guidance)*, 16 F.C.C.R. 7999, 8002 (2001); *Sagittarius Broad. (Sagittarius)*, 7 F.C.C.R. 6873, 6876 (1992).

²³³ See *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show (Super Bowl)*, 21 F.C.C.R. 2760, 2763 n.17 (2006); *2001 Indus. Guidance*, 16 F.C.C.R. at 8002 n.15; *WPBN/WTOM License Subsidiary, Inc. (WPBN)*, 15 F.C.C.R. 1838, 1841 (2000); *Sagittarius*, 7 F.C.C.R. at 6876.

²³⁴ 56 F.C.C.2d 94, 97 (1975), *rev'd sub nom. Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

²³⁵ See 18 U.S.C. § 1464 (2000); *Reno*, 521 U.S. at 860; *Denver Area*, 518 U.S. at 734, 736; *Sable*, 492 U.S. at 121 (explaining the legislative and regulatory history of the regulations at issue); *Carlin Commc'ns v. FCC*, 749 F.2d 113, 116 & n.7 (2d Cir. 1984) (confirming that the FCC's indecency definition in the *Pacifica Order* provided the legal standard for a violation of the statute).

²³⁶ See *2001 Indus. Guidance*, 16 F.C.C.R. at 8000; *Sagittarius*, 7 F.C.C.R. at 6876. Lower courts have reluctantly agreed with the FCC on the rare occasions they have been presented with challenges to the FCC's definition of indecency. See *Fox Television Stations*,

FCC's rejection of local standards and so could not approve it; indeed, the FCC did not adopt its anomalous, nonlocal standard ("based on a broader standard for broadcasting generally") until it significantly modified its use of the *Pacifica* definition to expand its indecency regime in 1987.²³⁷ That the *Pacifica* Court in 1978 would have interpreted "contemporary community standards" as necessarily referencing the mores of an identifiable local community seems all but incontrovertible given that *Miller* had only five years earlier put to rest a decade and a half of Supreme Court controversy on the question as it related to obscenity determinations.²³⁸ If any uncertainty remained, the Court could hardly have ignored the FCC's direct reliance on *Miller* in the *Pacifica* Order: the *Miller* decision served as both the occasion and the authority

Inc. v. FCC, 489 F.3d 444, 464–66 (2d Cir. 2007) (observing that whatever merits arguments against *Pacifica* may have, "they cannot sway us in light of Supreme Court precedent," though expressing skepticism that the FCC's indecency test could now survive a First Amendment challenge), *cert. granted*, 128 S. Ct. 1647 (2008); Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654, 659 (D.C. Cir. 1995); Action for Children's Television v. FCC (*ACT II*), 932 F.2d 1504, 1508 (D.C. Cir. 1991); Action for Children's Television v. FCC (*ACT I*), 852 F.2d 1332, 1338–39, 1344 (D.C. Cir. 1988) (welcoming, however, a "correction" from "Higher Authority" if the court had misunderstood the apparent endorsement of *Pacifica*).

²³⁷ See *Infinity*, 3 F.C.C.R. at 933.

²³⁸ See *Miller*, 413 U.S. at 37 (holding that obscenity is to be determined by applying the contemporary community standards of an actual community, "not 'national standards'").

The FCC tries to evade the directness of *Miller* by relying on an idiosyncratic reading of the Supreme Court's 1974 opinion in *Hamling v. United States* to justify a nonlocal standard. See *Infinity*, 3 F.C.C.R. at 933 (citing *Hamling v. United States*, 418 U.S. 87, 104–05 (1974)). It is open to question if the FCC's reading of *Hamling* is fair and complete. See Feldman, *supra* note 23 at 386–87 (characterizing the FCC's application of *Hamling* as illegitimate). Although *Hamling* allowed that instructions issued to jurors sitting in obscenity cases need not make reference to any particular community as the source of determining standards, that provision was made within the context of the broader rule of *Miller* and the cases that immediately followed it. See *Hamling*, 418 U.S. at 105. Taken together, *Miller* and *Hamling* establish that as a matter of constitutional law, no formulation of jury instructions may be issued that would prevent individual jurors from making reference to the standards of the particular geographic "community or vicinage" from which he or she comes in applying "contemporary community standards." See *id.*; *Miller*, 413 U.S. at 37. Thus, a rule that operated to prevent consultation of these local standards—as the FCC arguably does in asserting that its standard is "not a local one"—would seem to contradict the holdings of both *Miller* and *Hamling*. See *Hamling*, 418 U.S. at 105; *Miller*, 413 U.S. at 37.

Feldman also makes the convincing argument that by making its standard that of "broadcasting generally," the FCC unavoidably winds up relying on a national standard. See Feldman, *supra* note 23 at 381–82. Because "broadcasting generally" occurs in every major community in the United States, the "average listener" is logically the average of the entire nation; hence, the FCC's standard is undeniably national. See *id.* As a result, the FCC's use of a contemporary community standard for "broadcasting generally" violates the rule of *Miller*. See 413 U.S. at 37; see also *Smith v. United States*, 431 U.S. 291, 292–93 (1977) (recalling that in *Miller* the Court "rejected a plea for a uniform national standard").

for the FCC's announcement of a distinct indecency policy under § 1464 in the *Pacifica Order*.²³⁹ Finally, even putting aside the FCC's misrepresentations of what the Court might have held in *Pacifica*, the Commission's reliance on *Pacifica* ignores the fact that the portion of the opinion approving the FCC's "construction of the statutory language of § 1464"—that is, its indecency definition—garnered the support of only a three-justice plurality.²⁴⁰ The *Pacifica* indecency definition itself stands on shaky constitutional ground.²⁴¹

The FCC's rejection of local community standards for broadcast indecency determinations not only conflicts with Supreme Court decisions regarding telephone messaging services, cable television, and the Internet, but is also plainly illogical on its own terms given the local, geographically bounded nature of the conventional broadcast medium.²⁴² It is a commonplace of the Court's First Amendment jurisprudence that, in the words of its 1975 opinion in *Southeast Promotions v. Conrad*, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."²⁴³ The "problem" of regulating indecent speech on the Internet, as shown in the Supreme Court's opinions in *Ashcroft v. ACLU*, decided in 2002, and *Reno v. ACLU*, decided in 1997, is the conflict arising from the application of a local community standard to a medium whose geographic scope of distribution cannot be limited to exclude communities that might object to certain kinds of content.²⁴⁴ The FCC's perverse practice of applying a "nonlocal" standard to the local medium of broadcasting unnecessarily creates the inverse problem: an effectively national standard is applied to a medium whose distribution is restricted to an identifiable, local geography both by terms of its federal license and by the technological limitations of broadcast signal propagation.²⁴⁵ It is impossible to say that

²³⁹ See 18 U.S.C. § 1464; *Pacifica Order*, 56 F.C.C.2d at 94, 97.

²⁴⁰ See 18 U.S.C. § 1464; *Pacifica*, 438 U.S. at 744–45 & n.20.

²⁴¹ See *Pacifica*, 438 U.S. at 744–45 & n.20; see also *Fox*, 489 F.3d at 464 (expressing skepticism that a challenge to the FCC's indecency test could now withstand constitutional scrutiny).

²⁴² See *supra* note 39 and accompanying text.

²⁴³ 420 U.S. 546, 557 (1975); see also *Reno*, 521 U.S. at 868; *Pacifica*, 438 U.S. at 748; *Red Lion Broad. v. FCC*, 395 U.S. 367, 386 (1969).

²⁴⁴ See *Ashcroft I*, 535 U.S. at 575, 595–96 (Kennedy, J., concurring in the judgment); *Reno*, 521 U.S. at 877–78. But see *Sable*, 492 U.S. at 125–26 (dispensing easily with the conflict between local standards and a national means of distribution, in part because a commercial provider of sexually explicit "dial-a-porn" telephone messages was able to choose the communities to which it would direct its service by screening or blocking techniques).

²⁴⁵ See *supra* note 39 and accompanying text.

the First Amendment "standards" employed by the FCC are "suited" to the characteristics of broadcasting: the FCC's practice turns the Court's rule on its head.²⁴⁶

The FCC's practice also denies to broadcast speech the benefit of the rule that the Court relied on to resolve the conflict that local standards pose to national means of distribution in 1989, in *Sable Communications of California v. FCC*, and, in a somewhat more severe form, to resolve the same conflict in *Ashcroft I*: "If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities."²⁴⁷ Broadcasting is a medium that targets its material to "particular communities," but by employing a benchmark "based on a broader standard for broadcasting generally," the FCC refuses to judge broadcast content by the standards of the community actually targeted by the licensee's broadcast signal.²⁴⁸

The inappropriateness of the FCC's reliance on a "non-local" standard to regulate the content of what is an unavoidably local medium is confirmed by the fact that the Commission's indecency policy fundamentally conflicts with the practices and policies by which it regulates all other aspects of broadcast program content.²⁴⁹ As the FCC has consistently held for half a century, these policies apply a public interest standard that requires consultation of the particular "tastes, needs, and desires" of the specific, local community each broadcaster is licensed to

²⁴⁶ See *Reno*, 521 U.S. at 868; *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Red Lion*, 395 U.S. at 386.

²⁴⁷ *Ashcroft I*, 535 U.S. at 583 (opinion of Thomas, J.); see also *Sable*, 492 U.S. at 125-26. In this context, it is noteworthy that in *Roth v. United States*, the 1957 case in which the Court first adopted "contemporary community standards" as the proper measure of obscenity, the jury had been instructed to consider the effect of the challenged material "not upon any particular class, but upon all those whom it is likely to reach." See 354 U.S. 476, 490 (1957) (emphasis added). Broadcast content can "reach" only persons located within the range of a geographically limited broadcast signal. See *supra* note 39 and accompanying text.

²⁴⁸ See *Infinity*, 3 F.C.C.R. at 933.

²⁴⁹ See generally Broadcast Localism, 23 F.C.C.R. 1324 (2008); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations (*Television Deregulation Order*), 98 F.C.C.2d 1075, 1085 (1984); Deregulation of Radio (*Radio Deregulation Order*), 84 F.C.C.2d 968, 978-79, 988-94 (1981); Network Programming Inquiry, 25 Fed. Reg. 7291, 7294-96 (FCC Aug. 3, 1960). See generally Primer on Ascertainment of Community Problems by Broadcast Applicants (*Ascertainment Primer*), 27 F.C.C.2d 650 (1971). Feldman notes the fundamental contradiction between the FCC's strong rule of localism in regulating in the public interest and its emphatic disregard of local tastes and interests under its indecency policy. See Feldman, *supra* note 23, at 398.

serve.²⁵⁰ By contrast, consideration of national interests and concerns, the FCC has ruled, does nothing to advance a licensee's public interest obligation except to the degree these happen to intersect with those of the broadcaster's community of license.²⁵¹ To regulate indecent content alone under a standard that rejects the consideration of local "tastes, needs, and desires" makes the FCC's practices not just anomalous but perverse.²⁵²

B. *The Constitutional Infirmities of the FCC's Standard*

The constitutional infirmities that result from the FCC's rejection of a local standard for indecency determinations have been recognized by the Court since *Miller*.²⁵³ To begin with, the practice opens the FCC's indecency rule to charges that it is unconstitutionally vague because the Commission's use of "contemporary community standard for broadcasting generally" functions as the kind of national standard rejected by *Miller* as "hypothetical and unascertainable."²⁵⁴ To eliminate this uncertainty, *Miller* endorsed local standards which, although they may vary by community, at least have the merit of being ascertainable from the judgment of juries operating within identifiable communities.²⁵⁵ The FCC's formulation of a national community standard "for the broadcast community generally," is just the kind of abstraction rejected by the

²⁵⁰ Network Programming Inquiry, 25 Fed. Reg. at 7294-96.

²⁵¹ See *id.* at 7294 (explaining that the broadcaster's duty to the public interest is considered only "in terms of the area he is licensed to serve").

²⁵² Compare *id.* at 7294-96, with *Infinity*, 3 F.C.C.R. at 933.

²⁵³ See *Ashcroft I*, 535 U.S. at 593, 597 (Kennedy, J., concurring in the judgment); *id.* at 612 (Stevens, J., dissenting); *Reno*, 521 U.S. at 874, 877-78; *Miller*, 413 U.S. at 30, 32-33 & n.13. Because indecency embraces a field of content much broader in scope than that encompassed by obscenity, and because even content falling within the definition of indecency is due constitutional protection, a policy that fails to observe the required protections potentially results in more significant consequences than a similar failure with respect to obscenity. See *Reno*, 521 U.S. at 877-78; *Sable*, 492 U.S. at 126 (holding an outright ban on the commercial transmission of indecent telephone messages unconstitutional because sexual expression that is indecent but not obscene is protected by the First Amendment); cf. *Ashcroft I*, 535 U.S. at 578 (holding that the risks of unconstitutional burdens on speech are reduced under regulation with a substantially narrower focus than the wide area of indecency).

²⁵⁴ See 413 U.S. at 31. In *Jacobellis v. Ohio*, Justice Brennan argued that the best solution to uncertainty about standards would be the adoption of a national standard of obscenity, which would eliminate unpredictable variations among differing communities. See 378 U.S. 184, 193-94 (1964) (Brennan, J., announcing the judgment of the Court). But if a national standard is "hypothetical and unascertainable" in the conclusion of *Miller*, then it does nothing to provide the certainty Justice Brennan sought. See 413 U.S. at 31.

²⁵⁵ See *Miller*, 413 U.S. at 30; see also *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting).

Court in *Miller* because it leaves the broadcaster operating within a particular, local community without a clear guide as to the limits of acceptable speech.²⁵⁶

Even if a national standard were in fact ascertainable for purposes of indecency determinations, it is likely that the Court would hold its application unconstitutional in the context of broadcast indecency.²⁵⁷ This is because under a national standard, content found acceptable in more tolerant communities but not under the national standard would be unavailable for broadcast anywhere, even though it would be acceptable according to the standards of these more tolerant communities, and even though it could, by that measure, serve to advance the public interest by meeting the "needs, tastes, and desires" of such communities.²⁵⁸ It is the refusal of the Court to permit this particular burden that has left it unwilling to abandon a local standard for indecency determinations in other media even when the regulation in question applies to a purely national means of distribution, such as the Internet.²⁵⁹ In fact, since *Miller*, the Court has never approved the use of a national standard, either in indecency or in obscenity determinations.²⁶⁰

Finally, the FCC's rejection of local standards in indecency determinations runs directly counter to the consistent direction of the Court's First Amendment jurisprudence because it eliminates the possibility for local variation and individual choice in content decisions and replaces these with the conclusions of a centralized, governmental agency applying uniform rules of its own formulation.²⁶¹ Considered at the level of the local community, the practice ignores the Court's recognition in *Miller* that "[p]eople in different States vary in their tastes

²⁵⁶ See *Reno*, 521 U.S. at 874; *Miller*, 413 U.S. at 30-31; *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting).

²⁵⁷ See *Reno*, 521 U.S. at 874, 877-78; *Miller*, 413 U.S. at 32 & n.13; *Manual Enters. v. Day*, 370 U.S. 478, 488 (1962).

²⁵⁸ See *Reno*, 521 U.S. at 874, 877-78; *Miller*, 413 U.S. at 32 & n.13; *Manual Enters.*, 370 U.S. at 488; Network Programming Inquiry, 25 Fed. Reg. at 7294-96 (establishing that broadcast programming serves the public interest of its designated community of license to the extent it satisfies that community's particular needs, tastes, and desires).

²⁵⁹ See *Ashcroft I*, 535 U.S. at 585, 597 (Kennedy, J., concurring in the judgment); *Reno*, 521 U.S. at 874, 877-78; see also *Manual Enters.*, 370 U.S. at 488 (finding such a result "intolerable").

²⁶⁰ See *Ashcroft I*, 535 U.S. at 580; *Reno*, 521 U.S. at 874 n.39. But see *Ashcroft I*, 535 U.S. at 587 (O'Connor, J., concurring in part and concurring in the judgment) (advocating the introduction of a national standard for application to the Internet); *id.* at 590 (Breyer, J., concurring in part and concurring in the judgment) (arguing that Congress intended the application of a national standard under the statute at issue).

²⁶¹ See *Denver Area*, 518 U.S. at 763; *Sable*, 492 U.S. at 124-25; *Miller*, 413 U.S. at 33.

and attitudes," and that this variation reflects and enables choice by speakers and audiences.²⁶² The FCC's policy threatens, against the warning of *Miller*, to "strangle[]" this diversity by the "absolutism" of an "imposed uniformity."²⁶³ Considered at the level of the individual citizen, the FCC's practice of regulating content under a single standard eliminates any possibility for the exercise of choice.²⁶⁴ This is true whether one conceives of choice under Justice Stevens's notion that like-minded citizens "self-sort" by choosing to settle in communities that share and enforce their individual, varying views on what is acceptable for themselves and their children, or under the principle that a jury in a criminal obscenity trial or a community board overseeing local cable programming both serve to solicit and express the particular standards held by representative, individual citizens of the community most interested in the judgment they are called upon to make.²⁶⁵

In the context of obscenity determinations, the Court has acknowledged that expert testimony can play a part in establishing the nature of local community standards.²⁶⁶ It is conceivable, therefore, that under Court direction the FCC could develop an administrative fact finding process that, by relying on experts and the measuring of local, public opinion, legitimately establishes a local community standard when the Commission is called upon to employ one in resolving an indecency complaint under § 1464.²⁶⁷ The Commission appears,

²⁶² 413 U.S. at 33; see *Ashcroft I*, 535 U.S. at 612 (Stevens, J., dissenting); *Reno*, 521 U.S. at 874, 877–78.

²⁶³ See *Miller*, 413 U.S. at 33.

²⁶⁴ See *Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656, 667, 670 (2004); *Ashcroft I*, 535 U.S. at 612 (Stevens, J., dissenting); *Playboy*, 529 U.S. at 814–15, 818; *Reno*, 521 U.S. at 877–78; *Denver Area*, 518 U.S. at 754, 756–58; *Roth*, 354 U.S. at 506 (Harlan, J. concurring in the judgment in part and dissenting in part); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[I]t is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

²⁶⁵ See *Ashcroft I*, 535 U.S. at 612 (Stevens, J., dissenting); *Denver Area*, 518 U.S. at 763 (Breyer, J., announcing the judgment of the Court); *Hamling*, 418 U.S. at 105; *Miller*, 413 U.S. at 30, 32.

²⁶⁶ See *Miller*, 413 U.S. at 31 & n.12; see also *Hamling*, 418 U.S. at 109–10; *Smith v. California*, 361 U.S. 147, 164–65 (1959) (Frankfurter, J., concurring) (approving of the use of experts to enlighten the judgment of the tribunal as to the prevailing literary and moral community standards in an obscenity determination).

²⁶⁷ See 18 U.S.C. § 1464; *Miller*, 413 U.S. at 31; *Smith*, 361 U.S. at 164–65. The FCC has long required that broadcast licensees make detailed inquiries of community tastes, needs, and desires in order to fulfill their obligation to provide programming that meets the public interest. See *supra* notes 43–50 and accompanying text.

however, to have considered and rejected just this approach to evaluate obscenity complaints under § 1464 precisely at the time it introduced its problematic "broader standard for broadcasting generally" in indecency determinations.²⁶⁸

The simplest resolution to the problem posed by the FCC's indecency standard, and the one that would be most consistent with the Court's decisions, would be for the Court to require that the FCC abandon the practice of pursuing indecency adjudications as administrative proceedings on the view that a centralized, bureaucratic procedure is unlikely to establish the standards of far-flung communities potentially deprived of content they might, under their own standards, find acceptable and desirable to receive.²⁶⁹ A truly effective resolution would therefore limit the Commission to pursuing violations of § 1464 only in the setting of a civil trial that takes place in the judicial district encompassing the community of license of the station charged with broadcasting indecent material and that employs a local jury to determine whether the content of a challenged broadcast in fact violates the standards of that community.²⁷⁰ As Judge Bazelon of the Court of Appeals for the District of Columbia Circuit observed in reversing the FCC's *Pacifica Order* in 1977, the jury is "an exceptionally sturdy mechanism for soliciting community standards."²⁷¹

CONCLUSION

Because the FCC's reliance on a national standard for indecency conflicts with the Supreme Court's consistent requirement that judg-

²⁶⁸ See *supra* notes 164-169 and accompanying text. The FCC has asserted that such an approach would be "highly burdensome and of dubious reliability." See Video 44 (*Video 44 I*), 103 F.C.C.2d 1204, 1207 (1987).

²⁶⁹ See *Pacifica Found. v. FCC (Pacifica Appeal)*, 556 F.2d 9, 23 (D.C. Cir. 1977) (Bazelon, C.J., concurring) (explaining that the FCC's fact finding in the complaint against WBAI-FM consisted of nothing more than the FCC's recording of its own conclusion that the words broadcast were indecent); see also Feldman, *supra* note 23 at 392.

²⁷⁰ See 18 U.S.C. § 1464; *Miller*, 413 U.S. at 30-32; *Pacifica Appeal*, 556 F.2d at 23 n.15; *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913) (suggesting in the words of Judge Hand that "a jury is especially the organ with which to feel the content comprised" within the concept of contemporary community standards).

²⁷¹ *Pacifica Appeal*, 556 F.2d at 23 n.15 (Bazelon, C.J., concurring); *Kennerley*, 209 F. at 121. Feldman advocates that alleged indecency violations be referred to criminal prosecution in federal district courts, thereby guaranteeing access to the judgment of a local jury; the FCC would then be obliged to rely on the findings of the local jury in executing its civil sanctions. See Feldman, *supra* note 23, at 392. The approach has the advantage of securing a jury to apply contemporary community standards, but the requirement of a criminal proceeding seems draconian and particularly problematic considering that the right of free expression is at issue. See *id.*

ment must be made by reference to local community standards in both indecency and obscenity determinations, and because, more broadly, the FCC's practice violates the fundamental principle of choice that the Court has defended in the First Amendment, the Supreme Court should direct the FCC to abandon its anomalous national community standard. The Court should require that the FCC establish that allegedly offensive material violates the particular standards of the local community in which it was broadcast before the FCC may sanction a licensee for the broadcast of indecent content. In addition to bringing FCC indecency policy into conformity with the Court's requirements for indecency and obscenity regulation in all other contexts, this change would establish consistency between the FCC's indecency regulations and the policies and practices under which the FCC regulates all other forms of broadcast content. All forms of content regulation justified under the FCC's public interest standard would then be required to refer to the actual interest of the community in which the programming is broadcast, and indecency would no longer be a strange outlier of the Commission's regulatory practice.

MICHAEL KANEB