

Chapter 8

Regulation of the Mass Media

p. 366, after ¶ 3, before A.

In recent years, however, the institutional press, particularly newspapers, have been beset by economic difficulties that put their willingness and ability to fund future First Amendment litigation in jeopardy. The Annual Report on American Journalism, published by the Project for Excellence in Journalism of the Pew Research Center, available at <http://pewresearch.org/pubs/1151/state-of-the-news-media-2009>, summarizes the state of the mass media as follows:

Newspaper ad revenues have fallen 23% in the last two years. Some papers are in bankruptcy, and others have lost three-quarters of their value. By our calculations, nearly one out of every five journalists working for newspapers in 2001 is now gone, and 2009 may be the worst year yet.

In local television, news staffs, already too small to adequately cover their communities, are being cut at unprecedented rates; revenues fell by 7% in an election year-- something unheard of--and ratings are now falling or flat across the schedule. In network news, even the rare programs increasing their ratings are seeing revenues fall.

...

It is now all but settled that advertising revenue -- the model that financed journalism for the last century -- will be inadequate to do so in this one. Growing by a third annually just two years ago, online ad revenue to news websites now appears to be flattening; in newspapers it is declining.

...

[E]xecutives estimate that the recession at least doubled the revenue losses in the news industry in 2008, perhaps more in network television. Even more important, it swamped most of the efforts at finding new sources of revenue. In trying to reinvent the business, 2008 may have been a lost year, and 2009 threatens to be the same.

...

The old media have held onto their audience even as consumers migrate online. In 2008, audience gains at sites offering legacy news were far larger than those for new media. The old norms of traditional journalism continue to have value. And when you look at the numbers closely, consumers are not just retreating to ideological places for news.

...

In the last year, alternative news sites have continued to grow, including those produced by journalists who have left legacy newsrooms, but their scale remains small. The new media in aggregate are far from compensating for the losses in coverage in traditional newsrooms, and despite enthusiasm and good work, few if any are profitable or even self-sustaining.

p. 438, add to n. 3:

It remains unclear whether the Federal Communications Commission has power to sanction “fleeting expletives.” In *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009), the Supreme Court did not reach the First Amendment issue, but instead held 5-4 that the FCC’s new policy was not arbitrary and capricious in violation of the Administrative Procedures Act.. The Court refused to reach the First Amendment issue before it was fully addressed by the lower court:

It is conceivable that the Commission’s orders may cause some broadcasters to avoid certain language that is beyond the Commission’s reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material “surely lie at the periphery of First Amendment concern,” *Pacifica*, 438 U.S., at 743, 98 S.Ct. 3026, 3 Media L. Rep. 2553 (1978) (plurality opinion of STEVENS, J.). We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion. . .

The four dissenting justices (Breyer, Stevens, Souter and Ginsburg) believed that the FCC’s new policy was arbitrary because the agency had not adequately explained the change from its prior position. Justice Thomas joined the majority but questioned the constitutionality of the FCC’s new fleeting expletives policy. He noted that “dramatic technological advances have eviscerated the factual assumptions underlying [*Red Lion*] and [*Pacifica*],” and indicated that he was “open to reconsideration of [them] in the proper case.”