Column: Court should pull FCC into 21st century

By Ilya Shapiro and Trevor Burrus

Should one of our most important sources of information and entertainment — television broadcasts — receive less First Amendment protection than newspapers or the Internet? This term, in the case of *FCC v. Fox*, the Supreme Court will take up this question and ultimately decide who controls our airwaves: parents or bureaucrats.

It seems un-American to have teams of unchecked government officials peering over our shoulders to ensure that what we say and see is family-friendly. Unless TV shows receive full constitutional protection, those who produce them will produce bland content out of a fear that the censors will either abuse their authority or enforce vague restrictions that don't tell people what's allowed and what's prohibited.

Unfortunately, broadcasters don't enjoy the same First Amendment rights as other media producers: The Federal Communications Commission stands behind them and evaluates their content for family suitability, according to nebulous standards such as, "I know it when I see it."

And the FCC is living in the past, based on a decades-old Supreme Court ruling. In 1978, the court gave it the power to regulate broadcast content because of its pervasiveness in the American home (comparing it to an unwanted intruder) and its relatively uninhibited access to children as well as public ownership of the airwaves. It was a ruling based, more or less, on the nature of that era's technology: three channels, little cable and no VCRs, much less Internet, DVDs and satellite TV.

That has little relevance in today's world.

We now live in a world of media options that would have been unimaginable to even the most far-looking science-fiction writer. Video on-demand services such as Netflix and Amazon Prime stream more content to our televisions and computers than was available in even the most well-stocked video store in years past. We DVR our favorite shows to watch them when we want and keep libraries of DVDs on hand — or at least we used to, until direct streaming and cloud computing eliminated the need even for capacious hard drives, let alone physical discs.

Moreover, all TVs bigger than 13 inches have a "V-Chip" that can block content based on ratings. Parental controls are available in most cable and satellite boxes, specialized remote controls can be purchased for children, and there is even a service called "TV Guardian" that filters profanity from live broadcasts based on closed-captioning signals.

Traditional broadcast media have gone the way of the eight-track or audio cassette. What the court once called unwanted "intruders" are now mostly invited guests, guests who can be easily monitored to ensure they're on their best behavior.

Yet because the law is stuck in 1978, the medium through which we receive most of our information receives less First Amendment protection than other media. Parents and other consumers are not making judgments about which guests to invite, at what time and for what purpose. Instead, government officials set the standard for all of us, regardless of our values, tastes, or whether children are likely to be present.

Now, in a case that began with Bono slipping the F-word into a live broadcast of the Golden Globes in 2003, the court will have to decide whether technology has changed enough for over-the-air broadcasters to get the same speech protections as their cable counterparts. Because the old rule was based on 1970s technology, isn't it time for a new rule?

The FCC may have a place regulating the content of broadcasts, but in doing so it must be held to the important First Amendment standards that apply to cable, satellite, Internet and all other media: Controls must be narrowly tailored to avoid infringing more speech than necessary, and the interest of the state must be "compelling."

Such a standard would be useful not just for 2012, but for the rest of the 21st century.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute, where Trevor Burrus is a legal associate. Cato filed a legal brief supporting the broadcasters in FCC v. Fox.