

***Pacifica* Reconsidered: Implications for the Current Controversy over Broadcast Indecency**

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I. INTRODUCTION

This Article tells the story behind the Supreme Court’s 1978 decision in *Federal Communications Commission v. Pacifica Foundation*.¹ Using interviews with participants, documents from the case, and papers of some of the Justices who heard the appeal,² it explains how a single letter complaining about “dirty words” in a comedy routine broadcast by a radio station ended up in the Supreme Court. It also relates how a closely divided

1. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

2. All of Justice Blackmun’s papers cited in this article are from Box 274, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter Blackmun Papers]. All of Justice Powell’s papers cited in this article are from Box 198, Lewis F. Powell Jr. Papers, 1921-1998, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA [hereinafter Powell Papers]. Justice Marshall’s papers may be found in Box 215, Thurgood Marshall Papers, Supreme Court File, 1967-1991, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter Marshall Papers].

Court found the FCC's admonishment of the radio station to be constitutional even though the broadcast was protected by the First Amendment and its distribution by other means could not be prohibited.

The *Pacifica* case was controversial when it was decided in 1978. It became even more controversial during the George W. Bush administration when the FCC stepped up its enforcement of restrictions on indecent speech. Two FCC enforcement actions have come before the Supreme Court. In the *Fox* case,³ the FCC admonished Fox Television for broadcasting "fleeting expletives." In the *CBS* case,⁴ the FCC fined CBS over a half-million dollars for the brief exposure of Janet Jackson's breast during a Super Bowl halftime show.

In both cases, the networks argued, among other things, that the FCC's action violated the First Amendment and that *Pacifica* should be overturned. The Court remanded both cases without addressing the constitutional claims. This Article is timely because the Court may consider the soundness of *Pacifica* when it reviews the decisions on remand.

Part I describes the state of the law before *Pacifica*. Part II describes the FCC's decisions in *Pacifica*, and Part III discusses the D.C. Circuit's opinion reversing the FCC. Part IV describes the progress of the case in the Supreme Court, from the decision to grant certiorari to the five-to-four decision to reverse the D.C. Circuit and uphold the FCC. Part V discusses the contemporary reaction to the *Pacifica* decision, while Part VI summarizes the FCC's enforcement of the prohibition against broadcasting indecent material after *Pacifica*. Part VII describes the Supreme Court's decision in *Fox* and the decision of the Second Circuit on remand. Part VIII concludes by reflecting on the implications of this reassessment of *Pacifica* for these later indecency cases.

II. THE STATE OF THE LAW BEFORE *PACIFICA*

Although *Pacifica* is usually studied as a First Amendment case, it also resolved important statutory questions about the meaning of § 1464 of the Criminal Code, which prohibits the broadcast of "obscene, indecent, or profane language";⁵ the FCC's authority to enforce § 1464; and the anticensorship provision in section 326 of the Communications Act.

3. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009), *vacated*, 2010 WL 2736937 (2d Cir. Jul. 13, 2010).

4. *CBS Corp. v. FCC*, 535 F.3d 167, 172 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009).

5. 18 U.S.C. § 1464 (2006) ("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.").

A. *The Statutory Scheme*

Both § 1464 of the Criminal Code and section 326 of the Communications Act originated in the Radio Act of 1927, which created the Federal Radio Commission to license radio stations in the public interest.⁶ Section 29 of that Act read:

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.⁷

This language was reenacted in section 326 of the Communications Act of 1934.⁸ In 1948, the Criminal Code was revised, and the last sentence of section 326 was moved to Title 18 of the Criminal Code to join other federal criminal statutes regulating offensive matter.⁹ This revision made the Department of Justice (DOJ) responsible for criminal enforcement of § 1464.¹⁰ It was unclear whether this change was intended to remove the FCC's authority to enforce § 1464 administratively, since other sections of the Communications Act seemed to give the FCC authority to impose various sanctions for violations of § 1464.¹¹ The Court resolved this uncertainty in *Pacifica* and concluded that rearranging the provisions did not limit the FCC's authority to impose sanctions on licensees for broadcasting indecent material.¹²

B. *Enforcement of Section 1464 Prior to Pacifica*

In practice, neither the DOJ nor the FCC actively enforced § 1464

6. Radio Act of 1927, ch. 169, 44 Stat. 1172-73 (1927).

7. *Id.* § 29.

8. Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1064, 1091 (codified as amended at scattered sections 47 U.S.C.).

9. Criminal Code of 1948, ch. 645, § 1464, 62 Stat. 769, 866 (1948). For example, § 1461 prohibits the mailing of "obscene, lewd, lascivious, or filthy book . . . or other publication of an indecent character . . ." *Id.* § 1461.

10. Ann-Ellen Marcus, Casenote, *Broadcasting Seven Dirty Words*, 20 B.C. L. REV. 975, 983, 988 (1979).

11. These sanctions included monetary forfeitures, fines, and revocation of licenses. *Id.* at 985-87.

12. *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978). The Court interpreted § 326's anticensorship provision as denying the "[FCC] any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves" but not "the power to review the content of completed broadcasts in the performance of its regulatory duties." *Id.* at 735.

prior to 1970.¹³ In 1969, the Senate Subcommittee on Communications held a hearing and strongly suggested that the FCC do more to curb offensive broadcasting.¹⁴ This hearing was prompted, at least in part, by the Subcommittee's unhappiness with the FCC's grant of an additional license to the Pacifica Foundation despite the large number of complaints about its programming.¹⁵

Shortly after the hearing, the FCC issued a Notice of Apparent Liability (NAL) for violating § 1464 against WUHY-FM, a noncommercial station in Philadelphia.¹⁶ WUHY-FM had broadcast a fifty-minute, taped interview with the Grateful Dead's Jerry Garcia at 10:00 p.m. in which Garcia repeatedly used the words "fuck" and "shit."¹⁷ The FCC explained that the issue was not whether the station could present Garcia's views, but:

whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like, "S - - t, man . . .", ". . . and s - - t like that", or ". . . 900 f - - - n' times", ". . . right f - - - - g out of ya", etc.

We believe . . . we have a duty to act to prevent the widespread use on broadcast outlets of such expressions . . . For, the speech involved has no redeeming social value, and is patently offensive by contemporary community standards . . . [I]t conveys no thought to begin some speech with "S - - t, man . . .", or to use "f - - - - g" as an adjective throughout the speech.¹⁸

The FCC found that the broadcast was not "obscene" under § 1464 because it did not appeal to the prurient interest.¹⁹ However, it concluded that "the statutory term, 'indecent', should be applicable, and that, in the broadcast field, the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."²⁰ The decision cited no authority for this assertion, and indeed, recognized that there was no applicable judicial or administrative precedent.²¹ The FCC imposed a one-

13. Marcus, *supra* note 10, at 983. The FCC referred complaints about obscene or indecent programming to the DOJ, and imposed civil sanctions only after a successful prosecution by the DOJ or a determination by the DOJ that the offense was prosecutable. The DOJ rarely acted on such complaints. *Id.* at 983 n.77 (noting that DOJ brought only five prosecutions against broadcasters under § 1464).

14. *Proposed Amendment to the Communications Act of 1934: Hearings on S. 2004 Before the S. Subcomm. on Comm., 91st Cong., 343-74* (1969).

15. Marcus, *supra* note 10 at 987 n.93.

16. WUHY-FM Eastern Education Radio, *Notice of Apparent Liability*, 24 F.C.C.2d 408 (1970).

17. *Id.* at para. 3.

18. *Id.* at paras. 6-7.

19. *Id.* at para. 10.

20. *Id.*

21. *Id.* at para. 11.

hundred-dollar fine and stated that it welcomed judicial review.²² Despite this invitation and strong dissents,²³ WUHY-FM did not appeal.²⁴ Undoubtedly, it would have cost far more to appeal than to pay the fine.

Henry Geller, who served as a special assistant to the Republican FCC Chairman Dean Burch at the time of the WUHY case, explained why the FCC brought this case. The Chairman wanted this type of language off the air. Geller advised him that the broadcast did not violate § 1464 because it was not obscene. He suggested that Burch use the “raised eyebrow” approach, but Burch did not want to do that. Geller then suggested arguing that indecent speech differed from obscene speech under the statute. Even though Geller thought the FCC would lose in court, Burch wanted it done under the statute, and Geller thought he had no other choice but to follow Burch’s wishes.²⁵

The next FCC case enforcing § 1464 involved a commercial radio format known as “topless radio.”²⁶ This term refers to call-in shows, typically aired midday, which include explicit discussions of sex.²⁷ After receiving complaints about this format, the FCC issued a NAL in April 1973, proposing to fine Sonderling Broadcasting Corporation, licensee of WGLD-FM in Oak Park, Illinois, two thousand dollars for broadcasting “obscene and indecent” matter in violation of § 1464.²⁸

Like WUHY, Sonderling paid the fine rather than incur the expense of an appeal.²⁹ However, the Illinois Citizens for Broadcasting and the Illinois Division of the ACLU filed a petition alleging that the FCC’s actions had deprived listeners of their First Amendment rights to hear constitutionally protected programming.³⁰ The FCC denied the petition, and the petitioners appealed to the D.C. Circuit.³¹ The FCC Associate General

22. *Id.* at para. 16.

23. Commissioner Nicholas Johnson dissented, accusing the majority of condemning “a culture—a lifestyle it fears because it does not understand,” and “simply ignor[ing] decades of First Amendment law What the Commission tells the broadcaster he cannot say is anyone’s guess—and therein lies the constitutional deficiency.” *Id.* at 422 (Johnson, dissenting). Commissioner Kenneth A. Cox dissented in part because he thought the Commission had exaggerated the problem way out of proportion. *Id.* at 417–18 (Cox, dissenting in part).

24. Marcus, *supra* note 10, at 986–87.

25. Interview with Henry Geller, in Washington, D.C. (Oct. 20, 2008) [hereinafter Geller Interview].

26. Sonderling Brdcast. Corp., WGLD–FM, *Memorandum Opinion and Order*, 41 F.C.C. 2d 777 (1973).

27. *Id.* at para. 5.

28. *Id.* at para. 1.

29. *Illinois Citizens Comm. for Brdcast. v. FCC*, 515 F.2d 397, 400 (D.C. Cir. 1974), *reh’g denied*, 515 F.2d at 407 (1975) (per curiam).

30. *Id.*

31. *Id.* at 400–01.

Counsel, Joseph A. Marino, who would later argue the *Pacifica* case in the Supreme Court, argued this case in the D.C. Circuit.³² The court affirmed the FCC in a decision written by Judge Leventhal, who agreed that the broadcasts were obscene and that the sanction did not violate the First Amendment.³³

In *Sonderling*, “[t]he FCC found [the] broadcasts obscene under the standards of *Roth v. United States* and *Memoirs v. Massachusetts*.”³⁴ While the appeal was pending, the Supreme Court formulated new obscenity standards in *Miller v. California*.³⁵ *Miller* did not address whether indecent speech should be assessed using the same standard as obscenity. This question came to the fore in *Pacifica*.

III. THE FCC DECISION IN *PACIFICA*

On December 3, 1973, the FCC received a letter dated November 28, from John H. Douglas, 385 Madison Avenue, New York, NY. The entire letter stated as follows:

On October 30th, in the early afternoon (from approximately 1:30 to 2:30 p.m.) while driving in my car, I tuned to radio station WBAI in New York City.

I heard, among other obscenities, the following words: cocksucker, fuck, cunt, shit, and a whole host of others. This was supposed to be part of a comedy monologue.

Whereas I can perhaps understand an “X-rated” phonograph record’s being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control. Any child could have been turning the dial, and tuned in to that garbage.

Some time back, I read that “topless” radio stations were fined for suggestive phrases. If you fine for suggestions, should not this station lose its license entirely for such blatant disregard for the public ownership of the airwaves?

32. *Id.* at 400. Marino also argued *FCC v. Pacifica Found.*, 438 U.S. 726, 728 (1978).

33. *Illinois Citizens Comm. for Brdcst.*, 515 F.2d at 404. Judge Leventhal explained that the “excerpts cited by the Commission contain repeated and explicit descriptions of the techniques of oral sex” presented “in a context that was fairly described by the FCC as ‘titillating and pandering.’” Moreover, they were broadcast from 10:00 a.m. to 3:00 p.m. “when the radio audience may include children—perhaps home from school for lunch, or because of staggered school hours or illness.” *Id.* The citizens groups unsuccessfully sought rehearing en banc. *Id.* at 408 (per curiam order denying en banc rehearing). Judge Bazelon, the only one who voted for rehearing, issued a lengthy statement explaining his vote. *Id.* at 407–25.

34. *Id.* at 404 (citations omitted).

35. *Miller v. California*, 413 U.S. 15 (1972). The new standard had three parts: “(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.” *Id.* at 24 (citations omitted).

Can you say this is a responsible radio station, that demonstrates a responsibility to the public for its license?

I'd like to know, gentlemen, just what *you're* going to do about this outrage, and by copy, I'm asking our elected officials the same thing.

Incidentally, my young son was with me when I heard the above, and unfortunately, he can corroborate what was heard.³⁶

Although the letter does not state the age of his son, Douglas later told *Broadcasting* magazine that he was fifteen at the time.³⁷

The FCC forwarded the complaint to Pacifica. Pacifica responded:

Mr. Douglas' complaint is based upon the language used in a satirical monologue broadcast of a regularly scheduled live program "Lunchpail," hosted by Paul Gorman. The selection was broadcast as part of a discussion about the use of language in society. The monologue in question was from the album, "George Carlin, Occupation: FOOLE," . . . On October 30, the "Lunchpail" program consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language. . . . Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society.

The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. . . . To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue. . . .

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. . . . Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words

36. The letter is reproduced in the Appendix to the Brief of Petitioner FCC at 2-3, *FCC v. Pacifica Found.*, 438 U.S. 726 (No. 77-528). Douglas was a planning board member of Morality in Media. R. Wilfred Tremblay, *FCC v. Pacifica Foundation*, in *FREE SPEECH ON TRIAL* 219 (Richard A. Parker ed., 2003). Morality in Media's amicus brief described Morality in Media as

[A] New York not for profit inter-faith charitable Corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states. It corresponds 8 times a year with over 50,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessman, clergy and civic leaders.

Brief for Morality in Media as Amicus Curiae Supporting the FCC at 2, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528).

37. *WBAI Ruling: Supreme Court Saves the Worst for the Last*, *BROADCASTING*, July 10, 1978, at 20.

to satirize as harmless and essentially silly our attitudes towards those words.

[T]he inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding on the subject.³⁸

Instead of issuing an NAL as it did in *Eastern Education* and *Sonderling*, the FCC issued a declaratory order.³⁹ According to Marino, an investigator in the Broadcast Bureau originally drafted a “boilerplate” forfeiture notice on grounds that the program was both obscene and indecent.⁴⁰ Marino knew that in a prior case, Judge Leventhal had expressed concern that the FCC’s use of forfeitures pre-judged culpability.⁴¹ He took a copy of the Carlin transcript home to his wife.⁴² She read it and started laughing.⁴³ At that point, he knew that the FCC could not successfully prove the monologue was obscene.⁴⁴ Thus, he and others at the FCC drafted a declaratory order for the FCC’s consideration.⁴⁵

A. *The FCC’s Declaratory Order*

The *Declaratory Order* recognized that section 326 of the Communications Act prohibited the FCC from engaging in censorship, but noted that the FCC also had an obligation to enforce § 1464. While the *Declaratory Order* claimed it was “not intended to modify our previous decisions recognizing broadcasters’ broad discretion in the programming area,” it asserted that the broadcast medium had “special qualities” that distinguished it from other forms of expression and was, therefore, subject to a different mode of analysis.⁴⁶ Specifically, it found that:

Broadcasting requires special treatment because . . . (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of

38. The letter is reproduced in the Appendix to the Brief of Petitioner FCC at 3–4, *Pacifica*, 438 U.S. 726 (No. 77-528).

39. Citizen’s Complaint Against Pacifica Foundation Station WBAI, *Memorandum Opinion and Order*, 56 F.C.C.2d 94 (1975) [hereinafter *Declaratory Order*].

40. Telephone Interview with Joseph Marino (Oct. 15, 2008) [hereinafter Marino Interview].

41. See *Illinois Citizens Comm. for Brdcast. v. FCC*, 515 F.2d 397, 403 (D.C. Cir. 1974) (“The procedure used by the FCC in issuing the Notice of Apparent Liability raises questions with regard to the rights of the licensee. First, it includes terms of conclusions, while the statute contemplates only charges.”).

42. Marino Interview, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Declaratory Order*, *supra* note 39, at paras. 7–8.

which the government must therefore license in the public interest.⁴⁷

The *Declaratory Order* acknowledged that “the term ‘indecent’ ha[d] never been authoritatively construed by the Courts in connection with § 1464.”⁴⁸ In light of the *Miller* and *Illinois Citizens* decisions, the FCC decided to “reformulat[e] the concept of ‘indecent.’”⁴⁹ It concluded that “patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance” and thus, should be channeled to a more appropriate time rather than prohibited all together.⁵⁰ The FCC suggested that a more lenient definition of “indecent” would be appropriate during “late evening hours” when few children would be in the audience.⁵¹

Applying these considerations to WBAI’s broadcast of the Carlin monologue, the FCC concluded that the language was indecent and prohibited by § 1464 because:

[W]ords such as “fuck,” “shit,” “piss,” “motherfucker,” “cocksucker,” “cunt” and “tit” depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards . . . and are accordingly “indecent” when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast.⁵²

The FCC also explained its decision to issue a declaratory order instead of an *NAL*:

A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge “indecent language.” Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission’s attention to seek reconsideration. If not satisfied by the Commission’s action on reconsideration, judicial review may be sought immediately.⁵³

Although the FCC imposed no fine, it said that if subsequent complaints were received, it would take them into account at license renewal.⁵⁴

At that time, the FCC had seven Commissioners—four Republicans and three Democrats. The FCC Chairman, Richard E. Wiley, a Republican,

47. *Id.* at para. 9.

48. *Id.* at para. 10.

49. *Id.*

50. *Id.* at para. 11.

51. *Id.* at para. 12.

52. *Id.* at para. 14.

53. *Id.* at para. 15 (citations omitted).

54. *Id.* at para. 14.

concurring in the result.⁵⁵ Two Commissioners, Charlotte Reid and James Quello, issued concurring statements indicating that they believed that the broadcast of the language used in the Carlin monologue would be inappropriate at any time.⁵⁶ Commissioner James Quello explained that he disagreed with the majority's view that "such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value."⁵⁷

Commissioner Glen Robinson considered the First Amendment concerns at greater length in his concurring opinion, which was joined by Commissioner Ben Hooks.⁵⁸ But he ultimately concluded that the FCC could regulate offensive speech to the extent it constituted a public nuisance and that the FCC's decision represented a reasonable balance between the conflicting right of free speech and the right to have some protection from the undesired speech of others.⁵⁹

B. *The Purpose of Using a Declaratory Order*

Several contemporaneous and subsequent events emphasize that the FCC intended the *Order* to have a broad application and to serve as a test case for its new interpretation of indecency.

Around the same time it issued the *Declaratory Order*, the FCC sent to Congress its *Report on the Broadcast of Violent, Indecent, and Obscene Material*.⁶⁰ The *Violence Report* discussed how despite the FCC's enforcement actions in *Eastern Educational Radio* and *Sonderling*, it was "apparent . . . that particularly on radio the problem of 'indecent' language has not abated and that the standards set forth in prior opinions has [sic] failed to resolve the problem."⁶¹ The FCC expressed hope that its recently

55. Marino was stunned that Wiley concurred. Marino Interview, *supra* note 40. However, Wiley did not remember concurring or why he would have done so. He said that he rarely wrote separate opinions when he was FCC Chairman because he felt that the FCC opinion spoke for him. He told me he supported the FCC's action at the time and still believes it was correct today. Telephone Interview with Richard E. Wiley, Former Chairman, FCC (July 24, 2009) [*hereinafter* Wiley Interview].

56. *See Declaratory Order*, *supra* note 39, at 102 (Reid, concurring); *id.* at 102–03 (Quello, concurring).

57. *Id.* at 103. Quello filed an amicus brief in *Fox*, along with others agreeing with the Second Circuit that the FCC acted arbitrarily and in violation of the First Amendment. Brief of Former FCC Commissioners and Officials as Amici Curiae Supporting Respondents, *FCC v. Fox TV Stations*, 129 S. Ct. 1800 (2008) (No. 07-582).

58. *Declaratory Order*, *supra* note 39, at 103–07 (Robinson, concurring).

59. *Id.* at 107.

60. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975) [*hereinafter* Violence Report].

61. *Id.* at 425.

issued *Declaratory Order* in *Pacifica* would “clarify the broadcast standards for obscene and indecent speech”⁶²

In an interview with WBAI radio after the Supreme Court decision, then-former Chairman Wiley explained that the FCC had to enforce § 1464 but was not clear on the difference between obscenity and indecency.⁶³ The FCC had no position, but wanted finality more than anything else.⁶⁴ He noted that the FCC almost invited judicial review.⁶⁵ He thought that the FCC was uncomfortable in this area because of the First Amendment and wanted to know whether the FCC’s responsibility extended beyond hardcore obscenity.⁶⁶ He noted that most broadcasters would not have used such language and that it was “too bad” that WBAI had not acted more responsibly.⁶⁷

Commissioner Washburn confirmed in a 1979 speech that the FCC intentionally chose to issue the *Declaratory Order* to *Pacifica* to establish standards for “indecency.” He explained that:

When the “Seven Dirty Words” case reached us, . . . [o]ur dilemma was how to handle this and other complaints being received by the Broadcast Bureau about indecent language over the air. Congress mandated the FCC and the Department of Justice to enforce Section 1464 . . . But, unlike “obscenity,” in the area of “indecency” we had no legal guidelines or definitions. We were searching for a way to meet the statute.

The offensive speech, in the *Pacifica* complaint, . . . was not “obscene” within the appeal-to-the-prurient standard of the Supreme Court. Our General Counsel at that time, Ashton Hardy, advised that . . . it was doubtful the Commission would ever see a stronger case on which to establish FCC policy on what constitutes indecent speech within 1464 and to invite judicial review thereof. . . . I recall [Commissioner] Bob Lee saying at the time, “We need direction from the Court . . .”

Our purpose, thus, was to clarify Commission authority. It was not our intention to penalize *Pacifica* Station WBAI, because the legal meaning of “indecent” was then so vague.⁶⁸

62. *Id.* The FCC attached a copy of the *Declaratory Order* to the *Violence Report*. *Id.* at 430 app. E.

63. *The Carlin Case: Interviews by Joey Cuomo & Mickey Waldman* (WBAI radio broadcast Mar. 30, 1978), available at <http://pacificaradioarchives.org/browse/recording.php?recid=296&catid=3>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Abbott Washburn, FCC Commissioner, Luncheon Address Before the Federal Communications Bar Association, Washington, D.C.: Indecency and the Law in Broadcasting (Mar. 7, 1979) [hereinafter Washburn Speech]. Commissioner Washburn sent a copy of this speech to Justice Blackmun, who filed it in the *Pacifica* case files.

C. *Reconsideration and Review*

Under the Communications Act, a person aggrieved by an FCC action may appeal the decision directly to a United States Court of Appeals, except in two situations: where the person (1) was not a party to the proceeding below, or (2) was a party, but intends to raise facts or arguments that had not been presented to the FCC.⁶⁹ In those situations, the person must seek reconsideration at the FCC before seeking judicial review.⁷⁰ Even though the FCC invited persons aggrieved to file petitions for reconsideration and to subsequently seek judicial review, only one party took up this invitation. The Radio Television News Directors Association (RTNDA) filed a petition for clarification seeking a ruling that the FCC “does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program.”⁷¹

Pacifica opted to seek immediate judicial review in the D.C. Circuit. In its brief, Pacifica emphasized the relationship between the *Declaratory Order* and the *Report to Congress*:

Although the *Order* was issued by way of response to a listener complaint, the *Order* itself is not limited to the facts of the specific complaint. Rather, it was issued in conjunction with, and as an integral part of, the *Commission’s Report on the Broadcast of Violent, Indecent, and Obscene Material* . . . which [it] submitted to Congress on February 19, 1975, in response to Congressional directives.⁷²

Pacifica further argued that while the *Declaratory Order* referred to patently offensive language, which describes sexual or excretory activities and organs, the sweep of the *Order* is much broader.⁷³

[U]nder the [FCC’s] definition of ‘indecent’ any and all uses of certain words which . . . refer in a patently offensive manner to sexual or excretory functions or organs are banned whether such words, as actually used in context, describe sexual or excretory activities or organs or whether they are used colloquially in contexts where they

69. 47 U.S.C. § 405(a) (2006).

The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

Id.

70. *Id.*

71. Petition for Clarification or Reconsideration of a Citizen’s Complaint Against Pacifica Foundation, Station WBAI(FM), *Memorandum Opinion and Order*, 59 F.C.C.2d 892, para. 3 (1976) [hereinafter Citizen’s Complaint].

72. Brief for Petitioner at 5–6, *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977) (No. 77-528) (citation omitted); *see also* Violence Report, *supra* note 60.

73. Brief for Petitioner, *supra* note 72, at 11.

cannot conceivably be construed as describing or even referring to sex or excretion.⁷⁴

Thus, the effect of the FCC *Order* was to prohibit the broadcasts of the White House tapes, political speeches and rallies, and “many of the great works of literature including Shakespearean plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*.”⁷⁵

Pacifica also argued that § 1464 was unconstitutionally vague unless the term “indecent” was subsumed by the term “obscene” as defined in *Miller*.⁷⁶ The Carlin monologue was not obscene under the *Miller* test because (1) it did not appeal to any prurient interest and (2) it had literary and political value.⁷⁷ Finally, Pacifica argued that the special qualities of the broadcast medium did not justify suppressing nonobscene speech.⁷⁸

In its brief, the FCC defended its special treatment of broadcasting based on the four factors identified in the *Declaratory Order*.⁷⁹ It argued that its order merely channeled patently offensive language to times when it was least likely to “be thrust upon unsupervised young children.”⁸⁰

Accordingly, Pacifica’s lengthy compilation of allegedly prohibited quotations from the Bible, secular works of literature, and the “Nixon tapes” represents a serious misinterpretation of the Commission’s order. These materials were not presented to the Commission, even though Pacifica could have sought reconsideration.⁸¹

Thus, the FCC suggested—but did not explicitly argue—that Pacifica was precluded by § 405’s exhaustion requirement from challenging the breadth of the FCC’s ruling because it had not made that argument before the FCC.

A week before the oral argument, the FCC issued an order on reconsideration that narrowed the reach of the *Declaratory Order*. It rejected RTNDA’s claim that the *Declaratory Order* would cause licensees

74. *Id.* at 7.

75. *Id.* at 23.

76. *Id.* at 26–28.

77. *See id.*

78. *See id.* at 46. An amicus brief in support of Pacifica was filed by the San Francisco Chapter of the Committee for Open Media. It argued that the *Order* would have an especially harsh effect on the broadcast of plays attempting to realistically depict ghetto life. Brief of Committee for Open Media, San Francisco Chapter as Amicus Curiae Supporting Petitioner at 2, *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1391) [hereinafter *Open Media Br.*]. As further evidence that the *Order* was overbroad, it cited studies showing that large numbers of children were in the broadcast audience even in the late evening hours. *Id.* at 16–17.

79. Brief for Respondents at 16–23, *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1319).

80. *Id.* at 24.

81. *Id.* at 28.

to censor programming and inhibit broadcast journalism.⁸² It emphasized that the order was “issued in a specific context.”⁸³ It clarified that a licensee would not be held responsible for indecent language in covering live public events where journalistic editing was not possible.⁸⁴ However, it declined to provide further guidance in the absence of a concrete factual situation.⁸⁵

III. THE D.C. CIRCUIT

The case was argued before Judges Tamm, Bazelon, and Leventhal by Joseph Marino for the FCC and Harry Plotkin for Pacifica. Marino did not expect that Judge Bazelon would vote to affirm the FCC, but had hoped Judge Tamm, a conservative jurist, would.⁸⁶ However, the D.C. Circuit voted two to one to reverse the FCC.⁸⁷ Writing for the court, Judge Tamm found that “[d]espite the Commission’s professed intentions, the direct effect of its *Order* is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications.”⁸⁸ He rejected the FCC’s claim that it was merely channeling indecent language to certain times of the day: “In fact the *Order* is censorship, regardless of what the Commission chooses to call it.”⁸⁹ Citing ratings that showed over one million children were watching television until 1:00 a.m., he agreed with Pacifica that the “Commission’s action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*.”⁹⁰

Because Judge Tamm found the FCC’s action constituted censorship, which was prohibited by section 326 of the Communications Act, he did not address the FCC’s argument that “indecent” differed from “obscene.”⁹¹ But, assuming *arguendo* that the FCC had the power to prohibit nonobscene speech from being broadcast, he found the FCC’s order overbroad because it “sweepingly forbids any broadcast of the seven words *irrespective of context* or however innocent or educational they may be. . . . Clearly every use of these seven words cannot be deemed offensive even as

82. Citizen’s Complaint, *supra* note 71, at para. 4.

83. *Id.*

84. *Id.* at 893 n.1.

85. *Id.* at para. 5.

86. Marino Interview, *supra* note 40.

87. *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977).

88. *Id.* at 13.

89. *Id.*

90. *Id.* at 14.

91. *Id.* at 15.

to minors.”⁹² Thus, he characterized the FCC’s action as a “step toward reducing the adult population to hearing or viewing only that which is fit for children” and a “classic case of burning the house to roast the pig.”⁹³

Judge Bazelon concurred, but thought it was necessary to go beyond Judge Tamm’s decision and rule that, under the *Miller* test, the FCC’s definition of “indecent” speech was “massively overbroad” because it failed to use local community standards, consider whether the work appealed to prurient interest, and judge the work as a whole.⁹⁴ He rejected the FCC’s argument that regulation was justified by the privacy interests of unconsenting adults in their homes because any offense could be minimized by changing the channel.⁹⁵ He likewise dismissed the claim that regulation was justified by the presence of children in the audience.⁹⁶ While conceding that “no one would dispute that there is a public interest in stations airing programming suitable for children or that government has greater power to regulate speech aimed at children than speech aimed at adults,”⁹⁷ adults with normal sleeping habits would be limited to programs fit for children. If it were impractical to accommodate the competing interests of children and adults, the court should err on the side of under regulation because the harm to children could be minimized with warnings and parental supervision, but harm from over regulation was irreparable.⁹⁸

Judge Leventhal dissented. He stressed that the FCC had only held that the specific broadcast was indecent, not that the broadcast of any one of the seven words would be indecent.⁹⁹ He thought that the “Commission’s decision must be read narrowly, limited to the language ‘as broadcast’ in the early afternoon.”¹⁰⁰ While he recognized that Carlin was “a comedian of stature, and a social satirist,” whose monologue might be appreciated by a “mature audience,”

92. *Id.* at 17 (emphasis added). Judge Tamm also concluded that the FCC’s action was vague because it failed to define “children,” noting that a nineteen-year-old had different needs than a seven-year-old. *Id.*

93. *Id.* at 17 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). He also found no empirical support for the FCC’s claim that, had it not taken action, “filth [would] flood the airwaves,” and suggested that market forces would limit the broadcast of offensive language. *Pacifica*, 556 F.2d at 18.

94. *Pacifica*, 556 F.2d at 21 (Bazelon, J., concurring).

95. *Id.* at 26.

96. *Id.* at 28.

97. *Id.* at 27.

98. *Id.* at 27–28. Judge Bazelon also found the FCC’s decision based on undocumented assumptions that most parents would consider such language unsuitable for children and that parents were less able to control their children’s listening habits than their access to other media. *Id.* at 28.

99. *Pacifica*, 556 F.2d at 31 (Leventhal, J., dissenting).

100. *Id.* at 32.

every society has special vocabularies appropriate only for special groups, times and places. What the licensee did here was to broadcast them broadside, in houses and elsewhere; and to present the persistent, almost lavishly loving reiteration of the special words in an afternoon broadcast when children were likely in the audience.¹⁰¹

In Leventhal's view, the FCC's action reflected "a broad consensus of society, the view that the great bulk of families would consider it potentially dangerous to their children"¹⁰² While families should have the means to choose programming appropriate for children, the pervasiveness of broadcasting radio made that impossible. Since a majority of families with school-aged children had working mothers, children would be listening unsupervised.¹⁰³ Although children might hear these words elsewhere, hearing them broadcast created the impression that their use was generally acceptable.¹⁰⁴

Judge Leventhal saw the FCC's action as an appropriate time, place, or manner regulation rather than censorship.¹⁰⁵ While acknowledging that vagueness was "to some extent inherent" in the concept of indecency, he thought that the judicial review would ensure protection for works of literary, artistic, political, or scientific value.¹⁰⁶ In sum, the FCC had made an appropriate constitutional trade-off between assisting parents in protecting young children and protecting privacy versus free speech interests.¹⁰⁷

The FCC, with the support of the DOJ, promptly sought rehearing *en banc*.¹⁰⁸ Its petition emphasized the importance of deciding the statutory question—that is, "whether the word 'indecent' as used in § 1464 has a separate meaning from the term 'obscene.'"¹⁰⁹ The FCC agreed with Judge Leventhal that its "order was a declaration on a specific set of facts. When the Commission is confronted with a different set of facts, it can then determine whether the principles announced in this order should be applied, modified, or extended."¹¹⁰ The D.C. Circuit denied rehearing in an unpublished order on May 10, 1977.¹¹¹

101. *Id.* at 33.

102. *Id.*

103. *Id.* at 34.

104. *Id.*

105. *Id.* at 34 (Leventhal, J., dissenting).

106. *Id.* at 35.

107. *Id.* at 37.

108. Petition for Rehearing and Suggestion for Rehearing En Banc, *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1391).

109. *Id.* at 1–2.

110. *Id.* at 8.

111. Although the suggestion for rehearing *en banc* was denied *per curiam*, the *Order* notes that four of the nine Judges—Leventhal, McKinnon, Robb, and Wilkey—would have

IV. THE SUPREME COURT DECISION IN *PACIFICA*

The FCC filed its petition for certiorari on October 7, 1977.¹¹² Normally, the Solicitor General's office would represent the FCC in seeking review in the Supreme Court.¹¹³ Here, although the DOJ joined the FCC in defending its *Order* in the D.C. Circuit, it did not join in the petition for certiorari.¹¹⁴ This change of position may have been due to the change in administration. Democrat Jimmy Carter became President in January 1977, and in March, he appointed Wade H. McCree to replace Robert H. Bork as Solicitor General.¹¹⁵ However, the Republican Chairman of the FCC, Richard Wiley, served until October 13, just a few days after the FCC's certiorari petition was filed.¹¹⁶

A. *Decision to Grant Certiorari*

The Court took up whether to grant certiorari at its conference on January 6, 1978.¹¹⁷ The pool memo prepared for this conference by Justice Powell's clerk, Jim Alt, summarized the facts, decisions below, and contentions of the parties.¹¹⁸ The FCC had argued that certiorari should be granted to decide whether the unique quality of the broadcast media

granted the suggestion. A copy of the *Order* is attached to the FCC's Brief. Brief of Petitioner FCC app. at 1, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528).

112. Petition for Writ of Certiorari, *Pacifica*, 438 U.S. 726 (1978) (No. 77-528).

113. The United States, represented by the DOJ, is automatically a party in appeals of the FCC taken under § 402(a) of the Communications Act. 47 U.S.C. § 402(a) (2006); 28 U.S.C. § 2344 (2006). However, even though the Attorney General is responsible for the interests of the Government in all court proceedings under that chapter, an agency whose interests would be affected if its order were set aside may appear as a party and be represented by its own counsel. 28 U.S.C. § 2348 (2006).

114. Brief for the United States, *Pacifica*, 438 U.S. 726 (No. 77-528).

115. Marino recalled that Bork decided not to support seeking certiorari. Although Marino did not attend the meeting with Bork, he suspects that the petition was circulated for comment, and that the Criminal Division, which was responsible for enforcing § 1464, had a different view than the Antitrust Division, which had been involved in the case in the D.C. Circuit. This theory is consistent with the explanation given at oral argument. *See* Marino Interview, *supra* note 40.

116. Because the FCC is an independent agency, Commissioners may continue to serve out their terms after a new administration takes over. In this case, Wiley agreed to remain as Chairman until a new Chairman could be appointed and confirmed. Wiley Interview, *supra* note 55. Democrat Charles Ferris became FCC Chairman on October 17, 1977.

117. Preliminary Memorandum for Jan. 6, 1978 Conference, No. 77-528 (Dec. 13, 1977) [hereinafter Pool Memo]. Copies of this Pool Memo were found in the papers of both Justice Blackmun and Justice Powell.

118. Pool Memo, *supra* note 117. The practice of pooling clerks, dividing up the filings, and having a single memo circulated among all the participants began in 1972 as a way to reduce the workload as a result of the increasing number of cert petitions being filed. Some Justices, including Justice Stevens, did not participate in the pool. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 140 (8th ed. 2008).

justified its action.¹¹⁹ In opposing certiorari, Pacifica argued that the D.C. Circuit correctly found the Commission's *Order* overbroad and that the DOJ's decision not to support certiorari demonstrated that the case posed no important issue of federal law.¹²⁰

The pool memo recommended against hearing the case, noting that “[b]ecause of the legislative nature of the Commission’s order and the divergence of views on D.C. Cir., this case comes here in rather an unfocused state.”¹²¹ Moreover,

it seems likely that the Commission’s approach, with its focus on words, rather than on words and context, was not sufficiently discerning even taking into account the special problems of the broadcast media. The Commission made it quite clear that a broadcast’s claim to serious merit would make no difference in determining whether it was “indecent” except, perhaps, if the broadcast were late at night. As Judge Tamm pointed out, this would keep a fair number of serious works off the air at times when most adults could listen. Even granting validity to the Commission’s “channeling” approach, one would think that it might have taken into account both the adults’ interest in access to such works, and the possibility that children could be shielded from them.¹²²

The memo concluded that “[g]iven the breadth of the declaratory portion of the Commission’s order, and its potential chilling effect on broadcasters, the majority’s overbreadth approach seems more appropriate than the dissenter’s as-applied approach. Thus, unless the Court is inclined to review the majority’s overbreadth holding, the case probably is not worth taking.”¹²³

The Justices vote at conference whether to hear a case. Generally, four votes are needed for a case to be accepted.¹²⁴ Chief Justice Burger and Justices White, Rehnquist, and Stevens voted in favor of certiorari.¹²⁵ Justices Powell and Blackmun voted “join 3,” meaning that they would

119. Pool Memo, *supra* note 117, at 8.

120. *Id.* at 9.

121. *Id.*

122. *Id.* at 9–10.

123. *Id.* at 10. On Justice Powell’s copy of the pool memo, Alt wrote on the first page: “I would deny this petition.” On the last page he explained: “Because I think the FCC’s declaratory order was overbroad and showed a *startling insensitivity* to the interests of everyone except children, I would deny.” *Id.* Justice Blackmun’s clerk, Ruth Glushien, agreed with the recommendation, adding: “The FCC clearly intended its order to guide broadcasters generally; hence the overbreadth concern is apt. I think the majority’s view that the order *was* overbroad under 47 USC § 326 is well-supported. Hence, I see no reason to take the case.” *Id.* at 10 (on file in Blackmun Papers).

124. O’BIEN, *supra* note 118, at 211.

125. Tally Sheet (Jan. 6, 1978), *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528) (Powell files) (showing vote at conference).

vote in favor of hearing the case if three others did.¹²⁶ Justices Brennan, Stewart, and Marshall voted to deny certiorari.¹²⁷

Justice Powell's notes on the tally sheet indicate that the Chief Justice voted to hear the case because he wanted to reverse the D.C. Circuit. Powell's join-3 vote seems to have been prompted by his agreement with Judge Leventhal and disagreement with Judge Bazelon. At the top of the pool memo Powell wrote: "the [FCC's] definition [of indecent language] is certainly broad, but J. Leventhal (not a judge unsympathetic to 1st amend') read it narrowly & would sustain the FCC order. TV & Radio should not have the latitude of the Miller standard & FCC was addressing an urgent need."¹²⁸ And, next to the statement that Bazelon had questioned the FCC's premise that parents did not want children to hear indecent language and were unable to control children's listening, he wrote: "Bazelon must not have children."¹²⁹

B. *The Briefs*

The FCC's brief presented two issues.¹³⁰ The first was whether the term "indecent" as used in § 1464 was subsumed within the term "obscene" or had a special meaning as applied to broadcasting.¹³¹ The FCC argued that the term should be given special meaning because (1) children have easy access to radio and are often unsupervised; (2) "radio receivers are in the home, where individual rights to privacy are entitled to particular respect;" (3) nonconsenting adults may tune in without warning; and (4) the scarcity of frequencies required licensing in the public interest.¹³²

The second issue was whether the FCC reasonably concluded that certain words in the Carlin monologue were "indecent" as broadcast.¹³³ The FCC argued it was reasonable to conclude that Pacifica "abused its special trust by broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual and excretory organs and activities in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience."¹³⁴

126. O'BRIEN, *supra* note 118, at 215.

127. Certiorari was granted on January 9, 1978. FCC v. Pacifica Found., 434 U.S. 1008 (1978).

128. Pool Memo, *supra* note 117, at 1.

129. *Id.* at 7.

130. Brief for the FCC at 2, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528).

131. *Id.*

132. *Id.* at 24-25.

133. *Id.* at 2.

134. *Id.* at 27. Amicus briefs in support of the FCC were filed by Morality in Media, Brief of Morality in Media, Inc. as Amicus Curiae Supporting Petitioner FCC, *Pacifica*, 438 U.S. 726 (No. 77-528), and the U.S. Catholic Conference, Brief of United States Catholic Conference as Amicus Curiae Supporting Petitioner FCC, *Pacifica*, 438 U.S. 726 (No. 77-

Respondent Pacifica argued that the FCC's ruling set a "standard of 'decency' applicable to all broadcasters" that prohibited the "unexpurgated broadcast of great works of classical and contemporary literature, including even passages from the *Bible*."¹³⁵ Pacifica also argued that the FCC's construction of the term "indecent" was precluded by *Hamling v. United States*, which had construed "indecent" as used in § 1461 of the Criminal Code, which contained language similar to § 1464, as "subsumed" by the definition of "obscene" set forth in *Miller*.¹³⁶

Pacifica further argued that the FCC's order could not be justified based on the unique qualities of broadcasting. First, Pacifica argued that the scarcity rationale "cannot justify the Commission's action which serves to lessen the number of available voices, and thus aggravates, rather than alleviates, the problem of scarcity."¹³⁷ Second, the FCC's attempt to protect unsupervised children was a "classic example of unconstitutional overbreadth."¹³⁸ Third, the FCC's action unconstitutionally intruded into the role of parents.¹³⁹ Fourth, radio and television broadcasts did not invade the privacy of the home, but were invited; thus, undesired content could be avoided.¹⁴⁰

The United States, represented by the Solicitor General, also filed a brief as a Respondent. It argued that it was "impossible to read the Commission's order in any way except as an absolute ban, for most

528).

135. Brief for Pacifica Found. at 11, *Pacifica*, 438 U.S. 726 (No. 77-528).

136. *Id.* at 26.

137. *Id.* at 44.

138. *Id.* at 47.

139. *Id.* at 53–55.

140. *Id.* at 56–59. Several amicus briefs were filed in support of Pacifica. For example, the ABC, CBS, and NBC networks, filing jointly with the NAB, RTNDA, and others, argued that

Although the Commission has only proscribed here the broadcast of a comic monologue discussing society's use of and attitude toward 'dirty words,' the authority it has asserted would clearly extend much further. If successful here, the Commission would be placed in the position of a censor, free to forbid whatever is objectionable to "the most vocal and powerful of orthodoxies."

Brief for American Broadcasting Company, Inc. et al. as Amici Curiae Supporting Respondent at 13, *Pacifica*, 438 U.S. 726 (No. 77-528) [hereinafter ABC Br.] (citations omitted). The ACLU and others argued that the FCC's *Order* was intended to establish broad, nationwide standards for the broadcast of "indecent" language, that minors had a First Amendment right to listen to the radio free of FCC censorship, and that the FCC lacked legal authority to issue a declaratory ruling. Brief of the American Civil Liberties Union et al. as Amici Curiae at 6–11, *Pacifica*, 438 U.S. 726 (No. 77-528). The Writers Guild argued that "to forbid the use of words is to forbid the expression of ideas and feelings," and that it violated the First Amendment to equate principles of free speech "with those which govern property nuisances." Brief of Writers Guild, West, Inc. as Amicus Curiae in Support of Respondent at 2, 5, *Pacifica*, 438 U.S. 726 (No. 77-528) (original formatting omitted).

broadcasting hours, on the utterance of any of the specified words, regardless of context.”¹⁴¹ Because section 326 of the Communications Act prohibited the FCC from censoring broadcasts protected by the First Amendment, the FCC could not invoke the Act’s public interest authority to “wholly ban from the airways, at least for most hours, one species of language on grounds that have nothing to do with ‘balance’ or diversity.”¹⁴²

At the same time, the United States disagreed with *Pacifica* that the term “indecent” was subsumed by the term “obscene.” It argued that the “use of the disjunctive indicates that the prohibition encompasses language which is *either* obscene *or* indecent *or* profane.”¹⁴³ While acknowledging that the “category of ‘indecent’ words and phrases is not self-defining,” most of the words used by Carlin would fall into that category.¹⁴⁴ It concluded that if “the First Amendment does not prevent it, we believe the Commission still remains free to apply the statute as a nuisance law.”¹⁴⁵ However, the United States concluded that the FCC’s action did violate the First Amendment. It could not be justified as a “time, place, and manner restriction” because offensive broadcasts could easily be avoided by turning the radio off and the “rights of adults cannot be abridged for the sake of the children.”¹⁴⁶ The United States suggested that a carefully drafted partial ban on indecent broadcasts could be consistent with the First Amendment.¹⁴⁷ However, the FCC’s suggestion that indecent language might be permitted after 10:00 p.m. was “too grudging, and too arbitrary, to salvage the rule.”¹⁴⁸

C. Preparation for Oral Argument

To prepare the Justices for an oral argument, the clerks typically draft “bench memos,” summarizing the facts, issues, and arguments; recommending questions for oral argument; and suggesting how their

141. Brief for the United States at 14, *Pacifica*, 438 U.S. 726 (No. 77-528).

142. *Id.* at 19.

143. *Id.*

144. *Id.* at 20.

145. *Id.* at 23.

146. *Id.* at 35. The United States also suggested that children hearing “indecent” language on the radio was hardly a “matter of the gravest concern” because they heard the same words elsewhere. *Id.* at 35–36.

147. Brief for the United States at 36–37, 38 *Pacifica*, 438 U.S. 726 (No. 77-528).

148. *Id.* at 38. In the final section, titled “A Caveat,” the United States stressed that neither the FCC nor the DOJ was entirely powerless to deal with extreme cases, suggesting that sanctions could constitutionally be imposed where indecent words were “spewed forth without any arguable justification in a conscious attempt to shock, offend or outrage” or in broadcasts specifically directed to young children. *Id.* at 39–41. The FCC’s short reply brief highlighted the areas of agreement between the DOJ and the FCC and stressed that its ruling “was limited to the facts complained about” and had “not imposed a flat ban on these or any other words.” Petitioner’s Reply Brief at 4, 7, *Pacifica*, 438 U.S. 726 (No. 77-528).

Justice might vote.¹⁴⁹ Both the Powell and Blackmun clerks recommended that their Justices affirm the D.C. Circuit's decision.¹⁵⁰

1. Justice Powell's Chambers

James Alt's bench memo for Justice Powell identified three issues for decision. On the first issue, whether the validity of the *Order* should be considered on its face or as applied, Alt disagreed with Judge Leventhal, despite his respect for him.¹⁵¹ Alt thought that the FCC's express intent in issuing a declaratory ruling was to lay down general rules to govern future conduct, and that Judge Leventhal gave insufficient weight to concerns that the rules would deter constitutionally protected speech.¹⁵² Alt wrote: "Although I realize that you are no great fan of overbreadth analysis, I would urge that, at least in the first instance, you consider whether the rules are 'substantially overbroad,' and hence subject to facial invalidation."¹⁵³

As to the second issue, whether the term "indecent" could be construed to mean something other than "obscene," Alt concluded that "Congress probably meant to reach all language that constitutionally could be proscribed, whether or not it is 'obscene.'"¹⁵⁴ Justice Powell agreed, noting in the margin: "Since 1464 include[s] 'indecent', we must reach const. issue."¹⁵⁵

Regarding the third issue, Alt found two features of the FCC's order especially troublesome.¹⁵⁶ First,

the fact that unwilling adults are free to tune out offensive programming - to avert their ears, in effect - seems to me to cut strongly against the notion that the FCC must be able to protect adults whose sensitivities might be offended.

The second feature . . . is that the FCC Order makes almost no attempt to accommodate [sic] the asserted interest in protecting children with adults' interest in hearing programming that is permissible for willing

149. See O'BRIEN, *supra* note 118, at 141.

150. Bench Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun (Apr. 17, 1978) (on file in Blackmun Papers) [hereinafter Glushien Bench Memo]; Bench Memorandum from James Alt, Clerk to Justice Powell, to Justice Powell (Apr. 17, 1978) (on file in Powell Papers) [hereinafter Alt Bench Memo].

151. Alt Bench Memo, *supra* note 150, at 4.

152. *Id.* at 4-5.

153. *Id.* at 5.

154. *Id.* at 6.

155. *Id.*

156. *Id.* at 14. Alt thought Pacifica's strongest argument was that under *Cohen v. California*, 403 U.S. 15 (1971), the FCC could not ban nonobscene speech because it offended some people. In *Cohen*, the Court noted that people who were offended by a man's jacket bearing the words "Fuck the Draft" "could effectively avoid further bombardment of their sensitivities by simply averting their eyes." *Id.* at 21.

adults.¹⁵⁷

Alt believed that “context must count for something, both to protect the children’s own First Amendment rights, and to provide a measure of protection to adults’ rights.”¹⁵⁸ Because the FCC completely failed to take context into account, he “would hold the FCC order overbroad on its face.”¹⁵⁹

Alt attempted to sketch out a “constitutionally permissible scheme of regulation”¹⁶⁰ and, noting that Powell took the position in his dissent in *Rosenfeld v. New Jersey* that some language, which was neither obscene nor fighting words, may be so offensive that government could protect unwilling listeners,¹⁶¹ Alt suggested that the FCC could constitutionally prohibit “deliberately assaultive language” that lacked any value.¹⁶² Works of value with offensive language, such as the Carlin monologue or the Nixon tapes, could be channeled into time slots where the fewest number of unsupervised children would be listening. He also suggested that the FCC could not constitutionally prohibit the broadcasts that “contain only occasional offensive language,” such as “filmed news reports of public demonstrations.”¹⁶³ Thus, he recommended that the case be sent back to the FCC for a “second attempt.”¹⁶⁴

Justice Powell was not impressed by Alt’s arguments. In handwritten notations in the margins, he indicated that although he believed that verbal assaults on an unwilling audience could be constitutionally prohibited, he did not view this case “as involving adults” or preventing them from having access to programming.¹⁶⁵ Next to Alt’s observation that it is “not easy” to sketch out a constitutionally permissible regulation, he wrote “impossible.”¹⁶⁶

In pre-argument notes, Powell wrote that “[m]uch depends on how one reads FCC order” and that Judge Leventhal read it narrowly.¹⁶⁷ He

157. *Id.* at 14 (internal quotation marks omitted).

158. *Id.* at 15 (citations omitted).

159. *Id.*

160. *Id.*

161. *Rosenfeld v. New Jersey*, 408 U.S. 901, 905–06 (1972) (Powell, J., dissenting). In this case, the defendant was prosecuted under a New Jersey statute for using the word “motherfucker” four times during an address to a public school board meeting. See generally *id.*

162. Alt Bench Memo, *supra* note 150, at 15.

163. *Id.* at 16.

164. *Id.*

165. *Id.* at 2, 13–14.

166. *Id.* at 15.

167. Miscellaneous Preargument Notes by Justice Powell, 77-528 FCC v. Pacifica Foundation (Apr. 18, 1978), in THE LEWIS F. POWELL, JR. PAPERS, 1921–1998, at 2 (Lewis F. Powell, Jr. Archives, Washington and Lee U., Lexington, Va.).

observed that “Leventhal’s view – strongly endorsed by FCC’s briefs – is that it is the ‘holding’ that must be viewed as being all that is before us,” and that the rest of the FCC’s order was only “informational.”¹⁶⁸ Thus, before oral argument, Justice Powell seemed to lean strongly in favor of reversing the D.C. Circuit, even though his clerk had recommended otherwise.

2. Justice Blackmun’s Chambers

Blackmun clerk Ruth Glushien also recommended affirming the D.C. Circuit and finding the FCC *Order* overbroad under either the First Amendment or section 326 of the Communications Act.¹⁶⁹ As to how broadly to read the FCC *Order*, she observed that Judge Leventhal had read it “merely as proscribing Mr. Carlin’s particular language ‘as broadcast.’”¹⁷⁰ However, she had the impression that the FCC was “trying to reduce the size of its target after the fact,” because

this was the first occasion since *Miller v. California*’s reformulation of the definition of obscenity, that the Commission had had a chance to treat the problem of “indecent” language and that the opinion would “clarify the standards which will be utilized in considering the public’s complaints” about the broadcast of indecent language. [Paragraphs] 11 and 12 of the opinion deliberately sketch out the applicable principles and only then, in [Paragraph] 14, does the Commission go on to apply them to the Carlin broadcast.¹⁷¹

Moreover, the FCC issued a *Declaratory Order* instead of an *NAL* because it was “admirably suited . . . to clarify[ing] the standards which the Commission utilizes to judge indecent language.”¹⁷² Thus, Glushien “would take the Commission’s order as a broad ranging one.”¹⁷³

Next, she considered whether the FCC had authority to regulate nonobscene speech.¹⁷⁴ Glushien agreed with the Solicitor General that “the

168. *Id.*

169. Glushien Bench Memo, *supra* note 150.

170. *Id.* at 4.

171. *Id.* at 5 (citations omitted).

172. *Id.* at 6. (internal quotation marks omitted).

173. *Id.* at 7.

174. Pacifica had argued that the FCC lacked authority because when § 1464 “states that ‘any obscene, indecent or profane language by means of radio communication’ is punishable, ‘indecent’ is mere surplusage, subsumed in the category of ‘obscene’ language.” *Id.* at 8. Pacifica relied on two cases, *United States v. Twelve 200-Foot Reels of Super 8mm Film*, 413 U.S. 123 (1973), and *Hamling v. United States*, 418 U.S. 87 (1974), which had construed similar language in § § 1462 and 1461, respectively, of Title 18, as limited to material meeting the *Miller* standard for obscenity. The FCC responded that that “although *Hamling* and *Twelve 200-Foot Reels* might support Pacifica’s argument, the unique nature of the airwaves suffices to impute to Congress the intention to regulate non-obscene speech, because of the medium’s scarcity and intrusiveness, particularly as to children.” Glushien Bench Memo, *supra* note 150, at 10.

use of the disjunctive [in § 1464] indicates an intention to have three separate categories” of prohibited broadcasts—obscene, indecent, and profane.¹⁷⁵

Third, Glushien considered whether the rule was overbroad. She disagreed with the FCC’s argument that overbreadth scrutiny was improper in an adjudicatory proceeding because “the agency functionally intended to use the adjudicatory proceeding as the occasion for announcing a new standard; [and i]f allowed to stand unchallenged, the de facto rule would chill the exercise of First Amendment rights by other broadcasters.”¹⁷⁶ She noted that Judge Leventhal’s argument that Pacifica had failed to object to the breadth of the rule by seeking reconsideration presented the “most serious challenge to overbreadth analysis.”¹⁷⁷

On the substance, Glushien thought that the Solicitor General had provided the “best analysis.”¹⁷⁸ Its brief argued that the Court had never applied a “special standard for mixed audiences of children and adults.”¹⁷⁹ Moreover, it distilled a three-part test from the “nuisance regulation cases: (a) How offensive, to how many people, is the disputed speech; (b) how captive is the audience of unwilling listeners; (c) how great a deterrent [sic] effect on speech will the ban have?”¹⁸⁰ Although Glushien thought that the FCC’s action could be found reasonable under this test, the United States reached the opposite conclusion.¹⁸¹

Finally, Glushien addressed the “close question” of whether the rule was constitutional as applied.¹⁸² The FCC had presented no empirical data to support children’s viewing patterns, while *amici* American Broadcasting Company et al. offered data suggesting that few children listened to the radio at 2:00 p.m.¹⁸³ Moreover, the FCC had received only one complaint, and the radio station had warned that vulgar language would be used.¹⁸⁴ Additionally, “the premise that such language was completely unexpected . . . is also a little hard to swallow . . . [because] WBAI . . . is widely known for ‘hip’ Greenwich Village-type broadcasting, with several hours a week

175. Glushien Bench Memo, *supra* note 150, at 11. Because the FCC had authority under § 1464, she saw no reason to reach the question of whether section 303(g) of the Communications Act, which allows the FCC to regulate to promote the effective use of radio, granted the FCC authority to regulate indecent speech. Glushien Bench Memo, *supra* note 150, at 12.

176. Glushien Bench Memo, *supra* note 150, at 13.

177. *Id.* at 14.

178. *Id.*

179. *Id.*

180. *Id.* at 15.

181. *Id.* at 16–17.

182. *Id.* at 18.

183. *Id.*

184. *Id.*

of programming on gay rights, Puerto Rican nationalists, and what-have-you.”¹⁸⁵ On the other hand, the Carlin monologue “focuse[d] on indecent words in a concerted and protracted way, and in the hands of a jury I would not be surprised if the dialogue was held to constitute ‘a conscious attempt to shock, offend or outrage.’”¹⁸⁶ Glushien recommended affirming the D.C. Circuit “either on the ground of over-breadth or by holding Section 1464 to have been applied beyond its constitutional limit.”¹⁸⁷

Justice Blackmun’s notes suggest, however, that he was more inclined to agree with Judge Leventhal. Next to the summary of the D.C. Circuit judges’ opinion, he wrote “Leventhal did his best to save.”¹⁸⁸ In the margin, next to the question of whether the case presented only the narrow question of whether the words were indecent as broadcast, he wrote “Quaere whether overbreadth properly raised below” and “this is difficult.”¹⁸⁹ At the bottom of the page, he wrote “Stay with Leventhal.”¹⁹⁰

D. *The Oral Argument*

The oral argument took place on April 18–19, 1978. Joseph A. Marino argued for the FCC.¹⁹¹ He began by pointing out that the FCC and DOJ agreed that in enacting § 1464, Congress intended to prohibit the broadcast of both obscene and indecent speech and that they were not the same thing.¹⁹² He described the words in the Carlin monologue as “verbal taboos” or “verbal slaps.”¹⁹³ He argued that Judge Leventhal’s dissent had properly construed the FCC’s *Order*.¹⁹⁴ Although *Pacifica* and the DOJ presented the FCC’s *Order* as a “flat ban,” it was only a *Declaratory Order*

185. *Id.* at 18–19.

186. *Id.* at 18.

187. *Id.* at 19.

188. Miscellaneous Preargument Notes of Justice Blackmun, 77-528 FCC v. *Pacifica* Foundation (on file in Blackmun Papers).

189. *Id.*

190. *Id.*

191. By this time, Marino was no longer the head of Litigation and was working in the Common Carrier Bureau. He asked to keep the *Pacifica* case when he went to the Bureau, so he was able to work on the briefs and argue in the D.C. Circuit. By the time briefs needed to be filed in the Supreme Court, Ferris had become Chairman. Marino was surprised when then General Counsel Robert Bruce asked him to write the brief. Marino agreed to do the brief if he could argue the case. He had never argued in the Supreme Court before. Marino Interview, *supra* note 40.

192. Transcript of Oral Argument at 2, FCC v. *Pacifica* Found., 438 U.S. 726 (1978) (No. 77-528), reprinted in 101 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT 678 (Philip B. Kurland & Gerhard Casper eds., University Publications of America 1979) [hereinafter Kurland & Casper].

193. *Id.*

194. *Id.* at 677.

limited to the facts presented, and at heart, an attempt to protect children by channeling such programming to times when children were unlikely to be in the audience.¹⁹⁵

Marino finished his argument in about nine minutes with no interruptions and was about to sit down when the Justices started asking questions.¹⁹⁶ Justice Stevens wanted to know whether saying the same words on CB radio would be a crime, since the statute seemed to apply to all forms of radio communication.¹⁹⁷ Marino was flustered by the question, and after a long pause, said that the FCC had no position on that issue.¹⁹⁸ Justice Stevens tried again, asking whether the same words in the same statute could mean different things in different proceedings.¹⁹⁹ Marino explained that the DOJ was responsible for criminal enforcement, while the FCC could take only administrative action.²⁰⁰ The Chief Justice asked whether the FCC might consider that a CB operator used such words when the CB license came up for renewal, and Marino agreed that the FCC would consider it under the public interest standard of the Communications Act.²⁰¹

Another Justice tried again to pin Marino down as to whether the word “indecent” could mean one thing for purposes of the FCC’s administrative enforcement, and something else for purposes of the DOJ’s criminal enforcement.²⁰² The Chief Justice tried to help him out: “The same conduct, the same words, whether they were ultimately found to be criminal or non-criminal, might constitute the basis for not renewing a license, might they not?”²⁰³ Marino agreed that the FCC could, and did, address indecent language under the public interest standard, but “felt that since that specific prohibition has been in the statute [18 U.S.C. § 1464], it would try to give some concrete meaning to it, and limit it as much as possible in the light of this Court’s opinions in First Amendment cases.”²⁰⁴

Harry M. Plotkin, of Arent Fox Kintner Plotkin & Kahn, argued for

195. *Id.* at 679.

196. This can be heard when listening to the oral argument. FCC v. Pacifica Foundation *Oral Argument*, OYEZ.ORG, http://www.oyez.org/cases/1970-1979/1977/1977_77_528/argument (last visited Nov. 15, 2010).

197. Kurland & Casper, *supra* note 192, at 680; *see also* FCC v. Pacifica Foundation *Oral Argument*, *supra* note 196, for clarification of which Justice was speaking throughout.

198. *See* Kurland & Casper, *supra* note 192, at 680–81; *see also* FCC v. Pacifica Foundation *Oral Argument*, *supra* note 196, for descriptions of tone and nature the oral argument.

199. *Id.* at 681.

200. *Id.* at 681–82.

201. *Id.* at 682–83.

202. *Id.*

203. Kurland & Casper, *supra* note 192, at 684.

204. *Id.*

Pacifica. He stressed that WBAI was a “noncommercial educational station in New York, with a limited audience.”²⁰⁵ It aired the Carlin recording preceded by a warning in the context of a serious discussion program. One Justice asked whether the warning would lead young people to turn off the program or whether it was intended as a “come-on.”²⁰⁶ Plotkin replied that it was not intended as a come-on because “this is not the type of station that’s devoted to commercial enterprises, this was not a [pandering] program, it’s not a titillating program, it’s a station which does devote itself to the unusual programs, to highly controversial programs, to a wide variety of programming.”²⁰⁷

Justice Marshall seemed skeptical:

THE COURT: But of course the child that happens to tune in knows what kind of station it is?

MR. PLOTKIN: Oh, yes; yes. The child was sitting with his father, and presumably—

THE COURT: No, I say the average child knows that this is an educational station which has a broad range of programs—how in the world could a child know that?

MR. PLOTKIN: How could he know it’s educational?

THE COURT: Yes.

MR. PLOTKIN: Well, this particular child, we know very little about him.²⁰⁸

Plotkin moved on to argue that the FCC had acted inconsistently by taking action against Pacifica for indecent language, while at the same time concluding that the First Amendment precluded it from taking action against violent programs. Although conceding that § 1464 prohibited indecent but not violent programming, Plotkin argued that the statute did not give the FCC authority to issue a general declaration that certain words were banned “even though they have literary, artistic or scientific value.”²⁰⁹

This claim prompted Justice Marshall to interject:

THE COURT: Are you arguing now that this has literary or artistic value?

MR. PLOTKIN: Well, as a matter of fact, in the over-all context, yes, there was; yes. The words themselves may not, but in the over-all context, yes, Your Honor. . . .

THE COURT: This is educational, in your view?

205. *Id.* at 685. The Chief Justice asked for clarification and Plotkin replied: “It’s a noncommercial educational station. That means it’s a station licensed [to] a nonprofit organization . . . there can be no commercials on it, and its programs are of an educational nature. It’s like WETA here in Washington; the same type of station.” To which Justice Rehnquist quipped, “Almost!” and the audience laughed. *Id.* at 686.

206. *Id.*

207. *Id.*

208. Kurland & Casper, *supra* note 192, at 687.

209. *Id.* at 688.

MR. PLOTKIN: The question as to whether it's educational or not was not involved in this case. As to whether it has artistic literary or scientific value, yes. Even Commissioner Robinson, who concurred in the case, on a very narrow point, said that if he had to judge upon whether it had artistic, literary or scientific value, said he would come down and decide that it did have it. But, he agreed with the Commission that you don't look at context when children are likely to be in the audience.

THE COURT: Well, I'm not an expert, but if that's artistic, deliver me.²¹⁰

After the laughter died down, Plotkin moved on to his statutory argument. He pointed out that in *Federal Communications Commission v. ABC*, the Court overturned an FCC regulation interpreting a criminal statute differently than the DOJ.²¹¹ He drew a parallel to this case, claiming that § 1464 used "exactly the same type of words" as § 1461,²¹² which had been before the Court in *Hamling*.²¹³ He said, "this Court has specifically held that, as a matter of statutory construction, that when those words are used, the words 'indecent, filthy, vile and obscene' must mean the same as 'obscene'" to avoid vagueness.²¹⁴ At this point, Justice Rehnquist interjected, "To say 'hell' may be a little bit of an overstatement, may it not?"²¹⁵ Noting that Justice Rehnquist wrote the *Hamling* opinion, Plotkin conceded it was not a holding:

technically that was 1461 there and this is 1464. But the words in the statute are the same. The meaning was the same. We have a First Amendment medium here just as we do there, and it seems to me that not only do we have a First Amendment medium under the First Amendment, but Section 326 of the Communications Act specifically says that the Commission shall have no power of censorship.

Now, this is an entirely different thing from the fairness doctrine, or lack of balance, where, because this is a medium where scarcity is a factor, the Court has said that in order to make sure that the medium was made available to a maximum number of people, we will impose

210. *Id.*

211. In *FCC v. ABC*, 347 U.S. 284 (1954), the Supreme Court upheld a decision enjoining enforcement of the FCC's rules implementing § 1304 of the Criminal Code, formerly section 316 of the Communications Act. This statute prohibited the broadcast of lotteries and certain "give-aways" and was jointly enforced by the FCC and DOJ. *Id.* at 284. The FCC's rules implementing the statute were more restrictive than the statute. The Court agreed that the FCC's interpretation had "stretch[ed] the statute to the breaking point." *Id.* at 294. While acknowledging the FCC's rules did not apply to criminal cases, the Court found that the statute could not be construed one way by the FCC and another by the DOJ. *Id.* at 296.

212. Kurland & Casper, *supra* note 192, at 689.

213. In *Hamling v. United States*, 418 U.S. 87 (1974), a closely divided Court upheld a conviction under 18 U.S.C. § 1461, which prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article." *Id.* at 98 n.8.

214. Kurland & Casper, *supra* note 192, at 689.

215. *Id.*

certain duties upon broadcast stations to make sure that all can use it.

But that's an entirely different thing from the Government coming in and saying that you are forbidden to do something; and in the *Red Lion* case, which Mr. Justice White authored, you made that very point, that where there's a fairness doctrine and the personal attack doctrine might be sustained, because it's expanding the medium . . . an entirely different question would be presented if the Government here were trying to suppress speech; and that's exactly what they are doing here, they are trying to suppress speech. And if they are trying to suppress speech, they must be asked to pass the same test here as they do in any other First Amendment meaning. The fact that this is radio does not make a difference.

THE COURT: Well now, you say the question was reserved in *Red Lion*, as it certainly was, that doesn't necessarily mean that in the case of regulated airwaves they have to pass the same tests as they would if they sought to impose this test on a newspaper, does it?

MR. PLOTKIN: I think 326 does mean that, Your Honor. . . . I think Congress was saying that in Section 326, when it says "the Commission shall have no power of censorship." When it comes to suppression, I think the same test is applicable to radio and television as is applicable to a newspaper.

THE COURT: Well, then you say literally the FCC can never tell any station that it may not put out any particular message?

MR. PLOTKIN: I say that they . . . cannot suppress what a radio or television station can do any more than they can any other.²¹⁶

Justice Rehnquist pressed Plotkin further:

Well, supposing under your definition of censorship that a station just decided that for an hour it would put on a record consisting of one four-letter word repeated over and over again for the hour, no one would make any claim that it had any coherent message Under your definition, would the FCC be powerless because of the censorship statute to effect that?

MR. PLOTKIN: I think it would be powerless to tell them to stop doing it. I would have the same problem in response to your hypothetical question if the station did nothing, say, but play "The Music Goes Round and Round" all day. It is not because of the content, but because a station is required to operate in the public interest. . . .

But not because the particular words are bad, not because particular words have a particular taboo. Here the Commission was saying that just because you use these seven words, no matter in what context, if you put on a show where people call in and discuss a live subject, a controversial issue, and if some of the people came from the kind of culture that uses these kinds of words as part of their discussion, particularly in anger and heat, the Commission would say that if you did that in the afternoon that this would be a violation of the Criminal Code so far as the Commission can see it, and it would also be ground

216. *Id.* at 690–91.

for revoking their license. I don't think the Commission has that authority.²¹⁷

When the argument resumed the next day, Louis F. Claiborne from the Solicitor General's office immediately faced a barrage of questions about whom he represented and why the United States' position differed from the FCC's. He explained that he represented the Executive Branch of the government, and that the FCC, along with several other agencies, had been authorized by statute to represent itself in certain situations.²¹⁸ In addition, the DOJ had a separate interest because it had an independent responsibility to enforce § 1464 as a criminal matter.

Justice Rehnquist asked:

if this Court upholds the FCC, the Government will have no problem prosecuting cases under the statute, because it will be given a fairly broad construction, I would take it.

MR. CLAIBORNE: Mr. Justice Rehnquist, the Government, that is, the Solicitor General and the Department of Justice, takes the view that they should not press for broader prosecutorial discretion than in their view the constitutional reach of the statute would authorize. And, accordingly, it seems to us that the Court ought to have the benefit of the views of the Department of Justice as to the constitutional reach of the statute.

THE COURT: Would you think the Government is ever entitled as an institutional litigator through the Solicitor General to assert that an act of Congress is unconstitutional?

MR. CLAIBORNE: Mr. Justice Rehnquist, there may be rare occasions when that is so. This is not such an occasion. We do not suggest that the statute is unconstitutional, we suggest that it has a limited application and that the Commission has construed it beyond that constitutional reach.²¹⁹

Justice Powell pointed out that the DOJ had supported the FCC below. Claiborne admitted that it did, and that it was an "embarrassment."²²⁰ He explained that the Antitrust Division had handled the matter in the lower court, while the Criminal Division handled the decision whether to file a petition for certiorari.²²¹ He added that, although the DOJ thought that the lower court decision was correct, and that it had a duty to give the Court the benefit of its views, it did not oppose the FCC filing the petition for certiorari on its own.²²²

In the little time that remained, Claiborne tried to sum up the DOJ's position:

217. *Id.* at 691–92.

218. *Id.* at 697–98.

219. *Id.* at 698.

220. Kurland & Casper, *supra* note 192, at 701.

221. *Id.*

222. *Id.*

we construe Section 1464, the only statute which really is involved in this case, as one that cannot consistently, with the First Amendment, be applied so as to ban absolutely, for any substantial period of time, the airing of particular words on radio or television, wholly without regard to circumstances or to the context.²²³

Justice Powell asked if it was fair for the DOJ to “construe what the Commission actually held so sweepingly” when neither the FCC nor Judge Leventhal saw it that way.²²⁴ Claiborne replied:

Mr. Justice Powell, I fear it is. Judge Leventhal sought to save the Commission’s order by narrowing it, and the Commission rides his coattails.

But the order, which is what is before the Court and not counsel’s representation of it, is very clear that the Carlin dialog was not judged except only in so far as it contained certain words. Those words, regardless of how they were spoken or the manner in which they were spoken, regardless of the surrounding words, were adjudged by the Commission to be indecent language. The definition of indecent language, which the Commission gave was clearly one which did not have any relation to the context. They ruled that indecent language could in no circumstances, except perhaps after 10 o’clock in the evening, be redeemed by its context.²²⁵

Justice Powell then asked whether the FCC could act if such language aired on Saturday morning, which is “prime time for small children.”²²⁶ Claiborne said the FCC could if it could show that children were watching and the program was intended for children. Justice Stevens asked whether, if the Court adopted Judge Leventhal’s view and said that “all that is before us is the broadcast,” the DOJ would still take the position that the FCC acted unconstitutionally.²²⁷ Claiborne said that it would.²²⁸

Marino got up to give his rebuttal:

Yesterday in his argument, Mr. Plotkin, and this morning in his argument, Mr. Claiborne, keep referring to the Commission’s order as banning, suppressing. We thought the Commission’s order makes it very clear that it wasn’t banning, it wasn’t adopting a flat ban, that it was trying to channel this material to periods when there wouldn’t be a reasonable risk that children would be exposed to it.²²⁹

Marino insisted that the FCC’s action did not constitute censorship. He explained:

when Congress wrote 326, it quickly added at the end of it that it will be unlawful to use “any obscene, indecent or profane language by

223. *Id.* at 703.

224. *Id.* at 704.

225. *Id.*

226. *Id.* at 706–07.

227. *Id.* at 707.

228. *Id.*

229. *Id.* at 708.

means of radio communications.” That was written in by the same people who wrote the section in 1927. And so when we approach these cases, we have Congress’ indication in 326 itself that we should concern ourselves.²³⁰

One of the Justices asked whether it was “the Commission’s position that if the Commission regards something as indecent, profane or obscene, its expert judgment . . . then it’s entirely outside the prohibition against censorship?”²³¹ Marino explained that it was not the FCC’s view that mattered, but whether “those words are found to be patently offensive by contemporary community standards in that community.”²³² Justice Marshall asked:

What about this community you keep mentioning? All I have heard argued here today is one protest, by one man, with one son—am I right?

MR. MARINO: We only received one complaint, Your Honor, that’s correct.

THE COURT: Well, where do you get community action out of one man? He wasn’t the mayor, was he?

MR. MARINO: I’m sorry, Your Honor.

THE COURT: He didn’t speak for the community, did he?

Mr. MARINO: He certainly did, Your Honor. He came in in a representative capacity, we think. We’ve been—

THE COURT: [W]hat made you think that? You’ve only got one.

...

MR. MARINO: One citizen can raise a legitimate public interest question—

THE COURT: Well, if you’ve got one citizen, that doesn’t give you the right to say he speaks for the community, does it?

...

THE COURT: [A]m I correct that if nobody had protested, you wouldn’t have taken action?

MR. MARINO: We wouldn’t have known about it, Your Honor, because . . . we just don’t have the funds or . . . even instructions to monitor. So we would have never known about it, except [for] a citizen bringing this to our attention.

THE COURT [Chief Justice Burger]: Well, I suppose one citizen can call the attention of the police department or the fire department to a nuisance, and that triggers the procedures; is that what you’re suggesting?

...

THE COURT [Justice Marshall]: Well, this wasn’t a fire!²³³

Again, the courtroom broke into laughter. In closing, Marino stressed

230. *Id.* at 709–10.

231. *Id.* at 710.

232. *Id.*

233. *Id.* at 711–12.

the narrowness of the FCC's ruling:

I don't understand why the United States feels that they have to expand the Commission's order to reach constitutional questions, when it could have been read very narrowly, as it was by Judge Leventhal, and as it was by the Commissioners, who instructed us to come and seek cert before this Court on the basis of Judge Leventhal's opinion, knowing that we were going to rely on that opinion.²³⁴

Henry Geller, who attended the first day of oral argument, told me that he was certain the FCC would lose.²³⁵ Not only did he think the FCC was wrong on the merits, but Plotkin's argument was direct and easy to understand, while Marino got stage fright and did not argue well.²³⁶ Similarly, Richard Bodorff, who had worked on the FCC's brief in the D.C. Circuit, had expected the FCC to lose in the Supreme Court.²³⁷ He clearly recalls hearing from his FCC friends who attended the argument that they were sure that the FCC had lost at the Supreme Court.²³⁸

E. The Conference After Oral Argument

At the conference held two days later on April 21, five Justices voted to overturn the D.C. Circuit (Burger, Powell, Blackmun, Rehnquist, and Stevens), and four voted to affirm (Brennan, Stewart, White, and Marshall).²³⁹ However, Justice Powell's notes indicated that the vote to reverse was "tentative."²⁴⁰

The Justices vote in order of seniority. Chief Justice Burger voted to reverse, stating that he agreed with Judge Leventhal.²⁴¹ Justice Brennan voted to affirm even though he did not agree with any of the three opinions below.²⁴² He observed that while government has greater power to regulate with regard to children, such regulation had to be narrowly framed, and here it was not.²⁴³ The FCC could properly prohibit the broadcast of the

234. *Id.* at 713.

235. Geller Interview, *supra* note 25.

236. *Id.*

237. Telephone Interview with Richard J. Bodorff, Partner, Wiley Rein LLP (July 29, 2009).

238. *Id.*

239. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 372–74 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE].

240. Notes of Justice Powell from April 21 Conference (April 21, 1978) (on file in Powell Papers) [hereinafter Powell Conference Notes].

241. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373.

242. According to the Powell Conference Notes, *supra* note 240, Brennan thought that Judge Leventhal might be correct in reading *Miller* as going beyond *Roth*, but he was unconvinced. Brennan could not agree with Judge Tamm because he thought section 326's anticensorship provision was congruent with the First Amendment. *Id.*

243. Powell Conference Notes, *supra* note 240.

Carlin monologue on a children's program, but most children would be in school at 2:00 p.m. To survive, the FCC would need to spell out the restriction as to time and content.

Justices Stewart, White, and Marshall also voted to affirm. Justice Stewart thought the case turned on the meaning of § 1464.²⁴⁴ Since the Court had previously construed similar language in § 1464 to require material to be "obscene" before allowing it to be suppressed under the First Amendment, he thought the Court was required to construe § 1464 in the same way.²⁴⁵ Justice White thought the FCC lacked jurisdiction to bar anything short of obscene.²⁴⁶ Justice Marshall thought the FCC was engaging in censorship in violation of the First Amendment and the Court's decision in *CBS v. DNC*.²⁴⁷

Justices Powell, Blackmun, and Rehnquist joined the Chief Justice in voting to reverse. Justice Blackmun observed that the "FCC's order was not a very good one, and Leventhal tried to save it. I come out with him."²⁴⁸ Justice Powell agreed that Leventhal was "on target" and "right" to "construe what the decision is as narrowly as possible."²⁴⁹ Justice Stevens noted that he had:

flip-flopped on this case and may do so again. This is TV and radio, and the government has greater latitude to regulate them than in newspapers. So even if this material would be protected in newspapers, even apart from protecting children anything that goes into my living room under TV and radio may be regulated in the public interest. So constitutionally, I would sanction this ban as Leventhal says. We should also accept the FCC representation that Leventhal correctly read its order.²⁵⁰

244. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373.

245. *Id.*

246. Notes of Justice Blackmun from April 21 Conference (April 21, 1978) (on file in Blackmun Papers) [hereinafter Blackmun Conference Notes]. He also thought that this case was different from *Red Lion*. *Id.*

247. *Columbia Brdcast. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); see THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373.

248. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373. Powell's notes on Justice Blackmun's vote are similar to Brennan's: "Leventhal did good job of saving this order. Disagrees with PS as to 1464." Powell Conference Notes, *supra* note 240. Justice Powell also reported that Justice Rehnquist "[a]grees with Leventhal. FCC has general public interest powers so long as 1st Amend is not violated." *Id.*

249. Blackmun Conference Notes, *supra* note 246. Powell read from the Solicitor General's brief, which he thought was "outrageous." *Id.*

250. THE SUPREME COURT IN CONFERENCE, *supra* note 239, at 373. Blackmun's and Powell's notes provide similar accounts. For example, the first line of Blackmun's notes under Stevens's name reads: "Has flipflopped & may do so again." Blackmun Conference Notes, *supra* note 246. He further notes: "HL [Leventhal] correct. Keep it narrow: this particular [broadcast]." *Id.* But it was "hard to give a [different] meaning to § 1464 than to § 1461," a reference to the statutes at issue in *Hamling*. *Id.* The last line notes that Stevens was "still uncertain on the [statute]." *Id.* Powell's notes indicate that Stevens voted to

F. *Drafting the Opinions*

Justice Stevens was assigned to draft the decision for the Court. Justice Powell drafted a concurring opinion. Justices Stewart and Brennan drafted dissents. Although drafts of each opinion were circulated among all the Justices, very few substantive changes were made between the initial drafts and the published opinions. This is likely due to the short amount of time left in the term.

1. Justice Stevens's First Draft

Justice Stevens circulated his first draft on June 14, only nineteen days before the decision was announced. The introduction framed the issue as whether the FCC “has any power to regulate the broadcast of recorded material that is indecent but not obscene,”²⁵¹ and set forth four questions.

Part I addressed whether the scope of judicial review encompasses more than the FCC's determination that the monologue was indecent “as broadcast.”²⁵² It stressed that the FCC's decision resulted from an adjudication, not a rulemaking, and was issued in a specific factual context. It also noted that the Court reviews judgments, not statements in opinions.²⁵³

Part II addressed whether the FCC's action violated section 326 of the Communications Act, which denies the FCC the power to censor broadcasting.²⁵⁴ After reviewing the statutory history and case law, the draft concluded that section 326 denied the FCC the power to edit in advance but not to review the content of completed broadcasts.²⁵⁵ Moreover, section 326 was not intended to limit the FCC's power to regulate the broadcast of indecent language.²⁵⁶

Part III addressed “whether the afternoon broadcast of the ‘Filthy Words’ monologue was indecent within the meaning of § 1464.”²⁵⁷ Although *Pacifica* conceded that the monologue was offensive, it contended that it was not indecent within the meaning of § 1464 because it lacked prurient appeal.²⁵⁸ Part III found that the plain language of the statute did not support *Pacifica*'s argument:

“[r]everse (tentative as to construction of statute),” and that “Electronic media is different. Also children are different.” Powell Conference Notes, *supra* note 240.

251. Draft Opinion by Justice John P. Stevens 1 (June 14, 1978) (on file in Blackmun Papers) [hereinafter Stevens Draft Opinion].

252. *Id.* at 7.

253. *Id.* at 7.

254. *Id.* at 8.

255. *Id.* at 8, 11.

256. *Id.* at 11.

257. *Id.* at 12.

258. *See id.* at 13.

The words “obscene, indecent, or profane” are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of “indecent” merely refers to nonconformance with accepted standards of morality. The Commission is clearly correct in its view that the statutory prohibition was not intended by Congress to be limited to prurient matter.²⁵⁹

Part IV addressed Pacifica’s constitutional claims. First, it rejected the overbreadth argument because “our review is limited to the question whether the Commission has the authority to prescribe this particular broadcast.”²⁶⁰ It dismissed concerns that some broadcasters would censor themselves: “At most . . . the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.”²⁶¹

Next, the opinion stated that “[w]hen the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise.”²⁶² After a review of the case law, it concluded that the First Amendment did not prohibit all regulation of speech that depends on content.²⁶³ The draft acknowledged that speech could not be suppressed just because it was offensive or because of its political content.²⁶⁴ It also assumed that the Carlin monologue had artistic value and would be protected in other contexts.²⁶⁵ But here, the words were offensive “for the same reason that obscenity offends.”²⁶⁶

The draft explained that the Court has “long recognized that each

259. *Id.* at 13 (footnote omitted). The last sentence of this passage was not included in the published opinion. See *FCC v. Pacifica Found.*, 438 U.S. 726, 739–40 (1978).

260. Stevens Draft Opinion, *supra* note 251, at 16. The opinion noted that its approach was consistent with its action in *Red Lion*, rejecting the claim that the FCC’s Fairness Doctrine was too vague. *Id.* at 16–17.

261. *Id.* at 17 (footnote omitted). The footnote observed that the primary impact would be “on the form, rather than the content, of serious communication. There are not too many thoughts that cannot be expressed by the use of less offensive language.” *Id.* at 17 n.18. The next sentence, which does not appear in the published versions, went on to note that humorists would probably be most affected, but that it has been long understood that the appropriateness of some forms of humor depend on the setting. *Id.*

262. *Id.* at 18 (footnote omitted). Footnote 19 noted that adopting Pacifica’s position would deprive the FCC of any power to regulate erotic telecasts unless they were obscene under the *Miller* test. It also rejected Pacifica’s assurances that market forces would keep smut off the air, quoting Judge Leventhal’s dissent. *Id.* at 18 n.19.

263. *Id.* at 19–20.

264. *Id.* at 20.

265. *Id.* at 21.

266. *Id.* at 20.

medium of expression presents special First Amendment problems” and that broadcasting has received the most limited protection under the First Amendment.²⁶⁷ Two characteristics of broadcasting were particularly relevant here:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be let alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Department, 397 U.S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen’s written message might have been incomprehensible to a first grader, Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant. . . . We held in Ginsberg v. New York, 390 U.S. 629, that the government’s interest in the “well being of its youth” and in supporting “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression. Id., at 640 and 639. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.²⁶⁸

The final paragraph emphasized the narrowness of the holding. It did “not involve a conversation between a cab driver and a dispatcher or a telecast of an Elizabethan comedy.”²⁶⁹ It stressed that the FCC’s action “rested entirely on a nuisance rationale under which context is all-important. . . . We simply hold that when the Commission finds that a pig has entered the parlor, its regulatory power does not depend on proof that the pig is obscene.”²⁷⁰

The Chief Justice and Justice Rehnquist quickly joined Justice Stevens’s opinion.²⁷¹ Justice Stewart advised Justice Stevens that he would

267. *Id.* at 22 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502–03 (1952)).

268. Stevens Draft Opinion, *supra* note 251, at 23–25 (footnote omitted). Footnote 27 rejected the claim that the FCC’s action reduced adults to hearing only what was fit for children, noting that adults could purchase tapes and records, go to nightclubs and theaters, and perhaps, because the FCC had not decided this question, even listen to such programming broadcast in the late evening hours. *Id.* at 25 n.27.

269. *Id.* at 25.

270. *Id.* at 25–26.

271. The Chief Justice’s only suggestion was to add a citation to Office of Comm. of United Church of Christ v. FCC, 359 F.2d 994 (1966). Letter from the Chief Justice to Justice Stevens (June 16, 1978) (on file in Blackmun Papers). The published opinion cites that case to support the point that the FCC was not prevented from denying the license

be circulating a dissent, and both Justices White and Marshall indicated they would await the dissent.²⁷² To obtain a majority, Justice Stevens needed the support of both Justice Powell and Justice Blackmun. But both had concerns with Justice Stevens's draft. Justice Blackmun's clerk advised him that "there may be some problems joining JPS's Pacifica opinion as written, because he resorts to the 'semi-protected speech'/zoning theory that you rejected in joining [Stewart's] dissent in Young v. American Mini Theatres."²⁷³ Similarly, Justice Powell's clerk advised him that "[a]lthough there is much in this opinion with which you can agree, you may . . . have some trouble joining all of Part IV."²⁷⁴ Justice Stevens had made many of the same points he made in Part II of *American Mini Theaters*,²⁷⁵ which Justice Powell "pointedly did not join," and "he beat[] the drum loud and long for the proposition that government can regulate speech on the basis of its content."²⁷⁶ Alt observed that Justice Stevens's approach "simply carries one step further what the Court has been doing all along," because the Court looks to content to decide whether the speech is protected.²⁷⁷ But because it required the Court to decide the value of speech, it created the "danger . . . that the justices' own varying values will feed into the decision too much."²⁷⁸ Justice Powell underlined this sentence and wrote "yes" next

renewal of a broadcast station for improper programming. *FCC v. Pacifica Found.*, 438 U.S. 726, 737 (1978). The *UCC* decision was written by Burger when he was on the D.C. Circuit. It held that listeners and viewers had standing to raise objections to a station's programming, in this case, that the station had failed to comply with the Fairness Doctrine and engaged in racially discriminatory programming, and that the FCC was required to consider those objections in determining whether to grant the license renewal. *UCC*, 359 F.2d at 1007-09.

272. Letter from Justice Stewart to Justice Stevens (June 15, 1978) (on file in Blackmun Papers); Letter from Justice White to Justice Stevens (June 15, 1978) (on file in Blackmun Papers); Letter from Justice Marshall to Justice Stevens (June 16, 1978) (on file in Blackmun Papers). Justice Stewart circulated his draft dissent on June 16.

273. Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun (June 16, 1978) (on file in Blackmun Papers).

274. Memorandum from Jim Alt, Clerk to Justice Powell, to Justice Powell 1 (June 16, 1978) (on file in Powell Papers) [hereinafter Alt's June 16th Memo to Powell]. Alt described Part II as holding that section 326 means no more than that the FCC may not exercise prior restraint. He was "a little surprised to find that the opinion does not hold that the sweep of § 326 is the same as that of the First Amendment" because the meaning of the First Amendment had changed since the time section 326 was enacted in 1927. *Id.* at 1-2. But even if section 326 were "viewed as static, the First Amendment itself always will be available to challenge FCC actions that arguably infringe on broadcasters' rights, but do not constitute 'prior restraints.'" *Id.* Justice Powell wrote "yes" in the margin next to this sentence. *Id.* at 2.

275. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

276. Alt's June 16th Memo to Powell, *supra* note 274, at 2. Powell inserted by hand the phrase "but TV & Radio only" after the word "regulate." *Id.*

277. *Id.* at 4.

278. *Id.*

to it.²⁷⁹

Alt noted that “[t]here is a parallel to be drawn” to the debate in equal protection law as to whether to apply only the “strict scrutiny” and “rational relation” tests, or Justice Marshall’s “sliding scale.”²⁸⁰ If Justice Powell was “not inclined to adopt the ‘sliding scale’ approach to the First Amendment – which, I gather from your Mini Theaters concurrence, you may not be – the problem remains as to what to do here.”²⁸¹ Alt did not think the Court could hold that Carlin’s language was unprotected altogether. Thus, he recommended emphasizing three points: (1) the FCC’s holding did not bar adults from access to Carlin’s record but was like the zoning upheld in *Mini Theaters*; (2) the Court had recognized the value of protecting children from “objectionable but protected speech” in *Ginsberg v. New York*,²⁸² and radio was uniquely accessible to children; and (3) the speech here was “akin to a ‘verbal assault’ even to some adults.”²⁸³

Alt concluded that while the case was difficult to decide without some reference to content, it was not “necessary to downplay the Court’s tradition that the degree of protection due speech should not depend on the content of speech quite so much as Justice Stevens does.”²⁸⁴ He suggested that since Justice Stevens needed Justice Powell’s vote, it might be possible to get Justice Stevens to remove portions of his opinion, and if not, Powell might wish to write his own opinion.²⁸⁵

A few days later, Glushien reported to Justice Blackmun that the current lineup was three to three, but Powell had not yet voted and was planning to write a concurring opinion. She noted:

My own recommendation in the case has to be of a first order/second order kind, since our views on this case have been conscientiously different. I still would be inclined to affirm CADC on First Amendment grounds because I am not at all sure how one distinguishes . . . between George Carlin’s monologue and such works of serious literary merit as Joyce’s Molly Brown soliloquy in Ulysses, the work of Henry Miller or D.H. Lawrence, several portions of Samuel Beckett’s plays, Miguel Pinero’s Short Eyes play about prison life, or indeed some of the bawdier punning parts of Shakespeare.²⁸⁶

Recognizing that the Justice would not likely agree, she continued: However, assuming you are still inclined to reverse and thus uphold

279. *Id.*

280. *Id.*

281. *Id.* at 4–5.

282. 390 U.S. 629 (1968).

283. Alt’s June 16th Memo to Powell, *supra* note 274, at 5.

284. *Id.* at 6.

285. *Id.*

286. Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun 1 (June 18, 1978).

the Commission's order, I would recommend that we await, and most probably join LFP's concurrence in the judgment of reversal, rather than JPS's opinion. This is because JPS's opinion relies so heavily on his American Mini Theatres theory which you did not join, that there is a middle category of "peripherally protected" speech. His theory is that "offensive references to excretory and sexual organs and activities," while non-obscene, "surely lie at the periphery of First Amendment concerns" and thus deserve only limited First Amendment protections. . . . JPS's theory . . . would seemingly apply to books, magazines, plays, and phonograph records as well as to television/radio broadcasts. It ignores that fact, which I think important, that emphatic rough language can at times be used conscientiously by an artist in portraying certain ethos and ways of life, and that the ability to use such language where artistically necessary is an important First Amendment value.²⁸⁷

She notes that Powell's concurrence would "be based on two narrower factors: the unique intrusiveness of broadcast into the home, and the problem of involuntary exposure of children to broadcasting."²⁸⁸ She viewed the Powell approach as superior because it was "not capable of such easy transplantation to other media."²⁸⁹

2. Justice Powell's Concurring Opinion

Justice Powell circulated his draft concurrence on June 19, 1978. Part I explained his reasons for upholding the FCC. He emphasized that the FCC's primary concern was to prevent this broadcast, which the FCC correctly found "'patently offensive' to most people regardless of age" and "was at least wholly without taste," from reaching unsupervised children who were likely to be in the audience at 2:00 p.m.²⁹⁰ He supported the FCC's effort to "zone" the monologue to hours when few unsupervised children would be exposed to it.²⁹¹ He noted that:

children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the

287. *Id.* at 2.

288. *Id.* at 3.

289. *Id.*

290. Draft Concurring Opinion by Justice Lewis F. Powell 3 (June 19, 1978) (on file in Powell Papers) [hereinafter Powell Draft]. I also found an earlier, uncirculated draft in the Powell Papers. This draft had several deletions, additions, and corrections in Justice Powell's handwriting. For example, on the first page, he deleted a sentence that read, "Since I expect the Commission to proceed in a cautious and reasonable manner in the future, as it has done in the past, cf. Brief for Petitioner 42-43, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights." On page three, he added in reference to the Carlin monologue, "it was at least, however, wholly without taste." On page eight, he inserted a new sentence acknowledging that making judgments was not easy, but that "[the] responsibility ha[d] been reposed initially in the FCC and its expert judgment [was] entitled to respect." Powell Draft, *supra* note 290, at 8.

291. Powell Draft, *supra* note 290, at 8.

unwilling through the exercise of judicious choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than an adult.²⁹²

While in many cases, dissemination of such speech to children could be limited without also limiting the access of willing adults, it was not possible in broadcasting, and this distinction justified the differential treatment of broadcasting.²⁹³

Another relevant difference was that “broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sound.”²⁹⁴ While the First Amendment might require unwilling adults to absorb the first blow of offensive but protected speech when they are in public, “a different order of values obtains in the home.”²⁹⁵

Finally, although the argument that the FCC’s ruling reduced adults to hearing only what was fit for children was “not without force,” it was “not sufficiently strong to leave the Commission powerless to act” in these circumstances.²⁹⁶ The FCC’s decision did not prevent willing adults from obtaining access to the Carlin monologue, nor did it “speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the linguistic shock treatment administered by respondent here.”²⁹⁷

In Part II, Justice Powell explained why he did not join in Part IV of Justice Stevens’s opinion addressing the constitutional claims. He did not believe that the Court should “decide on the basis of its content which speech protected by the First Amendment is most ‘valuable’ and hence deserving of the most protection, and which is less ‘valuable’ and hence deserving of less protection.”²⁹⁸ Rather, the result should turn “instead on the unique characteristics of the broadcast media, combined with society’s right to protect its children from speech agreed to be inappropriate for their years, and secondarily with the interest of unwilling adults in not being assaulted by such offensive speech in their homes.”²⁹⁹ Justice Blackmun quickly joined Justice Powell’s concurring opinion after Justice Powell agreed to make some minor changes.³⁰⁰

292. *Id.* at 4.

293. *Id.* at 5.

294. *Id.* at 6.

295. *Id.* at 7.

296. *Id.* at 8.

297. *Id.* at 9.

298. *Id.* at 9–10. (citing *Young v. American Mini Theatres*, 427 U.S. 50 (1976)).

299. *Id.* at 10.

300. Letter from Justice Blackmun to Justice Powell (June 20, 1978) (on file in

The next day, Justice Stevens sent a personal letter to Justice Powell with a copy to Justice Blackmun:

Because you indicated that you might be able to join in portions of Part IV, I have broken it into three subsections. I think everything with which you took issue is in subpart B. . . .

To a certain extent the review of overbreadth analysis in subpart A rests on the premise that this speech is not very important and therefore your problems with subpart B may carry over to subpart A as well. Nevertheless, I would hope that you would at least think about joining subpart A because it is an important part of the picture. I believe, also, that it is consistent with the analysis in Harry's opinion in Bates.

Some of my changes are the product of further thinking prompted by your concurrence, but I do not mean to take issue with anything you have said and will welcome any suggestions you care to make notwithstanding our rather narrow area of disagreement.

Thank goodness we are at last on the home stretch.³⁰¹

Blackmun's clerk described Justice Stevens' changes as "mostly cosmetic," and recommended against joining Subparts A, B, and C unless Powell had "strong feelings about wishing to make a gesture to [Stevens]."³⁰² Ultimately, both Justices Powell and Blackmun joined Parts I, II, III, and IV(C) of Justice Stevens's opinion, providing him with the votes he needed to reverse the D.C. Circuit and affirm the FCC.

3. The Dissenting Opinions

Justice Stewart circulated the first draft of his dissent on June 16. The published opinion is not significantly changed from this initial draft. Justice Stewart thought the term "indecent" in § 1464 should be read as meaning no more than "obscene."³⁰³ He noted that the Court had recently held in *Hamling* that the term "indecent" had the same meaning as "obscene" as that term was defined in the *Miller* case, and nothing suggested that Congress intended a different meaning.³⁰⁴ He concluded that "[s]ince the Carlin monologue concededly was not 'obscene,' I believe that the Commission lacked statutory authority to ban it," and it was thus

Blackmun Papers). Justice Blackmun suggested (1) deleting the word "judicious" from the sentence quoted in the *supra* text accompanying note 293, explaining that "I suspect adults have a choice whether it is or is not judicious." and (2) eliminating the citation to the *Carey* case not only because he thought it was unnecessary but also because he was on the other side in *Carey*. *Id.*

301. Letter from Justice Stevens to Justice Powell (June 20, 1978) (on file in Blackmun Papers).

302. Memorandum from Ruth Glushien, Clerk to Justice Blackmun, to Justice Blackmun (June 21, 1978) (on file in Blackmun Papers).

303. Draft Dissenting Opinion by Justice John P. Stewart 3 (June 16, 1978) (on file in Blackmun Papers).

304. *Id.* at 3, 4-5.

unnecessary to reach the constitutional question.³⁰⁵

Justice Brennan advised the other justices on June 19 that he would probably join Justice Stewart's dissent, but was also writing something on the constitutional question.³⁰⁶ On June 24, Brennan circulated his draft dissent.³⁰⁷ He agreed with Justice Stewart that the word "indecent" in § 1464 prohibited only obscene speech.³⁰⁸ Ordinarily, he would have refrained from addressing the constitutional issues, but he found "the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its sadly myopic notions of propriety on the whole of the American people so misguided, that I am unable to remain silent."³⁰⁹

Part I of the draft pointed out that despite unanimous agreement that the Carlin monologue was protected speech and that a majority of the Court refused to "create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content," the majority found the FCC's imposition of sanctions for airing this speech constitutional.³¹⁰ The majority also ignored the fact that individuals voluntarily admitted radio communications into their homes and that, unlike other invasive modes of communications such as sound trucks, the radio could be turned off. It also ignored the constitutionally protected interests of those who wished to transmit or receive broadcasts that the FCC might find offensive.³¹¹

Although Justice Brennan recognized the government's interest in protecting children, he thought this interest had already been accounted for by the "variable obscenity standard" set forth in *Ginsberg v. New York*.³¹² Under that standard, the Carlin monologue was not obscene because it did not appeal to the prurient interests of children. Moreover, he argued, while both the Stevens opinion and prior cases "stress the time-honored right of a parent to raise his child as he sees fit," this decision actually undermined parents' rights to make decisions about what their children should be able to hear.³¹³

Justice Brennan also argued that the majority's attempt to justify its

305. *Id.* at 2.

306. Letter from Justice Brennan to Justice Stevens (June 19, 1978) (on file in Powell Papers) (copied to The Conference).

307. Draft Dissenting Opinion by Justice William J. Brennan (June 24, 1978) (on file in Powell Papers) [hereinafter Brennan Draft].

308. *Id.* at 1.

309. *Id.* at 1–2.

310. *Id.* at 3.

311. *Id.* at 6–7.

312. *Id.* at 9.

313. *Id.* at 13.

decision based on the intrusive nature of broadcasting and the presence of children in the audience both lacked “principled limits.”³¹⁴ He notes that “[t]aken to their logical extreme, these rationales would support the cleansing of public radio of any ‘four-letter’ words whatsoever, regardless of their context,” and could justify the banning of a myriad of literary works.³¹⁵

Part II of the draft attacked his colleagues’ assertion that their actions would “not significantly infringe on the First Amendment values [as] both disingenuous as to reality and wrong as a matter of law.”³¹⁶ He thought that Justice Stevens’s claim that avoiding indecent language would affect only the form, not substance of the communication was “transparently fallacious,” because “[a] given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.”³¹⁷ Moreover, the claim that willing adults were not prevented from purchasing the record or attending a performance, displayed

a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing the [sic] hear Mr. Carlin’s message may not be able to afford, and a naïve innocence of the reality that in many cases, the medium may well be the message.³¹⁸

Brennan also found that Justices Stevens and Powell’s opinions were “disturbing” for evidencing

a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.³¹⁹

He noted that the words found unpalatable by the Court “may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this Nation.”³²⁰ Because the decision would have the greatest impact on those who did not share the Court’s views, it should be seen as “another of the dominant culture’s inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.”³²¹

314. *Id.* at 14. In footnote 4, Brennan agreed that the FCC’s action was not justified by spectrum scarcity. Spectrum scarcity could justify regulation to increase diversity as in *Red Lion*, but not to justify censorship. *Id.* at 14 n.4.

315. *Id.* at 15.

316. *Id.* at 18.

317. *Id.*

318. *Id.* at 20.

319. Brennan Draft, *supra* note 307, at 22.

320. *Id.*

321. *Id.* at 24.

4. Reactions to Justice Brennan's Draft Dissent

Justice Powell and his clerks took offense to Justice Brennan's draft dissent. A handwritten note from "Bob" attached to Justice Brennan's first draft found in Justice Powell's files read: "This is the poorest, most self-impeaching piece of drivel from their Chambers yet! I wish now that we had left our Jewish quota language in."³²² Justice Powell wrote at the top of the draft, "This is 'garbage'!"³²³ He circled phrases such as "sadly myopic notions of propriety," "fragile sensibilities," and "acute ethnocentric myopia,"³²⁴ and underlined phrases such as "naïve innocence of the reality," "patently wrong result," "dangerous as well as lamentable," and "depressing inability to appreciate that in our land of cultural pluralism."³²⁵ Next to Justice Brennan's assertion that the majority rationale suffered from "lack of principled limits," Justice Powell wrote, "This – by [the] author of Bakke!"³²⁶

Alt's memo to Justice Powell characterized Justice Brennan's draft as "intemperate in some places, smugly self-righteous in others, and ludicrously overwritten in yet others."³²⁷ But, he concluded that Justice Brennan made no points worthy of reply and suggested only a few minor changes to Justice Powell's draft. Alt's most substantive proposed suggestion was to delete the observation that Carlin's monologue "was at least wholly without taste" because it was in tension with Part II, which eschewed making value judgments.³²⁸ Powell agreed, "Yes, I already had decided this sentence was out-of-place."³²⁹ Alt's memo concluded, "After re-reading the three opinions in this case that deal with the constitutional issues, I would immodestly venture the thought that yours makes the most sense by an appreciable margin." To which Justice Powell replied, "I find it difficult to disagree with this 'modest' assessment."³³⁰

Justice Powell sent Justice Blackmun a copy of his revised concurrence along with a cover note stating:

No doubt you have read Bill Brennan's dissent in which he pays his "respects" to my dissent [sic] as well as the Court's opinion.

323. "Bob" is likely Robert D. Comfort, one of Justice Powell's clerks from 1977–1978.

323. Brennan Draft, *supra* note 307, at 1.

324. *Id.* at 2, 22.

325. *Id.* at 22.

326. *Id.* at 14.

327. Memorandum from Jim Alt, Clerk to Justice Powell, to Justice Powell I (June 25, 1978) (on file in Powell Papers) [hereinafter Alt Memo on Brennan Dissent].

328. *Id.*

329. *Id.* Alt also suggested deleting a reference to what most people think because it seemed to express a personal view and the concurrence would be stronger without it, to which Powell responded "So do I." *Id.*

330. *Id.* at 2.

Perhaps you will not wish to be associated with an opinion said to display “acute ethnocentric myopia,” “a sad insensitivity”, and “naive innocence of reality”.³³¹

Justice Blackmun replied that “Writings of late, particularly in dissent, demonstrate once again that we are at the end of a term.”³³²

Justice Brennan recirculated his draft on June 29. Most of the language that offended Justice Powell remained in this as well as the published version.³³³ Indeed, Justice Powell wrote across the top of the recirculated draft: “File & keep in file as example of how not to write an opinion.”³³⁴

V. REACTION TO THE *PACIFICA* DECISION

The Court issued its decision at the end of the term on July 3, 1978.³³⁵ It received decidedly mixed reviews in the press, at the FCC, and by legal scholars.

A. *The Press*

On July 5, *Washington Post* television critic Tom Shales characterized the Court’s decision as “unthinkable” and “stupefying.”³³⁶ He wrote:

That the First Amendment is being trampled in such a decision, announced on the eve of the Fourth of July, is obvious. But then, it’s already obvious that the First Amendment is not one that the Burger Court holds in high regard.

Possible deleterious effects of the decision are more disturbing still. The Supreme Court has given managements and owners of TV and radio stations terrific new ammunition to use against reporters, news directors, producers and writers who want to put potentially explosive or controversial material on the air.

331. Letter from Justice Powell to Justice Blackmun (June 26, 1978) (on file in Blackmun Papers).

332. Letter from Justice Blackmun to Justice Powell (June 26, 1978) (on file in Powell Papers).

333. The phrase “sadly myopic” was omitted in the second printed draft circulated June 30 and in the published version. Second Printed Draft Dissenting Opinion by Justice William J. Brennan, No. 77-528, (June 30, 1978) (on file in Marshall Papers). However, the other language that Justice Powell objected to remained.

334. First Printed Draft Opinion by Justice William J. Brennan 1 (June 29, 1978) (on file in Powell Papers). Justice Powell underlined passages and wrote comments in the margin on this draft as well. For example, he again noted, “strange words from the author of the Brennan plurality in *Bakke*.” *Id.* at 9. Next to a passage reading “for those of us who place an appropriately high value on our cherished First Amendment rights, the word ‘censor’ is such a word[.]” Justice Powell wrote “Pious.” *Id.* at 12.

335. On October 2, 1978, it denied rehearing. *FCC v. Pacifica Found.*, 439 U.S. 726, 883 (1978).

336. Tom Shales, ‘Seven Dirty Words’ and the Burger Court . . . *Free Speech, the FCC and TV Censorship*, WASH. POST, July 5, 1978, at B1, B7.

And the Court has given the FCC, of all the all-thumbs regulatory agencies, new power to harass and intimidate TV and radio stations whose counterculture, antiestablishment or just offbeat programming may include vocabularies acceptable to their electronic constituencies but offensive to little old ladies, elderly judges, near and far right wingers, or parents unable to regulate the listening and viewing habits of their kiddies.

The stations most endangered will be the struggling, minority-interest, fringe stations who can least afford expensive lawyers to defend them against the FCC.³³⁷

Two days later, however, a *Washington Post* editorial agreed with the Supreme Court's decision.

All heck has broken loose in the radio and television world this week as a result of the Supreme Court's decision Monday in the case involving seven naughty words. The outcome was unexpected. The court, according to many experts, had been regarded as almost certain to hold unconstitutional the warning the Federal Communications Commission had given a radio station for broadcasting a 12-minute-long monologue in which those bad words were used over and over again. But the justices didn't go according to form; they upheld the warning by a vote of 5 to 4. We are glad they did.

This is one of those cases that never should have reached either the Supreme Court or the FCC. The monologue—recorded in a California theater by comedian George Carlin—may be regarded as funny by some; the transcript indicates he was interrupted 83 times by laughter or applause. But its prime appeal is its shock value Even as part of a program about society's attitude toward language—which is the way the station owner, Pacifica Foundation, described its use—the monologue did not belong on the air, as a matter of policy, in mid-afternoon.³³⁸

The editorial disagreed that the decision opened the door for substantial censorship since neither Justice Stevens nor Justice Powell suggested “that the FCC should require that the occasional dirty word be bleeped out or that programming should always be aimed only at family audiences.”³³⁹ However, the *New York Times* editorialized against the decision, noting that “[g]overnment action of this sort, however moderate, tends to make us uneasy”³⁴⁰

B. *The FCC*

The FCC Chairman Charles D. Ferris, a Democrat, did not agree with the Supreme Court's decision. According to Ferris's chief of staff, Frank Lloyd, Ferris said,

337. *Id.* at B1.

338. Editorial, *Seven Naughty Words*, WASH. POST, July 7, 1978, at A18.

339. *Id.*

340. Editorial, *Cleaning Up After Dirty Words*, N.Y. TIMES, July 31, 1978, at A14.

let's find the first possible indecency complaint that comes in and make it clear that that case will never reoccur at the FCC. There's an infinitesimal chance of FCC ever coming out with a ruling that something is indecent.

So we went down to the Media Bureau—Broadcast Bureau at that time—and said send us all of your complaints and we'll pick one. And we picked one against WGBH, the Boston public TV station for a rendition of Molly Bloom's soliloquy in *Ulysses* which had all the seven dirty words in it.³⁴¹

Within a matter of weeks, the FCC issued an unanimous ruling in favor of WGBH.³⁴² The FCC distinguished this case from *Pacifica* because petitioner “made no comparable showing of abuse by WGBH-TV of its programming discretion.”³⁴³ It also stated its intention to “construe the *Pacifica* holding consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion by broadcasters.”³⁴⁴

The same month, Ferris told the New England Broadcasting Association that he would consider it “‘a tragedy’ if the Supreme Court’s recent decision on the use of indecent language on television and radio were to become a reason for broadcasters to avoid controversy.”³⁴⁵ He asserted that the recent WGBH case demonstrated that “the [FCC] is not going to become a censor.”³⁴⁶ Ferris stressed that *Pacifica* would apply only to situations where the facts were “virtually recreated” and in his view, “[t]he particular set of circumstances in the *Pacifica* case is about as likely to occur again as Halley’s Comet.”³⁴⁷

While Ferris was not on the FCC when it issued the *Pacifica*

341. Frank Lloyd, Former FCC Chief of Staff, Comments Made at a Presentation at the Historical Society for the District of Columbia Circuit, FCC Indecency Cases in the D.C. Circuit: An Historical Perspective (Oct. 15, 2008). A webcast of this program is available at *Videos of Society Programs*, HISTORICAL SOCIETY OF THE DISTRICT OF COLUMBIA CIRCUIT, <http://www.dcchs.org/news/videos.html> (last visited Nov. 15, 2010) (Lloyd’s remarks start approximately seven minutes into segment labeled Discussion and Conclusion).

342. WGBH Educational Foundation, *Memorandum Opinion and Order*, 69 F.C.C.2d 1250 (1978). Morality in Media had filed a petition to deny the license renewal of WGBH, alleging that WGBH had “failed in its responsibility to the community by consistently broadcasting offensive, vulgar and otherwise material harmful to children without adequate supervision or parental warnings.” *Id.* at para. 2 (internal quotation marks omitted). The programs complained of included an episode of *Masterpiece Theater* and *Monty Python’s Flying Circus*. *Id.*

343. *Id.* at para. 10.

344. *Id.* at para. 11.

345. Les Brown, *Ferris Says F.C.C. Will Not Act as Censor of Controversial Issues*, N.Y. TIMES, July 23, 1978, at 34.

346. *Id.* (internal quotation marks omitted).

347. Jeff Demas, *Seven Dirty Words: Did They Help Define Indecency?*, 20 COMM. & L. 39, 51 (1998). Democratic Commissioner Tyrone Brown delivered a similar message in his speech to the Oklahoma Broadcasters Association. *Id.* at 49.

Declaratory Order, Commissioner Abbott Washburn was. He disagreed with the *New York Times* editorial that the *Pacifica* decision should make one “uneasy.”³⁴⁸ He asserted that Justice Stevens’s “carefully drafted opinion [was] an important and welcome clarification” of the meaning of § 1464 and the definition of “indecent language,” and that the overwhelming majority of the American public would agree that the Carlin broadcast was indecent.³⁴⁹

In a speech to the Federal Communications Bar Association, Washburn defended the *Pacifica* decision while assuring his audience that the FCC “ha[d] no intention of going on a regulatory spree as a consequence.”³⁵⁰ He did not think that the *Pacifica* decision would lead to timidity in programming.³⁵¹ But given the awesome power of television as a “socializing force comparable to the school, the church, even the home,” broadcasters had special responsibilities.³⁵² He compared industry “spokesmen deploring their orphan status with respect to the First Amendment” to “an orange wanting to be a banana.”³⁵³ He reminded broadcasters that the spectrum they used was a limited resource and there were “considerable advantages to being an orange.”³⁵⁴ He asserted that most broadcasters were not concerned about the indecency prohibition since they would not use such words in any event.³⁵⁵

C. Academic Reaction

Most academic articles criticized the Supreme Court’s decision. For example, the *Harvard Law Review*’s end-of-term review portrayed the majority’s reasoning as inconsistent, the privacy argument as makeweight, and the protection-of-children rationale as lacking support.³⁵⁶ It also criticized Justice Stevens’s sliding scale approach for ignoring the emotive impact of speech.³⁵⁷ The review concluded that unless the Court confined

348. Abbott Washburn, Letter to the Editor, ‘*Seven Dirty Words*’ and the Court, N.Y. TIMES, Nov. 16, 1978, at A26. Commissioner Washburn sent a copy of this letter to Justice Blackmun (on file in Blackmun Papers).

349. *Id.*

350. Washburn Speech, *supra* note 68, at 4.

351. *Id.* at 10.

352. *Id.* at 8.

353. *Id.* at 10.

354. *Id.* at 10–11.

355. Washburn Speech, *supra* note 68, at 12.

356. *The Supreme Court 1977 Term*, 92 HARV. L. REV. 57, 157–162 (1978) [hereinafter *1977 Term*]; see also Case Comment, FCC v. Pacifica Foundation: *An Indecent (Speech) Decision?* (George Carlin’s “*Filthy Words*”), 40 OHIO ST. L.J. 155 (1979) (arguing that the *Pacifica* decision would have a chilling effect and threatened the vitality of the First Amendment).

357. *1977 Term*, *supra* note 356, at 156.

its decision to this extraordinarily limited context, it would pose a “serious setback for those who prize our pluralistic society’s commitment to the free exchange of ideas.”³⁵⁸

A case note in the *Boston College Law Review* found it “surprising that the Court in *Pacifica* chose to uphold the right of a citizen to insulate himself at the cost of the rights of other persons to transmit and receive the broadcast,” especially since one could easily avoid offense by turning off the radio.³⁵⁹ That author also found it troubling that by disregarding all but one of the *Miller* elements (offensiveness), the Court effectively imposed a harsher standard for protected indecent speech than for unprotected obscene speech. Because few children were likely listening to the radio at 2:00 p.m., it was difficult “to conceive of a fact pattern which would be more appropriate than the one in this case to trigger this adult standard for indecent speech.”³⁶⁰ Moreover, by failing to assess the work as a whole, failing to identify what community standards were applied, and taking no expert testimony, the *Pacifica* Court “perpetuated the very absolutism and imposed uniformity that the Court in *Miller* attempted to correct.”³⁶¹ Finally, the author criticized the majority decision as leaving “in its wake confusion, unpredictability, and serious questions concerning the overbreadth of the standard and its constitutional limits” and as “substantially infring[ing] . . . the constitutional rights of broadcasters, recording artists, and listeners.”³⁶²

VI. FCC ENFORCEMENT OF INDECENCY PROHIBITION AFTER *PACIFICA*

In the first ten years after *Pacifica*, the FCC “chose to use its regulatory power simply to focus on broadcast uses of the ‘seven dirty

358. *Id.* at 163.

359. Marcus, *supra* note 10, at 992.

360. *Id.* at 997.

361. *Id.* at 999.

362. *Id.* at 1000, 1002. Although the academic treatment of *Pacifica* over the past thirty years is beyond the scope of this Article, the decision has few supporters. *See, e.g.*, R. Wilford Tremblay, *FCC v. Pacifica Foundation*, in *FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS* 218–33 (Richard A. Parker ed., 2003). Many articles have argued against extending *Pacifica* to nonbroadcast media. *See, e.g.*, Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606 (1983) (concluding that no acceptable interpretation of *Pacifica* would permit government to exclude from cable even the most indecent nonobscene programming). In fact, the Court did refuse to extend the *Pacifica*-type analysis to cable television in *United States v. Playboy Entm’t Group*, 529 U.S. 803, 815 (2000); to telephone dial-a-porn in *Sable Commc’ns v. FCC*, 492 U.S. 115, 127–28 (1989); and to indecent content on the Internet in *Reno v. ACLU*, 521 U.S. 844, 866–67 (1997).

words' identified in *Pacifica*.”³⁶³ In the early 1990s, the FCC created a safe harbor for indecent broadcasts between the hours of 10:00 p.m. and 6:00 a.m.³⁶⁴ The FCC “made it a point to reassure broadcasters that fleeting sexual references or depictions would not likely be problematic” and indicated that it would wield its regulatory power with restraint.³⁶⁵

The FCC’s approach to indecency changed dramatically under the administration of George W. Bush. The FCC used a complaint about NBC’s *Golden Globe Awards* program, which aired on January 19, 2003, to announce its stricter policy against indecency.³⁶⁶ Members of the Parents Television Council (PTC) alleged that Bono’s comment (“this is really, really, fucking brilliant”) violated § 1464.³⁶⁷ The FCC’s Enforcement Bureau denied the complaint, finding that in context, the word “fucking” did not describe sexual or excretory organs or activities, but was used “as an adjective or expletive to emphasize an exclamation.”³⁶⁸

The full FCC, however, voted unanimously to overturn the Bureau’s decision. The FCC explained that indecency findings involved two separate determinations:

First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition Second, the broadcast must be *patently* offensive as measured by contemporary community standards for the broadcast medium.

In making indecency determinations, the Commission has indicated that the “*full context* in which the material appeared is critically important,” and has articulated three “principal factors” for its analysis: “(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.”³⁶⁹

363. Lili Levi, *The FCC’s Regulation of Indecency*, 7 FIRST REPORTS 1 (2008). The Second Circuit’s decision in *Fox* also contains a thorough description of the evolution of the FCC’s indecency policy. See *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 448–51 (2d Cir. 2007).

364. Levi, *supra* note 363, at 13. After several years of litigation, the D.C. Circuit upheld the safe harbor in *Action for Children’s TV v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

365. Levi, *supra* note 363, at 2.

366. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, *Memorandum Opinion and Order*, 18 F.C.C.R. 19859, para. 1 (2003).

367. *Id.* at paras. 2–3.

368. *Id.* at para. 5.

369. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, paras. 6–7 (2004) (citations and some internal quotation marks omitted) [hereinafter *Golden Globe*].

Applying this approach, the FCC rejected the Bureau's conclusion. While recognizing that "fucking" was used "as an intensifier," it held that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation."³⁷⁰ Thus, the term fell within the definition of indecency. It added that: "The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the 'F-Word' here, on a nationally telecast awards ceremony, was shocking and gratuitous."³⁷¹

A. *CBS's Super Bowl Halftime Show—“Fleeting Nudity”*

About six months after the *Golden Globe* decision, the FCC issued an *NAL* against CBS in the amount of \$555,000 for the 2002 Super Bowl Halftime show in which Janet Jackson's breast was exposed.³⁷² CBS contested liability, but under the *Golden Globe* test, the FCC found that exposing a female breast depicted a sexual organ and thus fell within the definition of indecency.³⁷³ Moreover, it found the depiction patently offensive because the

segment in question did not merely show a fleeting glimpse of a woman's breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman's clothing to reveal her naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song."³⁷⁴

CBS sought review of the FCC's ruling in the Third Circuit.³⁷⁵

B. *Fox's Billboard Music Awards—“Fleeting Expletives”*

On the same day that the FCC fined CBS, it released an *Omnibus Order* addressing multiple complaints about programs aired between 2002 and 2005.³⁷⁶ The *Omnibus Order* found ten programs indecent, issued

370. *Id.* at para. 8.

371. *Id.* at para. 9.

372. See Complaints Against Various TV Licensees Concerning Their Feb. 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 19230 (2004) [hereinafter *NAL*]. The *NAL* states that the FCC received over 542,000 complaints about this incident from members of the public. *Id.* at 19231 n.6.

373. Complaints Against Various TV Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, *Forfeiture Order*, 21 F.C.C.R. 2760, para. 9 (March 15, 2006), *recon. denied*, 21 F.C.C.R. 6653 (May 31, 2006).

374. *Id.* at para. 13.

375. *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008).

376. Complaints Regarding Various TV Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, *Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (2006) [hereinafter *Omnibus Order*]. On the same day, the FCC also issued an *NAL* against CBS and its affiliates for broadcasting scenes of teenagers engaged in simulated sex

NALs for six, and found that seventeen others did not violate § 1464.³⁷⁷ The FCC stated that “[t]aken both individually and as a whole, we believe that [these rulings] will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.”³⁷⁸

The *Omnibus Order* found that two programs broadcast on Fox contained indecent content. One was the 2002 Billboard Music Awards programs during which Cher said in her acceptance speech: “People have been telling me I’m on the way out every year, right? So fuck ‘em [sic].”³⁷⁹ The FCC found the fact that “fuck” was not repeated was not dispositive because use of that word in a “live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and gratuitous.”³⁸⁰ The FCC applied a similar analysis to Fox’s 2003 Billboard Music Awards program, in which Nicole Richie used the words *fucking* and *shit*.³⁸¹ Fox sought review in the Second Circuit.³⁸²

Although the networks argued in both *Fox* and *CBS* that the FCC’s actions were unconstitutional, the courts of appeals reversed the FCC on a different ground—that the FCC had failed to adequately justify changing its prior policy as required by the Administrative Procedure Act (APA).³⁸³ The FCC sought certiorari in both cases.³⁸⁴

In seeking Supreme Court review in *Fox*, the FCC argued that the lower court’s decision conflicted with the Court’s decision in *Pacifica* because it “criticized the Commission for taking context into account and refusing to treat a single use of an expletive, no matter how graphic or gratuitous, as per se not indecent, even though, in *Pacifica*, this Court emphasized that ‘context is all-important’ in evaluating indecency.”³⁸⁵ In

acts during a 9:00 p.m. broadcast of *Without a Trace*. See Complaints Against Various TV Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program “Without a Trace,” *Notice of Apparent Liability for Forfeiture*, 21 F.C.C.R. 2732, para. 1 (2006).

377. *Omnibus Order*, *supra* note 376, at 2664–65.

378. *Id.* at para. 2.

379. *Id.* at para. 101 (internal quotation marks omitted).

380. *Id.* at paras. 104–05.

381. *Id.* at paras. 114–17.

382. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). The FCC sought and received a voluntary remand, but on remand sustained its earlier findings as to these two programs. See Complaints Regarding Various TV Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, *Order*, 21 F.C.C.R. 13299, para. 22 (2006).

383. *Fox TV Stations*, 489 F.3d at 462; *CBS Corp. v. FCC*, 535 F.3d 167, 174–75 (3d Cir. 2008).

384. Petition for Writ of Certiorari, *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2007 WL 3231567; Petition for Writ of Certiorari, *FCC v. CBS Corp.*, 129 S.Ct. 2176 (2008) (No. 08-653), 2008 WL 4933630.

385. Petition for Writ of Certiorari at 13–14, *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582), 2007 WL 3231567 (citing *FCC v. Pacifica Found.*, 438 U.S.

opposing review, NBC argued that the FCC's order was distinguishable from and posed no conflict with *Pacifica*.³⁸⁶ Nonetheless, it urged that if the Court took the case, it should overturn *Pacifica* because "there no longer exists any sound basis for according broadcast speech less protection than obtains in other channels of communication."³⁸⁷ NBC contended that

to the extent that *Pacifica* premised its distinction of the broadcast medium from other channels of communication on the "'unique' attributes of broadcasting,"—to wit, that broadcasts were, in 1978, "a uniquely pervasive presence in the lives of all Americans" and were "uniquely accessible to children" as compared to other types of content,—it rests, thirty years later, on a moth-eaten foundation. In the age of cable and satellite television and the Internet, broadcasting is now one of many methods of delivering content to Americans in their homes. Broadcast television, like other content in our media-driven age, may be "pervasive," but in 2008, even the Commission has trouble contending that it is "uniquely" so.³⁸⁸

The Supreme Court granted certiorari on March 17, 2008.³⁸⁹

VII. THE SUPREME COURT DECISION IN *FOX* AND THE DECISION ON REMAND

The FCC's brief argued that its action in *Fox* was justified by *Pacifica*, but that there was no need to reach the constitutional issues to decide this case.³⁹⁰ Both Fox and NBC argued that the FCC's current indecency regime was unconstitutional, but only NBC's brief focused on the constitutional arguments.³⁹¹ NBC argued that the FCC's definition of indecency was virtually identical to language in the Communications Decency Act, which the Court found unconstitutionally vague in *Reno*.³⁹²

726, 750 (1978)). The FCC asserted that it had acted reasonably in determining that Cher's and Richie's remarks constituted a "first blow" that could be redressed in the context in which they were uttered. *Id.* at 19.

386. See Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co. at 23–26, *Fox TV Stations*, 129 S. Ct. 1800 (No. 07-582) [hereinafter NBC Opp.].

387. *Id.* at 31.

388. *Id.* at 30–31 (citations omitted).

389. *FCC v. Fox TV Stations, Inc.*, 128 S. Ct. 1647 (2008). In its petition for certiorari in CBS, the FCC noted the similarities between the cases and asked the Court to hold the petition for certiorari in CBS pending its decision in the Fox case. Petition for Writ of Certiorari for FCC at 14, *FCC v. CBS*, 129 S. Ct. 2176 (2008) (No. 08-653), 2008 WL 4933630.

390. See Brief for the Petitioners at 17, 43, *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582) [hereinafter FCC Br.].

391. For example, NBC asserted at the beginning of its brief, "This is a case about the First Amendment." Brief of Respondents NBC Universal, Inc., NBC Telemundo License Co., CBS Brdcast. Inc., and ABC, Inc. at 1, *Fox TV Stations*, 129 S. Ct. 1800 (No. 07-582) [hereinafter NBC Br.].

392. See *id.* at 21–23.

NBC also argued that the FCC's policy should be analyzed under strict scrutiny rather than the lower standard applied in *Pacifica*, because “[w]hatever validity these rationales may have had when this Court articulated them decades ago, they rest today on moth-eaten foundations and can no longer support the ‘relaxed’ scrutiny on which the Commission’s content restrictions have historically depended.”³⁹³ Because of the widespread use of cable television, satellite services, and the Internet, NBC argued that “over-the-air” broadcasting was no longer “uniquely pervasive” or “uniquely accessible to children.”³⁹⁴

A. *The Supreme Court Decision*

Of the nine Justices deciding *Fox*, only one was on the Court when it decided *Pacifica*. Justice Stevens, then the newest Justice, had written the decision for the Court affirming the FCC in *Pacifica*. Now Justice Stevens was the most senior member of the Court, and he dissented in *Fox*.³⁹⁵

Justice Scalia wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.³⁹⁶ The Court did not address whether *Pacifica* remained good law or whether the FCC's action was constitutional. Instead, it reversed the lower court's conclusion that the FCC had acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA).³⁹⁷

The Second Circuit had reversed the FCC, finding that the APA required a more substantial explanation was required when an agency changed course. The Supreme Court rejected this interpretation of the APA, holding that neither the APA nor *State Farm* required that changes in policy be subjected to more searching review.³⁹⁸ The Court found that the

393. *Id.* at 32. See also Brief for Respondent Fox TV Stations, Inc. at 43–45, *Fox TV Stations*, 129 S. Ct. 1800 (No. 07-582) (arguing that the evolution of the contemporary media marketplace has eroded *Pacifica*'s premises) [hereinafter Fox Br.].

394. See NBC Br., *supra* note 391, at 33–35.

395. See *Fox TV Stations*, 129 S. Ct. at 1824 (Stevens, J., dissenting).

396. Only one section of Justice Scalia's opinion did not receive five votes. Justice Kennedy did not join in Part III-E, which responded to arguments made in the dissents. His separate opinion concurring in part and concurring in the judgment explained that he agreed with Justice Breyer that the agency must explain why it now rejects the considerations that led it to adopt the initial policy. However, because the FCC's *Order* explained that the FCC had changed its reading of *Pacifica*, its explanation was adequate. See *id.* at 1822–24 (Kennedy, J., concurring).

397. *Id.* at 1819.

398. *Id.* at 1810. *State Farm* refers to *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). There, the Court explained that

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice

FCC acknowledged that it was changing its policy and had given sufficient explanation for the change.³⁹⁹

Although the Second Circuit reversed the FCC on APA grounds alone, it expressed skepticism that the FCC could “provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.”⁴⁰⁰ In the “interest of judicial economy,” it offered several pages of “observations.”⁴⁰¹ First, the Second Circuit expressed sympathy with the networks’ “contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”⁴⁰² It noted that even though the FCC had declared that all variants of *fuck* and *shit* were presumptively indecent, the FCC had found that the repeated use of those words in *Saving Private Ryan* was not indecent.⁴⁰³

The Second Circuit court also noted “some tension in the law regarding the appropriate level of First Amendment scrutiny,” in that the Supreme Court applied strict scrutiny when evaluating the regulation of indecency on cable television and the Internet, but applied intermediate scrutiny to broadcasting because of “unique considerations.”⁴⁰⁴ The networks argued that the grounds for treating broadcasting differently had eroded over time. The Second Circuit seemed to agree, noting that “we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”⁴⁰⁵ The Supreme Court, however, declined to address the constitutional claims, noting that the

made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: “We may not supply a reasoned basis for the agency’s action that the agency itself has not given.” We will, however, “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”

Id. (citations omitted).

399. *Id.* at 1819.

400. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007), *rev’d*, *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800 (2009).

401. *Id.* at 462–66.

402. *Id.* at 463.

403. *See id.* (citing Complaints Against Various TV Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC TV Network’s Presentation of the Film “Saving Private Ryan,” *Memorandum Opinion and Order*, 20 F.C.C.R. 4507, para. 14 (2005)).

404. *Fox TV Stations*, 489 F.3d at 464.

405. *Id.* at 465.

constitutionality “will be determined soon enough, perhaps in this very case.”⁴⁰⁶

Although not deciding constitutionality, the majority opinion did rely on *Pacifica*. For example, it noted that *Pacifica* held that “the First Amendment allowed Carlin’s monologue to be banned in light of the ‘uniquely pervasive presence’ of the medium and the fact that broadcast programming is ‘uniquely accessible to children.’”⁴⁰⁷ Following *Pacifica*, the FCC had “preserved a distinction between literal and nonliteral (or ‘expletive’) uses of evocative language.”⁴⁰⁸ The FCC changed this view in its 2004 decision in the *Golden Globe* case, where it clarified that “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”⁴⁰⁹

The majority found that the FCC’s decision in *Fox* “to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*.”⁴¹⁰ In response to the lower court’s finding that the FCC acted arbitrarily because it lacked evidence of harm from fleeting expletives, the majority observed that *Pacifica* had not required any quantitative measure of harm. It added:

we have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden. To the contrary, we explicitly left for another day whether “an occasional expletive” in “a telecast of an Elizabethan comedy” could be prohibited. By using the narrowness of *Pacifica*’s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of *Pacifica*, which allowed *some* regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what *Pacifica* sanctioned.⁴¹¹

Justice Thomas concurred, agreeing that the FCC had complied with the APA.⁴¹² But he argued that the precedents cited to support the FCC’s

406. *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009). The Court was likely referring to the fact that even though the Second Circuit decided the case solely on administrative procedure grounds, it provided an extensive analysis of the constitutional challenges and expressed skepticism that the FCC could “provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.” *Fox TV Stations*, 489 F.3d at 462.

407. *Fox TV Stations*, 129 S. Ct. at 1806 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978)).

408. *Fox TV Stations*, 129 S. Ct. at 1807.

409. *Id.* at 1808 (quoting *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, para. 12 (2004)) (internal quotation marks omitted).

410. *Fox TV Stations*, 129 S. Ct. at 1812.

411. *Id.* at 1815 (citations omitted).

412. *Id.* at 1820 (Thomas, J., concurring).

constitutional authority—*Red Lion* and *Pacifica*—“were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.”⁴¹³ He contended that “*Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution.”⁴¹⁴ Moreover, even if these cases could have been justified at the time, “traditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were.”⁴¹⁵

Justice Stevens dissented, as did Justice Ginsburg and Justice Breyer, who was joined by Justices Stevens, Souter, and Ginsburg. Justice Stevens argued that the majority “incorrectly assum[ed]” that *Pacifica* endorsed a construction of the term “indecent” that “permits the FCC to punish the broadcast of *any* expletive that has a sexual or excretory origin,” when in fact, “*Pacifica* was not so sweeping, and the Commission’s changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time.”⁴¹⁶ Stevens described the *Pacifica* decision, which he wrote, as upholding

the FCC’s adjudication that a 12-minute [sic], expletive-filled monologue by satiric humorist George Carlin was indecent “as broadcast.” We did not decide whether an *isolated* expletive could qualify as indecent. And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.⁴¹⁷

Stevens noted a “critical distinction between the use of an expletive to describe a sexual or excretory function and . . . to express an emotion.”⁴¹⁸ Because the FCC adopted an interpretation of indecency bearing no resemblance to what *Pacifica* contemplated with no “awareness that it has ventured far beyond *Pacifica*’s reading of § 1464,” he found the FCC decision arbitrary.⁴¹⁹ Justice Ginsburg agreed that the FCC’s “bold stride beyond the bounds” of *Pacifica* was arbitrary and capricious.⁴²⁰ She noted that *Pacifica* was “tightly cabined, and for good reason,” and that Justice Brennan’s concerns about suppression were “even more potent today.”⁴²¹

413. *Id.*

414. *Id.* at 1821.

415. *Id.* at 1822. Justice Thomas noted that most consumers received broadcast media via cable or satellite and that it was also available on computers, cell phones, and other wireless devices. *Id.*

416. *Id.* at 1825 (Stevens, J., dissenting). Stevens also dissented on the grounds that the majority treated the FCC’s rulemaking authority as a “species of executive power” that need not be explained. *Id.*

417. *Id.* at 1827 (citations omitted).

418. *Id.*

419. *Id.* at 1828 (Stevens, J., dissenting).

420. *Id.* (Ginsburg, J., dissenting).

421. *Id.* at 1829. Justice Breyer also faulted the FCC for failing to acknowledge that an entirely different understanding of *Pacifica* supported its earlier policy. *Id.* at 1834 (Breyer, J., dissenting).

After deciding the *Fox* case, the Supreme Court granted the petition for writ of certiorari in *CBS*, vacated the judgment, and remanded to the Third Circuit for further consideration in light of its decision in *Fox*.⁴²²

B. *The Fox Decision on Remand*

After further briefing, the same panel of the Second Circuit unanimously found the FCC's indecency policy to be unconstitutionally vague.⁴²³ It rejected the FCC's claim that it needed a flexible standard because broadcasters had found ways to air indecent material without using the "seven dirty words," noting that "[i]f the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so."⁴²⁴ The court also found there was "little rhyme or reason" to the FCC's cases regarding the use of *fuck* and *shit*, thus leaving broadcasters to guess as to whether an expletive would be subject to an exception or not.⁴²⁵ It concluded that the FCC's "indiscernible standards" created an unacceptable risk that they would be enforced in a discriminatory manner.⁴²⁶

The court rejected the FCC's contention that its context-based approach was consistent with or even required by *Pacifica*:

While *Pacifica* emphasized the importance of context in regulating indecent broadcasts, it did so in order to emphasize the limited scope of its holding, finding that the particular "context" of the Carlin monologue justified an intrusion on broadcasters rights under the First Amendment. It does not follow that the FCC can justify any decision to sanction indecent speech by citing "context." Of course, context is always relevant, and we do not mean to suggest otherwise in this opinion. But the FCC still must have discernible standards by which individual contexts are judged.⁴²⁷

At the same time, the court declined the networks' invitation to overrule *Pacifica*. It agreed with the networks that the "past thirty years ha[ve] seen an explosion of media sources, and broadcast television has become only one voice in the chorus."⁴²⁸ It also recognized that the technological changes such as the V-Chip had provided parents with greater ability to decide what their children can watch.⁴²⁹ However, it concluded that "we are bound by Supreme Court precedent, regardless of

422. *FCC v. CBS*, 129 S. Ct. 2176 (2009).

423. *Fox TV Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010).

424. *Id.* at 331.

425. *Id.* at 332.

426. *Id.*

427. *Id.* at 333 (citations omitted).

428. *Id.* at 326.

429. *Id.* 328.

whether it reflects today's realities."⁴³⁰

VIII. CONCLUSION: THE IMPLICATIONS OF *PACIFICA* FOR THE CURRENT CONTROVERSY OVER BROADCAST INDECENCY

From today's vantage point, it seems surprising that the Supreme Court took the *Pacifica* case and upheld the FCC's position. The FCC had received only a single complaint about the broadcast of the Carlin monologue. While finding that the broadcast violated § 1468, the FCC merely admonished the station. As one article put it, the "FCC's response was tantamount to the proverbial principal telling the child upon his first offense that 'this will go on your permanent record.'"⁴³¹

The FCC intentionally utilized a *Declaratory Order* to provide guidance to broadcasters as to what language would be tolerated on the public airwaves when children were in the audience. The D.C. Circuit reversed, with Judge Leventhal dissenting. In its attempt to reverse the D.C. Circuit in the Supreme Court, the FCC recast its action as a narrow, fact-based adjudication.

Many observers expected that the FCC would lose in the Supreme Court. The United States, in fact, argued that the FCC's action violated the First Amendment. The position was set forth by an experienced Supreme Court advocate from the Solicitor General's office. In contrast, the FCC counsel had never argued before in the Supreme Court and had difficulty answering the questions at oral argument. When the case was decided, it was harshly criticized by many in the public and in academia.

My review of the available papers from the Justices that heard the case reveal just how close the decision was. Justice Stevens provided the swing vote, stating at the conference that he had flip-flopped and might do so again. He had a difficult time getting five votes for his opinion. Justices Blackmun and Powell both rejected the advice of their law clerks and joined most of Justice Stevens's opinion. The four other Justices dissented, with Justice Brennan writing a particularly blistering dissent on First Amendment grounds.

My review of the Justices' papers suggests that one of the factors leading to the Court's narrow affirmance of the FCC was the dissenting opinion of Judge Leventhal in the decision below. Leventhal was a highly respected jurist. He thought that the only issue before the court was the narrow question of the reasonableness of the FCC's finding with regard to

430. *Id.* at 327. The FCC filed a Petition for Rehearing and Rehearing En Banc on Aug. 25, 2010. It is "widely expected" that the case will go back to the Supreme Court. Associated Press, *FCC Asks Court to Revisit a Ruling Against an Indecency Policy*, N.Y. TIMES, Aug. 26, 2010, at B2.

431. Demas, *supra* note 347, at 40.

WBAI's broadcast of the Carlin monologue in the afternoon. The repeated references to Leventhal in the notes of Justices Blackmun and Powell and in the post-argument conference suggest that several members of the Supreme Court were swayed by Leventhal's framing of the case.

It is somewhat ironic, then, that the *Declaratory Order* in *Pacifica* came to be understood as a prohibition on the broadcast of the "seven dirty words" prior to 10:00 p.m.⁴³² However, the fact that it was not an actual rule and the narrowness of the Supreme Court's holding permitted the FCC to change its policy without conducting a rulemaking. That is exactly what the FCC did in *Golden Globe, Fox, and CBS*. Moreover, it justified its new approach by asserting that under *Pacifica*, it was necessary for the FCC to consider the context of the allegedly indecent broadcast. In reviewing the *Fox* decision, however, the Supreme Court applied the same standard of review it uses for rulemaking.

On remand from the Supreme Court, the Second Circuit has concluded that the FCC's approach to indecency in *Fox* was unconstitutionally vague. It is uncertain whether the FCC will seek certiorari of the Second Circuit's decision on remand in *Fox*, and if so, whether the Court will take the case. If the Court hears the case, it will be decided by a completely different bench than the one that decided *Pacifica*. Justice Stevens retired at the end of the 2009–10 term and has been replaced by Justice Elena Kagan.

Justice Stevens wrote the opinion for the Court in *Pacifica*, but he dissented in *Fox*, arguing that the FCC's actions in *Fox* went well beyond and were not supported by the decision in *Pacifica*. The history of the *Pacifica* decision supports Justice Stevens's position that *Pacifica* did not contemplate—much less mandate—the FCC's findings of indecency in the *Fox* and *CBS* cases. Neither the FCC nor the Court analyzed the content of the WBAI's "Lunchpail" in the manner that the FCC analyzed the Super Bowl Halftime Show or the Billboard Music Awards programs. To the contrary, many at the time criticized the *failure* to take context into account.⁴³³ Had the FCC considered the context of the program in which the language was used in *Pacifica*, it would have been difficult for it to have reached the result it did. WBAI compared Carlin to Mark Twain and argued that the monologue was broadcast as part of a serious discussion on the use of language and that he used "dirty words" to make fun of society's attitudes toward language.⁴³⁴ And indeed, four days before his death in June 2008, George Carlin was named recipient of the Mark Twain Prize for

432. See Levi, *supra* note 363, at 1.

433. See, e.g., *supra* notes 94, 123, 223 and accompanying text.

434. Brief for FCC at 16–17, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528) (quoting *Pacifica*'s Response to the complaint).

American Humor.⁴³⁵

However, there is another, perhaps more important lesson to be drawn from the history of the *Pacifica* case: individual adjudications, such as those in *Fox* and *CBS*, are not good vehicles for setting forth policy with regard to broadcast indecency.

Generally, the FCC announces new policies or changes existing policies after conducting notice and comment rulemaking under section 553 of the Administrative Procedure Act.⁴³⁶ In contrast, the *Pacifica* case involved the adjudication of a single complaint. The FCC also used complaints about specific programs to announce broad new rules regulating indecency. On review, both the Second and Third Circuits applied rulemaking standards to the FCC's adjudications, finding that the FCC had failed to comply with the APA and *State Farm*, a case that involved a rulemaking proceeding.⁴³⁷ The Supreme Court also applied the *State Farm* test, but the majority concluded that the FCC was consistent with the APA requirements.⁴³⁸

Both the majority and dissents viewed the FCC's ruling against Fox as the equivalent of adopting a new rule. For example, the majority explained that *State Farm*, "which involved the rescission of a prior regulation, said only that such action requires 'a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance.'"⁴³⁹ Justice Stevens criticized the majority for assuming that the FCC's "rulemaking authority is a species of executive power," and that it "need not explain its decision to discard a *longstanding rule* in favor of a dramatically different approach to regulation."⁴⁴⁰ Justice Breyer's dissent noted that the "result" of the FCC's action was "a *rule* that may well chill coverage."⁴⁴¹ He acknowledged that the FCC did not use "traditional administrative notice-and-comment procedures," which would have "obligate[d] the FCC to respond to *all* significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."⁴⁴² But he concluded that the same failures here—where the policy is important, the significance

435. The Kennedy Center presents this annual award to recognize lifetime achievement by an outstanding comedian. Jacqueline Trescott, *Bleep! Bleep! George Carlin to Receive Mark Twain Humor Prize*, WASH. POST, June 18, 2008, at C1.

436. 5 U.S.C. § 553 (2006).

437. *CBS v. FCC*, 535 F.3d 167, 174, 182–83, 188–89 (3d Cir. 2008); *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 455, 457 (2d Cir. 2007).

438. *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1823–24 (2009).

439. *Id.* at 1810.

440. *Id.* at 1824–25 (Stevens, J., dissenting) (emphasis added).

441. *Id.* at 1837 (Breyer, J., dissenting) (emphasis added).

442. *Id.*

of the issues clear, the failures near complete—should lead us to the same conclusion. The agency’s failure to discuss these two “important aspect[s] of the problem” means that the resulting decision is “arbitrary, capricious, an abuse of discretion” requiring us to remand the matter to the agency.”⁴⁴³

If the FCC wants to continue enforcing § 1468’s prohibition against broadcast indecency, the history of the *Pacifica* case suggests that the FCC would have greater success by initiating a rulemaking proceeding than by seeking certiorari in *Fox*. The benefits of rulemaking over case-by-case adjudication are well known. Rulemakings are said to produce higher quality rules because in an adjudication, only the party or parties to the particular dispute are before the agency. By contrast, in a rulemaking proceeding, all potentially affected members of the public have the opportunity to participate. The comments filed in a rulemaking typically provide diverse perspectives, address the nature and extent of the problem, provide factual information, and identify practical problems with the agency proposals.⁴⁴⁴

Pacifica illustrates the drawbacks of making policy by adjudication. The entire defense fell on the shoulders of the Pacifica Foundation, a nonprofit organization with limited resources. The record in *Pacifica*, which essentially consisted of two short letters, contained few facts even about the specific complaint, and nothing about the impact on other broadcasters, the listening public, or speakers, creators, or producers of the work being broadcast. As a result, the FCC Commissioners, as well as the judges and Justices who heard the case, made factual assumptions that may not have been correct. For example, the FCC assumed without citing any evidence that children would be listening to the radio at 2:00 p.m.⁴⁴⁵ Yet, data submitted in amicus briefs suggested that few children listened to the radio at 2:00 p.m., while large numbers listened in the late evening hours.⁴⁴⁶ Had the FCC conducted a rulemaking proceeding in which it sought information about the listening habits of children, it might have reached a better decision.⁴⁴⁷

443. *Id.* at 1838 (citing *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

444. *See, e.g.*, 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.8 (4th ed. 2002).

445. *Pacifica* did not submit such information, and in fact, it may not have had access to such data. Although ratings and demographic information are essential to commercial radio stations for purposes of advertising, noncommercial radio stations do not need such data because they do not sell advertising time. Moreover, such data is not publically available and is expensive to purchase.

446. *Open Media Br.*, *supra* note 78, at 12–13; *ABC Br.*, *supra* note 140, at 9. Participating as an amicus after an agency decision has been made is not as effective as being able to present arguments and facts to the agency before it decides.

447. Judge Bazelon’s opinion identified several other undocumented assumptions,

Similarly, the adjudication in *Fox* left important gaps in the factual record. For example, Breyer's dissenting opinion faulted the FCC for failing to consider the ruling's impact on small and public broadcasters, who, because they could not afford the cost of "bleeping" technology, would curtail their coverage of local public events.⁴⁴⁸ Had the FCC conducted a rulemaking, it could have obtained and submitted evidence on the cost and impact of this technology.

Rules make it easier for entities subject to regulation to ascertain what is or is not allowed and thus reduce the ability of the agency to engage in discretionary enforcement.⁴⁴⁹ The FCC's declaratory ruling in *Pacifica* did not put broadcasters on notice as to what they could and could not say on air, but only that they could not repeatedly broadcast the "seven dirty words" at times when children were likely to be in the audience. And it left the FCC free to bring later enforcement actions citing *Pacifica*, such as those in *Fox* and *CBS*, even though those cases were factually distinct.

Although the FCC claimed that the *Omnibus Order* in *Fox* provided guidance to broadcasters, even a broadcaster who read the entire *Order* would not have a clear idea of what the FCC considered indecent. Indeed, the Second Circuit reached the same conclusion on remand when it found the FCC's policy "impermissibly vague."⁴⁵⁰ Thus, the FCC's chance of adopting a constitutional indecency policy would be increased by abandoning its case-by-case approach and conducting a rulemaking proceeding.

including whether parents would find such language unsuitable for children and whether parents had other ways to control the listening habits of their children. *Pacifica Found. v. FCC*, 556 F.2d 9, 28 (D.C. Cir. 1977) (Bazelon, J., dissenting). Justice Powell thought the language was "'patently offensive' to most people regardless of age." *FCC v. Pacifica Found.*, 438 U.S. 726, 757 (1978) (Powell, J., concurring). Justice Brennan pointed out that "some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words." *Id.* at 770 (Brennan, J., dissenting). Had the FCC conducted a rulemaking proceeding instead of acting on a single complaint, parents or organizations representing parents may have weighed in on these issues.

448. *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1832–38 (2009) (Breyer, J., dissenting). The *CBS* case presented a similar issue involving the cost of video delays.

449. *See, e.g., PIERCE, supra* note 444, at 372–73.

450. The court illustrates how the FCC's indecency policy is impermissibly vague with an example: "[T]he FCC concluded that 'bullshit' in a 'NYPD Blue' episode was patently offensive, [but] it concluded that 'dick' and 'dickhead' were not." *Fox TV Stations, Inc. v. FCC*, 613 F.3d 317, 330 (2d Cir. 2010) (citing *Omnibus Order, supra* note 376, paras. 127–28).