FCC v. Fox Television Stations and the FCC's New Fleeting Expletive Policy

Jerome A. Barron*

* Harold H. Greene Professor of Law, George Washington University Law School; B.A., Tufts University; J.D., Yale Law School; LL.M., George Washington University. This Comment is based on a presentation on the *Fox Television Stations* case, which I made to the law faculty at George Washington University as part of a 2009 summer faculty discussion series. I wish to thank Associate Dean Paul Butler who invited me to make the presentation. I also wish to express my thanks for the helpful comments and questions of my colleagues. I am grateful to Dean Fred Lawrence for his summer research grant support. I would also like to thank Leslie Lee, Assistant Director of Administration at the Jacob Burns Law Library, for her bibliographic assistance; Winifred Hercules for her excellent secretarial assistance; and Michael A. Schulman of the George Washington University Law School class of 2011 for his excellent research assistance.

I. INTRODUCTION

In the nearly forty years since the beginning of the FCC's regulation of indecency, that regulation has expanded greatly. The FCC's indecency policy had its origin in an FCC case decided in 1970.[1] That case emphasized the narrow scope of FCC indecency regulation. In *FCC v. Fox Television Stations*, the fleeting expletive case, the Supreme Court further extended the life of this policy.[2] A fleeting expletive refers to the broadcast of a single expletive.[3] Until recently, the broadcast of a fleeting expletive did not violate the FCC's indecent speech policy.[4] To understand fleeting expletives, some background on the concept of indecent speech is necessary. FCC indecency regulation is based on a statute, 18 U.S.C. § 1464, which provides that broadcasting "any obscene, indecent or profane language" is subject to fine or imprisonment.[5]

Originally, this statute was enforced by the Department of Justice.[6] But enforcement of the statute has shifted to the FCC, perhaps because the

---

1. *See* WUHY-FM, *Notice of Apparent Liability*, 24 F.C.C.2d 408 (1970).

2. 129 S. Ct. 1800 (2009).

3. *Id.* at 1807.

4. *Id.* at 1807-08; *see also id.* at 1815.

5. 18 U.S.C. § 1464 (2006). This statute had its origin in Section 29 of the Radio Act of 1927 which provided that

> 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.

Radio Act of 1927, ch. 169, § 29, 44 Stat. 1173 (repealed); *see also* FCC v. Pacifica Found., 438 U.S. 726, 735 (1978) (discussing the legislative history of § 1464) The very language of this statute betrays a contradiction since it says that the regulator shall have no power to censor and yet, at the same time, the statute prohibits no less than three different categories of speech—obscenity, indecency, and profanity. Section 29 became Section 326 of the Communications Act of 1934, Ch. 652, § 326, 48 Stat. 1091. But the last sentence of the original Section 326 prohibiting "obscene, indecent, and profane broadcasts" was plucked out and reappeared as 18 U.S.C. § 1464 in the revision of Title 18 of the United States Code in 1948. *Pacifica*, 438 U.S. at 738. Justice Stevens explained these developments in *Pacifica*:

> In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18. 62 Stat. 769 and 866.

Id. at 738.

6. *See* United States v. Simpson, 561 F.2d 53 (7th Cir. 1977); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972).

Department of Justice was concerned about enforcing a statute which criminalized the use of language. In 1960, Congress gave the FCC authority to enforce 18 U.S.C. § 1464 pursuant to 47 U.S.C. § 503(b)(1), which provides that 18 U.S.C. § 1464 can be enforced by forfeiture or fines.[7] In recent years, some of the fines imposed by the FCC on broadcasters have been quite substantial. For example, the FCC fined CBS $550,000 for the Janet Jackson incident during the 2004 Super Bowl.[8]

II. THE *PACIFICA* CASE AND THE FIRST AMENDMENT STATUS OF INDECENT SPEECH

The FCC gave a separate definition to the word "indecent" in the statute cited in *Pacifica*,[9] which involved the broadcast of George Carlin's "Filthy Words" monologue.[10] Carlin was satirizing an FCC policy launched in 1970, which stated that gratuitous and repeated use of two dirty words—I leave it to you to surmise the words—constitutes a violation of the statute.[11] The FCC defined the word "indecency" in *Pacifica* as follows: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[12] The FCC ruled that Carlin's broadcast violated that standard.[13]

On appeal, the U.S. Supreme Court set forth the actual facts of the case, which were quite simple.[14] The Court recounted how a father driving with his son at two o'clock on an October afternoon in 1973 turned on the radio.[15] He then heard George Carlin reciting the seven most commonly used swear words in English.[16] Carlin repeated the words over and over again.[17] In doing so, Carlin was expressing his contempt for the FCC's ban on the two dirty words by expanding it to seven dirty words. The boy's father complained to the FCC.[18] The FCC issued a declaratory order granting the complaint.[19] The FCC declared that its indecency policy had

---

7. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1806 (2009).
8. *See* CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008).
9. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), *Memorandum Opinion and Order*, 56 F.C.C.2d 94, paras. 11, 12 (1975).
10. *Id.* at para. 4.
11. *Id.* at para. 1.
12. *Id.* at para. 11.
13. *Id.*
14. FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).
15. *Id.* at 729-30.
16. *Id.* at 751 (appendix to opinion of the Court).
17. *Id.* at 751-55 (appendix to opinion of the Court).
18. *Id.* at 730.
19. *Id.*

been violated and announced that the order would be associated with the broadcaster's license file.[20] The FCC warned that, if additional complaints were made concerning the broadcaster, the FCC would then decide whether to use the various sanctions set forth in the Communications Act.[21] The U.S. Court of Appeals for the D.C. Circuit reversed[22] on the ground that the FCC order violated the anticensorship provision of the Communications Act.[23]

In *FCC v. Pacifica Foundation*, the Supreme Court reversed the Court of Appeals and upheld the FCC's indecency policy as applied in the Carlin case and, thereby, recognized a new category of speech—indecent speech.[24] Indecent speech, unlike obscene speech, is supposedly fully protected, and yet it can be regulated.[25] Justice Stevens pointed out that the FCC had emphasized that the time of day was critical. What is not permissible to broadcast at two o'clock in the afternoon may well be permissible in the wee hours of the morning when children are not likely to be in the audience.[26]

At the Supreme Court, Pacifica argued that the word "indecent" was simply a synonym for obscenity and that, since the broadcast did not violate the *Miller v. California*[27] obscenity definition, enforcement was not authorized by the statute.[28] The Court disagreed and ruled, as had the FCC, that each of the words in the statute had a separate and discrete meaning.[29] The Court did not think that the First Amendment was violated.[30] The Court stressed that the broadcast occurred at an hour when children could be expected to be in the audience.[31] Broadcasting, furthermore, was

---

20. FCC v. Pacifica Found., 438 U.S. 726, 729-30 (1978).

21. *Id.* at 730.

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

23. 47 U.S.C. § 326 (2006).

24. *Pacifica*, 438 U.S. at 741.

25. *Id.* at 750.

26. *Id.* at 757. Justice Powell, concurring in *Pacifica*, stressed that the timing of the indecent broadcast was critical to the FCC decision to impose a sanction:

> The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. . . . In my view, this consideration provides strong support for the Commission's holding.

Id. (internal citations omitted).

27. 413 U.S. 15, 15 (1973).

28. *Pacifica*, 438 U.S. at 740.

29. *Id.* at 739-40.

30. *Id.* at 746.

31. *Id.* at 749-50.

different from other media and was, therefore, subject to greater regulation than other media for two reasons: (1) broadcasting had a "uniquely pervasive presence"[32] in our society, and (2) broadcasting was "uniquely accessible to children."[33] These two reasons were the rationale for the *Pacifica* holding.[34]

The single broadcast as to which the *Pacifica* Court gave a very specific interpretation has led to the creation of an indecency prohibition which has had a substantial impact on broadcasting. As Justice Scalia's opinion for the Court in *Fox Television Stations* points out,[35] the Public Telecommunications Act of 1992 bans indecency on commercial radio and television from six o'clock in the morning to ten o'clock at night.[36]

III. THE FCC'S NEW FLEETING EXPLETIVES POLICY

FCC v. Fox Television Stations resulted from notices of liability sent by the FCC to Fox Television Stations that the FCC's indecency policy had been violated by its broadcasts.[37] Two of these broadcasts were deemed actionable by the FCC.[38] The first broadcast arose out of the 2002 *Billboard Music Awards* which Fox Television broadcasted.[39] During the course of the broadcast, the singer Cher said, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em."[40] The second broadcast arose out of the 2003 Billboard Music Awards, where Nicole Richie and Paris Hilton, stars in the television show *The Simple Life* were presenters of an award.[41] During her presentation, Nicole Richie said, "[h]ave you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple."[42]

Until 2004, these broadcasts would not have violated the FCC's

---

32. *Pacifica*, 438 U.S. at 748.

33. *Id.* at 749.

34. *Id.* at 748-49.

35. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1806 (2009).

36. *See id.*; Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (1992) (codified at 47 U.S.C. § 303 (2006)). Note that the statute does not ban indecency for all twenty-four hours of the broadcast day. This is very consistent with the rationale of indecency regulation. In *Pacifica*, Justice Stevens observed that the FCC, in its opinion in the case, declared that indecency regulation should be governed by "principles analogous to those found in the law of nuisance where the 'law generally speaks to *channeling* behavior more than actually prohibiting it.'" *Pacifica*, 438 U.S. at 731 (quoting Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), *Memorandum Opinion and Order*, 56 F.C.C.2d 94, 98, para. 11 (1975)).

37. *Fox TV Stations*, 129 S. Ct. at 1808.

38. *Id.*

39. *Id.*

40. *Id.* at 1809 (internal quotation marks omitted).

41. *Id.*

42. *Fox TV Stations*, 129 S. Ct. at 1809 (internal quotation marks omitted).

indecency policy because the FCC's position was that "fleeting or isolated" expletives were not objectionable.[43] The use of such words had to be repetitive or gratuitous.[44] But, in 2004, in its *Golden Globe Awards Order*, the FCC changed its policy and ruled that a single expletive could be actionable.[45] In the *Golden Globe Awards* case, the Supreme Court summarized, in dicta, the FCC's 2004 *Order* with the following: "F- and S-Words could be actionably indecent, even when the word is used only once."[46]

During the *Golden Globe Awards*, performer Bono had commented, "[t]his is really, really, f***ing brilliant."[47] The *Golden Globe* case acknowledged that existing law would have permitted that broadcast.[48] The FCC acknowledged that NBC, which had broadcasted Bono's comment, did not have notice of the change in policy.[49] Therefore, no penalty was imposed.[50] But in 2006, the FCC published notices of apparent liability to broadcasters who had carried the Cher and Nicole Richie broadcasts of so-called fleeting expletives.[51]

IV. *FOX TELEVISION STATIONS V. FCC*: THE SECOND CIRCUIT DECISION

The broadcasters affected by the notices petitioned the Second Circuit for review and challenged the new policy on both constitutional and statutory grounds.[52] The FCC, however, had not previously given the affected parties an opportunity to respond to the indecency charges.[53] This opportunity had not been afforded, the FCC said, because it had not imposed sanctions.[54] And the FCC had not imposed sanctions because this

---

43. *Id.* at 1807.

44. *Id.*

45. 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. 2 (2004).

46. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1808 (2009).

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

48. *Id.* at 1806.

49. *Id.*

50. *Id.*

51. Complaints Regarding Various TV Brdcsts. Between Feb. 2, 2002 and Mar. 8, 2005, *Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (2006).

52. *Fox TV Stations*, 129 S. Ct. at 1808.

53. *Id.*

54. Complaints Regarding Various TV Brdcsts. Between Feb. 2, 2002 and Mar. 8, 2005, *Order*, 21 F.C.C.R. 13299, at para. 9 (2006) [hereinafter *Complaints Order*].

> [T]he FCC did not seek the views of the licensees . . . because the Commission did not impose any sanctions on them. . . . [B]roadcasters complained that they should have had an opportunity to present their views . . . . Upon reflection, the

was not only a new policy but also a reversal of policy.[55] The FCC, therefore, asked the Second Circuit for a voluntary remand so the parties could present their objections to the FCC.[56] The FCC then issued an order on remand upholding its findings that the broadcasts were indecent.[57] A three-judge panel of the Second Circuit held, per Judge Pooler, two-to-one, that the FCC's reversal of its fleeting expletives policy was "arbitrary and capricious under the Administrative Procedures Act."[58] The Second Circuit panel held that the FCC had failed to provide a satisfactory explanation for now holding that fleeting expletives could be actionable when it had specifically ruled in the past that they were not subject to sanction.[59] Interestingly, in the final part of its opinion, the Second Circuit panel noted that it had refrained from ruling on the constitutional challenges presented by the petitioners.[60] But at the same time, the panel observed that it was "skeptical" that the FCC could provide a reasoned explanation for its fleeting expletives regime that "could nevertheless provide the requisite clarity to withstand constitutional scrutiny."[61] The panel said it was sympathetic to the contention of the networks that the FCC's indecency test was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."[62]

The Second Circuit panel conceded that the FCC's ruling, regarding the expletives found throughout the televised movie *Saving Private Ryan*, did *not* violate the FCC's indecency policy.[63] The FCC ruled, inter alia, that the many expletives used in *Saving Private Ryan* were "'integral' to a

---

Commission agreed . . . and asked the Second Circuit for a voluntary remand . . . .

Id. at para 9. The Second Circuit granted the request. *Id.* at para. 10.

55. The FCC's remand order served only to highlight two points: first, the lack of clarity in the FCC's explanation as to when a fleeting expletive will be actionable; second, the imprecision, indeed basic fuzziness, of the FCC's professed contextual approach to fleeting expletives. Consider the following:

> We stated in *Golden Globe* 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." To be sure, the fact that material is not repeated does weigh against a finding of indecency, and in certain cases, when all of the relevant factors are considered together, this factor may tip the balance in a decisive manner. This, however, is not one of those cases.

Id. at para. 61.

56. *See Complaints Order*, *supra* note 54, at paras. 9-10.

57. *Id.*

58. Fox TV Stations v. FCC, 489 F.3d 444, 447 (2d Cir. 2007).

59. *Id.* at 446-47.

60. *Id.* at 462.

61. *Id.* at 464.

62. *Id.* at 463.

63. *Fox TV Stations*, 489 F.3d at 463.

fictional movie about the war."[64] But the Second Circuit panel pointed out that this factor was ignored by the FCC in seemingly similar situations.[65] The networks' vagueness argument, the Second Circuit said, was further supported by *Reno v. ACLU*, in which a statute that regulated indecency on the Internet and used language similar to the FCC's definition of indecency was struck down as unconstitutionally vague.[66]

V. *FCC V. FOX TELEVISION STATIONS*: THE SUPREME COURT DECISION

A. Justice Scalia's Decision for the Court

The Supreme Court reversed and remanded the Second Circuit in an opinion by Justice Scalia, joined by Chief Justice Roberts and Justices Alito, Thomas, and Kennedy.[67] Justice Scalia ruled for the Court that the FCC's orders were not "arbitrary or capricious" within the meaning of that standard set forth in the Administrative Procedure Act (APA).[68] The FCC had met the interpretation of the standard set forth by the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm*,[69] which required only that the FCC "examine the relevant data and articulate a satisfactory explanation for its action."[70] Instead, Justice Scalia said, the Second Circuit had relied on its own APA precedent which required a more "substantial explanation" for agency changes of policy than either the Supreme Court case law or the APA required.[71] The reasons for a change in administrative policy, Justice Scalia said, did not need to be better than the old policy.[72] As long as the statute permitted the change in policy and the change had "good reasons" to support it, the change was valid.[73]

Justice Scalia, for the Court, chronicled the "gradually expanding" evolution of FCC indecency regulation.[74] Immediately after the Supreme Court decided *Pacifica* in 1978, the FCC emphasized that in keeping with the "narrowness" of that decision, repetitive use of indecent words would

64. *Id.*

65. *Id.* (citing Complaints Against Various TV Licensees Regarding Their Brdcst. 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 (2005)).

66. *Id.* (citing 521 U.S. 844 (1997)).

67. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1819 (2009).

68. *Id*.

69. 463 U.S. 29 (1983).

70. *Id.* at 43.

71. *Fox TV Stations,* 129 S. Ct. 1800.

72. *Id.* at 1811.

73. *Id.*

74. *Id.* at 1806.

be a precondition to enforcement of FCC indecency regulation.[75] By 1987, the FCC had abandoned an insistence on the use of the seven so-called dirty words as a precondition to FCC indecency regulation.[76] By 2001, Justice Scalia noted that the FCC's focus was on the critical importance of the "'full context' in which particular materials appear."[77] Relying on the FCC policy statement designed to provide guidance regarding the enforcement of the FCC's policies on broadcast indecency, Justice Scalia set forth the "'principal' factors" which inform an FCC decision on whether a broadcast is indecent or not:

1. Was the broadcast of an explicit or graphic nature?

2. To what extent does "the material 'dwell[] on or repeat[]' the offensive material"?

3. Was the material presented to "titillate," "pander," or "shock"?[78]

Justice Scalia continued his chronicle on the expanding nature of FCC indecency regulation by observing that, by 2004, in the *Golden Globe Awards* case, the FCC ruled that even a "nonliteral" or isolated use of the F- and S-Words could be subjected to sanction by the FCC.[79]

---

75. *Id.* The Court, here, is referring to an FCC case decided shortly after the Supreme Court decision in *Pacifica*. *Id.* (citing App'n of WGBH Educ. Found. for Renewal of License for Noncommercial Educ. Station WGBH-TV, *Memorandum Opinion and Order*, 69 F.C.C.2d 1250 (1978)). A comparison of the FCC's new fleeting expletive policy with the FCC's ruling in *WGBH* illustrates just how far the FCC has traveled from its original approach to indecency regulation. The FCC's original understanding of the *Pacifica* decision is stated with admirable clarity in *WGBH*:

> The Supreme Court's decision in *FCC v. Pacifica Foundation* . . . affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive . . . would justify any sanction."

App'n of WGBH Educ. Foundation For Renewal of License for Noncommercial Educ. Station WGBH-TV, *Memorandum Opinion and Order*, 69 F.C.C.2d 1250, 1254, para. 10 (1978).

The FCC also observed in *WGBH* that Justice Powell's concurrence in *Pacifica Foundation* had emphasized that the broadcast at issue in that case had repeated the objectionable words over and over again to the extent that they constituted "a sort of verbal shock treatment." *Id.* (internal quotation marks omitted). Powell made the point that this was very different from "the isolated use of a potentially offensive word in the course of a radio broadcast." *Id.*

76. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1807 (2009) (citing Infinity Brdcst. Corp., *Memorandum Opinion and Order*, 3 F.C.C.R. 930, para. 5 (1987)).

77. *Id.*

78. *Id.* at 1807 (quoting Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Brdcst. Indecency, *Policy Statement*, 16 F.C.C.R. 7999, 8802, para. 9, 8003, para 10 (2001) (emphasis omitted)).

79. *Id.* (citing Complaints Against Various Brdcst. Licensees Regarding Their Airing of

A striking feature of this account of the growth of the scope and read of the FCC indecency policy is how each new FCC interpretation of the policy expanded and contradicted the FCC's original narrow approach. For example, the *WGBH* case, which, as the Court correctly said, emphasized the narrowness of FCC regulation,[80] was succeeded by a regulatory regime whose major characteristic is its ever-expanding scope. But even the expansion of indecency regulation was restrained to some extent by the "principal factors" set forth above, which the FCC said determined whether a particular broadcast was indecent. However, if we apply these factors to a policy of making even fleeting expletives sanctionable, they no longer make much sense. How graphic or explicit can a single fleeting expletive be? How can the broadcast of a single F-Word or S-Word dwell on or repeat the material in question? By definition, the single use of a swear word is nonrepetitive. Finally, how likely is it that a single use of the F-Word or the S-Word can be said to have been presented in order to pander, titillate, or shock? In summary, applying the FCC's context-based approach to indecency to a single broadcast of a single expletive makes meaningless the principal factors that previously had governed whether a broadcast, considered in context, was indecent.

Justice Scalia disagreed with Fox Television's argument that the FCC's new position was inconsistent with *Pacifica*.[81] Under *Pacifica*, context was "all-important."[82] In the Court's view, the new FCC position placed great emphasis on context as well.[83] For example, the FCC had ruled that the movie *Saving Private Ryan* was not sanctionable because the words used were integrated into the artistic enterprise.[84] Another argument in support of the argument that fleeting expletives were not per se prohibited and that context was all-important is that the FCC's new fleeting expletive policy contained a news exception.[85] But the Second Circuit noted that the FCC had also declared that the news exception was not an "outright news exemption from [its] indecency rules."[86]

The Court said the FCC's view that the F-Word's "power to insult

---

the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, 4976 n.4 (2004)).

80. App'n of WGBH Educ. Foundation for Renewal of License for Noncommercial Educ. Station WGBH-TV, *Memorandum Opinion and Order*, 69 F.C.C.2d 1250, 1254 (1978).

81. *Fox TV Stations*, 129 S. Ct. at 1815.

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

83. *Id.* at 1814.

84. *Id.*

85. Fox TV Stations v. FCC, 489 F.3d 444, 463 (2d Cir. 2007) (internal citations and quotations omitted).

86. *Id.*

and offend derives from its sexual meaning" was a rational one.[87] The FCC's decision to look at the "patent offensiveness of even isolated uses of the sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*."[88]

But does *Pacifica* support such an interpretation? Compare the *Fox Television Stations* Court's analysis of the meaning of context in *Pacifica* with the conclusionary remarks by Justice Stevens in *Pacifica*:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.[89]

In stressing the narrowness of the *Pacifica* ruling, Justice Stevens also emphasized that the Court did not hold that an occasional expletive would warrant any sanction.[90] It should be noted that these comments, unlike other portions of Justice Stevens's *Pacifica* opinion, were joined in by the Court.[91]

The broadcasters in *Fox Television Stations* contended that the FCC's new policy that even isolated expletives could be subject to sanction went beyond "the scope of authority approved in *Pacifica*."[92] But Justice Scalia rejected the idea that *Pacifica* had set the "outer limits of permissible regulation."[93] Indeed, he construed *Pacifica* as leaving for another day resolution of the issues as to whether an "occasional expletive" could be sanctioned.[94]

As to the larger First Amendment issues which the FCC's new fleeting expletive policy presented, the Court conceded that the policy might chill some speech which the FCC could not regulate under the First Amendment.[95] Whether the FCC's policy is unconstitutional, however, Justice Scalia said, "will be determined soon enough, perhaps in this very case."[96] In the meantime, Justice Scalia observed that "any chilled references to excretory and sexual material 'surely lie at the periphery of

---

87. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1812 (2009).

88. *Id.*

89. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

90. *Id.*

91. These comments of Justice Stevens were in Part IV.C of his opinion in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 728. Justices Powell and Blackmun, concurring, joined Part IV of Justice Stevens's opinion. *Id.* at 755.

92. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009).

93. *Id.*

94. *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)).

95. *Id.* at 1819.

96. *Id.*

First Amendment concern.'"[97] But there was no need to pass on these issues in the absence of a lower court opinion. The Court ruled that the FCC orders were "neither arbitrary nor capricious."[98] The contrary ruling of the Second Circuit was reversed and remanded.[99]

B. Justice Kennedy's Concurrence

Although the issue was not before the Court, Justice Scalia's sympathetic treatment of the FCC's new fleeting expletive policy suggests that he will not be in the vanguard of those seeking to invalidate that policy on First Amendment grounds. From a First Amendment perspective, Justice Kennedy's separate concurrence is much more noncommittal. Indeed, perhaps his belief that this was not the occasion to touch on the First Amendment issues in any way prompted his concurrence. Justice Kennedy conceded that the reasons the FCC gave for its change of policy were not so "precise, detailed, or elaborate as to be a model of Agency

---

97. *Id.* (quoting *Pacifica Found*., 438 U.S. at 743).

98. *Id.* at 1819.

99. *Id.* On September 16, 2009, Fox asked the Second Circuit to vacate the Supreme Court's remand order. The FCC argued, in support of its request, that the lesser protection accorded to the broadcast media violated the First Amendment. Fox contended that the FCC's actions were unconstitutional since the expletives uttered by Nicole Richie and Cher were unscripted. Furthermore, "Fox had no notice and did not intend for the words to be broadcast." *See* John Eggerton, *Fox Takes Aim at Indecency Enforcement Regime,* BROAD. & CABLE, Sept. 16, 2009, *available at* http://www.broadcastingcable.com/article/354302-Fox_Takes_Aim_at_Indecency_Enforcement_Regime.php (internal quotations omitted).

On January 13, 2010, the oral argument on the remanded case took place before the same Second Circuit panel that found that the FCC's new policy that even a single "fleeting expletive" was presumptively banned was arbitrary and capricious. A day after the oral argument, the Associated Press filed a story which stated that "[a]ll three judges on a panel of the 2d U.S. Circuit Court of Appeals in Manhattan kept a government lawyer on the defensive decision in the case . . . ." *See 2nd Circuit Rehears 'fleeting expletives' Case*, THE ASSOC. PRESS, Jan 14, 2010, *available at* http://www.firstamendmentcenter.org/news.aspx?id=22498. At the oral argument on the remand, the Second Circuit panel appeared sympathetic to the broadcasters' First Amendment position:

> Judge Rosemary Pooler, presiding at the argument before the U.S. Court of Appeals for the Second Circuit, repeatedly mocked FCC attorney Jacob Lewis's claim that the agency's policy of "bending over backwards" to respect the editorial discretion of is sufficient to avoid the obvious First Amendment problems with its broad, vague, and subjective regime of punishing broadcasters for programming that it considers "indecent."

See Sarcasm, Reigns as Court of Appeals Revists the FCC's "Fleeting Expletives" Rule, http://censorshell.com/sarcasm-reigns-as-court-of-appeals-revisits-the-fccs-fleeting-expletives-rule/ (last visited Jan. 13, 2010).

A New York Times editorial opined on the oral argument in a similar but more restrained vein: "[I]t is always risky to try to predict a case's outcome from oral argument. But it appears that the judges who heard this case understood that the commission's highly subjective standard violated the Constitution." *See* Editorial, *Policing Indecency*, N.Y. TIMES, Jan. 20, 2010, at A20.

explanation."[100] The reasons the FCC gave for its change of policy were sufficient, nevertheless, to justify its change of course.[101] Since the case came to the Supreme Court from the Second Circuit on the issue of whether the reasons for the FCC's change of policy were sufficient, Justice Kennedy thought the Court should limit its ruling to that issue and reserve judgment on whether the FCC's new fleeting expletive policy was unconstitutional.[102]

C. The Dissents: Justices Stevens, Breyer, and Ginsburg

1. Justice Stevens's Dissent

The dissent by Justice Stevens in *Fox Television Stations* is particularly significant since the majority opinion in that case rests to some extent on a reading of his majority opinion in *Pacifica*. It is a reading, however, which Justice Stevens does not share.[103] Justice Stevens said that the *Pacifica* Court did not hold that "any word with a sexual or scatological origin, however used, was indecent."[104] *Pacifica* allowed the FCC to regulate "only those words that *describe* sex or excrement."[105] The new FCC policy now says "any use of the words at issue in this case, in any context and in any form, *necessarily* describes sex or excrement."[106] Justice Stevens's point here is that there is a difference between using an expletive to describe a sexual or excretory function and using such a word "to express an emotion."[107] The first use "rests at the core of indecency" while the second "stands miles apart."[108] Justice Stevens said that most of the focus on the FCC's change in its indecency policy has been on the "repetitive use" issue.[109] But making all words involving sexual function or excrement subject to sanction was just as significant.[110]

---

100. FCC v. Fox Television Stations Inc., 129 S. Ct. 1800, 1824 (2009).
101. *Id.*
102. *Id.*
103. *See id.* at 1824-28 (Stevens, J., dissenting).
104. *Id.* at 1827.
105. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1827 (2009) (emphasis added).
106. *Id.* (emphasis in original).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Fox TV Stations*, 129 S. Ct. at 1827. On this point, Justice Stevens in his dissent in *Fox Television Stations* observed the following:

> While the "repetitive use" issue has received the most attention in this case, it should not be forgotten that *Pacifica* permitted the Commission to regulate only those words that describe sex or excrement. . . .The FCC minimizes the strength of this limitation by now claiming that any use of the words at issue in this case, in any context and in any form, *necessarily* describes sex or excrement. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002*

Although not mentioned in any of the opinions in *Fox Television Stations*, Justice Harlan's opinion for the Court in *Cohen v. California*[111] should be recalled at this point. This also was a case involving the F-Word, but *Cohen* refused to sanction its use.[112] As Justice Harlan said so memorably, "one man's vulgarity is another's lyric."[113] Justice Harlan also reminded us that "words are often chosen as much for their emotive as their cognitive force."[114] Justice Stevens contended that, since the FCC had gone "far beyond *Pacifica's* reading of § 1464," its change of policy should "be declared arbitrary and set aside as unlawful."[115]

Justice Stevens said the majority in *Fox Television Stations* wrongly assumed that the *Pacifica* decision permits the "word 'indecent,' as used in 18 U.S.C. § 1464," to authorize the FCC "to punish the broadcast of *any* expletive that has a sexual or excretory origin."[116] Justice Stevens denied that *Pacifica* was "so sweeping."[117] Moreover, if the FCC's present view of indecency had been presented to the *Pacifica* Court, he says it would have been rejected.[118]

2. Justice Breyer's Dissent

Justice Breyer's dissent, in *Fox Television Stations*, joined in by Justices Souter, Ginsburg, and Stevens, contended that the FCC had failed to give an adequate explanation for its change of policy.[119] Breyer's view of adequacy was considerably more demanding than that of the majority, although he denied Justice Scalia's charge that he was requiring a heightened standard of review.[120] He insisted that *State Farm* simply required that courts consider the reasons the FCC was prompted "to adopt the initial policy, and to explain why it now comes to a new judgment."[121]

The FCC had failed to provide such consideration for two reasons. First, the FCC had said almost nothing about the relationship of its "prior

---

and March 8, 2005, 21 FCC rcd. 13299, 13308, Para 23, 2006 WL 3207085 (2006) (*Remand Order)*. . . .The customs of speech refute this claim: There is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. *Id.*

111. 403 U.S. 15 (1971).

112. *See id.*

113. *Id.* at 25.

114. *Id.* at 26.

115. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1828 (2009).

116. *Id.* at 1825 (Stevens, J., dissenting) (emphasis in original).

117. *Id.*

118. *Id.*

119. *Id.* at 1829-41 (Breyer, J., dissenting).

120. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1831 (2009) (Breyer, J., dissenting).

121. *Id.*

'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship.'"[122] Yet the FCC's prior fleeting expletive policy had been adopted in the first place because the FCC wanted "to avoid treading too close to the constitutional line."[123] But *Pacifica* had long identified that line to be contrary to the new position of the FCC. FCC decisions from 1978 to 2004 reiterated its policy that fleeting expletives would not violate its indecency standard.[124] The FCC had based this policy, furthermore, on the Supreme Court's decision in *Pacifica*.[125]

A second inadequacy of the FCC's change in policy was the "potential impact of its new policy upon local broadcasting coverage."[126] The FCC's change in policy threatened broadcasters with heavy fines pursuant to its authority under 47 U.S.C. § 503(b) for transmitting even a single fleeting expletive.[127] As has been mentioned earlier, a widely publicized example was when the FCC imposed a $550,000 fine on CBS for broadcasting an incident during the halftime show at the 2004 Super Bowl.[128] The single offense was the exposure of the bare right breast of singer Janet Jackson to the millions watching on television for nine-sixteenths of one second—a fleeting image indeed.[129] The Third Circuit overturned the penalty.[130] But on May 4, 2009, the Supreme Court granted certiorari, vacated the judgment and remanded for further consideration in light of its recent *Fox Television Stations* decision.[131]

Justice Breyer said that one of the justifications offered by the FCC for its change in policy was that, as a result of new developments, lower "bleeping" technology costs now make it more feasible to block "even

---

122. *Id.* at 1833.
123. *Id.*
124. *Id.* at 1833-34.
125. *Id.*
126. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1835 (2009) (Breyer, J., dissenting).
127. *Id.* at 1832 (Breyer, J., dissenting).
128. *See supra* note 8 and accompanying text.
129. *CBS Corp. v. FCC*, 535 F.3d 167 (3d. Cir. 2008).
130. *See id.*
131. FCC v. CBS Corp., 129 S. Ct. 2176 (2009). On February 23, 2010, the oral argument on the remand in the Janet Jackson "fleeting image" case was held before the same panel of the United States Court of Appeals for the Third Circuit which had heard the original appeal by CBS of the fine the FCC had imposed on it. The Associated Press reported that during the oral argument Judge Marjorie Rendell observed that the FCC had failed to indicate in its rules "that nudity was another thing entirely from bad language." She asked how CBS could be put on notice as to what the FCC rule was when the "FCC does not draw any distinction between the two fleeting things." The Associated Press account of the oral argument on remand concluded by saying that the judges on the Third Circuit panel "did not indicate how they would rule." *See* AP NEWS, *CBS Fights 2004 'wardrobe malfunction fine*,' reprinted in USA TODAY, Feb. 23, 2010, *available at* http://www.usatoday.com/life/television/news/2010-02-23-CBS-FCC-fine_N.htm.

fleeting words in a live broadcast."[132] But although this might be true for the networks, it was much less likely to be true for the smaller independent broadcasters that cannot afford "bleeping" technology.[133] Justice Breyer said the problems that the new fleeting expletive policy posed for the smaller broadcasters received no consideration at all.[134]

3. Justice Ginsburg's Dissent

Although Justice Ginsburg joined Justice Breyer's dissenting assault on the FCC reversal of policy, she wrote separately. She believed there was "no way to hide the long shadow the First Amendment casts over what the Commission has done."[135] Justice Ginsburg pointed out the crucial role that repetition of the so-called dirty words had played in the FCC *Pacifica* order.[136] She emphasized that the *Pacifica* decision had been "tightly cabined."[137] She concluded with a reference to Brennan's dissent in *Pacifica* that "words unpalatable to some may be 'commonplace' for others."[138]

D. Justice Thomas's Concurrence

The concurrence by Justice Thomas took a very different First Amendment perspective than that of the dissents of either Justice Breyer or Justice Ginsburg.[139] Although Justice Thomas joined the Court's opinion and agreed with it "as a matter of administrative law," he questioned the constitutional validity of broadcast programming regulation altogether.[140] Specifically, he questioned the constitutionality of two foundational stones of such regulation—*Red Lion Broadcasting Co. v. FCC*[141] and *Pacifica*.[142] Justice Thomas believed both *Red Lion* and *Pacifica* should be reversed.[143] However, his concurrence did not confront the fact that these cases were based on totally different rationales. *Pacifica* was not based on technological scarcity; it was based on the social impact of broadcasting.

---

132. *Fox Television Stations*, 129 S. Ct. at 1835 (Breyer, J., dissenting) (internal quotations omitted).

133. *Id.*

134. *Id.*

135. *Id.* at 1828 (Ginsburg, J., dissenting).

136. *Id.*

137. *Id.* at 1829.

138. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1829 (2009) (Ginsburg, J., dissenting) (quoting FCC v. Pacifica Found., 438 U.S. 726, 776 (1978) (Brennan, J., dissenting)).

139. *See id.* at 1819-22 (Thomas, J., concurring).

140. *Id.* at 1820.

141. 395 U.S. 367 (1969).

142. 438 U.S. 726 (1978).

143. FCC v. Fox TV Stations, 129 S. Ct. 1800, 1821 (2009) (Thomas, J., concurring).

Certainly, the scarcity rationale on which *Red Lion* was predicated, when viewed in light of the variety of electronic media technologies available today, seems somewhat obsolete. But *Red Lion* is about more than the scarcity rationale for broadcast regulation.

For forty years, the Supreme Court has been asked to repudiate *Red Lion* on the ground that it violates the First Amendment. Yet the Supreme Court—despite many invitations and opportunities to do so—has refused to reverse it. Why? I think it is because the Court as a whole resists an idea that is at the core of Justice Thomas's concurrence—that is, all substantive regulation of the electronic media violates the First Amendment. *Red Lion* says it is the right of the public, not the broadcasters, which takes precedence.[144]

VI. *CBS CORP. V. FCC*: THE JANET JACKSON CASE

If we are trying to determine the future path of the FCC's policy on fleeting expletives, I think it is important to stress the significance of the fact that the Court has agreed to review the Janet Jackson case.[145] An important aspect of the Janet Jackson case is that it raised the question of what exactly the reach of the FCC's fleeting material policy is. Was the FCC's fleeting expletive policy limited to utterances? Or did it extend as well to fleeting images? The FCC argued that its past policy of exempting fleeting expletives did not apply to fleeting images.[146] The Third Circuit panel engaged in an analysis of FCC rulings on this issue and determined that for nearly thirty years, the FCC's fleeting material policy had made no distinction between fleeting utterances and fleeting images.[147] The panel concluded, therefore, that the FCC had exempted fleeting or isolated material—including fleeting images—from indecency regulation.[148] Speaking for the Third Circuit panel, Chief Judge Scirica determined, that "[a]t the time of the Halftime Show [featuring Justin Timberlake, Janet Jackson, and her breast] was broadcasted by CBS, the FCC's policy on fleeting material was still in effect."[149] Chief Judge Scirica declared that the FCC was now distinguishing between fleeting utterances and fleeting images for the first time.[150] In so doing, the FCC was departing from past policy. Therefore, the FCC was required to explain its departure from past

144. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters which is paramount.").

145. CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), *cert. granted*, FCC v. CBS Corp., 129 S. Ct. 2176 (2009).

146. *Id.* at 174.

147. *Id.*

148. *Id.*

149. *Id*.

150. *Id.*

policy.[151] Judge Scirica ruled that

> [l]ike any agency, the FCC may change its policies without judicial second-guessing. But it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure. Because the FCC failed to satisfy this requirement, we find its new policy arbitrary and capricious under the Administrative Procedure Act as applied to CBS.[152]

Indeed, the Third Circuit contrasted the FCC's position in the Janet Jackson case with the FCC ruling on fleeting utterances in *Fox Television Stations*: "Here, unlike in *Fox*, the FCC has not offered any explanation—reasoned or otherwise—for changing its policy on fleeting images."[153] Rather, as we have seen, the FCC insisted it had never had a policy of exempting fleeting images from indecency regulation.[154] But, of course, as we have also seen, Judge Scirica, relying on the FCC's own past decisions and rulings, rejected that argument.[155]

Since the Supreme Court reviewed the Third Circuit's decision in the Janet Jackson case, one might speculate that at least four justices (the minimum number necessary for certiorari to be granted[156]) believe either (1) that the FCC had never included fleeting images—only fleeting utterances—in its prior policy of exempting fleeting expletives from indecency regulation, or (2) that, as a result of its decision in *Fox Television Stations*, fleeting utterances and fleeting images are now equally subject to enforcement under the FCC's indecency policy.

VII. THE FCC'S NEW FLEETING EXPLETIVE POLICY AND THE SUPREME COURT—THE FUTURE

Finally, I would like to address the actual substantive policy issue in *Fox Television Stations*. I think the FCC's prior fleeting expletives policy, treating fleeting expletives as a safe harbor, was a sensible one. Insisting on repetition as a prerequisite to enforcement of the indecency ban gives broad and necessary latitude to the programming and editorial judgment of broadcasters. Furthermore, it is consistent with the First Amendment approach taken in *Pacifica*.

Behind *Fox Television Station*'s administrative law veil, there is evidence of an intense, ongoing First Amendment debate. I believe that some justices see the FCC's prior fleeting expletive policy as consistent with the First Amendment, but they think the new policy is not consistent

---

151. *CBS Corp.*, 535 F. 3d at 175.
152. *Id.*
153. CBS Corp. v. FCC, 535 F.3d 167, 183 (3d Cir. 2008).
154. *Id.* at 174.
155. *Id.* at 184-89.
156. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 674 (5th ed. 2007).

with the First Amendment. These justices are Justices Stevens, Souter,[157] Ginsburg, and Breyer.

There are other justices who I believe are likely to see both the FCC's prior fleeting expletive policy and its present one as consistent with the First Amendment. These justices are Chief Justice Roberts and Justices Scalia and Alito. It is unclear whether Justice Kennedy is in this camp as well. As for Justice Thomas, if the substantive constitutional issue were presented, I believe he would find both the prior and the present fleeting expletive policy to be violations of the First Amendment.

With respect to Justice Sotomayor, who has taken Justice Souter's seat on the Supreme Court, her views on FCC indecency regulation, or on its consistency with First Amendment standards, have yet to be voiced. If I am right about the views of the justices, the larger First Amendment law point here is that a majority of the Court, which includes liberal and conservative justices, probably supports indecency regulation as well as the FCC's prior fleeting expletive policy, despite their attendant vagueness and chilling effect infirmities. Whether the Supreme Court will accept or reject a First Amendment assault on the new FCC fleeting expletive policy is less clear.

157. For Souter, of course, the 2008–09 Supreme Court term was his last.