

# When Does F\*\*\* Not Mean F\*\*\*?: *FCC v. Fox Television Stations* and a Call for Protecting Emotive Speech

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## I. INTRODUCTION

Almost since the beginning of its First Amendment jurisprudence, the Supreme Court of the United States has had a love-hate relationship with words. Some words, the Court said early in its free-speech history, are undeserving of First Amendment protection because, in balance, they harm

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society or do not contribute to the search for truth.<sup>1</sup> The very utterance of such words would “inflict injury or tend to incite an immediate breach of the peace.”<sup>2</sup> Other words deserve extra protection because they are “the essence of self-government.”<sup>3</sup> These words constitute “speech that matters.”<sup>4</sup> For the most part, the Court has been able to delineate a structure to this “hierarchy of First Amendment values,”<sup>5</sup> but whether the application of the First Amendment to that structure has been effective is another question. One critic noted, for example, that the Court’s use of the theory that “not all speech is of equal First Amendment importance”<sup>6</sup> “has been marked by vacillation and uncertainty.”<sup>7</sup> Clearly, the Court’s dealings with nontraditional language and conduct can be so categorized. Whether the issue is the discussion of words that cannot be uttered over the airwaves,<sup>8</sup> nude dancers in Pennsylvania,<sup>9</sup> or award-winning musicians uttering profanities on television,<sup>10</sup> the Court has seemingly become befuddled when confronted with expression that is indecent or simply out of the ordinary.<sup>11</sup>

The Court’s confrontation with such slippery topics continued in the 2008–2009 term with *FCC v. Fox Television Stations, Inc.*,<sup>12</sup> a case involving one of the Court’s biggest bugaboos—the use of the so-called “f-word.”<sup>13</sup> The case did not turn on the use of the offensive word, however,

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1. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

2. *Id.*

3. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271, 273 (1964) (The “central meaning of the First Amendment” is to protect speech of self-governing importance.). See also *id.* at 282 (“It is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.”).

4. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

5. *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (plurality).

6. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

7. Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298 (1995).

8. *Pacifica*, 438 U.S. 726.

9. *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).

10. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

11. Another example that does not fit easily into a specific category but demonstrates the Court’s troubles dealing with the language is *Morse v. Frederick*. There, the Court allowed the punishment of a student for displaying a banner that read “BONG HiTS 4 JESUS” at an off-campus, school-sponsored function. 551 U.S. 393, 393 (2007). Writing for the Court, Chief Justice John Roberts found that the banner either advocated or celebrated the use of marijuana. *Id.* at 402. Not all Justices agreed. Justice John Paul Stevens called the banner’s message nonsense that neither advocated action nor violated any school policy. *Id.* at 435 (Stevens, J., dissenting).

12. 129 S. Ct. 1800 (2009).

13. The Author struggled with how to use the offending language in this Article, and ultimately decided to use the toned-down descriptor except in direct quotations or where the

but on the more mundane question of whether the FCC met the requirements of the Administrative Procedure Act (“APA”)<sup>14</sup> when it changed its policies relating to the broadcast of indecent language. While federal law prohibits the use of obscene, profane, or indecent language over the airwaves,<sup>15</sup> the FCC, with the blessings of the Court,<sup>16</sup> established that fleeting expletives did not meet the definition of indecency, whereas repetitive use of such words did.<sup>17</sup> When, in 2004, the FCC changed its policy and later took actions against broadcasters for on-air fleeting expletives,<sup>18</sup> it was required by the APA to ensure that such changes and resulting rulemaking were not arbitrary and capricious.<sup>19</sup>

Whether the FCC met that requirement was the question in *Fox Television Stations*. It is clear, however, that language was the undercurrent of the opinion. Only Justices Clarence Thomas<sup>20</sup> and Stephen Breyer<sup>21</sup> did not specifically address the use of the f-word. Each of the other Justices at least confronted it, and the use of the word was key to the majority opinion by Justice Antonin Scalia<sup>22</sup> and the dissent of Justice John Paul Stevens.<sup>23</sup> Justices Scalia and Stevens were clearly at odds over both the use and definitions of the word, elements that might play a significant role in the

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use of the full word contributes to a greater understanding of the issue or issues being discussed.

14. 5 U.S.C. §§ 551–59 (2006).

15. 18 U.S.C. § 1464 (2006).

16. *See* FCC v. Pacifica Found., 438 U.S. 726, 732, 750 (1978);. *See also* Robert Corn-Revere, FCC v. Fox Television Stations, Inc.: *Awaiting the Next Act*, 2009 CATO SUP. CT. REV. 295, 307–08 (2009).

17. Application of WGBH Educ. Found., *Memorandum Opinion and Order*, 69 F.C.C. 2d 1250, para. 10 (1978) [hereinafter *WGBH Educ. Found.*].

18. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, *Memorandum and Order*, 19 F.C.C.R. 4975, paras. 4, 12 (2004) [hereinafter *Golden Globes Order*].

19. 5 U.S.C. § 706(2)(A) (2006).

20. Justice Thomas’s concurrence was based on his assertion that there was “questionable viability” in *Red Lion Brdst. Co. v. FCC*, 395 U.S. 367 (1969), and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), as precedents. 129 S. Ct. 1800, 1819–20 (Thomas, J., concurring). Dramatic changes in technology that eviscerated the assumptions underlying the opinions, Justice Thomas wrote, would support a departure from the precedents established in the cases. *Id.* at 1821–22 (Thomas, J., concurring). *See also* *Pacifica*, 438 U.S. at 748–49; *Red Lion*, 395 U.S. 367 (1969); *Fox Television Stations*, 129 S. Ct. at 1806, 1820–22, 1822 n.5; *infra* text accompanying notes 351–358.

21. Though Justice Breyer did not specifically confront the use of the f-word on the airwaves, he wrote that the majority had misinterpreted *Pacifica* and wrote in support of the fleeting expletives protocol. 129 S. Ct. at 1833–35 (Breyer, J., dissenting).

22. *Id.* at 1808–09, 1812.

23. *Id.* at 1826–28 (Stevens, J., dissenting).

constitutional questions that were avoided in *Fox Television Stations*<sup>24</sup> but are now at issue.<sup>25</sup>

A panel of the Second Circuit Court of Appeals held in July 2010 that the FCC's indecency policy was unconstitutionally vague because it created "a chilling effect that goes far beyond the fleeting expletives at issue here."<sup>26</sup> In a bruising attack on the policy, the Second Circuit reported that broadcasters "simply want to know with some degree of certainty what the policy is so that they can comply with it."<sup>27</sup> The broadcasters do not know, however, because the FCC does not know. After summarizing the FCC's application of what it called "a vague, indiscernible standard," the court noted that "[i]f the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so."<sup>28</sup> The court suggested that strict scrutiny should apply to regulations on broadcast television, in part because the changes in the media landscape over the years have eliminated "the twin pillars of pervasiveness and accessibility to children" as rationales for lessened protection for the broadcast media.<sup>29</sup> But, the court noted, it could not establish that standard because it was "bound by Supreme Court precedent, regardless of whether it reflects today's realities."<sup>30</sup> The FCC may be able to create a constitutional indecency policy, the court indicated, but the current policy fails constitutional scrutiny.<sup>31</sup> In June 2011, the Supreme Court granted certiorari.<sup>32</sup>

Similar issues are integral to two other cases that will be implicated by a ruling in *Fox Television Stations*. Earlier this year, the Second Circuit vacated a fine of \$1.21 million against ABC affiliate stations imposed by the FCC.<sup>33</sup> *ABC, Inc. v. FCC* involved a fleeting image rather than a fleeting expletive. The FCC had fined ABC \$27,500 for each station that broadcasted an episode of *NYPD Blue* in which a woman's bare buttocks

24. *Id.* at 1819. The Second Circuit also avoided the issue. *See Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. 2007).

25. Justice Scalia suggested that those issues might return to the Court. "It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution," he wrote. 129 S. Ct. at 1819. "Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case." *Id.*

26. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010).

27. *Id.* at 331.

28. *Id.*

29. *Id.* at 326.

30. *Id.* at 327.

31. *Id.* at 335.

32. *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011) (mem.).

33. *See ABC, Inc. v. FCC*, 404 F. App'x 530, 533–34 (2d Cir. 2011).

were shown for approximately seven seconds.<sup>34</sup> “[T]here is no significant distinction between this case and *Fox*,” the court held,<sup>35</sup> and because the indecency policy was held unconstitutionally vague in that case, the FCC order, based on the same policy, was vacated.<sup>36</sup>

A third case, *CBS Corporation v. FCC*,<sup>37</sup> is stalled in the Third Circuit. The network is challenging an FCC-imposed fine of \$550,000 against CBS-owned television stations for the broadcast of the 2004 Super Bowl Halftime Show.<sup>38</sup> During the performance, entertainer Justin Timberlake pulled a portion of the costume worn by Janet Jackson, exposing Jackson’s breast for nine-sixteenths of one second.<sup>39</sup> The FCC maintained that, even if its fleeting expletive protocol was in place, that protocol applied only to fleeting utterances and not to visual images.<sup>40</sup> In its 2008 ruling in the case, the Third Circuit rejected the FCC’s argument. Even though the exposure of Jackson’s breast was “a deceitful and manipulative act,”<sup>41</sup> the FCC’s policy on fleeting material was in effect when the exposure occurred,<sup>42</sup> and a review of the FCC’s enforcement history demonstrated that the FCC had never limited its fleeting expletive protocol only to utterances.<sup>43</sup> When the FCC took action against CBS, it did so despite “a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency,”<sup>44</sup> and the action against CBS was a departure from prior policy.<sup>45</sup> The action, therefore, was arbitrary and capricious under the APA.<sup>46</sup> Six days after deciding *Fox Television Stations*, the Supreme Court vacated the judgment in the *CBS* case and remanded it for consideration in light of its decision.<sup>47</sup> On November 2, however, the Third Circuit again ruled that the action by the FCC was arbitrary and capricious under the APA, primarily because the

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34. *Id.* at 533–34.

35. *Id.* at 535.

36. *Id.* at 533.

37. 535 F.3d 167 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 2176 (2009) (remanded for further consideration in light of *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009)).

38. *Id.* at 171–72.

39. *Id.*

40. *Id.* at 174.

41. *Id.* at 171.

42. *Id.* at 174.

43. *Id.* at 174–75.

44. *Id.* at 179.

45. *Id.* at 181.

46. *Id.* at 189.

47. *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009) (mem. op.).

action occurred prior to the FCC rulings that became the basis for the *Fox Television Stations*.<sup>48</sup>

But more than the outcomes of the ABC and CBS cases hinges on the Court's decision in *Fox Television Stations*. The entire structure of the FCC's policymaking on indecency and, indeed, the philosophy behind the regulation of broadcasting may be at issue. Attorney Robert Corn-Revere, for example, predicted that the *Fox* decision was "more like an intermission between acts" than "the end of the story."<sup>49</sup> He wrote that a "more momentous judicial review of the FCC's ban on broadcast indecency is yet to come."<sup>50</sup>

When the Court considers *Fox Television Stations*, it could parse definitions of words or delve into the changing role of the broadcast media in an increasingly technological world. A simpler solution, however, may lie in a case that only Justice Ruth Bader Ginsburg cited in *Fox Television Stations*. *Cohen v. California* is the only case in the Court's history that turned exclusively on the Court's examination of the f-word.<sup>51</sup> It is remarkable that Justice Scalia ignored the case, though he may have done so because it was not related to broadcasting. Justice Ginsburg recognized the relevance of *Cohen*, however. She quoted language that could well hold the key to the resolution of the indecency issue,<sup>52</sup> particularly in light of Justice Thomas's biting critique in *Fox Television Stations* of the regulatory scheme governing the broadcast media—rules that he says were poorly conceived and are irrelevant in today's media environment.<sup>53</sup>

In *Cohen*, Justice John Marshall Harlan recognized that language has two elements—cognitive and emotive—and wrote that the emotive element deserves as much protection as the cognitive.<sup>54</sup> Unfortunately, no other justice or Court has fully recognized the import of Justice Harlan's proposal, and it has withered since its enunciation in 1971. Its revival could very well provide a solution to the issues dividing Justices Scalia and Stevens and establish a reasonable framework for confronting indecent speech.

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48. *CBS v. FCC*, \_\_ F.3d \_\_ (3d. Cir. 2011), 2011 WL 5176139.

49. Corn-Revere, *supra* note 16, at 297 (noting that the parties "extensively briefed and argued whether the new policy violates the First Amendment," though the Court avoided that issue).

50. *Id.*

51. 403 U.S. 15 (1971); *see infra* note 129.

52. *Fox Television Stations*, 129 S. Ct. 1800, 1829 (2009) (Ginsburg, J., dissenting).

53. *Id.* at 1821–22 (Thomas, J., concurring). *See also infra* discussion accompanying notes 351–358.

54. 403 U.S. at 25–26. *See also* text accompanying *infra* notes 158–60.

## II. *FEDERAL COMMUNICATIONS COMMISSION V. FOX TELEVISION STATIONS, INC.*

*Federal Communications Commission v. Fox Television Stations, Inc.* grew from the broadcasts of the 2002 and 2003 Billboard Music Awards on the Fox Television network,<sup>55</sup> though the FCC's response to the broadcasts did not occur until 2006.<sup>56</sup> The FCC had, in fact, altered its policy on broadcast indecency in 2004, based on a broadcast that occurred in 2003.<sup>57</sup> The FCC did not impose sanctions for the 2003 broadcast,<sup>58</sup> however, so a challenge to the policy change did not occur until the complaint by Fox. That serpentine intermingling of broadcasts and actions provides some idea of the convoluted nature of FCC policymaking and enforcement.

The 2004 policy change grew from the 2003 broadcast of the Golden Globes Awards, during which entertainer Bono commented that his receiving an award was "really, really fucking brilliant."<sup>59</sup> The FCC's enforcement bureau concluded that the comment was not indecent because Bono "did not describe, in context, sexual or excretory organs or activities and that the utterance was fleeting and isolated."<sup>60</sup> The full FCC reversed, finding that the use of the word fell within its indecency definition, even though it was used as an intensifier rather than a literal descriptor, holding: "[G]iven the core meaning of the 'F-Word,' any use of that word . . . inherently has a sexual connotation . . ."<sup>61</sup> The broadcast was determined to be patently offensive because the word "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," and "[i]ts use invariably invokes a coarse sexual image."<sup>62</sup> In addition, Bono's use was found to be entirely shocking and gratuitous.<sup>63</sup>

The FCC also found that exempting such language from enforcement actions because of its fleeting use would lead to more widespread use of the language, and the action was necessary to safeguard children.<sup>64</sup> In addition,

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55. 129 S. Ct. 1800, 1808 (2008).

56. Complaints Regarding Various Television Brdcsts. Between Feb. 2, 2002 & Mar. 8, 2005, *Notices of Apparent Liab. and Memorandum Opinion and Order*, 21 F.C.C.R. 2644 (Mar. 15, 2006) [hereinafter *Billboard Liab. Notice*].

57. *Id.*

58. *Golden Globes Order*, *supra* note 18, at para. 15 (March 18, 2004).

59. *Id.* at para. 3 n.4.

60. *Id.* at para. 3, at 4976.

61. *Id.* at para. 8.

62. *Id.* at para. 9.

63. *Id.*

64. *Id.*

the FCC found that technological advances have made it easier to excise a single use of an expletive.<sup>65</sup>

The FCC acknowledged that it was changing course in its regulation of indecent language. Previously, the FCC noted, such a broadcast would have been permitted under FCC precedent, so in the case at issue, the broadcaster “did not have the requisite notice to justify a penalty.”<sup>66</sup> However, the FCC held, the exemption of fleeting expletives from FCC action “is no longer good law.”<sup>67</sup>

The change in policy, despite Justice Scalia’s attempt in the opinion of the Court to develop a contrary position, was relatively sudden. The FCC first invoked the statutory ban on indecent broadcasts in 1975 and announced the definition of indecent speech that, as Justice Scalia pointed out, “it uses to this day”:<sup>68</sup> “[L]anguage that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience.”<sup>69</sup>

The Supreme Court embraced that reformulation of the indecency concept in its 1978 ruling in *Federal Communications Commission v. Pacifica Foundation*, upholding sanctions for a mid-afternoon broadcast of a monologue by George Carlin describing words that could not be uttered over the airwaves.<sup>70</sup> The Court emphasized that its ruling was narrow, that is, that the monologue was indecent as broadcast and that it would not be indecent in other circumstances.<sup>71</sup> The time of the broadcast was a key factor, but so was the fact that the offensive words were repeated many times.<sup>72</sup>

The Court and the FCC seemed to be of one accord on the issue of broadcast indecency. Three years after its holding in *Pacifica*, the FCC reiterated its intent to observe the narrow nature of the holding, which relied in part on the repetition of the offensive words.<sup>73</sup> Nine years later, the FCC called that protocol “unduly narrow,” but declared that each literal description of sexual or excretory function would be considered in the

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65. *Id.* at para. 11.

66. *Id.* at para. 15, at 4982.

67. *Id.* at para. 12.

68. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2008).

69. A Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 11 (1975).

70. 438 U.S. 726, 741 (1978).

71. *Id.* at 746, 750.

72. *Id.* at 739, 750.

73. *Fox Television Stations*, 129 S. Ct. at 1806 (quoting Application of *WGBH Educ. Found.*, *supra* note 17, at para. 10).



context of the use, even if the use was not repetitive.<sup>74</sup> The FCC reported, however, that repetition would continue to be a requisite to a finding of indecency when a complaint focuses on the use of non-literal expletives.<sup>75</sup>

In 2001, the FCC again emphasized the “full context” element of its analysis, holding that no single factor would provide the basis for a ruling.<sup>76</sup> Three years later, in the case involving Bono, declared for the first time that a non-literal use of an expletive could be actionably indecent, even when the word was used only once.<sup>77</sup> In the absence of sanctions against NBC for the Golden Globes broadcast, however, the case ended. The FCC’s change in protocol was not challenged until Fox Television Stations did so in 2006 in a case that actually began four years earlier.

At the 2002 Billboard Music Awards show, Cher aimed an expletive at her critics: “I’ve also had critics for the last 40 years saying that I was on the way out every year. Right. So f\*\*\* ‘em.”<sup>78</sup> And at the same awards show a year later, Nicole Richie used both the s-word and the f-word during her presentation, despite a mock warning from co-presenter Paris Hilton.<sup>79</sup> March 15, 2006, the FCC released Notices of Apparent Liability for a number of broadcasts, including the two Billboard Music Awards shows, but imposed no sanctions.<sup>80</sup>

The FCC found both broadcasts patently offensive under community standards for television because they involved entirely gratuitous uses of “one of the most vulgar, graphic, and explicit words for sexual activity in the English language.”<sup>81</sup> The broadcasts involved literal descriptions rather than intensifiers, the FCC held, and it found its prior “strict dichotomy between ‘expletives’ and ‘descriptions or depictions of sexual or excretory functions’” to be artificial and illogical “in light of the fact that an ‘expletive’s’ power to offend derives from its sexual or excretory meaning.”<sup>82</sup>

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74. *Id.* at 1807.

75. *Id.* (quoting *Pacifica Foundation, Inc., Memorandum Opinion and Order*, 2 F.C.C.R. 2698, paras. 12–13, (April 29, 1987)).

76. *Id.* (citation omitted).

77. *Id.*

78. *Id.* at 1808.

79. *Id.*

80. See *Billboard Liab. Notice*. Other shows at issue were various episodes of *NYPD Blue*, complaints of which were dismissed on procedural grounds, and CBS’s *The Early Show*, which were held not to be indecent or profane. See *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 323–24 (2d Cir. 2010).

81. *Fox Television Stations, Inc.*, 129 S. Ct. at 1809 (quoting *Complaints Regarding Various TV Brdcasts. Between Feb. 2, 2002 & Mar. 8, 2005, Order*, 21 F.C.C.R. 13299, paras. 17, 59 (2006) [hereinafter *2006 Remand Order*]).

82. *Fox Television Stations, Inc.*, 129 S. Ct. at 1809 (quoting *2006 Remand Order*,

Remarkably, the Order also stated that the immunity for isolated indecent expletives rested only upon staff rulings and dicta, and that the FCC had never held that the isolated use of an expletive was exempt from a finding of indecency.<sup>83</sup> Therefore, Justice Scalia would later add, the order made clear that the FCC had “eliminated any doubt that fleeting expletives could be actionably indecent . . . .”<sup>84</sup>

The FCC imposed no sanctions, but a number of parties petitioned the United States Court of Appeals for the Second Circuit for judicial review. Because of the absence of sanctions, the FCC had not given the broadcasters an opportunity to respond to the indecency charges, so it requested and obtained from the Second Circuit a voluntary remand so the parties could voice their objections.<sup>85</sup>

The Second Circuit found the FCC’s reasoning for its change inadequate under the APA,<sup>86</sup> but Justice Scalia had no trouble upholding the policy change.<sup>87</sup> Under the Act, he wrote, an agency must show that there are good reasons for a new policy but is not required to demonstrate that the reasons for the new policy are better than those for the old policy.<sup>88</sup> The FCC explained the rationale for the change, he wrote, and the reasons satisfied the statutory requirement.<sup>89</sup> In addition, Justice Scalia found the FCC’s reasoning entirely rational:

It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to expletive use of the F-Word, “the word’s power to insult and offend derives from its sexual meaning.”<sup>90</sup>

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*supra* note 81, at para. 23).

83. *2006 Remand Order*, *supra* note 81, at para. 21.

84. *Fox Television Stations, Inc.*, 129 S. Ct. at 1809.

85. *2006 Remand Order*, *supra* note 81, at para. 9.

86. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 447 (2d Cir. 2007).

87. For arguments for and against the change, see Toby Coleman, Comment, *Explaining Change and Rethinking Dirty Words: FCC v. Fox Television Stations, Inc.*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 71 (2008), <https://www.law.duke.edu/journals/djclpp/index.php?action=showitem&id=88> (suggesting that the FCC rule may be unconstitutional); Justin Winkist, Note, *Arbitrary and F^@#\*! Capricious: An Analysis of the Second Circuit’s Rejection of the FCC’s Fleeting Expletive Regulation in Fox Television Stations, Inc. v. FCC*, 57 AM. U. L. REV. 723 (2008) (favoring the FCC rule); *Constitutional Law – Vagueness – Second Circuit Strikes Down the FCC’s Indecency Policy as Void for Vagueness – Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010), 124 HARV. L. REV. 835 (2011) (finding fault with the Second Circuit’s reasoning on remand).

88. *Fox Television Stations, Inc.*, 129 S. Ct. at 1812.

89. *See id.* at 1813.

90. *Id.* at 1812 (quoting *2006 Remand Order*, *supra* note 81, at para. 58).

Justice Scalia conceded that the change may cause some broadcasters to avoid certain language that is beyond the governing power of the FCC but left the determination of constitutional questions for another day.<sup>91</sup>

The issue before the Court technically might have been one of administrative law, but it is clear that Justice Scalia's opinion was colored in large part by the particular words involved, and he made no effort to hide his enthusiasm in endorsing the FCC's new policy. Twice he pointed out that the FCC had made it extremely clear that fleeting expletives were not subject to action;<sup>92</sup> twice he quoted language to the effect that the f-word inherently has a sexual connotation, even when used in nonliteral contexts,<sup>93</sup> and it is from that connotation that the word derives its power to offend;<sup>94</sup> twice he quoted language calling the f-word "one of the most vulgar, graphic, and explicit words for sexual activity in the English language";<sup>95</sup> and twice he reported that Cher's statement during the 2002 Billboard Music Awards was patently offensive because the entertainer did not use the word "as a mere intensifier," but "metaphorically suggested a sexual act as a means of expressing hostility to her critics,"<sup>96</sup> ignoring a contradictory assessment of the comment by Justice Stevens.<sup>97</sup> All this to buttress the FCC's argument that its policy change was reasonable.

Justice Stevens' dissent demonstrated that he was greatly troubled by the holding, and, in particular, its reliance upon *Federal Communications Commission v. Pacifica Foundation* as support.<sup>98</sup>

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91. *Id.* at 1819. *See also supra* note 25.

92. *Fox Television Stations, Inc.*, 129 S. Ct. at 1808 ("[A]ny such interpretation [that fleeting expletives are exempt] is no longer good law." (quoting *Golden Globes Order*, *supra* note 18, at para. 12)); *id.* at 1809 ("[T]he *Golden Globes Order* eliminated any doubt that fleeting expletives" were subject to sanction. (citing *2006 Remand Order*, *supra* note 81, at paras. 23, 61)).

93. *Id.* at 1808–09 (2009) (quoting *Golden Globes Order*, *supra* note 18, at paras. 8–9; *2006 Remand Order*, *supra* note 81, at paras. 16, 58).

94. *Id.* at 1808.

95. *Id.* (quoting *Golden Globes Order*, *supra* note 18, para. 9; *2006 Remand Order*, *supra* note 81, at paras. 17, 59). The quotes, though on different pages and in different sections of the opinion, were five paragraphs apart.

96. *Id.* at 1809 (citing *2006 Remand Order supra* note 81, at para. 60). The two quotations were in subsequent paragraphs.

97. *See id.* at 1827 (Stevens, J., dissenting). Indeed, in Part III-E of his opinion, titled "The Dissents' Arguments," Justice Scalia does not address the arguments about the use of the language made by Justice Stevens. *Id.* at 1816–17.

98. While Justice Stevens dedicated much of his dissent to the improper definition of "indecent" by the FCC and the Court, he also joined Justice Breyer's dissent on grounds that the FCC did not adequately explain its rationale in changing policy with regard to the regulation of indecent language. *Fox Television Stations, Inc.*, 129 S. Ct. at 1825–26 (Stevens, J., dissenting).

The facts of *Pacifica* are so well-known that only a brief recapitulation is needed here.<sup>99</sup> The case was instigated by a complaint from a man who, while driving with his son, turned on his radio and was confronted by a program being broadcasted on a New York radio station owned by Pacifica.<sup>100</sup> As part of a program on society's attitude toward language, the station broadcast a monologue by comedian George Carlin titled "Filthy Words."<sup>101</sup> In the monologue, Carlin repeated seven words that "you couldn't say on the public . . . airwaves . . . the ones you definitely wouldn't say, ever."<sup>102</sup> The words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.<sup>103</sup>

The Court did not consider the specific definition of the f-word in *Pacifica*, but a key question was whether prurience was an element of indecency. The Pacifica Foundation argued that the broadcast was not indecent because it lacked prurient appeal.<sup>104</sup> The Court held that the statute at issue prohibited words that were "obscene, indecent, or profane" and found that each of those descriptors had a separate meaning.<sup>105</sup> "Prurient appeal is an element of the obscene," Justice Stevens wrote for the Court, "but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."<sup>106</sup> Prurient appeal, therefore, was not "an essential component of indecent language."<sup>107</sup> The distinction might be significant in some cases but was irrelevant in *Fox Television Stations*, because the majority followed the lead of Justice Scalia in his assertion that the f-word is always sexual and therefore always indecent.

In his *Fox Television Stations* dissent, Justice Stevens emphasized that the Court found the monologue by George Carlin indecent as broadcast. "We did not decide whether an *isolated* expletive could qualify as indecent," he wrote, "[a]nd we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent."<sup>108</sup> The repetition issue has garnered the most attention, he wrote, but *Pacifica*

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99. See *infra* notes 170–78.

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

101. *Id.* at 729–30.

102. *Id.* at 729.

103. *Id.* at 751 app. A verbatim transcript of the monologue, prepared by the FCC, was attached as an appendix to the Opinion of the Court. See *id.* at 751–55 app.

104. *Id.* at 739.

105. *Id.* at 739–40.

106. *Id.* at 740 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)).

107. *Id.* at 741.

108. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1827 (2009) (Stevens, J., dissenting).

permitted the FCC to regulate only those words that describe sex or excrement. The FCC minimized that limitation by claiming that “any use of the words at issue in this case, in any context and in any form, *necessarily* describes sex or excrement,” a claim that is refuted by “[t]he customs of speech.”<sup>109</sup> Justice Stevens wrote: “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. One rests at the core of indecency; the other stands miles apart.”<sup>110</sup>

Justice Stevens also found it ironic that “while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or are having trouble going to the bathroom.”<sup>111</sup>

It would be absurd, Justice Stevens wrote, to find an expletive uttered by a frustrated golfer to be sexual: “But that is the absurdity the FCC has embraced in its new approach to indecency.”<sup>112</sup> By improperly equating words that are impolite in their usage with words that are indecent, the FCC has adopted an “interpretation of ‘indecency’ that bears no resemblance to what *Pacifica* contemplated. Most distressingly, the Commission appears to be entirely unaware of this fact . . . and today’s majority seems untroubled by this significant oversight.”<sup>113</sup>

Justice Ginsburg agreed with Justice Stevens. Unlike the Carlin monologue, she wrote, “the unscripted fleeting expletives at issue here are neither deliberate nor relentlessly repetitive.”<sup>114</sup> “Spontaneous utterances,” she wrote, quoting Justice Harlan’s cogent admonishment in *Cohen* that words have both cognitive and emotive meanings, are used “simply to convey an emotion or intensify a statement.”<sup>115</sup> She also quoted an assertion by Justice Anthony Kennedy that a word categorized as indecent “often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power,”<sup>116</sup> and a warning from Justice William Brennan that “the Government should take care before enjoining

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109. *Id.*

110. *Id.*

111. *Id.* at 1827 n.4.

112. *Id.* at 1827.

113. *Id.* at 1827–28 (citations omitted).

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

115. *Id.* at 1829 (citing *Cohen v. California*, 403 U.S. 15, 26 (1971)).

116. *Id.* (quoting *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring in part and dissenting in part)).

the broadcast of words . . . ‘in our land of cultural pluralism.’”<sup>117</sup> “[The Court] should be mindful,” she wrote, “that words unpalatable to some may be ‘commonplace’ for others, ‘the stuff of everyday conversations.’”<sup>118</sup>

The dispute over the possible meanings of the f-word and the definition of indecency began—for purposes of *Fox Television Stations*, at any rate—in oral arguments. “[I]n the last analysis,” Justice Stevens said during the arguments of Carter G. Phillips representing Fox Television, “we are trying to decide what the word ‘indecent’ means.”<sup>119</sup> Phillips agreed.<sup>120</sup> Justice Stevens asked next, “[D]oes the number of times the word is used in a particular context make a difference in the definition?”<sup>121</sup> Phillips replied in the negative; the key to the inquiry, he said, is whether the language describes or depicts sexual or excretory activities and not the number of times a word is used.<sup>122</sup> Justice Stevens asked whether a word can have two meanings: Is it indecent if used in the context of the meaning that is not sexual?<sup>123</sup> No, Phillips responded; if a word has a sexual and a non-sexual meaning and the use of the word is ambiguous, punishment should not attach.<sup>124</sup>

Later, during the arguments of Solicitor General Gregory G. Garre, Justice Stevens asked whether the word “dung” would be indecent.<sup>125</sup> Probably not, Garre responded, but, “The one thing that can’t be disputed [] in this case is that the F-Word is patently offensive under community standards for the broadcast medium.”<sup>126</sup>

*Fox Television Stations* did not turn on the definition of the f-word, but the word’s definition clearly would be important in the determination of questions related to whether the First Amendment would allow the FCC to ban the use of certain words as indecent regardless of context. Historically, the FCC has only found language indecent if the language was related to sexual activity or excrement, though prurience is not a requirement for indecency,<sup>127</sup> a definition Justice Scalia seized upon. A sexual but

117. *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 775 (1978) (Brennan, J., dissenting)).

118. *Id.* (quoting *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting)).

119. Transcript of Oral Argument at 55, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No.07-582).

120. *Id.* at 56.

121. *Id.*

122. *Id.* at 56–57.

123. *Id.* at 56.

124. *See id.* at 57.

125. *Id.* at 60.

126. *Id.* at 60–61.

127. *See FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1806 (2009) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978)) (noting that the Court, in *Pacifica*, had “rejected

nonprurient use for Justice Scalia would be Cher's statement,<sup>128</sup> "metaphorically suggest[ing] a sexual act as a means of expressing hostility to her critics."<sup>129</sup>

Justices Scalia and Stevens, therefore, ended up representing two camps on the issue of the definition of the f-word, Justice Scalia arguing that it always related to sexual activity, and Justice Stevens arguing that there were nonliteral uses that were not related to sex and, therefore, are not necessarily indecent. As the Court considers whether a single word can be banned on the airwaves under the First Amendment, it would do well to consider a broader examination of that word.

### III. ANTECEDENTS TO *FOX TELEVISION STATIONS*

Because of the undercurrent created by Justices Scalia and Stevens, it is impossible to discuss fully the significance and ramifications of *Fox Television Stations* without considering other Supreme Court cases focusing on highly offensive language, specifically *Cohen v. California* and *Federal Communications Commission v. Pacifica Foundation*. The f-word appeared in at least ten other Supreme Court cases,<sup>130</sup> but it was the use of

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the broadcasters' argument that the statutory proscription applied only to speech appealing to the prurient interest," though "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality").

128. *Fox Television Stations*, 129 S. Ct. at 1808.

129. *Id.* at 1809.

130. See *Pacifica*, 438 U.S. at 753–79 app.; *Cohen v. California*, 403 U.S. 15 (1971). See also *Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010) (reference to a convicted felon's home life); *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993) (a quotation from a black man on attacking whites after seeing the movie *Mississippi Burning*); *Masson v. New Yorker, Inc.*, 501 U.S. 496, 508 (1991) (a quotation attributed to the plaintiff); *Morris v. Matthews*, 475 U.S. 237, 240–41 n.2 (1986) (a quotation from a written statement by a defendant accused of murder); *Davidson v. Cannon*, 474 U.S. 344, 345 n.† (1986) (a statement from an inmate relating to a threat from another inmate); *Bd. of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 897–903 app. (1982) (Powell, J., dissenting); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 566 n.1 (1975) (White, J., dissenting) (quotations from a play); *Lucas v. Arkansas*, 416 U.S. 919, 919 (1974) (Blackmun, J., dissenting) (reference to a police officer); *Reynolds v. Tennessee*, 414 U.S. 1163, 1166 n.4 (1974) (Douglas, J., dissenting) (a chant by demonstrators at a Billy Graham crusade in Tennessee at which President Richard Nixon appeared); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (per curiam) (threat by a demonstrator that "We'll take the fucking streets later"). In addition, the Court resolved a number of cases in which there were allusions to the use of the f-word or derivatives, but the word itself did not appear in the opinions. See *Papish v. Bd. of Curators, Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (per curiam); *Lewis v. New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring); *Rosenfeld v. New Jersey*, 408 U.S. 901, 909–10 (1972) (Rehnquist, J., dissenting) (members of the Court referred to offensive language with the letters and symbols, "m--- f---"). *But cf.* *Brown v. Oklahoma*, 408 U.S. 914 (1972) (similar offensive language was the subject of the case, but neither the offending words nor the toned-down substitutes were used); *Plummer v. Columbus*, 414 U.S. 2, 3–4 (1973) (Powell, J., dissenting) (Justice Powell made reference to "a series of absolutely vulgar, suggestive and

the specific word—and, in *Pacifica*, of similar words—upon which the decisions in *Cohen* and *Pacifica* turned. *Cohen* and *Pacifica* marked a period by the Court of increased tolerance toward offensive language,<sup>131</sup> at least until *Fox Television Stations*, when that trend was reversed. The two cases—and others that followed—could have guided the Court in *Fox Television Stations*, but some of those cases, *Cohen* in particular, were summarily ignored by most of the Justices,<sup>132</sup> and the holding in *Pacifica* was twisted out of shape.

#### A. *Cohen and Emotive Speech*

Paul Robert Cohen was convicted in Los Angeles Municipal Court of disturbing the peace by wearing a jacket in the courthouse that bore the slogan “Fuck the Draft.”<sup>133</sup> The conviction was upheld by the California Court of Appeals<sup>134</sup> and reversed by the Supreme Court.<sup>135</sup> Justice John Marshal Harlan’s opinion for the Court was an eloquent explication of the use of language and its protection under the speech clause of the First Amendment.<sup>136</sup>

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abhorrent, sexually-oriented statements” that were the subject of the case); *See generally* discussion *infra* Part IV (discussing time period from *Chaplinsky* to *Pico*).

131. *See* Shaman, *supra* note 7, at 301 (noting that the Supreme Court has consistently given shelter to more offensive words). *See generally* discussion *infra* Part IV (discussing time period from *Chaplinsky* to *Pico*).

132. As previously indicated, the only reference to *Cohen* is by Justice Ruth Bader Ginsburg in her dissenting opinion. *See Fox Television Stations*, 129 S. Ct. at 1829 (Ginsburg, J., dissenting). *See also Cohen*, 403 U.S. 15 (1971); discussion *supra* p. 6.

133. *Cohen*, 403 U.S. at 16. The jacket contained other slogans as well, including “Stop War,” and the offensive slogan did not stand out significantly. Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283, 286, 286 n.21 (1990). Clearly it stood out enough for the police officer patrolling the halls of the Los Angeles County Courthouse to notice it, however. *See* Transcript of Oral Arguments, *Cohen v. California*, reprinted in 70 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 827, 829–30 (Philip Kurland & Gerhard Casper eds. 1975).

134. *People v. Cohen*, 81 Cal. Rptr. 503, 503 (1969).

135. *Cohen*, 403 U.S. at 26.

136. *See* Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT* 60, 93 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (calling Justice Harlan’s opinion “magnanimous”); Ronald J. Krotoszynski Jr., *Cohen v. California: “Inconsequential” Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1251 (1996) (The case “speaks eloquently to values that transcend its facts, and does so in a way that vindicates core civil liberties;” it also “serves as an exemplar on the importance of careful judging.”). *Cohen* has also been called the Court’s “most thoughtful discussion of the problem of public civility,” DANIEL A. FARBER, *THE FIRST AMENDMENT* 107 (2d ed. 2003), and “the Court’s most important precedent protecting offensive speech,” Lackland H. Bloom Jr., *Fighting Back: Offensive Speech and Cultural Conflict*, 46 SMU L. REV. 145, 150 (1992). It has been identified as the first case in which the Court acknowledged “that there is value in speech such as Cohen’s.” DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN,



Justice Harlan began the opinion, however, with what might be interpreted as an apology: “This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.”<sup>137</sup> Chief Justice Warren Burger and Justices Hugo Black and Harry Blackmun disagreed with that assessment by Justice Harlan. Writing for the three dissenters, Justice Blackmun called “Cohen’s absurd and immature antic . . . mainly conduct and little speech.”<sup>138</sup> The Chief Justice originally intended to offer a separate dissent, which he reported in a memo to the other Justices as being “the most restrained I can manage.”<sup>139</sup> Wrote the Chief Justice:

I, too, join in a word of protest that this Court’s limited resources of time should be devoted to such a case as this. It is a measure of a lack of a sense of priorities and with all deference I submit that Mr. Justice Harlan’s “first blush” was the correct reaction. It is nothing short of absurd nonsense that juvenile delinquents and their emotionally unstable outbursts should command the attention of this Court. The appeal should be dismissed for failure to present a substantial federal question.<sup>140</sup>

Never mind that Cohen was not a juvenile, that there was no outburst in the case, and there was neither evidence nor argument that Cohen was emotionally unstable. To the contrary, the evidence was that Cohen made no effort to speak to anyone, he did not threaten any act of violence, he did not make any loud or unusual noise, and, in fact, he made no sound prior to his arrest.<sup>141</sup> Indeed, Melvin Nimmer, Cohen’s attorney, told the Court that Cohen, who was a witness rather than a party in a case, wore his jacket in the courthouse corridor, but he removed it and draped it over his arm when he went into the courtroom so that it was not visible.<sup>142</sup> He was not arrested until a judge refused an officer’s request to cite Cohen for contempt of court.<sup>143</sup>

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FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEAS 156 (1997).

137. *Cohen*, 403 U.S. at 15.

138. *Id.* at 27 (Blackmun, J., dissenting). Justice Byron White joined the portion of Justice Blackmun’s dissent questioning whether the construction of the statute by the California Court of Appeals followed that of the California Supreme Court and writing that the case should be remanded for reconsideration in light of that court’s ruling in *In re Bushman*, 463 P.2d 727 (Cal. 1970). *Id.* at 27–28.

139. Memorandum to the Conference (May 25, 1971), Papers of Justice John Marshall Harlan, Box 434, Library of Congress, Washington, D.C.

140. *Id.* Chief Justice Burger joined Justice Blackmun’s dissent and withdrew his own on June 3, 1971. Memorandum from Chief Justice Burger to the Conference (May 25, 1971) (on file with Library of Congress).

141. *Cohen*, 403 U.S. at 16–17 (citation omitted).

142. Transcript of Oral Argument, *Cohen v. California*, *supra* note 133, at 828–§29.

143. *Id.*

The explicit complaint of Justice Harry Blackmun, however, and the implicit complaint of Chief Justice Burger, that the case involved conduct rather than speech, directly contradicted the holding of the Court. Justice Harlan wrote that the case dealt with “a conviction resting solely upon ‘speech,’ . . . not upon any separately identifiable conduct . . . .”<sup>144</sup> The State, Justice Harlan wrote, does not have the power under the First Amendment to punish Cohen because of the “underlying content of the message the inscription conveyed,” that is, for the position Cohen took “on the inutility or immorality of the draft . . . .”<sup>145</sup> Therefore, it was clear that the conviction was based “upon the asserted offensiveness of the *words*” used to convey the message, that is, upon the word “fuck.”<sup>146</sup>

Also important to the issue, Justice Harlan wrote, was the fact that the statute applied throughout the state—not just in courthouses<sup>147</sup>—and the speech involved did not fall into one of those categories of speech where the Court has allowed greater regulation—obscenity or fighting words, for example.<sup>148</sup> Specifically, he wrote, for speech to be obscene, it must be “in some significant way, erotic,” and, therefore, though Justice Scalia might disagree, “[i]t cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.”<sup>149</sup> In addition, because the four-letter word as used here was not directed at a person as a personal insult, it did not constitute fighting words,<sup>150</sup> and there was no captive audience because viewers could avert their eyes.<sup>151</sup>

Therefore, Justice Harlan wrote, the question is “whether California can excise as ‘offensive conduct’ one particularly scurrilous epithet,” and “acting as guardians of public morality, may properly remove [the epithet] from the public vocabulary.”<sup>152</sup> And the answer is clearly no, he wrote:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . .<sup>153</sup>

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144. *Cohen*, 403 U.S. at 18 (citations omitted).

145. *Id.*

146. *Id.*

147. *Id.* at 19.

148. *Id.* at 19–20.

149. *Id.* at 20.

150. *Id.*

151. *Id.* at 21.

152. *Id.* at 22–23.

153. *Id.* at 24.

There may be side effects to this freedom, Justice Harlan wrote, but, “[t]hat the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.”<sup>154</sup>

The “[s]tate has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us,” he wrote.<sup>155</sup> “[W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.”<sup>156</sup> Indeed, he wrote, “in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”<sup>157</sup>

The key finding of the Court, however, particularly as related to the controversy over offensive language, is that the scope of the First Amendment’s protection extends beyond content to the method of expression:

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>158</sup>

Indeed, Justice Harlan wrote that forbidding certain words raised a substantial risk of suppressing ideas: “[G]overnments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>159</sup> Therefore, in the absence of a particularized and compelling reason, the state cannot make the use of “this single four-letter expletive a criminal offense.”<sup>160</sup>

Though Chief Justice Burger had withdrawn his dissent, it was clear he found the offending word particularly troubling. Apparently, he lobbied both Justices Harlan and Nimmer to refrain from using it in the courtroom. According to journalists Bob Woodward and Scott Armstrong, while the

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154. *Id.* at 25.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 25–26.

159. *Id.* at 26. *See also* Krotoszynski, *supra* note 136, at 1253 (Justice Harlan recognized that “[u]ltimately, the ability to define language becomes the ability to control thoughts.”).

160. *Cohen*, 403 U.S. at 26.

members of the Court were robing, the Chief Justice asked Justice Harlan not to use the word, and Harlan assented.<sup>161</sup> More than three months earlier, when oral arguments in the case were held, the Chief Justice also attempted to signal Nimmer that he should not use the word. “[Y]ou may proceed whenever you are ready,” Burger said. “I might suggest to you that, as in most cases, the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you, I’m sure, to dwell on the facts.”<sup>162</sup>

Nimmer was not as accommodating as Justice Harlan. He did not immediately make reference to Cohen’s jacket, but in responding to a question by Justice Blackmun as to why Cohen was in the courthouse, Nimmer reported that Cohen was walking in the corridor “wearing a jacket upon which were inscribed the words ‘Fuck the Draft.’ Also inscribed were the words ‘Stop War,’ and several peace symbols.”<sup>163</sup> Neither the Chief Justice nor any other member of the Court responded to the use of the word.<sup>164</sup>

The *Cohen* case caused many a chuckle during its journey through the judicial system.<sup>165</sup> More recently, however, it has been recognized because of its value in protecting political speech as well as offensive language. The case, one scholar wrote, “involves nothing less than the scope of the First Amendment’s protection of core political speech and the ability of the government to prohibit disfavored means of political expression.”<sup>166</sup> Scholars also found that the opinion “reflects the very best of the

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161. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 133 (1979).

162. Transcript of Oral Arguments, *Cohen v. California*, *supra* note 133, at 828.

163. *Id.* See also Farber, *supra* note 133, at 286 n.21. Apparently, Nimmer strongly believed that “he had to use that word, and not some euphemism, in his oral argument to make his point that its use could not be banned from all public discussion.” William S. Cohen, *A Look Back at Cohen v. California*, 34 *UCLA L. REV.* 1595, 1599 (1987) [hereinafter William S. Cohen].

164. Apparently, attorneys arguing *FCC v. Fox Television Stations, Inc.* were more accommodating. Justice Ginsburg, in a speech to the conference of the United States Court of Appeals for the Second Circuit, was reported as saying the attorneys had been told that some of the Justices might find the use of the word unseemly. Tony Mauro, *Ginsburg Clears up Mystery About “Fleeting Expletives” Case*, *THE BLOG OF LEGAL TIMES* (June 14, 2009, 9:29 AM), <http://legaltimes.typepad.com/blt/2009/06/ginsburg-clears-up-mystery-about-fleeting-expletives-case.html>.

165. See William S. Cohen, *supra* note 163, at 1595 (writing that only Paul Robert Cohen’s attorney, Melville Nimmer, thought the case was of any constitutional significance).

166. Krotoszynski, *supra* note 136, at 1252.

‘marketplace of ideas’ paradigm first espoused by Justice Holmes in *Abrams*.<sup>167</sup>

Some question remains, however, as to whether *Cohen* is directly applicable to *Pacifica*.<sup>168</sup>

### B. *Pacifica* and “Words You Never Say”

The facts and likely misapplication of *Pacifica* have been discussed previously.<sup>169</sup> *Pacifica*, just as *Cohen* did, turned on the use of language. Unlike *Cohen*, however, *Pacifica* involved broadcast indecency, yet the holding was controlled by a coalition of Justices who objected to the words used regardless of any broader context of their use. Underlying Justice Stevens’ opinion—particularly those parts that were for a plurality rather than a majority—was a myopic view of offensive speech. Indeed, he lost the votes of Justices Lewis Powell and Harry Blackmun specifically because he addressed the value of such words.<sup>170</sup>

Key to the holding that the George Carlin monologue was indecent as broadcast was the finding by Justice Stevens that the words used were of slight value in the marketplace. In some circumstances, Justice Stevens wrote, the offensive words are protected, but, he added, “they surely lie at the periphery of First Amendment concern.”<sup>171</sup> The FCC, he wrote, does not object to the point of view expressed in the monologue, but to the way it was expressed.<sup>172</sup> Therefore, the FCC ban on indecency would affect only form and not content.<sup>173</sup> And that is a good thing: “There are few, if any, thoughts that cannot be expressed by the use of less offensive language.”<sup>174</sup>

Justice Powell, concurring in the judgment, emphasized the narrow holding.<sup>175</sup> He wrote that the case did not turn on the value or lack thereof

167. *Id.* at 1253. See also Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 314-317 (1974).

168. See *infra* notes 186–88 and accompanying discussion.

169. See discussion accompanying *supra* notes 70–72, 100–07.

170. See *FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., dissenting) (noting departure from Part IV of the Opinion of the Court because it is not for Justices to determine the value of speech and, hence, which speech is more deserving of protection).

171. *Id.* at 743. See also *id.* at 746 (“Some uses of even the most offensive words are unquestionably protected.”).

172. *Id.* at 746 n.22. Ironically, one point of the monologue was that many in society have a silly attitude toward language. See *infra* notes 183–85 and accompanying discussion.

173. *Id.* at 743 n.18.

174. *Id.*

175. *Id.* at 760–61 (Powell, J., concurring) (noting that the FCC holding does not prevent *Pacifica* from broadcasting the monologue during the late evening hours and does not speak to cases involving the isolated use of a potentially offensive word).

of Carlin's monologue, but on "the unique characteristics of the broadcast media, combined with society's right to protect its children" from such language.<sup>176</sup>

Justice Brennan also objected to Justice Stevens' evaluation of the value of the language involved.<sup>177</sup> The ruling, he wrote, can be viewed 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."<sup>178</sup> It is "transparently fallacious," Justice Brennan wrote, to think that "the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression."<sup>179</sup> Agreeing with Justice Harlan's expansive view of language and its use in *Cohen*, Justice Brennan wrote, "[a] given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image."<sup>180</sup> Justice Brennan also found a disturbing vein running through the opinions of Justices Stevens and Powell. There was, he wrote:

[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.<sup>181</sup>

Words, he wrote, quoting Justice Oliver Wendell Holmes, are not "crystal, transparent and unchanged," but are "the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>182</sup> The words the Court and the FCC find so unpalatable, Justice Brennan writes, "may be the stuff of everyday conversation in some, if not many, of the innumerable subcultures that compose this Nation."<sup>183</sup> Indeed, the Pacifica Foundation argued that Carlin was not merely "mouthing obscenities" but was using specific words

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176. *Id.* at 762.

177. This was not Brennan's only objection. He criticized the Court's characterization of a radio listener as being a passive member of a captive audience: The listener makes a decision to take part in an ongoing public discourse "if only as a listener." *Id.* at 765 (Brennan, J., dissenting). He also criticized the Court for usurping the role of parents, particularly some parents who might want their children to hear the program, and with usurping the responsibility of the public to weed out worthless and offensive communications from the public airways. *Id.* at 770-72.

178. *Id.* at 777.

179. *Id.* at 773.

180. *Id.*

181. *Id.* at 775.

182. *Id.* at 776 (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).

183. *Id.*

to satirize as harmless and silly attitudes toward those words.<sup>184</sup> Justice Brennan wrote:

In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evinces an attitude toward the "seven dirty words" that many others besides Mr. Carlin and *Pacifica* might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.<sup>185</sup>

Unfortunately, Justice Brennan's hopes were misplaced; the opinion did not prove to be harmless.

#### IV. *CHAPLINSKY, COHEN* AND BEYOND

*Cohen* and *Pacifica* were language-based decisions, but—for the majority in *Pacifica*, at any rate—the contexts of the two cases were sufficiently different, making *Cohen* inapplicable to the later case.<sup>186</sup> *Cohen* was quoted in *Pacifica* with regard to the use of the language, but not on point in support of the ultimate holding. *Cohen* focused on the content of the message, that is, the specific use of an offending word and the meaning of that word. *Pacifica*, on the other hand, focused primarily on the context of the broadcast—that the offending language was repeated at a time when children were likely to be in the audience. The issue decided in *Cohen*, as one writer observed, was "whether the state, acting as a paternalistic guardian of public morality, could ban the use of certain words in all contexts."<sup>187</sup> The issue in *Pacifica* was whether the FCC could ban the use of indecent language in the middle of the afternoon. Therefore, "*Cohen*, although not wholly irrelevant, has little to say for cases such as *Pacifica*."<sup>188</sup>

As Justice Brennan so eloquently pointed out, however, *Pacifica* transcended the issues of context and drew upon issues related to the value of speech. Justice Harlan, for example, established in *Cohen* that offensive speech may not be regulated simply because another category of speech—obscenity—*can* be regulated.<sup>189</sup> Justice Stevens, on the other hand, relied upon an analogy between indecency and obscenity. The words Carlin used, Justice Stevens wrote:

[O]ffend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part

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184. *Id.*

185. *Id.* at 777.

186. See Farber, *supra* note 133, at 294.

187. *Id.* (emphasis in original).

188. *Id.* at 285.

189. See William S. Cohen, *supra* note 163, at 1610.

of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>190</sup>

That is, the words do not rise to the level of First Amendment protection because they possess insufficient value.

Both *Cohen* and *Pacifica*, therefore, demonstrate the ways bias against certain words can impact decisions in important First Amendment cases. Indeed, one commentator praised Justice Harlan’s opinion because of its ability to transcend “the strong emotional pull” of the facts.<sup>191</sup> The emotional response, he wrote, snared the four dissenters, just as it snared Chief Justice William Rehnquist in *Texas v. Johnson*.<sup>192</sup>

Justice Stevens’ reliance on *Chaplinsky v. New Hampshire* is also telling. Walter Chaplinsky, a Jehovah’s Witness, was convicted of using offensive words in public for calling a police officer a “God damned racketeer” and “a damned Fascist”—relatively tame epithets by today’s standards.<sup>193</sup> Chaplinsky claimed protection under the First Amendment,<sup>194</sup> but a unanimous Court found that the words lie outside of the free-speech guarantee. The Court held:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>195</sup>

The doctrine spawned in that case has lived a schizophrenic life. One could argue that the Court created three—or four—categories of speech that lie outside the protection of the First Amendment: (1) the insulting or fighting words that inflict injury or tend to incite an immediate breach of the peace, (2) “the lewd and obscene, the profane,” and (3) the libelous. Libel and

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190. *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (footnotes omitted) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

191. Krotoszynski, *supra* note 136, at 1255.

192. *Id.* See also *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting).

193. 315 U.S. 568, 569 (1942). See also *Shaman*, *supra* note 7, at 303.

194. 315 U.S. at 569.

195. *Id.* at 571–72 (footnotes omitted).



obscenity, however, have been pulled out of the schema and addressed in separate lines of cases.<sup>196</sup>

The Court has paid lip service to the notion that fighting words are not protected, but it has all but gutted the proposition. While there has been some dispute over the definition of “fighting words” and what words did or did not fall into that narrow category of speech,<sup>197</sup> since *Chaplinsky*, no court has seriously questioned the fighting words doctrine; it has been settled law that fighting words are not protected.<sup>198</sup> *Chaplinsky*, however, was the last case in which the Court has upheld a conviction under the fighting words doctrine.<sup>199</sup>

In addition, the Court seems to have ignored language in *Chaplinsky* relegating lewd and profane speech to unprotected status; at least that is the point made by a number of Justices who have objected to offensive language and have called upon that rubric when voting to uphold regulations prohibiting such language.<sup>200</sup> For example, when the Court ruled that a student could not be expelled from a public university because she had used the term “mother fucker” in an article she wrote for an underground newspaper,<sup>201</sup> Chief Justice Warren Burger and Justices William Rehnquist and Harry Blackmun dissented. Justice Rehnquist, writing for the trio, found the use of the term “lewd and obscene” as that phrase was used in *Chaplinsky*.<sup>202</sup> The notion that university officials cannot control the university environment is unacceptable, he wrote, “and I would suspect would have been equally unacceptable to the Framers of the First Amendment.”<sup>203</sup> Chief Justice Burger agreed. That a state university

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196. Libel under the First Amendment has been explicated in a line of cases beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and obscenity in a line of cases beginning with *Roth v. United States*, 354 U.S. 476 (1957). One may argue that the second category delineated in *Chaplinsky*—once obscenity has been removed—is actually two categories, *lewd* and *profane*, but a determination on that point is not necessary for this discussion.

197. Justice Scalia, for example, pointed out in *R.A.V. v. City of St. Paul*, that fighting words had been defined as having “no *essential* part” of a search for truth, rather than having “no part.” 505 U.S. 377, 385 (1992) (emphasis in original).

198. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

199. See Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1129 (1993) [hereinafter Demise Note].

200. See *id.* See also *Shaman*, *supra* note 7, at 302.

201. *Papish v. Bd. of Curators, Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (per curiam). The offending language did not appear in the per curiam opinion or in Justice Rehnquist’s dissent. See *supra* note 130.

202. *Id.* at 676 (Rehnquist, J., dissenting).

203. *Id.* at 677.

could not control such “obscene and infantile” conduct, he wrote in a separate dissent, is “curious—even bizarre . . . .”<sup>204</sup>

The Justices had made similar arguments a year earlier in three cases that were handed down on the same day. The judgments in *Rosenfeld v. New Jersey*,<sup>205</sup> *Lewis v. New Orleans*,<sup>206</sup> and *Brown v. Oklahoma*<sup>207</sup> were vacated and the cases remanded in light of the opinions handed down in *Cohen* and another earlier case, *Gooding v. Wilson*.<sup>208</sup>

In *Gooding*, the Court ruled that a Georgia statute prohibiting the use of “opprobrious words or abusive language, tending to cause a breach of the peace”<sup>209</sup> was unconstitutional because the definitions of the offending words went beyond the “fighting words” category identified in *Chaplinsky*.<sup>210</sup> Georgia courts, Justice Brennan wrote for the majority, had applied the statute to utterances that were not fighting words. Chief Justice Burger and Justice Blackmun again dissented because of what they saw as a narrow reading of *Chaplinsky*.<sup>211</sup> The offensive language—calling a police officer a “[w]hite son of a bitch” and threatening to choke him to death and to cut his partner to pieces—constituted fighting words, Justice Blackmun wrote for the dissenters.<sup>212</sup> Finding that the words are protected, he wrote, constitutes little more than “paying lip service to *Chaplinsky*,” which, though it remains good law, is being eviscerated by the Court.<sup>213</sup> The Chief Justice wrote in a separate dissent that the case placed outside the protection of the First Amendment several narrowly-defined classes of speech, but the Court was eliminating from consideration all categories of speech except for fighting words.<sup>214</sup> “Indeed,” he wrote, “the language used by the *Chaplinsky* Court to describe words properly subject to regulation bears a striking resemblance to that of the Georgia statute, which was enacted many, many years before *Chaplinsky* was decided.”<sup>215</sup>

*Rosenfeld*, *Lewis*, and *Brown*, decided almost exactly one year after *Cohen*, involved another of those types of unprotected speech Burger and Blackmun said were enumerated in *Chaplinsky* but later ignored. The three

204. *Id.* at 672 (Burger, C.J., dissenting).

205. 408 U.S. 901 (1972).

206. 408 U.S. 913 (1972).

207. 408 U.S. 914 (1972).

208. 405 U.S. 518 (1972).

209. *Id.* at 519 (quoting GA. CODE ANN. § 26-6303).

210. *Id.* at 525.

211. Justices Powell and Rehnquist took no part in *Gooding*. *Id.* at 528.

212. *Id.* at 534 (Blackmun, J., dissenting).

213. *Id.* at 536-37.

214. *See id.* at 529 (Burger, C.J., dissenting).

215. *Id.*

cases grew from the use of the term “mother fucker.” David Rosenfeld used the term four times during remarks he made at a meeting of a local school board;<sup>216</sup> Wilbert Brown used it in reference to police officers during a meeting at the University of Tulsa chapel;<sup>217</sup> and Mallie Lewis used it to address police officers.<sup>218</sup>

Justice Powell dissented in *Rosenfeld* and concurred with the result in the other two cases. Rosenfeld’s language, he wrote, was “so grossly offensive and emotionally disturbing” that it was the proper subject of criminal prosecution.<sup>219</sup> “[T]he good taste and restraint” of the audience “made it unlikely that physical violence would result,” so the words could not be considered fighting words.<sup>220</sup> “But,” he noted, “the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.”<sup>221</sup> He called Rosenfeld’s speech “a verbal assault” on the audience.<sup>222</sup>

Though similar language was used, Justice Powell distinguished the other two cases. In *Lewis*, he wrote that the offensive words may have caused a physical response if addressed by one citizen to another, but they were addressed to a police officer “trained to exercise a higher degree of restraint than the average citizen.”<sup>223</sup> Justice Powell did not attempt to explain how the case was distinguished from *Chaplinsky*, where the offending words were also addressed to a police officer and, arguably, were not as virulent as those expressed in *Lewis*. In *Brown*, Justice Powell wrote, the statute was considerably broader than that in *Rosenfeld*, and Wilbert Brown had been asked to attend a meeting to present the Black Panther

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216. *Rosenfeld v. New Jersey*, 408 U.S. 901, 910 (1972) (Rehnquist, J., dissenting). The language upon which the case was based did not appear in the Court’s order or in Justice Rehnquist’s dissent. *See supra* note 130.

217. *Id.* at 911 (Rehnquist, J., dissenting) (describing the defendant’s actions in *Brown v. Oklahoma*, 408 U.S. 914 (1972)).

218. *Id.* at 909 (describing defendant’s actions in *Lewis v. New Orleans*, 408 U.S. 913 (1972)). The language upon which the case was based did not appear in the Court’s order or in Justice Rehnquist’s dissent. *See supra* note 130.

219. 408 U.S. at 906 (Powell, J., dissenting). He was joined by Chief Justice Burger and Justice Blackmun. *Id.* at 903.

220. *Id.* at 905.

221. *Id.*

222. *Id.* at 906. Justice Powell dissented for the same reason in *Plummer v. Columbus*, 414 U.S. 2, 4 (1972) (Powell, J., dissenting). He was joined by Justice Rehnquist. *Id.* at 3.

223. *Lewis v. City of New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring), *quoted with approval in City of Houston v. Hill*, 482 U.S. 451, 462 (1987).

political viewpoint. Therefore, “language of the character charged might well have been anticipated by the audience.”<sup>224</sup>

Chief Justice Burger and Justices Rehnquist and Blackmun were not so discriminating. The Chief Justice and Justice Rehnquist wrote dissents in the three cases complaining of the offensive language, both dissents joined by Justice Blackmun. The three joined opinions by the Chief Justice and Justice Rehnquist covering all three cases, and both opinions complained of the offensive language. The language used by Lewis constituted fighting words, Justice Rehnquist wrote, and that of Rosenfeld and Brown was lewd, obscene, and profane, as those terms are used in *Chaplinsky*.<sup>225</sup> Therefore, in each instance, the language “clearly falls within the class of punishable utterances . . . .”<sup>226</sup> Chief Justice Burger agreed with Justice Powell that Rosenfeld’s remarks might not have caused an immediate breach of the peace, but that their offensiveness might well have prompted someone to have taken action after the meeting.<sup>227</sup>

The *Lewis* case returned to the Court two years later, and the three dissenting Justices continued their attack on offensive language. For the three dissenters, Justice Blackmun wrote that the holding in *Lewis* was wrong, just as the holding in *Gooding* had been.<sup>228</sup> The language uttered to the police officer, he wrote, “‘plainly’ was profane, ‘plainly’ it was insulting, and ‘plainly’ it was fighting.”<sup>229</sup>

Finally, two months later, the Court vacated the conviction of a man for referring to a North Little Rock police officer with the term “mother fucker.”<sup>230</sup> Justice Blackmun, joined again by Chief Justice Burger and Justice Rehnquist, wrote that he was at a loss to understand what more the Court needed to affirm the conviction. The Arkansas Supreme Court, he wrote, held that words could be punished if they were addressed to or about a person within that person’s hearing, fitting the *Chaplinsky* requirement.<sup>231</sup>

224. *Brown v. Oklahoma*, 408 U.S. 914, 914 (1972).

225. *Rosenfeld*, 408 U.S. at 911 (Rehnquist, J., dissenting).

226. *Id.* at 912.

227. *Id.* at 903 (Burger, C.J., dissenting). The Chief Justice did not attempt to reconcile the contradiction his “after the meeting” example presents to the specific language defining fighting words as requiring an “immediate” breach of the peace.

228. *Lewis v. City of New Orleans*, 415 U.S. 130, 136–37 (1974) (Blackmun, J., dissenting).

229. *Id.* at 141.

230. *Lucas v. Arkansas*, 416 U.S. 919 (1974).

231. *Id.* at 920 (Blackmun, J., dissenting). Two other cases involved offensive language, but neither dissent focused specifically on the offensiveness of the language used. In *Hess v. Indiana*, 414 U.S. 105 (1973), Justice Rehnquist complained that there were insufficient facts for the Court to justify its holding that a threat that “[w]e’ll take the fucking street

In the late 1970s and beyond, the Court confronted uses of offensive language in contexts more formal than “verbal assaults.” No one was verbally assaulted in *Southeastern Promotions, Ltd. v. Conrad*,<sup>232</sup> for example, but three of the dissenting Justices believed that the city of Chattanooga should be allowed to prohibit the showing of *Hair* because of the play’s content.<sup>233</sup> Ironically, Justice Blackmun broke from the dissenting coalition to write for the Court that the ban constituted unconstitutional prior restraint.<sup>234</sup> Justice Byron White, however, provided quotes from the play to demonstrate its offensive nature,<sup>235</sup> and he wrote that, based on such content, the First Amendment did not compel the city to permit its production in city-owned facilities.<sup>236</sup> Justice Rehnquist added that a city had the power to preserve the property under its control, and that is what Chattanooga was doing.<sup>237</sup>

Justice Powell used a tactic similar to Justice White’s seven years later in his dissent to the holding in *Board of Education, Island Trees Union Free School District v. Pico*. A plurality had held that school boards could not constitutionally remove books from school libraries because the board did not like the contents of those books.<sup>238</sup> Justice Powell’s opinion focused on the powers that local school boards should have over schools within their jurisdictions,<sup>239</sup> but he could not resist pointing out what he thought to be the offensive nature of the books in question. He supplied a seven-page appendix with multiple examples of the offensive words in the books.<sup>240</sup>

Justices on the Supreme Court and judges on other courts who struggle with offensive language can be excused for their objections to the f-word. The word has a troublesome history, and Justices are not the first members of society who have difficulty defining it. A definition is

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later” constituted neither fighting words nor a public nuisance. *Id.* at 109–11 (Rehnquist, J., dissenting). And in *Eaton v. City of Tulsa*, 415 U.S. 697 (1974), Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, wrote that there was no basis for the Court’s ruling that the use of the term “chicken shit” was insufficient for finding the speaker in contempt of court. *Id.* The Court, he wrote, substituted its own judgment to find that the contempt conviction was based solely on the use of the expletive. *Id.* at 707–08 (Rehnquist, J., dissenting).

232. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

233. *Id.* at 564–74 (White, J., dissenting; Rehnquist, J., dissenting).

234. *Id.* at 559.

235. *Id.* at 566 n.1 (White, J., dissenting).

236. *Id.* at 567.

237. *Id.* at 571 (Rehnquist, J., dissenting).

238. 457 U.S. 853, 871–72 (1982) (plurality opinion).

239. *Id.* at 893 (Powell, J., dissenting).

240. *Id.* at 897–903 app.

essential, however, to the way the word is regulated under the First Amendment.

### V. WHEN DOES F\*\*\* NOT MEAN F\*\*\*?

In 1959, Judge Frederick van Pelt Bryan of the United States Court for the Southern District of New York ruled that the state's postmaster general had overstepped his authority when he found *Lady Chatterly's Lover* to be obscene and, therefore, not fit to be mailed.<sup>241</sup> "There is no doubt of [the book's] literary merit," Judge Bryan wrote.<sup>242</sup> The book was "replete with fine writing and with descriptive passages of rare beauty," and, therefore, not obscene, even though it contained "a number of passages describing sexual intercourse in great detail with complete candor and realism" and with the frequent use of "[f]our-letter Anglo-Saxon words."<sup>243</sup>

Time has found the judge to be correct in his assessment of the literary value of the novel, but just as Justice Scalia was wrong in his characterization of the f-word's meaning,<sup>244</sup> Judge Bryan may not have been fully accurate in his assessment of the word's origins.<sup>245</sup>

The two characterizations, however, exemplify the long-standing controversy over, and frequent misunderstanding about, the word. It has been considered, since "time out of mind,"<sup>246</sup> one of the most—if not *the* most—egregious of offensive words.<sup>247</sup> Both Justice Scalia and the FCC

241. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 499 (S.D.N.Y. 1959), *aff'd* 276 F.2d 433 (2d Cir. 1960).

242. *Id.* at 500.

243. *Id.* A judicial reference to the f-word being of Anglo-Saxon origin pre-dated the *Lady Chatterly's Lover* case. In 1933, in the same court, Judge John M. Woosley, ruling that James Joyce's novel *Ulysses* was not obscene, wrote that "[t]he words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe." *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 183–84 (S.D.N.Y. 1933). A similar reference appeared in the Second Circuit's opinion in the *Grove Press* case. 276 F.2d at 440.

244. Compare Justice Scalia's definition of the word, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009), with the definitions discussed at *infra* notes 292–308.

245. Many authorities agree that the origins of "fuck" are unknown. See, e.g., ASHLEY MONTAGU, *THE ANATOMY OF SWEARING* 307 (1967); RUTH WAJNRYB, *EXPLETIVE DELETED \$&#@\*! : A GOOD LOOK AT BAD LANGUAGE* 52, 55 (2005); Allen Walker Read, *An Obscenity Symbol*, 9 AM. SPEECH 264, 267–69 (1934).

246. The phrase was used by the Supreme Court in a public forum case, but its use here seems applicable. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Streets and parks, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

247. See RICHARD DOOLING, *BLUE STREAK: SWEARING, FREE SPEECH, AND SEXUAL HARASSMENT* 18 (1996) ("For centuries, fuck was the most objectionable word in the

have said as much,<sup>248</sup> and scholars have agreed. Ashley Montagu wrote that the word is “the nonpareil of all the foulest and most inadmissible of all swear-words, four-lettered or otherwise,”<sup>249</sup> and Allen Walker Read called it “the most disreputable of all English words . . . .”<sup>250</sup> Sociologist Edward Sagarin wrote, “In the entire language of proscribed words, from slang to profanity, from the mildly unclean to the utterly obscene, including terms relating to concealed parts of the body, to excretion and excrement as well as to sexuality, one word reigns supreme, unchallenged in its preeminence.”<sup>251</sup>

In movies, an eight-year-old boy called it the “queen mother” of curse words,<sup>252</sup> and a blogger speculated that her use of the word was one reason she is hated by the subject of her blog.<sup>253</sup> The word was part of a vocabulary that may have cost Edward Albee a Pulitzer Prize for his play *Who’s Afraid of Virginia Woolf?*,<sup>254</sup> and there have been debates for centuries as to whether the word should appear in dictionaries and, if it should, how it should be handled.<sup>255</sup> Indeed, in 1954, psychiatrist Leo Stone complained that “scholarly information about this important word is remarkable for its scarcity . . . . No reliable American or English general dictionaries now current contain the word.”<sup>256</sup> The *Oxford English Dictionary* began including entries in the early 1970s, and the editors of the *Random House Dictionary of the English Language* “agonized for decades” before the first inclusion in 1987.<sup>257</sup> The first appearance of the word in movies was in 1970,<sup>258</sup> and the word did not appear in *The New York Times*

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English language . . .”).

248. *Fox Television Stations, Inc.*, 129 S. Ct. at 1809 (quoting *Golden Globes Order*, *supra* note 18, at 4979).

249. MONTAGU, *supra* note 245, at 303. Despite his hyperbole in calling “fuck” the *only* four-letter word in the English language, Montagu lists six other “four-letter words”: cunt, cock, arse, shit, piss, and fart. *Id.* at 315–18.

250. Read, *supra* note 245, at 267.

251. EDWARD SAGARIN, *THE ANATOMY OF DIRTY WORDS* 136 (1962).

252. *A CHRISTMAS STORY* (Metro-Goldwyn-Mayer 1983).

253. *JULIE AND JULIA* (Columbia Pictures 2009).

254. See EDWIN BATTISTELLA, *BAD LANGUAGE: ARE SOME WORDS BETTER THAN OTHERS?* 68 (2005).

255. See *id.* at 79–80; DOOLING, *supra* note 247, at 17–27; WAJNRYB, *supra* note 245, at 5, 39, 59, 64; Read, *supra* note 243, at 269–74.

256. Leo Stone, *On the Principal Obscene Word of the English Language (An Inquiry, with Hypothesis, Regarding its Origin and Persistence)*, 35 INT’L J. PSYCHO-ANALYSIS 30, 31 (1954).

257. WAJNRYB, *supra* note 245, at 5.

258. Jesse Sheidlower, *Introduction: About the F-Word*, in *THE F-WORD* xxvi (Jesse Sheidlower ed., Random House 2d ed. 1999). The movies were *MASH* and *Myra Breckenridge*. *Id.*

until the newspaper printed the report on the independent counsel's investigation of Bill Clinton, which contained the word in a quotation from Monica Lewinsky.<sup>259</sup>

Despite its disrepute, some authorities today propose that the f-word, because of its increasing use, is slipping in its position as the most egregious of foul words.<sup>260</sup> At least two writers have referred to its use as ubiquitous,<sup>261</sup> which, they claim, results in its lessened impact as an expletive.<sup>262</sup> That is, the word is losing some of its power because of its increased use. Jesse Sheidlower, a senior editor in the Random House reference department, wrote in 1999, that taboos against the word are "weaker than ever,"<sup>263</sup> and linguist Ruth Wajnryb, wrote that there is some question as to whether the word retains its power as an intensifier. "[I]ts emotive force," she writes, "is nearing exhaustion,"<sup>264</sup> so that nowadays, "it takes more FUCKs to achieve what one lone FUCK would have achieved ten years ago."<sup>265</sup> Edwin Battistella wrote that it might even be entering more sophisticated circles, still improper, but, at the same time, rebellious and respectable. "In the context of this cultural split," he wrote, "the use of vulgar language can provide covert prestige to otherwise conventional speakers."<sup>266</sup> Noting that both John Kerry and Dick Cheney used it during a presidential campaign, Battistella wrote that each positioned himself "as a speaker who puts directness over convention."<sup>267</sup> Attorney Richard Dooling writes that the distinction of being the most objectionable word in the English language is now held jointly by "nigger" and "cunt," and "*fuck* has at long last stepped down."<sup>268</sup>

There is no doubt that attitudes toward the word are changing or have changed. In the first half of the twentieth century, a journalist could write

259. *Id.* at xxv.

260. *See* WAJNRYB, *supra* note 245, at 41, 44.

261. *See* CHRISTOPHER M. FAIRMAN, *FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES* 13 (2009); WAJNRYB, *supra* note 245, at 40.

262. WAJNRYB, *supra* note 245, at 44. Wajnryb also quotes the *Collins Australian Dictionary* as reporting that "[t]he use and overuse of FUCK in everyday speech of many people has led, to some extent, to a lessening of its impact" though "the word still retains its shock value . . ." *Id.* at 41.

263. Sheidlower, *supra* note 258, at xx.

264. WAJNRYB, *supra* note 245, at 64.

265. *Id.* at 40.

266. BATTISTELLA, *supra* note 254, at 77.

267. *Id.* *See also* Farber, *supra* note 133, at 295 (The word "has become considerably more acceptable in what used to be called 'polite society.'").

268. DOOLING, *supra* note 247, at 18. *See also* *Cruff v. H.K.*, 778 N.W.2d 764 (N.D. 2010) (affirming a juvenile court's finding that the use of the word "nigger" constituted disorderly conduct).



an article about profanity without referring to the f-word,<sup>269</sup> and a linguist could write an article specifically about the word without using it.<sup>270</sup> Indeed, Dooling wrote that Allen W. Read's article in *American Speech* titled "An Obscenity Symbol," contained "everything you would want to know about the f-word, except how to spell it."<sup>271</sup> But even in 1934, Read noted that "the use of the word is widespread and a set of derivatives and combinatives has developed."<sup>272</sup> Twenty years later, Stone also reported ample use of the word, even as he complained about the lack of scholarly study.<sup>273</sup>

Stone's complaint is no longer applicable, as a word search in virtually any scholarly database will demonstrate. In recent years, there has been the distribution of at least one book,<sup>274</sup> one movie,<sup>275</sup> and one law journal article<sup>276</sup> each with the one-word title: *Fuck*. Another book is titled *The F-Word*,<sup>277</sup> and yet another author claims that his law journal article delineates the types of cases where American courts have adjudicated disputes involving the word, and how they have resolved those disputes.<sup>278</sup>

Despite all that, the word retains much of its taboo status. No authority argues that the word has become so commonplace that its use would be uniformly accepted in polite society.<sup>279</sup> Writer Roy Blount Jr., for

269. See H. L. Mencken, *American Profanity*, 19 AM. SPEECH 241 (1944).

270. See Read, *supra* note 245.

271. DOOLING, *supra* note 247, at 41.

272. Read, *supra* note 245, at 275. See also *id.* at 274 ("In recent years our word has gained greater currency . . .").

273. See Stone, *supra* note 256, at 30–31.

274. FAIRMAN, *supra* note 261.

275. FUCK (Rainstorm Entertainment 2005).

276. Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711 (2007). This article was expanded into the book with the same title. FAIRMAN, *supra* note 261. Each work seems to be more of an excuse to use the word than to treat the issue seriously. For example, the first two words of the article—immediately after the one-word title—are "Oh fuck." Fairman, *Fuck*, CARDOZO L. REV. 1711, 1711. The author keeps his promise that the reader would find no "sanitized version" of the word in the article. *Id.* In sixty pages, he uses the word more than 560 times (not counting the table of contents and the footnotes), for an average of more than nine times per page, and has such playful subheads as "Fuck History" and "Fuck Jurisprudence." Similarly, the author begins chapter one of the book this way: "Oh fuck. Let's just get this out of the way." FAIRMAN, *supra* note 261, at 1. Yet, in the fifteen-page prologue, the author had used the word at least thirty-five times. *Id.* at vii–xxii. And, the word appeared in the titles of eight of the sixteen chapters listed in the table of contents. It is unclear, therefore, what the author was attempting to "get out of the way."

277. THE F-WORD (Jesse Sheidlower ed., Random House 2d ed. 1999).

278. Robert F. Blomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 SANTA CLARA L. REV. 65, 68 (1999). Professor Blomquist does not delineate his methodology for the selection of the cases he discusses.

279. Edwin Battistella reports that taboos also continue strong against racial and ethnic epithets. BATTISTELLA, *supra* note 254, at 82–83. Of the f-word, Wajnryb writes: "Its only

example, argued in a foreword to a book that “define[d] and trace[d] through history every use of *fuck* known to man,”<sup>280</sup> that the use of the word is decreasingly egregious, but admitted, “if my parents were alive I would not be writing this.”<sup>281</sup>

The taboo status of the word is tied in large part to its primary definition, which, of course, relates to sex. Historically, Allen Read writes, sexual and excretory areas were thought to have magical significance and, therefore, the use of words related to those areas of life for insult and opprobrium was a “verbal extension of phallic symbolism.”<sup>282</sup> Absent the magic, Montagu writes that four-letter words are deemed obscene because they refer to an aspect of life that has long been considered filthy. He credits the Christian church with being largely responsible for casting sex in the light of uncleanness.<sup>283</sup> There is no language to comfortably talk about sex, Wajnryb writes, casting the light of the taboo on all references to sex, but particularly on “fuck.” There are many euphemism, she writes, but, “they’re all beating around the bush in comparison to the simple FUCK, which, it’s been argued, has the virtues of brevity, sturdiness, adaptability, expressiveness, and comprehensibility.”<sup>284</sup> She writes: “[T]here is no other word for FUCK that means FUCK.”<sup>285</sup> That is, of course, the key to the current debate: What is the definition of “fuck?”

Wajnryb highlighted the unique character of the word—the character that makes it “the hands-down winner in terms of morphological flexibility.”<sup>286</sup> Blount writes: “It’s one of the best things we can do *with* someone, one of the worst *to* someone. And this is how we make people! . . . Do it too casually and we get broken homes, diseases . . . and unwanted babies.”<sup>287</sup>

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power is in the underlying taboo, and that’s not going anywhere. It’s re-morphing, changing the way it operates. Over time, FUCK will probably be replaced by something more immediately potent.” WAJNRYB, *supra* note 245, at 65.

280. Roy Blount Jr., *Foreword* to THE F-WORD, *supra* note 277, at xiii.

281. *Id.* at xi.

282. Read, *supra* note 245, at 274–75.

283. MONTAGU, *supra* note 245, at 301.

284. WAJNRYB, *supra* note 245, at 48.

285. *Id.* at 47. This seems to contradict Wajnryb’s own argument at *supra* note 264–66, and Blount agrees with the point made here. He writes: “[T]he F-word is a fact of life. It thrives. Repression has not effaced it, nor can even this exhaustive taxonomy run it into the ground.” Blount, *supra* note 280, at xv. There exists some debate, therefore, on the continued power of the word, though there is no disagreement that its continued use is assured.

286. Wajnryb, *supra* note 245, at 43.

287. Blount, *supra* note 280, at xi.

George Carlin said much of the same thing in the monologue that became the centerpiece of *Pacifica*. Carlin recognized that the f-word was considered by society to be particularly heinous,<sup>288</sup> but he also recognized its dual character:

It's an interesting word too . . . . It leads a double life . . . . First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love . . . . And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you.<sup>289</sup>

The focus of the Scalia-Stevens debate—essentially the Fox-FCC debate—is on whether the word must always be defined in relation to its sexual connotation. That is, does “fuck” ever have a definition that will cast it outside the net of broadcast indecency?<sup>290</sup> The FCC and the Supreme Court say “no.” Most authorities disagree. They are virtually unanimous in their answers to the question: There are many nonsexual definitions for “fuck.”<sup>291</sup>

The *Oxford English Dictionary* has three entries for “fuck”—a noun, a verb, and an interjection—and while the noun and verb entries define the word in terms of sexual intercourse, they also list dozens of definitions that have nothing to do with the sex act, including:<sup>292</sup>

- “A worthless or despicable person.”
- “An intensifier expressing annoyance, hostility, urgency, exasperation, etc.”
- “Expressing anger, despair, frustration, alarm, etc.”
- “To damage, ruin, spoil, botch . . . .”

288. *FCC v. Pacifica Found.*, 438 U.S. 726, 753 app. (1978).

289. *Id.* at 754 app.

290. For broadcast purposes, indecent language is “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast media, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience.” *Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), Memorandum Opinion and Order*, 56 F.C.C.2d 94, 98 (1975) [hereinafter *Complaint Against Pacifica*]. See also *supra* notes 103–06 and accompanying discussion.

291. For example, Richard Dooling writes: “Almost all dirty-word antiquarians agree . . . that ‘Fuck you!’ has very little to do with cupidity or heterosexual copulation, and indeed probably has much more to do with the abject humiliation of enforced buggery.” DOOLING, *supra* note 247, at 12. While he may be overstating the point, he is essentially correct in his assessment of the use and definition of the word. See WILLIAM GASS, *ON BEING BLUE: A PHILOSOPHICAL INQUIRY* (1975).

292. *Fuck Definition*, OXFORD ENGLISH DICTIONARY, available at <http://www.oed.com> (follow “1. Fuck, n.” and follow “fuck, v.” and follow “fuck, int.”).

- “To cheat . . . .”

In addition, the dictionary contains twenty-six separate related entries, from “fuckability” to “fuck you.”<sup>293</sup> Even some dictionaries of slang usage do not list as many entries. For example, Eric Partridge, in *A Dictionary of Historical Slang*, lists twenty-four entries for “fuck” or related words.<sup>294</sup> Most have sexual connotations, but he also lists “[e]xpressive of extreme skepticism, to play the fool,” and a “variant of *damn all*.”<sup>295</sup> John Ayto and John Simpson list similar definitions among the five entries they report in *The Oxford Dictionary of Modern Slang*. Definitions include: to fool about (fuck about), to make a mess of (fuck up), to go away, and an expression of contemptuous or angry rejection (both fuck off).<sup>296</sup> Nearly fifty years after his first dictionary, Partridge provides fifty-four entries of the word or its derivatives in *A Dictionary of Slang and Unconventional English*.<sup>297</sup> In addition to definitions with sexual connotations, he lists “fuck up” as “[t]o fail dismally,” and “fuck you” as “[t]he strongest of low condemnations, and never meant literally,” like “damn you.”<sup>298</sup>

In addition, Random House published a book consisting entirely of definitions of “fuck” and its derivatives. *The F-Word* was edited by Jesse Sheidlower, a senior editor in Random House’s reference department, and contains some 270 pages of definitions, following a foreword by writer Roy Blount Jr. and an introduction by the editor.<sup>299</sup>

Authorities note that it is the use of the word that removes it from its sexual context. When a person is in a high emotional pitch and, as a result, swears, Dooling writes that the person cares not what the swear words mean—they are used as means of assault or other expression of frustration and are used interchangeably. In such a context, when attempting to define the word, “Don’t ask for the meaning, ask for the use.”<sup>300</sup> Linguist Wajnryb agrees. During highly emotional experiences, she writes, there is a “flooding out” and “the actual expletive used is functionally immaterial.”<sup>301</sup> “Fuck,” however, is a likely choice for an expletive

293. *Id.*

294. ERIC PARTRIDGE, *A DICTIONARY OF HISTORICAL SLANG* 349 (abr. by Jacqueline Simpson, Penguin Books 1972) (1937).

295. *Id.*

296. JOHN AYTO & JOHN SIMPSON, *THE OXFORD DICTIONARY OF MODERN SLANG* 75 (1992).

297. ERIC PARTRIDGE, *A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH* 432–33 (1984).

298. *Id.* at 432.

299. See generally SHEIDLLOWER, *supra* note 258.

300. DOOLING, *supra* note 247, at 40 (quoting Ludwig Wittgenstein).

301. WAJNRYB, *supra* note 245, at 27–28 (relying on Erving Goffman).

because of the intensity it evokes.<sup>302</sup> Indeed, today it is “known and used more for its emotional meaning” than for its reference to lovemaking, which is “largely ignored . . . .”<sup>303</sup> Though it may have been used originally because of its referential function, it has “gravitated over time toward more emotional outlets,” so that today, “[t]here is barely a sexual glimmer of meaning in the word, as it often means something more like ‘go figure.’”<sup>304</sup> The word is often uttered, read, and written for the thrill of the forbidden, to insult or to express “the jangled state of one’s nerves . . . .”<sup>305</sup> Law Professor, Christopher Fairman, writes that the use of the word is related to power. When someone experiences intense excitement, the person is likely to choose a word that is powerful because of its taboo, rather than because of its literal definition.<sup>306</sup> “*Fuck*,” he writes, “is all about sex and nothing about sex all at the same time. Virtually none of the uses of the word that I discuss have anything to do with sex.”<sup>307</sup> As a result, “When the FCC declares all uses of *fuck* are per se sexual and indecent, taboo triumphs over reason.”<sup>308</sup>

One cannot overlook the sexual connotation of the word, however. Leo Stone notes that other references to lovemaking—to “sleep with,” for example, and even, “to screw”—have definitions that are not related to sexual intercourse.<sup>309</sup> But he writes that the f-word “has no other primary meaning; all other meanings are figurative or (at the present time) consciously derivative.”<sup>310</sup> And, he notes, “[w]hen a man says: ‘I got my day all fucked up,’ he is fully aware of the primary sexual meaning of the word.”<sup>311</sup>

Therein lies the conundrum—the word is always sexual, even when it is not, which may explain the inconsistent and schizophrenic way it is treated in society and in the law.

## VI. THE F-WORD—THE NEXT ROUND

The f-word is, in itself, a conundrum. As one observer noted, it reflects “a uniquely high level of emotional intensity.”<sup>312</sup> Another wrote

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302. *Id.* at 45–46.

303. *Id.* at 45.

304. *Id.* at 45–46.

305. Read, *supra* note 245, at 274.

306. FAIRMAN, *supra* note 261, at 8.

307. *Id.*

308. *Id.* at 9.

309. Stone, *supra* note 256, at 35–36.

310. *Id.* at 35.

311. *Id.*

312. FRALEIGH & TUMAN, *supra* note 136, at 156.

that it behaves like “a kind of verbal ‘assault . . . .’”<sup>313</sup> Yet, despite the protestations of Justice Scalia, it cannot be defined with sufficient precision to settle the question of when it can be banned under the First Amendment.<sup>314</sup> And, as previously indicated, that is a question the Court is likely to face when it decides *FCC v. Fox Television Stations* in the current term.<sup>315</sup>

Clearly, words must be defined if they are to be banned, and the problem with defining the f-word has been made clear earlier in this article. The problem crystallizes, however, when one juxtaposes definitions of the word with the facts of *Cohen*: Even if “fuck” can be defined, what does “Fuck the Draft” mean?<sup>316</sup>

It is unclear whether the semantic battle fought between Justices Scalia and Stevens will be revived this term. Justice Stevens, of course, has been replaced by Elena Kagan, and Justice Souter, who was also in dissent in the case, has been replaced by Sonia Sotomayor. The First Amendment inclinations of both Justices have yet to be determined.<sup>317</sup> If the debate is revisited,<sup>318</sup> a parallel question is whether the Court will reaffirm the doctrine established in 1969 in *Red Lion Broadcasting Co. v. FCC* and vouchsafed in later cases that broadcast media are subject to less First Amendment protection than other types of media?<sup>319</sup> The issue was broached by both the Second Circuit<sup>320</sup> and Justice Thomas.<sup>321</sup>

313. Shaman, *supra* note 7, at 327.

314. It was a similar absence of precision that prompted Justice Brennan to change his mind about the regulation of obscenity. Writing for the Court in *Roth v. United States*, Justice Brennan held that obscenity could be restricted because it was “utterly without redeeming social importance.” 354 U.S. 476, 484 (1957). Sixteen years later, however, dissenting in *Paris Adult Theatre I v. Slaton*, he wrote that he was forced to conclude “that the concept of ‘obscenity’ cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials . . . .” 413 U.S. 49, 103 (1973) (Brennan, J., dissenting).

315. See *supra* discussion accompanying notes 26–48.

316. See Arkes, *supra* note 167, at 315–16.

317. See *infra* notes 361–69 and accompanying discussion.

318. The focus here is on the use of the f-word, but the issues related to indecency raised in *CBS, Inc. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, 129 S. Ct. 2176 (2009), and *ABC, Inc. v. FCC*, No 08–0841–AG (2d Cir. June 20, 2008) are similar. See *supra* notes 33–48 and accompanying discussion.

319. Indeed, as Justice Thomas pointed out, *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1820–22 (2009) (Thomas, J., concurring) was based on the proposition enunciated in *Red Lion*.

320. *Fox Television Stations v. FCC*, 613 F.3d 317, 325–27 (2d Cir. 2010). See also *infra* note 360 and accompanying discussion.

321. See *infra* notes 354–58 and accompanying discussion.

## VII. AN EMOTIVE SPEECH DOCTRINE?

One cannot help but agree with the simple logic of Leo Stone whom—more than fifty years before Justice Scalia retorted that the f-word is always sexual, and Justice Stevens maintained that it would be absurd to interpret a frustrated golfer’s expletive as sexual—wrote that the word always has a sexual undercurrent even though its use is not always in a sexual context<sup>322</sup> (what the FCC calls a literal versus a nonliteral use).<sup>323</sup> The conflict is not likely to be resolved.

One solution, however, might be the incorporation of Justice Harlan’s cogent observation that speech has two elements—the cognitive and the emotive—and they deserve equal protection.<sup>324</sup> The holding has been largely ignored since it was enunciated in 1971, possibly because of the difficulty a court might have in its implementation. Under an emotive speech doctrine, courts would spend less time attempting to determine whether words are or are not an “essential part of any exposition of ideas,”<sup>325</sup> and the Supreme Court might not be required to establish a test to determine whether various types of expression constitute intimidating speech.<sup>326</sup> And, of course, judges and Justices would not be required to hold debates on the definition of the f-word. On the other hand, courts would be required to determine when speech is primarily cognitive, when it is primarily emotive, and—possibly—when it is a mix of cognitive and emotive, mirroring Chief Justice Earl Warren’s delineation of the types of conduct in *United States v. O’Brien*.<sup>327</sup>

The enunciation of the f-word is almost always emotive, at least based on *Cohen*. Cohen’s activity does not appear to be emotional—he simply entered a courthouse where he was expected to be a witness. Yet Chief Justice Burger referred to his action as an “emotionally unstable outburst[.]”<sup>328</sup> Cohen’s speech was emotive only because of the presence

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322. Stone, *supra* note 256, at 35, *quoted at supra* note 308.

323. See Pacifica Found., *Memorandum Opinion and Order*, 9 F.C.C.R. 2698, paras. 12–13 (1987).

324. *Cohen v. California*, 403 U.S. 15, 25–26 (1971), *quoted at supra* note 157.

325. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

326. See *Virginia v. Black*, 538 U.S. 343, 357 (2003). See also W. Wat Hopkins, *Cross Burning Revisited: What the Supreme Court Should Have Done in Virginia v. Black and Why it Didn’t*, 26 HASTINGS COMM. & ENT. L.J. 269 (2004) (arguing that the Court established a new type of speech—intimidating speech—that lies outside the protection of the First Amendment, and that the Court will eventually be required to define the types of speech that are “intimidating”).

327. 391 U.S. 367, 376 (1968) (pointing out that not all conduct is expressive and that some conduct has both speech and nonspeech elements).

328. Memorandum from Chief Justice Burger, *supra* note 139.

of the single word, regardless of whether the word was used as a synonym for the act of sexual intercourse or as an intensifier.

If such a passive use of the word constituted emotive speech, then certainly Cher's dismissive "fuck 'em" to her critics and Bono's exclamation that winning the Golden Globe Award was "fucking brilliant" would constitute emotive speech and, therefore, would be eligible for protection under what might be called the *Cohen* test. Similarly, the exposure for a few seconds of a breast during a high-energy dance during the halftime show of a Super Bowl would constitute emotive speech and would be equally deserving of protection, at least outside the parameters of the broadcast media.<sup>329</sup>

All of these expressions, one could argue, are targeted at evoking emotional responses, though not necessarily physical responses. An emotive speech doctrine would also impact such expressive conduct as the Super Bowl example demonstrates. The Court has recognized the emotive elements of flag burning<sup>330</sup> and cross burning,<sup>331</sup> both of which would be protected under the doctrine without examination of whether the speech was political<sup>332</sup> or possibly intimidating.<sup>333</sup> Emotive speech, however, would not be protected if it fell into one of the categories of speech that the Court has determined to be unprotected. There would be times, therefore, when a court would have to examine both the cognitive and emotive elements of speech.

Of course, speech may be emotive and, at the same time, express ideas, information, or opinions. As one scholar noted, despite Justice Harlan's reference to "otherwise inexpressible emotions,"<sup>334</sup> it would be odd to think that emotions can never be "accurately expressed in a precise, detached way."<sup>335</sup> "Emotions," he wrote, are "not merely, sensations or twinges, but typically involve beliefs, judgments, interpretations or

329. See *CBS v. FCC*, \_\_\_ F.3d \_\_\_ (3d Cir. 2011), 2011 WL 5176139; *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 322 n.2 (2d Cir. 2010).

330. See *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (discussing the likelihood that burning the U.S. flag might cause a disturbance because of the emotional response to the act); *id.* at 422–35 (Rehnquist, C.J., dissenting) (discussing the symbolic nature of the flag).

331. See *Virginia v. Black*, 538 U.S. 343, 357 (2003) (writing that cross burning is a symbol of hate and that few messages are more powerful).

332. The Court clearly held that burning the flag was political speech. *Johnson*, 491 U.S. at 406 ("The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."). Such a determination would not be necessary under a *Cohen* test, however.

333. *Black*, 538 U.S. at 357. See also *Hopkins*, *supra* note 326.

334. *Cohen v. California*, 403 U.S. 15, 26 (1971).

335. R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429, 431 (2003).



reasonable evaluations of world features.”<sup>336</sup> Therefore, expressions of emotion “can encompass cognition in general, intentions, beliefs, judgments, attitudes, modes of perceiving and understanding, and even what we might call world-constructions.”<sup>337</sup> Indeed, even Cohen’s classic emotive speech was presumed to convey ideas—it was part of the political debate of the day on the Vietnam War,<sup>338</sup> and one scholar emphasized that it was within the political mainstream.<sup>339</sup>

The language used by Walter Chaplinsky is also an example of a mix of cognitive and emotive speech. While a modern analysis might find the epithets “God-damned racketeer” and “damned Fascist” to be emotive, clearly the Court focused on the cognitive elements of the speech—otherwise there would be no need to measure whether the speech was an “essential part of any exposition of ideas . . . .”<sup>340</sup> The *Chaplinsky* Court was, indeed, in error to think that designated classes of unprotected speech were “well-defined and narrowly limited.”<sup>341</sup> As one observer noted, the lewd, obscene, and profane “have proven remarkably resistant to precise definition.”<sup>342</sup>

Definitions would be unnecessary under Justice Harlan’s proposal, and that, in itself, would be a boon to free expression. Can it ever be good when a Court rules that the innocuous phrase “BONG HiTS 4 JESUS” advocates illegal drug use,<sup>343</sup> and that there is no way to use the word “fuck” that is not sexual? As legal scholar Ronald Krotoszynski wrote, “Ultimately, the ability to define language becomes the ability to control thoughts.”<sup>344</sup> The question would rest on whether the speech is emotive. Today, such a test would not apply to the facts of *Fox Television Stations*, however, at least not under current law.

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336. *Id.* at 459.

337. *Id.* at 460.

338. See William S. Cohen, *supra* note 163, at 1610 (noting that Robert Paul Cohen used profanity to make a point); Shaman, *supra* note 7, at 344 (Is Cohen’s speech political or profanity? “Obviously it is both.”).

339. See Farber, *supra* note 133, at 295.

340. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 568, 572 (1942). See also Arkes, *supra* note 167, at 317; FRALEIGH & TUMAN, *supra* note 136, at 156.

341. *Chaplinsky*, 315 U.S. at 571.

342. Shaman, *supra* note 7, at 302.

343. *Morse v. Frederick*, 551 U.S. 393, 397, 402 (2007). See also *supra* note 11.

344. Krotoszynski, *supra* note 136, at 1253.

## VIII. BROADCAST MEDIA AND THE FIRST AMENDMENT

One could argue that *Cohen* eliminated the notion that people have a right to be protected from verbal assault in public places.<sup>345</sup> Even if that is true, broadcasting, for purposes of indecency law, does not constitute a typical “public place”; it is treated differently from other media. Indecent speech is allowed in the print media,<sup>346</sup> over the telephone,<sup>347</sup> in movies,<sup>348</sup> over cable television systems,<sup>349</sup> and on the Internet.<sup>350</sup> Such speech is not allowed over the airwaves, even if the focus is on the emotive quality of the speech. The prohibition, made clear in *Pacifica*<sup>351</sup> and reiterated in *Fox Television Stations*,<sup>352</sup> was based on the proposition that broadcasting is a unique medium because of its pervasiveness and, in particular, its unique accessibility to children, a proposition first enunciated in *Red Lion*.<sup>353</sup>

In his *Fox Television Stations* concurrence, Justice Thomas spent all but one sentence attacking those rationales and the general proposition that First Amendment protection for the broadcast media is not equivalent to that of the print media. He wrote, “*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.”<sup>354</sup>

First, Justice Thomas wrote, *Red Lion* adopted and *Pacifica* reaffirmed “a legal rule that lacks any textual basis in the Constitution.”<sup>355</sup> Second, even if the rules upon which the reduced protection is based could have been justified when the two decisions were delivered, “dramatic technological advances have eviscerated the factual assumptions

345. See, e.g., Arkes, *supra* note 167, at 313.

346. See *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that, even though indecent material may be sold to adults, it can be restricted in its sale to minors).

347. See *Sable Comms., Inc. v. FCC*, 492 U.S. 115 (1989) (striking down restrictions on indecent pay phone messages while upholding restrictions on obscene pay phone messages).

348. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding zoning ordinances for adult movie houses, even though, the sexually explicit material being shown in those movie houses is protected by the First Amendment).

349. See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (holding that regulations requiring cable systems to segregate and block indecent programming were unconstitutional).

350. See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional those portions of the Communication Decency Act that criminalized the posting of indecent material on the Internet).

351. 438 U.S. 726, 748–49 (1978).

352. 129 S. Ct. 1800, 1806 (2009) (quoting *Pacifica*, 438 U.S. at 748–49).

353. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (noting that the Government may restrain public broadcasting “because of the scarcity of radio frequencies”).

354. *Fox Television Stations, Inc.*, 129 S. Ct. at 1820 (Thomas, J., concurring).

355. *Id.* at 1821.

underlying those decisions.”<sup>356</sup> There is no longer any scarcity, he wrote, and the broadcast media are no longer uniquely pervasive.<sup>357</sup> These changes require a departure from precedent under the prevailing approach to stare decisis.<sup>358</sup>

No other Justice joined Thomas’ critique, but Justice Stevens at least acknowledged that Justice Thomas was not far afield: “While Justice Thomas and I disagree about the continued wisdom of *Pacifica*, the changes in technology and the availability of broadcast spectrum he identifies certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen.”<sup>359</sup>

The Second Circuit adopted the same position in the same case, finding 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.”<sup>360</sup>

While Justice Thomas joined Justice Scalia in holding that the FCC did not violate the APA, it is conceivable that Justice Thomas could also vote that a ban on all expletives—even fleeting expletives—on the airwaves is unconstitutional because the rationale behind that ban is flawed. If there is no constitutional justification for treating the broadcast media differently, there is no constitutional justification for banning speech that would not be banned if expressed via other media.

Justice Thomas, therefore, could forge an alignment with the dissenters in *Fox Television Stations*: Justices Ginsburg and Breyer. Two other dissenters, Justices Souter and Stevens, will not be on the Court to hear such a case. Justice Souter has been replaced by Justice Sonia Sotomayor, and Justice Stevens by Justice Elena Kagan. One can only guess at how the new Justices would vote, but there are reasons to believe they might be in alignment with Justices Ginsburg and Breyer.

First Amendment scholar, Ronald K.L. Collins, wrote before the confirmation of Justice Sotomayor that there were reasons for cautious optimism in the area of free speech jurisprudence,<sup>361</sup> and the Reporters Committee for Freedom of the Press, though it wrote that “no clear

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356. *Id.*

357. *Id.* at 1822.

358. *Id.*

359. *Id.* at 1828 n.5 (Stevens, J., dissenting) (citations omitted and capitalization modified).

360. *Fox Television Stations v. FCC*, 489 F.3d. 444, 465 (2d Cir. 2007), *rev’d on other grounds*, 129 S. Ct. 1800 (2009). *See also supra* note 320 and accompanying discussion.

361. Ronald K.L. Collins, *Sotomayor and Free Expression*, FIRST AMENDMENT CTR. (May 28, 2009), <http://www.firstamendmentcenter.com/commentary.aspx?id=21637>.

standard on First Amendment issues has emerged from her many cases,” also found that she seemed to support the rights of the public and press to access to court proceedings and “[to] be free from judicial and prosecutorial restraints on speech.”<sup>362</sup> Her decisions show “a careful analysis of the First Amendment issues at stake,” the lobbying group wrote.<sup>363</sup>

In addition, during her first term, Justice Sotomayor voted with Justice Breyer in at least two speech-related cases,<sup>364</sup> and during oral arguments in a third case, seemed to question the speech restrictions related to alleged terrorist organizations.<sup>365</sup>

Justice Kagan seemed even more First Amendment friendly before her appointment.<sup>366</sup> Adam Liptak of the *New York Times* writes that she is more conservative than Justice Stevens, but also suggests that she would not have voted with Stevens in either *FCC v. Pacifica*, in which Stevens wrote the Opinion of the Court, or *Texas v. Johnson*, in which he wrote a dissent.<sup>367</sup> Justice Kagan has written that the government may not limit speech because citizens find the ideas offered wrong or offensive, which would have put her at odds with the *Pacifica* decision, and she has specifically stated that the Court was right in its *Texas v. Johnson* decision.<sup>368</sup> In addition, First Amendment scholar Eugene Volokh suggests that Kagan’s attitudes toward the First Amendment are much like Justice Ginsburg’s.<sup>369</sup>

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362. *A Summary of Media-Related Decisions by Supreme Court Nominee Sonia Sotomayor*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (May 27, 2009), <http://www.rcfp.org/news/documents/20090527-asummaryofmediarelateddecisionsbysupremecourtnomi.pdf>.

363. *Id.*

364. *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Stevens, J., concurring); *Graham Cnty. Soil and Water Conservation Dist. v. U.S.*, 130 S. Ct. 1396, 1411 (2010) (Sotomayor, J., dissenting).

365. See Tony Mauro, *Justices Skeptical of Anti-Terror Speech Rules*, FIRST AMENDMENT CTR. (June 9, 2010), <http://www.firstamendmentcenter.org/justices-skeptical-of-anti-terror-speech-rules>. Unexpectedly, in this case, Justice Sotomayor was seemingly at odds with future Justice Kagan who, as Solicitor General, was arguing the case for the United States.

366. See *A Summary of the Media-Law Background of Supreme Court Nominee Elena Kagan*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (May 13, 2010), <http://www.rcfp.org/news/documents/20100513-asummaryofthemedialawbackgroundofsupremecourtnomi.pdf>.

367. Adam Liptak, *On Speech, Kagan Leaned Toward Conservatives*, N.Y. TIMES, May 14, 2010, available at <http://www.nytimes.com/2010/05/16/us/politics/16court.html>.

368. *Id.*

369. Eugene Volokh, *Elena Kagan as Scholar*, THE VOLOKH CONSPIRACY (May 10, 2010, 3:47 PM), <http://volokh.com/2010/05/10/elena-kagan-as-scholar/>.

There is a possibility, therefore, that Justice Thomas might join Justices Ginsburg and Breyer—the dissenters in *Fox Television Stations*—in striking down a ban on all uses of the f-word on the airwaves. That would leave only Chief Justice John Roberts and Justices Scalia, Kennedy, and Alito from the original majority, with Justice Kagan controlling the outcome of the case. Justice Sotomayor, who was on the Second Circuit when the case was heard, has recused herself from consideration of the case, also leaving the possibility of a 4–4 tie.<sup>370</sup>

A new majority, therefore, could render a judgment, if not an Opinion of the Court, favoring Fox on grounds that the FCC is interpreting indecency too narrowly under the First Amendment, that is, that a ban on any specific word in any context or a glimpse of nudity—no matter how brief—is unconstitutional. Such a holding would be a major step for increased freedom of expression over the airwaves.

## IX. CONCLUSION

There is always room for hope in the Supreme Court's First Amendment jurisprudence. Just as Justice Brennan expressed hope that the decision in *Cohen* would be harmless,<sup>371</sup> we can maintain hope that the Court recognizes the inherent benefits of abandoning efforts to define words for the public, and then restrict those words based on narrow judicial definitions.

We can also hope that the Supreme Court will adopt Justice Harlan's proposition that emotive elements of speech be protected equally with the cognitive elements. Granting obtrusive protection for emotive expression would make decision making in free speech jurisprudence simpler and sturdier. The rule would apply to speech uttered on the airwaves as well as through other media.

Such a holding might be considered radical at this point in the debate over offensive language, however, so, in the alternative, we can hope that a coalition of Justices would strike down efforts to ban so-called fleeting expletives on the airwaves by recognizing the futility and absurdity of such efforts. Such a holding is more likely considering the position of Justice Thomas and the possible positions of Justices Sotomayor and Kagan.

We can hope, therefore, that the silliness of *Fox Television Stations* will be short lived.

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370. *FCC v. Fox Television Stations*, 613 F.3d 317 (2d. Cir. 2011), cert. granted 79 U.S.L.W. 3629 (U.S. Jun. 27, 2011) (No. 10-1293).

371. See *supra* note 186 and accompanying text.

