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Pacifica Reconsidered: Implications for the Current Controvery over Broadcast Indecency

Angela J. Campbell, Georgetown University

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by
Angela J. Campbell
Georgetown Law

ABSTRACT

This article tells the story of how and why a single letter complaining about “dirty words” in a comedy routine broadcast by a radio station ended up in the Supreme Court and how a closely divided Court found that it was constitutional for the Federal Communications Commission to admonish the station for the broadcast even though the speech was protected by the First Amendment and its distribution by other means could not be could not be prohibited. This case, FCC v. Pacifica Foundation, was controversial when it was decided in 1978, and it has become more controversial because of the FCC’s recent crackdown on indecency. Relying on Pacifica, the FCC admonished Fox Television for broadcasting even “fleeting expletives” and fined CBS over a half-million dollars for the brief exposure of Janet Jackson’s breast during a Super Bowl Halftime show. In its 2009 decision in FCC v. Fox Television, the Court found the FCC’s enforcement action against Fox was reasonable under the Administrative Procedure Act. But it remanded both the Fox and CBS cases to the lower courts for consideration of the networks’ claims that the FCC’s actions violated the First Amendment.

Using interviews with participants, documents from the case, and papers of some of the Justices who heard the appeal, this article finds that the FCC utilized a declaratory order in Pacifica to establish a broadly applicable rule prohibiting the broadcast of “indecent” content when children were likely to be in the audience. Yet, before the Supreme Court, the FCC successfully defended its order by portraying it, as the dissenting Judge Levanthal did below, as a narrow ruling applicable solely to the facts in this particular case. In practice, however, Pacifica did establish a de facto rule, a fact implicitly recognized by the Supreme Court when it applied the State Farm standard of review to the FCC’s changed policy in Fox. Ironically, the FCC defended its enforcement actions against Fox and CBS by citing language from the Pacifica majority opinion that “context is all important,” when at the time, the FCC’s action against the Pacifica station was widely criticized for failing to take into account the context of the broadcast, that is, that the comedy routine was included as part of a serious discussion program.

The article concludes that the Pacifica decision does not compel a ruling either way on the constitutional question and thus, the Court could find the FCC’s actions in Fox and CBS unconstitutional without overturning Pacifica. It also concludes that the FCC’s decision to use enforcement actions to establish rules rather than rulemaking proceedings creates uncertainty and consequently has a chilling effect on broadcast speech.
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The future of the Supreme Court’s decision in Federal Communications Commission v. Pacifica\(^2\) hangs in the balance. In August 2008, all four major networks – NBC, CBS, ABC, and Fox – urged the Supreme Court to overturn Pacifica in briefs filed in FCC v. Fox Television Stations, Inc.\(^3\) Both Pacifica and Fox involve the same statute – §1464 of the Criminal Code, which prohibits the broadcast of “any obscene, indecent, or profane language.”\(^4\)

Despite the networks’ request, Supreme Court did not address whether Pacifica remained good law. Because it reversed the lower court’s finding that the FCC had acted arbitrarily as a matter of administrative law, the case was remanded for further proceedings. In so doing, the Court noted that the constitutionality “will be determined soon enough, perhaps in this very case.”\(^5\) The Court was referring to the fact that even though the Second Circuit decided the case

\(^1\) (c) Angela J. Campbell, Aug. 4, 2009. The views expressed in this article are solely those of Professor Campbell and should not be attributed to any of the organizations she represents. Professor Campbell co-authored an Amicus Brief for the American Academy of Pediatrics, et al. in Support of Neither Party, FCC v. Fox Television Stations, 129 S. Ct 1800 (2009) (No. 07-582). Professor Campbell thanks the following persons for agreeing to be interviewed about the case: Joseph Marino, Henry Geller, Richard E. Wiley, Daniel M. Armstrong, and Richard Bodorff. She also thanks Professor Jerry Goldman and the staff at www.Oyez.org for providing transcripts and recordings of the oral argument, and Georgetown Law students Matthew Scutari, Erika Stallings, and Nicholas Bowers for their research assistance.

\(^2\) 438 U.S. 726 (1978). This case is variously referred to as the “Seven Dirty Words” case or the “George Carlin” case, since it affirmed the FCC determination that the broadcast by a radio station of Carlin’s 12-minute monologue was indecent under §1464 and that the FCC’s action was consistent with the First Amendment. See infra at ___.

\(^3\) 129 S. Ct. 1800 (2009).

\(^4\) Fox Television Stations, Inc. v. FCC, 489 F.2d 444 (2007). In this case, Fox challenged the finding that it violated §1464 during broadcasts of the Billboard Music Awards, in which Cher used the word “fuck” once and Nicole Richie used the word “shit” a few times.

\(^5\) 129 S. Ct at 1819.
solely on administrative procedure grounds, it provided an extensive analysis of the constitutional challenges and expressed skepticism that the FCC could “provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.”

Moreover, the Supreme Court also remanded for further proceedings in light of Fox, a Third Circuit case, CBS Corp. v. FCC, in which the FCC had found a fleeting image of nudity also violated §1464. Thus, it is likely that the Supreme Court will address whether Pacifica remains good law sometime in the next few years.

This article tells the story of the Pacifica case. Pacifica is generally viewed as somewhat of an outlier in terms of First Amendment law. I wanted to understand how and why this case came to be heard by the highest court, and why it came out the way it did. To tell this story, I conducted interviews with some people involved in the case and examined the publicly available papers of the Justices who heard the Pacifica case. Part I describes the state of the law before the Pacifica case, Part II describes the FCC’s decision, and Part III discusses the D.C. Circuit’s opinion reversing the FCC. Part IV describes the progress of the case in the Supreme Court, from the decision to grant certiorari to the five-to-four decision reverse the D.C. Circuit and upholding the FCC. Part V briefly discusses the aftermath of the Pacifica decision. Part VI provides background on the Fox and CBS cases, while Part VII reflects on the implications of this reassessment of Pacifica for those cases.

The article concludes that contrary to the FCC’s claims, the Second Circuit’s decision in Fox does not conflict with the Supreme Court’s decision in Pacifica. Pacifica specifically reserved the question of whether occasional expletives could be found indecent, and in observing

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6 489 F.2d at 462.
7 CBS Corp. v. FCC, 535 F2d 167, 179 (3rd Cir. 2008). In this case, CBS challenged the FCC’s imposition of a $550,000 forfeiture, or fine, for airing the Super Bowl Halftime show in which Janet Jackson’s breast was briefly exposed.
that context was all important, it meant something different than the FCC’s current interpretation. Thus, the Court would not need to overturn Pacifica to find that the FCC’s actions in Fox and CBS were unconstitutional.

The article also finds that the litigation strategy employed by the FCC in Fox and CBS was similar to that used Pacifica. I call it “regulatory bait and switch,” by which I mean the FCC variously characterized its action as either a narrow ruling limited to the specific facts or a broad statement establishing a new rule, depending on which characterization best served its needs. In its declaratory ruling against Pacifica station WBAI, the FCC candidly noted that it was setting forth a new interpretation of the word “indecency” in §1464. Yet, on review in the D.C. Circuit, the FCC argued that the court’s review should be confined to the facts of this specific case. While only Judge Leventhal agreed with the FCC in the D.C. Circuit, the FCC was able to convince that majority of the Supreme Court Justices of the narrowness of its actions. Yet, despite the fact that the decision for the Court emphasized the narrowness of the ruling, the effect of the Pacifica decision was to establish a new policy with broad application.

The history of indecency enforcement by the FCC after Pacifica illustrates several problems with its approach. First, unlike a rule adopted through a rulemaking, the FCC can and did subsequently change the indecency rule in a later case without warning. This alone can have a chilling effect. Second, without the benefit of broad public input, the FCC fails to take adequate account of the facts and how its ruling could affect different parties, such as small and large broadcast stations, members of the public (some of whom may be offended while others may want to see or hear the allegedly indecent content), and those involved in producing content such as writers, producers, actors and musicians. Thus, I conclude that it would be preferable for
the Court to review the constitutionality of the FCC’s indecency standards after they are clarified in a rulemaking proceeding, rather than in the specific Fox and CBS cases.

I. The State of the Law Before Pacifica

Although today Pacifica is usually considered as a First Amendment case, it also resolved important questions about the meaning of the Criminal Code §1464’s prohibition against the broadcast of “any obscene, indecent, or profane language,” the FCC’s authority to enforce §1464, and the anticensorship provision in §326 of the Communications Act.

1. The Statutory Scheme

Both §1464 of the Criminal Code and §326 of the Communications Act originated in the Radio Act of 1927, which created the Federal Radio Commission to license radio stations in the public interest.\(^8\) Section 29 of that Act read:

> Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.\(^9\)

This language was re-enacted in §326 of the Communications Act of 1934. In 1948, the Criminal Code was revised, and the last sentence of §326 was moved to Title 18 of the Criminal Code to join other federal criminal statutes regulating offensive matter.\(^10\) The first sentence (anti-censorship provision) remained in §326 of the Communications Act. This revision made the Department of Justice (DOJ) responsible for criminal enforcement of §1464. It was unclear

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\(^8\) FCC v. Pacifica Foundation, 438 U.S. at 736-38.
\(^9\) 44 Stat. 1172-1173.
\(^10\) 62 Stat. 769 and 866. For example, §1461 prohibits the mailing of “obscene, lewd, lascivious, indecent filthy or vile” material.
whether this change was intended to remove the Commission’s authority to enforce §1464 administratively, since other sections of the Communications Act seemed to give the Commission authority to impose various sanctions for violations of §1464.\textsuperscript{11}

The Court resolved this uncertainty in \textit{Pacifica}. After discussing the statutory history, and finding nothing in the legislative history to the contrary, the Court concluded that the rearrangement of the provisions did not limit the FCC’s authority to impose sanctions on licensees for the broadcast of indecent material.\textsuperscript{12}

\textbf{2. Enforcement of §1464 Prior to \textit{Pacifica}}

In practice, however, neither the DOJ nor the FCC actively enforced §1464 prior to 1970.\textsuperscript{13} The Commission referred complaints about obscene or indecent programming to the DOJ and only imposed civil sanctions after a successful prosecution by DOJ or a determination by DOJ that the offense was prosecutable. The DOJ rarely acted on such complaints.\textsuperscript{14}

In 1969, the Senate Subcommittee on Communications, chaired by Senator Pastore, held a hearing and strongly suggested that the FCC should do more to curb the trend toward offensive broadcasting.\textsuperscript{15} This hearing was prompted at least in part by the Subcommittee’s unhappiness

\textsuperscript{11} These sanctions included issuing cease and desist orders, imposing monetary forfeitures, or fines, and revoking licenses. Ann-Ellen Marcus, Case Note, \textit{Broadcasting Seven Dirty Words}, 20 B.C. L. Rev. 975 (1978-79).
\textsuperscript{12} \textit{Id.} at 738. The Court interpreted §326’s anti-censorship provision as denying the “Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves” but not “the power to review the content of completed broadcasts in the performance of its regulatory duties.” \textit{Id.} at 735.
\textsuperscript{13} Marcus at 983. In fact, the FCC had rejected a petition to deny Pacifica’s license renewal for San Francisco radio station, KPFK, on that ground that it was not concerned with individual programs, or with matters of licensee taste or judgment. \textit{Application of Pacifica Foundation}, 36 FCC 147 (1964).
\textsuperscript{14} Marcus at 963 n. 77 (DOJ only brought 5 prosecutions against broadcasters under §1464).
with the FCC’s grant of an additional license to the Pacifica Foundation despite the large number of complaints about its programming.\(^\text{16}\)

**a. Eastern Educational Radio**

Not long after the hearing, the FCC issued a Notice of Apparent Liability (NAL) against WUHY-FM, a noncommercial station in Philadelphia, for violating §1464.\(^\text{17}\) WUHY-FM had broadcast a 50-minute taped interview with the Grateful Dead’s Jerry Garcia at 10 pm, in which Garcia repeated used the words “fuck” and “shit” in expressing his views on ecology, music, and other topics. In issuing the NAL, the Commission explained that the issue was not whether the station could present Garcia’s views, which it could.

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

We believe . . . we have a duty to act to prevent the widespread use on broadcast outlets of such expressions . . . For, the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the “public interest in the larger and more effective use of radio” . . . [I]t conveys no thought to begin some speech with “S - - t, man. . .”, or to use “f - - - - - g” as an adjective throughout the speech. We recognize that such speech is frequently used in some settings, but it is not employed in public ones.\(^\text{18}\)

The FCC agreed with the licensee that the broadcast was not “obscene” under §1464 because it did not appeal to the prurient interest. But, it found that “the statutory term, ‘indecent’, should be applicable, and that, in the broadcast field, the standard for its applicability should be

\(^{16}\) Id. at n. 93.


\(^{18}\) Id. at 410, ¶¶ 6-7.
(b) is utterly without redeeming social value.”\textsuperscript{19} The decision cited no authority for this assertion, and indeed, recognized that there was no judicial or administrative precedent for this case.\textsuperscript{20} It imposed a $100 fine and stated that it welcomed judicial review.\textsuperscript{21}

Commissioner Nicholas Johnson dissented, accusing the majority of condemning “a culture – a lifestyle it fears because it does not understand,” and “simply ignor[ing] decades of First Amendment law. . . What the Commission tells the broadcaster he cannot say is anyone’s guess – therein lies the constitutional deficiency.”\textsuperscript{22} Despite this strong dissent and the Commission’s invitation to seek judicial review, the station just paid the fine. Undoubtedly, it would have cost far more than $100 to appeal.

Henry Geller, who served as a special assistant to the Republican FCC Chairman Dean Burch at the time of the WUHY case, told me why the Commission brought this case. Chairman Burch wanted this type of language off the air, but Geller advised him that the broadcast did not violate § 1464 because it was not obscene and suggested that Burch use the “raised eyebrow” approach. But Burch did not want to do that. So, Geller suggested that they could argue that under the statute that indecent speech differed from obscene speech but he thought they would lose in court. Burch said he wanted it done under the statute, and Geller thought he had no other choice but to follow Burch’s wishes.\textsuperscript{23}

\textbf{b. Sonderling}

\textsuperscript{19} \textit{Id.} at 412, ¶10.
\textsuperscript{20} \textit{Id.} 412-13, ¶11.
\textsuperscript{21} \textit{Id.} at 415, ¶16.
\textsuperscript{22} \textit{Id.} at 422 (Johnson, dissent). Commissioner Kenneth A. Cox dissented in part because he thought the Commission had exaggerated the problem way out of proportion. \textit{Id.} at 417-18 (Cox, separate statement).
\textsuperscript{23} Interview with Henry Geller, in Washington, D.C. (Oct. 20, 2008) [hereinafter Geller Interview].
The next FCC case enforcing §1464 involved a commercial radio format known as “topless radio.” This term refers to call-in shows, typically aired mid-day, that included explicit discussions of sex. After receiving complaints about this format, the Chief of the FCC’s Complaints and Compliance Division had several programs taped and edited for the Commissioners. After listening to the tapes on March 21, 1973, the Commission instructed the staff to prepare a NAL against Sonderling Broadcasting Corp., licensee of radio station WGLD-FM in Oak Park, Illinois. On April 11, 1973, the FCC issued the NAL proposing to fine the station $2,000 fine for broadcasting “obscene or indecent matter” in violation of §1464.

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

The FCC Associate General Counsel, Joseph A. Marino, who would later argue the *Pacifica* case in the Supreme Court, argued this case in the DC Circuit. The court affirmed the FCC in a decision written by Judge Leventhal. He agreed with the FCC that the broadcasts were obscene and thus, the FCC’s sanction did not infringe the First Amendment.

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26 *Illinois Citizens*, 515 F.2d at 401. A few weeks earlier, the FCC announced that it would conduct a non-public fact-finding proceeding to determine whether certain television, cable and radio licensees were broadcasting obscene, indecent, or profane material in violation of §1464. Chairman Burch also gave a speech at the annual convention of the National Association for Broadcasters commending that organization for adopting a resolution condemning “topless radio.” *Id.* at 400.
27 *Id.* at 404. The opinion explained:

> The excerpts cited by the Commission contain repeated and explicit descriptions of the techniques of oral sex. And these are
groups unsuccessfully sought rehearing *en banc*. Judge Bazelon, the only one who voted for rehearing, issued a lengthy statement explaining his view that the FCC’s actions had violated the First Amendment.

3. The Obscenity Cases in the Supreme Court

In *Sonderling*, the FCC had found the broadcasts obscene under the standards set forth in two Supreme Court cases, *Roth v. United States*, and *Memoirs v. Massachusetts*. While the appeal was pending, the Supreme Court formulated new obscenity standards in *Miller v. California*. The new standard had three parts: 1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law, and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller* did not address whether indecent speech was to be assessed using the same standard as obscenity or a different standard. This open question came to the fore in *Pacifica*.

*Id.* (citations omitted).

28 515 F.2d 407 (1975) (per curiam).
29 *Id.* at 407-425.
30 515 F.2d at 404.
32 *Id.* at 24.
II. The FCC Decision in *Pacifica*


Gentlemen:

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

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

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

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

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

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

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

The letter indicated that copies had been sent to Senators James Buckley and John Pastore, as well as Morality in Media. Although the letter does not state the age of his son, Douglas later told Broadcasting magazine that he was 15 at the time.

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33 The letter is reproduced in Brief of Petitioner FCC app. at 2-3, *Pacifica*, 438 U.S. 726 (No. 77-528). Douglas was a planning board member of Morality in Media. R. Wilfred Trembly, FCC v. Pacifica Foundation, at 219, in *FREE SPEECH ON TRIAL* (Richard A. Parker, ed. 2003). Morality in Media’s amicus brief described Morality in Media as “a New York not for profit
The FCC forwarded the complaint to Pacifica. Pacifica responded:

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

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

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those ‘secret’ manners and words which, when held before us for the first time, show us new images of ourselves.

. . . Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.
As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding on the subject.  

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

A. The Declaratory Order

The *Declaratory Order* recognized that §326 of the Communications Act prohibited the Commission from engaging in censorship, but noted that the Commission also had an obligation, along with the DOJ, to enforce §1464. While claiming that this “declaratory order is not intended to modify our previous decisions recognizing broadcasters’ broad discretion in the programming area,” the broadcast medium had “special qualities” that distinguished it from

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35 The letter is reproduced in Brief of Petitioner FCC app. at 3-4, *Pacifica*, 438 U.S. 726 (No. 77-528).
36 *Citizen’s Complaint against Pacifica Foundation Station WBAI*, 56 FCC 2d 94, 95-96 (1975) [hereinafter *Declaratory Order*].
37 Telephone Interview with Joseph Marino (Oct. 15, 2008) [hereinafter Marino Interview].
38 I believe he was referring to *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 403 (1970).
39 Marino Interview.
other forms of expression and was therefore, subject to a different mode of analysis.  

Specifically, it found that:

Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference, (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.

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

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

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40 56 FCC 2d at 96, ¶7.  
41 *Id.* at 97, ¶9.  
42 *Id.* at 97, ¶10.  
43 *Id.*  
44 *Id.* at 98, ¶11.  
45 *Id.* at 98, ¶12.
words such as “fuck,” “shit,” “piss,” “motherfucker,” “cocksucker,” “cunt” and “tit” depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly ‘indecent’ when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast.  

The Commission also explained its decision to issue a declaratory order instead of a NAL.

A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge ‘indecent language.’ See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission’s attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission’s action on reconsideration, judicial review may be sought immediately. 

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

At that time, the FCC had seven Commissioners—four Republicans and three Democrats. The Republican FCC Chairman, Richard E. Wiley, concurred in the result. Two Commissioners, Charlotte Reid and James Quello, issued concurring statements indicating that they believed that the broadcast of the language used in the Carlin monologue would be 

46 Id. at 99, ¶14.  
47 Id. at 99, ¶15. Marino told me that the Commission had successfully used declaratory rulings in past, for example, in the Red Lion case. The FCC saw declaratory rulings as a good vehicle to good vehicle to resolve legal issues. Marino Interview.  
48 Id. at 99, ¶14.  
49 Marino was stunned that Wiley concurred. Marino Interview. However, Wiley did not remember concurring or why he would have done so. He said that he rarely wrote separate opinions when he was FCC Chairman because he felt that the Commission opinion spoke for him. He told me supported the Commission’s action at the time and still believes it was correct today. Telephone Interview with Richard E. Wiley (July 24, 2009) hereinafter Wiley interview.
inappropriate at any time. Commissioner Quello explained that he disagreed with the majority’s view that “such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious, artistic, political, or scientific value.”

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

The other Commissioners at the time, Abbot Washburn and Robert E. Lee, did not write separately.

B. The Purpose of Using a Declaratory Order

In addition to using a declaratory ruling rather than issuing a NAL, several contemporaneous and subsequent events emphasize that the Commission intended this ruling to broad application and to serve as a test case for its new interpretation of indecency.

About the same time it issued the Declaratory Order, the FCC sent to Congress its Report on the Broadcast of Violent, Indecency and Obscene Material. Congress had asked the

50 56 FCC 2d at 102 (Reid, concurring); Id. (Quello, concurring).
51 Id. at 103. Quello filed an amicus brief in Fox, along with others agreeing with the Second Circuit that the FCC acted arbitrarily and in violation of the First Amendment. Brief for Amici Curiae Former FCC Commissioners and Officials in Support of Respondents, Fox, 129 S. Ct 1800 (No. 07-582).
52 56 FCC at 107 (Robinson, concurring).
53 According to Marino, Commissioner Washburn, who had a young daughter at the time, was one of strongest supporters for seeking certiorari. Also, Washburn called Marino the night before the argument to go over points to be made and again the next morning before rebuttal, to tell him he had missed some. Marino Interview.
54 51 FCC 2d 418 (1975).
FCC to address specific positive actions it had undertaken to protect children from inappropriate programming. The Report drew a distinction between steps that might (1) prohibit the broadcast of obscene or indecent material and (2) protect children from other sexually-oriented or violent material that might be inappropriate for them. \(^{55}\) This distinction was warranted because §1464 prohibited the broadcast of obscene and indecent material, but not violent or sexual content that was not indecent or obscene.

As to indecency and obscenity, the Report discussed how despite the FCC’s enforcement actions in *Eastern Educational Radio* and *Sonderling*, it was “apparent . . . that particularly on radio the problem of ‘indecent’ language has not abated and that the standards set forth in prior opinions has filed to resolve the problem.” \(^{56}\) Consequently, the Commission reported that it had just adopted a declaratory order in *Pacifica* setting forth a new definition of “indecent.” \(^{57}\) The Commission concluded that it was hopeful that the declaratory order would “clarify the broadcast standards for obscene and indecent speech.” \(^{58}\)

\(^{55}\) *Id.* at 419.

\(^{56}\) *Id.* at 425.

\(^{57}\) *Id.*

\(^{58}\) *Id.* It attached a copy of the *Declaratory Order* to the *Report*. *Id.* at 430, App. E. As to violent and non-indecent sexual material, the *Report* noted that “although the unique characteristics of broadcasting may justify greater governmental supervision than would be constitutionally permissible in other media, it is clear that broadcasting is entitled to First Amendment protection.” *Id.* at 419. “On the other hand, the Communications Act requires the Commission to insure that broadcast licensees operate in a manner consistent with the ‘public interest.’” *Id.* at 420. The Commission concluded that regulatory action would be less desirable than self-regulation because (1) adopting rules might involve the government too deeply in programming content, raising serious constitutional standards, and (2) judgments concerning the suitability of programming for children were highly subjective, making it difficult to construct rules. *Id.* To encourage self-regulation, Chairman Wiley held a series of meetings with the heads of the three broadcast television networks. Ultimately, each network developed its own set of guidelines, each with the common element that first hour of prime time be suitable for viewing by the entire family. In addition, the NAB proposed to amend its Code to establish family viewing period. The FCC concluded that these developments obviated the need for government regulation and expressed the view that this approach struck an appropriate balance.
In an interview with WBAI radio after the Supreme Court decision, former FCC Chairman Richard E. Wiley explained that the FCC had to enforce §1464 but was never quite certain what law was in this area. He said they were not clear on the difference between obscenity and indecency. Did the word “indecent” have legal definition? The FCC had no position but wanted finality more than anything else. He noted that the Commission almost invited judicial review. He thought that the FCC was uncomfortable in this area because of the First Amendment, and so it was helpful to know whether the FCC’s responsibility extended beyond hard core obscenity. He also noted that most broadcasters would not have used such language and it was “too bad” that WBAI had not acted more responsibly. 59

In a later speech to the Federal Communications Bar Association (FCBA), Commissioner Washburn confirmed that the FCC intentionally chose to issue the Declaratory Order to establish standards for “indecency.” He explained that:

When the “Seven Dirty Words” case reached us, . . .[o]ur dilemma was how to handle this and other complaints being received by the Broadcast Bureau about indecent language over the air. Congress mandated the FCC and the Department of Justice to enforce Section 1464 of Title 18, which prohibits the broadcast utterance of obscene and indecent language. But, unlike “obscenity,” in the area of “indecency” we had no legal guidelines or definitions. We were searching for a way to meet the statute.

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

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

C. Reconsideration and Review

Under the Communications Act, a person aggrieved by an FCC action may appeal the agency decision directly to a US Court of Appeals except in two situations: the person (1) was not a party to the proceeding below, or (2) was a party but wishes to rely on facts or arguments that had not been presented to the Commission. In those situations, the person must seek reconsideration at the FCC before seeking judicial review. This requirement poses a difficult choice for parties challenging an FCC decision – whether to seek immediate review and risk that the FCC will object that they failed to exhaust their administrative remedies, or to file a petition for reconsideration and have to wait, often for a long period of time, for the FCC to act on reconsideration before going to court.

Because this case involved a complaint against a particular station, Pacifica was the only party, and it alone could seek immediate judicial review. Pacifica filed its Petition for Review in the D.C. Circuit on April 18, 1975. Even though the Commission invited persons aggrieved to

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61 47 USC §402(a); 47 USC §405. Section 405 is sometimes referred to as a statutory requirement of exhausting administrative remedies, but it can be waived in certain situations. See generally Washington Ass’n for Television and Children v. FCC, 712 F.2d 677, 681-82 (D.C. Cir. 1983).

62 Pacifica’s long time counsel, Harry F. Plotkin, is deceased. However, I asked Henry Geller, who described Plotkin as a good friend, why he thought Pacifica did not seek reconsideration. He speculated that Plotkin thought the FCC was totally wrong and it made no sense to file for reconsideration because the FCC was not going to change its mind. Interview with Henry Geller, (Oct. 20, 2008).
file petitions for reconsideration and to subsequently seek judicial review, only one party took up this invitation. The Radio Television News Directors Association (RTNDA) filed a petition for clarification seeking a ruling that the Commission “‘does not intend to apply its definition of indecent language so as to prohibit the broadcasting of indecent words which might otherwise be reported as a part of a bona fide news or public affairs program.’”

In its brief in the D.C. Circuit, Pacifica emphasized the relationship between the Declaratory Order and the Report to Congress. It observed that:

Although the Order was issued by way of response to a listener complaint, the Order itself is not limited to the facts of the specific complaint. Rather it was issued in conjunction with, and as an integral part of, the Commission’s Report on the Broadcast of Violent, Indecent and Obscene material, which it submitted to Congress on February 27, 1975, in response to Congressional directives.

And although the Declaratory Order referred to “‘patently offensive language which describes sexual or excretory activities and organs,”’ the “sweep of the Order is much broader.” Pacifica contended that under the Commission’s definition of ‘indecent’ any and all uses of certain words which in their origin . . . refer to a patently offensive manner to sexual or excretory functions or organs are banned whether such a word as actually used in context, describes a sexual or excretory activity or whether it is used colloquially in a context where it cannot conceivably be construed as describing or even referring to sex or excretion.

As a consequence, the

63 56 FCC 2d at 99, ¶15.
64 Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), 59 FCC 2d 892 (1976).
65 Brief of Petitioner at 5-6, Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1319)(citation omitted).
66 Id. at 11.
67 Id. at 11-12.
direct effect of the Commission’s action was to proscribe the broadcast of the words in question in the context of the White House tapes, . . . a political speech or rally, . . . a public affairs documentary . . . [and] many of the great works of literature including Shakespearean plays and contemporary plays which have received critical acclaim, the works of renowned classical and contemporary poets and writers and passages from the Bible.68

Pacifica also argued that §1464 was unconstitutionally vague unless the term “indecent” was subsumed by term “obscene” as defined in Miller.69 The Carlin monologue was not obscene under the Miller test for two reasons: (1) it did not appeal to any prurient interest, and (2) it had literary and political value.70 Finally, Pacifica argued that the FCC’s action could not be sustained as a valid exercise of its authority to regulate broadcasting in the public interest and that the special qualities of the broadcast medium did not justify suppression of non-obscene speech.71

In its brief, the FCC defended its special treatment of broadcasting based on the four factors identified in the Declaratory Order.72 It also argued that its order merely channeled patently offensive language to times when it was least likely to “be thrust upon unsupervised young children.”73

68 Id. at 13-14.
69 Id.
70 Id. at 13.
71 Id. at 28-66. Two amicus briefs were filed in support of Pacifica. Henry Geller filed an amicus brief in his own name in support of Pacifica. Another supportive amicus brief was filed by the San Francisco Chapter of the Committee for Open Media arguing that the order would have an especially harsh effect on the broadcast of literature depicting minority cultures. As further evidence that the Order was overbroad, it cited studies showing that large numbers of children were in the broadcast audience even in the late evening hours. Brief of Committee for Open Media, San Francisco Chapter as Amicus Curiae, Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977) (No. 75-1319)
73 Id. at 24.
Accordingly, Pacifica’s lengthy compilation of allegedly prohibited quotations form the Bible, secular works of literature, and the “Nixon tapes” represents a serious misinterpretation of the Commission’s order. These materials were not presented to the Commission, even though Pacifica could have sought reconsideration.\textsuperscript{74}

Thus, the FCC suggested – but did not explicitly argue – that Pacifica was precluded by §405’s exhaustion requirement from challenging the breadth of the FCC’s ruling because it had not first sought reconsideration.

A week before the oral argument, the Commission narrowed the reach of the \textit{Declaratory Order} in its order on reconsideration. The Commission rejected RTNDA’s claim that the \textit{Declaratory Order} would cause licensees to censor programming and inhibit broadcast journalism. It emphasized that its order was “issued in a specific context.”\textsuperscript{75} It clarified that a licensee would not be held responsible for indecent language in covering live public events where journalistic editing was not possible.\textsuperscript{76} However, it declined to provide further guidance in the absence of a concrete factual situation.\textsuperscript{77}

\section*{III. The DC Circuit}

The case was argued before Judges Tamm, Bazelon, and Leventhal, by Joseph Marino for the FCC and Harry Plotkin for Pacifica. Marino did not expect that Judge Bazelon would vote to affirm the FCC, but had hoped Judge Tamm, a conservative jurist, would.\textsuperscript{78} However, in a two

\textsuperscript{74} \textit{Id.} at 28.

\textsuperscript{75} “\textit{Petition for Clarification or Reconsideration}” of a Citizen’s Compliant against Pacifica Foundation, Station WBAI(FM), New York, N.Y., 59 FCC 2d 892, 893 ¶4.

\textsuperscript{76} \textit{Id.} at 893, n. 1.

\textsuperscript{77} \textit{Id.} at 893, ¶5.

\textsuperscript{78} Telephone Interview with Joseph Marino, Associate General Counsel, United States Office of General Counsel, (October 15, 2008).
to one decision, the D.C. Circuit reversed the Commission. Writing for the court, Judge Tamm found that:

Despite the Commission’s professed intentions, the direct effect of its Order is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications. In promulgating the Order the Commission has ignored both the statute which forbids it to censor radio communications and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee.

Judge Tamm rejected the Commission’s claim that it was merely channeling indecent language to certain times of the day: “In fact the Order is censorship, regardless of what the Commission chooses to call it.” Citing ratings showing that over one million children were watching television until 1:00 am, he agreed with Pacifica that the “Commission’s action proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible.”

Because Judge Tamm viewed the Commission’s action as censorship prohibited under Section 326 of the Communications Act, he did not address the FCC’s argument that “indecent” differed from “obscene.” But, assuming arguendo that the FCC had the power to prohibit non-obscene speech from being broadcast, its prohibition could not be overbroad or vague. The FCC’s order was overbroad because it:

80 Id. at 13 (footnotes omitted).
81 Id.
82 Id. at 14.
83 Id. at 15 (emphasis added).
84 Id. at 16.
sweepingly forbids any broadcast of the seven words *irrespective of context* or however innocent or educational they may be. For instance, the Order would prohibit the broadcast of Shakespeare’s *The Tempest* or *Two Gentlemen of Verona*. Certain passages of the Bible are also proscribed from broadcast by the Order. Clearly every use of these seven words cannot be deemed offensive even as to minors.  

Judge Tamm rejected all of the Commission’s justifications. With regard to the intrusive nature of broadcasting, he observed that the radio could be turned off. In an analogous case, *Cohen v. California*, the Supreme Court had overturned a conviction for wearing a jacket with the F-word in a courthouse because the expression occurred in public and citizens could avoid offense by “averting their eyes.” Judge Tamm characterized the FCC’s action as a “step toward reducing the adult population to hearing or viewing only that which is fit for children” and a “classic case of burning the house to roast the pig.”

Judge Bazelon agreed with the result, but thought it was necessary to go beyond Judge Tamm’s decision and rule that the FCC’s definition of “indecent” speech was, under the *Miller* test, “massively overbroad” because it failed to use local community standards or support the use of a national standard, to consider whether the work appealed to prurient interest, and to judge the work as a whole. Concluding that the speech would be protected by the First Amendment in other media, Judge Bazelon considered whether the unique characteristics of broadcasting justified the proposed expansion of governmental control. He rejected the FCC’s argument that regulation was justified because by the privacy interests of unconsenting adults in their homes

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

86 *Id.* at 17.

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

88 *Pacifica*, 556 F.2d at 20 (Bazelon, J., concurring).
because, unlike a sound truck, radio made no sound unless turned on and any offense could be minimized by changing the channel or turning it off.  

Judge Bazelon dismissed the FCC’s claim that regulation was justified by the presence of children in the audience. While conceding that “no one would dispute that there is a public interest in stations airing programming suitable for children or that government has greater power to regulate speech aimed at children than speech aimed at adults,” he was concerned that adults with normal sleeping habits would be limited to programs fit for children.  

He argued that if it were impractical to accommodate the competing interests of children and adults, the court should err on side of under-regulation because the harm to children could be minimized with warnings and parental supervision but harm from over-regulation was irremediable.  

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

In addition, the FCC had acted inconsistently in prohibiting indecent broadcasts while asserting, in a different proceeding, that a prohibition on violent programming would violate the First Amendment. He noted that “[v]iolence in programming … may be more objectionable than the use of off-colored language; after all, children do not learn to kill each other with dirty words.”  

Finally, Judge Bazelon rejected the FCC’s reliance on spectrum scarcity, finding that “although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify

89 Id. at 26.
90 Id. at 27-28.
91 Id. at 28.
92 Id.
93 Id. at 29. The proceeding he was referring to is Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 FCC 418, 420 (1975).
Unlike in Red Lion, the broadcasters’ interest in freedom from content regulation was not incompatible with the audience interest in selecting programming.

Judge Leventhal dissented. He stressed that the FCC had only held that the specific broadcast was indecent, not that the broadcast of any one of the seven words would be indecent. Moreover, in light of the varying views in the concurring opinions, the “Commission’s decision must be read narrowly, limited to the language ‘as broadcast’ in the early afternoon.”

Judge Leventhal recognized that Carlin was “a comedian of stature, and a social satirist,” whose monologue might be appreciated by a “mature audience.” Nonetheless,

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

He thought the FCC’s determination that the material was indecent reflected “a broad consensus of society, the view that the great bulk of families would consider it potentially dangers to their children.” While families should have the means to choose programming appropriate for children, the pervasiveness of TV and radio made that impossible. Radio was widely available to children for free, and a majority of families with school-aged children had working mothers, so they would be listening unsupervised. Although Judge Leventhal acknowledged that children would hear these words somewhere, hearing them broadcast created

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94 Id. at 29.
95 Id. at 32.
96 Id. at 33.
97 Id. at 33.
98 Id. at 34.
the impression that their use was generally acceptable.\(^{99}\) He viewed the FCC’s action as an appropriate time, place or manner regulation rather than censorship.\(^{100}\)

Judge Leventhal acknowledged that vagueness was “to some extent inherent” in the concept of indecency.\(^{101}\) But he thought that the availability of judicial review would ensure protection for works of literary, artistic, political, or scientific value and guard against arbitrary enforcement.\(^{102}\) In sum, Judge Leventhal believed that the FCC had made an appropriate constitutional “trade-off” between assisting parents in protecting young children and protecting privacy versus free speech interests.\(^{103}\) He insisted that these considerations did not reflect “priggishness, but . . . society’s concern with the quality of its community life.”\(^{104}\)

The FCC, with the support of the DOJ, promptly sought rehearing \textit{en banc}.\(^{105}\) Its Petition emphasized the importance of deciding the statutory question, \textit{i.e.}, whether the word “indecent” as used in §1464 has a separate meaning from the term “obscene.”\(^{106}\) It also pointed out that the three judge panel that decided the case was “sharply divided.”\(^{107}\) Further, some of the judges had been “persuaded in part by arguments and facts that Pacifica had failed to place before the court.”\(^{107}\)

\begin{itemize}
\item \footnote{\textit{Id.} at 34.}
\item \footnote{\textit{Id.} at 34.}
\item \footnote{\textit{Id.} at 35.}
\item Although he questioned some aspects of the FCC’s order, those issues had not been “preserved for the court.”\(^{102}\) He added that had “the case been presented from the start in a different way, I would have remanded for further consideration, to make the rulings and standard more specific.”\(^{102}\) He did not understand why the word “tit” was included in the FCC’s Index. He also would have sought clarification as to the times when such programming would not be allowed. He rejected Judge Bazelon’s argument that children are not likely to be in the audience at 2 pm because that objection was not put before the court or argued on appeal.\(^{107}\)
\item \footnote{\textit{Id.} at 37.}
\item \footnote{\textit{Id.} at 37.}
\item Petition for Rehearing and Suggestion for Rehearing En Banc, Pacifica Foundation v. FCC, No. 75-1391, April 15, 1977.\(^{105}\)
\item \footnote{\textit{Id.} at 1-2.}
\item \footnote{\textit{Id.} at 5.}
\end{itemize}
Commission. Pacifica had never relied on before the Commission the litany of literary works, including the Bible, that were allegedly proscribed by the Commission’s order.\textsuperscript{108} The Commission agreed with Judge Levanthal that its “order was a declaration on a specific set of facts. When the Commission is confronted with a different set of facts, it can then determine whether the principles announced in this order should be applied, modified, or extended.”\textsuperscript{109} The D.C. Circuit denied rehearing in an unpublished order on May 10, 1977.\textsuperscript{110}

IV. The Supreme Court Decision

The FCC filed its petition for certiorari on October 7, 1977. Normally, the Solicitor General’s office would represent the FCC in filing a petition for certiorari.\textsuperscript{111} Here, although the Department of Justice joined the FCC in defending its order in the D.C. Circuit, it did not join in the petition for certiorari.\textsuperscript{112} This change of position may have been due to the change in administration. Democrat Jimmy Carter became President in January 1977, and in March 1977, appointed Wade H. McCree to replace Robert H. Bork as Solicitor General.\textsuperscript{113} However, the

\textsuperscript{108} Id. at 5.
\textsuperscript{109} Id. at 8.
\textsuperscript{110} Although the suggestion for rehearing \textit{en banc} was denied \textit{per curiam}, the Order notes that four of the nine Judges – Leventhal, McKinnon, Robb and Wilkey – would have granted the suggestion. A copy of the order is attached to the FCC’s Brief. Brief of Petitioner FCC app. at 117-18, 438 U.S. 726 (March 1978) (No. 77-528), 1978 WL 206838
\textsuperscript{111} The United States, represented by the Department of Justice, is automatically a party in appeals of FCC taken under §402(a) of the Communications Act. 47 U.S.C. § 402(a); 28 U.S.C. § 2344. However, under 28 U.S.C. § 2348, even though the Attorney General is responsible for the interests of the Government in all court proceedings under that chapter, an agency whose interests would be affected if its order were set aside, may appear as a party as of right, and be represented by its own counsel.
\textsuperscript{112} Brief for the United States, 438 U.S. 726 (March 1978) (No. 77-528) 1978 WL 206846 (U.S.).
\textsuperscript{113} Marino recalled that Solicitor General Robert Bork decided not to support seeking certiorari. Although he did not attend the meeting with the Solicitor General, he suspects that the petition was circulated for comment and that Criminal Division, which was responsible for the criminal enforcement of §1464 had a different view than the Antitrust Division, which had been involved
Republican Chairman of the FCC, Richard Wiley, served until October 13, 1977, just a few days after the FCC’s certiorari petition was filed.\textsuperscript{114}

\textbf{A. Decision to Grant Certiorari}

The Court took up whether to grant certiorari at its conference on January 6, 1978. The pool memo prepared for this conference summarized the facts, decisions below, and contentions of the parties.\textsuperscript{115} The FCC had argued that certiorari should be granted to decide whether the unique quality of the broadcast media justified its action. It also pointed out the divergence of views in the D.C. Circuit and that it was receiving an increasing number of indecency complaints.\textsuperscript{116} In opposing certiorari, Pacifica argued that the D.C. Circuit was correct in finding the Commission’s order overbroad and that the DOJ’s decision not to support certiorari demonstrated that the case posed no important issue of federal law.\textsuperscript{117}

\textbf{1. The Pool Memo}

The pool memo, which was written by Powell clerk Jim Alt, recommended against hearing the case.\textsuperscript{118} It noted that “[b]ecause of the legislative nature of the Commission’s order

\textsuperscript{114} Because the FCC is an independent agency, Commissioners may continue to serve out their terms even when a new administration takes over. In this case, the Carter transition team asked Wiley to remain as Chairman until a new Chairman could be appointed and confirmed and Wiley agreed. Telephone Interview with Richard E. Wiley, July 24, 2009. Democrat Charles Ferris became FCC Chairman on October 17, 1977.


\textsuperscript{116} Pool Memo at 8.

\textsuperscript{117} Id. at 9.

\textsuperscript{118} The practice of pooling clerks, dividing up the filings and having a single memo circulated among all the participants, began in 1972 at the suggestion of Justice Powell as a way to reduce the workload as a result of the increasing number of cert petitions being filed. Some Justices,
and the divergence of views on D.C. Cir., this case comes here in rather an unfocused state.” 119

While acknowledging that the Court had not ruled on these issues before,

it seems likely that the Commission’s approach, with its focus on words, rather than on words and context, was not sufficiently discerning even taking into account the special problems of the broadcast media. The Commission made it quite clear that a broadcaster’s claim to serious merit would make no difference in determining whether it was “indecent” except, perhaps, if the broadcast were late at night. As Judge Tamm pointed out, this would keep a fair number of serious works off the air at times when most adults could listen. Even granting validity to the Commission’s “channeling” approach, one would think that it might have taken into account both the adults’ interest in access to such works, and the possibility that children could be shielded from them. 120

The memo concluded that “[g]iven the breadth of the declaratory portion of the Commission’s order, and its potential chilling effect on broadcasters, the majority’s overbreadth approach seems more appropriate than the dissenter’s as-applied approach. Thus, unless the Court is inclined to review the majority’s overbreadth holding, the case probably is not worth taking.” 121

Justice Blackmun’s clerk Ruth Glushien agreed with the recommendation, adding: “The FCC clearly intended its order to guide broadcasters generally; hence the overbreadth concern is apt. I think the majority’s view that the order was overbroad under 47 USC §326 is well-supported. Hence, I see no reason to take the case.” 122


119 Id.
120 Id. at 9-10.
121 Id. at 10. On Justice Powell’s copy of the pool memo, Alt wrote on the first page: “I would deny this petition.” On the last page he explained: “Because I think the FCC’s declaratory order was overbroad and showed a startling insensitivity to the interests of everyone except children, I would deny. If the FCC comes back with a more narrowly (and thoughtfully) drawn rule, it will be appropriate for the Court to consider it.” Id.
122 Preliminary Memo at 10 in Blackmun Papers.
2. The Conference Vote

Four votes are needed to grant certiorari.\footnote{123} Chief Justice Burger and Justices White, Rehnquist, and Stevens voted in favor of certiorari.\footnote{124} Justices Powell and Blackmun voted "join 3," meaning that they would vote in favor of hearing the case if three others did.\footnote{125} Justices Brennan, Stewart, and Marshall voted to deny certiorari.\footnote{126}

Justice Powell’s notes on the tally sheet indicate that the Chief Justice voted to hear the case because he wanted to reverse the D.C. Circuit. Powell’s join-3 vote seems to have been prompted by his agreement with the Judge Leventhal and disagreement with Judge Bazelon. At the top of the pool memo Powell wrote: “the [FCC’s] definition [of indecent language] is certainly broad, but J. Leventhal (not a judge unsympathetic to 1st amend) read it narrowly and would sustain the FCC order. TV & Radio should not have the latitude of the Miller standard & FCC was addressing an urgent need.”\footnote{127} And, next to the statement that Bazelon had questioned the FCC’s premise that parents did not want children to hear indecent language and were unable to control children’s listening, he wrote: “Bazelon must not have children.”\footnote{128}

B. The Briefs

The FCC’s brief filed March 3, 1978, presented two issues.\footnote{129} The first was whether the term “indecent” as used in §1464 was subsumed within the term “obscene” or had a special

\footnote{123} O’Brien, supra note ___ at 211.
\footnote{124} Jan. 6-chart showing vote at conference (on file in Box 198 with the Powell Archives, Washington and Lee University School of Law).
\footnote{125} O’Brien, supra note ___ at 215.
\footnote{127} Pool Memo at 1 (on file in Box 198 with the Powell Archives, Washington and Lee University School of Law), (on file in Powell Papers)
\footnote{128} Id. at 7.
meaning as applied to broadcasting. The FCC argued that the term should be given special
meaning for four reasons: 1) children have easy access to radio and are often unsupervised; 2)
radio receivers are in the home, where individual rights to privacy are entitled to particular
respect; 3) non-consenting adults may tune in without warning; and 4) the scarcity of
frequencies required licensing in the public interest.130

The second issue was whether the FCC had reasonably concluded that certain words in
the Carlin monologue were “indecent” as broadcast. The FCC argued that it was reasonable to
conclude that Pacifica “had abused its special trust by broadcasting for nearly twelve minutes a
record which repeated over and over works which depict sexual and excretory organs and
activities in a manner patently offensive by its community’s contemporary standards in the early
afternoon when children were in the audience.”131

Respondent Pacifica argued as it did below that the FCC’s ruling set a “standard of
‘decency’ applicable to all broadcasters” that prohibited the “unexpurgated broadcast of great
works of classical and contemporary literature, including even passages from the Bible.”132
Pacifica also argued that the FCC’s construction of the term “indecent” was precluded by
Hamling v. United States, which had construed “indecency” as used in §1461 of the criminal
code, which contained language similar to §1464, as “subsumed” by the definition of “obscene”
set forth in Miller.133

Pacifica further argued that the FCC’s order could not be justified based on the “unique
qualities” of broadcasting. First, Pacifica argued that “whatever greater measure of

130 Id. at 24-28.
131 Id. at 27. Amicus briefs in support of the FCC were filed by Morality in Media and the US Catholic Conference.
133 Id. at 26-27.
governmental regulation of broadcasting may be permissible relative to other media under the
Red Lion ‘scarcity’ rationale, that rationale cannot justify the Commission’s action which serves
to lessen the number of available voices, and thus aggravates, rather than alleviates, the problem
of scarcity.”

Second, the FCC’s attempt to justify it ruling as necessary to protect unsupervised
children was a “classic example of unconstitutional overbreadth.” Third, the FCC’s action
represented an unconstitutional intrusion into the role of parents in bringing up their children and
was unnecessary to protect children. Finally, Pacifica argued that radio and television
broadcasts did not invade the privacy of the home, but were invited into the home, and any
undesired content could be avoided by simply twisting the dial.

The United States, represented by the Solicitor General, also filed a brief as a
Respondent. This brief argued that it was “impossible to read the Commission’s order in any
way except as an absolute ban, for most broadcasting hours, on the utterance of any of the

134 Id. at 44.
135 Id. at 47.
136 Id. at 53-55.
137 Id. at 56-59. Several Amicus briefs were filed in support of Pacifica. For example, the ABC,
CBS and NBC networks filing jointly with the NAB and RTNDA and others, argued that
“[a]lthough the Commission has only proscribed here the broadcast of a comic monologue
discussing society's use of and attitude toward ‘dirty words,’ the authority it has asserted would
clearly extend much further. If successful here, the Commission would be placed in the position
of a censor, free to forbid whatever is objectionable to ‘the most vocal and powerful of
orthodoxies.’” Brief for ABC, et al. as Amici Curiae Supporting Respondents at 13, 438 U.S.
726 (March 1978) (No. 77-528), 1978 WL 223423. The American Civil Liberties Union and
others argued that the FCC’s order was intended to establish broad, nationwide, standards for the
broadcast of “indecent” language, that minors had a First Amendment right to listen to the radio
free of FCC censorship, and that the FCC lacked legal authority to issue a declaratory ruling.
77-528), 1978 WL 206861, The Writers Guild argued that “to forbid the use of words is to forbid
the expression of ideas and feelings,” and that it violated the First Amendment to equate the
principles which apply to free speech “with those which govern property nuisances.” Brief for
the Writers Guild as Amicus Curiae Supporting Respondent at 2, 5, 438 U.S. 726 (March 1978)
(No. 77-528), 1978 WL 223426.
specified words, regardless of context.” \(^{138}\) Next, it argued because §326 of the Communications Act prohibited the FCC from censoring broadcasts protected by the First Amendment, the Commission could not invoke the Act’s public interest authority to “wholly ban from the airways, at least for most hours, one species of language on grounds that have nothing to do with ‘balance’ or diversity.” \(^{139}\)

At the same time, the United States disagreed with Pacifica that the term “indecency” as used in §1464 was subsumed by the term “obscene.” It argued that the “use of the disjunctive indicates that the prohibition encompasses language which is either obscene or indecent or profane.” \(^{140}\) While acknowledging that the “category of ‘indecent’ words and phrases is not self-defining,” it accepted that most of the words used by Carlin would fall into that category. \(^{141}\) Thus, it concluded that if “the First Amendment does not prevent it, we believe the Commission still remains free to apply the statute as a nuisance law.” \(^{142}\) However, the United States went on to conclude that the FCC’s action did violate the First Amendment. It could not be justified as a “time, place, and manner restriction” because offensive broadcasts could easily be avoided by turning the radio off. Moreover, “the rights of adults cannot be abridged for the sake of the children.” \(^{143}\)

The United States suggested that a carefully drafted and limited partial ban on indecent broadcasts could be consistent with the First Amendment. However, the Commission’s


\(^{139}\) Id. at 19.

\(^{140}\) Id. at 19-20.

\(^{141}\) Id. at 20.

\(^{142}\) Id. at 23.

\(^{143}\) Id. at 35. The United States also suggested that children hearing “indecent” language on the radio was hardly a “matter of the gravest concern” because they heard the same words elsewhere. Id. at 36.
suggestion that indecent language might be permitted after 10 pm was “too grudging, and too arbitrary, to salvage the rule.” In the final section entitled “A Caveat,” the United States stressed that neither the FCC nor DOJ was entirely powerless to deal with extreme cases, suggesting that sanctions could constitutionally be imposed where indecent words were “spewed forth without any arguable justification in a conscious attempt to shock, offend or outrage” or in broadcasts specifically directed to young children. The FCC’s short reply brief highlighted the areas of agreement between the DOJ and FCC and stressed that its ruling “was limited to the facts complained about” and had “not imposed a flat ban on these or any other words.”144

C. Preparation for Oral Argument

To prepare the Justices for an oral argument, the clerks typically draft “bench memos” summarizing the facts, issues, and arguments, recommending questions for oral argument, and suggesting how their Justice might vote. In this case, both the Powell and Blackmun clerks recommended that their Justices affirm the D.C. Circuit’s decision.

1. Justice Powell’s Chambers

Alt’s bench memo for Justice Powell identified three issues for decision:

1. whether the statute and constitutional validity of the order should be considered on its face or as applied;

2. whether the term “indecent” can be construed to mean something other than obscene; and

3. whether the FCC’s construction of §1464’s proscription of “indecent” language violated the First Amendment rights of broadcasters or listeners. 145

144 Reply Brief of Petitioner at 4-7, FCC v. Pacifica Foundation, 438 U.S. 726 (April 1978) (No. 77-528), 1978 WL 206843
On the first issue, Alt stated that despite his respect for Judge Leventhal, he disagreed with him here. Alt thought that the FCC’s express intent in issuing a declaratory ruling was to lay down general rules to govern future conduct, and that Judge Leventhal gave insufficient weight to concerns that the rules would deter constitutionally protected speech. Alt wrote: “Although I realize that you are no great fan of overbreadth analysis, I would urge that, at least in the first instance, you consider whether the rules are ‘substantially overbroad,’ and hence subject to facial invalidation.”

As to the second issue, Alt concluded that “Congress probably meant to reach all language that constitutionally could be proscribed, whether or not it is ‘obscene.’” Justice Powell agreed, noting in the margin: “Since 1464 includes ‘indecent’, we must reach const. issue.”

Regarding the third issue, Alt found two features of the FCC’s order “especially troublesome.”

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

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146 Id. at 5.
147 Id. at 6.
148 Id. at 14. Alt thought that Pacifica’s strongest argument was that under Cohen v. California, 403 U.S. 15 (1971), the FCC could not ban nonobscene speech because it offended some people. In Cohen, the Court reversed the conviction of a man for disturbing the peace by wearing a jacket bearing the words “Fuck the Draft” in a courtroom. The Court noted that people who were offended “could effectively avoid further bombardment of their sensitivities by simply averting their eyes.” Id. at 21. However, the Solicitor General had not argued that the FCC was prohibited from banning indecent language in all circumstances. “Although the SG is not very explicit about what alternative approach might be valid, he does make a couple of points worth considering. First, he suggests that indecent language that is deliberately used to assault listeners’ sensitivities could be banned whenever it is broadcast. . . . Second, he suggests that children still can be protected to some extent, without reducing adult fare to a level fit only for children.” Powell commented that the SG’s first point was “no standard at all.” Id. at 11.
The second feature . . . is that the FCC Order makes almost no attempt to accommodate the asserted interest in protecting children with adults’ interest in hearing programming that is permissible for willing adults. . . .the FCC’s Order prevents adults who do not stay up to midnight from hearing such programming, despite whatever their own preferences might be.\textsuperscript{149}

Acknowledging that it was difficult for parents to supervise children’s use of radio, Alt believed that “context must count for something, both to protect the children’s own First Amendment rights, and to provide a measure of protection to adults’ rights.”\textsuperscript{150} Because the FCC completely failed to take context into account, he “would hold the FCC order overbroad on its face.”\textsuperscript{151}

Alt attempted to sketch out a “constitutionally permissible scheme of regulation.” Noting that Powell took the position in his dissent in \textit{Rosenfeld v. New Jersey} that some language, which was neither obscene nor fighting words, may be so offensive that government could protect unwilling listeners,\textsuperscript{152} Alt suggested that the FCC could constitutionally prohibit deliberatively assaultive language that lacked any value.\textsuperscript{153} Works of value with offensive language, such as the Carlin monologue or the Nixon tapes, could be channeled into time slots where the fewest number of unsupervised children would be listening. He also suggested that the FCC could not constitutionally prohibit the broadcasts that “contain only occasional offensive language” such as “filmed news reports of public demonstrations.” Thus, he recommended that the case be sent back to the FCC for a “second attempt.”\textsuperscript{154}

\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} at 15.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} 408 U.S. 901, 905-06 (1972) (Powell, J., dissenting). In this case, the defendant was prosecuted under a New Jersey statute for using the word “motherfucker” four times during an address to a public school board meeting.
\textsuperscript{153} Bench Memo at 15.
\textsuperscript{154} \textit{Id.}
Justice Powell was not impressed by Alt’s arguments. In handwritten notations in the margins, he indicated that although he believed that verbal assaults on an unwilling audience could be constitutionally prohibited, he did not view this case “as involving adults, or preventing them from having access to programming.” Next to Alt’s observation that it is “not easy” to sketch out a constitutionally permissible regulation, he wrote “impossible.”

In preargument notes, Powell outlined the relevant statutory provisions, FCC arguments, and views of the lower court judges. He noted that “[m]uch depends on how one reads FCC order” and that Judge Leventhal read it narrowly. He observed that “[i]t is important to understand exactly what the FCC did,” and that “Leventhal’s view – strongly endorsed by FCC’s briefs – is that it is the ‘holding’ that must be viewed as being all that is before us,” and that the rest of the FCC’s order was “only informational.” Thus, before oral argument, Justice Powell seemed to lean strongly in favor of reversing the D.C. Circuit, even though his clerk had recommended otherwise.

2. Justice Blackmun’s Chambers

Like Alt, Blackmun clerk Glushien recommended affirming the D.C. Circuit and finding the FCC order overbroad under either the First Amendment or §326 of the Communications Act. Glushien viewed the case as raising four issues. First she addressed how broadly to read FCC order. She observed that Judge Leventhal had read it “merely as proscribing Mr. Carlin’s particular language as broadcast,” and the FCC argued that overbreadth scrutiny was not

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155 Id. at 2, 13-14.
156 Id. at 15.
158 Id. at 2.
appropriate in an *ad hoc* adjudication, as opposed to a statute or regulation.\textsuperscript{160} However, Glushien got the impression that the FCC was “trying to reduce the size of its target after the fact.”\textsuperscript{161} She pointed out that FCC order stated that:

\begin{quote}
this was the first occasion since *Miller v. California*’s reformulation of the definition of obscenity, that the Commission had had a chance to treat the problem of “indecent” language and that the opinion would “clarify the standards which will be utilized in considering the public’s complaints” about the broadcast of indecent language. [Paragraphs] 11 and 12 of the opinion deliberately sketch out the applicable principles and only then, in [Paragraph] 14, does the Commission go on to apply them to the Carlin broadcast.\textsuperscript{162}
\end{quote}

Moreover, the FCC concluded that no notice of liability would be issued against WBAI but that a declaratory order would be used because it was “admirably suited . . . to clarify[ing] the standards which the Commission utilizes to judge indecent language.”\textsuperscript{163} Thus, she “would take the Commission’s order as a broad ranging one.”\textsuperscript{164}

The second issue was whether the FCC had authority to regulate non-obscene speech.\textsuperscript{165} Here, Glushien agreed with the Solicitor General that “the use of the disjunctive [in §1464] explains

\begin{footnotesize}
\begin{enumerate}
\item Id. at 4-5.
\item Id. at 5.
\item Id.
\item Id. at 6.
\item Id. at 7.
\item Id. at 8.
\item Pacifica had argued that the FCC lacked authority because when § 1464 “states that ‘any obscene, indecent or profane language by means of radio communication’ is punishable, ‘indecent’ is mere surplusage, subsumed in the category of ‘obscene’ language.” Id. at 8. Pacifica relied on two cases, *United States v. Twelve 200-Foot Reels of Film* and *Hamling v. United States*, which had construed similar language in §§1462 and 1461, respectively, of Title 18, as limited to material meeting the Miller standard for obscenity. The FCC responded that that “although Hamling and Twelve 200-Foot Reels might support Pacifica’s argument, the unique nature of the airwaves suffices to impute to Congress the intention to regulate non-obscene speech, because of the medium’s scarcity and intrusiveness, particularly as to children.” Id. at 10.
\end{enumerate}
\end{footnotesize}
indicates an intention to have three separate categories” of prohibited broadcasts — obscene, indecent, and profane.\footnote{166} 

Third, Glushien considered whether the rule was overbroad. She disagreed with the FCC’s argument that overbreadth scrutiny was improper in an adjudicatory proceeding because “the agency functionally intended to use the adjudicatory proceeding as the occasion for announcing a new standard,” and if allowed to stand unchallenged, the de facto rule would chill the exercise of First Amendment rights by other broadcasters.\footnote{167} She noted that the “most serious challenge to overbreadth analysis is that proffered by Judge Leventhal rather than petr. [who] argues that resp failed to offer objections to the breadth of the rule below” by seeking reconsideration.\footnote{168} Glushien suggested that this objection to any overbreadth analysis should be pressed at oral argument.\footnote{169} 

On the substance, Glushien thought that the Solicitor General had provided the “best analysis.”\footnote{170} Its brief argued that the Court had never applied a “special standard for mixed audiences of children and adults.” Moreover, it distilled from “nuisance regulation cases a three part test: “(a) How offensive, to how many people, is the disputed speech; (b) how captive is the audience of unwilling listener; (c) how great a deterrent effect on speech will the ban have?”\footnote{171} Although Glushien thought that the FCC’s action could be found reasonable under this test, the United States reached the opposite conclusion.

\footnote{166} \textit{Id.} at 11. Because the FCC had authority under §1464, she saw no reason to reach the question of whether § 303(g) of the Communications Act, which allows the FCC to regulate to promote the effective use of radio, granted the FCC authority to regulate indecent speech. \textit{Id.} at 12.  
\footnote{167} \textit{Id.} at 13.  
\footnote{168} \textit{Id.} at 14.  
\footnote{169} \textit{Id.}  
\footnote{170} \textit{Id.}  
\footnote{171} \textit{Id.} at 15.
Finally, Glushien addressed whether the rule as applied here was constitutional. Assuming a narrow reading of FCC order, the reasonableness of the prohibition presented a “close question.” On the one hand, the FCC presented no empirical data to support children’s viewing patterns, while amici ABC offered data suggesting that few children listened to the radio at 2 pm. Moreover, the FCC had received only one complaint, and the radio station had warned that vulgar language would be used.

On the other hand, the Carlin monologue “focuse[d] on indecent words in a concerted and protracted way, and in the hands of a jury I would not be surprised if the dialogue was held to constitute ‘a conscious attempt to shock, offend or outrage’ (a narrowed category of prohibition which the S.G., although not I, would allow).” But she further noted that “the Carlin dialogue [sic] was part of an apparently serious discussion of the use of language.” Moreover, “the premise that such language was completely unexpected, . . ., is also a little hard to swallow on the facts of this case . . . [because] WBAI, like the Pacifica station in San Francisco, is widely known for ‘hip’ Greenwich Village-type broadcasting, with several hours a week of programming on gay rights, Puerto Rican nationalists and what-have-you.” Moreover, the child that heard the broadcast “was directly under the supervision of his parent, precisely the circumstance where the FCC says some indecent-word programming might be allowed.” Thus, Glushien concluded that she would affirm the D.C. Circuit, “either on the ground of over-breadth or by holding § 1464 to have been applied beyond its constitutional limit.”

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172 Id. at 18.
173 Id.
174 Id. at 18-19.
175 Id. at 20.
176 Id.
A document in Justice Blackmun’s handwriting that appears to be his preargument notes, outlines the bench memo, adding several comments in the margin. Next to the summary of the D.C. Circuit judges’ opinion, he wrote “Leventhal did his best to save.” Next to the question whether the case presented only the narrow question whether the words were indecent as broadcast, he wrote “Quaere whether overbreadth properly raised below” and “this is difficult.” At the bottom of the page, he wrote “Stay with Leventhal.” Thus, it appears that Justice Blackmun, like Justice Powell, was inclined to reverse the D.C. Circuit despite the contrary recommendation of his clerk.

D. The Oral Argument


Marino began by pointing out that the FCC and DOJ agreed that in enacting §1464, Congress intended to prohibit the broadcast of both obscene and indecent speech and that they were not the same thing. He described the words in the Carlin monologue as “verbal taboos” or “verbal slaps.” He argued that the Judge Leventhal’s dissent had properly construed the

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

178 Transcript of Oral Argument at 2, 678, Pacifica, 438 U.S. 726 (No. 77-528) reprinted in 101 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT (Philip B. Kurland & Gerhard Casper eds., 1979). [Note: The first number refers to the page number of the transcript and the second to the page number in the book. The transcript does not identify which Justice is speaking. Where available, that information has been obtained from Professor Jerry Goldman, director of the The Oyez Project. A sound
FCC’s order. Although Pacifica and the DOJ presented the FCC’s order as a “flat ban,” it was only a declaratory order limited to the facts presented, and at a heart, an attempt to protect children by channeling such programming to times when children were unlikely to be in the audience.\(^{179}\)

Marino finished his argument in about nine minutes with no interruptions and was about to sit down the Justices started asking questions. Justice Stevens wanted to know whether saying the same words on CB radio would be a crime, since the statute seemed to apply to all forms of radio communication. Marino was flustered by the question, and after a long pause, said that the FCC had no position on that issue. Justice Stevens tried again, asking whether the same words in the same statute could mean different things in different proceedings. Marino explained that the DOJ was responsible for criminal enforcement, while the FCC could only take administrative or regulatory action.\(^{180}\) The Chief Justice asked whether the FCC might consider that a CB operator used such words when the CB license came up for renewal, and Marino agreed that the FCC would consider it under the public interest standard of the Communications Act.\(^{181}\)

Another Justice tried again to pin Marino down as to whether the word “indecent” could mean one things for purposes of the FCC’s administrative enforcement and something else for purposes of the DOJ’s criminal enforcement.\(^{182}\) The Chief Justice tried to help him out: “The same conduct, the same words, whether they were ultimately found to be criminal or non-

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\(^{179}\) Id. at 3, 679.

\(^{180}\) Id. at 5-6, 681-82.

\(^{181}\) Id. at 6, 682.

\(^{182}\) Id. at 6-7, 682-83.
criminal might constitute a basis for not renewing a license, might they not?"¹⁸³ Marino agreed that the FCC could, and did, address indecent language under the public interest standard, but “felt that since that specific prohibition has been in the statute [18 USC § 1464], it would try to give some concrete meaning to it, and limit it as much as possible in the light of this Court’s opinions in First Amendment cases."¹⁸⁴

Pacifica’s attorney started out by stressing that WBAI was a “noncommercial, educational station in New York with a limited audience.”¹⁸⁵ It aired the Carlin recording preceded by a warning in the context of a serious discussion program. One Justice asked whether the warning would lead young people to turn off the program or was intended as a “come on.”¹⁸⁶ Plotkin replied that in this case, it was not intended as a come on because “this is not a type of a station that is devoted to commercial enterprises. This was not a pandering program. It is not a titillating program. It is a station that does devote itself to the unusual programming, to the highly controversial program to a wide variety of programming.”¹⁸⁷

Justice Marshall seemed skeptical.

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

Plotkin: Oh, yes; yes. The child was sitting with his father, and presumably –

¹⁸³ Id. at 8, 684.
¹⁸⁴ Id.
¹⁸⁵ Id. at 9, 685. The Chief Justice asked for clarification and Plotkin replied: “It is a non-commercial educational station. That means it is a station licensed [to] a non-profit organization, . . there can be no commercials on it and its programs are of an educational nature. It’s like WETA here in Washington; the same type of station.” To which Justice Rehnquist quipped “Almost!” and the audience laughed. Id. at 10, 686.
¹⁸⁶ Id. at 10, 686.
¹⁸⁷ Id.
Marshall: No, I said the average child knows that this is an educational station which has a broad range of programs – How in the world could a child know that?

Plotkin: How could he know it’s educational?

Marshall: Yes.

Plotkin: Well, this particular child, we know very little about him.¹⁸⁸

Plotkin moved on to argue that the FCC had acted inconsistently by taking action against Pacifica for indecent language, while at the same time, concluding that the First Amendment precluded it from taking action against violent programs. Although conceding that §1464 prohibited indecent but not violent programming, Plotkin argued that the statute did not give the FCC authority to issue a general declaration that certain words were banned “even though they have literary, artistic, or scientific value.”¹⁸⁹

This claim prompted Justice Marshall to interject: “Are you arguing now that this has literary or artistic value?”

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

The Court: This is educational, in your view?

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

¹⁸⁸ Id. at 10-11, 686-87.
¹⁸⁹ Id. at 11-12, 687-88.
Marshall: Well, I am not an expert but, if that is artistic, deliver me.\(^\text{190}\)

After the laughter died down, Plotkin moved on to his statutory argument. He pointed out that in *FCC v. ABC*,\(^\text{191}\) the Court had overturned an FCC regulation involving lotteries which had interpreted a criminal statute in a different manner than the DOJ, which had responsibility for criminal enforcement. He drew a parallel to this case, claiming that §1464 used “exactly the same type of words” as §1461, which had been before the Court in the *Hamling* case.\(^\text{192}\) “And this Court has specifically held that, as a matter of statutory construction, that when those words are used, the words, ‘indecent, filthy, vile and obscene’ must mean the same as ‘obscene’” to avoid vagueness.\(^\text{193}\) At this point, Justice Rehnquist interjected, “To say ‘held’ may be a little bit of an overstatement, may it not?”\(^\text{194}\) Noting that Justice Rehnquist wrote the *Hamling* opinion, Plotkin had to concede it was not a holding:

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\text{. . . technically, that was 1461 there and this is 1464. But, the words in the statute are the same. The meaning is the same. We have a First Amendment medium here just as we do there, and it seems to me that not only do we have a First Amendment medium under the First Amendment, but Section 326 of the Communications Act specifically says that the commission shall have no power of censorship.}
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\(^\text{190}\) *Id.* at 12, 688.

\(^\text{191}\) 357 U.S. 284 (1954). In *FCC v. ABC*, 347 U.S. 284 (1954), the Supreme Court upheld a decision enjoining enforcement of the FCC’s rules implementing §1304 of the Criminal Code, formerly §316 of the Communications Act. This statute prohibited the broadcast of lotteries and certain “giveaways” and was jointly enforced by the FCC and DOJ. The FCC’s rules implementing the statute were more restrictive than the statute. The Court agreed that the FCC’s interpretation had “stretched” the “statute to the breaking point.” *Id.* at 294. While acknowledging the FCC’s rules did not apply to criminal cases, the Court found that the statute could not be construed one way by the FCC and another by the DOJ. *Id.* at 296.

\(^\text{192}\) In *Hamling v. United States*, 418 U.S. 87 (1974), a closely-divided Court upheld a conviction under 18 USC §1461, which prohibits the mailing of “every obscene, Lewd, lascivious, indecent filthy or vile article.” *Id.* at 99 n. 8.

\(^\text{193}\) *Id.* at 13, 689.

\(^\text{194}\) *Id.*
Now, this is an entirely different thing from the fairness doctrine, or lack of balance, where because this is a medium where scarcity is a factor, the Court has said that in order to make sure the medium is made available to a maximum number of people, we will impose certain duties upon broadcast stations to make sure that all can use it.

But, that is an entirely different thing from the government coming in and saying that you are forbidden to do something; and, in the Red Lion case, which Justice White authored, you made that very point — that whereas the Fairness Doctrine and the Personal Attack Doctrine might be sustained because it’s expanding the medium – . . an entirely different question would be presented if the government here were trying to suppress speech; and that’s exactly what they are doing here. They are trying to suppress speech. If they are trying to suppress speech, they must be asked to pass the same test here as they do in any other First Amendment medium. The fact that this is radio does not make a difference.

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

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

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

Plotkin: I say that they . . . cannot suppress what a radio or television station can do any more than they can to any other. 195

Justice Rehnquist pressed Plotkin further.

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

195 Id. at 14-15, 690-91.
Plotkin: I think they will be powerless to tell them to stop doing it. I would have the same problem in response to your hypothetical question, if a station did nothing say but play “The Music Goes Round and Round” all day. It is not because of the content but because a station is required to operate in the public interest.

But not because particular words are bad, not because particular words have a particular taboo. Here the Commission is saying that just because you use these seven words, no matter in what context, if you put on a forum, where people came in and discussed a live subject and a controversial issue, and if some of the people came from the time or culture that use these kind of words are part of their discussion, particularly in anger and heat, the Commission would say that if you did that during the afternoon that this would be a violation of the Criminal Code so far as the commission can see it and would also be ground for revoking a license. I do not think the Commission has that authority.\footnote{Id. at 15-16, 692-93.}

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

Justice Rehnquist asked:

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

Claiborne: Mr. Justice Rehnquist, the government, that is the Solicitor General and the Department of Justice, take the view that they should not press for broader prosecutorial discretion than in their view the constitutional reach of the statute would authorize. Accordingly, it seems to us that the court order had the benefit that views the Department of Justice as the constitutional reach of the statute.

Rehnquist: Would you say the government is ever entitled as an institutional litigator to the Solicitor General to assert that an act of Congress is unconstitutional?
Claiborne: Mr. Justice Rehnquist, there may be rare occasions when that is so. This is not such an occasion. We do not suggest that the statute is unconstitutional. We suggest that it has a limited application and that the commission has construed it beyond that constitutional reach.\textsuperscript{197}

Justice Powell pointed out the DOJ had supported the Commission below. Claiborne admitted that it did and that it was an “embarrassment.” He explained that the Antitrust Division, had handled the matter in the lower court while the Criminal Division handled the decision whether to file a petition for certiorari. He added that although the Department thought that the lower court decision was correct and it had a duty to give the Court the benefit of its views, it did not oppose the FCC filing the petition for certiorari on its own.\textsuperscript{198}

In the little time that remained, Claiborne tried to sum up the Department’s position:

\begin{quote}
we construe Section 1464, the only statute which we view that is involved in this case, as one that cannot consistently with the First Amendment be applied so as to ban absolutely for any substantial period of time the airing of particular words on radio or television wholly without regard to circumstances or to context.\textsuperscript{199}
\end{quote}

Justice Powell asked if it was fair for the DOJ to “construe what the Commission actually held so sweepingly” when neither the FCC nor Judge Leventhal saw it that way.\textsuperscript{200} Claiborne replied:

\begin{quote}
Mr. Justice Powell, I fear it is. Judge Leventhal sought to save the commission’s order by narrowing it and the commission rides these coattails. But, the order which is before the court, not their counsel’s representation of it, is very clear that the Carlin dialog was not judged except only in so far as it contained certain words. Those words, regardless of how they were spoken, or the manner in which they were spoken, regardless of the surrounding words, were adjudged by the Commission to be indecent language. The definition of indecent language which the commission gave was clearly one which did not have any relation to the
\end{quote}

\textsuperscript{197} \textit{Id.} at 2, 698.
\textsuperscript{198} \textit{Id.} at 5, 701.
\textsuperscript{199} \textit{Id.} at 7, 703.
\textsuperscript{200} \textit{Id.} at 7-8, 703-04.
context. They ruled that indecent language can in no circumstances, except perhaps after 10 o’ clock in the evening, be redeemed by the context. 201

Chief Justice Burger asked if WBAI’s license came up for renewal and a coalition of community organizations intervened, whether the FCC’s refusal to renew the license would be upheld in court. Clairborne replied that in considering license renewals, the FCC could consider whether station’s programming appealed to a substantial part of the audience, but could not deny the license based on an isolated instance. But what if the station aired the Carlin monolog every week for ten weeks? Claiborne did not know where the FCC would draw the line, but it could not “censor particular programs through the back door.” 202 The Chief Justice asked: Is DOJ’s position that “anything goes” under §1464? No, Claiborne responded. Under certain circumstances, such as when a broadcast used words in hostile manner to insult individuals or audiences similar to fighting words, the FCC could find such language indecent. 203

Justice Powell then asked whether the FCC could act if such language aired on Saturday morning, which is “prime time for small children.” 204 Claiborne agreed that it could if the FCC could show that children were watching and the program was intended for children. If the Court adopted Judge Leventhal’s view and said that “all that is before us are these words as broadcast” would the DOJ still take the position that the FCC acted unconstitutionally, Justice Stevens asked. 205 Claiborne said that it was.

    Marino got up to give his rebuttal:

        Yesterday in his argument, Mr. Plotkin, and this morning in his argument, Mr. Claiborne kept referring to the commission’s order

201 Id. at 8, 704.
202 Id. at 9, 705.
203 Id. at 9-10, 705-06.
204 Id. at 10-11, 706-07.
205 Id. at 11, 707.
as banning or suppressing. We thought the commission’s order makes it very clear that it was not banning. It was not adapting a flat ban. It was trying to channel this material to periods when there would not be a reasonable risk that children would be exposed to it.\textsuperscript{206}

Marshall interrupted: “What was it, a suggestion? I mean, tell the truth.” Marino kept insisting that the Commission’s action did not constitute censorship. He explained:

when Congress wrote 326, it quickly added at the end of it that it will be unlawful to use any obscene, indecent, or profane language by means of radio communication. That was written in by the same people who wrote the section in 1927. So, when we approach these cases, we have Congress’ indication in 326 itself, that we should concern ourselves.\textsuperscript{207}

Another Justice asked whether it was “the Commission’s position that if the Commission regards something as indecent, profane, or obscene in its expert judgment . . . then it is entirely outside the prohibition against censorship?”\textsuperscript{208} Marino explained that it was not the Commission’s view that mattered, but whether “those words are found to be patently offensive by contemporary community standards in that community” where the station was located.\textsuperscript{209} Justice Marshall asked:

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

Marino: We only received one complaint, Your Honor. That’s correct.

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

Marino: I am sorry, Your Honor?

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

\textsuperscript{206} Id. at 12, 708.
\textsuperscript{207} Id. at 13-14, 709-10.
\textsuperscript{208} Id. at 14, 710.
\textsuperscript{209} Id.
Marino: He certainly did, Your Honor. He came in in a representative capacity, we think. We’ve been –

Marshall: What made you think that? You only got one.

. . .
Marino: One citizen can raise a legitimate public interest question.

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

. . .

Marshall: Am I correct that if nobody had protested you wouldn’t have taken action?

Marino: We would not have known about it, Your Honor, because . . . we just don’t have the funds or . . . even instructions to monitor. So we would not have ever known about it except [for] the citizen bringing this to our attention.

Burger: Well, I suppose one citizen can call the attention of the Police Department or the Fire Department to a nuisance, and that triggers the procedures; is that what you’re suggesting?

. . .
Marshall: Well, this wasn’t a fire! 210

Again, the courtroom broke into laughter. Marino agreed it wasn’t a fire, but went on to emphasize:

it gave the Commission an opportunity to give broadcasters some guidance and it did it in a context of a concrete factual situation. I want to once again stress, and I don’t understand why the United States feels that they have to expand the Commission’s order to reach constitutional questions when it could have been read very narrowly as it was by Judge Leventhal, and as it was by the Commissioners who instructed us to come and seek cert before this court on the basis of Judge Leventhal’s opinion, knowing that we were going to rely on that opinion. 211

Henry Geller, who attended the first day of oral argument, told me that he was certain the FCC would lose. Not only did he think the FCC was wrong on the merits, but Plotkin’s

210 Id. at 15-16.
211 Id. at 17, 713.
argument direct and easy to understand while Marino got stage fright and did not argue well.\textsuperscript{212} Similarly, Richard Bodorff, who had worked on the FCC’s brief in the D.C. Circuit, had expected the FCC to lose in the Supreme Court. He clearly recalls hearing from his FCC friends who attended the argument that they were sure that the FCC had lost at the Supreme Court.\textsuperscript{213}

E. The Conference after Oral Argument

At the conference held two days later on April 21, five Justices voted to overturn the D.C. Circuit (Burger, Powell, Blackmun, Rehnquist and Stevens) and four voted to affirm (Brennan, Stewart, White, and Marshall).\textsuperscript{214} However, Justice Powell’s notes indicated that the vote to reverse was “tentative.”

The Justices voted in order of seniority. Chief Justice Burger voted to reverse, stating that he agreed with Judge Leventhal. Justice Brennan voted to affirm. However, he did not agree with any of the three opinions below.\textsuperscript{215} He observed that while government has greater power to regulate with regard to children, such regulation had to be narrowly framed, and here it was not. The FCC could properly prohibit the broadcast of the Carlin monologue on a children’s program, but most children would be in school at 2 pm. To survive, the FCC would need to spell out the restriction as to time and content.

Justices Stewart, White, and Marshall also voted to affirm. Stewart saw the case as turning on the meaning of §1464. Since the Court had previously construed similar language in

\textsuperscript{212} Geller Interview.
\textsuperscript{213} Telephone Interview with Richard J. Bodorff, Partner, Wiley Rein LLP (July 29, 2009).
\textsuperscript{214} This account is based on the notes found in the Papers of Powell and Blackmun as well as Justice Brennan’s notes which are reproduced in THE SUPREME COURT IN CONFERENCE (1940-1985) 372-74 (Del Dickson, ed., Oxford Univ. Press 2001).
\textsuperscript{215} According to Powell’s notes, Brennan thought that Judge Leventhal might be correct in reading \textit{Miller} as going beyond \textit{Roth}, but he was unconvinced. Brennan could not agree with Judge Tamm because he thought §326’s anticensorship provision was congruent with the First Amendment.
to require material to be “obscene” before allowing it to be suppressed under the First Amendment, he thought the Court was required to construe §1464 in the same way.\footnote{Brennan’s notes in Dickson, at 373.} Justice White said that his view was similar to Brennan’s and that the FCC lacked jurisdiction to bar anything short of obscene.\footnote{Blackmun’s notes. He also thought that this case was different from Red Lion. \textit{Id}.} Marshall thought that the FCC was engaging in censorship in violation of the First Amendment and the Court’s decision in \textit{CBS v. DNC}.\footnote{Brennan’s notes in Dickson at 373.}

Justices Powell, Blackman, and Rehnquist all agreed with Judge Leventhal’s dissent and voted to reverse. For example, Blackmun observed that the “FCC’s order was not a very good one, and Leventhal tried to save it. I come out with him.”\footnote{Id. Powell’s notes on Justice Blackmun’s vote are similar to Brennan’s: “Leventhal did good job of saving this order. Disagrees with PS as to 1464.” Justice Powell’s notes also report that Justice Rehnquist “Agrees with Levanthal. FCC has general public interest powers so long as 1st Amend is not violated.”} Justice Powell said that Leventhal was “on target” and “right” to “construe what the decision is as narrowly as possible.”\footnote{Blackmun’s notes. Powell read from the Solicitor General’s brief which he thought was “outrageous.” \textit{Id}.} Justice Stevens also voted to reverse. According to Justice Brennan’s notes, he said:

\begin{quote}
I have flip-flopped on this case and may do so again. This is TV and radio, and the government has greater latitude to regulate them than in newspapers. So even if this material would be protected in newspapers, even apart from protection children anything that goes into my living room under TV and radio may be regulated in the public interest. So constitutionally, I would sanction this ban as Leventhal says. We should also accept the FCC representation that Leventhal correctly read its order. But is there statutory authority to prohibit the broadcast? BEW says that the “limited spectrum” rationale of Red Lion supports only the fairness doctrine and that it does not extent to this preclusion.\footnote{Dickson at 373-74. Blackmun’s and Powell’s notes provide similar accounts. For example, the first line of Blackmun’s notes under Steven’s name reads: “Has flipflopped & may do so again.” He further notes: “HL [Leventhal] correct. Keep it narrow: this particular broadcast.” But it was “hard to give a different meaning to §1464 than to §1461” a reference to the statutes at} \end{quote}
F. Drafting the Opinions

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

1. Justice Steven’s First Draft

Justice Stevens circulated his first draft on June 14, only 19 days before the decision was announced. The Introduction framed the issue as whether the FCC “has any power to regulate the broadcast of recorded material that is indecent but not obscene,” and set forth four questions for decision:

(1) whether the scope of judicial review encompasses more than the Commission’s determination that the monologue was indecent “as broadcast”; (2) whether the Commission’s order was a form of censorship forbidden by §326; (3) whether the broadcast was indecent within the meaning of §1464; and (4) whether the order violates the First Amendment of the United States Constitution.\(^{222}\)

In addressing the first question, Part I stressed that the FCC’s decision resulted from an adjudication, not a rulemaking, and was issued in a specific factual context, that is, the Carlin monologue as broadcast. It also noted that the Court reviews judgments, not statements in the opinions.\(^{223}\)

Part II addressed whether the FCC’s action violated §326 of the Communications Act, which denies the Commission the power to censor broadcasting. This section originated in the issue in *Hamling*. The last line notes that Stevens was “still uncertain on the statute.” Powell’s notes indicate that Stevens voted to “reverse (tentative as to construction of statute),” and that “Electronic media is different. Also children are different.”

\(^{222}\) Draft Opinion by Justice John Paul Stevens, at 1 (June 14, 1978) (on file in Blackmun Papers).

\(^{223}\) *Id.* at 7.
Radio Act of 1927, which also contained the prohibition against the broadcast of “obscene, indecent or profane” language that became §1464 of the Criminal Code. After reviewing the statutory history and case law, the draft concluded that §326 denied the FCC the power to edit in advance but not to review the content of completed broadcasts. Moreover, §326 not intended to limit FCC’s power to regulate the broadcast of indecent language.

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

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

Part IV addressed Pacifica’s constitutional claims. First, it rejected the overbreadth argument because “our review is limited to the question whether the Commission has the authority to prescribe this particular broadcast.” It dismissed concerns that some broadcasters to censor themselves: “At most, . . . the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.

224 Id. at 12-15.
225 Id. at 13 (footnote omitted). The last sentence of this passage was not included in the published opinion. See 438 U.S. at 740.
226 Id. at 16. The opinion noted that its approach was consistent with the its action in Red Lion rejecting the claim that the FCC’s fairness doctrine was too vague. Id. at 16-17.
While some of these references may be protected, they surely lie at the periphery of First Amendment concern.”227

Next, the opinion stated that “[w]hen the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise.”228 After a review of the case law, it concluded that the First Amendment did not prohibit all regulation of speech that depended on content.229 The draft acknowledge that speech could not be suppressed just because it was offensive or because of its political content. It also assumed that the Carlin monologue had artistic value and would be protected in other contexts.230 But here, the words were offensive “for the same reason that obscenity offends.”231

The draft explained that the Court has “long recognized that each medium of expression presents special First Amendment problems,” and that broadcasting has received the most limited protection under the First Amendment.232 Two characteristics of broadcasting were particularly relevant here:

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

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

229 Id. at 19-20.

230 Id. at 21.

231 Id. at 20.

232 Id. at 22, citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503.
First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Department*, 397 U.S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

* * *

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen’s written message might have been incomprehensible to a first grader, Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, that the government’s interest in the “well-being of its youth” and in supporting “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression. *Id.* at 640 and 639. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.233

The final paragraph emphasized the narrowness the holding. It did “not involve a conversation between a cab driver and a dispatcher or a telecast of an Elizabethan comedy.”234 It stressed that the Commission’s action “rested entirely on a nuisance rationale under which context is all-important. . . . We simply hold that when the Commission finds that a pig has

233 *Id.* at 23-25 (fn. 27 omitted). Footnote 27 rejected the claim that the Commission’s action reduced adults to hearing only what was fit for children, noting that adults could purchase tapes and record, go to nightclubs and theaters, and perhaps, because the FCC had not decided this question, even listen to such programming broadcast in the late evening hours.

234 *Id.* at 23.
entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”

The Chief Justice and Justice Rehnquist quickly joined Stevens’ opinion. Justice Stewart advised Justice Stevens that he would be circulating a dissent, and both Justice White and Marshall indicated they would await the dissent. Thus, to obtain a majority, Justice Stevens needed both Justice Powell and Blackmun.

However, both Justices had some problems with Stevens’ draft. Two-days after it was circulated, Glushien sent Justice Blackmun a short note advising him that “there may be some problems joining JPS’s Pacifica opinion as written, because he resorts to the ‘semi-protected speech’/zoning theory that you rejected in joining PS’s dissent in Young v. American Mini Theatres.” She suspected that Justice Powell might have “something of the same qualm, as he would like to reverse in this case but declined to join JPS’s ‘speech at periphery of the First Amendment theory’ in American Mini Theatres.”

On the same day, Justice Powell’s clerk advised the Justice that “Although there is much in this opinion with which you can agree, you may . . . have some trouble joining all of Part

235 Id. at 25-26.
236 The Chief Justice’s only suggestion was to add a cite to Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (1966) [hereinafter UCC]. The published opinion cites UCC to support the point that the Commission was not prevented from denying the license renewal of a broadcast station for improper programming. 438 U.S. at 737. The UCC decision was written by Burger when he was on the D.C. Circuit. It held that listeners and viewers had standing to raise objections to a station’s programming, in this case, that the station had failed to comply with the Fairness Doctrine and engaged in racially discriminatory programming, and that the FCC was required to consider those objections in determining whether to grant the license renewal.
237 Justice Stewart circulated his draft dissent on June 16.
239 Id.
IV. 240 Stevens had made many of the same points he had made in Part II of American Mini Theaters, which Justice Powell “pointedly did not join” and “he beats the drum loud and long for the proposition that government can regulate speech on the basis of its content.” 241 Alt observed that “One argument in favor of Justice Stevens’ approach is that it simply carries one step further what the Court has been doing all along,” because the Court looks to content to decide whether the speech is protected. 242 But Alt thought that the “strongest argument” against Stevens’ position was that required the Court to decide the value of speech: “The danger is that the Justices’ own varying values will feed into the decision too much.” Justice Powell underlined this sentence and wrote “yes” next to it. 243

Alt drew a parallel to the debate in equal protection law as to whether to apply only the “strict scrutiny” and “rational relation” tests, or as Justice Marshall had urged, to use a “sliding scale.” If Justice Powell was “not inclined to adopt the ‘sliding scale’ approach to the First Amendment – which, I gather from your Mini Theaters concurrence, you may not be – the problem remains what to do here.” 244 He did not think the Court could hold that Carlin’s language was unprotected altogether. Thus, he recommended emphasizing three points: (1) the FCC’s holding did not bar adults from access to Carlin’s record, but was like the zoning upheld

240 Memorandum from Jim Alt, Clerk for Justice Powell, to Justice Powell regarding Justice Steven’s Opinion for the Court at 1 (June 16, 1978) (on file in Powell Papers). Alt described Part II as holding that Section 326 means no more than that the FCC may not exercise prior restraint. He was “a little surprised to find that the opinion does not hold that the sweep of § 326 is the same as that of the First Amendment” because the meaning of the First Amendment had changed since the time Section 326 was enacted in 1927. Id. But even if § 325 was “viewed as static, the First Amendment itself always will be available to challenge FCC actions that arguably infringe on broadcasters’ rights, but do not constitute ‘prior restraints.’” Justice Powell wrote “yes” in the margin next to this sentence. Id. at 2.

241 Id. Powell inserted by hand the phrase “but TV & Radio only” after the word “regulate.”

242 Id. at 4.

243 Id.

244 Id. at 4-5.
in *Mini Theaters*; (2) the court had recognized the value of protecting children from “objectionable but protected speech” in *Ginsberg v. New York*, and radio was uniquely accessible to children; and (3) the speech here was “akin to a “verbal assault” even to some adults.  

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

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

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

Recognizing that the Justice would not likely agree, she continued:

> However, assuming you are still inclined to *reverse* and uphold the Commission’s order, I would recommend that we await, and most

245 *Id.* at 5-6.
246 *Id.* at 6.
247 *Id.* at 6.
probably join LFP’s concurrence in the judgment of reversal, rather than JPS’s opinion. This is because JPS’s opinion relies so heavily on his American Mini Theatres theory which you did not join, that there is a middle category of “peripherally protected” speech. His theory is that “offensive references to excretory and sexual organs and activities,” while non-obscene, “surely lie at the periphery of First Amendment concerns” and thus deserve only limited First Amendment protections. . . . JPS’s theory . . . would seemingly apply to books, magazines, plays, and phonograph records as well as to television/radio broadcasts. It ignores that fact, which I think important, that emphatic rough language can at times be used conscientiously by an artist in portraying certain ethos and ways of life, and that the ability to use such language where artistically necessary is an important First Amendment value.  

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

2. Justice Powell’s Concurring Opinion

Justice Powell circulated his draft concurrence on June 19, 1978. Part I explained his reasons for upholding the FCC. He emphasized that the FCC’s primary concern was to prevent this broadcast, which the FCC correctly found “‘patently offensive’ to most people regardless of age” and “was at least wholly without taste,” from reaching unsupervised children who were likely to be in the audience at 2 pm. He supported the FCC’s effort to “‘zone’” the

249 Id. at 2.
250 Id. at 3.
251 Draft Concurring Opinion by Justice Powell, at 3 (June 19, 1978) (on file in Powell Papers). I also found an earlier, uncirculated draft in the Powell Papers. This draft had several deletions, additions and corrections in Justice Powell’s handwriting. For example, on the first page, he deleted a sentence that had read “Since I expect that Commission to proceed in a cautious and reasonable manner in the future, cf. Brief for Petitioner 42-43, I do not foresee an undue ‘chilling’ effect on broadcasters’ exercise of their rights.” On page 3, he added referring to the Carlin monologue, “it was at least, however, wholly without taste.” On page 8,
monologue to hours when few unsupervised children would be exposed to it. He noted that “children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of judicious choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than an adult.” While in many cases, dissemination of such speech to children could be limited without also limiting the access of willing adults, it was not possible in broadcasting and this distinction justified the differential treatment of broadcasting.

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

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

he inserted a new sentence acknowledging that making judgments not easy but the responsibility had been reposed initially in the FCC and its expert judgment was entitled to respect.

252 Id.
253 Id. at 4.
254 Id. at 5.
255 Id. at 6.
256 Id.
257 Id. at 7-8.
258 Id. at 8.
In Part II, Justice Powell explained why he did not join in Part IV of Justice Stevens’ opinion addressing the constitutional claims. Powell did not believe that the Court should “decide on the basis of its content which speech protected by the First Amendment is most ‘valuable’ and hence deserving of the most protection, and which is less ‘valuable’ and hence deserving of less protection.”

Nor did he think that the result should turn on the whether the Carlin monologue had more or less value than a campaign speech, but “instead on the unique characteristics of the broadcast media, combined with society’s right to protect children from speech agreed to be inappropriate for their years, and secondarily with the interest of unwilling adults in not being assaulted by such offensive speech in their homes.” Justice Blackmun quickly joined Powell’s concurring opinion after Justice Powell agreed to make some minor changes.

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

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

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

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260 Id. at 9.

261 Letter from Justice Blackmun to Justice Powell (June 20, 1978) (on file in Blackmun Papers). First, he suggested deleting the word “judicious” in the sentence quoted supra in the text accompanying footnote ___. He explained: “I suspect adults have a choice whether it is it or is not judicious.” Second, he asked him to eliminate a citation to the Carey case as unnecessary and because he was on the other side in Carey.
Some of my changes are the product of further thinking prompted by your concurrence, but I do not mean to take issue with anything you have said and will welcome any suggestions you care to make notwithstanding our rather narrow area of disagreement.

Thank goodness we are at last on the home stretch.262

Blackmun’s clerk described Stevens’ changes as “mostly cosmetic,” and recommended against joining both A and B, and C as well, unless Powell had “strong feeling about wishing to make a gesture to Stevens.”263 Ultimately, both Justice Powell and Blackmun joined in Parts I, II, III and IV(C) of Justice Stevens’ opinion, providing him with the votes he needed to reverse the D.C. Circuit and affirm the FCC.

3. The Dissenting Opinions

Justice Stewart circulated the first draft of his dissent on June 16. The published opinion is not significantly changed from this initial draft. Stewart thought that the term “indecent” in §1464 should be read as meaning no more than “obscene.”264 He noted that the Court had recently held in Hamling that the term “indecent” in a closely related statutory context had the same meaning as “obscene” as that term was defined in the Miller case, and nothing suggested that Congress intended a different meaning.265 He concluded that “[s]ince the Carlin monologue concededly was not ‘obscene,’ I believe that the Commission lacked statutory authority to ban it,” and it was thus, unnecessary to reach the constitutional question.266

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262 Letter from Justice Stevens to Justice Powell (June 20, 1978) (on file in Blackmun Papers).
265 Id. at 3.
266 Id. at 2.
Justice Brennan advised the other Justices on June 19 that he would probably join Stewart’s dissent, but was also writing something on the constitutional question. On June 24, Brennan circulated his draft dissent.\footnote{Draft Dissenting Opinion by Justice Brennan (June 24, 1978) (on file in Powell Papers).} He agreed with Justice Stewart that the word “indecent” in §1464 prohibited only obscene speech. Ordinarily, he would refrain from addressing the constitutional issues, but he found “the Court’s misapplication of fundamental First Amendment principles so patent, and its attempt to impose its sadly myopic notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.”\footnote{Id. at 2 (emphasis in original).}

Part I pointed out that despite unanimous agreement that the Carlin monologue was protected speech and that a majority of the Court refused to “create a sliding scale of First Amendment protection calibrated to this Court’s perception of the worth of a communications content,” the majority found the FCC’s imposition of sanctions for airing this speech was constitutional.\footnote{Id. at 3.} The majority also ignored that fact that individuals voluntarily admitted radio communications into their homes and that, unlike other invasive modes of communications such as sound trucks, the radio could be turned off. It also ignored the constitutionally protected interests of those who wished to transmit or receive broadcasts that the FCC might find offensive.\footnote{Id. at 6-7}

Although Brennan recognized the government’s interest in protecting children, he thought this interest had already been accounted for by the “variable obscenity standard” set forth in \textit{Ginsberg v. New York}.\footnote{Id. at 9.} Under that standard, the Carlin monologue was not obscene because it did not appeal to the prurient interests of children. Moreover, he argued, while both
the Stevens opinion and prior cases “stress the time-honored right of a parent to raise his child as
he sees fit,” this decision actually undermined parents’ rights to make decisions about what their
children should be able to hear.272

Next, Justice Brennan argued that the majority’s attempt to justify its decision based on
the intrusive nature of broadcasting and the presence of children in the audience both lacked
“principled limits.”273 He notes that “[t]aken to their logical extreme, these rationales would
support the cleansing of public radio of any ‘four-letter’ words whatsoever, regardless of their
context,” and could justify the banning of a myriad of literary works.274

Part II draft attacked his colleagues’ assertion that their actions would “not significantly
infringe on the First Amendment values [as] both disingenuous as to reality and wrong as a
matter of law.”275 He found Justice Stevens’ claim that avoiding indecent language would affect
only the form not substance of the communication “transparently fallacious,” because a “given
word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an
image.”276 Moreover, the claim that willing adults were not prevented from purchasing the
record or attending a performance, displayed

a sad insensitivity to the fact that these alternatives involve the
expenditure of money, time, and effort that many of those wishing
the [sic] hear Mr. Carlin’s message may not be able to afford, and
a naïve innocence of the reality that in many cases, the medium
may well be the message.277

272 Id. at 13.
273 Id. at 14. In footnote 4, Brennan agreed with the FCC’s action was not justified by spectrum
scarcity. Spectrum scarcity could justify regulation to increase diversity as in Red Lion, but not
to justify censorship.
274 Id. at 15.
275 Id. at 18.
276 Id.
277 Id. at 20.
Brennan found the Stevens and Powell opinions “disturbing” for evidencing:

a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.\(^{278}\)

He noted that the words found unpalatable by the Court “may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this nation.”\(^{279}\)

Because the decision would have the greatest impact on those who did not share the Court’s views, it should be seen as “another of the dominant culture’s inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.”\(^{280}\)

4. **Reactions to Justice Brennan’s Draft Dissent**

Justice Powell and his clerks took offense at Justice Brennan’s draft dissent. Attached to the copy of Brennan’s first draft found in Powell’s files, was a handwritten note from Bob:

“This is the poorest, most self-impeaching piece of drivel from their Chambers yet! I wish now that we had left our Jewish quota language in.” Justice Powell wrote: at the top of the draft:

“This is ‘garbage.’”\(^{281}\) He circled phrases such as “sadly myopic notions of propriety,” “fragile sensibilities,” and “acute ethnocentric myopia,” and underlined phrases such as “naïve innocence of the reality,” “patently wrong result,” “dangerous as well as lamentable,” and “depressing inability to appreciate that in our land of cultural pluralism.”\(^{283}\) Next to Brennan’s

\(^{278}\) *Id.* at 22.

\(^{279}\) *Id.*

\(^{280}\) *Id.* at 24.

\(^{281}\) *Id.* at 1.

\(^{282}\) *Id.* at 2, 22.

\(^{283}\) *Id.* at 23.
assertion that the majority rationale suffered from “lack of principled limits” Powell wrote: “This – by the author of Bakke!!”284

Alt’s memo to Justice Powell characterized Brennan’s draft as “intemperate in some places, smugly self-righteous in others, and ludicrously overwritten in yet others.” 285 But, he concluded that Brennan made no points worthy of reply, and suggested only a few minor changes to Powell’s draft. Alt’s most substantive proposal suggestion was to delete the observation that Carlin’s monologue “was at least wholly without taste” because it was in tension with Part II which eschewed making value judgments. Powell agreed: “Yes, I already had decided this sentence was out of place.” 286 Alt’s memo concluded: “After re-reading the three opinions in this case that deal with the constitutional issues, I would immodestly venture the thought that yours make the most sense by an appreciable margin.” To which Powell replied, “I find it difficult to disagree with this ‘modest’ assessment.”287

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

No doubt you have read Bill Brennan’s dissent in which he pays his “respects” to my dissent [sic] as well as the Court’s opinion. . . Perhaps you will not wish to be associated with an opinion said to display “acute ethnocentric myopia,” “a sad insensitivity,” and “naïve innocence of reality.”288

Blackmun replied that “Writings of late, particularly in dissent, demonstrate once again that we are at the end of a term.”289

284 Id. at 14.
286 Id. Alt also suggested deleting a reference to what most people think because it seemed to express a personal view and would be stronger without it, to which Powell responded “So do I.” Id.
287 Id. at 2 (handwritten note).
288 Note from Justice Powell to Justice Blackmun (June 26, 1978) (on file in Blackmun Papers).
289 Id.
Brennan recirculated his draft on June 29. Most of the language that offended Justice Powell remained in this version as well as the published version. Indeed, Powell wrote across the top of the recirculated draft: “File & keep in file as example of how not to write an opinion.”

V. Reaction to the Pacifica Decision

The Court issued its decision at the end of the term on July 3, 1978. It received decidedly mixed reviews in the press, at the FCC and by legal scholars.

A. The Press

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

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

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

And the Court has given the FCC, of all the all-thumbs regulatory agencies, new power to harass and intimidate TV and radio stations whose counterculture, antiestablishment or just

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290 The phrase “sadly myopic” was omitted in the 2d printed draft circulated June 30 and in the published version. However, the other language that Justice Powell objected to remained. 438 U.S. at 774 (“sad insensitivity” and “naïve innocence”) and 775 (“acute ethnocentric myopia”).

291 1st Printed Draft Opinion by Justice Brennan at 1 (June 29, 1978) (on file in Powell Papers). Powell underlined passages and wrote comments in the margin on this draft as well. For example, he again noted: “strange words from the author of the Brennan plurality in Bakke.” Id. at 9. Next to a passage reading “for those of us who place an appropriately high value on our cherished First Amendment rights, the word ‘censor’ is such a word.” Justice Powell wrote “Pious.” Id. at 12.

offbeat programming may include vocabularies acceptable to their electronic constituencies but offensive to little ole ladies, elderly judges, near and far right wingers, or parents unable to regulate the listening and viewing habits of their kiddies.

The stations most endangered will be the struggling, minority-interest, fringe stations who can least afford expensive lawyers to defend them against the FCC. 293

A few days, however, a Washington Post editorial agreed with the Supreme Court’s decision.

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

This is one of those cases that never should have reached either the Supreme Court or the FCC. The monologue - recorded in a California theater by comedian George Carlin - may be regarded as funny by some; the transcript indicates he was interrupted 83 times by laughter or applause. But its prime appeal is its shock value. . . .Even as part of a program about society’s attitude toward language - which is the way the station owner, Pacifica Foundation, described its use - the monologue did not belong on the air, as a matter of policy, in mid-afternoon. 294

The editorial disagreed that the decision opened the door for substantial censorship since neither Stevens nor Powell suggested “that the FCC should require that the occasional dirty word be bleeped out or that programming should always be aimed only at family audiences.” However, the New York Times editorialized against the decision, noting that “[g]overnment action of this sort, however moderate, tends to make us uneasy.” 295

B. The FCC

The FCC Chairman Charles D. Ferris, a Democrat, did not agree with the Supreme Court’s decision. According to Ferris’ Chief of Staff, Frank Lloyd, they promptly sent someone down to the Broadcast Bureau to find a suitable complaint for sending the message that the FCC did not consider the Supreme Court’s decision a mandate to involve itself in program content.\(^{296}\)

Within a matter of weeks, the FCC unanimously dismissed a petition to deny the license renewal of Boston public television station WGBH that had been filed by Morality in Media.\(^{297}\) The Commission distinguished this case from Pacifica because petitioner “made no comparable showing of abuse by WGBH-TV of its programming discretion.”\(^{298}\) It also stated its intention to “construe the Pacifica holding consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion by broadcasters.”\(^{299}\)

The same month, Chairman Ferris told the New England Broadcasting Association that he would consider it “‘a tragedy’ if the Supreme Court’s recent decision on the use of indecent language on television and radio were to become a reason for broadcasters to avoid controversy.”\(^{300}\) He asserted that the recent WGBH case demonstrated that “the FCC is not going to become a censor.”\(^{301}\) Ferris stressed that Pacifica would apply only to situations where the

\(^{296}\) Frank Lloyd, Former FCC Chief of Staff, Comment made to FCC Indecency Cases in the D.C. Circuit: an Historical Perspective panel (Oct. 15, 2008).

\(^{297}\) Application of WGBH Educational Foundation for Renewal of License, 69 FCC 2d 1250 (1978). Morality in Media argued that WGBH had “failed in its responsibility to the community by consistently broadcasting offensive, vulgar and otherwise material harmful to children without adequate supervision or parental warnings.” The programs complained of included an episode of Masterpiece Theater and Monty Python’s Flying Circus.

\(^{298}\) Id. at 1254, ¶10.

\(^{299}\) Id. at 1254-55, ¶11.


\(^{301}\) Id.
facts were “virtually recreated” and in his view, “the particular set of circumstance in the
Pacifica case is about as likely to occur again as Halley’s Comet.”

While Ferris was not on the Commission when it issued the Pacifica declaratory order, Commissioner Abbot Washburn was. He disagreed with the New York Time’s editorial that the Pacifica decision should make one “uneasy.” He asserted that Justice Stevens’ “carefully drafted opinion [was] an important and welcome clarification” of the meaning of §1464 and the definition of “indecent language.” and that the overwhelming majority of American public would agree that the Carlin broadcast was indecent.

In a speech to the Federal Communications Bar Association, Washburn defended the Pacifica decision while assuring his audience that the FCC “had no intention of going on a regulatory spree as a consequence.” He did not think that the Pacifica decision would lead to timidity in programming. But given the awesome power of television as a “socializing force comparable to the school, the church, even the home,” broadcasters had special responsibilities. He compared industry “spokesmen deploring their orphan status with respect to the First Amendment” to “an orange wanting to be a banana.” He reminded broadcasters that the spectrum they used was a limited resource and there were “considerable advantages to being

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304 Washburn Speech, supra note __, at 4.
305 Id. at 4.
306 Washburn Speech, supra note __, at 8.
an orange.”

He asserted that most broadcasters were not concerned about the indecency prohibition since they would not use such words in any event.  

C. Academic Reaction

Most academic articles criticized the Supreme Court’s decision. For example, the Harvard Law Review’s end-of-the-term review criticized the majority’s reasoning as inconsistent, the privacy argument as makeweight, and the protection-of-children rationale for lacking support. It also criticized Justice Stevens’ sliding scale approach for ignoring the emotive impact of speech. The review concluded that unless the Court confined its decision to this extraordinarily limited context, it would pose a “serious setback for those who prize our pluralistic society’s commitment to the free exchange of ideas.”

A case note in the Boston College Law Review found it “surprising that the Court chose to uphold the right of a citizen to insulate himself at the cost of the rights of other persons to transmit and receive the broadcast,” especially since one could easily avoid offense by turning off the radio. This author also found it troubling that by disregarding all but one of the Miller elements (offensiveness), the Court effectively imposed a harsher standard for protected indecent speech than for unprotected obscene speech. Because few children were likely listening to the radio at 2 pm, it was “difficult to conceive of a fact pattern which would be more appropriate

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307 Id. at 10-11.
308 Id. at 12.
310 Id. at 163.
311 Ann-Ellen Marcus, Casenote, Broadcasting Seven Dirty Words, 20 B.C. L. Rev. 975, 992 (1978-79)
than the one in this case to trigger this adult standard for indecent speech.”

Moreover, by failing to assess the work as a whole, failing to identify what community standards were applied, and taking no expert testimony, the *Pacifica* Court “perpetuated the very absolutism and imposed uniformity that the Court in *Miller* attempted to correct.” Finally, the author criticized the majority decision as leaving ‘in its wake confusion, unpredictability, and serious questions concerning the overbreadth of the standard and its constitutional limits’ and “substantially infringing the constitutional rights of broadcasters, recording artists, and listeners.”

VI. **FCC Enforcement of §1464 after *Pacifica***

A review of FCC enforcement actions published in 1987 concluded that the FCC had backed away from enforcing §1464 and that broadcasters’ great fear of censorship was unwarranted. At the same time, it warned that there may be a hidden chilling effect and that “although *Pacifica* is seemingly inactive, it is far from dead.” A more recent review by

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312 Id. at 997.
313 Id. at 999.
314 Id. at 1000. Although the academic treatment of *Pacifica* over the past thirty years it is beyond the scope of this article, the decision has few supporters. See, e.g., Tremblay, R. Wilfred (2003). "FCC v. Pacifica Foundation", in Parker, Richard A. (ed.): *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*. Tuscaloosa, AL: University of Alabama Press, 218–233. Tremblay identifies four “serious flaws” in the *Pacifica* decision. (1) It defined indecency in a more restrictive than the contemporary definition of obscenity by using a nebulous, national standard. (2) It failed to address the age of child or provide any evidence of harm to children. (3) Its *ad hoc* enforcement led to confusion. (4) It treated broadcasting differently than other media. Many articles have argued against extending *Pacifica* to non-broadcast media. See, e.g., Thomas G. Krattenmaker and Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 Fordham L. Rev. 606 (1982-83)(concluding that no acceptable interpretation of *Pacifica* would permit government to exclude from cable even the most indecent non-obscene programming). In fact, the Court did refuse to extend the *Pacifica* type analysis to cable television in *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 815-16 (2000), to telephone dial-a-porn, in *Sable Communications v. FCC*, 492 U.S. 115. 127-28 (1989), and to indecent content on the internet in *Reno v. ACLU*, 521 U.S. 844, 866-67 (1997).

Professor Lili Levi similarly found that in the first ten years after the *Pacifica* decision, the Commission “chose to use its regulatory power simply to focus on broadcast uses of the “seven dirty words” identified in *Pacifica*. 316

The FCC subsequently became more active in enforcing the indecency prohibition. In the late 1980s, for example, the FCC put “broadcasters on notice that crass shock-jocks, boundary-crossing college radio stations, and programs targeting particular groups (such as gay men) could all be found to have aired actionable indecency even if they did not use any of the forbidden words.”317 In the early 1990s, the Commission created a safe harbor for indecent broadcasts between the hours of 10 pm and 6 am.318 But even then, the Commission “made it a point to reassure broadcasters that fleeting sexual references or depictions would not likely be problematic,” and it indicated that it would wield its regulatory power with restraint.319

**A. Recent Changes in the FCC’s Indecency Enforcement Policy**

The FCC’s approach to indecency changed dramatically under the administration of George W. Bush. The change was partly in response to the public uproar over the brief exposure of Janet Jackson’s breast during CBS’s Super Bowl Halftime show in February 2002.320 But, especially after Commissioner Kevin Martin took over the Chairmanship in March 2005, the Commission took a much more active role in policing the airwaves.

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317 Levi at 3.


319 Levi at 3.

320 The FCC claims to have received over 542,000 complaints from members of the public. *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 19230, n.6 (2004).
The FCC chose a complaint about NBC’s *Golden Globe Awards* program aired January 19, 2003, as the vehicle to announce its stricter policy against indecency. Complaints filed by members of the Parents Television Council (PTC) alleged that Bono’s comment on receiving and award (“this is really, really, fucking brilliant”) was indecent in violation of §1464. In October 2003, the FCC’s Enforcement Bureau denied the complaint, finding that in context, the word “fucking” did not describe sexual or excretory organs or activities, but was used “as an adjective or expletive to emphasize an exclamation.” The Bureau cited prior rulings finding that “fleeting and isolated remarks of this nature do not warrant Commission action.”

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

First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.

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

Applying this approach, the Commission rejected the Bureau’s conclusion that Bono’s comment fell outside of the definition of indecency:

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322 *Id.* at 19861, ¶6.
We recognize NBC's argument that the “F-Word” here was used “as an intensifier.” Nevertheless, we believe that, given the core meaning of the “F-Word,” any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition. This conclusion is consistent with the Commission’s original Pacifica decision, affirmed by the Supreme Court, in which the Commission held that the “F-Word” does depict or describe sexual activities.\(^{324}\)

The Commission further found that the use of that word in this broadcast was patently offensive. “The “F-Word” is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the “F-Word” here, on a nationally telecast awards ceremony, was shocking and gratuitous.”\(^{325}\)

B. CBS’s Super Bowl Halftime Show - “Fleeting Nudity”

About six months after the Golden Globe decision, the FCC issued a NAL against CBS in the amount of $555,000 for the broadcast of indecent material during the Super Bowl Halftime show.\(^{326}\) CBS contested liability, but the FCC assessed the forfeiture in an order released March 15, 2006.\(^{327}\)

In finding the broadcast indecent, the FCC applied the test articulated in Golden Globe. It found that the exposure of a female breast fell within the subject matter scope since it depicted a sexual organ.\(^{328}\) Next, the FCC undertook a “contextual analysis” to determine whether the

\(^{324}\) Id.

\(^{325}\) Id. at 4977, ¶9.


\(^{328}\) 21 FCC Rcd at 2764-65, ¶9.
broadcast was patently offensive. First, it concluded that the image was graphic and explicit. Second, it found that even a fleeting image could be indecent when other factors contributed to a finding of patent offensiveness. Third, the FCC found in context, the exposure of Jackson’s breast was “pandering, titillating and shocking to the viewing audience.” Or as the Commission put it: “The offensive segment in question did not merely show a fleeting glimpse of a woman’s breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman’s clothing to reveal her naked breast during a highly sexualized performance and while he sang ‘gonna have you naked by the end of this song.’” CBS sought review of the FCC’s ruling in the Third Circuit.

C. Fox’s Billboard Music Awards – “Fleeting Expletives”

On the same day the FCC fined CBS, it released an Omnibus Order addressing multiple complaints about television programs aired between February 2, 2002 and March 8, 2005. The FCC issued NALs for six programs, found four programs indecent but decided not to impose forfeitures, and ruled that seventeen others did not violate §1464. The Commission noted that “[t]aken both individually and as a whole, we believe that [these rulings] will provide substantial

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329 Id. at 2765-66, ¶11.
330 Id. at 2766, ¶12.
331 Id. at 2766-67 ¶13.
332 Id.
guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.”

Two of the programs found indecent included Fox Television’s broadcast of the 2002 and 2003 Billboard Music Awards programs. In the 2002 broadcast, Cher stated in her acceptance speech: “People have been telling me I’m on the way out every year, right? So fuck ‘em.” Citing *Golden Globe*, the FCC concluded that the “F-Word,” inherently described sexual activity and that “under the circumstances here, is vulgar, graphic and explicit.” The fact that it was not repeated was not dispositive, because the use of that word in a “live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and gratuitous.” The FCC applied a similar analysis to the broadcast of the 2003 Billboard Music Awards program, in which Nicole Richie used the words “fucking” and “shit.” The Commission noted that the use of these words before 10 p.m. would ordinarily result in a forfeiture, here it would not because Commission “precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against isolated use of expletives.”

Fox and other networks sought review of the *Omnibus Order* in the Second Circuit. The FCC asked the Second Circuit for a voluntary remand in response to the networks’ complaints that they had not had an opportunity to comment on the FCC’s indecency findings in the instances where it had not issued NALs, i.e., the 2002 and 2003 Billboard Music Awards,

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334 *Omnibus Order*, 21 FCC Rcd at 2665, ¶2.
335 *Id.* at 2691, ¶102-03.
336 *Id.* at 2691, ¶104-05.
337 *Id.* at 2693, ¶115.
338 *Id.* at 2692, 2695 ¶¶111, 124.
NYPD Blue, and The Early Show. In the Remand Order, the FCC sustained the indecency findings regarding the Billboard Music Awards but dismissed the other two. It provided somewhat more detailed reasons for rejecting Fox’s assertions that the broadcasts of the Billboard Award Shows were not actionably indecent. For example, it found “little doubt that Ms. Richie’s comments were deliberately uttered and that she planned her comments in advance.” As support, it noted that Richie was told to “watch the bad language,” and her “confident and fluid delivery of the lines.” Commissioner Jonathan Adelstein dissented in part, noting that despite the Commission’s claim that context was critically important, its analysis of the Billboard Music Awards was “limited exclusively to a few seconds of a two-hour program.”

The Remand Order defended the constitutionality of the FCC actions. The networks had argued that the Supreme Court’s decision Reno v. ACLU undermined the Commission approach to indecency. The FCC rejected their reliance on Reno on the grounds that broadcasting is different from the Internet. It disagreed that broadcasting was no longer “a uniquely pervasive presence” in American life, observing that not only do many people rely solely on broadcasting,


341 Id. at 13307, ¶22.

342 Id. at 13308, ¶23.

343 Id. at 13332 (Adelstein, concurring in part and dissenting in part).

344 Id. at 13317, ¶44. In Reno v. ACLU, 521 U.S. 844 (1997) the Supreme Court found unconstitutionally overly broad provisions in the Communications Decency Act (CDA), which prohibited the transmission or display of indecent material to minors via the Internet, using a definition of indecency similar to that used by the FCC.

345 Id. at 13318-19, ¶¶47-50.
but the audience for broadcast networks was far greater than that for cable networks. Moreover, the broadcast media remained “uniquely accessible to children.”

D. The Circuit Courts’ Decisions

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

1. The Second Circuit’s Decision in Fox

The networks challenged the FCC’s Remand Order on at least seven different grounds. The court held that the “FCC’s new policy regarding ‘fleeting expletives’ represents a significant policy departure,” and the FCC had failed to articulate “a reasoned basis for this change” as required by the APA and State Farm. Thus, court reversed and remanded to the FCC based on this ground alone and did not reach the other arguments. But because the constitutional challenges had been briefed and argued by the networks and the court was skeptical that the FCC could provide a reasoned explanation for its “fleeting expletive” regime that would pass

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346 Id. at 13319-21, ¶¶51-52.
347 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 454 (2d Cir. 2007). They included “(1) the Remand Order is arbitrary and capricious because the Commission's regulation of 'fleeting expletives' represents a dramatic change in agency policy without adequate explanation; (2) the FCC's 'community standards' analysis is arbitrary and meaningless; (3) the FCC's indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC's definition of 'profane' is contrary to law; (5) the FCC's indecency regime is unconstitutionally vague; (6) the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment.”
349 489 F.3d at 467.
constitutional muster, it offered several pages of “observations” in the “interest of judicial economy.”

The Second Circuit expressed sympathy with the networks’ “contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.” It noted that even though the Commission had declared that all variants of “fuck” and “shit” were presumptively indecent, the Commission had found that the repeated use of those words in “Saving Private Ryan” was not indecent.

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

2. The Third Circuit Decision in CBS

Similarly, in the Third Circuit, CBS brought a variety of legal challenges including a claim that the FCC’s action was unconstitutional. The Third Circuit agreed with the Second

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350 Id. at 462-66.
351 Id. at 463.
353 489 F.3d at 463.
354 Id. at 464.
355 Id. at 465.
356 CBS put the constitutional argument first in its brief. Specifically, it argued that in addressing the complaint against WBAI for airing the Carlin monologue, the FCC had narrowly construed
Circuit “that the Golden Globes decision represented a policy departure by the FCC,” and found that that the FCC’s new policy of including fleeting images within the scope of actionable indecency was arbitrary and capricious under State Farm because the FCC never supplied a reasoned explanation for the new policy. However, here, unlike in Fox, the FCC did not acknowledge that it had changed its policy. Although the Third Circuit court found other infirmities in the FCC’s order, it did not address CBS’s constitutional arguments.

E. Petitions for Certiorari

The FCC sought certiorari in both cases. In Fox, the FCC framed the issue as whether the lower court erred in striking down the FCC’s determination that the broadcast of vulgar

“indecency” for purposes of §1464 to be limited to intentionally repeated and extended presentations of indecent material. Brief of CBS at 16-31. Moreover, such restraint was required by the First Amendment, a view endorsed by the Supreme Court’s decision in Pacifica and by the FCC in later cases. Thus, the FCC’s “new ‘zero-tolerance’ approach [was] flatly inconsistent with the bedrock principle that First Amendment freedoms require breathing space to survive.” Id. at 24. Nor, according to CBS, did Pacifica “give the agency carte blanche to find an indecency violation based entirely on its subjective analysis of ‘contextual factors.’” Id. at 27. CBS accused the FCC of “manipulat[ing] its ‘contextual factors’ to reach whatever result it wants.” Id. at 28. CBS also argued the imposing liability on CBS where it had no advance knowledge that Jackson’s breast would be exposed violated the First Amendment. Additionally, CBS claimed FCC refused to take into account changes in the communications landscape since Pacifica, specifically, the fact that viewers today have many options to screen or block content on television. Id. at 33-34.

The FCC responded that Pacifica remained good law and that the Supreme Court had repeatedly recognized that the broadcast media was entitled to limited First Amendment protection. Thus, any restrictions were subject only to intermediate, rather than strict scrutiny. FCC Brief at 52. The FCC also contended that Pacifica only dealt with language and did not address nudity. Id. at 57. The FCC maintained that Pacifica’s holding had not been weakened by legal or technological changes. Id. at 59. Moreover, in response to CBS’s argument that the V-Chip eliminated the need for a ban on ban on indecency, the FCC argued that it was not required to adopt the least restrictive method and that as a factual matter, problems with the V-Chip rendered it an ineffective alternative. Id. at 60-61.

357 CBS Corp. v. FCC, 535 F3d 167, 179, 188-89 (3rd Cir. 2008).

358 Id. at 183.

359 Specifically, the Third Circuit was not convinced that CBS should be held liable for the actions of Janet Jackson and Justin Timberlake, who were independent contractors, where CBS had no advance knowledge that Timberlake planned to expose Jackson’s breast. Id. at 189.
expletives violated §1464 when the expletives were not repeated. The Commission argued that the lower court’s decision conflicted with the Supreme Court’s decision in Pacifica because it “criticized the Commission for taking context into account and refusing to treat a single use of an expletive, no matter how graphic or gratuitous, as per se not indecent, even though, in Pacifica, this Court emphasized that ‘context is all-important’ in evaluating indecency.” Thus, the lower court’s decision “put the FCC to a choice between allowing one free use of any expletive no matter how graphic or gratuitous, or else adopting a (likely unconstitutional) across-the-board prohibition against expletives.”

In opposition, NBC argued that the FCC’s order was distinguishable from and posed no conflict with Pacifica. Nonetheless, it urged that if the Court took the case, it should overturn Pacifica because “there no longer exists any sound basis for according broadcast speech less protection than obtains in other channels of communication.” NBC elaborated that:

to the extent that Pacifica premised its distinction of the broadcast medium from other channels of communication on the “‘unique’ attributes of broadcasting,” – to wit, that broadcasts were, in 1978, “a uniquely pervasive presence in the lives of all Americans” and were “uniquely accessible to children” as compared to other types of content, it rests, thirty years later, on a moth-eaten foundation. In the age of cable and satellite television and the Internet, broadcasting is now one of many methods of delivering content to Americans in their homes. Broadcast television, like other content in our media-driven age, may be “pervasive,” but in 2008, even the Commission has trouble contending that it is “uniquely” so. And in our current age of media saturation, where children are likely to have access not only to broadcast television, but also to cable or

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360 Id. at 13-14, citing Pacifica, 438 U.S. at 750. The FCC asserted that it had acted reasonably in determining that Cher’s and Richie’s remarks constituted a “first blow” that could be redressed in the context in which they were uttered.
361 Id. at 14.
363 Id. at 30.
satellite television, the Internet, and a cell phone, it can no longer be seriously maintained that broadcast content is “uniquely accessible to children” when compared to other media. 364

The Supreme Court granted certiorari on March 17, 2008. 365 Soon after the oral argument in Fox in November 2008, the FCC filed its petition for certiorari in CBS. In this petition, the FCC noted that both cases:

concern APA challenges to the FCC’s enforcement of broadcast-indecency prohibitions that were upheld by this Court in Pacifica. Both cases involve the contours of the Commission’s indecency policies over the past three decades—specifically as applied to offensive material (expletives in Fox, images in this case) that is isolated or fleeting. And both cases involve the deference due to the Commission’s actions and interpretations under the APA. 366

Thus, the Commission asked the Court to hold the petition for certiorari in CBS pending its decision in the Fox case.

F. The Briefs in Fox

In its brief, the Commission argued that its action in Fox was justified by Pacifica. It argued that in enforcing §1464,

the Commission employs a contextual analysis that this Court upheld in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Indeed, in Pacifica, the Court recognized that “context is all-important.” Id. at 750. Until recently, the Commission made one factor dispositive in its analysis in certain cases by holding that the utterance of a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding. As the Commission reaffirmed in the order at issue here, that per se, one-free-expletive rule was inconsistent with a context-based approach to broadcast indecency enforcement. In abandoning that rule, the Commission acknowledged that it was adopting a new indecency enforcement

364 Id. at 30-31(citations omitted).
policy, declined to impose fines, and provided a reasoned explanation for the change [that] fully satisfied the requirements of the APA . . . 367

The Commission further argued that since the only issue addressed by the lower court was the adequacy of the FCC’s explanation for its policy change, the Court should not decide the constitutional issues. Rather, it “should remand the case to allow that court to consider, in the first instance, respondents’ other challenges to the Commission’s order.” 368

Although both Respondents Fox and NBC argued that the FCC’s current indecency regime was unconstitutional, Fox focused on the APA arguments, while NBC focused on the constitutional arguments. 369 NBC argued that the FCC’s indecency definition was impermissibly vague and could not “remotely meet constitutional standards, either facially or in its application.” 370 NBC’s main argument was the FCC’s definition of indecency was virtually identical to language in the Communications Decency Act which the Court found unconstitutional in Reno. 371 Moreover, the “bizarre and irreconcilable outcomes produced by [the FCC’s] complaint-driven enforcement policy only amplify the inherent vagueness of the Commission’s indecency standard,” and as a result, chills broadcasters’ protected speech. 372 In addition, NBC argued that the FCC’s policy should be subjected to strict scrutiny instead of the lower standard applied by the Commission relying Pacifica and Red Lion. 373 It contended that:

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368 Id. at 19-20.
369 For example, NBC asserted at the beginning of its brief that “This is a case about the First Amendment.” Brief of Respondents Universal, Inc. and NBC Telemundo License Co. at 1, 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3153438 [hereinafter NBC Br.].
370 Id. at 20.
371 Id. at 21-23.
372 Id. at 25, 28-20.
373 Id. at 14-15. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Court upheld the FCC’s Fairness Doctrine, which required that broadcast stations present both sides of
“Whatever validity these rationales may have had when this Court articulated them decades ago, they rest today on moth-eaten foundations and can no longer support the “relaxed” scrutiny on which the Commission’s content restrictions have historically depended.”

Pointing to the widespread use of cable television, satellite services and the Internet, NBC argued that “over-the-air” broadcasting was no longer “uniquely pervasive” or “uniquely accessible to children.”

Moreover, it argued that “today the scarcity rationale is totally, surely, and finally defunct” because spectrum is not scarce.

On reply, the FCC argued that the Supreme Court need not and should not reach the constitutional challenges. But if it did, it should reject them. After addressing the challenges on the merits, the FCC warned:

Finally, it bears noting where respondents’ constitutional arguments would lead the Court. The logic of respondents’ frontal constitutional attack on the regulation of broadcast indecency leads to a regime in which no regulation of broadcast indecency is permitted, see ACLU Br. 33-37, such that broadcasters could...

[continues after footnote]

Footnotes:

374 NBC Br. at 33. See also Fox Br. at 43-45 (arguing that the evolution of the contemporary media marketplace has eroded Pacifica’s premises).

375 Id. at 33-35.

376 Id. at 37.
bombard children with indecent language (fleeting or not) at any point during the day, . . .

G. Supreme Court Decision in Fox

Of the nine Justices hearing oral argument on November 4, 2008, only one had heard the *Pacifica* case. Justice Stevens, then the newest Justice and now the most senior, wrote the decision for the Court affirming the FCC in *Pacifica*. As discussed above, Stevens’ opinion was joined in full by Chief Justice Burger and Justice Rehnquist, and in part by Justices Powell and Blackmun. Four Justices, Stewart, Brennan, White and Marshall, dissented. Justice Brennan wrote a particularly strong dissent blasting the majority for its “misapplication of fundamental First Amendment principles” and misguided “attempt to impose its notions of propriety on the whole of the American people.”

Like *Pacifica*, the *Fox* decision is a divided one. Justice Scalia wrote the opinion for the Court, except for Part III-E, and was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. The opinion for the Court notes that the *Pacifica* had held that “the First Amendment allowed Carlin’s monologue to be banned in light of the ‘uniquely pervasive presence’ of the medium and the fact that broadcast programming is ‘uniquely accessible to children.’” Following *Pacifica*, the FCC had “preserved a distinction between literal and nonliteral (or ‘expletive’) uses of evocative language.” The FCC changed this view in its

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379 Justice Kennedy did not join in Part III-E, which responded to arguments made in the dissents. His separate opinion concurring in part and concurring in the Judgment explained that he agreed with Justice Breyer that the agency must explain why it now rejects the considerations that led it to adopt the initial policy. However, because the FCC’s order explained that the FCC had changed its reading of *Pacifica*, its explanation was adequate. *Id.* at 1822-24 (Kennedy, J., concurring).
380 *Id.* at 1806, citing *Pacifica*, U.S. 438 at 748-49.
381 *Id.* at 1807.
2004 decision in the *Golden Globe* case, where it clarified that “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”\(^{382}\)

The majority found that the FCC’s decision in the *Fox* case “to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach we sanctioned in *Pacifica*.\(^{383}\)” In response to the Court of Appeal’s finding that the FCC’s decision was arbitrary because it lacked evidence of harm from fleeting expletives, the majority noted that the *Pacifica* Court had not required any quantitative measure of harm from the language in that case. Moreover,

we have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden. To the contrary, we explicitly left for another day whether “an occasional expletive” in “a telecast of an Elizabethan comedy” could be prohibited. By using the narrowness of *Pacifica*’s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of *Pacifica*, which allowed *some* regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what *Pacifica* sanctioned.\(^{384}\)

Justice Thomas concurred. While he agreed that FCC had complied with the APA, he argued that the precedents supporting the FCC’s constitutional authority, “*Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.”\(^{385}\) He argued that “*Red Lion* adopted and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the First Amendment.”\(^{386}\) Moreover, even

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\(^{383}\) *Id.* at 1812.

\(^{384}\) *Id.* at 1815 (citations omitted).

\(^{385}\) *Id.* at 1820 (Thomas, J., dissenting).

\(^{386}\) *Id.* at 1821.
if these cases could have been justified at the time, “traditional broadcast television and radio
were no longer the ‘uniquely pervasive’ media forms they once were.”

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

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

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

387 Id. at 1822. Justice Thomas noted that most consumers received broadcast media via cable or
satellite and that it was also available on computers, cell phones and other wireless devices.
388 Id. at 1825 (Stevens, J., dissenting). Steven’s also dissented on the grounds that the majority
acted the FCC’s rulemaking authority as a “species of executive power” that need not be
explained. Id.
389 Id. at 1827.
390 Id.
391 Id. at 1828.
good reason,” and that Justice Brennan’s concerns about suppression “even more potent today.” Although Justice Breyer’s dissent focused on the administrative law issues, he also faulted the FCC for failing to acknowledge that an entirely different understanding of *Pacifica* underlay its earlier policy.  

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

VII. Implications of *Pacifica* for the Pending Indecency Cases

Now that the FCC’s decisions on fleeting expletives and nudity are back before lower courts, one or both courts are likely to address the constitutional claims on the merits. However the lower courts decide, the losing side will likely ask the Supreme Court to hear the case. In this event, *Pacifica* offers some insights relevant to the current controversy. First, I argue that since the Supreme Court’s narrow decision in *Pacifica* does not compel, or even provide support for the FCC’s indecency rulings in *Fox* and *CBS*, a court may find that the FCC’s action unconstitutional in those cases without disturbing *Pacifica*. Second, because *Fox* and *CBS*, like *Pacifica*, involved adjudications, the Supreme Court’s ruling, regardless of how it comes out, will leave unanswered questions about what can be permissibly broadcast.

A. Are the FCC’s Findings that Fox and CBS Violated §1464 Compelled by the *Pacifica* Decision?

As described above, the FCC consistently defended its *CBS* and *Fox* decisions based on *Pacifica*. Moreover, in its petition for certiorari in *Fox*, the FCC contended that the Second  

392 *Id.* at 1829 (Ginsburg, J., dissenting).
393 *Id.* at 1834 (Breyer, J., dissenting).
394 *FCC v. CBS Corp.*, 129 S.Ct. 2176 (U.S. 2009)
Circuit “criticized the Commission for taking context into account and refusing to treat a single use of an expletive, no matter how graphic or gratuitous, as per se not indecent, even though, in Pacifica, this Court emphasized that ‘context is all-important’ in evaluating indecency.” The history of the Pacifica decision, however, demonstrates that it did not contemplate, much less mandate, the FCC’s findings of indecency in the Fox and CBS cases.

The Pacifica Court did not address whether an “occasional expletive” could be found indecent. Indeed, the final paragraph of the Pacifica opinion emphasized the narrowness of its holding:

This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.396

Nor can the FCC’s assertion that “context is all-important” bear the weight the FCC places on it. The Pacifica Court stressed that:

The Commission’s decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote a “nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard.” We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.397

396 438 U.S. at 750.
397 Id. at 750-751 (citations omitted).
In finding the Carlin monologue indecent, neither the FCC nor the Court analyzed the content of the WBAI’s “Lunchpail” in the manner that the FCC analyzed the Super Bowl Halftime Show or the Billboard Music Awards programs. To the contrary, many at the time criticized the FCC for failing to take context into account.\textsuperscript{398} Had the FCC considered the context of the program in which the language was used in \textit{Pacifica}, it would have been difficult for it to have reached the result it did. WBAI compared Carlin to Mark Twain and argued that the monologue was broadcast as part of a serious discussion on the use of language and that he used “dirty words” to make fun of society’s attitudes toward language.\textsuperscript{399} And indeed, four days before his death in June 2008, George Carlin was named recipient of the Mark Twain Prize for American Humor.\textsuperscript{400}

Thus, a close review of \textit{Pacifica} shows no support for the FCC’s claim that the Second Circuit’s decision in \textit{Fox} conflicted with \textit{Pacifica}. At the same time, the networks’ argument that \textit{Pacifica} decision compelled reversal because it represented the outer limits of the Commission’s authority, was squarely rejected by the \textit{Fox} majority.\textsuperscript{401} As a result, if the lower courts or the Supreme Court are inclined to find the FCC’s actions in \textit{CBS} or \textit{Fox} unconstitutional, they may do so without overturning \textit{Pacifica}.

\textsuperscript{398} \textit{See supra} at ___.
\textsuperscript{399} \textit{See supra} at ___.
\textsuperscript{400} The Kennedy Center presents this annual award to recognize lifetime achievement by an outstanding comedian. Jacqueline Trescott, \textit{Bleep! Bleep! George Carlin to Receive Mark Twain Humor Prize}, WASH. POST, June 18, 2008 at C1.
\textsuperscript{401} The majority found that the Court had “never held that \textit{Pacifica} represented the outer limits of permissible regulation, so that fleeting expletives \textit{may not} be forbidden. To the contrary, we explicitly left for another day whether ‘an occasional expletive’ in “a telecast of an Elizabethan comedy” could be prohibited. By using the narrowness of \textit{Pacifica}’s holding to require empirical evidence of harm before the Commission regulates more broadly, the broadcasters attempt to turn the sword of \textit{Pacifica}, which allowed \textit{some} regulation of broadcast indecency, into an administrative-law shield preventing any regulation beyond what \textit{Pacifica} sanctioned. Nothing prohibits federal agencies from moving in an incremental manner.” \textit{FCC v. Fox}, 129 S. Ct. at 1815(citations omitted).
B. Will Addressing the Constitutional Issue Provide Clear Guidance as to What May be Broadcast

The *Fox* and *CBS* cases are similar to *Pacifica* in that they each involve complaints about specific programs that the FCC used to announce broad policies. In most other policy contexts, the FCC announces new policies or make changes in existing policies after conducting notice and comment rulemaking under §554 of the Administrative Procedure Act.

In contrast, the *Pacifica* case involved adjudication of a single complaint. The *Declaratory Order* did not impose any penalty on the radio station. Indeed, as one article put it, the “FCC’s response was tantamount to the proverbial principal telling the child upon his first offense that ‘this will go on your permanent record.’” As discussed above, the Commission intentionally utilized a declaratory order instead of a NAL to announce what effectively was a new rule.

But to win on appeal, the FCC engaged in a regulatory version of “bait and switch” by recasting its action as a narrow, fact-based adjudication. Just a few days before the oral argument in the D.C. Circuit, the FCC issued its reconsideration order emphasizing the limited nature of the ruling. Although the FCC did not prevail in the D.C. Circuit, it did get a strong dissent from Judge Leventhal, a highly respected jurist. Leventhal thought that the only issue before the court was the narrow question of the reasonableness of the FCC’s finding with regard to WBAI’s broadcast of the Carlin monologue in the afternoon. The FCC relied heavily on Leventhal’s dissent its arguments before the Supreme Court and to the surprise of many, a majority on the Supreme Court agreed with Judge Leventhal.

403 See supra at ___.
404 See supra at ___.

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Thus, even though the FCC issued the declaratory ruling against WBAI to establish a new rule, it framed the issue narrowly before the Supreme Court to prevent it from being overturned. It is ironic that, as *Pacifica* predicted, the Declaratory Order came to be understood as a prohibition on the broadcast of the “seven dirty words” at least prior to 10 pm. In practice, the *Declaratory Order* had a broad effect despite the Supreme Court’s attempt to narrow it.

Now, it seems that the FCC is employing a similar strategy. Intent on cracking down on indecency, the FCC is using complaints against specific broadcasts to announce broad new rules regulating indecency. Under its new policy, stations can be fined for fleeting expletives or images of nudity where the FCC finds them to be pandering or titillating based on the context of the surrounding program. However, this time, the courts have not treated these cases as if they involved only a simple fact-based adjudication.

Both circuit courts found that the FCC had failed to comply with the APA and with the requirements of *State Farm*, a case that involved a rulemaking proceeding. The Supreme Court also applied the *State Farm* test, but the majority found that FCC had complied with it, while the dissenting Justices thought that the FCC had not.

Both the majority and dissenters viewed the FCC’s action as the equivalent to adopting a new rule. For example, the majority explained that that *State Farm*, “which involved the rescission of a prior regulation, said only that such action requires ‘a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance’.”

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405 *See supra* at ___.
406 *Fox*, 489 F.3d at 455, 457; *CBS*, 535 F.3d at 174, 182-83, 188-89.
408 *Id.* at 1829-31, 1837-38, 1841(Breyer, J., dissenting)
409 129 S.Ct. at 1810.
Justice Stevens criticized the majority for assuming that the FCC’s “rulemaking authority is a species of executive power,” and that it “need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation.” Justice Breyer’s dissent noted that the “result” of the Commission’s action was “a rule that may well chill coverage.”

He acknowledged that the FCC did not use “traditional administrative notice-and-comment procedures,” which would have “obligate[d] the FCC to respond to all all significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” But he concluded that “the same failures here—where the policy is important, the significance of the issues clear, the failures near complete—should lead us to the same conclusion. The agency’s failure to discuss these two “important aspect[s] of the problem” means that the resulting decision is ‘arbitrary, capricious, an abuse of discretion’ requiring us to remand the matter to the agency.”

I think it is appropriate for the Court to apply rulemaking-like standards to adjudicatory decisions that essentially adopt new rules. However, it would be better if the FCC adopted rules in traditional notice and comment rulemaking proceedings, rather than in individual cases. The benefits of rulemaking over case-by-case adjudication are well known. Both Pacifica and Fox illustrate the problems with using adjudications to adopt new policy.

Rulemakings are said to produce higher quality rules because in an adjudication, the only the party or parties to the particular dispute are before the agency. By contrast, in a rulemaking proceeding, all potentially affected members of public have the opportunity to participate. The

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410 Id. at 1824-25 (Stevens, J., dissenting).
411 Id. at 1837 (Breyer, J., disssenting) (emphasis added).
412 Id.
413 Id. at 1838, citing State Farm, 463 U.S. at 43.
comments filed in a rulemaking typically provide diverse perspectives, address the nature and extent of the problem, provide factual information, and identify practical problems with the agency proposals.415

The drawbacks of making policy by adjudication may be seen in the Pacifica, where the entire defense fell on the shoulders of the Pacifica Foundation, a non-profit organization with limited resources. The record in Pacifica, which essentially consisted of two short letters, contained few facts even about the specific complaint, and nothing about the impact on other broadcasters, the listening public, or speakers, creators or producers of the work being broadcast. As a result, the FCC Commissioners, as well as the judges and Justices who heard the case, made factual assumptions that may not have been correct. For example, the FCC assumed without citing any evidence that children would be listening to the radio at 2 pm.416 Yet, data submitted in amicus briefs suggested that few children listened to the radio at 2 pm while large numbers listened in the late evening hours.417 Had the FCC had a rulemaking in which it sought information about the listening habits of children, it might have reached a better decision.418

415 Id.
416 Pacifica did not submit such information, and in fact, it may not have had access to such data. Although ratings and demographic information are essential to commercial radio stations for purposes of advertising, non-commercial radio stations do not need such data because they do not sell advertising time. Moreover, such data is not publicly available and is expensive to purchase.
417 SF Chapter of Comm. for Open Media, supra note ___ at 17-16; ABC, supra n. ___ at 36. Participating as an amicus after an agency decision has been made is not as effective as being able to present arguments and facts to the agency before it decides.
418 Judge Bazelon’s opinion identified several other undocumented assumptions, including whether parents would find such language unsuitable for children and whether parents had other ways to control the listening habits of their children. 556 F.2d at 23-24. Justice Powell thought the language was “patently offensive to most people regardless of age.” 430 U.S. at 757. Justice Brennan pointed out that “some parents may actually find Mr. Carlin’s unabashed attitude towards the seven “dirty words” healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words.” 430 U.S. at 770. Had the
Similarly, in the *Fox* case, the adjudicatory nature of the proceeding left important gaps in the factual record. For example, Breyer’s dissenting opinion faulted the FCC for failing to consider the impact of its ruling on smaller independent broadcast and public broadcasters, who because they could not afford the cost of “bleeping” technology, would curtail their coverage of local public events.\(^{419}\) Had the FCC conducted a rulemaking, small broadcasters and public broadcasters could have presented evidence on this issue.

Adopting rule through a notice and comments rulemakings rather than in an adjudication is considered to be more fair. By setting out rules, people can more easily learn what is or is not allowed. It also has the tendency to reduce inconsistencies and to limit the discretion of the agency to engage in selective enforcement.\(^{420}\) Limiting agency discretion is especially important when speech is involved. Again, these problems are illustrated in both the *Pacifica* and *Fox* cases.

The FCC’s declaratory ruling in *Pacifica* did not put broadcasters on notice as to what they could and could not say on the airwaves. It merely put them on notice that they could not repeatedly broadcast the “seven dirty words” at times when children were likely to be in the audience. Moreover, the FCC retained a great deal of discretion in enforcing the prohibition against indecency, as evidenced by the recent actions in which the FCC relies on *Pacifica*.

In the *Omnibus Order* at issue in the *Fox* case, the FCC issued multiple rulings purportedly to provide guidance to broadcasters and the public about what types of programming were and were not permitted. The FCC characterized it rulings as demonstrating that its

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\(^{419}\) *Fox*, 129 S. Ct. at 1832-38, (Breyer, J., dissenting). The CBS case presented a similar issue involving the cost of video delays.

\(^{420}\) See, *e.g.*, Pierce at.
“contextual analysis takes into account the manner and purpose of the broadcast material. For example, material that panders to, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience.”  

In fact, I doubt that any broadcaster or member of the public who read the entire Omnibus Order would obtain a clear idea about what the Commission would find indecent. One of many possible examples illustrates this point. In the first part of the Omnibus Order, the Commission imposed a $15,000 forfeiture against a noncommercial educational television station licensed to a community college for airing an episode of a documentary series provided by the Public Broadcasting Service about blues music at 8:42 pm. The FCC found the broadcast indecent because some blues artists and record producers interviewed used variations of fuck and shit. The FCC cites as an example a scene showing hip-hop artists in a record store saying, “This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear— that shit, that shit is crazy right there! I’m buyin it!” The station maintained that the language was not used in a prurient manner. It chose not to edit the dialog so as to allow the subjects of the documentary to express themselves in their own words and to give viewers a realistic portrayal of the musicians. Nonetheless, the FCC found the use of these words to be vulgar, explicit, and shocking to the audience.

In another part of the Omnibus Order, the Commission addressed a complaint concerning a discussion of teenage sexual practices on “The Oprah Winfrey Show,” in which a guest explained the meaning of terms such as “salad-tossing,” which refers to “oral sex to the anus” and “a rainbow party,” which is “an oral sex party” where “all of the girls put on lipstick and

421 Omnibus Order, 21 FCC Rcd at 2668, ¶15.
422 Id. at 2685, ¶77.
423 Id. at 2685, ¶78.
each one puts her mouth around the penis of the gentleman.” The Commission found the dialog vulgar and explicit, but not indecent. Because the segment was designed to inform viewers about an important topic, that is, the disturbing, secret teenage behavior portrayed in the movie “Thirteen,” it was not patently offensive as measured by contemporary community standards for the broadcast medium.

It is not clear what guidance could possibly be drawn from comparing these two adjudications. In both cases, the programs were alleged to be “educational.” So why did the FCC find vulgar and explicit language in a PBS documentary indecent but not similar language on a daytime talk show? Could it be that in the PBS documentary, the speakers actually used “fuck” or “shit” or some variation of those words, whereas those words were not used on Oprah? But then how to explain the Commission’s decision in the Remand Order that the word “bullshitter” was not indecent when uttered by a “Survivor” contestant in an interview on CBS’s “The Early Show.” And in another decision issued just one year earlier, the Commission found that even the repeated use of use of “shit” and “fuck” in the movie “Saving Private Ryan” was not indecent because the language was necessary to tell the story in a realistic manner.

The arbitrariness of the Commission’s case-by-case approach suggests that a rulemaking proceeding would be preferable way for the FCC to provide guidance to broadcasters.

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424 Id. at 2705, ¶173.
425 Id. at 2706, ¶178.
426 Remand Order, 21 FCC Rcd. 13299,13326-28, ¶¶ 67-73 (finding the use not indecent because the interview was conducted in the context of a news program).
VIII. Conclusion

That a single complaint about a twelve minute broadcast on a non-commercial radio station went all the way to the Supreme Court seems surprising. That the Supreme Court found that the FCC could reprimand a station for this broadcast consistent with the First Amendment is even more surprising. The explanation for these events is that the FCC chose this case to issue the declaratory in order to provide guidance to broadcasters as to what kind of language would be tolerated on the public airwaves when children were in the audience. However, to avoid being found unconstitutional in the Supreme Court, the FCC had to narrow its ruling to the facts of the specific case. Ironically, broadcasters interpreted the *Pacifica* order as a rule setting out the words that could not be used on the air. However, the fact that it was not an actual rule and the narrowness of the Supreme Court’s holding left the FCC free to change its policy in future adjudications without the necessity of conducting a rulemaking.

In the recent cases of *Fox* and *CBS*, the FCC did change its policy to find fleeting expletives and images of nudity to be actionably indecent under the same statute at issue in *Pacifica*. On appeal, the circuit courts found that this change in policy was arbitrary and capricious under the standards for agency action in *State Farm*, a rulemaking case. In a 5-to-4 decision, the Supreme Court reversed the lower court in *Fox*. Although agreeing that *State Farm* supplied the correct standard of review, the majority concluded that the FCC’s explanation was reasonable.

As a result of the remands in *Fox* and *CBS*, it is likely that the Court will soon have an opportunity to address the constitutionality of the FCC’s indecency policy and, if it is so included, to overrule the *Pacifica* decision. This article concludes that the *Pacifica* decision does not compel a ruling either way on the constitutional question. Thus, the Court could find the FCC’s actions in *Fox* and *CBS* unconstitutional without overturning *Pacifica*. 
Regardless of how the Court comes out on the constitutionality of the FCC’s decisions in *Fox* and *CBS*, however, it is likely that that broadcasters and the public will remain uncertain about what is and is not actionably indecent, and as a result, constitutionally protected broadcast speech will likely be chilled. Although the *Fox* majority found the FCC had adequate justification for finding that the broadcasts of fleeting expletives in the Billboards Awards programs were indecent, other rulings including some in the very same *Omnibus Order*, show that the FCC does not consider every use of “fuck” or “shit” to be indecent. The “context-based approach” used to determine whether the language is actionably indecent differs from that employed in *Pacifica*. Instead of focusing on whether the language aired at an inappropriate time so as to be a “nuisance,” the FCC now conducts a subjective inquiry considering a host of factors including whether the purpose of the program is to titillate or educate, whether the language is necessary to the program, and the manner in which the material was delivered.

Just as the narrow decision in *Pacifica* created confusion and left open the possibility for stricter enforcement, a narrow decision based on the facts of these two programs without addressing whether *Pacifica* remains good law, would create confusion. On the other hand, if the Court overruled *Pacifica*, it would be unclear whether broadcast indecency, as opposed to obscenity, could be regulated at all. And overruling *Pacifica* could have other, unintended negative consequences that have not been fully considered in these adjudicatory proceedings. Thus, the FCC should re-examine its indecency enforcement policies in a rulemaking proceeding in which all interested parties can participate, all relevant facts and arguments can be presented, and the likely impact of the regulation on all interests as well as any other significant issues can be addressed.