Red Lion Broadcasting v. FCC

395 U.S. 367
Supreme Court of the United States
June 9, 1969

RED LION BROADCASTING CO., INC., ET AL. v. FEDERAL COMMUNICATIONS COMMISSION ET AL. No. 2. Argued April 2-3, 1969. Decided June 9, 1969. Together with No. 717, United States et al. v. Radio Television News Directors Assn. et al., on certiorari to the United States Court of Appeals for the Seventh Circuit, argued April 3, 1969. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. *Roger Robb* argued the cause for petitioners in No. 2. With him on the brief were *'. Donald Kistler* and *Thomas B. Sweeney. Solicitor General Griswold* argued the cause for the United States and the Federal Communications Commission, petitioners in No. 717 and respondents in No. 2. With him on the brief were *Assistant Attorney General McLaren, Deputy Solicitor General Springer, Francis X. Beytagh, Jr., Henry Geller,* and *Daniel R. Ohlbaum. Archibald Cox* argued the cause for respondents in No. 717. With him on the brief for respondents Radio Television News Directors Assn. et al. were *'. Theodore Pierson, Harold David Cohen, Vernon C. Kohlhaas,* and *J. Laurent Scharff.* On the brief for respondent National Broadcasting Co., Inc., were *Lawrence J. McKay, Raymond L. Falls, Jr., Corydon B. Dunham, Howard Monderer,* and *Abraham P. Ordover.* On the brief for respondent Columbia Broadcasting System, Inc., were *Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Robert V. Evans,* and *Herbert Wechsler.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act[38] that equal time be allotted all

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[38] Communications Act of 1934, Tit. III, 48 Stat. 1081, as amended, 47 U.S. C. § 301 et seq. Section 315 now reads:

"315. Candidates for public office; facilities; rules.
"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –
"(1) bona fide newscast,
"(2) bona fide news interview,
"(3) bona fide news documentary (if the appearance of the candidate is incidental to the

qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater – Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[39] When Cook heard of

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presentation of the subject or subjects covered by the news documentary), or
"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.
"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.
"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

[39] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER – EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has

the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.,* 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit,˜ the FCC's position was upheld as constitutional and otherwise proper. 127 U.S. App. D. C. 129, 381 F. 2d 908 (1967).

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit, on review of the rule-making proceeding, as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

As they now stand amended, the regulations read as follows:

> "Personal attacks; political editorials.
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> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

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championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies . . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater – Extremist Of The Right!' "

"(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], above. See, section 315 (a) of the Act, 47 U.S. C. 315 (a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F. R. 10415. The categories listed in [(3)] are the same as those specified in section 315 (a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion,* and the promulgation of the regulations in *RTNDA,* are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion.*

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission

was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[40] It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.[41] Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views,

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[40] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Communications Act of 1912, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. United States v. Zenith Radio Corporation, 12 F. 2d 614 (D. C. N. D. Ill. 1926). Cf. Hoover v. Intercity Radio Co., 52 App. D. C. 339, 286 F. 1003 (1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request confirmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1-14 (1932).

[41] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual . . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

and the commission believes that the principle applies . . . to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.,* 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F. 2d 993, cert. dismissed, 281 U.S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC,* 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U.S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel,* 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.,* 8 F. C. C. 333 (1940), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.,* 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.,* 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.,* 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey,* 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.,* 19 P & F Radio Reg. 602 (1960); *The Evening News Assn.,* 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.,* 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F. 2d 993, cert. dismissed, 281 U.S. 706 (1930); *Chicago Federation of Labor* v. *FRC,* 3 F. R. C. Ann. Rep. 36 (1929), aff'd, 59 App. D. C. 333, 41 F. 2d 422 (1930); *KFKB Broadcasting Assn.* v. *FRC,* 60 App. D. C. 79, 47 F. 2d 670 (1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.,* 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response,

rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions. . . as may be necessary to carry out the provisions of this chapter . . . ." 47 U.S. C. § 303 and § 303 (r).~ The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S. C. §§ 307 (a), 309 (a); renewing them, 47 U.S. C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U.S. C. § 309 (‘). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 285 (1933). It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception *"from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."* Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S. C. § 315 (a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.~ And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,~ especially when Congress has refused to alter the administrative construction.~ Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,~ but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public

issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.~

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air~ and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8-9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, *id.,* at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine~ and was altered to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that that provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that: "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . whether there may not be other available groups or individuals who might be more

> appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F. C. C., at 1251-1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 216-217 (1943); *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion,* or the regulations at issue in *RTNDA,* are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to

use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[42] *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs* v. *Cooper,* 336 U.S. 77 (1949).

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible

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[42] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (J. Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); M. Ernst, The First Freedom 125-180 (1946); T. Robinson, Radio Networks and the Federal Government, especially at 75-87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change, Printed for Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce (1968).

communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,~ as the Court has noted at length before. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210-214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. *FRC* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to

have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.,* 349 U.S. 358, 361-362 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964); *Abrams* v. *United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. *Farmers Educ. & Coop. Union* v. *WDAY,* 360 U.S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of

discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[43] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.~ It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views

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[43] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. Mill, On Liberty 32 (R. McCallum ed. 1947).

on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S. C. § 301. Unless renewed, they expire within three years. 47 U.S. C. § 307 (d). The statute mandates the issuance of licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S. C. § 307 (a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *FRC* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.,* at 285. In the same vein, in *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137-138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943).

D.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion.* Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past

cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan,* 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.˜ Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.˜ "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum˜ and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[44] Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

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[44] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could say nothing." Lafayette Radio Electronics Corp. v. United States, 345 F. 2d 278, 281 (1965).˜

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.~ The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.~

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[45] This does not mean, of course, that every possible wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.~

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible.

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[45] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as Red Lion, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 National Broadcasting Co. case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8-9 (1959). In light of this history; the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment; and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.[46] The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

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[46] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

FCC v. Pacifica

438 U.S. 726
Supreme Court of the United States
July 3, 1978

FEDERAL COMMUNICATIONS COMMISSION v. PACIFICA FOUNDATION ET AL. No. 77-528. Argued April 18, 19, 1978. Decided July 3, 1978. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Joseph A. Marino argued the cause for petitioner. With him on the briefs were Robert R. Bruce and Daniel M. Armstrong. Harry M. Plotkin argued the cause for respondent Pacifica Foundation. With him on the brief were David Tillotson and Harry F. Cole. Louis F. Claiborne argued the cause for the United States, a respondent under this Court's Rule 21 (4). With him on the brief were Solicitor General McCree, Assistant Attorney General Civiletti, and Jerome M. Feit. Briefs of amici curiae urging reversal were filed by Anthony '. Atlas for Morality in Media, Inc.; and by George E. Reed and Patrick F. Geary for the United States Catholic Conference. Briefs of amici curiae urging affirmance were filed by J. Roger Wollenberg, Timothy B. Dyk, James A. McKenna, Jr., Carl R. Ramey, Erwin G. Krasnow, Floyd Abrams, J. Laurent Scharff, Corydon B. Dunham, and Howard Monderer for the American Broadcasting Companies, Inc., et al.; by Henry R. Kaufman, Joel M. Gora, Charles Sims, and Bruce J. Ennis for the American Civil Liberties Union et al.; by Irwin Karp for the Authors League of America, Inc.; by James Bouras, Barbara Scott, and Fritz E. Attaway for the Motion Picture Association of America, Inc.; and by Paul P. Selvin for the Writers Guild of America, West Inc. Charles M. Firestone filed a brief for the Committee for Open Media as amicus curiae.

MR. JUSTICE STEVENS delivered the opinion of the Court (Parts I, II, III, and IV-C) and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST joined (Parts IV-A and IV-B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as

"a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 F. C. C. 2d 94, 99. The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."[47]

In its memorandum opinion the Commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. *Id.,* at 94. Advancing several reasons for treating broadcast speech differently from other forms of expression,[48] the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S. C. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications,"[49] and 47 U.S. C. § 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."~

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of

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[47] 56 F. C. C. 2d, at 99. The Commission noted:

"Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S. C. [§§] 312 (a), 312 (b), 503 (b) (1) (E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S. C. [§§] 307, 308." Id., at 96 n. 3.

[48] "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, see Rowan v. Post Office Dept., 397 U.S. 728 (1970); (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." Id., at 97.

[49] Title 18 U.S. C. § 1464 (1976 ed.) provides:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

nuisance where the "law generally speaks to *channeling* behavior more than actually prohibiting it. . . . [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." 56 F. C. C. 2d, at 98.~

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." *Id.,* at 99. In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S. C. [§] 1464."~ *Ibid.*

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F. C. C. 2d 892 (1976). The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition.[50] *Id.,* at 893. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." *Ibid.*

The United States Court of Appeals for the District of Columbia Circuit reversed, with each of the three judges on the panel writing separately. 181 U.S. App. D. C. 132, 556 F. 2d 9. Judge Tamm concluded that the order represented censorship and was expressly prohibited by § 326 of the Communications Act.[51] Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was "overbroad." 181 U.S. App. D. C., at 141, 556 F. 2d, at 18. Chief Judge Bazelon's concurrence rested on the Constitution. He was persuaded that § 326's prohibition against censorship is

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[50] The Commission did, however, comment: " '[I]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 F. C. C. 2d, at 893 n. 1.

[51] "Nothing in this Act shall be understood or construed to give the Commission 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 Commission which shall interfere with the right of free speech by means of radio communication." 48 Stat. 1091, 47 U.S. C. § 326.

inapplicable to broadcasts forbidden by § 1464. However, he concluded that § 1464 must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. 181 U.S. App. D. C., at 140-153, 556 F. 2d, at 24-30. Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language "*as broadcast.*" *Id.,* at 154, 556 F. 2d, at 31. Emphasizing the interest in protecting children, not only from exposure to indecent language, but also from exposure to the idea that such language has official approval, *id.,* at 160, and n. 18, 556 F. 2d, at 37, and n. 18, he concluded that the Commission had correctly condemned the daytime broadcast as indecent.

Having granted the Commission's petition for certiorari, 434 U.S. 1008, we must decide: (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.

I

The general statements in the Commission's memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U.S. C. § 554 (e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations. The order "was issued in a specific factual context"; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue "as broadcast."

"This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297. That admonition has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues. *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-569. However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions. See *Herb* v. *Pitcairn,* 324 U.S. 117, 126. Accordingly, the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast.

II

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of 47 U.S. C. § 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U.S. C. § 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

Section 29 of the Radio Act of 1927 provided:

> "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." 44 Stat. 1172.

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.[52]

During the period between the original enactment of the provision in 1927 and its re-enactment in the Communications Act of 1934, the courts and the Federal Radio Commission held that the section deprived the Commission of the power to subject "broadcasting matter to scrutiny prior to its release," but they concluded that the Commission's "undoubted right" to take note of past program content when considering a licensee's renewal application "is not censorship."[53]

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[52] Zechariah Chafee, defending the Commission's authority to take into account program service in granting licenses, interpreted the restriction on "censorship" narrowly: "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England – the deletion of specific items and dictation as to what should go into particular programs." 2 Z. Chafee, Government and Mass Communications 641 (1947).

[53] In KFKB Broadcasting Assn. v. Federal Radio Comm'n, 60 App. D. C. 79, 47 F. 2d 670 (1931), a doctor who controlled a radio station as well as a pharmaceutical association made frequent broadcasts in which he answered the medical questions of listeners. He often prescribed mixtures prepared by his pharmaceutical association. The Commission determined that renewal of the station's license would not be in the public interest, convenience, or necessity because many of the broadcasts served the doctor's private interests. In response to the claim that this was censorship in violation of § 29 of the 1927 Act, the Court held:

"This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship." 60 App. D. C., at 81, 47 F. 2d, at 672.

In Trinity Methodist Church, South v. Federal Radio Comm'n, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U.S. 599, the station was controlled by a minister whose broadcasts contained frequent references to "pimps" and "prostitutes" as well as bitter attacks on the Roman Catholic Church. The Commission refused to renew the license, citing the nature of the broadcasts. The Court of Appeals affirmed, concluding the First Amendment concerns did not prevent the Commission from regulating broadcasts that "offend the religious susceptibilities of thousands . . . or offend youth and innocence by the free use of words suggestive of sexual immorality." 61 App.

Not only did the Federal Radio Commission so construe the statute prior to 1934; its successor, the Federal Communications Commission, has consistently interpreted the provision in the same way ever since. See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964). And, until this case, the Court of Appeals for the District of Columbia Circuit has consistently agreed with this construction.˜ Thus, for example, in his opinion in *Anti-Defamation League of B'nai B'rith* v. *FCC,* 131 U.S. App. D. C. 146, 403 F. 2d 169 (1968), cert. denied, 394 U.S. 930, Judge Wright forcefully pointed out that the Commission is not prevented from canceling the license of a broadcaster who persists in a course of improper programming. He explained:

> "This would not be prohibited 'censorship,' . . . any more than would the Commission's considering on a license renewal application whether a broadcaster allowed 'coarse, vulgar, suggestive, double-meaning' programming; programs containing such material are grounds for denial of a license renewal." 131 U.S. App. D. C., at 150-151, n. 3. 403 F. 2d, at 173-174, n. 3.

˜Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language. A single section of the 1927 Act is the source of both the anticensorship provision and the Commission's authority to impose sanctions for the broadcast of indecent or obscene language. Quite plainly, Congress intended to give meaning to both provisions. Respect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.

There is nothing in the legislative history to contradict this conclusion. The provision was discussed only in generalities when it was first enacted.˜ In 1934, the anticensorship provision and the prohibition against indecent broadcasts were re-enacted in the same section, just as in the 1927 Act. In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18. 62 Stat. 769 and 866. That rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the anticensorship provision. '. R. Rep. No. 304, 80th Cong., 1st Sess., A106 (1947). Cf. *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 162.

We conclude, therefore, that § 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

D. C., at 314, 62 F. 2d, at 853. The court recognized that the licensee had a right to broadcast this material free of prior restraint, but "this does not mean that the government, through agencies established by Congress, may not refuse a renewal of license to one who has abused it." Id., at 312, 62 F. 2d, at 851.

III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" monologue was indecent within the meaning of § 1464.˜ Even that question is narrowly confined by the arguments of the parties.

The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does 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.[54]

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in *Miller* v. *California,* 413 U.S. 15. Pacifica relies most heavily on the construction this Court gave to 18 U.S. C. § 1461 in *Hamling* v. *United States,* 418 U.S. 87. See also *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123, 130 n. 7 (18 U.S. C. § 1462) (dicta). *Hamling* rejected a vagueness attack on § 1461, which forbids the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material. In holding that the statute's coverage is limited to obscenity, the Court followed the lead of Mr. Justice Harlan in *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478. In that case, Mr. Justice Harlan recognized that § 1461 contained a variety of words with many shades of meaning.[55] Nonetheless, he thought that the phrase "obscene, lewd, lascivious, indecent, filthy or vile," taken as a whole, was clearly limited to the obscene, a reading well grounded in prior judicial constructions: "[T]he statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." 370 U.S., at 483. In *Hamling* the Court agreed with

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[54] Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . ." Webster's Third New International Dictionary (1966).

[55] Indeed, at one point, he used "indecency" as a shorthand term for "patent offensiveness," 370 U.S., at 482, a usage strikingly similar to the Commission's definition in this case. 56 F. C. C. 2d, at 98.

Mr. Justice Harlan that § 1461 was meant only to regulate obscenity in the mails; by reading into it the limits set by *Miller* v. *California, supra,* the Court adopted a construction which assured the statute's constitutionality.

The reasons supporting *Hamling's* construction of § 1461 do not apply to § 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted § 1464 as encompassing more than the obscene.~ The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.~

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F. C. C. 2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context – it cannot be adequately judged in the abstract.

The approach is also consistent with *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367. In that case the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program content. *Radio Television News Directors Assn.* v. *United States,* 400 F. 2d 1002, 1016 (CA7 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated:

> "We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these

regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan,* 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise." 395 U.S., at 396.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities[56] While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 380-381. *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 61. The danger dismissed so summarily in *Red Lion,* in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

B

When 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.

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The classic exposition of the proposition that both the content and the context of speech are critical elements of First Amendment analysis is Mr. Justice Holmes' statement for the Court in *Schenck* v. *United States,* 249 U.S. 47, 52:

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction

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[56] A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

> against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Other distinctions based on content have been approved in the years since *Schenck.* The government may forbid speech calculated to provoke a fight. See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. It may pay heed to the " 'commonsense differences' between commercial speech and other varieties." *Bates* v. *State Bar of Arizona, supra,* at 381. It may treat libels against private citizens more severely than libels against public officials. See *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323. Obscenity may be wholly prohibited. *Miller* v. *California,* 413 U.S. 15. And only two Terms ago we refused to hold that a "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." *Young* v. *American Mini Theatres, Inc., supra,* at 52.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content.˜ Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth* v. *United States,* 354 U.S. 476. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.˜ If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four-letter words˜ – First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.˜ Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire,* 315 U.S., at 572.

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, *e. g., Hess* v. *Indiana,* 414 U.S. 105. Indeed, we may assume, *arguendo,* that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.˜ It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. Cf. *Cohen* v. *California,* 403 U.S. 15, 25.˜

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502-503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity."~ Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367.

The reasons for these distinctions are complex, but two have relevance to the present case. 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 Dept.,* 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. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.~

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 case with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg,* amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided

that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. 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." *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 388. 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.

The judgment of the Court of Appeals is reversed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

The following is a verbatim transcript of "Filthy Words" prepared by the Federal Communications Commission.

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [']cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, [']cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, mother-fucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really – it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word – the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty – dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock – three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight,

remember – What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, ['']cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always like that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals – Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. ['']Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's

easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to FUCK OF THE MOUNTAIN. (laughter) It's an interesting word too, ['']cause it's got a double kind of a life – personality – dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) ['']Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your *ass*. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

[M]y views are generally in accord with what is said in Part IV-C of MR. JUSTICE STEVENS' opinion. See *ante,* at 748-750. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to 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.~ In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.~

The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. Cf. *id.,* at 77-79 (POWELL, J., concurring). These are the grounds upon which I join the judgment of the Court as to Part IV.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with MR. JUSTICE STEWART that, under *Hamling* v. *United States,* 418 U.S. 87 (1974), and *United States* v. *12 200-ft. Reels of Film,* 413 U.S. 123 (1973), the word "indecent" in 18 U.S. C. § 1464 (1976 ed.) must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose *its* notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.~

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. Cf. *Lehman* v. *Shaker Heights, supra. Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970), relied on by the FCC and by the opinions of my Brothers POWELL and STEVENS, confirms rather than belies this conclusion. In *Rowan,* the Court upheld a statute, 39 U.S. C. § 4009 (1964 ed., Supp. IV), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not

prevented from doing so. Equally important, the determination of offensiveness *vel non* under the statute involved in *Rowan* was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernible here.

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, *ante,* at 757-758, and my Brother STEVENS, *ante,* at 749-750, both stress the time-honored right of a parent to raise his child as he sees fit – a right this Court has consistently been vigilant to protect. See *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Yet this principle supports a result directly contrary to that reached by the Court. *Yoder* and *Pierce* hold that parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, 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. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.˜

My Brother STEVENS, in reaching a result apologetically described as narrow, *ante,* at 750, takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," *ante,* at 743 n. 18, and finds solace in his conviction that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Ibid.* The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word. Mr. Justice Harlan, speaking for the Court, recognized the truism that a speaker's choice of words cannot surgically be separated from the ideas he desires to express when he warned that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California,* 403 U.S., at 26. Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications. This, too, was apparent to Mr. Justice Harlan and the Court in *Cohen.*

> "[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their

> cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Id.,* at 25-26.

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words." *Ante,* at 750 n. 28. My Brother POWELL agrees: "The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion." *Ante,* at 760. The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases, the medium may well be the message.~

FCC v. Fox Television Stations

129 S.Ct. 1800
Supreme Court of the United States
April 28, 2009.

FEDERAL COMMUNICATIONS COMMISSION, et al., Petitioners, v. FOX TELEVISION STATIONS, INC., et al. No. 07-582. Argued November 4, 2008. Decided April 28, 2009. SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-A through III-D, and IV, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III-E, in which ROBERTS, C.J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment. STEVENS, J., and GINSBURG, J., filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined. Gregory G. Garre, Washington, DC, for Petitioners. Carter Phillips, for Respondents. Richard Cotton, Susan Weiner, New York, NY, Miguel A. Estrada, Andrew S. Tulumello, Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, D.C., for Respondents NBC Universal, Inc. and NBC Telemundo License Company. Jonathan '. Anschell, Los Angeles, CA, Susanna M. Lowy, New York, NY, for Respondent CBS Broadcasting Inc. Robert Corn-Revere, Davis Wright Tremaine LLP, Washington, D.C., John '. Zucker, New York, NY, Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for Respondent ABC, Inc. Ellen S. Agress, New York, NY, Maureen A. O'Connell, Washington, DC, Carter G. Phillips, R. Clark Wadlow, James P. Young, Jennifer Tatel, David S. Petron, Quin M. Sorenson, Sidley Austin LLP, Washington, D.C., for Respondent Fox Television Stations, Inc. Andrew Jay Schwartzman, Parul Desai, Jonathan Rintels, Washington, DC, for Center for Creative Voices in Media, Inc. Matthew B. Berry, General Counsel, Joseph R. Palmore, Deputy General Counsel, Jacob M. Lewis, Associate General Counsel, Nandan M. Joshi, Washington, D.C., Paul D. Clement, Solicitor General, Gregory G. Katsas, Acting Assistant Attorney General, Gregory G. Garre, Deputy Solicitor General, Eric D. Miller, Assistant to the Solicitor General, Thomas M. Bondy, Anne Murphy, Washington D.C., for Petitioner.

Justice SCALIA delivered the opinion of the Court, except as to Part III-E.

Federal law prohibits the broadcasting of "any ... indecent ... language," 18 U.S.C. § 1464, which includes expletives referring to sexual or excretory activity or organs, see *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). This case concerns the adequacy of the Federal Communications Commission's explanation of its decision that this sometimes forbids the broadcasting of indecent expletives even when the offensive words are not repeated.

I. Statutory and Regulatory Background

The Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 *et seq*. (2000 ed. and Supp. V), established a system of limited-term broadcast licenses subject to various "conditions" designed "to maintain the control of the United States over all the channels of radio transmission," § 301 (2000 ed.). Twenty-seven years ago we said that "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc. v. FCC,* 453 U.S. 367, 395, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981) (internal quotation marks omitted).

One of the burdens that licensees shoulder is the indecency ban – the statutory proscription against "utter[ing] any obscene, indecent, or profane language by means of radio communication," 18 U.S.C. § 1464 – which Congress has instructed the Commission to enforce between the hours of 6 a.m. and 10 p.m. Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954, note following 47 U.S.C. § 303.[57] Congress has given the Commission various means of enforcing the indecency ban, including civil fines, see § 503(b)(1), and license revocations or the denial of license renewals, see §§ 309(k), 312(a)(6).

The Commission first invoked the statutory ban on indecent broadcasts in 1975, declaring a daytime broadcast of George Carlin's "Filthy Words" monologue actionably indecent. *Pacifica Foundation,* 56 F.C.C.2d 94, 1975 WL 29897. At that time, the Commission announced the definition of indecent speech that it uses to this day, prohibiting "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.,* at 98.

In *FCC v. Pacifica Foundation, supra,* we upheld the Commission's order against statutory and constitutional challenge. We rejected the broadcasters' argument that the statutory proscription applied only to speech appealing to the prurient interest, noting that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Id.,* at 740, 98 S.Ct. 3026. And we 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." *Id.,* at 748-749, 98 S.Ct. 3026.

In the ensuing years, the Commission took a cautious, but gradually expanding, approach to enforcing the statutory prohibition against indecent broadcasts. Shortly after *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, the Commission expressed its "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" contained in Carlin's monologue. *In re Application of WGBH Educ. Foundation,* 69 F.C.C.2d 1250, 1254, ¶ 10, 1978 WL 36042 (1978). When the full Commission next considered its indecency standard, however, it repudiated the view that its enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue." *In re Pacifica Foundation, Inc.,* 2 FCC Rcd. 2698, 2699, ¶ 12, 1987 WL 345577 (1987). The Commission determined that such a "highly restricted

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[57] The statutory prohibition applicable to commercial radio and television stations extends by its terms from 6 a.m. to 12 midnight. The Court of Appeals for the District of Columbia Circuit held, however, that because "Congress and the Commission [had] backed away from the consequences of their own reasoning," by allowing some public broadcasters to air indecent speech after 10 p.m., the court was forced "to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight." Action for Children's Television v. FCC, 58 F.3d 654, 669 (1995) (en banc), cert. denied, 516 U.S. 1043, 116 S.Ct. 701, 133 L.Ed.2d 658 (1996).

enforcement standard ... was unduly narrow as a matter of law and inconsistent with [the Commission's] enforcement responsibilities under Section 1464." *In re Infinity Broadcasting Corp. of Pa.,* 3 FCC Rcd. 930, ¶ 5, 1987 WL 345514 (1987). The Court of Appeals for the District of Columbia Circuit upheld this expanded enforcement standard against constitutional and Administrative Procedure Act challenge. See *Action for Children's Television v. FCC,* 852 F.2d 1332 (1988) (R. Ginsburg, J.), superseded in part by *Action for Children's Television v. FCC,* 58 F.3d 654 (1995) (en banc).

Although the Commission had expanded its enforcement beyond the "repetitive use of specific words or phrases," it preserved a distinction between literal and nonliteral (or "expletive") uses of evocative language. *In re Pacifica Foundation, Inc.,* 2 FCC Rcd., at 2699, ¶ 13. The Commission explained that each literal "description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive," but that "deliberate and repetitive use ... is a requisite to a finding of indecency" when a complaint focuses solely on the use of nonliteral expletives. *Ibid.*

Over a decade later, the Commission emphasized that the "full context" in which particular materials appear is "critically important," but that a few "principal" factors guide the inquiry, such as the "explicitness or graphic nature" of the material, the extent to which the material "dwells on or repeats" the offensive material, and the extent to which the material was presented to "pander," to "titillate," or to "shock." *In re Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8002, ¶ 9, 8003, ¶ 10, 2001 WL 332787 (2001) (emphasis deleted). "No single factor," the Commission said, "generally provides the basis for an indecency finding," but "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency." *Id.,* at 8003, ¶ 10, 8008, ¶ 17.

In 2004, the Commission took one step further by declaring for the first time that a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once. The first order to this effect dealt with an NBC broadcast of the Golden Globe Awards, in which the performer Bono commented, "'This is really, really, f* * *ing brilliant.'" *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Red. 4975, 4976, n. 4, 2004 WL 540339 (2004) *(Golden Globes Order).* Although the Commission had received numerous complaints directed at the broadcast, its enforcement bureau had concluded that the material was not indecent because "Bono did not describe, in context, sexual or excretory organs or activities and ... the utterance was fleeting and isolated." *Id.,* at 4975-4976, ¶ 3. The full Commission reviewed and reversed the staff ruling.

The Commission first declared that Bono's use of the F-Word fell within its indecency definition, even though the word was used as an intensifier rather than a literal descriptor. "[G]iven the core meaning of the 'F-Word,'" it said, "any use of that word ... inherently has a sexual connotation." *Id.,* at 4978, ¶ 8. The Commission determined, moreover, that the broadcast was "patently offensive" because the F-Word "is one of the most vulgar, graphic and explicit descriptions

of sexual activity in the English language," because "[i]ts use invariably invokes a coarse sexual image," and because Bono's use of the word was entirely "shocking and gratuitous." *Id.,* at 4979, ¶ 9.

The Commission observed that categorically exempting such language from enforcement actions would "likely lead to more widespread use." *Ibid.* Commission action was necessary to "safeguard the well-being of the nation's children from the most objectionable, most offensive language." *Ibid.* The order noted that technological advances have made it far easier to delete ("bleep out") a "single and gratuitous use of a vulgar expletive," without adulterating the content of a broadcast. *Id.,* at 4980, ¶ 11.

The order acknowledged that "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' ... are not indecent or would not be acted upon." It explicitly ruled that "any such interpretation is no longer good law." *Ibid.,* ¶ 12. It "clarif[ied] ... 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." *Ibid.* Because, however, "existing precedent would have permitted this broadcast," the Commission determined that "NBC and its affiliates necessarily did not have the requisite notice to justify a penalty." *Id.,* at 4981-4982, ¶ 15.

II. The Present Case

This case concerns utterances in two live broadcasts aired by Fox Television Stations, Inc., and its affiliates prior to the Commission's *Golden Globes Order*. The first occurred during the 2002 Billboard Music Awards, when the singer Cher exclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f* * * 'em." Brief for Petitioners 9. The second involved a segment of the 2003 Billboard Music Awards, during the presentation of an award by Nicole Richie and Paris Hilton, principals in a Fox television series called "The Simple Life." Ms. Hilton began their interchange by reminding Ms. Richie to "watch the bad language," but Ms. Richie proceeded to ask the audience, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow s* * * out of a Prada purse? It's not so f* * *ing simple." *Id.,* at 9-10. Following each of these broadcasts, the Commission received numerous complaints from parents whose children were exposed to the language.

On March 15, 2006, the Commission released Notices of Apparent Liability for a number of broadcasts that the Commission deemed actionably indecent, including the two described above. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd. 2664, 2006 WL 656783 (2006). Multiple parties petitioned the Court of Appeals for the Second Circuit for judicial review of the order, asserting a variety of constitutional and statutory challenges. Since the order had declined to impose sanctions, the Commission had not previously given the broadcasters an opportunity to respond to the indecency charges. It therefore requested and obtained from the Court of Appeals a voluntary remand so that the parties could air their objections. 489 F.3d 444, 453 (2007). The Commission's order on remand upheld the indecency findings for the broadcasts described above. See *In re Complaints Regarding Various Television Broadcasts Between February 2,*

2002, and March 8, 2005, 21 FCC Rcd. 13299, 2006 WL 3207085 (2006) *(Remand Order)*.

The order first explained that both broadcasts fell comfortably within the subject-matter scope of the Commission's indecency test because the 2003 broadcast involved a literal description of excrement and both broadcasts invoked the "F-Word," which inherently has a sexual connotation. *Id.,* at 13304, ¶ 16, 13323, ¶ 58. The order next determined that the broadcasts were patently offensive under community standards for the medium. Both broadcasts, it noted, involved entirely gratuitous uses of "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." *Id.,* at 13305, ¶ 17, 13324, ¶ 59. It found Ms. Richie's use of the "F-Word" and her "explicit description of the handling of excrement" to be "vulgar and shocking," as well as to constitute "pandering," after Ms. Hilton had playfully warned her to "'watch the bad language.'" *Id.,* at 13305, ¶ 17. And it found Cher's statement patently offensive in part because she metaphorically suggested a sexual act as a means of expressing hostility to her critics. *Id.,* at 13324, ¶ 60. The order relied upon the "critically important" context of the utterances, *id.,* at 13304, ¶ 15, noting that they were aired during prime-time awards shows "designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars," *id.,* at 13305, ¶ 18, 13324, ¶ 59. Indeed, approximately 2.5 million minors witnessed each of the broadcasts. *Id.,* at 13306, ¶ 18, 13326, ¶ 65.

The order asserted that both broadcasts under review would have been actionably indecent under the staff rulings and Commission dicta in effect prior to the *Golden Globes Order* – the 2003 broadcast because it involved a literal description of excrement, rather than a mere expletive, because it used more than one offensive word, and because it was planned, 21 FCC Rcd., at 13307, ¶ 22; and the 2002 broadcast because Cher used the F-Word not as a mere intensifier, but as a description of the sexual act to express hostility to her critics, *id.,* at 13324, ¶ 60. The order stated, however, that the pre-*Golden Globes* regime of immunity for isolated indecent expletives rested only upon staff rulings and Commission dicta, and that the Commission itself had never held "that the isolated use of an expletive ... was not indecent or could not be indecent," 21 FCC Rcd., at 13307, ¶ 21. In any event, the order made clear, the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent, 21 FCC Rcd., at 13308, ¶ 23, 13325, ¶ 61, and the Commission disavowed the bureau-level decisions and its own dicta that had said otherwise, *id.,* at 13306-13307, ¶¶ 20, 21. Under the new policy, a lack of repetition "weigh[s] against a finding of indecency," *id.,* at 13325, ¶ 61, but is not a safe harbor.

The order explained that the Commission's prior "strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning." *Id.,* at 13308, ¶ 23. In the Commission's view, "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children)" to take "'the first blow'" and would allow broadcasters "to air expletives at all hours of a day so long as they did so one at a time." *Id.,* at 13309, ¶ 25. Although the Commission determined that Fox encouraged the offensive language by using

suggestive scripting in the 2003 broadcast, and unreasonably failed to take adequate precautions in both broadcasts, *id.,* at 13311-13314, ¶¶ 31-37, the order again declined to impose any forfeiture or other sanction for either of the broadcasts, *id.,* at 13321, ¶ 53, 13326, ¶ 66.

Fox returned to the Second Circuit for review of the *Remand Order,* and various intervenors including CBS, NBC, and ABC joined the action. The Court of Appeals reversed the agency's orders, finding the Commission's reasoning inadequate under the Administrative Procedure Act. 489 F.3d 444. The majority was "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster," but it declined to reach the constitutional question. *Id.,* at 462. Judge Leval dissented, *id.,* at 467. We granted certiorari, 552 U.S. ___, 128 S.Ct. 1647, 170 L.Ed.2d 352 (2008).

III. Analysis

A. Governing Principles

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.,* which sets forth the full extent of judicial authority to review executive agency action for procedural correctness, see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 545-549, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), permits (insofar as relevant here) the setting aside of agency action that is "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A). Under what we have called this "narrow" standard of review, we insist that an agency "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). We have made clear, however, that "a court is not to substitute its judgment for that of the agency," *ibid.,* and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

In overturning the Commission's judgment, the Court of Appeals here relied in part on Circuit precedent requiring a more substantial explanation for agency action that changes prior policy. The Second Circuit has interpreted the Administrative Procedure Act and our opinion in *State Farm* as requiring agencies to make clear "'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive'" as well as "'why the new rule effectuates the statute as well as or better than the old rule.'" 489 F.3d, at 456-457 (quoting *New York Council, Assn. of Civilian Technicians v. FLRA,* 757 F.2d 502, 508 (C.A.2 1985); emphasis deleted). The Court of Appeals for the District of Columbia Circuit has similarly indicated that a court's standard of review is "heightened somewhat" when an agency reverses course. *NAACP v. FCC,* 682 F.2d 993, 998 (1982).

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change

must be justified by reasons more substantial than those required to adopt a policy in the first instance. That case, 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." 463 U.S., at 42, 103 S.Ct. 2856 (emphasis added).˜ Treating failures to act and rescissions of prior action differently for purposes of the standard of review makes good sense, and has basis in the text of the statute, which likewise treats the two separately. It instructs a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and to "hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] ... arbitrary [or] capricious," § 706(2)(A). The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States v. Nixon,* 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

In this appeal from the Second Circuit's setting aside of Commission action for failure to comply with a procedural requirement of the Administrative Procedure Act, the broadcasters' arguments have repeatedly referred to the First Amendment. If they mean to invite us to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties, we reject the invitation. The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). We know of no precedent for applying it to limit the scope of authorized executive action. In the same section authorizing courts to set aside "arbitrary [or] capricious" agency action, the Administrative Procedure Act separately provides for setting aside agency action that is "unlawful," 5 U.S.C. § 706(2)(A), which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon

judicial review of authorized agency action. If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's "arbitrary [or] capricious" standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.~

B. Application to This Case

Judged under the above described standards, the Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious. First, the Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent "prior Commission and staff action" and explicitly disavowing them as "no longer good law." *Golden Globes Order,* 19 FCC Rcd., at 4980, ¶ 12. To be sure, the (superfluous) explanation in its *Remand Order* of why the Cher broadcast would even have violated its earlier policy may not be entirely convincing. But that unnecessary detour is irrelevant. There is no doubt that the Commission knew it was making a change. That is why it declined to assess penalties; and it relied on the *Golden Globes Order* as removing any lingering doubt. *Remand Order,* 21 FCC Rcd., at 13308, ¶ 23, 13325, ¶ 61.

Moreover, the agency's reasons for expanding the scope of its enforcement activity were entirely rational. It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent. As the Commission said with regard to expletive use of the F-Word, "the word's power to insult and offend derives from its sexual meaning." *Id.,* at 13323, ¶ 58. And the Commission's decision 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,* 438 U.S., at 750, 98 S.Ct. 3026. Even isolated utterances can be made in "pander[ing,] ... vulgar and shocking" manners, *Remand Order,* 21 FCC Rcd., at 13305, ¶ 17, and can constitute harmful "'first blow[s]'" to children, *id.,* at 13309, ¶ 25. It is surely rational (if not inescapable) to believe that a safe harbor for single words would "likely lead to more widespread use of the offensive language," *Golden Globes Order, supra,* at 4979, ¶ 9.

When confronting other requests for *per se* rules governing its enforcement of the indecency prohibition, the Commission has declined to create safe harbors for particular types of broadcasts. See *In re Pacifica Foundation, Inc.,* 2 FCC Rcd., at 2699, ¶ 12 (repudiating the view that the Commission's enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue"); *In re Infinity Broadcasting Corp. of Pa.,* 3 FCC Rcd., at 932, ¶ 17 ("reject[ing] an approach that would hold that if a work has merit, it is *per se* not indecent"). The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was "at odds with the Commission's overall enforcement policy." *Remand Order, supra,* at 13308, ¶ 23.

The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy. *Golden Globes Order, supra,* at 4980, ¶ 11. And the agency's decision not to impose any forfeiture or other sanction precludes any

argument that it is arbitrarily punishing parties without notice of the potential consequences of their action.

C. The Court of Appeals' Reasoning

The Court of Appeals found the Commission's action arbitrary and capricious on three grounds. First, the court criticized the Commission for failing to explain why it had not previously banned fleeting expletives as "harmful 'first blow[s].'" 489 F.3d, at 458. In the majority's view, without "evidence that suggests a fleeting expletive is harmful [and] ... serious enough to warrant government regulation," the agency could not regulate more broadly. *Id.,* at 461. As explained above, the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so. And it is not the Commission, but Congress that has proscribed "any ... indecent ... language." 18 U.S.C. § 1464.

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. See, *e.g., State Farm,* 463 U.S., at 46-56, 103 S.Ct. 2856 (addressing the costs and benefits of mandatory passive restraints for automobiles). It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe – or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

The Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica,* and we nonetheless held that the "government's interest in the 'well-being of its youth' ... justified the regulation of otherwise protected expression." 438 U.S., at 749, 98 S.Ct. 3026 (quoting *Ginsberg v. New York,* 390 U.S. 629, 640, 639, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)). If the Constitution itself demands of agencies no more scientifically certain criteria to comply with the First Amendment, neither does the Administrative Procedure Act to comply with the requirement of reasoned decision-making.

The court's second objection is that fidelity to the agency's "first blow" theory of harm would require a categorical ban on *all* broadcasts of expletives; the Commission's failure to go to this extreme thus undermined the coherence of its rationale. 489 F.3d, at 458-459. This objection, however, is not responsive to the Commission's actual policy under review – the decision to include patently offensive fleeting expletives within the definition of indecency. The Commission's prior enforcement practice, unchallenged here, already drew distinctions between the offensiveness of particular words based upon the context in which they appeared. Any complaint about the Commission's failure to ban

only some fleeting expletives is better directed at the agency's context-based system generally rather than its inclusion of isolated expletives.

More fundamentally, however, the agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious. "Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale," we have explained, "would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected." *Pacifica, supra,* at 750, n. 29, 98 S.Ct. 3026. The same rationale could support the Commission's finding that a broadcast of the film Saving Private Ryan was not indecent – a finding to which the broadcasters point as supposed evidence of the Commission's inconsistency. The frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material. See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd. 4507, 4513, ¶ 15, 2005 WL 474210 (2005) (noting that the broadcast was not "intended as family entertainment"). The agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review – shows that were expected to (and did) draw the attention of millions of children.

Finally, the Court of Appeals found unconvincing the agency's prediction (without any evidence) that a *per se* exemption for fleeting expletives would lead to increased use of expletives one at a time. 489 F.3d, at 460. But even in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense. To predict that complete immunity for fleeting expletives, ardently desired by broadcasters, will lead to a substantial increase in fleeting expletives seems to us an exercise in logic rather than clairvoyance. The Court of Appeals was perhaps correct that the Commission's prior policy had not yet caused broadcasters to "barrag[e] the airwaves with expletives," *ibid.* That may have been because its prior permissive policy had been confirmed (save in dicta) only at the staff level. In any event, as the *Golden Globes* order demonstrated, it did produce more expletives than the Commission (which has the first call in this matter) deemed in conformity with the statute.

D. Respondents' Arguments

Respondents press some arguments that the court did not adopt. They claim that the Commission failed to acknowledge its change in enforcement policy. That contention is not tenable in light of the *Golden Globes Order*'s specific declaration that its prior rulings were no longer good law, 19 FCC Rcd., at 4980, ¶ 12, and the *Remand Order*'s disavowal of those staff rulings and Commission dicta as "seriously flawed," 21 FCC Rcd., at 13308, ¶ 23. The broadcasters also try to recharacterize the nature of the Commission's shift, contending that the old policy was not actually a *per se* rule against liability for isolated expletives and that the new policy is a presumption of indecency for certain words. This description of the prior agency policy conflicts with the broadcasters' own prior position in this case. See, *e.g.,* Brief in Opposition for Respondent Fox

Television Stations, Inc., et al. 4 ("For almost 30 years following Pacifica, the FCC did not consider fleeting, isolated or inadvertent expletives to be indecent"). And we find no basis for the contention that the Commission has now adopted a presumption of indecency; its repeated reliance on context refutes this claim.

The broadcasters also make much of the fact that the Commission has gone beyond the scope of authority approved in *Pacifica,* which it once regarded as the farthest extent of its power. But 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. 438 U.S., at 748, 98 S.Ct. 3026. 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. Nothing prohibits federal agencies from moving in an incremental manner. Cf. *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 1002, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

Finally, the broadcasters claim that the Commission's repeated appeal to "context" is simply a smokescreen for a standardless regime of unbridled discretion. But we have previously approved Commission regulation based "on a nuisance rationale under which context is all-important," *Pacifica, supra,* at 750, 98 S.Ct. 3026, and we find no basis in the Administrative Procedure Act for mandating anything different.

E. The Dissents' Arguments

Justice BREYER purports to "begin with applicable law," *post,* at 1829, but in fact begins by stacking the deck. He claims that the FCC's status as an "independent" agency sheltered from political oversight requires courts to be "all the more" vigilant in ensuring "that major policy decisions be based upon articulable reasons." *Post,* at 1829, 1829-1830. Not so. The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction. See, *e.g., In re Sealed Case,* 838 F.2d 476, 507-508 (C.A.D.C.) (Silberman, J.), rev'd *sub nom. Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988); Kagan, Presidential Administration, 114 Harv. L.Rev. 2245, 2271, n. 93 (2001); Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 583 (1994); Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective, 107 Harv. L.Rev. 1328, 1341 (1994). Indeed, the precise policy change at issue here was spurred by significant political pressure from Congress.[58]

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[58] A Subcommittee of the FCC's House oversight Committee held hearings on the FCC's broadcast indecency enforcement on January 28, 2004. "Can You Say That on TV?": An Examination of the FCC's Enforcement with respect to Broadcast Indecency, Hearing before the Subcommittee on

Justice STEVENS apparently recognizes this political control by Congress, and indeed sees it as the manifestation of a principal-agency relationship. In his judgment, the FCC is "better viewed as an agent of Congress" than as part of the Executive. *Post,* at 1825-1826 (dissenting opinion). He nonetheless argues that this is a good reason for requiring the FCC to explain "why its prior policy is no longer sound before allowing it to change course." *Post,* at 1826. Leaving aside the unconstitutionality of a scheme giving the power to enforce laws to agents of Congress, see *Bowsher v. Synar,* 478 U.S. 714, 726, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986), it seems to us that Justice STEVENS' conclusion does not follow from his premise. If the FCC is indeed an agent of Congress, it would seem an adequate explanation of its change of position that Congress made clear its wishes for stricter enforcement, see n. 4, *supra.*~ The Administrative Procedure Act, after all, does not apply to Congress and its agencies.~

Regardless, it is assuredly not "applicable law" that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no

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Telecommunications and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess. Members of the Subcommittee specifically "called on the full Commission to reverse [the staff ruling in the Golden Globes case]" because they perceived a "feeling amongst many Americans that some broadcasters are engaged in a race to the bottom, pushing the decency envelope to distinguish themselves in the increasingly crowded entertainment field." Id., at 2 (statement of Rep. Upton); see also, e.g., id., at 17 (statement of Rep. Terry), 19 (statement of Rep. Pitts). They repeatedly expressed disapproval of the FCC's enforcement policies, see, e.g., id., at 3 (statement of Rep. Upton) ("At some point we have to ask the FCC: How much is enough? When will it revoke a license?"); id., at 4 (statement of Rep. Markey) ("Today's hearing will allow us to explore the FCC's lackluster enforcement record with respect to these violations").

About two weeks later, on February 11, 2004, the same Subcommittee held hearings on a bill increasing the fines for indecency violations. Hearings on '. R 3717 before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, 108th Cong., 2d Sess. All five Commissioners were present and were grilled about enforcement shortcomings. See, e.g., id., at 124 (statement of Rep. Terry) ("Chairman Powell, ... it seems like common sense that if we had ... more frequent enforcement instead of a few examples of fines... that would be a deterrent in itself"); id., at 7 (statement of Rep. Dingell) ("I see that apparently ... there is no enforcement of regulations at the FCC"). Certain statements, moreover, indicate that the political pressure applied by Congress had its desired effect. See ibid. ("I think our committee's work has gotten the attention of FCC Chairman Powell and the Bush Administration. And I'm happy to see the FCC now being brought to a state of apparent alert on these matters"); see also id., at 124 (statement of Michael Copps, FCC Commissioner) (noting "positive" change in other Commissioners' willingness to step up enforcement in light of proposed congressional action). A version of the bill ultimately became law as the Broadcast Decency Enforcement Act of 2005, 120 Stat. 491.

The FCC adopted the change that is the subject of this litigation on March 3, 2004, about three weeks after this second hearing. See Golden Globes Order, 19 FCC Rcd. 4975

distinction between independent and other agencies, neither in its definition of agency, 5 U.S.C. § 701(b)(1), nor in the standards for reviewing agency action, § 706. Nor does any case of ours express or reflect the "heightened scrutiny" Justice BREYER and Justice STEVENS would impose. Indeed, it is hard to imagine any closer scrutiny than that we have given to the Environmental Protection Agency, which is not an independent agency. See *Massachusetts v. EPA,* 549 U.S. 497, 533-535, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007); *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 481-486, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch, see *Freytag v. Commissioner,* 501 U.S. 868, 921, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (SCALIA, J., concurring in part and concurring in judgment), by letting Article III judges – like jackals stealing the lion's kill – expropriate some of the power that Congress has wrested from the unitary Executive.

Justice BREYER and Justice STEVENS rely upon two supposed omissions in the FCC's analysis that they believe preclude a finding that the agency did not act arbitrarily. Neither of these omissions could undermine the coherence of the rationale the agency gave, but the dissenters' evaluation of each is flawed in its own right.

First, both claim that the Commission failed adequately to explain its consideration of the constitutional issues inherent in its regulation, *post,* at 1832-1835 (opinion of BREYER, J.); *post,* at 1826-1828 (opinion of STEVENS, J.). We are unaware that we have ever before reversed an executive agency, not for violating our cases, but for failure to discuss them adequately. But leave that aside. According to Justice BREYER, the agency said "next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship,'" *post,* at 1832-1833. The *Remand Order* does, however, devote four full pages of small-type, single-spaced text (over 1,300 words not counting the footnotes) to explaining why the Commission believes that its indecency-enforcement regime (which includes its change in policy) is consistent with the First Amendment – and therefore not censorship as the term is understood. More specifically, Justice BREYER faults the FCC for "not explain[ing] why the agency changed its mind about the line that *Pacifica* draws or its policy's relation to that line," *post,* at 1834. But in fact (and as the Commission explained) this Court's holding in *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, drew no constitutional line; to the contrary, it expressly declined to express any view on the constitutionality of prohibiting isolated indecency. Justice BREYER and Justice STEVENS evidently believe that when an agency has obtained this Court's determination that a less restrictive rule is constitutional, its successors acquire some special burden to explain why a more restrictive rule is not *un* constitutional. We know of no such principle.~

Second, Justice BREYER looks over the vast field of particular factual scenarios unaddressed by the FCC's 35-page *Remand Order* and finds one that is fatal: the plight of the small local broadcaster who cannot afford the new technology that enables the screening of live broadcasts for indecent utterances. Cf. *post,* at 1834-1838. The Commission has failed to address the fate of this unfortunate, who will, he believes, be subject to sanction.

We doubt, to begin with, that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood. Their main exposure with regard to self-originated programming is live coverage of news and public affairs. But the *Remand Order* went out of its way to note that the case at hand did not involve "breaking news coverage," and that "it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event," 21 FCC Rcd., at 13311, ¶ 33. As for the programming that small stations receive on a network "feed": This *will* be cleansed by the expensive technology small stations (by Justice BREYER's hypothesis) cannot afford.

But never mind the detail of whether small broadcasters are uniquely subject to a great risk of punishment for fleeting expletives. The fundamental fallacy of Justice BREYER's small-broadcaster gloomy scenario is its demonstrably false assumption that the *Remand Order* makes no provision for the avoidance of unfairness – that the single-utterance prohibition will be invoked uniformly, in all situations. The *Remand Order* made very clear that this is not the case. It said that in determining "what, if any, remedy is appropriate" the Commission would consider the facts of each individual case, such as the "possibility of human error in using delay equipment," *id.,* at 13313, ¶ 35. Thus, the fact that the agency believed that Fox (a large broadcaster that used suggestive scripting and a deficient delay system to air a prime-time awards show aimed at millions of children) "fail[ed] to exercise 'reasonable judgment, responsibility and sensitivity,'" *id.,* at 13311, ¶ 33, and n. 91 (quoting *Pacifica Foundation, Inc.,* 2 FCC Rcd., at 2700, ¶ 18), says little about how the Commission would treat smaller broadcasters who cannot afford screening equipment. Indeed, that they would not be punished for failing to purchase equipment they cannot afford is positively suggested by the *Remand Order's* statement that "[h]olding Fox responsible for airing indecent material in this case does not ... impose undue burdens on broadcasters." 21 FCC Rcd., at 13313, ¶ 36.

There was, in sum, no need for the Commission to compose a special treatise on local broadcasters.~ And Justice BREYER can safely defer his concern for those yeomen of the airwaves until we have before us a case that involves one.

IV. Constitutionality

The Second Circuit did not definitively rule on the constitutionality of the Commission's orders, but respondents nonetheless ask us to decide their validity under the First Amendment. This Court, however, is one of final review, "not of first view." *Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material "surely lie at the periphery of First Amendment concern," *Pacifica,* 438 U.S., at 743, 98 S.Ct. 3026 (plurality opinion of STEVENS, J.). We see no reason to abandon our usual

procedures in a rush to judgment without a lower court opinion. We decline to address the constitutional questions at this time.

* * *

The Second Circuit believed that children today "likely hear this language far more often from other sources than they did in the 1970's when the Commission first began sanctioning indecent speech," and that this cuts against more stringent regulation of broadcasts. 489 F.3d, at 461. Assuming the premise is true (for this point the Second Circuit did not demand empirical evidence) the conclusion does not necessarily follow. The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given. We decline to "substitute [our] judgment for that of the agency," *State Farm,* 463 U.S., at 43, 103 S.Ct. 2856, and we find the Commission's orders neither arbitrary nor capricious.

The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

I join the Court's opinion, which, as a matter of administrative law, correctly upholds the Federal Communications Commission's (FCC) policy with respect to indecent broadcast speech under the Administrative Procedure Act. I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. See *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). *Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" in these cases. *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 812, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (THOMAS, J., concurring in judgment in part and dissenting in part).

In *Red Lion,* this Court upheld the so-called "fairness doctrine," a Government requirement "that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." 395 U.S., at 369, 400-401, 89 S.Ct. 1794. The decision relied heavily on the scarcity of available broadcast frequencies. According to the Court, because broadcast spectrum was so scarce, it "could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Id.,* at 376, 89 S.Ct. 1794. To this end, the Court

concluded that the Government should be "permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.,* at 390, 89 S.Ct. 1794; see also *id.,* at 389, 89 S.Ct. 1794 (concluding that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused"). Applying this principle, the Court held that "[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Id.,* at 394, 89 S.Ct. 1794.

Red Lion specifically declined to answer whether the First Amendment authorized the Government's "refusal to permit the broadcaster to carry a particular program or to publish his own views[,] ... [or] government censorship of a particular program," *id.,* at 396, 89 S.Ct. 1794. But then in *Pacifica,* this Court rejected a challenge to the FCC's authority to impose sanctions on the broadcast of indecent material. See 438 U.S., at 729-730, 750-751, 98 S.Ct. 3026; *id.,* at 742, 98 S.Ct. 3026 (plurality opinion), relying on *Red Lion,* the Court noted that "broadcasting ... has received the most limited First Amendment protection." 438 U.S., at 748, 98 S.Ct. 3026. The Court also emphasized the "uniquely pervasive presence" of the broadcast media in Americans' lives and the fact that broadcast programming was "uniquely accessible to children." *Id.,* at 748-749, 98 S.Ct. 3026.

This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional question, the Court relied on a set of transitory facts, *e.g.,* the "scarcity of radio frequencies," *Red Lion, supra,* at 390, 89 S.Ct. 1794, to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia v. Heller,* 554 U.S. ___, ___, 128 S.Ct. 2783, 2821, 171 L.Ed.2d 637 (2008). In breaching this principle, *Red Lion* adopted, and *Pacifica* reaffirmed, a legal rule that lacks any textual basis in the Constitution. *Denver Area, supra,* at 813, 116 S.Ct. 2374 (THOMAS, J., concurring in judgment in part and dissenting in part) ("First Amendment distinctions between media [have been] dubious from their infancy"). Indeed, the logical weakness of *Red Lion* and *Pacifica* has been apparent for some time: "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." *Telecommunications Research & Action Center v. FCC,* 801 F.2d 501, 508 (C.A.D.C.1986) (Bork, J.).

Highlighting the doctrinal incoherence of *Red Lion* and *Pacifica,* the Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to federal regulation of telephone dial-in services, see *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 127-128, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), cable television programming, see *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 637, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), and the Internet, see *Reno v. American Civil Liberties Union,* 521 U.S. 844, 867-

868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). "There is no justification for this apparent dichotomy in First Amendment jurisprudence. Whatever the merits of *Pacifica* when it was issued[,]... it makes no sense now." *Action for Children's Television v. FCC,* 58 F.3d 654, 673 (C.A.D.C.1995) (Edwards, C. J., dissenting). The justifications relied on by the Court in *Red Lion* and *Pacifica* – "spectrum scarcity, intrusiveness, and accessibility to children – neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast." 58 F.3d, at 673; see also *In re Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999, 8021, n. 11, 2001 WL 332787 (2001) (statement of Commissioner Furchtgott-Roth) ("It is ironic that streaming video or audio content from a television or radio station would likely receive more constitutional protection, *see Reno* [*v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)], than would the same exact content broadcast over-the-air").

Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica,* dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. See Brief for Respondents NBC Universal et al. 37-38 (hereinafter NBC Brief). As NBC notes, the number of over-the-air broadcast stations grew from 7,411 in 1969, when *Red Lion* was issued, to 15,273 by the end of 2004. See NBC Brief 38; see also FCC Media Bureau Staff Research Paper, J. Berresford, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 12-13 (Mar.2005) (No. 2005-2). And the trend should continue with broadcast television's imminent switch from analog to digital transmission, which will allow the FCC to "stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today." *Consumer Electronics Assn. v. FCC,* 347 F.3d 291, 294 (C.A.D.C.2003).

Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services. See App. to Pet. for Cert. 107a. Broadcast and other video programming is also widely available over the Internet. See Stelter, Serving Up Television Without the TV Set, N.'. Times, Mar. 10, 2008, p. C1. And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices. See May, Charting a New Constitutional Jurisprudence for the Digital Age, 3 Charleston L.Rev. 373, 375 (2009). The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today. See *In re Industry Guidance, supra,* at 8020 (statement of Commissioner Furchtgott-Roth) ("If rules regulating broadcast content were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications marketplace of the past. As

the Commission has long recognized, the facts underlying this justification are no longer true" (footnote omitted)).[59]

These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to *stare decisis.* See *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 855, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (asking "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); see also *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 302, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate ..."). "In cases involving constitutional issues" that turn on a particular set of factual assumptions, "this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 412, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). For all these reasons, I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.

Justice KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, III-A through III-D, and IV of the opinion of the Court and agree that the judgment must be reversed. This separate writing is to underscore certain background principles for the conclusion that an agency's decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation for doing so. In those circumstances I agree with the dissenting opinion of Justice BREYER that the agency must explain why "it now reject[s] the considerations that led it to adopt that initial policy." *Post,* at 1831.~

The FCC's *Remand Order* explains that the agency has changed its reading of *Pacifica.* The reasons the agency announces for this change are not so precise, detailed, or elaborate as to be a model for agency explanation. But, as the opinion for the Court well explains, the FCC's reasons for its action were the sort of reasons an agency may consider and act upon. The Court's careful and complete analysis – both with respect to the procedural history of the FCC's indecency policies, and the reasons the agency has given to support them – is quite sufficient to sustain the FCC's change of course against respondents' claim that the agency acted in an arbitrary or capricious fashion.

The holding of the Court of Appeals turned on its conclusion that the agency's explanation for its change of policy was insufficient, and that is the only

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[59] With respect to reliance by FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), on the ease with which children could be exposed to indecent television programming, technology has provided innovative solutions to assist adults in screening their children from unsuitable programming – even when that programming appears on broadcast channels. See NBC Brief 43-47 (discussing V-chip technology, which allows targeted blocking of television programs based on content).

question presented here. I agree with the Court that as this case comes to us from the Court of Appeals we must reserve judgment on the question whether the agency's action is consistent with the guarantees of the Constitution.

Justice STEVENS, dissenting.

While I join Justice BREYER's cogent dissent, I think it important to emphasize two flaws in the Court's reasoning. Apparently assuming that the Federal Communications Commission's (FCC or Commission) rulemaking authority is a species of executive power, the Court espouses the novel proposition that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation. See *ante,* at 1810-1811. Moreover, the Court incorrectly assumes that our decision in *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), decided that the word "indecent," as used in 18 U.S.C. § 1464,[60] permits the FCC to punish the broadcast of *any* expletive that has a sexual or excretory origin. *Pacifica* was not so sweeping, and the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time.

I

"The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches – the Legislative, the Executive, and the Judicial – placing both substantive and procedural limitations on each." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 272, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991). The distinction among the branches is not always sharp, see *Bowsher v. Synar,* 478 U.S. 714, 749, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (STEVENS, J., concurring in judgment) (citing cases), a consequence of the fact that the "great ordinances of the Constitution do not establish and divide fields of black and white," *Springer v. Philippine Islands,* 277 U.S. 189, 209, 48 S.Ct. 480, 72 L.Ed. 845 (1928) (Holmes, J., dissenting). Strict lines of authority are particularly elusive when Congress and the President both exert a measure of control over an agency. As a landmark decision involving the Federal Trade Commission (FTC) made clear, however, when Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed for fixed terms, it substantially insulates the agency from executive control. See *Humphrey's Executor v. United States,* 295 U.S. 602, 623-628, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

With the view that broadcast regulation "should be as free from political influence or arbitrary control as possible," S.Rep. No. 772, 69th Cong., 1st Sess., 2 (1926), Congress established the FCC with the same measure of independence

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[60] Section 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

from the Executive that it had provided the FTC. Just as the FCC's commissioners do not serve at the will of the President, see 47 U.S.C. § 154(c) (2000 ed.), its regulations are not subject to change at the President's will. And when the Commission fashions rules that govern the airwaves, it exercises legislative power delegated to it by Congress. See *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 489-490, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (STEVENS, J., concurring in part and concurring in judgment); *Bowsher,* 478 U.S., at 752, 106 S.Ct. 3181 (opinion of STEVENS, J.). Consequently, the FCC "cannot in any proper sense be characterized as an arm or an eye of the executive" and is better viewed as an agent of Congress established "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative ... aid." *Humphrey's Executor,* 295 U.S., at 628, 55 S.Ct. 869.˜

The FCC, like all agencies, may revise its regulations from time to time, just as Congress amends its statutes as circumstances warrant. But the FCC is constrained by its congressional mandate. There should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute. The rules adopted after *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, have been in effect for decades and have not proved unworkable in the intervening years. As Justice BREYER's opinion explains, broadcasters have a substantial interest in regulatory stability; the threat of crippling financial penalties looms large over these entities. See *post,* at 1834-1836. The FCC's shifting and impermissibly vague indecency policy only imperils these broadcasters and muddles the regulatory landscape. It therefore makes eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course.˜ The FCC's congressional charter, 47 U.S.C. § 151 *et seq.,* the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006 ed.) (instructing courts to "hold unlawful and set aside ... arbitrary [or] capricious" agency action), and the rule of law all favor stability over administrative whim.

II

The Court commits a second critical error by assuming that *Pacifica* endorsed a construction of the term "indecent," as used in 18 U.S.C. § 1464, that would include any expletive that has a sexual or excretory origin. Neither the opinion of the Court, nor Justice Powell's concurring opinion, adopted such a far-reaching interpretation. Our holding was narrow in two critical respects. First, we concluded, over the dissent of four Justices, that the statutory term "indecent" was not limited to material that had prurient appeal and instead included material that was in "nonconformance with accepted standards of morality." *Pacifica,* 438 U.S., at 740, 98 S.Ct. 3026. Second, we upheld the FCC's adjudication that a 12-minute, expletive-filled monologue by satiric humorist George Carlin was indecent "as broadcast." *Id.,* at 735, 98 S.Ct. 3026. We did not decide whether an *isolated* expletive could qualify as indecent. *Id.,* at 750, 98 S.Ct. 3026; *id.,* at 760-761, 98 S.Ct. 3026 (Powell, J., concurring in part and concurring in

judgment). And we certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.

The narrow treatment of the term "indecent" in *Pacifica* defined the outer boundaries of the enforcement policies adopted by the FCC in the ensuing years. The Commission originally explained that "under the legal standards set forth in *Pacifica,* deliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Foundation,* 2 FCC Rcd. 2698, 2699, ¶ 13, 1987 WL 345577 (1987). While the "repetitive use" issue has received the most attention in this case, it should not be forgotten that *Pacifica* permitted the Commission to regulate only those words that describe sex or excrement. See 438 U.S., at 743, 98 S.Ct. 3026 (plurality opinion) ("[T]he Commission's definition of indecency will deter only the broadcasting of patently offensive *references* to excretory and sexual organs and activities" (emphasis added)). The FCC minimizes the strength of this limitation by now claiming that any use of the words at issue in this case, in any context and in any form, *necessarily* describes sex or excrement. See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd. 13299, 13308, ¶ 23, 2006 WL 3207085 (2006) *(Remand Order)* ("[A]ny strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an expletive's power to offend derives from its sexual or excretory meaning" (internal quotation marks omitted)). The customs of speech refute this claim: There is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart. As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.[61] See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Rcd. 4975, 4978-4979, ¶¶ 8-9, 2004 WL 540339 (2004) (declaring that even the use of an expletive to emphasize happiness "invariably invokes a coarse sexual image").

Even if the words that concern the Court in this case *sometimes* retain their sexual or excretory meaning, there are surely countless instances in which they are used in a manner unrelated to their origin. These words may not be polite, but that does not mean they are necessarily "indecent" under § 1464. By improperly equating the two, the Commission has adopted an interpretation of "indecency"

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[61] It is ironic, to say the least, that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they too are battling erectile dysfunction or are having trouble going to the bathroom.

that bears no resemblance to what *Pacifica* contemplated.[62] Most distressingly, the Commission appears to be entirely unaware of this fact, see *Remand Order,* 21 FCC Rcd., at 13308 (erroneously referencing *Pacifica* in support of its new policy), and today's majority seems untroubled by this significant oversight, see *ante,* at 1807-1808, 1812-1813. Because the FCC has failed to demonstrate an awareness that it has ventured far beyond *Pacifica*'s reading of § 1464, its policy choice must be declared arbitrary and set aside as unlawful. See *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

III

For these reasons and those stated in Justice BREYER's dissenting opinion, I would affirm the judgment of the Court of Appeals.

Justice GINSBURG, dissenting.

The mainspring of this case is a Government restriction on spoken words. This appeal, I recognize, arises under the Administrative Procedure Act.˜ Justice BREYER's dissenting opinion, which I join, cogently describes the infirmities of the Federal Communications Commission's (FCC or Commission) policy switch under that Act. The Commission's bold stride beyond the bounds of *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), I agree, exemplified "arbitrary" and "capricious" decisionmaking. I write separately only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow.

More than 30 years ago, a sharply divided Court allowed the FCC to sanction a midafternoon radio broadcast of comedian George Carlin's 12-minute "Filthy Words" monologue. *Ibid.* Carlin satirized the "original" seven dirty words and repeated them relentlessly in a variety of colloquialisms. The monologue was aired as part of a program on contemporary attitudes toward the use of language. *In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM),* 56 F.C.C.2d 94, 95, 1975 WL 29897 (1975). In rejecting the First Amendment challenge, the Court "emphasize[d] the narrowness of [its] holding." *Pacifica,* 438 U.S., at 750, 98 S.Ct. 3026. See also *ante,* at 1824-1825 (STEVENS, J., dissenting). In this regard, the majority stressed that the Carlin monologue deliberately repeated the dirty words "over and over again." 438 U.S., at 729, 751-755, 98 S.Ct. 3026 (Appendix). Justice Powell, concurring, described Carlin's speech as "verbal shock treatment." *Id.,* at 757, 98 S.Ct. 3026 (concurring in part and concurring in judgment).

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[62] While Justice THOMAS and I disagree about the continued wisdom of Pacifica, see ante, pp. 1819-1820 (concurring opinion), the changes in technology and the availability of broadcast spectrum he identifies certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen

In contrast, the unscripted fleeting expletives at issue here are neither deliberate nor relentlessly repetitive. Nor does the Commission's policy home in on expressions used to describe sexual or excretory activities or organs. Spontaneous utterances used simply to convey an emotion or intensify a statement fall within the order's compass. Cf. *Cohen v. California,* 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) ("[w]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 805, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part) (a word categorized as indecent "often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power").

The *Pacifica* decision, however it might fare on reassessment, see *ante,* at 1822 (THOMAS, J., concurring), was tightly cabined, and for good reason. In dissent, Justice Brennan observed that the Government should take care before enjoining the broadcast of words or expressions spoken by many "in our land of cultural pluralism." 438 U.S., at 775, 98 S.Ct. 3026. That comment, fitting in the 1970's, is even more potent today. If the reserved constitutional question reaches this Court, see *ante,* at 1819 (majority opinion), we should be mindful that words unpalatable to some may be "commonplace" for others, "the stuff of everyday conversations." 438 U.S., at 776, 98 S.Ct. 3026 (Brennan, J., dissenting).

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In my view, the Federal Communications Commission failed adequately to explain *why* it *changed* its indecency policy from a policy permitting a single "fleeting use" of an expletive, to a policy that made no such exception. Its explanation fails to discuss two critical factors, at least one of which directly underlay its original policy decision. Its explanation instead discussed several factors well known to it the first time around, which by themselves provide no significant justification for a *change* of policy. Consequently, the FCC decision is "arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706(2)(A)˜ And I would affirm the Second Circuit's similar determination.