AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Media

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F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978)

On October 30, 1973, at 2:00 PM, WBAI, an avant-garde radio station in New York owned by the Pacifica Foundation, broadcast a record of George Carlin's monologue, "Filthy Words." The routine, which was a variation on Carlin's famous "Seven Words You Can Never Say on Television," was an extensive, allegedly humorous, satire on "the words you couldn't say on the public airwaves."[1] A parent who heard the broadcast while driving with a young child complained to the Federal Communications Commission (FCC). The FCC concluded that while the broadcast was not obscene, Carlin's material was "indecent and prohibited" by federal law. Pacifica Foundation appealed, and that appeal was sustained by a three-judge panel on the Court of Appeals. The FCC then asked the Supreme Court to reverse that decision. Many civil liberties and media organizations filed amicus briefs urging the justices to declare Pacifica's broadcast constitutionally protected. The brief for the major broadcast networks (at the time, NBC, ABC and CBS) worried that "If successful here, the Commission would be placed in the position of a censor, free to forbid whatever is objectionable to 'the most vocal and powerful of orthodoxies.'" Several socially conservative organizations filed amicus briefs supporting the FCC. The United States Catholic Conference asserted that the "First Amendment does not require the government to participate in use of indecent, profane or obscene language." The brief for the Motion Pictures Association was more concerned with the potential influence of the decision in Pacifica on the emerging pay-television industry. The lawyers for that organization hoped that if the justices ruled for the FCC, they would limit the ruling to radio. "[T]he constitutional ability of the FCC to prohibit the dissemination of non-obscene but nevertheless 'indecent' material by means of 'electronic media,'" their brief contended,

> *is wholly dependent upon "the captive audience notion." Each electronic medium, however, "tends to present its own peculiar problems." . . . At one extreme is radio, a ubiquitous and omnipresent medium to which everyone has uncontrolled and uncontrollable access. It is found not only in homes, but also in automobiles and restaurants and on sidewalks and beaches. And all of radio's numerous stations are available simply by turning the dial, or may be heard simply by being within earshot of someone who turns the dial. The potential of radio for making "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," . . . is therefore not insubstantial. At the other extreme is pay television, a medium whose locations are limited (usually to the home) and whose reception requires constitutionally significant choice and affirmative action on the part of its subscribers. Electing to receive pay television programming is therefore analogous to purchasing a ticket of admission to a motion picture theatre.*

The United States, after initially siding with the FCC, switched positions after the 1976 national election returned Democrats to the White House. The brief for the Carter justice department asserted, that the relevant federal law "construed in the light of the First Amendment, does not authorize the Commission's present attempt to absolutely outlaw certain words on radio, wholly without regard to context, for all or most of the broadcast day."

When reading Pacifica*, remember that this is a case concerning federal regulation of radio. No party to the case insisted that governing officials could regulate indecent language in the press or in ordinary speech. The issue*

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[1] For the transcript of Carlin's broadcast, see http://www.cba.uni.edu/decencyl/7words.html. For Carlin's original "Seven Dirty Words" routine, see http://www.erenkrantz.com/Humor/SevenDirtyWords.shtml.

was, whether under Red Lion Broadcasting Co. v. FCC *(1969), the federal government could restrict indecent speech on the airwaves that would normally be protected by the First Amendment. On what basis did the FCC maintain that such speech could be constitutionally restricted? Do you find those reasons constitutionally convincing? Consider, in particular, claims that radio is particular intrusive. Do you believe that judicial majority or minority better understood the place of radio during the late twentieth century? Consider also, in light of the judicial opinions, whether you would include the seven dirty words if lecturing about* Pacifica *(or writing this headnote). Does this suggest that decisions about language have political significance? Why does the majority disagree?*

JUSTICE STEVENS delivered the opinion of the Court and an opinion in which THE CHIEF JUSTICE and JUSTICE REHNQUIST joined in part.

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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. . . . 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 Justice Murphy when he said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

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We have long recognized that each medium of expression presents special First Amendment problems. . . . 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." . . .

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

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

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The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." . . . This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." . . . Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat.

In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. . . . The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. . . . A second difference, not without relevance, is that broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home. . . .

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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. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

. . . 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.

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

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. . . This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. . . . Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience. Dispassionate analysis, removed from individual notions as to what is proper and what is not, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental

homogenization of radio communications—if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme—that the Court today permits.

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. . . [A]n individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse.

. . . Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. . . .

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. . . .

Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to adults," . . . we have made it abundantly clear that "under any test of obscenity as to minors . . . to be obscene 'such expression must be, in some significant way, erotic.' " . . .

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them.

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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 . . . and my Brother STEVENS . . . 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. . . . Yet this principle supports a result directly contrary to that reached by the Court. *Wisconsin v. Yoder* (1972) and *Pierce v. Society of Sisters* (1925) 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.

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My Brother STEVENS, in reaching a result apologetically described as narrow, . . . 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," . . . 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." 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.. . . 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. . . .

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. . . [T]here runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their

fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

. . . The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research indicates that this is indeed the case.

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. . . . In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.

JUSTICE STEWART, with whom JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL join, dissenting.

[Justice Stewart's dissent concluded that Congress had not authorized the FCC to restrict indecent broadcasts.]