ARTICLES

THE DECLINE OF AMERICAN CULTURE: THE ROLE OF THE FEDERAL JUDICIARY

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INTRODUCTION

> *"The 'masters' have been done away with; the morality of the vulgar man has triumphed."*[1]

There are many factors that make a country's culture what it is. Two of the most important are the use of the State's police power to protect public morality[2] and the moral influence of religion.[3] The United States Supreme Court, since at least

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1. Friedrich Nietzsche, *The Genealogy of Morals*, essay 1, aphorism 9, 18 (T.N.R. Rogers ed., Horace B. Samuel trans., Dover Publications, Inc. 2003). Whatever Nietzsche might have precisely meant by this, the last half of the sentence certainly fits the theme of this Article quite well.

2. "Police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort, and general welfare." *Carroll v. State*, 361 So. 2d 144, 146 (Fla. 1978) (citing *St. ex rel. Municipal Bond & Inv. Co., Inc. v. Knott*, 154 So. 2d 143, 145 (Fla. 1934)).

3. As to Judaism and Christianity, the Holy Bible is filled with examples. The Ten Commandments are well known as a source of moral law. Those which can be considered partly secular are found in Exodus 20:12–20. They involve honoring one's parents and abstaining from murder, adultery, theft, and bearing false witness. *Exodus* 20:12–20 (King James). As to "bad" words, consider the following passages presented in the order in which they are found in the Holy Bible:

- He that keepeth his mouth keepeth his life: *but* he that openeth wide his lips shall have destruction. *Proverbs* 13:3 (King James).
- The thoughts of the wicked *are* an abomination to the Lord: but *the words* of the pure *are* pleasant words. *Proverbs* 15:26 (King James).
- The heart of the righteous studieth to answer: but the mouth of the wicked poureth out evil things. *Proverbs* 15:28 (King James).
- Surely the serpent will bite without enchantment; and a babbler is no

the Warren Court,[4] has interpreted the First Amendment's

better. *Ecclesiastes* 10:11 (King James).

- The words of a wise man's mouth *are* gracious; but the lips of a fool will swallow up himself. *Ecclesiastes* 10:12 (King James).
- The beginning of the words of his mouth *is* foolishness: and the end of his talk *is* mischievous madness. *Ecclesiastes* 10:13 (King James).
- But I say unto you, [t]hat every idle word that men shall speak, they shall give account thereof in the day of judgment. For by thy words thou shalt be justified, and by thy words thou shalt be condemned. *St. Matthew* 12:36–37 (King James) (reporting the words of Christ).
- Let all bitterness, and wrath, and anger, and clamor, and evil speaking, be put away from you, with all malice . . . . *Ephesians* 4:31 (King James).
- Neither filthiness, nor foolish talking, nor jesting, which are not convenient: but rather giving of thanks. *Ephesians* 5:4 (King James).
- But now ye also put off all of these; anger, wrath, malice, blasphemy, filthy communication out of your mouth. *Colossians* 3:8 (King James).
- Let your speech *be* always with grace, seasoned with salt, that ye may know how ye ought to answer every man. *Colossians* 4:6 (King James).
- For in many things we offend all. If any man offend not in word, the same *is* a perfect man, *and* able also to bridle the whole body. *James* 3:2 (King James).
- Behold, we put bits in the horses' mouths, that they may obey us; and we turn about their whole body. *James* 3:3 (King James).
- Behold also the ships, which though *they be* so great, and *are* driven of fierce winds, yet are they turned about with a very small helm, whithersoever the governor listeth. *James* 3:4 (King James).
- Even so the tongue is a little member, and boasteth great things. Behold, how great a matter a little fire kindleth! *James* 3:5 (King James).
- And the tongue *is* a fire, a world of iniquity: so is the tongue among our members, that it defileth the whole body, and setteth on fire the course of nature; and it is set on fire of hell. *James* 3:6 (King James).
- For every kind of beasts, and of birds, and of serpents, and of things in the sea, is tamed, and hath been tamed of mankind . . . . *James* 3:7–8 (King James).
- Therewith bless we God, even the Father; and therewith curse we men, which are made after the similitude of God. *James* 3:9 (King James).
- Out of the same mouth proceedeth blessing and cursing. My brethren, these things ought not so to be. *James* 3:10 (King James).
- Doth a fountain send forth at the same place sweet *water* and bitter? *James* 3:11 (King James).
- Can the fig tree, my brethren, bear olive berries? either a vine, figs? so *can* no fountain both yield salt water and fresh. *James* 3:12 (King James).
- Who *is* a wise man and endued with knowledge among you? let him show out of a good conversation his works with meekness of wisdom. *James* 3:13 (King James).

4. Earl Warren (March 19, 1891–July 9, 1974) was a California district attorney of

speech[5] and Establishment of Religion[6] clauses in ways that are not only seriously incorrect but that played, and continue to play, a major negative role in the decline of American culture. Other factors are involved, but the courts have severely damaged the ability of State and Church to retard the advance of those other factors or perhaps reverse them.

SECTION I: SPEECH, CULTURE, AND THE FIRST AMENDMENT—"ONE MAN'S VULGARITY IS ANOTHER'S LYRIC"[7]

It will be convenient to focus on a very recent federal court of appeals case, *Fox Television Stations, Inc. v. Federal Communications Commission*,[8] which involved the Federal Communications Commission's (FCC) attempt to regulate certain words used on broadcast television and radio.[9] After a detailed examination of both the majority opinion and the dissent, together with the principal Supreme Court precedent, this Article will take a very hard look at how the Supreme Court got us to the circuit court's point of departure on the slippery slope and how far down the slope we really are.

Fox concerned a petition for review by Fox Television Stations, Inc., and FBC Television Affiliates Association (collectively Fox) of an order of the FCC "issuing notices of apparent liability against two Fox broadcasts for violating the FCC's indecency and profanity prohibitions."[10] Although Fox challenged the notice on several grounds,[11] the panel majority[12] held "that the FCC's new

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Alameda County and the thirtieth governor of California, but is best known as the fourteenth chief justice of the United States from 1953–1969. Ed Cray, *Chief Justice* 9–11 (Simon & Schuster 1997). His time in office was marked by numerous rulings affecting, among other things, the legal status of racial segregation, civil rights, separation of church and state, and police arrest procedure in the United States. *Id.*

5. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

6. "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

7. *Cohen v. Cal.*, 403 U.S. 15, 25 (1971).

8. 489 F.3d 444 (2d Cir. 2007).

9. *Id.* at 446.

10. *Id.*

11. *Id.* (contending that the notice was invalid for constitutional, administrative, and statutory reasons).

12. *Id.* at 467. The panel divided two to one. Judges Pooler and Hall were in the majority. Judge Leval dissented.

policy regarding 'fleeting expletives' [was] arbitrary and capricious under the Administrative Procedure Act."[13] The notice that the Second Circuit struck down found that Fox had crossed the line four times.[14]

For instance, in her acceptance speech at the 2002 *Billboard Music Awards*, "Cher stated: 'People have been telling me I'm on the way out every year, right? So f[***] 'em.'"[15] Fox broadcasted her speech, including the vulgarity. Again, at the 2003 *Billboard Music Awards*, Nicole Richie, a presenter, commented, "Have you ever tried to get cow s[***] out of a Prada purse? It's not so f[***]ing simple."[16]

Two other incidents that had been part of the FCC's omnibus order that included the *Billboard Music Awards* were eventually resolved by the Commission in favor of CBS and NBC. Since the NBC case was dismissed on procedural grounds,[17] it will be necessary to mention only the CBS situation. That situation involved a live interview on *The Early Show* where a contestant on *Survivor: Vanuatu*—a CBS reality show—called another contestant a "bulls[***]er."[18] Proving that the FCC can compete with the courts in the arena of moral bankruptcy,[19] it "reversed its finding

13. *Id.* at 447 (finding that the FCC failed to give a reasonable explanation for changing its long-standing policy that fleeting expletives were not indecent).

14. *Id.* at 452.

15. *Id.* The use of the three asterisks after the letter "F" presents the Author with the very problem that this Article addresses. In the *Fox* panel majority and dissent, the judges were not shy about using the vulgar words that were involved in the factual situations under discussion. For proof of this, the Author refers the reader to the actual opinions. This unfortunate practice was no doubt considered to be daring and perhaps supportive of what had to be in the Court's mind, that many people use such words all the time. *See e.g. id.* at 459 (citing repeated use of the expletives at issue in the case); *id.* at 473 (Leval, J., dissenting) (repeatedly using the expletives at issue in his analysis); Daniel Henninger, *F***, S*** and Other Typos*, http://www.opinionjournal.com/forms/printThis.html?id=110010208 (June 14, 2007) (finding the use of expletives shocking; the Author shares in this shock). The Author faced a dilemma when deciding how to address specific expletives in the text. He could simply let it go with the first letter of the objectionable word followed by however many asterisks were necessary. Or, he could include a glossary at the end of the Article. Or, and what he finally decided to do, was to spell out the word in a footnote the first time it appears in a quotation from the opinions. After that, that word will never be spelled out in the Article again. Cher, proving, if proof is necessary, that women can be as foul-mouthed as men, said "So fuck 'em." *Fox*, 489 F.3d at 452.

16. *Id.* In Ms. Richie's foul-mouthed comment, s*** equals shit. Her other four-letter word was explained *supra* note 15.

17. *Id.* at 453.

18. *Id.* at 452.

19. This comment is based upon the panel majority's decision, its reasoning, and the

that the expletive used was indecent or profane because it occurred in the context of a '*bona fide* news interview.'"[20] As the Second Circuit pointed out, "[t]he Commission stated that in light of First Amendment concerns, 'it is imperative that we proceed with the utmost restraint when it comes to news programming.'"[21] The Commission also "found it 'appropriate . . . to defer to CBS's plausible characterization of its own programming' as a news interview."[22] Plausible? Sure, maybe if the news interview were compared to a movie or sports event. But the only legitimate First Amendment concern regarding news programs and live interviews would be in the context of a *real* news event where excited utterances are likely to occur. The First Amendment *should* protect, for example, an expletive uttered by a tired, dirty, perhaps frightened, and certainly angry first responder to the World Trade Center on 9/11. That is a far cry from what amounts to an in-house interview on one CBS show of a contestant on another CBS show.[23]

As the majority opinion pointed out, the FCC's power in such cases derives from Congress as follows: "[W]hoever 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."[24] Since obscenity is not protected by the First Amendment,[25] this discussion will be limited to the FCC's forays into regulating indecent and/or profane language, which enjoy some protection.

I. THE ROLE OF THE PACIFICA *PRECEDENT*

The fairly well-known battle in the Supreme Court between the FCC and Pacifica Foundation (Pacifica) in the 1970s over the latter's afternoon radio broadcast of George Carlin's *Seven Filthy*

Supreme Court's decision in *Cohen v. California*, 403 U.S. 15, which is discussed *infra* pt. V.

20. *Id.* at 454 (emphasis in original).

21. *Id.*

22. *Id.*

23. *Id.* at 452.

24. *Id.* at 447 (quoting 18 U.S.C. § 1464 (2000)).

25. *See generally FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that the FCC's declaratory order on the indecency of radio broadcasts did not abridge Pacifica's First Amendment rights).

Words[26] monologue was the first constitutional test of the FCC's authority to issue this type of regulation.[27] The FCC found the monologue "indecent and subject to forfeiture,"[28] and because this was the first use of its statutory power, explained its conception of "indecent" as follows:

> [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. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.[29]

The FCC issued an order clarifying its posture in the *Pacifica* case, while an appeal by Pacifica was pending before the United States Court of Appeals for the District of Columbia (D.C.) Circuit.[30] In that order, the FCC "noted that its prior order was intended to address only the particular facts of the Carlin monologue as broadcast, and acknowledged the concern that 'in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.'"[31]

Later, the panel majority in *Fox* noted that "the FCC stated that in such a situation, 'we believe that it would be inequitable for us to hold a licensee responsible for indecent language.'"[32]

Well, maybe so, maybe not. The distinction drawn earlier in describing the CBS case[33] would seem to strike a fairer or more

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26. *Id.* at 730–731 (plurality); *Fox*, 489 F.3d at 447.

27. *Fox*, 489 F.3d at 447.

28. *Id.* (citing *In re Citizen's Compl. against Pacifica Found.*, 56 F.C.C.2d 94, 94 (1975), *rev'd*, 438 U.S. 726 (1978)).

29. *Id.*

30. *Id.* (discussing the chain of events in *Pacifica*).

31. *Id.* (quoting *In re Pet. for Clarification or Reconsideration of a Citizen's Compl. against Pacifica Found.*, 59 F.C.C.2d 892, 892 n. 1 (1976)).

32. *Id.*

33. *See supra* n. 25 and accompanying text (stating that the FCC does have the power to regulate obscene speech, which is not protected by the First Amendment).

equitable balance than simply throwing in the regulatory towel every time a live broadcast is involved. Be that as it may, the concession did not save the FCC before the Court of Appeals for the D.C. Circuit.

Instead, the D.C. Circuit found in *Pacifica* the FCC had engaged in censorship.[34] It further "found the FCC's order both vague and overbroad, noting that it would prohibit 'the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*."[35]

This reasoning of the circuit court illustrates a great part of the whole problem. One study of Shakespeare discovered minor use of two and perhaps four of Carlin's *Seven Filthy Words*.[36] Shakespeare's use of the phrase "the beast with two backs"[37] to describe sexual intercourse hardly qualifies and is perhaps more illustrative of Shakespeare's style. People do make love, and reference to lovemaking can hardly be avoided in literature. Now admittedly, Shakespeare's description of lovemaking is not as delicate as the phrase "make love," but it is not even in the same universe as Carlin's foul-mouthed monologue. The Author has read most of the Bible, parts of it a number of times, and before writing more, the Author took time to read the *Song of Solomon*, or as it is sometimes called, the *Song of Songs*. To compare the *Song of Solomon* to Carlin's monologue is laughable. To suggest

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34. *Pacifica*, 438 U.S. at 733–734. The following is a more complete description of the action by the D.C. Circuit as told by the Supreme Court:

> The United States Court of Appeals for the District of Columbia Circuit reversed [the FCC], with each of the three judges on the panel writing separately. . . . Judge Tamm concluded that the order represented censorship and was expressly prohibited by § 326 of the Communications Act. Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was "overbroad." . . . Chief Judge Bazelon's concurrence rested on the Constitution. He was persuaded that § 326's prohibition against censorship is 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.

Id. (citations omitted).

35. *Fox*, 489 F.3d at 448 (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1977)).

36. Robert W. Peterson, *The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakespeare*, 39 Santa Clara L. Rev. 789, n. 33 (1999).

37. William Shakespeare, *Othello* act 1, scene 1, 10 (Applause Bks. 2001).

that the *Song of Solomon* would fall within the FCC's definition of indecent is inconceivable to any reasonable person. Beyond the *Song of Solomon*, there are isolated incidents in the Bible where some of the words are used.[38] Insofar as the court's reference to "contemporary plays which have won critical acclaim"[39] or "the works of renowned classical and contemporary poets and writers,"[40] if their works contain words or phrases that meet the

38. In his dissent in *Pacifica*, Justice Brennan, joined by Justice Marshall, alluded to two of the seven monologue words as being found in the King James version of the Holy Bible. 438 U.S. at 771 n. 5 (Brennan & Marshall, JJ. dissenting). As to one of the two words, however, this statement does not appear to be entirely true. The words "teats" and "breasts" do appear, used seemingly interchangeably. *E.g. Ezekiel* 23:3 (King James); *St. Luke* 23:48 (King James). Neither word appears in Carlin's monologue as one of the seven dirty words. What does appear is the word "tit." *Pacifica*, 438 U.S. at 751. According to the *Chambers Dictionary of Etymology*, this word, which has the same meaning as nipple or teat, first appeared in Old English as "titt," circa 950 A.D. in the *Lindisfarne Gospels*. *Chambers Dictionary of Etymology* 1145 (Robert K. Barnhart ed., Chambers 2000).

Justice Brennan did not actually claim that t** was used in the King James version of the Holy Bible, and a check of the concordance to a King James version does not show that word. The fact that it was apparently in use by 950 A.D. (at least as "titt") but was not used in the King James version, which was, as pointed out below, published in 1611, would suggest that even then the word was considered doubtful if not, in fact, vulgar. *Chambers* also informs us that the vulgar slang word t**, meaning a woman's breast, was a part of American English as early as 1928. *Id.* This would all seem to cast doubt on Justice Brennan's reasoning.

The word "piss" does appear in the King James version of the Holy Bible. *Isaiah* 36:12 (King James). *Chambers* refers to it as slang for "urinate." *Chambers*, *supra* n. 38, at 798. The only reference therein to vulgar is a similar French word taken from the vulgar Latin (defined in *The American Heritage Dictionary of the English Language* as "[t]he common speech of the ancient Romans, which is distinguished from standard literary Latin and is the ancestor of the Romance languages"). *American Heritage Dictionary of the English Language* 1931 (Joseph P. Pickett, ed., 4th ed., Houghton Mifflin Co. 2000) [hereinafter *American Heritage Dictionary*].

It was, perhaps, slightly earlier to appear than the words urine—sometime before 1300—and urinate—probably 1599. *Chambers*, *supra* n. 38, at 1188–1189. The King James version of the Holy Bible was of course published in 1611. *American Heritage Dictionary*, *supra* n. 38, at 965. This would suggest that p*** (used as a verb) was the only word available, or at least in common usage, and while both p*** and "urine" were available by 1611, the odds are that p*** was the more commonly used word. Nothing suggests that p*** was considered vulgar or indecent at the time. After all, translators of the King James version of the Holy Bible apparently had the word t** available but chose not to use it. This would suggest that they would have followed the same policy with the use of p***. While this fact supports part of Justice Brennan's argument, it ultimately fails because it appears that the word "urine" became, over time, the accepted word while p*** gradually became slang usage and from there to vulgar and then indecent. Certainly the Carlin monologue considered it to be such.

So, it seems that Justice Brennan's argument ultimately proves little or nothing.

39. *Fox*, 489 F.3d at 448.

40. *Id.*

FCC's definition of indecency and/or profanity and if their presentation falls within the jurisdiction of the FCC, then let the chips fall where they may. A state should also be able to use its inherent police or regulatory power to protect public morality from indecency and/or profanity by using the FCC's definition or a similar one. However, venues other than broadcast radio and television are generally beyond the scope of this Article, with the exception of *Cohen v. California*,[41] discussed in Section V.

The FCC sought review of the *Pacifica* decision by the United States Supreme Court, which granted the petition and reversed the D.C. Circuit.[42] Based at least in part on the FCC's clarifying order[43] limiting its ruling to the Carlin monologue itself,[44] the Supreme Court confined its review to the specific question of whether the Commission could find the Carlin monologue indecent as and when it was broadcasted.[45]

As the panel majority in *Fox* pointed out, perhaps the most crucial part of the Supreme Court's opinion in *Pacifica* was the finding that Congress intended the word "indecent" in the statute to mean something more than obscenity, regardless of the Supreme Court's definition of obscene.[46] In other words, something can be indecent within the meaning of the statute without having to also be obscene.[47] Placing great weight on the facts of the case, the Supreme Court held that the nature of the words in the monologue, which were repeated over and over again,[48] together with the real likelihood that unsupervised children could be listening, brought the monologue within the meaning of the statute being enforced by the FCC.[49] In that context, the statute and the ruling of the FCC were constitutional under the First Amendment.[50] As

41. 403 U.S. 15.

42. *Pacifica*, 438 U.S. at 734, 751.

43. *Id.* at 732–733.

44. *Id.* at 735.

45. *Id.*

46. *Fox*, 489 F.3d at 444; *see generally Miller v. Cal.*, 413 U.S. 15 (1973) (reviewing "obscenity" within the purview of the First Amendment).

47. *Pacifica*, 438 U.S. at 739–740.

48. *Fox*, 489 F.3d at 449.

49. *Pacifica*, 438 U.S. at 750.

50. The Court in *Pacifica* noted the following:

> 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 occa-

Justice Stevens concluded in his plurality opinion, "[w]e 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."[51]

Justices Powell and Blackmun concurred with most of Justice Stevens' opinion, thus providing the necessary five votes to overturn the Court of Appeals.[52] The difference between the concurrence and the opinion was summed up by Justice Powell for himself and Justice Blackmun in the following, and somewhat murky, paragraph:

> 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.[53]

In this sense, Justices Powell and Blackmun are, in the Author's opinion, correct, although perhaps not in the way they wished their words to be taken. No, a court is not in the business of placing values on varieties of speech, or at least it should not be. That is the function of legislative bodies, whether under the Commerce Clause's authority to regulate the electronic broadcast media or a state's police power authority to protect public morality.[54] Only when a court properly presented with the issue finds

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sional 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.

Id.

51. *Id.* at 750–751 (Stevens, J., concurring).

52. *Id.* at 755 (Powell & Blackmun, JJ., concurring in Parts I–III, IV-C and concurring in this judgment).

53. *Id.* at 761 (citations omitted).

54. *Id.*

that the First Amendment has been infringed can it disallow what the peoples' representatives have done.[55]

And that, of course, is the heart of the problem. It may very well be the *Ashwander* Rule[56] that cautions a court to decide a case on nonconstitutional grounds if possible, and if not, to rule on no broader of a constitutional issue than it has to.[57] The Supreme Court was correct in *Pacifica* to rule on nothing more than the very narrow Carlin monologue issue and, in its concern about children, the time of the broadcast.

However, at the very least, in the case of broadcast radio and television, Congress should legislate that words such as those in the Carlin monologue may *never* be used except as they appear by happenstance in a legitimate news interview and bearing the same characteristics as excited utterances in the law of evidence. If this were the case, society would gain much and lose nothing. Limitations like the First Amendment were designed to protect a putative minority against a putative majority.[58] But, in the case of words, such as those in the monologue, who protects the majority that finds the words highly offensive? Who protects the majority from a culture becoming ever more coarse and at times downright foul?

In any event, the *Pacifica* case was a small step in a relatively narrow forum toward repairing American culture, or at least it seemed to prevent further decline. Beyond that, the following thought in Justice Stevens' plurality opinion *had* the potential to *significantly* change the relationship between the First Amendment and indecent words:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of se-

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55. *Id.* at 772 (Brennan & Marshall, JJ., dissenting) (discussing the freedom of the public to determine what it listens to or watches).

56. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–348 (1936) (plurality opinion) (discussing the seven "*Ashwander* Rules"). In *Ashwander*, the plurality refused to "pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* at 347.

57. *Rescue Army v. City of L.A.*, 331 U.S. 549 (1947). "[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied . . . ." *Id.* at 569.

58. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969).

> rious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.[59]

Regrettably, only three of the Court's nine justices thought this.[60] Any hope of its use beyond the electronic broadcast media was, in any event, destroyed later in the following portion of the Court's opinion:

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.[61]

II. DID THE FCC'S DEPARTURE FROM ITS "FLEETING EXPLETIVE" STANDARD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT?

To return to the D.C. Circuit and the *Fox* case, the narrow issue eventually became whether a change in the FCC policy subsequent to the *Pacifica* case violated the Administrative Procedure Act, which governed the Commission's activities.[62] The original FCC policy was in part based upon whether the broadcast "'dwells' on the offensive content (indecent) and material that was 'fleeting and isolated' (not indecent)."[63] This policy was obvious in the *Pacifica* case where the Court emphasized the "seven dirty words" being used over and over again in the Carlin monologue.[64]

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59. *Pacifica*, 438 U.S. at 743 n. 18 (Stevens, J., Burger, C.J. & Rehnquist, J., concurring in Parts IV-A and IV-B).

60. *Id.* The three justices to which the Author refers are Justice Stevens, Chief Justice Burger, and Justice Rehnquist.

61. *Id.* at 750 n. 28 (plurality) (citation omitted).

62. *Fox*, 489 F.3d at 454; 5 U.S.C. § 706(2)(A).

63. *Fox*, 489 F.3d at 451 (explaining that the policy was also based on the explicitness of the material and whether the speaker intended to shock or titillate).

64. *Pacifica*, 438 U.S. at 729, 734, 750. The full text of the monologue appears in the appendix beginning at page 751.

The FCC would, however, later abandon that policy. As the panel majority pointed out, "[d]uring NBC's January 19, 2003, live broadcast of the *Golden Globe Awards*, musician Bono stated in his acceptance speech 'this is really, really, f[***]ing brilliant. Really, really great.'"[65] Not surprisingly, complaints were filed with the FCC.[66] The Commission's Enforcement Bureau rejected the complaints, in part because Bono's use of the expletive was "fleeting and isolated."[67] However, the full Commission reversed the Bureau's decision and stated the following:[68]

> First, the FCC held that any use of any variant of the "F-Word" inherently has sexual connotation and therefore falls within the scope of the indecency definition. The FCC then held that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language" and therefore the use of the word was patently offensive under contemporary community standards. The Commission found the fleeting and isolated use of the word irrelevant and overruled all prior decisions in which fleeting use of an expletive was held not indecent. ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.")[69]

Because the Commission's decision amounted, in the view of the FCC, to a major policy change, it decided not to enforce its ruling on NBC.[70] However, the FCC "emphasized . . . that licensees were now on notice that any broadcast of the 'F-Word' could subject them to monetary penalties and suggested that implementing delay technology would ensure future compliance with its policy."[71]

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65. *Fox*, 489 F.3d at 451 (emphasis added).

66. *Id.* (noting that viewers with ties to the Parents Television Council complained that the speech was obscene and indecent).

67. *Id.* (finding that the expletive also did not describe "sexual or excretory organs or activities").

68. *Id.*

69. *Id.* at 451–452 (citations omitted) (finding that the language was also "profane" under FCC regulations).

70. *Id.* at 452 (reasoning that NBC lacked sufficient notice of the policy change).

71. *Id.*

At this point, the reader should note three differences between *Pacifica* and *Fox*. First, the "fleeting and isolated" policy was abandoned. Second, the time of day or night was no longer thought to be important—not during prime time, anyway. Third, the "fleeting and isolated" change apparently applied only to f***.[72] Of course, that was the word Bono used in the case where the FCC changed the policy.[73]

In the end, the *Fox* court determined that "because the Commission's regulation of 'fleeting expletives' represent[ed] a dramatic change in [the FCC's] policy without adequate explanation,"[74] it was "arbitrary and capricious."[75] Thus, a constitutional issue was avoided, and the case would turn upon a quasi-constitutional argument under the Administrative Procedure Act.

As the panel majority pointed out, it was authorized by the Administrative Procedure Act to invalidate "agency decisions found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[76] However, in doing so, the *Fox* court had to keep in mind the Supreme Court's following limitation on the process:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."[77]

Under this standard,

> [a]gency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausi-

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72. *Id.* at 444.

73. *Id.* at 451.

74. *Id.* at 454 (determining that the FCC's explanation lacked a "rational connection" to the FCC's new policy). This was an argument made by Fox with which the panel majority agreed. *Id.*

75. *Id.* (citing 5 U.S.C. § 706).

76. *Id.* (laying the foundation for its response to the first of Fox's seven arguments).

77. *Id.* at 455.

> ble that it could not be ascribed to a difference in view or the product of agency expertise."[78]

And, the court "may not supply a reasoned basis for the agency's action that the agency itself has not given."[79]

The broadcasters in *Fox* quite naturally contended "that the [the 'fleeting expletive' rule was] arbitrary and capricious because the FCC has made a 180-degree turn . . . without providing a reasoned explanation justifying the about-face."[80] With that proposition, the majority of the panel found itself in agreement.[81]

As the panel majority indicated, there could be no argument on one point: the FCC had made a major policy change.[82] The FCC had "changed the landscape with regard to the treatment of fleeting expletives."[83] But of course, as a general proposition, "[a]gencies are . . . free to revise their rules and policies";[84] this the panel majority conceded.[85]

But, as previously mentioned,[86]

> [w]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the [new] rule is consistent with the law that gives the agency its authority to act. In addition, the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review. Although there is not a "heightened standard of scrutiny . . . *the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the compet-

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78. *Id.*

79. *Id.* (explaining that courts are not at liberty to supply rationale for an agency's decision when the agency itself has not articulated such reasoning).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 456 (noting that the FCC conceded only after briefly attempting to deny a policy change).

84. *Id.*

85. *Id.*

86. *See supra* n. 74 and accompanying text (stating that the FCC did not adequately explain its policy change).

> ing statutory policies. But such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*[87]

After pointing out that "*post hoc* rationalizations for agency action" are, as a general rule, disfavored,[88] the panel majority began its examination of the FCC's justification for the rule change at issue by stating the following:

> The primary reason for the crackdown on fleeting expletives advanced by the FCC [was] the so-called "first blow" theory described in the Supreme Court's *Pacifica* decision. In *Pacifica*, the Supreme Court justified the FCC's regulation of the broadcast media in part on the basis that indecent material on the airwaves enters into the privacy of the home uninvited and without warning. The [Supreme] Court rejected the argument that the audience could simply tune-out: 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. Relying on this statement in *Pacifica*, the Commission attempt[ed] to justify its stance on fleeting expletives on the basis that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow."[89]

The panel majority was having none of it. It began by noting that the FCC had failed to provide an explanation for suddenly changing its established position that a fleeting expletive was not a harmful "first blow."[90] Even more troubling to the panel majority was that the FCC had taken a seemingly inconsistent position regarding fleeting expletives in that the FCC would still excuse expletives that occur during a "*bona fide* news interview."[91] Thus, in some instances, an expletive would not be indecent or profane under FCC rules.

Not surprisingly, the panel majority, which seemed determined to rule against the FCC, gleefully leaped upon this seeming

87. *Fox*, 489 F.3d at 456–457 (emphasis in original).
88. *Id.* at 457 (emphasis in original).
89. *Id.* at 457–458 (citations omitted).
90. *Id.* at 458.
91. *Id.* (internal quotations omitted) (emphasis in original).

inconsistency. It noted that the broad nature of the news exception protected broadcasters from penalties where an isolated expletive was used on air.[92] Thus, a station broadcasting the oral argument of a case (such as the one at hand) where expletives were repeated in a courtroom would not be indecent because of context. Yet viewers would still be left to absorb the "first blow."[93] The FCC has also ruled that even repeated or deliberate expletives are not indecent or profane if the expletives are "integral" to the work.[94] An unedited broadcast of *Saving Private Ryan* would therefore not be indecent or profane because removing the many expletives used throughout the movie "would have altered the nature of the artistic work and diminished the power, realism[,] and immediacy of the film experience for viewers."[95] However, viewers are exposed to the "first blow" caused by those expletives whether or not they realize that the expletives are integral to the artistic value of the film. The panel majority concluded that, given these inconsistencies, the "first blow" theory could not justify the FCC's new position.[96]

In its attempt to draw a line in the sand, the FCC was far too timid and fearful of the First Amendment.[97] The FCC seems to have tried to keep more indecency and, presumably, profanity off the airwaves by jettisoning the "fleeting expletive rule," but it continued to allow so many exceptions for various instances of "fleeting expletives" that its rule change could appear to lack reason.[98]

A better approach would have been for the FCC to create *narrow* exceptions where expletives, if nonobscene, would have been tolerated. The one very clear exception would have been a news interview of the type mentioned earlier with the 9/11 first responder at the scene.[99] To concede, in effect, that this circumstance was no different from *The Early Show* interview of a con-

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 458–459; *see infra* nn. 100–107 and accompanying text (discussing the Commission's determination regarding *Saving Private Ryan*).

96. *Fox*, 489 F.3d at 458–459.

97. *See supra* n. 23 and accompanying text (comparing expletives uttered by first responders on 9/11 to those of a reality-show contestant).

98. *Fox*, 489 F.3d at 458–459.

99. *Supra* n. 23 and accompanying text.

testant from *Survivor* would be laughable if it were not so pathetic.

The use of *Saving Private Ryan* as an example of "artistic" use of expletives[100] presents, perhaps, a closer question. Soldiers—some of them—talk like that, so perhaps the expletives create more realism. On the other hand, great war movies of the past did not contain expletives and were "powerful, realistic, and immediate."[101] John Wayne in *The Sands of Iwo Jima*[102] and Kirk Douglas in *Paths of Glory*[103] come to mind. Even *Patton*,[104] in which the General was allowed an occasional realistic expletive, was not awash in foul language as are many of today's movies. Upon reflection, perhaps the powers that *were* should *not* have allowed Clark Gable to utter the immortal phrase "Frankly my dear, I don't give a damn."[105]

Saving Private Ryan might be a close case. But Spielberg's use of expletives could have been acknowledged without giving away the store as the FCC seems to have done. Recognizing the validity of expletives in that kind of war movie could not, or at least should not, translate into anything short of obscenity. However, parents had warning of the expletives in *Saving Private Ryan* because of the movie and television rating systems.[106] This

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100. *Fox*, 489 F.3d at 458–459.

101. *Id.* at 458.

102. *The Sands of Iwo Jima* (Republic Pictures (I) 1949) (motion picture).

103. *Paths of Glory* (Bryna Prod. 1957) (motion picture).

104. *Patton* (Twentieth Century-Fox Film Corp. 1970) (motion picture).

105. Regarding "[t]he most famous line in the most famous movie in Hollywood history":

> Rhett Butler's farewell "Frankly, my dear, I don't give a damn" . . . cost its producer five thousand dollars. In 1939, when David O. Selznick was filming Margaret Mitchell's best-selling novel *Gone with the Wind*, the Hays Office was still very much in power, and Selznick was able to include the line—which millions of Americans already knew from reading the book—only after coughing up the modest sum as a fine. . . .
>
> Rhett speaks the line to Scarlett O'Hara at the end of the movie as he is walking out, one last time, into the fog and she is whimpering that, without him, she'll be lost. By that point she has been mooning over Ashley Wilkes for three and a half hours, so by anybody's reckoning she's got it coming—whether Captain Butler, or the audience, cares or not. He goes, she cries, the curtain falls. And David Selznick takes the Oscar for best picture.

Tad Tuleja, *Quirky Quotations* 78 (Stonesong Press 1992) (referencing *Gone with the Wind* (MGM 1939) (motion picture) (emphasis omitted)).

106. *Fox*, 489 F.3d at 463.

is a far cry from things like the *Billboard Music Awards*, which at the time carried no warning.[107]

So, by not drawing a better line in the sand, the FCC conceded far too much, and these concessions assisted the panel majority in reaching a result it seemed inclined to reach anyway. In that sense, the FCC became an accomplice in the panel majority's killing its own rule change.

Perhaps unconvinced of its own reasoning, the panel majority attempted to bolster that reasoning by rejecting other reasons that the FCC had put forward "in passing."[108] Since indecent was defined by the FCC with reference to sexual or excretory functions,[109] the FCC argued that it made no difference whether or not indecent words literally referred to those functions.[110] In effect, dirty words are dirty words, period. The panel majority found the FCC's argument "defie[d] any commonsense understanding of these words."[111] The majority referred to the use of indecent words it considered nonliteral.[112] This literal-use-versus-nonliteral-use distinction allowed the panel majority to disallow the FCC's argument that it was a distinction without a difference as support for the FCC's rule change, which the majority, of course, had already held invalid.[113]

Next, the panel majority seems to have taken comfort in the thought that the occasional "fleeting expletive" would do little or no harm to children because in today's world children are likely to hear these words "from other sources" far more often than they did in the 1970s "when the Commission first began sanctioning indecent speech."[114] So, the FCC had simply gone overboard to solve a problem that either did not exist, or if it did, was so minimal that it could not be controlled by regulation;[115] and according to the court in *Fox*, "a regulation perfectly reasonable and appro-

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107. As far as the Author knows, it carried no warning at that time.

108. *Fox*, 489 F.3d at 459 (discussing the Commissioner's stance that nonliteral use qualifies as indecent).

109. *Id.* at 450.

110. *Id.* at 459.

111. *Id.* (using Bono's *Golden Globe Awards* speech to illustrate its point).

112. *Id.*

113. *See supra* nn. 75–76 and accompanying text (finding the rule change was arbitrary and capricious).

114. *Fox*, 489 F.3d at 461.

115. *Id.*

priate in the face of a given problem may be highly capricious if that problem does not exist."[116] So, in effect, in a world awash in indecent and profane language, what difference does the occasional "fleeting" broadcast of an indecent word make? That seems to have been the view of the panel majority.[117]

The panel majority also found that when the indecent is separated from the profane, the FCC was on even weaker ground.[118] The nub of the argument seemed to be that the profane involves religion, and any attempt to regulate that would run a foul of the First Amendment.[119] Prior to 2004, the Commission never attempted to regulate "profane" speech, and instead took the view that a separate ban on profane speech was unconstitutional.[120] The FCC recommended that Congress delete "profane" from Section 1464 due to the serious constitutional problems involved.[121]

It thus seems likely that the Supreme Court's largely successful effort to drive religion out of the public square, which is discussed in Section II of this Article, played a role in this analysis.

III. RESORT TO THE FIRST AMENDMENT: A PLETHORA OF OBITER DICTA[122]

The FCC's rule change had also been challenged on constitutional grounds.[123] The panel majority paid what seems to amount to little more than lip service to the rule that constitutional issues should be avoided if the case can be decided some other way.[124] The *Fox* court ended up, in effect, "deciding" the constitutional questions "in the interest of judicial economy."[125] However, if the

116. *Id.* (noting that the Commissioner's reasoning must be rooted in more extensive analysis).

117. *Id.*

118. *Id.* at 450.

119. *Id.* at 451.

120. *Id.* (continuing its discussion on how a reasoned analysis would strengthen the Commissioner's position).

121. *Id.* at 462.

122. *Id.* at 462 n. 12.

123. *Id.* at 454.

124. This is one of the seven *Ashwander* Rules. *See supra* nn. 55–57 and accompanying text (explaining that the rule cautions a court to decide a case on nonconstitutional grounds if possible, and, if not, to rule on no broader constitutional issue than it must).

125. *Fox*, 489 U.S. at 462.

FCC should try to once again support its rule change by "reasoned explanation," perhaps successfully, it will trigger a renewed court challenge based upon the First Amendment.[126]

The panel majority first reminded those reading its opinion that indecent speech that is not obscene, and presumably does not amount to fighting words, is protected by the First Amendment.[127] The majority then stated the following analysis: "[T]hus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."[128] This statement is more than questionable in light of the medium being regulated, as the panel majority later conceded.[129]

Beyond that, if indeed the electronic broadcast of indecent words is somehow now magically protected by the strict scrutiny of the compelling governmental interest test, it is bizarre. In *Barnes v. Glenn Theatre*,[130] which involved nonobscene nude dancing, the Supreme Court refused to apply strict scrutiny,[131] and nude dancing is entitled to only relatively minimal First Amendment protection.[132] The two situations seem analogous to the Author with, if anything, nonobscene nude dancing being somewhat less objectionable than indecent words. After all, the undraped human form has been the subject of art for thousands of years.

The panel majority then proceeded to apply, *it said*,[133] strict scrutiny to the FCC's new indecency test.[134] The reader should keep in mind that the case had already been decided on nonconstitutional grounds.[135] So, in spite of the panel majority's ex-

126. *Id.*

127. *Id.* The panel majority mentioned only obscenity as being beyond First Amendment protection. However, as discussed in *Cohen*, fighting words and the hostile audience are also beyond the pale. *See infra* pt. V and accompanying text (explaining the *Cohen* case).

128. *Id.* at 462–463. The FCC was apparently of the same mind. *Id.* at 451.

129. *See infra* nn. 172–173 and accompanying text (discussing the failure of less drastic means to regulate broadcast media effectively).

130. 501 U.S. 560 (1991).

131. *Id.* at 566–568.

132. *Id.* at 565–566.

133. If the panel majority in fact did this, it is difficult to see.

134. *Fox*, 489 F.3d at 462–463.

135. The reference here is to the court's finding that the rule change violated the Administrative Procedure Act. *Id.* at 462.

pressed concern about judicial economy,[136] its constitutional discussion seems like either simple overkill or bolstering what must have seemed to it to be a weak argument under the Administrative Procedure Act.[137]

In any event, in pursuit of the First Amendment's restrictions, the panel majority found itself "sympathetic to [Fox's] contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."[138] In order to get around the FCC's rather clear position that "all variants of [f***] and [s***] are presumptively indecent and profane,"[139] the panel compared the single use of f*** during the *Golden Globe Awards*[140] with the repeated use of both "presumptively indecent and profane" words in *Saving Private Ryan.*[141] The Author has previously commented at some length on this tautology.[142] It will suffice it to say here that if the panel majority could not see the difference between soldiers using words that soldiers use in a war movie (where the rating would have put movie watchers on notice) and the single use of an indecent word by an entertainer in accepting an award (which was broadcast over the airwaves), then it is a difference that the panel majority simply did not wish to see.

Now, it is possible that the point has been reached where it can be expected that entertainers customarily talk like soldiers in combat. If that is indeed the case, then two comments need to be made. First, the presentation of a movie in a theatre or even on television carries a warning as to what the viewer is to expect by way of language, violence, and so forth. To the best of my knowledge, no warning preceded either the *Billboard Music*[143] or the *Golden Globe Awards.*[144]

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136. *Id.*

137. The panel majority was no doubt delighted to cite a law review article written by the dissenting judge to support their extensive First Amendment dicta. *Id.* at 462 n. 12.

138. *Id.* at 463.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See supra* nn. 94–107 and accompanying text (juxtaposing the use of expletives in movies to those on award shows and discussing how the FCC attempted to draw the line).

143. *Fox*, 489 F.3d at 452–453.

144. *Id.* at 451.

Second, even if we have reached the point where indecent words can be expected to be used by entertainers plying their trade, as well as by soldiers defending the United States, the soldier (and sailor, marine, airman, or member of the Coast Guard) ranks at the very top in their value to our society, while, admitting of some exceptions, today's crop of entertainers rank at the very bottom.

The panel majority then paraded other supposed inconsistencies in the FCC's policy, which appear to be more apparent than real, leading to the conclusion that

> [w]e can understand why [Fox] argue[s] that the FCC's "patently offensive as measured by contemporary community standards" indecency test coupled with its "artistic necessity" exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to "steer far wider of the unlawful zone."[145]

If the FCC had not attempted to draw such fine lines, much of this inconsistency argument would have been headed off.[146] But, even so, to say that the FCC's distinctions—fine though some of them may be—are all the terrible things the panel majority found them to be is an exercise in seeing what the panel majority wanted to see rather than what was really there.

Next, the panel majority in *Fox* took comfort in *Reno v. ACLU*[147] in which the Supreme Court struck down on vagueness grounds an indecency regulation of the Internet.[148] *Reno* involved not an FCC interpretation and application of a statute, but the bare language of the statute itself:

> The [Supreme] Court found that the *statute's* use of the "general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value. Moreover, the 'community standards' criterion as applied to the Internet means that

145. *Id.* at 463 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

146. *See e.g. supra* nn. 108–113 and accompanying text (discussing how the Second Circuit rejected the FCC's argument that dirty words are always dirty words).

147. 521 U.S. 844 (1997).

148. *Fox*, 489 F.3d at 463 (citing *Reno*, 521 U.S. 844).

> any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." Because of the "vague contours" of the regulation, the Court held that "it unquestionably silences some speakers whose messages would be entitled to constitutional protection," and thus violated the First Amendment.[149]

Ignoring the difference alluded to above, the panel majority found that

> [b]ecause *Reno* holds that a regulation that covers speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" is unconstitutionally vague, we are skeptical that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny. Indeed, we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified "context" of a broadcast indecency.[150]

Quite apart from the fact that the FCC had gone to great lengths in explanatory orders[151] to set out those things that did not come within the limitation on what words could be broadcast,[152] the views of the panel majority, taken to their logical extreme, would seem to have a circuit court panel cast doubt not only on action taken by the FCC but also by the Supreme Court in *Pacifica*. What made the FCC's *Pacifica* ruling constitutional in the Supreme Court's view was exactly the context in which it was applied—repeated use of indecent language as defined by the FCC. Why does that satisfy the First Amendment, while the change to a somewhat different standard—that fleeting use of expletives will no longer receive an automatic pass with everything else remaining the same—all of a sudden becomes impermissibly vague? A cynic might suggest that this argument, bri-

149. *Id.* (emphasis added) (quoting *Reno*, 521 U.S. at 877–878).

150. *Id.* at 464 (quoting *Reno*, 521 U.S. at 860).

151. *See e.g. id.* at 453 (showing an example of the FCC's issuance of explanatory orders in November 2006).

152. *See e.g. supra* at n. 99 and accompanying text (arguing for the FCC to take a more narrow exception on when nonobscene expletives are tolerable).

gaded with the whole panoply of First Amendment opining by the panel majority, was designed to tell the FCC to forget attempting to change its rule. Even if the change could be read to fulfill the Administrative Procedure Act, it will not satisfy the First Amendment.

Having complained that the use of the community-standards yardstick for measuring whether an indecent word as defined is patently offensive,[153] in the very next paragraph of its opinion, the panel majority fussed about the FCC's use of "its subjective view of the merit of [a word]" in determining whether or not to sanction it.[154] In its unconvincing discussion, the court refers to what it describes as "arbitrary application" of a rule.[155] As with earlier constitutional objections put forward in its pursuit of "judicial economy,"[156] it is difficult for the Author to see why the FCC's sanctioning of Pacifica under the standard that existed at the time is any less "arbitrary."[157] And yet the Supreme Court approved the FCC action based on the facts of that case.[158] It is even more difficult to see how the FCC's approach to indecent words is arbitrary when, for example, the Supreme Court can create a three-part definition of obscenity,[159] which is hardly a model of clarity, and then allow lower courts and, presumably, the FCC to apply it. There is also the fact, pointed out by the panel dissent, that the F-Word stands alone or nearly alone in the panoply of indecent words.[160]

It has been the Author's assumption all along that this entire discussion was limited to the electronic broadcast media, where the government regulator has more leeway than elsewhere.[161] And yet, at an earlier point in its opinion, the panel majority had behaved as though it was free to apply the strict scrutiny of the compelling governmental interest test in the context of broadcast

153. *Fox*, 489 F.3d at 464.
154. *Id.*
155. *Id.*
156. *Id.* at 462.
157. *Id.* at 464.
158. *Pacifica*, 438 U.S. at 744 (Stevens, J., Burger, C.J. & Rehnquist, J., concurring in Parts IV-A & IV-B).
159. *See Miller*, 413 U.S. 15 (outlining the guidelines for determining whether material is obscene).
160. *Fox*, 489 F.3d at 469 (Leval, J., dissenting).
161. *Id.* at 464.

media regulation.[162] Then, near the end of its opinion, it conceded, apparently reluctantly, that "there is some tension in the law regarding the appropriate level of First Amendment scrutiny."[163] But, the law is rather clear, as the panel majority belatedly recognized as follows:

> At the same time, however [as it was applying strict scrutiny in other contexts], the Supreme Court has also considered [electronic] broadcast media exceptional. "[B]ecause broadcast regulation involves unique considerations, our cases . . . have never gone so far as to demand that such regulations serve 'compelling' governmental interests." Restrictions on broadcast "speech" have been upheld "when we [are] satisfied that the restriction is narrowly tailored to further a substantial governmental interest."[164]

The broadcasters argued that this thinking has been overtaken by technology,[165] but the panel majority—it could do nothing different—adhered to Supreme Court precedent.[166] It then, however, proceeded to attack that precedent as outmoded, stating the following:

> Nevertheless, we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.[167]

Then the panel majority did an amazing thing. It went through a lengthy analysis to see what would happen if strict scrutiny were applied. Its example was *United States v. Playboy Entertainment Group*,[168] in which "a statute requiring *cable* operators who provide channels primarily dedicated to sexually explicit or otherwise indecent programming to either fully scramble

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162. *Id.* at 462–463.
163. *Id.* at 464.
164. *Id.* at 464–465 (citation omitted) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984)).
165. *Id.* at 465–466.
166. *Id.* at 465.
167. *Id.*
168. 529 U.S. 803 (2000).

these channels or limit their transmission to the 10 p.m. to 6 a.m. safe[-]harbor period"[169] was invalidated on First Amendment grounds using strict scrutiny because a less drastic alternative was available.[170] That alternative was to scramble or block the signal only if individual subscribers wanted it done.[171]

In response to a similar less-drastic-means argument involving the v-chip and parental rating system,[172] the panel majority gave an unenthusiastic nod to the FCC's position that less-drastic means actually have to work, and the two suggested ones do not.[173] However, as the panel majority pointed out, that could change in the future:

> The FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's *robust* oversight.[174]

So, in the view of the panel majority, under current Administrative Procedure Act requirements together with First Amendment theories, the FCC is pretty much limited in its attempt to regulate indecency to what the Supreme Court allowed in *Pacifica*.[175] However, the Supreme Court in *Pacifica* was careful to point out that it was not deciding the issue that was now before the Second Circuit in *Fox*.[176] In the future, the panel majority opined, the FCC may not even be able to regulate that much because the FCC is bound by the Constitution, and technology may eventually obviate the need for the FCC's "robust oversight."[177]

Finally, the panel majority, in what is also arguably more obiter dicta,[178] criticized for the second time the FCC's definition of profanity as really being no different from its definition of indecency.[179] Although the court's discussion of the problems it per-

169. *Fox*, 489 F.3d at 465 (emphasis added).
170. *Id.*
171. *Id.*
172. *Id.* at 466.
173. *Id.*
174. *Id.* (emphasis added).
175. *Pacifica*, 438 U.S. at 730 (plurality).
176. *Id.*
177. *Fox*, 489 F.3d at 466.
178. *Id.*
179. *Id.* at 467.

ceived to be caused by this overlap are not a model of clarity, the court seemed to suggest the following scenario. The two words, indecency and profanity, cannot mean the same thing or even substantially the same thing. Referring to dictionary definitions and a 1931 court of appeals case[180] tying profanity to the irreligious, the panel majority found that this must be the real meaning of profanity.[181] Thus, the FCC's attempt to make it mean something else was unreasonable.[182]

So, the panel majority created barrier after barrier to the FCC's ability to make the rule change it wished. The goal of the panel majority, murky though it is, seems to come as close as possible to making First Amendment free speech an absolute when it comes to indecency or profanity. If this goal is attained, *sic transit*[183] commerce-power and police-power protection of morality in this context.

IV. THE PANEL DISSENTER

The panel dissenter strongly disagreed with the panel majority. After describing the contested change to the interpretation of the federal statute as "small,"[184] he succinctly described the FCC's method of adjudicating indecency complaints. This method involved weighing factors, such as the explicit or graphic nature of the usage, whether the expletive was repeated, and whether the material was presented for its shock value. He noted that the FCC had traditionally attached great importance to the factor of whether the expletive was repeated and that under pre-*Golden Globes* rulings, use of a mere fleeting expletive, without more, practically guaranteed that the FCC would not impose a penalty on the offending broadcaster. The *Golden Globes* ruling meant a less permissive stance in cases where the expletive was not re-

180. *Duncan v. U.S.*, 48 F.2d 128 (9th Cir. 1931).

181. *Fox*, 489 F.3d at 466–467.

182. *Id.* at 467.

183. The Latin word "*sic*" translates to the English "thus." The Latin word "*transitus*" translates to the word "passage." Therefore, "*sic transit*" translates to "thus passes." *The Bantam New College Latin and English Dictionary* 391, 428 (John C. Traupman, Ph.D., 3rd ed., Bantam 2007).

184. *Id.* (Leval, J., dissenting).

peated, at least in cases where the broadcast is not a genuine newscast.[185]

The FCC's new position was especially true in cases where the F-Word was used.[186] The FCC had expressed its disdain for use of the word and its inherently sexual connotation.[187] The dissenter found that in his view the FCC had satisfied the Administrative Procedure Act in regard to its "relatively modest change."[188] The FCC

> gave a sensible, although not necessarily compelling, reason. In relation to the word "f[***]," the [FCC's] central explanation for the change was essentially its perception that the "F-Word" is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation. The [FCC] thus concluded that the use of the F-Word—even in a single fleeting instance without repetition—is likely to constitute an offense to the decency standards of § 1464.[189]

This, thought the dissenter, should have satisfied the requirements of the Administrative Procedure Act and judicial review of agency action controlled by it, articulated as follows:

(1) Agencies operate with broad discretionary power to establish rules and standards, and courts are required to give deference to agency decisions.[190]

(2) A court must not "substitute its judgment for that of the agency."[191]

(3) "Administrative decisions should [not] be set aside . . . because the court is unhappy with the result reached." In general, an agency's determination will be upheld by a court unless found to be "arbitrary and capricious."[192]

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185. *Id.* at 468–469 (emphasis in original) (quoting *Indus. Guidance on the Commn.'s Case Law Interpreting* 18 U.S.C. § 1464, 16 F.C.C. Rec. 7999, ¶¶ 8, 10 (2001)).

186. *Id.* at 469.

187. *Id.* (citations omitted).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (citations omitted).

192. *Id.* (citations omitted).

> (4) An agency is free . . . to change its standards.[193]
>
> (5) [W]hen an agency changes its standard or rule, it is "obligated to supply a reasoned analysis for the change."[194]
>
> (6) Such explanation, we have said, is necessary so that the reviewing court may "be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate."[195]

The dissenting judge believed that the FCC had properly followed those standards. First, the FCC "made clear acknowledgment that its [new] rulings were not consistent with its prior standard regarding lack of repetition."[196] Second, "[i]t announced the adoption of a new standard."[197] Third, "it furnished a reasoned explanation for the change."[198] And, as he pointed out,

> [A]lthough one can reasonably disagree with the [FCC's] new position, its explanation—at least with respect to the F-Word—is not irrational, arbitrary, or capricious . . . . In other words, the Commission found, contrary to its earlier policy, that the word is of such graphic explicitness in inevitable reference to sexual activity that absence of repetition does not save it from violating the standard of decency.[199]

Furthermore, the fact that there are exceptions for news broadcasts and artistic integrity does not make the change irrational because they have been there all along and they are context-based distinctions.[200] In other words, they exist to allow ex-

193. *Id.* at 470.
194. *Id.* (citations omitted).
195. *Id.* (citations omitted).
196. *Id.* (noting the propriety of the FCC changing its position regarding the repetition of an expletive).
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 471 (discussing the FCC's use of a context-based approach rather than an all-or-nothing policy).

ceptions to what some would see as an otherwise unreasonably rigid rule.[201]

The fact that the FCC thought that its old rule would facilitate "broadcasters air[ing] expletives at all hours of a day so long as they did so one at a time,"[202] and that the panel majority thought this view was "divorced from reality"[203] did not, in the view of the dissenting judge, make this reason for the rule change arbitrary or capricious because all it is is a difference of opinion.[204] This is an example of where judicial deference is due.[205]

The dissenting judge then expressed the following point of view that parallels part of the point that the Author makes in this Article:

> Furthermore, if obligated to choose, I would bet my money on the agency's prediction. The majority's view presupposes that the future would repeat the past. It argues that because the networks were not flooded with discrete, fleeting expletives when fleeting expletives had a free pass, they would not be flooded in the future. This fails to take account of two facts. First, the words proscribed by the [FCC's] decency standards are much more common in daily discourse today than they were thirty years ago. Second, the regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with such expletives. The media press regularly reports how difficult it is for networks to compete with cable *for that reason.* It seems to me the agency has good reason to expect that a marked increase would occur if the old policy were continued.[206]

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201. *Id.* at 471–472 (recognizing the FCC's goal of reconciling conflict values by permitting standards to take context into account).

202. *Id.* at 472.

203. *Id.* (citations omitted) (referring to the majority opinion's belief that the FCC irrationally concluded that granting an exception for "isolating or fleeting" expletives would result in expletives at all hours of the day).

204. *Id.* (noting the divergent predictions between the FCC and the majority).

205. *Id.* (recognizing that the court is required to be deferential to the agency's judgment and merely disagreeing with the agency's result is not sufficient to set aside the agency's action).

206. *Id.* at 472–473 (emphasis added).

The dissent's footnote seventeen discusses the cultural decline, which is the central theme of this Article. For that reason, it is quoted in its entirety as follows:

> *See, e.g.*, Gail Pennington, *Kingpin[;] There Are More Things in Heaven and Earth Than "Sopranos," NBC Insists*, St. Louis Post-Dispatch, Feb. 2, 2003, at F1 ("Although they tried at first to feign indifference, broadcasters have seethed for years over the critical acclaim and abundant awards handed to cable series like *The Sopranos*. The complaint: that the playing field isn't level. Broadcasters are strained by FCC rules about content—nudity and sex, violence and language—that don't apply to cable."); Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV*, N.Y. Times, Jan. 25, 2003, at B7 ("Broadcast television, under intensifying attack by saltier cable competitors, is pushing the limits of decorum further by the year, and hardly anyone is pushing back."); Jim Rutenberg, *Hurt by Cable, Networks Spout Expletives*, N.Y. Times, Sept. 2, 2001, at 11 ("Broadcast television is under siege by smaller cable competitors that are winning audiences while pushing adult content. In that climate, broadcast is fighting the perception that its tastes are lagging behind those of a media-saturated culture whose mores have grown more permissive.").[207]

Finally, the dissenter demolished the majority's last argument "that the F-Word is often used in the everyday conversation without any sexual meaning."[208] While agreeing that the word may be used without intending any sexual connotation,[209] that is irrelevant to the FCC,[210] and the panel majority either failed to understand the FCC's perspective or interpreted it in the way "least favorable" to the FCC.[211] Correctly understood, the FCC believed that *however the speaker viewed the use of the word*, "a substantial part of the community, and of the television audience,

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207. *Id.* at 472 n. 17.

208. *Id.* at 473 (providing several instances where the F-Word is used without an intent to convey a sexual meaning).

209. *Id.* (noting the various non-sexual uses of the F-Word).

210. *Id.* (asserting that the FCC was not referring to the fact that every use of the F-Word has a sexual connotation).

211. *Id.*

will understand the word as freighted with an offensive sexual connotation."[212] Thus, viewed correctly, this and the other parts of the FCC's reasoning for the contested change were clearly rational.[213]

The dissent added in a footnote the following about the panel majority's foray into the First Amendment:[214]

> I express neither agreement nor disagreement with my colleagues' added discussion of Fox's other challenges to the [FCC's] actions because, as the majority opinion recognizes, it is dictum and therefore not an authoritative precedent in our Circuit's law. In subsequent adjudications, the respect accorded to dictum depends on its persuasive force and not on the fact that it appears in a court opinion.[215]

V. THE SPECTRE OF COHEN v. CALIFORNIA

In *Cohen*, the Court majority was not only perched on top of the slippery slope but, by the end of Justice Harlan's majority opinion, had started a slippery slide down that slope.

The facts are simple enough:

> On April 26, 1968, the defendant [Cohen] was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words "F[***] the Draft" which were plainly visible. There were women and children present in the corridor . . . . The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.[216]

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212. *Id.*

213. *Id.* at 473–474 (viewing the decision as merely a difference of opinion between the Commission and the agency and noting the need to extend deference to the agency in such instances).

214. *Id.* at 474 n. 19. Perhaps this was in response to the panel majority's use of the dissenter's law review article to support its use of First Amendment dicta. *Supra* n. 137.

215. *Id.*

216. *Cohen*, 403 U.S. at 16.

Cohen was charged and convicted under a part of California Penal Code, Section 415, which was essentially a disturbing-the-peace statute.[217] All Cohen did was knowingly wear the jacket:

> The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.[218]

The basis upon which the California Court of Appeal affirmed his conviction was that

> "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, [i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.[219]

A divided California Supreme Court refused to hear the case.[220]

The United States Supreme Court, in order to reach what it considered the essence of the case, ruled out various issues.[221] Not involved were the following:

(1) The regulation of conduct independent of the speech itself.[222]

(2) The punishment of Cohen for the anti-draft message conveyed by the jacket unrelated to the actual language used.[223]

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217. *Id.* (noting that the statute prohibits willful disturbances of the peace through offensive conduct).

218. *Id.* at 16–17.

219. *Id.* at 17 (emphasis in original).

220. *Id.*

221. *Id.* at 18 (maintaining the issue was a conviction which rested on speech alone).

222. *Id.* (declining to analyze "any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive").

223. *Id.* (explaining that Cohen could not be punished for the asserted position on his jacket).

After reaching what is considered to be the key general issue, the Court stated that

> Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever and wherever he pleases or to use any form of address in any circumstance that he chooses.[224]

Here again, it became necessary for Justice Harlan to rule out issues "typically associated with such problems [that were] not presented here" as follows:[225]

(1) The law under which Cohen was convicted was not limited to the protection of the decorum of court houses.[226]

(2) The jacket did not fall within the definition of obscenity or fighting words, both categories of speech that enjoy no First Amendment protection.[227]

(3) The jacket, under the circumstances, did not fall within that category of cases generally described as captive audience cases.[228]

Finally, the Court arrived at the following heart of the issue:

> It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is in-

224. *Id.* at 19.

225. *Id.* (providing the necessity of ruling out those issues "typically associated with such problems").

226. *Id.* (maintaining that the statute under which the defendant was convicted lacked language that permissible speech or conduct would not be allowed in certain areas).

227. *Id.* at 19–20 (asserting the jacket was neither erotic nor fighting words).

228. *Id.* at 21 (emphasizing the differences between the jacket and typical captive-audiences cases).

> herently likely to cause violent reaction *or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.*[229]

After correctly pointing out that Cohen's jacket and his wearing it could not be stretched into a proper application of either the fighting-words or hostile-audience doctrines,[230] Justice Harlan reached the following thought, which the Author considers the key issue:

> Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[231]

The Court was of the opinion, however, "that examination and reflection will reveal the shortcomings of a contrary viewpoint."[232] With all due respect to Justice Harlan and the majority, it is in its "examination" and "reflection" that "shortcomings" are to be found.

Justice Harlan's defense of the indefensible began with the following words:

> 'At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression.[233]

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229. *Id.* at 22–23 (emphasis added).

230. *Id.* at 23; *see supra* n. 218 and accompanying text (stating that Cohen's jacket did not involve the use of fighting words nor did the jacket fall within the category of captive-audience cases).

231. *Cohen*, 403 U.S. at 23.

232. *Id.* at 23–24.

233. *Id.* at 24; *see supra* nn. 226–228 and accompanying text (describing established exceptions related to courthouse decorum, obscenity or fighting words, and captive audiences).

"[M]ost situations"[234] does not mean all situations. Surely, if there exist grounds for another exception, it would be the public use of the F-Word![235]

Justice Harlan then continued,

> [e]qually important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[236]

Certainly this is the theory and practice of the First Amendment's protection of free speech, but it is neither an *absolute* theory nor an *absolute* practice! What the unfettered use of the F-Word has to do with "a more capable citizenry,"[237] "[a] more perfect polity"[238] or with "individual dignity"[239] is certainly not immediately obvious. Reflection will not give any more guidance. Sure, freedom of speech guarantees one's right to denounce the military draft in the strongest terms, but surely not by using a word that is, charitably put, grossly indecent.[240]

Justice Harlan's reasons for his defense of the F-Word become even more implausible as follows:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader endur-

234. *Id.*

235. *See supra* nn. 2–6, 229 and accompanying text (suggesting that this opinion is grounded on the theory that the states are guardians of public morality).

236. *Cohen*, 403 U.S. at 24.

237. *Id.*

238. *Id.*

239. *Id.*

240. *See infra* n. 245 and accompanying text (explaining that the word f*** is generally offensive).

> ing values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons,"[241] . . . and why "so long as the means are peaceful, the communication need not meet standards of acceptability."[242]

To accord First Amendment protection to the use of the F-Word is "not a sign of weakness but of strength"?[243] Rather, it seems to be a sign of near-terminal, nonjudgmental interpretation of freedom of speech when judgment could hardly be more badly needed! "[F]undamental societal values"[244] include the protection of the F-Word? What a quaint thought. Finally, we get to the adhesive that is designed to hold together the argument that along with almost everything else, the F-Word is protected by the First Amendment. And lo and behold it is the "slippery slope" argument as follows:

> [T]he principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitu-

241. *Cohen*, 403 U.S. at 24, 25 (citing *Winters v. N.Y.*, 333 U.S. 507 (1948) (Frankfurter, J., dissenting)).

242. *Id.* (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

243. *Id.* at 25.

244. *Id.*

> tion leaves matters of taste and style so largely to the individual.[245]

It has been said that when governors lose the will to govern, society is in trouble.[246] It seems to the Author that the same may be said when the Supreme Court, in the name of the First Amendment, takes away from governors the *power* to govern. To say, as does Justice Harlan, that a line cannot be drawn between the F-Word and other distasteful words is to ignore reality. As Justice Holmes once said in a different context, one side of a line may look much like the other side of a line, but lines still have to be drawn.[247] The only issue before the Court in *Cohen* was one especially foul word. Anything said beyond ruling on the government's attempt to take that word out of public discourse would be *obiter dicta*. So, instead of making a very limited ruling that would have made society a little more civil, Justice Harlan bowed down to a perceived slippery slope—today the F-Word, tomorrow, who knows? The real slippery slope was ignored. If government cannot ban *that word*, what can it ban beyond obscenity and fighting words?[248] Almost anything goes, and society slips further and further down the slope.

With all due respect to Justice Harlan, and considerable respect is due, his final two thoughts on this subject become even more distant from the reality of that one word as follows:

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

245. *Cohen*, 403 U.S. at 25.

246. The Author is uncertain exactly where he first heard this phrase, but he has heard it many times throughout his extensive career as a constitutional law professor.

247. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

248. *See supra* n. 227 and accompanying text (explaining that obscenity and fighting words are categories of speech that receive no First Amendment protection).

> *ment of the overall message sought to be communicated.* Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[249]

In the case of that one word that was before the Court, let Judge Leval of the Second Circuit in *Fox*, which informs the core of the speech part of this Article, speak to the "overall [emotive] message sought to be communicated" as follows:[250]

> [E]ven when the speaker does not intend a sexual meaning, a substantial part of the community . . . will understand the word as freighted with an offensive sexual connotation. . . . [T]he F-[w]ord is never completely free of an offensive, sexual connotation.[251]

Is this, then, "the overall [emotive] message" Justice Harlan wishes the First Amendment to protect? And as far as the reference to Justice Frankfurter's comments quoted by Justice Harlan,[252] the reader will note that they appear to be taken out of context.[253] One cannot help but wonder what Justice Frankfurter

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249. *Cohen*, 403 U.S. at 25, 26 (emphasis added).

250. *Id.*

251. *Fox*, 489 F.3d at 473 (Leval, J., dissenting).

252. *See supra* n. 214 and accompanying test (demonstrating where Justice Harlan cites justice Frankfurter's dissenting opinion in *Winters*).

253. In *Winters*, Justice Frankfurter, along with Justices Jackson and Burton, dissented from a decision that struck down a New York Statute, "subsection 2 of Section 1141 of the New York penal law." It provided the following as quoted by the Court:

> SECTION 1141. OBSCENE PRINTS AND ARTICLES.
>
> (1) A person . . . who,
>
> (2) Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . . [i]s guilty of a misdemeanor . . . .

Winters, 333 U.S. at 508. In full context, Justice Frankfurter's following remarks appear to be different from what Justice Harlan appeared to suggest:

> [T]he Court sufficiently summarizes one aspect of what the State of New York here condemned when it says "we can see nothing of any possible value to society in these magazines." From which it jumps to the conclusion that, nevertheless, "they are as

would have thought of the use of his comments to protect the F-Word.[254]

Finally, the silliest reason of all for protecting Cohen's vulgar word is the following:

> [W]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.[255]

Once again one sees the spectre of the slippery slope trotted out. It boggles the mind to see how banning the F-Word from public discourse would bring about the horrors Justice Harlan set before the reader. Had this case gone the other way, and government then attempted some of what Justice Harlan appeared to fear, the words of his brethren in another context are apropos, not "while this Court sits."[256]

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much entitled to the protection of free speech as the best of literature." Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons. But to say that these magazines have "nothing of any possible value to society" is only half the truth. This merely denies them goodness. It disregards their mischief. As a result of appropriate judicial determination, these magazines were found to come within the prohibition of the law against inciting "violent and depraved crimes against the person," and the defendant was convicted because he exposed for sale such materials. The essence of the Court's decision is that it gives publications which have "nothing of any possible value to society" constitutional protection but denies to the States the power to prevent the grave evils to which, in their rational judgment, such publications give rise.

Id. at 527–528 (Frankfurter, Jackson & Burton, JJ., dissenting).

254. It may not be that Justice Frankfurter's comments would fully support the position taken by this Article. It is, however, clear that they do not support Justice Harlan's opinion.

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

256. The quote is from *Walz v. Tax Commn. of City of N.Y.*, 397 U.S. 664 (1970). *Walz* was decided the year before *Cohen* and is mentioned for the response of the majority opinion by Chief Justice Burger to a slippery slope argument in Justice Douglas' dissent. The issue was tax exemption for churches:

> [A]n unbroken practice of according the exemption to churches, openly by affiliate state action, not covertly by state inaction, is not something to be lightly cast aside. . . . If tax exemption can be seen as this first step toward "establishment" of religion, as Mr. Justice Douglas fears, the second step has been along in coming. *Any*

So there it is! Because of *Cohen*, the F-Word can be freely used in public discourse unless it is used in a situation that amounts to "fighting words" or the "hostile audience problem" as those concepts are viewed by the Supreme Court.[257] In the very narrow context of the electronic broadcast media,[258] primarily because of public ownership of the airwaves and spectrum scarcity,[259] the repeated use of the F-Word and similar vulgarity for what appeared to be its shock effect could be exiled to times when children are probably not part of the audience.[260] An attempt by the FCC to ban the F-Word from the electronic broadcast medium, even if used once (with exceptions of news broadcasts and artistic integrity) and at any time, was struck down by the Second Circuit Court of Appeals on the basis that the change violated the Administrative Procedure Act.[261] Lest there be any doubt, however, the FCC was warned that even if on remand it could comply with the Administrative Procedure Act, its efforts were almost certainly doomed by the First Amendment.[262] State governments, in the exercise of their sovereign police power to protect, among other things, public morality vis-à-vis the F-Word, have been totally frustrated by judicial interpretation (or more likely misinterpretation) of the First Amendment. The federal government's use of the power to regulate interstate commerce to keep that word off the publicly owned airwaves has met with but little more success. Were the question asked if the United States is better or worse off as a result, the vast majority would almost surely say worse. While it is true that the First Amendment protects the putative minorities from the putative majorities, the question must be asked: In this context, has the majority no rights? Must it watch, with no recourse short of constitutional amendment, American culture coarsen and decline?

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move that realistically "establishes" a church or tends to do so can be dealt with "while this Court sits."

Id. at 678 (emphasis added).

257. *Supra* nn. 227–228 and accompanying text.

258. *Supra* n. 61 and accompanying text.

259. *See supra* n. 89 and accompanying text (explaining the Supreme Court's justification for the FCC's regulation of broadcast media).

260. *Supra* n. 61 and accompanying text.

261. *Fox*, 489 F.3d at 462.

262. *Id.*

SECTION II: RELIGION, CULTURE, AND THE PUBLIC SQUARE[263]

There are two major problems that underlie the expulsion of religion from the public square. The first is the message that may be found in the very act of expulsion. It can be seen as the mirror image[264] of Justice O'Connor's endorsement theory of the Establishment Clause,[265] which suggests that if an act of government can be seen by an ordinary person as an endorsement of religion, then the Establishment Clause has been violated. Perhaps the best overall discussion is found in the several opinions in the *Capitol Square Review and Advisory Board v. Pinette*.[266]

There, the issue was the government's denial of a permit for an unattended cross the Ku Klux Klan wished to place in Capitol Square, the statehouse plaza in Columbus, Ohio.[267] The square was open generally to various other forms of expression.[268] Justice Scalia wrote an opinion, part of which was the majority one and the remainder being a plurality opinion.[269] This examination will be limited to the question of endorsement as a violation of the Establishment Clause. In an attempt to distinguish this situation from two cases that seemingly conflicted with the government's position vis-à-vis the cross,[270] the government argued that "the forum's proximity to the seat of government . . . may produce the perception that the cross bears the [government's] approval."[271] Thus, the government "urged" the Court to uphold their denial of a permit for the cross by applying the so-called endorsement test.[272] This test would allow the Court "to find that, because an

263. Circumstances beyond either of our control kept the intended co-author from writing this part of the Article. It would have, no doubt, been a fitting companion to Section I. However, since the Author does not wish to leave this part out entirely, brief comments will be made on the topic as described above.

264. The reference is to *N.C.A.A. v. Tarkanian*, 488 U.S. 179, 192 (1988).

265. *See supra* n. 6 and accompanying text (quoting the Establishment Clause).

266. 515 U.S. 753 (1995).

267. *Id.* at 758.

268. *Id.*

269. *Id.* at 757.

270. The two cases the government distinguished *Capitol Square* from are *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668 (1984).

271. *Capitol Square*, 515 U.S. at 763.

272. *Id.* (citing *e.g. County of Allegheny v. ACLU Greater Pitt. Ch.*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

observer might mistake private expression for officially endorsed religious expression," the government's refusal to permit the placement of the cross in Capitol Square was constitutional.[273]

Regarding the discussion of the endorsement test, Part IV of the opinion by Justice Scalia becomes that of only four justices:[274]

> "Endorsement" connotes an expression or demonstration of approval or support. Our cases have accordingly equated "endorsement" with "promotion" or "favoritism." We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the same access to a public forum [Capitol Square] that all other displays enjoy. . . . The test [the government proposes], which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.[275]
>
> . . .
>
> Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years. Private religious speech cannot be subject to veto by those who see favoritism where there is none.[276]

Justice O'Connor responded.[277] It is this response that illustrates the true nature of the endorsement test and provides the basis for the Author's argument that fear of endorsement can lead to anti- or negative endorsement—the impression that government frowns on religion—and thus the consequence of driving religion out of the public square:

> I part company with the plurality on a fundamental point: I disagree that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement." On the contrary, when a reasonable observer would view a govern-

273. *Id.*

274. *Id.* (Scalia, J., Rehnquist, C.J., Kennedy & Thomas, JJ., concurring).

275. *Id.* at 763–764 (emphasis in original) (citations omitted).

276. *Id.* at 766.

277. *Id.* at 772–783 (O'Connor, Souter & Breyer, JJ., concurring in part and concurring in the judgment).

> ment practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid.[278]

And there, of course, is the crux of the problem. An ordinary person who does not understand the workings of the Establishment Clause (or the minds of Supreme Court justices for that matter) could easily come to look at the struggles to avoid endorsement as hostility toward religion. Thus for some folks, this perceived hostility would be seen as a government view that religion is bad, and then the moral influence of religion is weakened. And with the weakening comes moral decay of the culture.

Of course, all this is unnecessary. As Justice Rehnquist has pointed out, a proper original understanding of the Establishment Clause is that there can be no national church.[279] As a possible corollary, the federal government cannot favor one religion over another[280] and thus presumably informally establish a state religion. Were this the accepted view, rather than the separation of church and state—which was never intended—government could be seen as approving of religion so long as the approval was of all religions.

CONCLUSION

The argument can be summed up with ease. Through a too-expansive interpretation of freedom of expression, as guaranteed by the First Amendment, and through a totally flawed interpretation of the Establishment Clause of that Amendment, the federal judiciary and especially the Supreme Court have made their not insubstantial contribution to the decline of the American culture.

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278. *Id.* at 776–777 (emphasis in original).

279. *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting) (quoting Joseph Story, *Story's Commentaries on the Constitution of the United States* vol. 2, 630–632 (5th ed., Little, Brown & Co. 1905) (originally published 1891) (explaining that the real objective of the First Amendment was to "exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government")).

280. *Id.* at 98.