conduct" is quite explicit in this regard. It makes clear that the statute only reaches "visual depictions" of:

"Actual or simulated ... sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; ... bestiality; ... masturbation; ... sadistic or masochistic abuse; ... or lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2).

The Court and JUSTICE O'CONNOR suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to "simulated" intercourse. Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber*, 458 U.S. at 773–774. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in actual sexual activity; mere suggestions of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions, and thus fall outside the purview of the statute.

* * *

Indeed, we should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication—from text or legislative history—that such a result was intended. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. As the Court of Appeals for the First Circuit has observed:

> "The legislative record, which makes plain that the [CPPA] was intended to target only a narrow class of images—visual depictions 'which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.'" *United States v. Hilton*, 167 F.3d 61, 72 (1999) (quoting S. Rep. No. 104–358, pt. I, p. 7 (1996)).

* * *

This narrow reading of "sexually explicit conduct" not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was understood prior to the broadening gloss the Court gives it today. Indeed, had "sexually explicit conduct" been thought to reach the sort of material the Court says it does, then films such as *Traffic* and *American Beauty* would not have been made the way they were. *Traffic* won its Academy Award in 2001. *American Beauty* won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court ("Few legitimate movie producers ... would risk distributing images in or near the uncertain reach of this law"), has apparently never been felt by those who actually make movies.

To the extent the CPPA prohibits possession or distribution of materials that "convey the impression" of a child engaged in sexually explicit conduct, that prohibition can and should be limited to reach "the sordid business of pandering" which lies outside the bounds of First Amendment protection. This is how the Government asks us to construe the statute, and it is the most plausible reading of the text, which prohibits only materials "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(D) (emphasis added).

The First Amendment may protect the video shop owner or film distributor who promotes material as "entertaining" or "acclaimed" regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus, materials promoted as conveying the impression that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner. I would construe "conveys the impression" as limited to the panderer, which makes the statute entirely consistent with Ginzburg and other cases.

* * *

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be "substantial ... in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. The aim of ensuring the enforceability of our Nation's child pornography laws is a compelling one. The CPPA is targeted to this aim by extending the definition of child pornography to reach computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

For these reasons, I would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals' judgment, and uphold the statute in its entirety.

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

[Justice O'Connor agreed with the majority striking down the CPPA ban on material that "conveys the impression that it contains actual-child pornography," but with the dissent upholding "the ban on pornographic depictions that appear to be of minors so long as it is not applied to youthful-adult pornography."]

* * *

II

I disagree with the Court, however, that the CPPA's prohibition of virtual-child pornography is overbroad. Before I reach that issue, there are

two preliminary questions: whether the ban on virtual-child pornography fails strict scrutiny and whether that ban is unconstitutionally vague. I would answer both in the negative.

The Court has long recognized that the Government has a compelling interest in protecting our Nation's children. This interest is promoted by efforts directed against sexual offenders and actual-child pornography. These efforts, in turn, are supported by the CPPA's ban on virtual-child pornography. Such images whet the appetites of child molesters, who may use the images to seduce young children. Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual-child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated. Respondents may be correct that no defendant has successfully employed this tactic. But, given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable. Computer-generated images lodged with the Court by Amici Curiae National Law Center for Children and Families et al. bear a remarkable likeness to actual human beings. Anyone who has seen, for example, the film *Final Fantasy: The Spirits Within* (H. Sakaguchi and M. Sakakibara directors, 2001) can understand the Government's concern. Moreover, this Court's cases do not require Congress to wait for harm to occur before it can legislate against it.

Respondents argue that, even if the Government has a compelling interest to justify banning virtual-child pornography, the "appears to be . . . of a minor" language is not narrowly tailored to serve that interest. They assert that the CPPA would capture even cartoon-sketches or statues of children that were sexually suggestive. Such images surely could not be used, for instance, to seduce children. I agree. A better interpretation of "appears to be . . . of" is "virtually indistinguishable from"—an interpretation that would not cover the examples respondents provide. Not only does the text of the statute comfortably bear this narrowing interpretation, the interpretation comports with the language that Congress repeatedly used in its findings of fact . . .

Reading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual-child pornography is narrowly tailored, but would also assuage any fears that the "appears to be . . . of a minor" language is vague. The narrow reading greatly limits any risks from "discriminatory enforcement." Respondents maintain that the "virtually indistinguishable from" language is also vague because it begs the question: from whose perspective? This problem is exaggerated. This Court has never required "mathematical certainty" or "meticulous specificity" from the language of a statute.

The Court concludes that the CPPA's ban on virtual-child pornography is overbroad. The basis for this holding is unclear. Although a content-based regulation may serve a compelling state interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific value or that does not threaten the harms sought to be combated by the Government. If so, litigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. Respondents have not made such a demonstration. Respondents provide no examples of films or other materials that are wholly computer-generated and contain images that "appear to be . . . of minors" engaging in indecent conduct, but that have serious value or do not facilitate child abuse. Their overbreadth challenge therefore fails.

[Justice O'Connor then explained why she judged the ban on "youthful-adult pornography to violate the First Amendment," as the majority had held, but why that did *not* require holding unconstitutional the SPPA "ban on virtual-child pornography." Even though this was in the same "appears to be" of children text, drawing that key distinction would "preserve the CPPA's prohibition of the material that Congress found most dangerous to children."]

While the Court majority was not prepared to accept his narrower reading of the CPPA to save its constitutionality, while he was still Attorney–General, Ashcroft did ask Congress to have that explicitly written in for the future, though they have not done so yet. Among the key questions posed by such action is whether it still does make sense as a matter of public policy in this new millennium; is it politically viable on Capitol Hill and in the White House; and if such a new CPPA law is enacted, should the Justices consider that it does pass their First Amendment standards.

The National Endowment for the Arts (NEA) was created in 1965. By the late 1960s it was awarding grants of around $10 million annually, and over $300 million in the late 1980s. The NEA could take credit for such major accomplishments as supplying the initial seed money for what eventually became the Academy Award-winning movie *Driving Miss Daisy*. By the early 1990s, though, the NEA was engulfed in controversy for having given money for exhibition of the work of photographer Robert Mapplethorpe, including his portfolio of homoerotic and child nudity scenes. This and a few other sexually explicit NEA projects did not strengthen the NEA's hand in the broader political debate over whether any such government spending program should be preserved.

Whatever the politics, though, there was a basic question of constitutional principle about whether it was legitimate for a body like the NEA to

apply a standard established by a 1980 federal statutory amendment directing NEA personnel to "take into consideration general standards of decency and respect for the values of the American public," as well as the "artistic excellence and artistic merit" of the applicants and proposals in deciding which were to get NEA funding for their projects. In *NEA v. Finley*, 524 U.S. 569 (1998), the Supreme Court addressed this issue for the first time with a dissent by Justice Souter, and a skeptical concurrence by Justices Scalia and Thomas. Justice O'Connor reversed the lower court decisions and upheld this provision against a challenge to its facial constitutionality.

The first key distinction drawn by the Court majority was from its ruling in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), which had struck down as facially invalid a municipal ordinance prohibiting anyone placing a symbol on property (e.g., a swastika) that would "arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." Here, by contrast, the NEA was awarding a grant rather than punishing a crime, and this "decency" factor was just one of many for the NEA to consider.

In striking down this NEA directive, the D.C. Circuit had relied on the Supreme Court's recent decision in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), which had found it unconstitutional for a public university to refuse to grant funding to a particular student newspaper because it was *religious* in content. The distinction drawn by Justice O'Connor between *Rosenberger* and *NEA* was that the latter body was conducting a competition among a large number of notable artists for a scarce amount of public funding, and the "decency" of this work was only one factor to be taken into consideration in what was inherently a "content-based" NEA verdict. And in response to the claim that simply making "decency" a factor on the face of the statute had a chilling effect on First Amendment speech, the Court noted that the Act also told the NEA that in displaying respect for the diverse beliefs and values of the American public in its grant-making decisions, it should treat as a *positive* feature of a proposal the fact that it "reflects the culture of a minority. . . ."

Justice O'Connor did say that "if the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." However, this would require proof that Karen Finley, for example, had topped her competitors on all other artistic scores, and thus the reason she had not won an NEA grant was because of the sexual indecency of her work. In view of the fact that two of Finley's co-plaintiffs in this case had actually secured NEA grants since their suit was filed, the Court was not prepared to assume that the NEA was actually exercising its discretionary power "in a manner that raises concern about the suppression of disfavored viewpoints."

Given that qualifications added by Justice O'Connor to her *NEA* opinion, Justice Scalia characterized Congress' apparent victory here as the equivalent of "the operation was a success, but the patient died." Justice Scalia believed that this statute was clearly "mandating" consideration of decency, such that if the other artistic factors were equal, an indecent work was supposed to lose the competition. However, this unquestionable "viewpoint discrimination" in the spending of public money on Finley should not be said to *abridge* her First Amendment freedom of speech because there were a host of other sources of money for her artistic works.

Just a year later, a major artistic battle took place in New York, one that had Mayor Rudy Giuliani agreeing with Justice Scalia. The Brooklyn Museum of Art had been located on the Eastern Parkway for over a century and receiving financial support from the City for that time as well. The fall of 1999 had a special exhibition coming there, *Sensation*, consisting of 90 paintings from the private Saatchi collection from Britain. One of these paintings, by Chris Ofili (a Roman Catholic of Nigerian descent), was called *The Holy Virgin Mary*, but depicted the Madonna with a breast made from elephant dung and surrounded by female genitalia from pornographic magazine cutouts. Giuliani called this "sick stuff" that was "Catholic-bashing"; his administration not only cut off all financial aid for the museum, but set out to terminate its lease.

The museum responded by going to court, and found federal district Judge Nina Gershon agreeing with its position in *Brooklyn Institute of Arts and Sciences v. City of New York and Rudolph W. Giuliani*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999). Judge Gershon characterized what had happened here as an "effort by governmental officials to censor works of expression and to threaten the vitality of a major cultural institution, as punishment for failing to abide by governmental demands for orthodoxy." She rejected the Giuliani administration's argument that "hard-working taxpayers shouldn't have to foot the bill for offensive displays and the desecration of religion." In her view, the relevant Supreme Court precedent was not *Finley*, but *Burstyn* (discussed above), from which she quoted the following passage:

> It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

The Judge then enjoined the City from cutting either the museum's funding or ending its lease. Mayor Giuliani immediately said he would be appealing what he characterized as "the usual knee-jerk reaction" of judges under the First Amendment. However, just before the Senate race got underway in the spring of 2000, Giuliani dropped his appeal and the City gave the Museum an additional $800,000. But what do you think is the appropriate reaction by either the courts or the government to *The Holy Virgin Mary*? Suppose that, rather than cutting off all financial support of the Brooklyn Museum and terminating its lease, Mayor Giulia-

ni had just deducted funds for the space and time when *Sensation* was being exhibited: should that make a difference in the legal verdict? From the perspective of artists generally, what is the most productive reading of the First Amendment here?

One part of the entertainment world we have not yet seen in any of the cases is the medium that is now most prominent in our daily lives—television and radio broadcasting. As we shall explore in Chapter 13, so far this branch of the entertainment industry has received significantly different regulatory and First Amendment treatment than its counterparts in movies, music, and print. Indeed, in the same period when the Supreme Court was sharply expanding the constitutional rights of newspapers, magazines, and motion picture distributors, the Court was upholding government regulation of the broadcast industry.

In *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367 (1969), the Court approved use of the FCC's "fairness doctrine," which gave subjects of personal, over-the-air attacks a right to free air time in order to reply. Though just a few years later the Court rejected application of such a right-of-reply doctrine to newspapers, see *Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974), it has continued to endorse this and other special treatment of broadcasting because of the latter's use of part of the scarce, governmentally-allocated spectrum for communicating messages directly into the privacy of people's homes.

Besides "fairness," another problem that attracted the attention of the FCC in the 1970s was the phenomenon of "topless radio." These were mid-day call-in shows in which the radio hosts graphically talked about a variety of intimate sexual topics—e.g., favored techniques for oral sex—with callers. After a formal proceeding, the FCC found this kind of talk to violate § 1464 of the *Communications Act*, which forbids "obscene, indecent, or profane language" on broadcasts. That ruling was upheld by an appeals court against constitutional challenge in *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C.Cir. 1974). Then came the Supreme Court's crucial ruling in the following case.

FEDERAL COMMUNICATIONS COMMISSION v. PACIFICA FOUNDATION

Supreme Court of the United States, 1978.
438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073.

JUSTICE STEVENS delivered the principal opinion of the Court.

[In this case, a performer named George Carlin recorded a 12–minute monologue—aptly entitled, "Filthy Words"—that he had delivered on a live stage in a California theater. Some time later, Pacifica broadcast the recording on a Tuesday afternoon over its New York station. A man who had heard the broadcast while driving his car with his young son, wrote to the Federal Communications Commission (FCC), saying that while he could understand the record being sold for private use, he could not accept it being broadcast over the air. Pacifica responded to this complaint by stating that Carlin was "a significant social satirist" who "like Twain and Sahl before him, examined the language of ordinary people ... not mouthing obscenities ... [but] merely using words to satirize as harmless and essentially silly our attitudes toward these words."

A five-member majority of the Court upheld the FCC's finding that Carlin's language violated the terms of the Communication Act which barred "indecent", though not necessarily "obscene," broadcasts. Dissenting from that statutory interpretation were Justices Brennan, Stewart, White, and Marshall, who would limit the Act's prohibition to "obscene" broadcasts. Given the majority's statutory construction, the question was posed of whether such federal legislation was constitutional. As to this issue Justice Stevens wrote simply for Chief Justice Burger and Justice Rehnquist.]

* * *

IV

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

A

[The Court rejected Pacifica's first argument on the grounds that judicial review was "limited to the question whether the Commission has the authority to proscribe this particular broadcast." In the Court's view, "invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.' "]

B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.[19] For if

19. Pacifica's position would, of course, deprive the Commission of any power to regulate erotic telecasts unless they were obscene under *Miller v. California* 413 U.S. 15. Anything that could be sold at a newsstand for private examination could be publicly displayed on television.

We are assured by Pacifica that the free play of market forces will discourage indecent programming. "Smut may," as Judge Leventhal put it, "drive itself from the market and confound Gresham;" the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism.

the government has any such power, this was an appropriate occasion for its exercise....

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

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

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

249 U.S. at 52. Other distinctions based on content have been approved in the years since *Schenck*. The government may forbid speech calculated to provoke a fight. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). It may pay heed to the "commonsense differences between commercial speech and other varieties." *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). It may treat libels against private citizens more severely than libels against public officials. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Obscenity may be wholly prohibited. *Miller v. California*, 413 U.S. 15. And only two Terms ago we refused to hold that a "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976).

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth v. United States*, 354 U.S. 476 (1957). But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe

that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words[22]—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.[23] Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[Such] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S., at 572.

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

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

C

We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action

22. The monologue does present a point of view; it attempts to show that the words it uses are "harmless" and that our attitudes toward them are "essentially silly." The Commission objects, not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.

23. The Commission stated: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions...." Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure.

would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.[27]

Second, broadcasting is uniquely accessible to children, even those too young to read. Although *Cohen's* written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629 (1968), that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.[28] The ease with which children may obtain access to

27. Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See *Erznoznik v. Jacksonville*, 422 U.S. 205. As we noted in *Cohen v. California*:

"While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . ., we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' "

403 U.S. at 21. The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "[placing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "[using] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." *Consumer Credit Protection Act Amendments*, 91 Stat. 877, 15 U.S.C. § 1692d (1976 ed., Supp. II).

28. The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). 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.

broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience,[29] and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

APPENDIX TO OPINION OF THE COURT

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

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, ['cause] words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead (laughter). Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, [']cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker,

29. Even a prime-time recitation of Geoffrey Chaucer's *Miller's Tale* would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: "And prively he caughte hire by the queynte." *The Canterbury Tales*, Chaucer's Complete Works (Cambridge ed. 1933), p. 58, l. 3276.

and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon (laughter). And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo–Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word (laughter). They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you (footsteps fading away) (papers ruffling).

* * *

[The transcript continued for two more pages in the same vein.]

Justice Powell wrote a concurring opinion with which Justice Blackmun agreed. The two accepted the major premise of Justice Stevens' opinion (in Part IV–C) that broadcasting requires different treatment under the First Amendment because of the practical problems faced in protecting children from programs being carried directly into the home:

> . . . Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. In my view, the Commission was entitled to give substantial weight to this difference in reaching its decision in this case.

> A second difference, not without relevance, is that broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. . . . The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case. This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes. Making the sensitive judgments required in these cases is not easy. But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.
>
> * * *
>
> The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

438 U.S. at 758–61. However, Justices Powell and Blackmun refused to endorse the theme developed in Part IV–B of the Court's principal opinion, to the effect that there are variations in the "value" of particular brands of speech, and thence their levels of constitutional protection. Justice Powell did have to acknowledge, however, that he and the rest of the Court had just made that kind of differential value judgment for *commercial* speech.

Justice Brennan, with whom Justice Marshall joined, filed a dissent on the First Amendment issues. Comparing Carlin's "Filthy Words" broadcast with the "Fuck the Draft" jacket worn in a Los Angeles courtroom in *Cohen v. California*, 403 U.S. 15 (1971), Justice Brennan said it was much easier for Carlin's listeners to protect their privacy by turning off their radios than for Cohen's viewers to leave the courtroom:

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

reach a contrary balance, as does the Court, is clearly to follow Mr. Justice Stevens' reliance on animal metaphors, ante, at 750–751, "to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. . . .

438 U.S. at 765–66. Justice Brennan rejected the notion that parents wanting to protect their children from Carlin were the only ones with a claim here. Not only did this FCC rule bar access by all adults to Carlin's material in order to protect children, but it actually misapplied the crucial parental right at issue:

> [T]he time-honored right of a parent to raise his child as he sees fit—[is] a right this Court has consistently been vigilant to protect. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Yet this principle supports a result directly contrary to that reached by the Court. *Yoder* and *Pierce* hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.

438 U.S. at 769–70. The Justice was also concerned about the absence of any principled limit to the FCC's "privacy and children-in-the-audience" rationales for excluding "offensive" broadcasts from the air waves:

> . . . Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.[5]

438 U.S. at 770–71. Finally, Justice Brennan observed that both the FCC and the Court majority were affected by an "acute ethnocentric myopia" that left them depressingly unable "to appreciate that in our land of cultural pluralism there are many . . . who do not share their fragile sensibilities." Id. at 776–77.

QUESTIONS FOR DISCUSSION

1. Having read key segments of the opinions authored by these three different groups on the Court, with whose positions do you disagree? Is radio (or television) special? Should the airwaves be protected from the "Filthy Words" (which, incidentally, Carlin and Pacifica developed as protest action against this FCC rule)? Is it relevant that the FCC has refused to take action against Pacifica's annual "Bloomsday" readings from the most erotic passages in James Joyce's *Ulysses*? From a more general perspective, does the "spectrum scarcity" rationale for the Supreme Court's endorsement of the FCC "fairness" policy in *Red Lion* also support the "indecency" policy under the First Amendment? Are radio and television stations really scarce any more? (For the later history of the scarcity-fairness issue, see *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C.Cir. 1989), and Chapter 13 generally.) If not, in what other ways are broadcasts different from books, movies, records, or live performances by groups such as 2 Live Crew?

2. What does the Court's rationale in *Pacifica* imply for the problem that confronted the Supreme Court in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)—a local ordinance that barred showing at open-air, drive-in theaters of movies with nude scenes? (Suppose the ordinance barred only nude *sex* scenes at open-air drive-ins?) Or the problem that faced the Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)—an ordinance that barred location of "adult" motion picture theaters within 1,000 feet of a church, school, park, or residential neighborhood?

For the decade following the Supreme Court's *Pacifica* verdict, the FCC limited this policy to shows which used one or more of the "filthy words" before ten o'clock in the evening. Then came two controversial decisions in 1987. One involved a new Pacifica broadcast—a late night play, "Jerker," which included the extremely erotic sexual fantasies of two gay men dying of AIDS. This led the FCC to postpone the "safe harbor" period to midnight. The other involved Howard Stern's new brand of

5. *See*, e.g., I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that pertain to him by the morning light any that pisseth against the wall"; II Kings 18:27 and Isaiah 36:12: "[Hath] he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"; Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."; Ezekiel 23:21: "Thus thou calledst to remembrance the lewdnes of thy youth, in bruising thy teats by the Egyptians for the paps of thy youth." The Holy Bible (King James Version) (Oxford 1897).

early-morning "shock radio" via Infinity Broadcasting. The following excerpts targeted by the FCC convey some of the Stern show's flavor of constant references to sexual bodily parts and actions.

FCC Excerpts from Howard Stern Broadcasts

* * *

Excerpt 1

Howard Stern: "God, my testicles are like down to the floor. Boy, Susan, you could really have a party with these. I'm telling you honey."

Excerpt 2

Howard Stern: "Let me tell you something honey. These homos you are with are all limp."
Ray: "Yeah. You've never even had a real man."
Howard Stern: "You've probably never been with a man with a full erection."

Excerpt 3

Susan: "No, I was in a park in New Rochelle, N.Y."
Howard Stern: "In a park in New Rochelle? On your knees?"
Susan: "No, no."
Ray: "And squeezing someone's testicles, probably."

Excerpt 4

Howard Stern: "I mean to go around porking other girls with vibrating rubber products and they [lesbians] want the whole world to come to a standstill."

Excerpt 5

Howard Stern: "The closest I came to making love to a black woman was, I masturbated to a picture of Aunt Jemima."

Excerpt 6

Howard Stern: "First I want to just strip and rape [rival Los Angeles disc jockeys] Mark and Brian. I want my two bitches laying there in the cold, naked . . . I want them bleeding from the buttocks."

Excerpt 7

Howard Stern: [About Michelle Pfeiffer]: "I would not even need a vibrator. . . . Boy, her rump would be more black and blue than a Harlem cub scout."

* * *

The *Stern* case produced a new generic standard for "indecent" broadcasting:

> "Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

Stating that it was now concerned about the impact of broadcast indecency on teenagers (from 12–17 years old), not just children younger than 12, the FCC reaffirmed this new policy in *Infinity Broadcasting Corp. of Pennsylvania*, 64 R.R.2d 211 (F.C.C. 1987). The FCC also found, in *Gannett Publishing*, 5 F.C.C.R. 7688 (1990), a violation of its indecency standard by the broadcast of a song by the feminist folk group, Uncle Bursai, whose "Penis Envy" began and ended with the following verses:

> If I had a penis I'd wear it outside, In cafes and car lots With pomp and with pride.
>
> * * *
>
> If I had a penis I'd still be a girl, But I'd make much more money, And conquer the world.

Thence came a fascinating interaction among the FCC, the D.C. Circuit Court, the Congress, and the industry (particularly Howard Stern). The new FCC policy was quickly appealed to the D.C. Circuit which, in an opinion authored by then-Judge Ruth Bader Ginsburg, upheld the new "indecency" standard against vagueness and overbreadth challenges, but struck down the shortened safe harbor time as inadequately justified by the FCC in terms of its concern for teenagers. See *Action For Children's Television v. FCC*, 852 F.2d 1332 (D.C.Cir. 1988) (*ACT I*).

Shortly after the Circuit Court ruling in *ACT I*, the Congress passed a rider to an appropriations bill that required the FCC to consider and promulgate new indecency regulations with a 24–hour ban. The FCC conducted an extended rulemaking proceeding in 1989 and 1990, and concluded that the 24–hour ban on broadcast indecency was appropriate. See *Enforcement of Prohibition Against Broadcast Indecency*, 67 Rad. Reg. 2d 1714 (F.C.C. 1990). The D.C. Circuit again reversed, with Judge Abner Mikva concluding that the Supreme Court's recent ruling in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), which had struck down a federal statutory ban on dial-a-porn 900–number telephone services, meant that adults were also entitled to some access to sexual indecency on radio as well as over the phone. See *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C.Cir. 1991) (*ACT II*).

Congress intervened once more, in the *Public Communications Act of 1992* § 16(a), which required the FCC to consider a new regulation that allowed a safe harbor for indecency just from midnight to 6 a.m., with the exception of public stations that could broadcast indecent programs after 10 p.m. if the station was going off the air at or before midnight. The Commission again accepted this congressional directive, in *Re Broadcast Indecency*, 71 Rad. Reg. 2d 1115 (F.C.C. 1993), which spelled out three objectives to be served by the policy.

1. Ensuring that parents had the opportunity to supervise their children listening to or viewing over-the-air broadcasts;

2. Ensuring the well-being of minors regardless of parental supervision;

3. Protecting the right of all members of the listening public to be insulated from indecent material in the privacy of their homes.

Again, the case went back to the D.C. Circuit, and again the FCC policy was struck down as constitutionally overbroad. See *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C.Cir. 1993) (*ACT III*). This time, though, the case took an unexpected legal twist. The panel decision was reargued *en banc* in late 1994.

While the D.C. Circuit decision was pending, the issue was assuming major economic as well as moral interest. Howard Stern himself had become a major media figure. Besides his nationally-syndicated shock radio show, Stern's book, *Private Parts*, was a 1993 best-seller, and his New Year's Eve television special that year (with John Wayne Bobbitt as one of the bit players) set the new record as the most lucrative non-boxing, pay-for-view show. (At $40 a home, *The Miss Howard Stern New Year's Eve Pageant* grossed over $15 million. The biggest prior pay-TV show was a 1990 New Kids on the Block concert that had grossed $5.4 million at $20 a home.) The only down-side for Stern was that the content of the New Year's Eve show led the Fox Broadcasting Network to break off negotiations for a regular Stern television series.

Meanwhile, Stern's host network, Infinity Broadcasting, had expanded into the largest radio network in the country, with 22 stations and three more purchases pending. The latter three included the highly-rated Westwood station in Los Angeles whose existing syndicated programs included Larry King and Pat Buchanan, which Infinity wanted to combine with its existing stable (including Stern, Don Imus, and Gordon Liddy). The problem was that purchase of these new stations needed FCC approval for transfer of the broadcast licenses, and the FCC had by then assessed a total of nearly $2 million in fines against Infinity for "indecent" Stern broadcasts that the network was refusing to pay on constitutional grounds. Eventually, following receipt of the D.C. Circuit ruling in *ACT III* and before its *en banc* revocation, the FCC gave the go-ahead to these three station transfers. Several more acquisitions were still pending, though, as Infinity sought to expand its radio syndication network.

Finally, in the summer of 1995 the full D.C. Circuit issued its ruling, *Action for Children's TV. v. FCC*, 58 F.3d 654 (D.C.Cir. 1995) (*ACT IV*), upholding the constitutionality of restrictions on "indecent" broadcast programming between 6 a.m. and midnight. The majority opinion authored by Judge Buckley found that this legal policy was based on two "compelling government interests"—support for parental supervision of children and the social concern for the emotional and ethical well-being of the nation's children. Relying on recent survey evidence that two-thirds of children live in homes with several television sets and half have sets in

their own bedrooms, the court decided that restraints upon what could be broadcast on television (or radio) is a measure that is narrowly tailored to serve one or both of these independent governmental interests:

> The government's dual interest in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when parents can be at home to supervise what their children see and hear. It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restriction on the airing of broadcast indecency.

58 F.2d at 663. Shortly thereafter, and without admitting to any wrongdoing by Howard Stern, Infinity agreed to make a "voluntary contribution to the United States Treasury" in the amount of the still-unpaid FCC fines and interest. In early 1996, the Supreme Court rejected ACT's petition for review of the D.C. Circuit's decision.

QUESTIONS FOR DISCUSSION

1. The *ACT IV* en banc dissent argued that there was a potential tension between parental and governmental concerns about what kinds of programming children would see or hear, and that parents must have the final say on this score. Even if parents want their children to watch or listen to materials that the FCC considers indecent, do parents have alternatives to over-the-air shows for that purpose? And even if there are no adequate alternatives, should parental views on that score always override social concerns about the ethical development of its citizenry?

2. In yet another ruling in the "indecency" saga, *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C.Cir. 1995) (*ACT V*), a divided D.C. Circuit panel upheld the FCC's procedures for enforcing its rules through the imposition of fines ("forfeitures"), even though as a practical matter the validity of the ruling did not get to court for years, and in the interim the FCC felt entitled to levy higher fines for subsequent instances of indecency on that broadcast outlet. The majority rejected the analogy of the Supreme Court's ruling in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), which had struck down Rhode Island's Commission to Encourage Morality in Youth, a body that investigated publications felt to be objectionable for children, and asked book stores selling the item to remove it from their shelves or have the matter referred to the local police for possible prosecution under state obscenity law. Do you think that the FCC procedures warrant the same judgment as the Supreme Court gave to this Rhode Island Commission—*de facto* government censorship without effective recourse to the courts?

3. Is the FCC policy narrowly tailored to the emotional and moral protection of children and their parents? In particular, should the FCC have focused only on children 12 and under, rather than on teenagers between 13 and 17? Would that somewhat more relaxed stance afford greater freedom to broadcasters seeking to reach adults earlier than midnight (how much earlier)? Or is the real social concern about the impact of indecent programming precisely at that early teenage stage?

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