Chapter XI: Speaker and Medium Based Distinctions

In some circumstances, First Amendment analysis varies with the identity of the speaker or the medium used to communicate. The First Amendment does not apply at all to government speech, speech by government employees and public school students receives only limited protection, and the amount of protection speech receives can vary depending on the nature of the media responsible for the speech. For example, speech published in a newspaper is fully protected, whereas speech broadcast on radio and television receives less protection and can be more heavily regulated.

A. Government Speech

PLEASANT GROVE CITY, UTAH v. SUMMUM
555 U.S. 460 (2009)

JUSTICE ALITO delivered the opinion of the Court, joined by ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ.

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

I

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two occasions in 2003, Summum's president wrote to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM"[1] and be similar in size and nature to the Ten Commandments

[1]Respondent's brief describes the church and the Seven Aphorisms as follows:

"The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'

monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics. In 2005, respondent's president again wrote to the mayor asking to erect a monument. The city council rejected this request.

Respondent filed this action asserting that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument.

II

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct or were they providing a forum for private speech?

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to "speak for itself." "[I]t is entitled to say what it wishes," *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995), and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. See *Rosenberger*, *supra* at 833 (a government entity may "regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message").

This does not mean that there are no restraints on government speech. For example,

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"Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai . . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.

government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate for its advocacy."

While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks. In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny.

With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property. We have held that a government entity may create "a designated public forum" if government property is intentionally opened up for that purpose. Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.

III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely -- and reasonably -- interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to

appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

But while government entities regularly accept privately donated monuments, they have exercised selectivity. Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."

Public parks are often closely identified in the public mind with the government unit that owns the land. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument; and the City has now expressly set forth the criteria it will use in making future selections.

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required. Requiring all of these jurisdictions to go back and proclaim formally that

they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

In this case, for example, although respondent argues that Pleasant Grove City has not adequately "controll[ed] the message" of the Ten Commandments monument, the City took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf. And the City has made no effort to abridge the traditional free speech rights -- the right to speak, distribute leaflets, etc. -- that may be exercised by respondent and others in Pioneer Park.

What respondent demands, however, is that the City "adopt" or "embrace" "the message" that it associates with the monument. Respondent seems to think that a monument can convey only one "message" -- which is, presumably, the message intended by the donor -- and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct.

This argument fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one. Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger. Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas?

These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. Consider the statue of Pancho Villa that was given to the city of Tucson, Arizona, in 1981 by the Government of Mexico with, according to a Tucson publication, "a wry sense of irony." Does this statue commemorate a "revolutionary leader who advocated for agrarian reform and the poor" or "a violent bandit"?

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the vicinity. For example, following controversy over the design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of a flagstaff and bronze Three Soldiers statue, which many believed changed the overall effect of the memorial.

The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes." A striking example of how the interpretation of a monument can evolve is provided by the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the influence of American ideals. Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom.

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. A public university's buildings may offer meeting space for hundreds of student groups.

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, "'time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'" but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments."

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators -- often, for all who want to speak -- but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy offered by, say, the German Empire or Imperial Russia).

While respondent and some of its *amici* deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government

entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. If public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. Where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument -- for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause. We therefore reverse.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message. To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. The Court's opinion in this case signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the First Amendment. I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State;" respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently "adopted" its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that "might of course raise Establishment Clause issues."

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment. The city can safely exhale. Its residents and visitors can now return to enjoying

Pioneer Park's wishing well, its historic granary -- and, yes, even its Ten Commandments monument -- without fear that they are complicit in an establishment of religion.

JUSTICE BREYER, concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well violate the First Amendment.

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye towards their purposes -- lest we turn "free speech" doctrine into a jurisprudence of labels. Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.

Were we to do so here, we would find that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. Cities use park space to further a variety of recreational, historical, educational, aesthetic, and other civic interests. To reserve to the City the power to choose among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate.

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that the Ten Commandments monument is government speech. I have qualms, however, about accepting the position that public monuments are government speech categorically.

Because the government speech doctrine is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored. Even though, for example, Establishment Clause issues have been neither raised nor briefed, there is no doubt that this case and its government speech claim has been litigated with one eye on the Establishment Clause. The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate. It is an occasion, however, to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all.

Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech. This reasonable observer test is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases. The adoption of it would make sense of our common understanding that some monuments on public land display religious symbolism that clearly does not express a government's chosen views. Application of this observer test provides the reason I find the monument here to be government expression.

Note: In 2015, the Court again addressed the government speech doctrine. In *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015), a 5-4 decision with a majority opinion written by Justice Breyer joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, the Court applied the government speech doctrine to the speciality license plate system in Texas. Under that system, special interest groups could request that the government issue license plates that the group designed to promote their views so that their members could buy the plates. The case arose when Texas rejected a speciality license plate with a confederate flag design. Because the government had to approve the design of the plate and the plate was an official state license plate that operated like an official state ID, the majority concluded that the specialty plates were government speech, thereby allowing Texas to reject the confederate flag design even though the state's decision was based on viewpoint discrimination. Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Kennedy, however, dissented in *Walker*, arguing that the expansion of the government speech doctrine had the potential to significantly weaken First Amendment protections.

B. Government Employee Speech

1. PICKERING v. BOARD OF EDUC. OF TOWNSHIP HIGH SCHOOL DIST. 205
391 U.S. 563 (1968)

MR. JUSTICE MARSHALL delivered the opinion of the Court, joined by WARREN, C.J., and HARLAN, BRENNAN, STEWART, and FORTAS, JJ.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the relevant Illinois statute that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth

Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois affirmed the judgment of the Circuit Court. For the reasons detailed below we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. On September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor. The letter constituted an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers from opposing or criticizing the proposed bond issue. The Board dismissed Pickering for writing and publishing the letter.[1]

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III.

Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the

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[1] Professor's Note: Pickering's dismissal was also based on the claim that the letter he wrote contained falsehoods. Material related to that aspect of the case has been deleted.

superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

Certainly an accusation that too much money is being spent on athletics by the administrators of the school system cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

What we do have before us is a case in which a teacher has made public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

2. CONNICK v. MYERS
461 U.S. 138 (1983)

JUSTICE WHITE delivered the opinion of the Court, joined by BURGER, C.J. and POWELL, REHNQUIST, and O'CONNOR, JJ.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue

of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The problem, we thought, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period Myers competently performed her responsibilities of trying criminal cases.

In the early part of October 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6 Myers was notified that she was being transferred. Myers again spoke with Dennis Waldron, one of the First Assistant District Attorneys, expressing her reluctance to accept the transfer. A number of other office matters were discussed and Myers testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do research on the matter.

That night Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Early the following morning, Myers typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

Myers filed suit under contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and attorney's fees. Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed. Connick then sought review in this Court by way of certiorari, which we granted.

II

For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The District Court, and thus the Court of Appeals as well, misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance for respondent.

The District Court got off on the wrong foot in this case by initially finding that, "[taken] as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in *Pickering*. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the heirarchy of First Amendment values,'" and is entitled to special protection.

Pickering v. Board of Education followed from this understanding of the First Amendment. In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. *Pickering*'s subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate."

Pickering, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not

subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[The] First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory

dismissal.

Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether Connick was justified in discharging Myers. The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

III

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

JUSTICE BRENNAN, with whom MARSHALL, BLACKMUN, and STEVENS, JJ., join, dissenting.

Sheila Myers was discharged for circulating a questionnaire to her fellow Assistant District Attorneys seeking information about the effect of petitioner's personnel policies on employee morale and the overall work performance of the District Attorney's Office. The Court concludes that her dismissal does not violate the First Amendment, primarily because the questionnaire addresses matters that, in the Court's view, are not of public concern. It is hornbook law, however, that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. Because the questionnaire addressed such matters and its distribution did not adversely affect the operations of the District Attorney's Office or interfere with Myers' working relationship with her fellow employees, I dissent.

Based on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment

protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness. The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end.

Although the Court finds most of Myers' questionnaire unrelated to matters of public interest, it does hold that one question -- asking whether Assistants felt pressured to work in political campaigns on behalf of office-supported candidates -- addressed a matter of public importance and concern. The Court also recognizes that this determination of public interest must weigh heavily in the balancing of competing interests required by *Pickering*. Having gone that far, however, the Court misapplies the *Pickering* test and holds that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears are essentially unfounded.

The Court's decision today inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal. As a result, the public will be deprived of valuable information with which to evaluate the performance of elected officials. Because protecting the dissemination of such information is an essential function of the First Amendment, I dissent.

3. GARCETTI v. CEBALLOS
547 U.S. 410 (2006)

Justice KENNEDY delivered the opinion of the Court, joined by ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I
Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to challenge the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not

receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000 , Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." We granted certiorari, and we now reverse.

II.

The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. "The problem," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." Thus, the Court concluded that "the interest of the school

administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the government entity had an adequate justification for treating the employee differently from any other member of the public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance."

III.

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may

receive First Amendment protection for expressions made at work. Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. As the Court noted in *Pickering*: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. . . . . Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity.

Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.

Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

IV.

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees. "The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

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

I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

I.

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in

government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer.

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties. Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties.

C. Public School Student Speech

MAHANOY AREA SCHOOL DISTRICT v. B.L.
141 S. Ct. 2038 (2021)

JUSTICE BREYER delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, KAGAN, GORSUCH, KAVANAUGH and BARRETT, JJ., joined.

A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment. Although we do not agree with the reasoning of the Third Circuit, we do agree with its conclusion that the school's disciplinary action violated the First Amendment.

I
B.L. was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B.L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B.L. did not accept the coach's decision with good grace, particularly because the coaches placed an entering freshman on the varsity team.

That weekend, B.L. and a friend visited the Cocoa Hut, a local convenience store. There, B.L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B.L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B.L. had about 250 "friends") to view the images for a 24 hour period.

The first image B.L. posted showed B.L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley face emoji.

B.L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B.L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B.L.'s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B.L. from the junior varsity cheerleading squad for the upcoming year. B.L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B.L.'s suspension from the team. In response, B.L., together with her parents, filed this lawsuit in Federal District Court.

The District Court found in B.L.'s favor. It first granted a preliminary injunction ordering the school to reinstate B.L. to the cheerleading team. In granting B.L.'s subsequent motion for summary judgment, the District Court found that B.L.'s Snapchats had not caused substantial disruption at the school. Cf. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). Consequently, the District Court declared that B.L.'s punishment violated the First Amendment, and it awarded B.L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.

On appeal, a panel of the Third Circuit affirmed the District Court's conclusion. In so doing, the majority noted that this Court had previously held in *Tinker* that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of "'pure speech'" on school property during the school day. In reaching its conclusion in *Tinker*, this Court emphasized that there was no evidence the student protest would "substantially interfere with the work of the school or impinge upon the rights of other students." But here, the panel majority held that this additional freedom did "not apply to off-campus speech," which it defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Because B.L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B.L. for engaging in a form of pure speech. A concurring member of the panel agreed with the majority's result but wrote that the school had not sufficiently justified disciplining B.L. because, whether the *Tinker* standard did or did not apply, B.L.'s speech was not substantially disruptive.

The school district filed a petition for certiorari in this Court, asking us to decide "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially

and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." We granted the petition.

II

We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). One such characteristic, which we have stressed, is the fact that schools at times stand in loco parentis, i.e., in the place of parents. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see *id.* at 685; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse v. Frederick*, 551 U.S. 393, 409 (2007); and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, see *Kuhlmeier*. Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of amici, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B.L. herself and the amici supporting her would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B.L.'s proposed rule.

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule. That rule, basically, if not entirely, would deny the off-campus applicability of *Tinker's* highly general statement about the nature of a school's special interests. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list.

Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do

not now set forth a broad, highly general First Amendment rule stating just what counts as "off-campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand in loco parentis. The doctrine of in loco parentis treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

III

Consider B.L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B.L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B.L.'s posts, while crude, did not

amount to fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). And while B.L. used vulgarity, her speech was not obscene as this Court has understood that term. See *Cohen v. California*, 403 U.S. 15, 19–20 (1971). To the contrary, B.L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. cf. *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

Consider too when, where, and how B.L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school or target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained) diminish the school's interest in punishing B.L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B.L. spoke outside the school on her own time. See *Morse*, 551 U.S. at 405 (clarifying that although a school can regulate a student's use of sexual innuendo in a speech given within the school, if the student "delivered the same speech in a public forum outside the school context, it would have been protected").

B.L. spoke under circumstances where the school did not stand in loco parentis. And there is no reason to believe B.L.'s parents had delegated to school officials their own control of B.L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B.L.'s posts encompassed a message, an expression of B.L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B.L.'s interest in free expression.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*, 393 U.S. at 514. Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B.L.'s Snapchats. But when one of B.L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," she responded simply, "No." As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that

always accompany an unpopular viewpoint." The alleged disturbance here does not meet *Tinker's* demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. There is little that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have said, simple "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

It might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. "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." *Cohen*, 403 U.S. at 25.

Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, we nonetheless agree that the school violated B.L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

JUSTICE THOMAS, dissenting.

B.L., a high school student, sent a profanity-laced message to hundreds of people, including classmates and teammates. The Court overrides that decision—without even mentioning the 150 years of history supporting the coach. Using broad brushstrokes, the majority outlines the scope of school authority. When students are on campus, the majority says, schools have authority *in loco parentis*—that is, as substitutes of parents—to discipline speech and conduct. Off campus, the authority of schools is somewhat less. At that level of generality, I agree. But the majority omits important detail. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?

Disregarding these important issues, the majority simply posits three vague considerations and reaches an outcome. A more searching review reveals that schools historically could discipline students in circumstances like those presented here. Because the majority does not attempt to explain why we should not apply this historical rule and does not attempt to tether its approach to anything stable, I respectfully dissent.

While the majority entirely ignores the relevant history, I would begin the assessment of the scope of free-speech rights incorporated against the States by looking to "what 'ordinary citizens' at the time of [the Fourteenth Amendment's] ratification would have understood" the right to encompass. Cases and treatises from that era reveal that public schools retained substantial authority to discipline students. As I have previously explained, that authority was near plenary while students were at school. Authority also extended to when students were traveling to or from school. See, *e.g., Lander v. Seaver*, 32 Vt. 114, 120 (1859). And, although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment.

Perhaps the most familiar example applying this rule is a case where a student, after returning home from school, used "disrespectful language" against a teacher—he called the teacher "old"—"in presence of the [teacher] and of some of his fellow pupils." The Vermont Supreme Court held that the teacher could discipline a student for this speech because the speech had "a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination." The court distinguished the speech at issue from speech "in no ways connected with or affecting the school" and speech that has "merely a remote and indirect tendency to injure."

If there is a good constitutional reason to depart from this historical rule, the majority and the parties fail to identify it. I would thus apply the rule. Assuming that B.L.'s speech occurred off campus, the purpose and effect of B.L.'s speech was "to degrade the [program and cheerleading staff]" in front of "other pupils," thus having "a direct and immediate tendency to . . . subvert the [coach's] authority." As a result, the coach had authority to discipline B.L.

Perhaps there are good constitutional reasons to depart from the historical rule, and perhaps this Court and lower courts will identify and explain these reasons in the future. But because the Court does not do so today, and because it reaches the wrong result under the appropriate historical test, I respectfully dissent.

D. Medium of Communication

1. MIAMI HERALD PUBLISHING CO. v. TORNILLO
418 U.S. 241 (1974)

CHIEF JUSTICE BURGER delivered the opinion for a unanimous Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

I
In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy.[2] In response to these editorials appellee demanded

[2] The text of the September 20, 1972, editorial is as follows:
"The State's Laws And Pat Tornillo
"LOOK who's upholding the law!
"Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking 'the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'
"Czar Tornillo calls 'violation of this law inexcusable.'

that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County. The action was premised on Florida Statute § 104.38, a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellant sought a declaration that § 104.38 was unconstitutional. The Florida Supreme Court [held] that § 104.38 did not violate constitutional guarantees. It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public."

III

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions.

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views

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"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.
"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:
"FROM the people who brought you this -- the teacher strike of '68 -- come now instructions on how to vote for responsible government, i. e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us -- what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic proxy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

reach the public. It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise

it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

The Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the Miami Herald from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the

decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

2. RED LION BROADCASTING CO., INC. v. FCC
395 U.S. 367 (1969)

MR. JUSTICE WHITE delivered the opinion of the Court, joined by WARREN, C.J. AND BLACK, HARLAN, BRENNAN, STEWART, and MARSHALL, JJ.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us

now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. Red Lion involves the application of the fairness doctrine to a particular broadcast, and RTNDA arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the Red Lion litigation had begun.

I

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater -- Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, the FCC's position was upheld as constitutional and otherwise proper.

Not long after the Red Lion litigation was begun, the FCC issued a Notice of Proposed Rule Making with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed. As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

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

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

II

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the Red Lion case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own. The statutory authority of the FCC to promulgate these

regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter."

We cannot say that the FCC's declaratory ruling in Red Lion, or the regulations at issue in RTNDA, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them. For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination.

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.

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

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934, as the Court has noted at length before. It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users.

Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

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

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech."

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

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available

a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

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

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

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

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the

regulations; there was nothing vague about the FCC's specific ruling in Red Lion that Fred Cook should be provided an opportunity to reply. The regulations at issue in RTNDA could be employed in precisely the same way as the fairness doctrine was in Red Lion.

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

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

3. FCC v. PACIFICA FOUNDATION
438 U.S. 726 (1978)

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

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

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

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

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

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

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

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

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it. . . . [The] 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."

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

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition.

The United States Court of Appeals for the District of Columbia Circuit reversed.

Having granted the Commission's petition for certiorari, we must decide: . . . (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the

First Amendment of the United States Constitution. . . .

III

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

IV

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

A

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

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. 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." We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise.

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

The government may forbid speech calculated to provoke a fight. It may pay heed to the "'commonsense differences' between commercial speech and other varieties." It may treat libels against private citizens more severely than libels against public officials. Obscenity may be wholly prohibited.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content -- or even to the fact that it satirized contemporary attitudes about four-letter words -- First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by 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."

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.

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. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to

be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629 (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. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." 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.

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

I join Parts I, II, III, and IV-C of JUSTICE STEVENS' opinion. The Court today reviews only the Commission's holding that Carlin's monologue was indecent "as broadcast" at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion. In addition to being consistent with our settled practice of not deciding constitutional issues unnecessarily, this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts.

I do not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance. And I would assume that an adult could not constitutionally

be prohibited from purchasing a recording or transcript of the monologue and playing or reading it in the privacy of his own home.

But it also is true that the language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing the narrow category of language used here as "patently offensive" to most people regardless of age.

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. In my view, this consideration provides strong support for the Commission's holding.

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

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of "[reducing] the adult population . . . to [hearing] only what is fit for children." This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.

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.

As the foregoing demonstrates, my views are generally in accord with what is said in Part

IV-C of MR. JUSTICE STEVENS' opinion. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

The Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. Moreover, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," or obscenity, that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of the words found condemnable here are fully protected by the First Amendment in other contexts. Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience. Dispassionate analysis starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications -- if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme -- that the Court today permits.

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many -- including the FCC and this Court -- might find offensive.

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within the "substantial privacy interests" to which Mr. Justice Harlan referred in *Cohen*, and is entitled to the greatest solicitude. However, I believe that an individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. Although an individual's decision to allow radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-a-vis the communication he voluntarily admits into his home are surely no greater than those of the people in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[the] radio can be turned off," -- and with a minimum of effort. 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, "to burn the house to roast the pig."

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.

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to adults,"

the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. It thus ignores our recent admonition that "[speech] that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). The Court's refusal to follow its own pronouncements is especially lamentable since it has the subsidiary effect, at least in the radio context, of making unavailable to adults material which may not constitutionally be kept even from children.

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL and my Brother STEVENS, both stress the time honored right of a parent to raise his child as he sees fit -- a right this Court has consistently been vigilant to protect. Yet this principle supports a result directly contrary to that reached by the Court. 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.

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS -- the intrusive nature of radio and the presence of children in the listening audience -- can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. 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.

In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as

involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment" involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. For my own part, even accepting that this case is limited to its facts, I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

II

I find the reasoning by which my Brethren conclude that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," and finds solace in his conviction that "[there] are few, if any, thoughts that cannot be expressed by the use of less offensive language." The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. A speaker's choice of words cannot surgically be separated from the ideas he desires to express. Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications.

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

It is doubtful that even those frustrated listeners in a position to follow my Brother POWELL's gratuitous advice and attend one of Carlin's performances or purchase one of his records would receive precisely the same message Pacifica's radio station sent its audience. The airways are capable not only of carrying a message, but also of transforming it. A

satirist's monologue may be most potent when delivered to a live audience; yet the choice whether this will in fact be the manner in which the message is delivered and received is one the First Amendment prohibits the government from making.

III

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

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

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on "'the words you couldn't say on the public . . . airways,'" explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evidences an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

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

The Court today recognizes the wise admonition that we should "avoid the unnecessary decision of [constitutional] issues." But it disregards one important application of this salutary principle -- the need to construe an Act of Congress so as to avoid, if possible, passing upon its constitutionality. It is apparent that the constitutional questions raised by the order of the Commission in this case are substantial. Before deciding them, we should be certain that it is necessary to do so.

The statute pursuant to which the Commission acted makes it a federal offense to utter "any obscene, indecent, or profane language by means of radio communication." The Commission held, and the Court today agrees, that "indecent" is a broader concept than "obscene" as the latter term was defined in *Miller v. California*, 413 U.S. 15 (1973), because language can be "indecent" although it has social, political, or artistic value and lacks prurient appeal. But this construction of § 1464, while perhaps plausible, is by no means compelled. To the contrary, I

think that "indecent" should properly be read as meaning no more than "obscene." Since the Carlin monologue concededly was not "obscene," I believe that the Commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power to prohibit speech that would be constitutionally protected outside the context of electronic broadcasting.

I would hold, therefore, that Congress intended, by using the word "indecent" in § 1464, to prohibit nothing more than obscene speech. Under that reading of the statute, the Commission's order in this case was not authorized, and on that basis I would affirm the judgment of the Court of Appeals.

4. RENO v. ACLU
521 U.S. 844 (1977)

JUSTICE STEVENS delivered the opinion of the Court, joined by SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ.

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment.

I
The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

The Internet

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."

The Internet has experienced "extraordinary growth." The number of "host" computers--those that store information and relay communications--increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a

number that is expected to mushroom to 200 million by 1999.

Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for a small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium--known to its users as "cyberspace"--located in no particular geographical location but available to anyone, anywhere, with access to the Internet.

E-mail enables an individual to send an electronic message--generally akin to a note or letter--to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic. About 100,000 new messages are posted every day. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue by typing messages to one another. The District Court found that at any given time "tens of thousands of users are engaging in conversations on a huge range of subjects." It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world.

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is

freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls the Web, nor is there any centralized point from which Web sites can be blocked from the Web."

Sexually Explicit Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core." These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community."

Some of the communications over the Internet that originate in foreign countries are also sexually explicit. Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources, block designated sites, or attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images."

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." The Government offered no evidence that there was a reliable way to screen recipients and participants in such fora for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be

possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent."

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down.

II

The Telecommunications Act of 1996 was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "the rapid deployment of new telecommunications technologies." Title V--known as the "Communications Decency Act of 1996" (CDA)--contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are informally described as the "indecent transmission" provision and the "patently offensive display" provision.

The first, 47 U.S.C.A. § 223(a) (Supp. 1997), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:
"(a) Whoever--(1) in interstate or foreign communications--. . . .
(B) by means of a telecommunications device knowingly--
(i) makes, creates, or solicits, and
(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;. . . . .
(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both."

The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.

The breadth of these prohibitions is qualified by two affirmative defenses. One covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code.

III

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs filed suit challenging the constitutionality of §§ 223(a)(1) and 223(d).

In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First

Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. We begin our analysis by reviewing the principal authorities on which the Government relies. Then, after describing the overbreadth of the CDA, we consider the Government's specific contentions, including its submission that we save portions of the statute either by severance or by fashioning judicial limitations on its coverage.

IV

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg v. New York*, 390 U.S. 629 (1968); (2) *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and (3) *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). A close look at these cases, however, raises--rather than relieves--doubts concerning the constitutionality of the CDA.

In *Ginsberg*, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant's broad submission that "the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor." In rejecting that contention, we relied not only on the State's independent interest in the well-being of its youth, but also on our consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." In four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. First, we noted in *Ginsberg* that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." 390 U.S. at 639. Under the CDA, by contrast, neither the parents' consent--nor even their participation--in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." The CDA fails to provide us with any definition of the term "indecent" as used in § 223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by § 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

In *Pacifica*, we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled "Filthy Words" that had previously been delivered to a live audience "could have been the subject of administrative sanctions." The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent "as broadcast." The respondent contended that it was not "indecent" within the meaning of the relevant statutes because it contained no prurient appeal. After rejecting respondent's statutory arguments, we confronted its two constitutional arguments: (1) that the Commission's construction of its authority to ban indecent speech was so broad that its order

had to be set aside even if the broadcast at issue was unprotected; and (2) that since the recording was not obscene, the First Amendment forbade any abridgement of the right to broadcast it on the radio.

In the portion of the lead opinion not joined by Justices Powell and Blackmun, the plurality stated that the First Amendment does not prohibit all governmental regulation that depends on the content of speech. Accordingly, the availability of constitutional protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast. Relying on the premise that "of all forms of communication" broadcasting had received the most limited First Amendment protection, the Court concluded that the ease with which children may obtain access to broadcasts, "coupled with the concerns recognized in *Ginsberg*," justified special treatment of indecent broadcasting.

As with the New York statute at issue in *Ginsberg*, there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when--rather than whether--it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

In *Renton*, we upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"--such as crime and deteriorating property values--that these theaters fostered: "'It is the secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.'" According to the Government, the CDA is constitutional because it constitutes a sort of "cyberzoning" on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any "secondary" effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be "analyzed as a form of time, place, and manner regulation."

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

V

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), we observed that "each medium of expression may present its own problems." Thus, some of our cases have

recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Foundation*. In these cases, the Court relied on the history of government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its "invasive" nature.

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" It also found that "almost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident."

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

VI

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

VII

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

In evaluating the free speech rights of adults, we have made it clear that "sexual expression which is indecent but not obscene is protected by the First Amendment." It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. The Government may not "reduce the adult population to only what is fit for children."

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. 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 any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message. The regulated subject matter includes any of the seven "dirty words" used in the *Pacifica* monologue, the use of which the Government's expert acknowledged could constitute a felony. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the

blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The Court reaches a contrary conclusion, and from that holding that I respectfully dissent.