1987

The Signal Cable Sends, Part II--Interference from the Indecency Cases

Laurence H. Wilner
INTRODUCTION

THE 1980's are a propitious time to expand first amendment freedom for the electronic media. Mark Fowler, the recent Chairman of the
Federal Communications Commission ("FCC" or "Commission") often emphasized that, as nearly as possible, the print media should be the regulatory model for the electronic media. Under Commissioner Fowler, the FCC has had remarkable success in carrying out a deregulatory program toward this goal. The Supreme Court recently advanced this movement by suggesting that it may be time to reexamine the fundamental premise for much of broadcast regulation: the perceived scarcity of the electromagnetic spectrum. Contemporaneously, the FCC

1. See, e.g., Fowler and Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 209 (1982) ("the perception of broadcasters as community trustees should be replaced by a view of broadcasters as market-place participants"); Deregulation's Architect Finds the Structure Sturdy, Broadcasting, Dec. 23, 1985, at 44, 52 ("I'd want to see the First Amendment firmly in the saddle in broadcasting. That means no government content control, period.") (interview with Mark S. Fowler, Chairman, FCC); The Bittersweet Chairmanship of Mark S. Fowler, Broadcasting, Feb. 18, 1985, at 39, 41 (regulatory relationship between FCC and broadcast media "should be the same as the print people enjoy") (interview with Mark S. Fowler). Mr. Fowler has resigned, effective in spring, 1987, and is to be succeeded by Commissioner Dennis Patrick, who generally shares Mr. Fowler's views. See Broadcasting, Feb. 9, 1987, at 43-44; Stuart, A Cautious Deregulator, N.Y. Times, Feb. 7, 1987, at col. 5.


Comprehensive government regulation of broadcasting has been justified by the perceived, inherent, physical limit to the available broadcast frequencies at least since the Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927), created the Federal Radio Commission. See, e.g., Statement on Public Interest, Convenience, or Necessity, 2 FRC Ann. Rep. 166, 168, 170 (1928) (citing "the paucity of channels," the "limited facilities for broadcasting," and the fact that the "number of persons desiring to broadcast is far greater than can be accommodated" to justify regulation under the public interest standard). Justice Frankfurter's expansive and much criticized opinion for the Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), first gave priority to the rationale
launched a formal inquiry into the continuing viability of the fairness doctrine, one of the most inhibiting features of the remaining regulation.\footnote{4}
In the cable television area, the Commission, soon supported by the Supreme Court, maintained that much state and local regulation of cable is federally preempted, thereby substantially deregulating that industry. Congress, in the Cable Communications Policy Act of 1984 ("1984 Cable Act"), codified much of the preemption and deregulation. In addition, the Court of Appeals for the District of Columbia found unconstitutional the FCC's "must-carry" rules, which required cable systems to carry local broadcast signals. Requirements that cable operators provide access to their systems are increasingly subject to attack on first amendment and other grounds. More generally, the Ninth Circuit has questioned the constitutionality of several elements of the basic cable franchising scheme under the 1984 Cable Act.

As encouraging as these deregulatory trends are, broadcasting will achieve its due first amendment status only when the law no longer treats the broadcast spectrum as a peculiarly unique and scarce resource subject to greater regulation than other media. Changing this perception of

---


7. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700-01 (1984) (affirming the FCC's "unambiguously expressed... intent to pre-empt any state or local regulation... of signals carried by cable television systems").


9. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986). For many years, the must-carry rules required cable systems to carry all local and other "significantly viewed" broadcast signals. See 47 C.F.R. §§ 76.51-76.67 (1985). See generally C. Ferris, F. Lloyd, & T. Casey, Cable Television Law, ¶¶ 7.04-7.09 (discussing history of must-carry rules). The FCC, however, acquiesced in and, indeed, praised the Quincy decision, see statement of Chairman Fowler and Comm'r Dawson and Patrick, 58 Rad. Reg. 2d (P & F) 1005 (1985), but the National Association of Broadcasters sought Supreme Court review. Under pressure from Congress, however, and after a compromise between major cable and broadcast interests, the Commission has reimposed a less burdensome form of must carry. See Must Carry Rules, 61 Rad. Reg. 2d (P & F) 792 (1986), modified on reconsid., 62 Rad. Reg. 2d (P & F) — (1987). These new rules base broadcast carriage requirements on the channel capacity of the cable system.

10. See infra notes 266-70 and accompanying text.


the broadcast spectrum may depend, in turn, on the advent of comparable, competing modes of communication, such as cable television and other entrants in the new electronic video marketplace, that are not saddled with the historical error of scarcity as a rationale for regulation. Consequently, if broadcast and cable are perceived as fungible, scarcity, if it ever was a legitimate rationale, will be a thing of the past and so ought to be much of the regulation based on it. At the same time, competition from the essentially substitutable broadcast medium should preclude regulation of cable based on its alleged monopoly position.

For these reasons, I have argued in a companion Article that cable and broadcast television should be viewed as a single, unified medium. In that Article, I show that judicial opinions that afford cable more freedom from regulation than broadcasting, by ostensibly distinguishing the two media, actually support their similarity. Consequently, there is no reason to apply either to cable or to broadcasting different first amendment standards than to the print media. The unified cable/broadcasting approach I advocate therefore encourages a vital symbiotic relationship between the two media in which each medium supports for the other full first amendment freedom from a broad range of actual and potential regulation.

The cable indecency cases, however, are sui generis in this regard and pose a potential impediment to this goal. In these cases, advocates of greater first amendment freedom for the video marketplace have scrambled to distinguish cable from broadcasting to avoid the reach of FCC v. Pacifica Foundation, the 1978 “seven dirty words” decision allowing censorship of vulgar language on radio. Because the Pacifica rationale for controlling broadcast indecency is generally thought, somewhat in-
correctly, not to rely on spectrum scarcity, the cable indecency cases rest on distinctions other than scarcity. Based on these distinctions, courts to date have, for the most part, correctly forestalled censorship but often for the wrong reasons. This Article concludes that distinguishing cable from broadcast television in the indecency context is wrong, outmoded, and unnecessary. More important, it is antithetical to the developing symbiotic relationship between cable and broadcasting and, therefore, detrimental to maximizing first amendment freedom for the electronic media.

Part I of this Article surveys generally the development of content regulation in broadcasting and, specifically, control over indecent programming, culminating in Pacifica. It shows that Pacifica is unsupportable and technologically outdated. Censoring anything except legal obscenity, therefore, should be improper in both cable and broadcasting. Part II examines the distinctions between cable and broadcasting asserted in the case law to exclude cable from indecency regulation. Part III demonstrates that these asserted distinctions are unconvincing and inimical to the broader goal of viewing cable and broadcasting as fungible to afford each the same first amendment status as the print media. The approach of the cable indecency cases, therefore, should be abandoned.

I. THE DEVELOPMENT OF CONTENT CONTROL IN BROADCAST REGULATION

Censorship of George Carlin's radio monologue at issue in Pacifica would be unthinkable in most other nonbroadcast media. To understand, then, why there even was an issue over the radio broadcast requires examination of the statutory, regulatory, and judicial background of general content control in broadcasting, particularly as to indecent or offensive programming.

A. The Early Development of General Content Control

Congress has long shown concern for broadcasters' freedom of expression. Section 29 of the 1927 Radio Act specifically precluded government censorship of radio communication. Moreover, the Federal...
Radio Commission ("FRC"), established by the Act, ostensibly eschewed any censorship role. Nevertheless, the Commission quickly assumed the general power to control radio program content through an application of the Act’s central regulatory standard, the "public interest, convenience, or necessity." In an early exercise of this power, the FRC announced that its main interest in evaluating competing license applications was to insure that "the program service of broadcasting stations is good, i.e., in accordance with the standard of public interest, convenience or necessity." This meant that "the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program." In this regard, the Commission clearly considered the interests of the public as listeners to prevail over those of broadcasters as speakers.

In addition to this general policy, the FRC soon reacted against what it perceived as specific broadcaster abuses. Although most early major networks and stations were quite formal and conservative, a number of eccentric broadcasters engaged in excesses. Two early cases that upheld the FRC’s right not to renew a license because of program content deemed inconsistent with the public interest standard set the precedent for control of broadcast indecency.

In *KFKB Broadcasting Association, Inc. v. FRC*, plaintiff radio station was controlled by Dr. Brinkley, who had formed an association of druggists to dispense numbered prescriptions prepared according to the legislative history of a 1948 amendment to § 326, see Codification of Title 18 of the United States Code, ch. 645, § 1464, 62 Stat. 683, 769 (1948), emphasized the "hands-off" restriction on the Commission: "[S]ection 326 . . . makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition which would interfere with the right of free speech by radio." *See* S. Rep. No. 1567, 80th Cong., 2d Sess. 14 (1948) (emphasis added).

See *S. Head & C. Sterling, Broadcasting in America* 145 (4th ed. 1982). In 1934, for example, CBS declined to carry a speech by the United States Surgeon General that would have alluded to venereal disease. *Id.* at 146. Moreover, when the National Broadcasting Company ("NBC") was so bold as to broadcast certain dialogue in a Mae West comedy routine, the FCC reminded NBC of the proper standards of taste and propriety. *Id.* at 145. In the late 1930’s, the FCC also expressed its disapproval of other subject matter, such as astrology, contraceptive advertising, horse race information broadcast in code, fraudulent products, and misleading personal advice. See *C. Sterling & J. Kittross, Stay Tuned: A Concise History of American Broadcasting* 189 (1978).

25. *See infra* notes 26-40 and accompanying text. In an earlier case, the first appeal of a Commission decision denying a license renewal based in part on the licensee’s program service, the court simply assumed that the Commission could consider program service in evaluating a licensee’s performance under the public interest standard. *See* Technical Radio Lab. v. FRC, 36 F.2d 111, 114 (D.C. Cir. 1929).

26. 47 F.2d 670 (D.C. Cir. 1931).
doctor's formulas. Dr. Brinkley broadcast a regular question-and-answer period in which he would respond to listeners' letters, make a diagnosis, and prescribe by number one of his medications, for which he received a fee from the dispensing druggist.\(^\text{27}\)

Upon challenge to the FRC's denial of KFKB's license renewal application, the court held that the limited number of available broadcast frequencies allowed the FRC to consider "the character and quality of the service to be rendered," as measured by a station's past conduct.\(^\text{28}\) In fact, because the Commission considered past conduct, albeit to deny an opportunity for future broadcasting, the court found there was no attempt at prior restraint. Consequently, finding no censorship in violation of section 29, the court had little difficulty sustaining the FRC's decision.\(^\text{29}\)

A more troublesome case, dealing with allegedly defamatory and objectionable language, was decided the next year. In *Trinity Methodist Church v. FRC*,\(^\text{30}\) a church owned a Los Angeles radio station that was operated by its minister, Dr. Schuler. The minister's broadcasts attacked other religions and sought to influence the outcome of pending court cases. For the latter activity Dr. Schuler had already been cited for contempt of court. Because of these activities the FRC denied the station's license renewal application.\(^\text{31}\) The station's appeal squarely presented to the Court of Appeals for the District of Columbia a first amendment challenge to the FRC's authority to regulate offensive programming, without the issue of improper practice of medicine that had complicated KFKB.

Although the court paid homage to first amendment freedoms with reference to Milton's *Areopagitica* and other works,\(^\text{32}\) the only case cited in support of such freedom\(^\text{33}\) was the Supreme Court's recent prior restraint case, *Near v. Minnesota*.\(^\text{34}\) In *Near*, the Supreme Court struck down a state statute allowing the "abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper.' "\(^\text{35}\) The *Trinity Methodist* court, however, followed the dissent in *Near*, which did not view the nuisance abatement statute as a prior restraint because it did not authorize previous administrative control of what was printed.\(^\text{36}\) In the *Near* dissent's view, abatement only punished improper past publication, which was an "abuse of the right of free press."\(^\text{37}\) Similarly, the court in

---

27. See id. at 671.
28. Id. at 672.
29. See id.
30. 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933).
31. See id. at 850-52.
32. See id. at 851.
33. See id.
34. 283 U.S. 697 (1931).
35. See id. at 701-02, 722-23.
36. See id. at 735 (Butler, J., dissenting).
37. Id.
Trinity Methodist, citing KFKB, ruled that first amendment freedom of expression
does not mean that the government, through agencies established by
Congress, may not refuse a renewal of license to one who has abused it
to broadcast defamatory and untrue matter. In that case there is not a
denial of the freedom of speech, but merely the application of the regu-
latory power of Congress in a field within the scope of its legislative
authority. 38

This is clearly contrary to the majority opinion in Near. The Near
Court recognized that the effect of the abatement statute was not just
subsequent punishment for an offensive publication, like a suit for libel.
Rather, the statute proscribed any future publication, the same effect as
nonrenewal of a radio license. The Near Court thus found that the stat-
ute, in operation and effect, was “the essence of censorship,” and there-
fore invalid. 39

Consequently, although Dr. Schuler might have been liable for defa-
mation, contempt of court, or similar punishment for his broadcasts, the
Near opinion made clear that he should not have been denied a license
renewal because of past offensive programming. Unfortunately, the
Supreme Court denied certiorari in this case, 40 and waited for ten years,
until National Broadcasting Co. v. United States 41 to consider the first
amendment’s restriction on government regulation of broadcasting.

In the meantime, from its inception under the Communications Act of
1934, 42 the Federal Communications Commission, as successor to the
FRC, continued the policy of controlling the content of radio program-

Minnesota, 283 U.S. 697 (1931) had been decided the previous year but after the decision
in KFKB Broadcasting Ass’n v. FRC, 47 F.2d 670 (D.C. Cir. 1931). There was no
reason for the court of appeals in Trinity Methodist to follow KFKB instead of the major-
ity in Near.


40. See Trinity Methodist Church v. FRC, 288 U.S. 599 (1933). The court of ap-
peals’ failure to follow the Near majority, and the Supreme Court’s denial of certiorari in
Trinity Methodist are ultimately inexplicable. But see infra note 190. If the courts per-
ceived a difference between the print media and radio broadcasting, justifying the applica-
tion of different first amendment standards to each, they did so sub silentio. Except for a
passing reference in Trinity Methodist to “limited facilities” as a justification for the
FRC’s role in controlling program content notwithstanding the first amendment, see
Trinity Methodist, 62 F.2d at 852, there is no principled or reasoned discussion of the
distinctions between the two media that could lead to contrary conclusions. Perhaps,
however, the distinction lay in the unchallenged licensing system itself, which was ac-
cepted for radio, yet anathema for the press. Trinity Methodist, however, failed to distin-
guish proper consequences of licensing, such as technical regulations to reduce
interference and to maintain a system of broadcasting, from impermissible forays into the
realm of censorship. By the time of National Broadcasting Co. v. United States, 319 U.S.
190 (1943), it may have been too late for the Court to rethink this fundamental approach.

41. 319 U.S. 190 (1943). For a discussion of this case, see Winer, supra note 3, at
220-27.

& Supp. III 1985)).
The Commission, through its licensing power, informally coerced stations to keep their programming in line. Indeed, this coercive power may have persuaded broadcasters, as an industry, to regulate their own programming. In 1929, the National Association of Broadcasters ("NAB") promulgated a Code of Ethics proscribing the broadcast of any material that "would commonly be regarded as offensive" or that could be banned from the mails as fraudulent, deceptive or obscene. Until very recently, the NAB promulgated radio and television codes specifying standards of acceptable behavior for its members.

In 1939, the FCC tried to set general standards by listing fourteen kinds of program material or practices that it considered not to be in the public interest. A few years later, in 1946, the FCC followed with the "Blue Book," a comprehensive statement of FCC programming policy that also defended the authority for and propriety of judging the quality of licensee programming. This analysis was based on the legislative history of the 1927 and 1934 Acts, the administrative practice under these Acts and the decisions in KFKB, Trinity Methodist, and National Broadcasting Co. v. United States. The Blue Book then enumerated four major issues involved in the application of the public interest standard to program service policy.

The FCC's Programming Policy Statement of 1960, which updated

---

43. See generally C. Sterling & J. Kitross, supra note 20, at 189 (like the FRC, "the FCC . . . could decide whether a station's policies and programs were in the public interest").

44. See id. Between 1934 and 1941, for example, the Commission had to revoke only two licenses, and it failed to renew only eight. Id.


46. The NAB Code was eliminated as a result of a consent decree concluding a government antitrust action against the NAB. See United States v. National Ass'n of Broadcasters, 553 F.Supp. 621, 626 (D.D.C. 1982).

47. The fourteen categories were:

   (1) defamation, (2) racial or religious intolerance, (3) fortune-telling or similar programs, (4) favorable reference to hard liquor, (5) obscenity, (6) programs depicting torture, (7) excessive suspense on children's programs, (8) excessive playing of recorded music to fill air time, (9) obvious solicitation of funds, (10) lengthy and frequent advertisement, (11) interruption of "artistic programs" by advertising, (12) false, or fraudulent or otherwise misleading advertising, (13) presentation of only one side of a controversial issue—an early statement of the Fairness Doctrine and, (14) refusal to give equal treatment to both sides in a controversial discussion.

48. FCC, Public Service Responsibility of Broadcast Licensees (1946). This was dubbed the "Blue Book" because of the color of its cover.

49. Id. at 9-12.

50. See id. at 12-47. The issues were: (1) the carrying of sustaining (i.e. non-sponsored) programs to supplement standard commercial fare; (2) the carrying of local live programs; (3) the carrying of discussions of public issues; and (4) the elimination of commercial advertising excesses. Id. at 12-47.

this approach, accorded more deference to the first amendment and the
anticensorship provision of the 1934 Act. Citing Supreme Court deci-
sions confirming first amendment protection for films, the Commission
ostensibly disavowed any role in matters of taste or in deciding whether a
program is good or bad—apart from obscenity, profanity, and inde-
cency. Nonetheless, the FCC listed fourteen “major elements usually
necessary to meet the public interest” standard for service of a station’s
local community.

There are numerous other FCC rules, policies, and actions that im-
pinge significantly on the content of broadcast programming and, there-
fore, raise their own first amendment considerations. The fairness
decision and related rules governing political or electoral broadcasts
comprise probably the most significant and important of these. In addi-
tion, broadcasters’ programming freedom is limited in various categories
such as cigarette advertisement; drug-related song lyrics;

52. See id. 44 F.C.C. at 2306-10.
53. Id. at 2314. These included:
   (1) opportunity for local self-expression, (2) the development and use of local
talent, (3) programs for children, (4) religious programs, (5) educational pro-
grams, (6) public affairs programs, (7) editorialization by licensees, (8) political
broadcasts, (9) agricultural programs, (10) news programs, (11) weather and
market reports, (12) sports programs, (13) service to minority groups, and
(14) entertainment programs.

Id. at 2314.

The Commission, however, specifically referred to this list as “neither all-embracing
nor constant.” Id. The Commission repealed these categories for radio in 1981. See
Deregulation of Radio, 84 F.C.C.2d 968, 971 (rep. & ord.) reconsid. granted in part, 87
F.C.C.2d 797 (1981), aff’d in part, remanded in part sub nom. Office of Communication

54. See supra note 5. For a discussion of the doctrine and related rules, see Winer,
supra note 3, at 268-78.

55. At one time, the FCC applied the fairness doctrine to commercial advertising,
and thereby required presentation of the dangers of smoking to counteract cigarette
advertising. See WCBS-TV, 8 F.C.C.2d 381 (1967), aff’d sub nom. Banzhaf v. FCC, 405
to limit the application of the fairness doctrine to the smoking controversy, see Friends of
the Earth v. FCC, 449 F.2d 1164, 1169 (D.C.Cir. 1971) (requiring FCC to apply fairness
decision to automobile and gasoline advertising based on its application to cigarette
advertising), the FCC reversed its policy and excluded most commercial advertising from
the ambit of the fairness doctrine. See Fairness Doctrine Report, 48 F.C.C.2d 1, 22-28
(1974). The exceptions were “editorial advertisements” that do not merely sell products
but present a “meaningful statement which obviously addresses, and advocates a point of
view on, a controversial issue of public importance.” Id. at 22-23. This new policy was
sustained. See Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975),

Congress, however, entered the cigarette controversy in 1969 by making cigarette ad-
vertising illegal on “any medium of electronic communication” subject to FCC jurisdic-
1985) (regulating cigarette labeling and advertising). The ban was upheld in Capital
Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972), at a time when
communal speech, particularly in the form of advertising, was given little or no first
amendment protection. See, e.g., Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (mu-
municipal ordinance forbidding distribution of commercial handbills in the streets is constitutional. It has been argued that the ban on cigarette advertising has become unconstitutional in light of Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) and its progeny, which extend considerable constitutional protection to commercial speech. See Wuliger, The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban, 36 Fed. Comm. L.J. 1, 2 (1984). But see Posadas de Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2979-80 (1986) (in upholding statute and regulations restricting advertising of casino gambling the Court suggested that ban on advertising of harmful products, such as cigarettes, would not violate first amendment because products themselves may be regulated).

56. Whether regulation of liquor advertising in broadcasting or cable is consistent with the first amendment is still somewhat unsettled, despite substantial protection of commercial speech. Broadcasters and cable operators challenged an Oklahoma prohibition on television advertising of wine and alcoholic beverages other than beer. See Oklahoma Telecasters Ass’n v. Crisp, 699 F.2d 490, 492-93 (10th Cir. 1983), rev’d sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). The ban excluded media printed outside Oklahoma, but sold or distributed in state. See id. at 493 n.1. The Tenth Circuit upheld the ban, in part, because the previous year the Supreme Court had summarily dismissed a case with substantially identical merits. See id. at 497 (relying on Queensgate Inv. Co. v. Liquor Control Comm’n, 459 U.S. 807 (1982) (dismissing by memorandum for want of substantial federal question).

Only the cablecasters and not the broadcasters petitioned for certiorari. See Capital Cities, 467 U.S. at 696-97. The Supreme Court reversed, relying on federal preemption of cablecasting regulation without reaching the first amendment issue. See id. at 715-16. One week later, the Court continued to avoid this issue by declining to review a Fifth Circuit upholding a Mississippi law prohibiting the advertising of alcoholic beverages. See Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984). An Oklahoma district court, however, recently found that the Oklahoma ban on advertising violates the equal protection clause of the fourteenth amendment by discriminating between in-state and out-of-state advertisers. See Oklahoma Broadcasters v. Crisp, 12 Media L. Rep. (BNA) 2379 (W.D. Okla. 1986). In the wake of campaigns against drunk driving, there is renewed controversy over the propriety of broadcast or cable advertising of any alcoholic beverages and the use of counter-advertising messages. See, e.g., Beer-Wine Strategy Moves to Counterads, Broadcasting, May 27, 1985 at 70.

57. In 1971, the Commission admonished broadcasters, under the public interest standard, to make reasonable efforts to understand lyrics that allegedly glorify and promote illegal drug use, and to judge the wisdom of airing such music. See Licensee Responsibility to Review Records, 28 F.C.C.2d 409 (1971) (pub. notice). The clear import of the Notice was that licensees should remove lyrics that offend the Commission from programming, or risk sanction. See Yale Broadcasting Co. v. FCC, 414 U.S. 914, 915 (1973) (Douglas, J., dissenting from denial of certiorari). One Commissioner, however, called this attitude a blind attack, inspired by the Nixon Administration, on the youth culture, and an "unsuccessfully-disguised effort by the Federal Communications Commission to censor song lyrics that the majority disapproves of;... [it was] an unconstitutional action by a Federal agency aimed clearly at controlling the content of speech." See Licensee Responsibility to Review Records, 31 F.C.C.2d 377, 378 (1971) (Johnson, Comm’r, dissenting). The Commission immediately clarified its Notice, stating that it was not attempting to censor any particular record or class of records, with the possible exception of records creating a "clear and present danger." See Licensee Responsibility to Review Records, 31 F.C.C.2d 377, 378 (1971).

The Court of Appeals for the District of Columbia rejected a first amendment challenge to the FCC’s action. See Yale Broadcasting Co. v. FCC, 478 F.2d 594, 597-99 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973). Judge Bazelon, however, sought, sua sponte, a rehearing en banc because he thought that the Commission’s action could be construed as censorship. He also believed that the case presented the issue whether the FCC could regulate material that the first amendment would not allow to be regulated in
lotteries\textsuperscript{58}; contests\textsuperscript{59}; sponsorship identification\textsuperscript{60}; network programming and prime time access rules\textsuperscript{61}; and children's programming.\textsuperscript{62}

the print media. See id. 478 F.2d at 603-06 (statement of Bazelon, J.). Justice Douglas answered this question in the negative in his dissent from the denial of certiorari. See Yale Broadcasting Co. v. FCC, 414 U.S. 914, 916-17 (1973) (Douglas, J., dissenting from denial of certiorari).

The issue of offensive song lyrics is being raised again in the context of sexually explicit or suggestive material. See infra note 234.

58. A specific criminal statute bans broadcast of lottery information, except for state-run lotteries. See 18 U.S.C. §§ 1304, 1307 (1982); see also Communications Act, 47 U.S.C. §§ 312(a)(6), 312(b), 503(b)(1)(E) (providing sanctions for violation of § 1304); Broadcast of Lottery Information, 47 C.F.R. § 73.1211 (1986). The state lottery exception was added after the Third Circuit reversed an FCC ban on broadcasting a daily winning state lottery number. See New Jersey State Lottery Comm'n v. United States, 491 F.2d 219, 222-24 (3d Cir. 1974), vacated, 420 U.S. 371 (1975). The court was troubled by the censorship aspect of the FCC's ban. It reasoned that such information was news outside the criminal statute's scope, which it construed as limited to advertising and promotional material. See id. at 223-24. The Supreme Court granted certiorari. See United States v. New Jersey State Lottery Comm'n, 417 U.S. 907 (1974). After argument but before decision, Congress enacted 18 U.S.C. § 1307(a)(2) (1982), which exempted from the ban state lottery advertising and information broadcast in the lottery state or adjacent lottery states. The Supreme Court, therefore, remanded the case to consider whether it would moot. See United States v. New Jersey State Lottery Comm'n, 420 U.S. 371, 374 (1975) (per curiam). The Third Circuit, however, held that it was not moot because broadcasts in non-lottery states would still be barred thereby interfering with the dissemination of news. The court, therefore, reaffirmed its rejection of the FCC's construction of § 1304. See New Jersey State Lottery Comm'n v. United States, 34 Rad. Reg. 2d (P&F) 825 (3d Cir. 1975).

59. Stations are allowed to run contests and game shows subject to regulations requiring fairness in the games, disclosure of material terms and non-rigging. See 47 U.S.C. § 509 (1982); 47 C.F.R. § 73.1216 (1986); see also Broadcast of Station Contests, 37 Rad. Reg. 2d (P & F) 260 (1976). These are basically anti-fraud provisions that arose out of the scandals over rigged quiz shows. See generally S. Head & C. Sterling, supra note 23, at 209-11 (discussing the quiz show scandals of the 1950's).

60. Similarly, scandals over "payola" and "plugola", see S. Head & C. Sterling, supra note 23, at 375-76, led to disclosure requirements for any consideration paid or received for the broadcast of an advertisement or promotional or political message. See 47 U.S.C. §§ 317-508 (1982); 47 C.F.R. § 73.1212 (1986); see also Loveday v. FCC, 707 F.2d 1443, 1444 (D.C. Cir. 1983) (upholding FCC requirements that broadcast licensees identify the sponsors of paid political announcements), cert. denied, 464 U.S. 1008 (1984).

61. The Prime Time Access Rule (PTAR) requires that, subject to certain exceptions, network affiliates devote at least one of the four daily "prime time" hours to non-network programming. 47 C.F.R. § 73.658(k) (1986); see also Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382 (1970) (original PTAR); Consideration of Prime Time Access Rule, 44 F.C.C.2d 1081 (1974) (considering changes or recission of rule); Consideration of Prime Time Access Rule, 50 F.C.C.2d 829 (1975) (subsequent modifications of PTAR). The prime time hours are 7-11 P.M. Eastern and Pacific Time; 6-10 P.M. Central and Mountain Time. See 47 C.F.R. § 73.658(k) (1986).

The first version of the PTAR was challenged on statutory and constitutional grounds in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). The court held that the rules promote the first amendment goal of diversity and rejected an analogy to newspapers on the basis of the theory developed in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), that the peculiar qualities of each medium must be considered in applying the first amendment. See Mt. Mansfield, 442 F.2d at 477. Subsequent FCC action and court opinions have modified these rules while maintaining their basic structure, though with very mixed results. See National Ass'n of Indep. Television Producers
This Article, however, chiefly addresses control over programming that is potentially offensive as it concerns sexual matters in an arguably indecent way. In a prophetic passage from its 1960 Programming Policy Statement, the FCC asserted that the broadcast of nudity, profanity, or the depiction of sexual activity might raise serious questions, regardless of the propriety of such material in print. The Commission based this distinction on the accessibility of television and radio in the home and to children. Considering the broad context in which the FCC asserts considerable control over program content, one might think that proscribing sexually indecent broadcast material would be an a fortiori matter for the Commission. These issues, however, arose for the Commission contemporaneously with the Supreme Court's developing obscenity jurisprudence. Becoming entangled in that quagmire, the Commission vacillated as to its proper role. The controversy over indecent broadcast programming, therefore, has a particularly interesting history that is central to an understanding of Pacifica and the current, parallel dispute over cable indecency.

62. For a discussion of children's programming issues, see Winer, supra note 3, at 278-82.
63. See Programming Inquiry, 44 F.C.C. 2303, 2307 (1960). Specifically, the Commission stated:

[R]adio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature. . . . Thus, for example, while a nudist magazine may be within the protection of the First Amendment. . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464. . . . Similarly, regardless of whether the "4-letter words" and sexual description set forth in 'lady Chatterley's Lover',[sic] (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and Section 1464 questions.

Id.
64. See infra notes 87-91 & 320-25.
B. Control Over Sexually Explicit Broadcast Programming

1. Development of Obscenity and Indecency Jurisprudence

To appreciate the treatment of indecency in broadcasting by the Commission and the courts, it is necessary to keep in mind the underlying development of judicial approaches to obscene and indecent expression. Applying this background to the broadcasting context, one can argue that it should have been fairly easy for a majority of the Court in Pacifica to repudiate the FCC's heavy-handed sanction of that broadcast.

At about the same time that the FCC began to deal with particular incidents of alleged broadcast indecency, the Supreme Court first ruled, in Roth v. United States, that obscenity is not entitled to first amendment protection and thus began its long, continuing struggle to define obscenity. Nine years later in Memoirs v. Massachusetts, the Court attempted to refine the concept of obscenity. The result was so unsatisfactory that, between 1967 and 1973, the Court rendered at least thirty-one per curiam reversals of obscenity convictions whenever at least five Justices, applying their separate tests, found the material not obscene.

---


66. 354 U.S. 476 (1957). In the "fighting words" case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), however, the Court, in dictum, described the "lewd and obscene" as one of four categories of expression not entitled to first amendment protection. See id. at 571-72.

67. The lexicon of obscenity includes many variants such as "pornography" (hard- or soft-core), "filthy" or "dirty" expression, "indecency" and the like. Putting aside metaphorical implications of such variants, this Article reserves the term "obscenity" to describe that content or manner of expression that meets whatever legal test is in vogue for denying full first amendment protection. Even so, with its preoccupation with sex and excretion, see infra note 72, legal obscenity seems to overlap only partially with what could be considered obscene in the true, broad meaning of that word—"disgusting to the senses" or "grossly repugnant to the generally accepted notions of what is appropriate." Webster's Third New International Dictionary 1557 (5th ed. 1981). See Miller v. California, 413 U.S. 15, 18-19 n.2 (1973); see also infra note 328. Perhaps this is why questions of obscenity have produced "a variety of views among the members of the Court unmatched in any other cause of constitutional adjudication." Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704-05 (1968) (citation omitted) (Harlan, J., concurring in part, dissenting in part). See Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting) ("No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated so much disharmony of views, and remained so resistant to the formulation of stable and manageable standards.").


69. The Roth test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957) (footnote omitted). Memoirs added two requirements to the dominant appeal to prurient interest. First, the material must be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." Second, a court must find that "the material is utterly without redeeming social value." Memoirs, 383 U.S. at 418.

70. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting).
Finally, in *Miller v. California* and four other cases decided the same day, a 5-4 majority announced the Court’s current tripartite definition of obscenity.

Thus, while the FCC and lower courts were dealing with broadcast indecency, they were guided by the Supreme Court’s position that obscenity is outside the protection of the first amendment and by its changing, abstract test for obscenity, which the Court itself had great difficulty applying. Yet, in most of the broadcasting cases, the FCC purported to act against material that was offensive or indecent, not against obscene material. Several other trends, therefore, that the Court developed in dealing with indecent expression are arguably more relevant.

First, the Court has maintained a fairly strict dichotomy between unprotected obscenity and all other expression, which is protected. It

---

72. The *Miller* test asks:
(a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

*Miller*, 413 U.S. at 24 (citation omitted). The other four cases are: United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-ft. Reels of Super 8mm Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); and Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973). In a few examples, the Court tried to indicate the sort of offensive representations or descriptions of sexual or excretory matters with which it was concerned. See *Miller*, 413 U.S. at 25-26; see also infra note 165.

73.  See infra Part I.B.2

In Stanley v. Georgia, 394 U.S. 557 (1969), the Court took obscenity one step in the same direction by holding that an individual may not be criminally prosecuted for possessing and viewing obscene material in his own home. See id. at 568. The Court, however, has shown no inclination to extend further protection for obscenity. See United States v. 12 200-ft. Reels of Super 8mm Film, 413 U.S. 123, 125-28 (1973) (declining to
therefore takes a permissive attitude toward offensive but nonobscene expression, even when inflicted in public on those who object. In Cohen v. California,75 for example, Cohen was convicted for wearing a jacket bearing the words “Fuck the Draft” in a courthouse corridor where there were women and children.76 The lack of any erotic content to Cohen’s jacket eliminated any question of obscenity, and the Court held that the state could not proscribe its nonobscene offensiveness.77 In Justice Harlan’s words, “one man’s vulgarity [often] is another’s lyric,” and “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”78

The next year, a divided Court vacated and remanded three cases,79 involving indecent language and “fighting words,” for reconsideration in light of Cohen and Gooding v. Wilson, 80 a “fighting words” case the

extend Stanley to importation of obscene material for private, personal use). The Oregon Supreme Court, however, has held that:

[characterizing expression as “obscenity” under any definition, be it Roth, Miller, or otherwise, does not deprive it of protection under the Oregon Constitution. . . . In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered “obscene.”


75. 403 U.S. 15 (1971).

76. Id. at 16. Cohen testified that his jacket was intended to express the depth of his feelings against the Vietnam War and the draft, thereby giving the case overtones of political speech. Id.

77. See id. at 25-26.

78. Id. at 25.

79. The three cases are: Rosenfeld v. New Jersey, 408 U.S. 901 (1972), in which the appellant was convicted under a statute prohibiting indecent and offensive language in public places that either might incite an immediate breach of the peace or, in light of the age and gender of the listeners and the setting, was likely “to affect the sensibilities of a hearer.” Id. at 904 (Powell, J., dissenting) (quoting State v. Profaci, 56 N.J. 346, 353, 266 A.2d 579, 583-84 (1970)). At a school board meeting in the presence of women and children, appellant on four occasions referred to school and town officials as “m—— f——.” Id.; Lewis v. City of New Orleans, 408 U.S. 913 (1972), in which a statute prohibiting the use of “obscene or opprobrious language” to a policeman on duty was applied to a mother who called police officers arresting her son “g— d— m—— f—— police.” Rosenfeld, 408 U.S. at 909-10 (Rehnquist, J., dissenting); Brown v. Oklahoma, 408 U.S. 914 (1972), in which Brown was convicted of using “obscene or lascivious language or word[s] in any public place, or in the presence of females.” See Rosenfeld, 408 U.S. at 911 (Rehnquist, J., dissenting). At a meeting in a university chapel, he referred to policemen as “m—— f—— fascist pig cops” and “black m—— f—— pig.” See Rosenfeld, 408 U.S. at 911.

Chief Justice Burger and Justice Blackmun, who had dissented in Gooding, also dissented in each of these cases, as did Justice Rehnquist, who had not participated in Gooding. Justice Powell, who also did not participate in Gooding, dissented in Rosenfeld but concurred in the results in Lewis and Brown. When Lewis returned to the Court in 1974, the conviction simply was reversed on overbreadth grounds. See Lewis v. City of New Orleans, 415 U.S. 130, 131 (1974). Justice Powell concurred in this disposition while the other three dissenters continued to object.

80. 405 U.S. 518 (1972). Gooding involved an anti-war picketer convicted under a Georgia statute proscribing “opprobrious words or abusive language, tending to cause a breach of the peace.” See id. at 519. In the course of struggling with policemen the picketer exclaimed, “‘White son of a bitch, I’ll kill you. . . . You son of a bitch, if you
Court had decided. The Court's approach of adhering to a strict and narrow definition of obscenity and tolerating all other offensive expression, even if indecent and public, was later confirmed in *Erznoznik v. City of Jacksonville*.

In *Erznoznik*, the manager of a drive-in movie theater was charged with violating a municipal ordinance against exhibiting a motion picture containing human nudity visible from any public street or place. The movie screen was visible from two adjacent streets and a nearby church parking lot. Although the ordinance clearly restricted material that was not obscene, the city claimed it could enforce it to suppress a nuisance as a legitimate exercise of the police power. The Supreme Court, however, invalidated the ordinance, rejecting the City's arguments that its action was permissible either to protect its citizens in general against "unwilling exposure to materials that may be offensive" or to protect children. Rather, the Court held that unwilling adult viewers could avert their eyes, and that the ordinance was overbroad as to children because not all nudity can be deemed obscene as to minors.

Contrary to this permissive trend, and perhaps indicative of the unsettled positions toward obscenity among the Justices, the Court, in parallel developments, began reducing protection for indecent but nonobscene expression in special circumstances. In *Ginsberg v. New York*, for example, the Court employed "variable concepts of obscenity" to reject a facial challenge to a New York statute making it a crime to sell directly to minors under seventeen material that is obscene as to them — that is, material "harmful to minors." The Court thus adjusted the definition ever put your hands on me again I'll cut you all to pieces." *Id.* at 519, n.1 (quoting from the indictment as set out in *Wilson v. State*, 223 Ga. 531, 534, 156 S.E.2d 446, 449 (1967)). The Court voided the statute on its face as overbroad and affirmed the federal district court's reversal of the conviction. *See id.* at 528.


82. *See, e.g.*, Eaton v. City of Tulsa, 415 U.S. 697, 699 (1974) (per curiam) (use of language "chicken shit" in courtroom testimony could not sustain a conviction for criminal contempt for insolent behavior in court.); *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973) (person who during a campus antiwar demonstration shouted, "We'll take the fucking street later (or again)" could not be charged under a disorderly conduct statute because this language was neither obscene, nor "fighting words," nor incitement of imminent lawlessness); *Papish v. Board of Curators*, 410 U.S. 667, 667, 671 (1973) (per curiam) (graduate student at state university, who was expelled for using the expression "m—— f——" in a publication to be distributed on campus, ordered reinstated). Again Justice Rehnquist, joined by the Chief Justice and Justice Blackmun, dissented in each case. *See Eaton*, 415 U.S. at 701; *Hess*, 414 U.S. at 109; *Papish*, 410 U.S. at 673.

83. 422 U.S. 205, 209 (1975).

84. *Id.* at 208, 212.

85. *See id.* at 211.

86. *See id.* at 213.

87. 390 U.S. 629 (1968).

88. *Id.* at 631-33. That *Ginsberg* is limited to distribution specifically aimed at minors
of obscenity to what it called "social realities." Consequently, the Court upheld regulation of material even though it did not meet the current obscenity standards for adults. The Court recently extended its particular concern for children by unanimously holding in *New York v. Ferber* that child pornography is not entitled to first amendment protection.

Similarly, in *Ginzburg v. United States*, a divided Court upheld a conviction based on material that was not itself obscene. In considering an alleged violation of a federal obscenity statute for mailing "nonmailable" material, the Court ruled that the "question of obscenity may include consideration of the setting in which the publications were presented." Thus, "pandering" by "purveying textual or graphic matter openly advertised to appeal to the erotic interest," the "'leer of the sensualist,'" and "a background of commercial exploitation of erotica solely for the sake of their prurient appeal," could convert otherwise nonobscene material into proscribable obscenity. Despite objections from dissenters, who question how such alchemy can be achieved by truthful advertising, particularly in light of increased protection for commercial speech, the Court has continued to apply this pandering concept, at least in close cases.

Finally, several Justices have developed a troublesome doctrine that potentially would allow broad regulation of indecent or offensive, but nonobscene, speech based upon the purported lack of value of such ex-

is clear from its egregious facts. A sixteen year old boy was enlisted by his mother to purchase two "girlie" magazines from a "mom-and-pop" luncheonette so that the owners could be prosecuted. *Id.* at 671-72. (Fortas, J., dissenting).

The Court adopted the concept of variable obscenity from a New York state case stating that "the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined." *Id.* at 636 (quoting Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 75, 218 N.E.2d 668, 671, 271 N.Y.S.2d 947, 952, appeal dismissed sub nom. Bookcase, Inc. v. Leary, 385 U.S. 12 (1966)). See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 85 (1960) ("Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults.").

89. See *Ginsberg*, 390 U.S. at 638.

90. The statutory test for "harmful to minors" was based on the obscenity standards in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), as applied to an audience of minors. See *Ginsberg* at 635-36. But the magazines were not obscene for adults, see *id.* at 634, and the Court avoided deciding whether they were obscene for youths under seventeen because plaintiff challenged the New York statute on its face and did not dispute the finding of obscenity. See *id.* at 636.

91. 458 U.S. 747 (1982); see also infra note 107.

92. *Id.* at 773-74.


94. *Id.* at 465 (quoting in part Roth v. United States, 354 U.S. 476, 495-96 (1957)).

95. *Id.* at 467-68. Defendant, for example, had sought for his magazine mailing privileges from the postmasters of the towns of Intercourse and Blue Ball, Pennsylvania. *Id.* at 467.

pression. This sliding scale of first amendment protection, which depends on the Justices' value judgments, originated from dicta in Justice Stevens' plurality opinion in *Young v. American Mini Theaters.* In that case, the Court upheld, against a vagueness attack, local ordinances that restricted where adult movie theaters could operate. A bare majority dismissed as insignificant the ordinances' possible deterrence of showing films protected by the first amendment. The Court, further, was not overly concerned about doubtful cases because "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."  

In a latter part of his opinion, joined only by the Chief Justice and Justices White and Rehnquist, Justice Stevens defended the content-based zoning restraint. He reasoned that, although erotic materials with some arguably artistic value could not be suppressed entirely under the first amendment, "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Justice Stevens, however, cited neither legal nor empirical evidence to support these propositions that he claimed were "surely" true and "manifest." Moreover, each proposition can be read as asserting only the familiar notion of a "central meaning of the First Amendment" revolving around political speech necessary for a self-governing, democratic society, and that all other expression pales in importance, though not necessarily in first amendment protection. Indeed, the four dissenting Justices in *Young* character-

---

98. Id. at 61. Justice Powell, who joined this part of Stevens' opinion, nonetheless disassociated himself from these remarks. See id. at 73 n.1 (Powell, J., concurring). See *infra* note 104.
100. *Young*, 427 U.S. at 70. But see *American Booksellers Assoc., Inc. v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985) (pornography, which influences social relations and politics on a grand scale and controls attitudes, as such is not "low value" speech), *aff'd mem.*, 106 S. Ct. 1172 (1986).
102. Compare A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948), in Political Freedom (1965) at 24-27 (suggesting a narrow scope to "political speech" entitled to first amendment protection) with Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255-57 (1961) (full protection of the first amendment extends over a wide range of "human communications from which the voter derives the knowledge, intelligence, sensitivity to human values"). But see A. Bickel, *The Morality of Consent*, 62-63 (1976) (first amendment should protect speech that serves to make the political process work, but not speech that undermines that process or constitutes a breach of an otherwise valid law); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 302, 304-22 (1978) (first amendment protects political speech—"speech that participates in the processes of democracy"—but does not protect non-political speech or anti-democratic speech); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20-35 (1971) (only speech that is explicitly political and, in addition, does not advocate forcible overthrow of the government or violation of any law should be constitutionally protected). See generally Redish, *The Value of Free Speech*, in Freedom of Expression I-
ized the Court's opinion as an "aberration," and specifically denied that the objectionable nature of the films diminished in any way their constitutionally protected status.

Justice Stevens has held tenaciously to this sliding scale valuation of speech to determine its constitutional protection. He has repeatedly attempted to portray a majority of his colleagues as agreeing with him. He has, however, been able to rely in this regard only on Chief Justice Rehnquist and former Chief Justice Burger. In Pacifica, when this issue was last squarely addressed, all the other Justices either specifically disavowed the sliding scale approach or ignored it.

86 (1984) (discussing the values free speech serves and the consequent constitutional protection to be given various forms of expression).

103. Young v. American Mini Theaters, 427 U.S. 50, 87 (1976) (Stewart, Brennan, Marshall, Blackmun, J., dissenting). But see Renton v. Playtime Theatres, Inc., 106 S.Ct. 925, 929-30 (1986), (invoking Stevens' plurality opinion in Young to uphold a zoning ordinance restricting the locations of adult movie theaters by finding that the ordinance was not aimed at the content of the films shown but at the "secondary effects" of the theaters on the community).

104. "The fact that the 'offensive' speech here may not address 'important' topics—'ideas of social and political significance,' in the Court's terminology—does not mean that it is less worthy of constitutional protection." Young, 427 U.S. at 87 (Stewart, Brennan, Marshall, Blackmun, J., dissenting). Justice Powell, concurring in part of the Court's opinion, also disagreed with the notion "that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." Id. at 73 n.1 (Powell, J., concurring).


106. See, e.g., FCC v. League of Women Voters, 468 U.S. 364, 412 n.4 (1984) (Stevens, J., dissenting) ("[O]nce again the Court embraces the obvious proposition that some speech is more worthy of protection than other speech") (emphasis added); Ferber, 458 U.S. at 781 (Stevens, J., concurring in judgment) ("[T]oday the Court accepts [my] view").

107. See FCC v. Pacifica Found., 438 U.S. 726, 761 (1978) (Powell, Blackmun, J.J., concurring); id. at 762-63 (Brennan, Marshall, J.J., dissenting); id. at 777-80 (Stewart, Brennan, White, Marshall, J.J., dissenting) (ignoring sliding scale approach and basing analysis on statutory construction of "indecent"). But see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 & n.5 (1985) (Powell, J.) ("We have long recognized that not all speech is of equal First Amendment importance.").

The Court's unanimity in New York v. Ferber, 458 U.S. 747 (1982), holding child pornography unprotected does not contradict the majority's disavowal of Stevens' sliding scale approach. Certainly those Justices who steadfastly and explicitly have opposed such an approach did not abandon that position sotto voce in Ferber. In fact, only 5 Justices joined the Court's opinion in Ferber. Further, Brennan and Marshall, concurring in the judgment, criticized the majority for labelling all materials affected by New York's child pornography statute as of de minimis first amendment value. See Ferber, 458 U.S. at 776-77 (Brennan, Marshall, J.J., concurring). Even Justice Stevens disagreed with the majority's view that the entire category of speech described in the statute is totally without first amendment protection. See id. at 781 (Stevens, J., concurring).

Moreover, Ferber should be viewed as a "conduct" case rather than a "speech" case. The Court makes clear that the New York statute at issue is aimed at the sexual abuse and exploitation of children. See id. at 759-60. On that basis, the Court will presumably allow states to interdict child pornography as the end product of such activities, even if by itself it is nonobscene expression, because the Court was persuaded that this may be the only practical way to attack the underlying problem. See id. at 759-62. Moreover, the Court suggested that simulation of child pornography by young-looking persons over the
Thus, when *Pacifica* reached the Supreme Court, the Court had an established, if not unanimous, approach to obscenity that easily precluded a finding that the Carlin monologue at issue was obscene. And, there was ample authority for affording first amendment protection to virtually all nonobscene expression, even if offensive, indecent, and public. The pandering element of *Ginzburg v. United States*, was not relevant in *Pacifica*, and the broadcast did not involve specific distribution directed to minors as in *Ginsberg v. New York.* Finally, the sliding scale approach enjoyed the firm support of only three Justices.

*Pacifica*, then, should have garnered a majority of the Court to reject FCC sanction of the broadcast. *Pacifica*, however, arose in the context of broadcasting, and this factor made all the difference. To appreciate why this was so, and how the Court inappropriately adapted the facts and casually relied on its own as well as administrative precedents, it is necessary to look at the colorful, but tentative, background of FCC regulation of indecency in broadcast programming.

2. Regulation of Broadcast Indecency

Specific instances of allegedly indecent language on radio did not become a significant problem for the Commission until the mid-1950's. At that time, it first considered indecent programming as one factor in determining the award of a new commercial television license between two competing radio stations. One station had broadcast certain recorded songs “in less than good taste” with some language that conveyed “a double meaning in its suggestive content” or was “vulgar.” The station objected to the finding of a lack of good taste. Moreover, it had the temerity to argue that, in fulfilling its role as an outlet for local self-expression, it had to consider minority groups, as well as majority tastes, to provide balanced programming. This challenge to the Commission’s authority failed. The Commission rejected the idea that it was barred

statutory age would be outside the reach of the statute, thereby demonstrating that it was more concerned with protecting children from being used in the underlying activity than with the resulting expression. See id. at 763. Further, the Court strained to note that child pornography that is not obscene retains first amendment protection if it does not involve live performances or visual reproduction thereof. Thus, for example, written depictions of children engaged in sexual activity, created without the actual use of children, remain protected. See id. at 764-65.


110. Nevertheless, prior to the 1950’s, the FRC denied renewal to some licensees because of specific broadcast language that was obscene, indecent or otherwise deemed not in the public interest. See Norman Baker (station KTNT) v. FRC, 5th FRC Ann. Rep. 78 (1931), notice of dismissal, 6th FRC Ann. Rep. 22 (1932); William B. Schaeffer (KVEP) v. FRC, 4th FRC Ann. Rep. 46 (1930), notice of dismissal, 5th FRC Ann. Rep. 73 (1931); see also Wolfe, Norman Baker and KTNT, 12 J. Broadcasting 389 (1968) (history of Norman Baker’s controversial broadcasting career and his on-air promotion of a cure for cancer). See supra note 24.


112. Id. The Commission cited no examples.
from examining programs "pander[ing] to any taste, however low," and awarded the new license to the other applicant.

This first confrontation over indecent language arose over the Commission's award of a new license to one of two competing applicants. This decision was committed to the Commission's discretion and, therefore, difficult to challenge. Nevertheless, the possible consequences of challenging the Commission's authority over indecent programming was not lost on licensees. In *Mile High Stations, Inc. v. FCC*, the radio station agreed to accept a cease and desist order in lieu of revocation proceedings as a result of its broadcast, over several weeks, of certain offensive remarks and sound effects. The Commission specifically based its authority to sanction the station on its finding that the language broadcast did not serve the public interest. It dismissed section 326, the anticensorship provision of the Communications Act, finding no protection for the sort of remarks at issue.

Licensees, however, soon began to challenge the Commission, particularly when it purported to act pursuant to 18 U.S.C. § 1464, a federal statute prohibiting "obscene, indecent, or profane language" in the medium of "radio communication." In the Palmetto Broadcasting Co. 118

---

113. *Id.* at 1113.
114. 28 F.C.C. 795 (1960).
115. See *id.* at 796-97. In an Appendix, the Commission gave some examples of the offending material, which included mildly suggestive comments by an announcer, poor jokes such as, "[D]id you hear about the guy who goosed the ghost, and got a handful of sheet," sound effects of a toilet being flushed, and on-the-air telephone conversations between the announcer and college or junior high school female students. *See id.* at 798. The Commission found it "especially deplorable" that the remarks in question, "offensive in any context," occurred on programs that included young people. *See id.* at 796. The station president admitted the poor taste in broadcasting the remarks but attributed them to one announcer who had violated station policy and had been fired. *See id.*
116. See *supra* note 19.
118. This section reads in full: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1982).

Such a prohibition originally was part of the anticensorship provisions—§ 29 of the Radio Act and § 326 of the Communications Act—but was moved to the criminal code by the 1948 general recodification of federal criminal law. See *Gagliardo v. United States*, 366 F.2d 720, 723 (9th Cir. 1966); Pub. L. No. 772, 80th Cong. 2d Sess. 1948, ch. 645, 62 Stat. 769. Nonetheless, the Communications Act retains several sanctions for violation of § 1464 such as fines, see 47 U.S.C. § 503(b) (1982 & Supp. III 1985), and license revocation, 47 U.S.C. § 312(a) (6) (1982). This raises the issue of a federal agency imposing sanctions for the alleged violation of a criminal statute without any criminal proceeding, let alone a conviction. *See infra* note 191.

Even cable is now subject to statutory restrictions on obscene, indecent, and profane material. *See infra* notes 261-81 and accompanying text. Further, "radio communication" in § 1464 probably includes television. *See 47 U.S.C. § 153(b) (1982) ("'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds'"). Ironically, the reference in § 1464 to the described language probably leaves visual images on broadcast television unrestricted by the statute. *See* 131 Cong. Rec. S 5543 (daily ed. May 7, 1985) (Letter of Stephen S. Trott, Assistant Attorney General, Criminal Division to Senator Jesse Helms, dated May
license renewal proceedings, the radio station argued that only a court could find a violation of a criminal statute such as section 1464. The Commission asserted it could make such a finding. It then avoided the issue by construing the statutory categories of obscene or indecent not to include the language in question, which was merely "coarse, vulgar, suggestive and susceptible of indecent, double meaning." Instead, the Commission purported to act under the public interest standard, and cited KFKB Broadcasting Association v. FRC and Trinity Methodist Church v. FRC to reject the argument that it could not constitutionally consider, in a license renewal proceeding, the broadcast of "smut and patent vulgarity" unless it rose to the level of obscenity under section 1464. Thus, at this stage, the Commission eschewed section 1464 and established instead the standard of "flagrantly and patently offensive" to determine what, in addition to the statutory categories of obscenity or indecency, is contrary to the public interest.

The Commission soon had a chance to apply this standard in a 1964 case. This case involved the Pacifica Foundation's radio broadcast

24, 1984); see also Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 424 (1975). But see 18 U.S.C. § 1465 (1982), (prohibiting the interstate transportation of obscene material, which arguably could apply).


120. See id. at 255. The Commission relied on a footnote in FCC v. American Broadcasting Co., 347 U.S. 284, 289 n.7 (1954), which suggested that the FCC could consider a license applicant's violation of a federal criminal statute designed to bar certain conduct by licensees. See id. at 255 n.7; see also Violation by Applicants of Laws of United States, 42 F.C.C.2d 399, 401 (1951) (reaffirming FCC authority to consider unlawful behavior by license applicant). The FCC, however, acknowledged its uncertainty in applying § 1464 due to the dearth of court decisions construing it. See Palmetto, 33 F.C.C. at 256 n.7.

121. Palmetto, 33 F.C.C. at 255. Some of the material in question concerned use of nicknames for certain towns—"Ann's Drawers" for Andrews, "Bloomersville" for Bloomville—use of the phrase "let it all hang out," a joke about an outhouse being worn out from use, and the line, "Careful drivers can have accidents. Careful boyfriends can have accidents too." Id. at 278-79 (initial decision of Hearing Examiner).

122. 47 F.2d 670 (D.C. Cir. 1931). See supra notes 26-29 and accompanying text.

123. 67 F.2d 850, cert. denied, 288 U.S. 599 (1933). See supra notes 30-40 and accompanying text.

124. Palmetto, 33 F.C.C. at 256-57. The Commission believed it would not run afoul of either 47 U.S.C. § 326 (1982), prohibiting censorship of radio by the FCC, or the first amendment so long as it did not attempt to establish itself as a national arbiter of taste, substituting its judgment or preference for that of a broadcaster or the public. See id. at 257.

125. See id. at 257. The Commission also alluded to the special circumstance of applying its standard in the broadcast field. Id. at 257. It referred to its earlier discussion of the problem of exposing "[t]he housewife, the teenager, [or] the young child" to patently offensive radio programming. Id. at 256.

126. Pacifica Found., 36 F.C.C. 147 (1964). Pacifica was seeking an initial license for one radio station, renewal of licenses for others, and consent to transfer of control of the Foundation. See id. at 147.

127. The Pacifica Foundation is an educational, non-profit corporation established in 1949 on pacifist ideals. It owns and operates radio stations in Berkeley, Los Angeles, Houston, New York City and Washington, D.C. Although its stations are non-commer-
of material such as poems authored and read by Lawrence Ferlinghetti, a reading of Edward Albee's play "The Zoo Story," a discussion by eight homosexuals of their attitudes and problems, and other literary readings. In a footnote, the Commission reaffirmed its ability to enforce section 1464 but found that unwarranted here. The Commission disavowed a role under the public interest standard to decide matters of licensee taste or judgment. It contrasted Pacifica's broadcasts with Palmetto's substantial pattern of patently offensive operation with no redeeming features serving the needs of the broadcast audience. Because, in the Commission's view, serious literary and social content distinguished Pacifica's broadcasts, most of the material, though provocative and possibly offensive to some, fell clearly within the wide discretion afforded to a licensee. Pacifica, however, admitted that some passages did not measure up to its own standards of good taste and successfully explained the lapses so as not to bar license renewal.

This early Pacifica Foundation case marks a more tolerant approach by the Commission toward unconventional and potentially offensive programming. Indeed, a remarkable feature of the case is that, despite its blatant value judgment, the FCC was the champion of free speech, while the broadcasting industry was singular in its lack of support for Pacifica. The ACLU, the New York Times, and many others rallied behind Pacifica, but major broadcasting representatives, such as the NAB and Broadcasting magazine, were silent. More ironic still, it soon fell to several Commissioners to excoriate the NAB and other major broadcasting interests for being overly concerned with commercial matters while failing to support fundamental free speech issues raised by Pacifica and

---

128. See Pacifica Found., 36 F.C.C. at 147. Two other issues in the proceeding were possible Communist Party influence over Pacifica and an unauthorized transfer of control, both of which the Commission resolved in Pacifica's favor. See id. at 151-52.

129. Id. at 148 n.1.

130. Id. at 148-49. Pacifica also had taken care to broadcast, with one minor exception, this material only after 10 P.M. thereby minimizing the number of children in the audience. Id. at 147.

131. Id. at 150. The following year, however, the Commission granted only short-term (one-year) renewal for several of Pacifica's stations for Pacifica's failure to conform to its own program supervisory policies and procedures. See Pacifica Found., 6 Rad. Reg. 2d (P & F) 570, 571 (1965).

132. See Barton, The Lingering Legacy of Pacifica: Broadcasters' Freedom of Silence, 53 Journ. Q. 429, 431-32 (1976). Commercial broadcasters apparently were reluctant to be associated with the controversy. Moreover, they were not too concerned with preserving the right of an entity like Pacifica to present diverse, unconventional programming not found on most commercial stations. So even though this decision ultimately favored the licensee, it did not come until after a long battle with an unavoidable chilling effect on Pacifica and other broadcasters. See Not., Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards, 84 Harv. L. Rev. 664, 667-71 (1971).
similar, small unconventional stations.\textsuperscript{133}

This more tolerant approach was short-lived, however, as changes in the Commission by a new administration led to a campaign to clean up the airways,\textsuperscript{134} though not without dissent from some Commissioners. In January, 1970, an award-winning noncommercial educational radio station in Philadelphia broadcast an interview with Jerry Garcia, leader of "a California rock and roll musical group," the Grateful Dead.\textsuperscript{135} Garcia's comments, broadcast from 10 to 11 P.M., "were frequently interspersed with the words 'f-k' and 's-t,' used as adjectives, or simply as an introductory expletive or substituted for the phrase, et cetera."\textsuperscript{136} Neither the Commission nor the station received any complaints about the program, but the Commission had monitored the broadcast and initiated proceedings on its own motion to assess a forfeiture.\textsuperscript{137}

This case, \textit{WUHY-FM, Eastern Educational Radio}, is the predicate for the Supreme Court's \textit{Pacifica} decision because the Commission deliber-

\begin{itemize}
  \item \textsuperscript{134} Beginning with his appointment as FCC Chairman by President Nixon in Fall, 1969, Dean Burch stressed his particular concern about obscene or indecent programming on the airwaves. In a \textit{Meet the Press} interview on January 25, 1970, he stated that "there are certain words that have no redeeming social value." Jack Straw Memorial Found., 21 F.C.C.2d 833, 837 (1970) (Cox, Comm'r, dissenting) (quoting \textit{Meet the Press} interview with Chairman Burch Jan. 25, 1970) (emphasis omitted). He then said that the Commission had abandoned drafting a list of such proscribed words, which he thought was itself an obscene document, because language has to be considered in context. As a result, the list alone would be unintelligible. See \textit{id}. For a description of the Nixon Administration's antagonistic attitude toward the broadcast media in general, and network news in particular, see Whiteside, \textit{Annals of Television: Shaking the Tree}, The New Yorker, Mar. 17, 1975, at 41. Whiteside, however, notes that Burch attempted to conduct the Commission's work in a competent and fair fashion. \textit{See id.} at 78.
  \item \textsuperscript{135} WUHY-FM, E. Educ. Radio, 24 F.C.C.2d 408, 408 (1970). A dissenting Commissioner tellingly described his colleagues' estrangement from the lifestyle and language of a younger generation: "To call The Grateful Dead a 'rock and roll musical group' is like calling the Los Angeles Philharmonic a 'jug band.' And that about shows 'where this Commission's at.'" \textit{Id.} at 422 (Johnson, Comm'r, dissenting).
  \item \textsuperscript{136} \textit{Id.} at 409. The interview was one of a series of "underground" programs, intended for college-age people, dealing with the avant-garde movement in music and the arts. \textit{Id.} at 408 n.1.
  \item \textsuperscript{137} \textit{Id.} at 409 n.2, 418 (Cox, Comm'r, concurring in part and dissenting in part). The Commission had received some general complaints about WUHY's programming. It had, however, received far more complaints about major television network programs like the \textit{Smothers Brothers Comedy Hour} and the \textit{Rowan and Martin Laugh-In} than about programs on small noncommercial radio stations. Nevertheless, the Commission had never acted against any of the major broadcasters. See Jack Straw Memorial Found., 21 F.C.C.2d 833, 838-39 (1970) (Cox, Comm'r, dissenting) ("T]he Smothers, Rowan and Martin, and Carson shows have all involved patterns of material that some have found offensive, rather than the limited incidents at KRAB and the Pacifica stations.").
\end{itemize}
ately broke new ground in its legal analysis. The Commission continued to maintain that it could act under the public interest standard in clear-cut, flagrant cases such as the one before it. For the first time, however, the Commission also purported to enforce the criminal prohibition of section 1464. This was not because it considered the broadcast obscene. Indeed, the FCC conceded it was not obscene because it lacked a dominant appeal to prurient or sexual matters; rather, the broadcast was indecent.

The Commission’s standard for evaluating the broadcast material was the same, however, under either approach: whether the material was patently offensive under contemporary community standards and utterly without redeeming social value. The Commission also stressed that crucial differences between radio and other media affect the application of this standard to broadcasting. But the true animus behind the Commission’s action may have been its conviction that language like Garcia’s is wholly “gratuitous.” In other words, it “conveys no thought,” “fosters no debate,” “serves no social purpose” and is “not

138. See WUHY, 24 F.C.C.2d at 415.
139. See id. at 413-14.
140. In a previous citizen band license revocation proceeding, however, the Commission’s Hearing Examiner adjudicated a violation of § 1464 by applying some of the procedural and substantive standards of a criminal prosecution. See Warren J. Currence, 33 F.C.C. 827, 828 (1962) (requiring FCC to meet the stricter burden of proof of criminal cases) (initial decision of Hearing Examiner), aff’d, 34 F.C.C. 761 (1963) (decision of Review Board). The Hearing Examiner noted there was no direct precedent for interpreting “obscene” and “indecent” under § 1464, but relied on Duncan v. United States, 48 F.2d 128 (9th Cir.), cert. denied, 283 U.S. 863 (1931), which construed substantially identical language in § 29 of the Radio Act of 1927 as equating “indecent” with “obscene.” See Warren J. Currence, 33 F.C.C. at 833-34.
142. See id. at 413-14. The Commission asserted that these were the standards that it had applied in Palmetto. See id.; see also Palmetto Broadcasting Co., 33 F.C.C. 250, 257 (1960).
143. See WUHY, 24 F.C.C.2d at 411. These differences were that radio is disseminated generally to the public without the deliberate action that reading a book or going to a movie requires; it frequently comes directly into the home without advance warning of its content, so that even programs aimed at specific audiences may reach unintended listeners scanning the dial; and, any such audience may include a large number of children. See id. The Commission thus postulated that any significant broadcast of such material would cause people to avoid the radio or to stop browsing through the dial to avoid embarrassment and offense from an objectionable program. As a result, such broadcasts would curtail the usefulness of radio for millions of people. Id. The Commission believed such a result would be inconsistent with its statutory goal of encouraging “‘larger and more effective use of radio.’” Id. at 412 (quoting 47 U.S.C. § 303(g) (1982)).

On the other hand, as one Commissioner noted, “[i]t may be that using radio and television to help bridge the generation gap would be an example of ‘the larger and more effective use of radio.’” WUHY, 24 F.C.C.2d at 420 (Cox, Comm’r, concurring in part and dissenting in part). Commissioner Cox also thought it was unlikely that broadcasters, who make money by attracting audiences, would be so shortsighted as to drive listeners away from radio by filling the airwaves with widely offensive programming. Id. at 422 (Cox, Comm’r, concurring in part and dissenting in part).
essential to the presentation of the subject matter."

The WUHY case encompassed all the elements of the broadcast indecency debate that would resurface in Pacifica. The Commission, however, recognized that there was no judicial or administrative precedent for its position. In particular, there was no support for distinguishing "indecent" in section 1464 from "obscene," or for the Commission's authority to control indecency, which could be settled definitively only by the courts. Having initiated the proceedings on its own motion, the Commission then specifically invited judicial review as a test case. But the station simply paid the modest fine and did not appeal, probably because of financial hardship.

A few years later the Commission got its desired court opinion that established the only direct judicial precedent for Pacifica. The case arose from the Commission's attempts in the Spring of 1973, motivated and supported by Congressional pressure, to censor the developing phenomenon of so-called "topless radio." The shows quickly became very

---

144. Id. at 412-13, 415. At least one of the Commissioners, however, recognized that Garcia's choice of words might not have been totally divorced from the content of what he was saying. While agreeing that the language was offensive to many he noted that it might have been difficult for Garcia to express the same ideas in more conventional terms. Id. at 418-19 (Cox, Comm'r, concurring in part and dissenting in part). Another Commissioner cited Professor Ashley Montague for the proposition that such speech "serves clearly definable social as well as personal purposes." See id. at 424 (quoting A. Montague, The Anatomy of Swearing 1 (1967)); cf. Cohen v. California, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

145. See WUHY, 24 F.C.C.2d at 412-13. As Commissioner Johnson put it, "[T]here are no judicial precedents, no law review articles, no FCC decisions, and no scholarly thinking that even attempt to define the standards of permissible free speech for the broadcasting medium." Id. at 424-25. (Johnson, Comm'r, dissenting). But see supra note 140.

146. See WUHY, 24 F.C.C.2d at 421 (Cox, Comm'r, concurring in part and dissenting in part). Indeed, the Commission stated it was imposing a nominal forfeiture of $100.00 to preserve the availability of review, which would have been unavailable if the Commission simply acted prospectively. See id. at 414-15.

147. As the dissent put it, instead of considering the impact that the major television networks have on the moral values of the country, the Commission was "picking on little educational FM radio stations that can scarcely afford the postage to answer our letters, let alone hire lawyers." See WUHY-FM, E. Educ. Radio, 24 F.C.C.2d 408, 423 (Johnson, Comm'r, dissenting) (1970); see also supra note 137. Commissioner Johnson called on the Federal Communications Bar Association, and the broadcasting industry in general, to overcome their greater interest in profitable speech rather than free speech and vigorously to enter amici appearances if there was an appeal. See id. at 424-25.


149. "Topless radio" consisted of telephone talk shows appealing largely to housewives and other women. Such shows included explicit discussions of sexual techniques and related matters. Various licensees developed such programming including major entities like Storer Broadcasting Company, Metromedia Broadcasting Company and Sonderling Broadcasting Corporation. See Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 408 (D.C. Cir. 1975) (statement of Bazelon, C.J.); Sonderling, 27 Rad. Reg. 2d (P & F), at 285-86, 290 n.4 (examples of the programming); see also infra note 155.
popular, even "top rated," but generated a number of listener complaints.  

The Commission mounted an orchestrated attack on "topless radio" that included an intimidating address by FCC Chairman Dean Burch to the NAB's annual national convention. As a result, broadcast stations immediately banned virtually all sexual discussions from their talk shows to avoid further problems. For one station, however, it was too late. The FCC issued a Notice of Apparent Liability to Sonderling Broadcasting Corporation and proposed a $2,000 forfeiture.  

The Commission stressed that sex per se is not a forbidden subject for the broadcast media, particularly in works of dramatic or literary art. Moreover, it eschewed any censorship role under the public interest standard. Instead, the Commission, relying on its power to enforce section 1464, found the Sonderling broadcasts obscene under the Roth and Memoirs standards, together with guidelines from Ginzburg. It did not view the broadcasts as serious discussions of sexual matters but as "titillating, pandering exploitation of sexual materials."  

On one level, then, the Commission's action was not too problematic because it simply purported to find obscenity pursuant to current Supreme Court standards and censor such material under the perceived authority of section 1464. The Commission, however, clearly applied the obscenity test in light of the special qualities of the broadcast medium.

150. Sonderling, 27 Rad. Reg. 2d (P & F) at 297 (Johnson, Comm'r, dissenting) (citing a television columnist for the Chicago Tribune).
152. For a detailed description of this attack, see Illinois Citizens, 515 F.2d at 407-10 (statement of Bazelon, C.J.).
153. See id. at 408. The convention passed a resolution deploring "tasteless and vulgar program content." Id.
154. See id. at 409. The Commission asserted its sensitivity to allegations that it forced licensees to abandon controversial, but lawful, programming. Yet, it disingenuously maintained that such changes were independent programming decisions like those routinely made by the licensees. The Commission also insisted that it was not mandating the immediate elimination of all sexual material from the air. See Sonderling, 41 F.C.C.2d at 783-84 (pet. for reconsid.).
156. See Sonderling, 27 Rad. Reg. 2d (P & F) at 290. The majority's assessment of the material was clear: "If discussions in this titillating and pandering fashion of . . . [oral sex] . . . do not constitute broadcast obscenity within the meaning of 18 U.S.C. § 1464, we do not perceive what does or could." Id.
that it had identified in _WUHY_. In so deciding the case, the Commission strangely maintained that the constitutional standards for obscenity—such as an appeal to prurient interest and lack of redeeming social value—could differ for the same material presented in different media. Instead, it could have taken the more plausible, if no less controversial, position that differences in the media allow different standards to determine what material can be regulated or banned.

Moreover, the Commission alternatively construed “indecent” under section 1464 as something less than obscene in the broadcast field. Thus, even if Sonderling’s broadcasts did not appeal to a prurient interest, they were patently offensive and without redeeming social value and, therefore, could be proscribed. The Commission’s action, therefore, again raised the issue of the scope of its power to censor. Recognizing the uncertainty and absence of judicial guidance, the Commission again explicitly “welcome[d] and urge[d] judicial consideration” of its action.

The resulting appeal by concerned citizens produced the first opportunity for substantive judicial review of the Commission’s policy toward obscene and indecent broadcast material. The court, however, largely ignored this opportunity. On the crucial issue of the obscenity of the

---

157. See _supra_ note 143 and accompanying text. The Commission reiterated that these special qualities are that broadcasting is a medium designed to be received and sampled ubiquitously and almost casually, as an “electronic smorgasbord” with free access to the home “without regard to age, background or degree of sophistication” of the listeners. See _Sonderling_, 27 Rad. Reg. 2d (P & F) at 288. While the Commission based its conclusion on the generally “pervasive and intrusive nature of the broadcast radio,” the potential for children in the broadcast audience made it an a fortiori matter. See _id._ at 290.

158. _Id._ at 288-89; _cf._ _id._ at 296 (Johnson, Comm’r, dissenting).

159. _See id._ at 292.

160. _Id._ at 293. A dissenting Commissioner, however, challenged the Commission’s finding of obscenity, and its special treatment of the broadcast medium. He further challenged the notion that nonobscene, but “indecent,” material could be regulated unless it was impossible for an unwilling listener to avoid exposure to it. He even took issue with the propriety of Commission rather than judicial action, with the consequent “Big Brother” chilling effect from such action by the licensing agency. _See id._ at 294 (Johnson, Comm’r, dissenting).

161. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975). Although Sonderling vehemently protested the Commission’s decision, it paid the forfeiture stating that it could not sustain the tremendous financial burden of testing the constitutional issues involved. _Id._ at 410 (statement of Bazelon, C.J.) (quoting letter from Sonderling to FCC). Thus, the Illinois Citizens Committee for Broadcasting and the Illinois Division of the ACLU pursued the matter, thereby creating some procedural difficulties in obtaining review of all relevant issues. _Id._ at 403.

162. In an intervening reconsideration the Commission disavowed any broad chilling effect and tried to dispel the notion that it was intent on censoring all material dealing with sex. _See Sonderling Broadcasting Corp., 41 F.C.C.2d 777, 783-84 (1973) (pet. for reconsid.). But see Illinois Citizens, 515 F.2d at 421 (statement of Bazelon, C.J.) (according little weight to FCC’s assertion that it did not intend broad self-censorship of broadcasting by its decision in _Sonderling_). The Commission also reaffirmed its finding of obscenity in the broadcast context under the new criteria announced by the Supreme Court in _Miller v. California_, 413 U.S. 15 (1973), which had been decided just after the Notice of Apparent Liability in _Sonderling_. _See Sonderling_, 41 F.C.C.2d at 782 n.14.
broadcast, the court upheld the Commission's finding in a curious way. Although the Commission originally had found the program obscene under the Roth and Memoirs standards, the court held that the new Miller criteria, which it recognized both expanded and contracted the definition of obscenity, controlled. The court, however, then affirmed the Commission's action which, in fact, complied with neither the Roth/Memoirs standards nor the new Miller standards. Indeed, in a forceful and lengthy statement explaining why he would grant rehearing en banc, Chief Judge Bazelon castigated the court for its numerous errors, most notably the failure to recognize as blatant censorship the Commission's general attack on all sex-oriented talk shows. To the Chief Judge, the Commission's action "illustrated a whole range of 'raised eyebrow' tactics" of FCC regulation, instances of which were "legion."

Initial judicial review of the Commission's attempts to control sexually oriented broadcast programming as either obscene or indecent thus left the Commission in a very tenuous and unstable position. Nothing prior to Pacifica established a satisfactory legal basis or policy for dealing with such programming. A case like Pacifica, therefore, was bound to reach the Supreme Court before too long. Unfortunately, Pacifica also failed to produce anything approaching a well-defined or well-reasoned standard for the broadcast media.

163. Significantly, because the court upheld the finding of obscenity, it specifically declined to decide whether the Commission's interpretation and application of the term "indecent" under § 1464 was constitutional. See Illinois Citizens, 515 F.2d at 403 n.14.

164. See supra notes 66-70 and accompanying text.

165. As the court explained, Miller expanded the definition of obscenity by replacing the "utterly without redeeming social value" test with a lack of "serious literary, artistic, political or scientific value." Id. at 404. Yet, Miller contracted the definition by limiting it to materials that "depict or describe patently offensive 'hardcore' sexual conduct specifically defined by the regulating state law." Id. at 405 (quoting Miller v. California, 413 U.S. 15, 27 (1973)).

166. See Illinois Citizens, 515 F.2d at 406. The court, for example, declined to decide if the statutory specificity required by Miller was satisfied. It also found no problem, under either set of standards, in the Commission's failure to determine and to apply contemporary community standards. Finally, it approved the Commission's consideration of only a brief condensation of the offensive material apart from the context of the broadcast as a whole. See id. at 404-06; see also id. at 415-20 (statement of Bazelon, C.J.) (discussing the problems with a finding of obscenity under either the Miller or the Roth/Memoirs standards).

167. Judge Bazelon was not a member of the panel that heard the case and was the only one to vote for en banc consideration. See id. at 410 (statement of Bazelon, C.J.) (court made four groups of errors justifying rehearing en banc).

168. Id. at 407-08. For the origins of the "raised eyebrow" view of FCC regulation, see C. Ferris, F. Lloyd & T. Casey, Cable Television Law ¶ 3.11 n.5 (1985). Bazelon also suggested that the root of such overbearing regulation and censorship might be the comprehensive licensing scheme creating the pervasive threat of "sub rosa bureaucratic hassling." Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407, 425 (D.C. Cir. 1975) (statement of Bazelon, C.J.).
3. The Pacifica Case

On a weekday afternoon in October, 1973, Pacifica's New York City FM radio station WBAI broadcast George Carlin's monologue about "the words you couldn’t say on the public, ah, airwaves, um, and ones you definitely couldn’t say.”169 WBAI did not broadcast the monologue for its comedic value, but as an “incisive satirical” contribution to a listener call-in discussion of contemporary society’s attitudes toward language.170 Not everyone so regarded it. Although the broadcast had been preceded by a warning, one man, driving in Manhattan with his “young” son, heard at least a portion of the monologue over his car radio and complained to the FCC.171 As in WUHY,172 no one else complained either to the Commission or to the station.173 The Commission did not issue an order regarding the complaint until its Sonderling174 decision had been affirmed. Thus emboldened, the Commission used the Pacifica case to address the unabated problem of indecency on the air and to clarify the standards that it would apply to “indecent” language.175

The Commission based its decision on the analysis in WUHY and Sonderling as to perceived “unique qualities” of the broadcast medium that made it “not subject to the same analysis that might be appropriate

171. As in WUHY, no one else complained either to the Commission or to the station. See supra note 137 and accompanying text.
172. See supra note 137 and accompanying text.
175. The Commission issued a Declaratory Order as a “flexible procedure” to terminate the instant controversy and clarify the Commission's standard on indecency. At the same time, this allowed interested parties to seek reconsideration and judicial review. Pacifica, 56 F.C.C.2d at 99. The Commission did not impose sanctions on Pacifica. In a rather intimidating manner, however, it associated its order with the station's license file, for reference in light of any future complaint. See id.; Pacifica, 556 F.2d 20 n.7 (Bazelon, C.J., concurring).
176. The Commission simultaneously relied on Sonderling and its action against Pacifica in a report to Congress about actions it was taking to combat television violence and obscenity. See Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 424-25 (1975).
for other, less intrusive forms of expression." But because it was still unclear whether indecency was distinct from obscenity, and because the Sonderling court had left in limbo the appropriate obscenity standard for the Commission to apply, the Commission reformulated its concept of indecency.

Although its analysis was less than clear, the Commission first relied on the Miller standards as adapted by the Ginsberg notion of variable obscenity. It then indicated that these criteria would be measured in light of the "unique qualities" of the broadcast medium. The Commission also strongly suggested that indecent material should be unavailable even solely to adults, and totally barred such material from the airwaves if there was a wholly undefined risk of exposure to children. On this basis, and particularly because WBAI broadcast forbidden words repeatedly and deliberately in the early afternoon, when children "undoubtedly" were in the audience, the Commission readily concluded that the language "as broadcast" violated section 1464's ban on indecency.

For the first time, a licensee sought judicial review of the Commission's position on broadcast indecency. Once again, however, the court avoided the "perplexing question" whether the unique characteristics of radio and television allow the FCC to prohibit nonobscene speech. Instead, Judge Tamm, writing for a sharply divided panel,
discredited the Commission’s labelling of its ban simply as a channeling mechanism to protect children under a nuisance doctrine.\textsuperscript{186} The court then held the Commission’s Declaratory Order to be censorship in violation of section 326. Judge Tamm thus did not have to reach the difficult and unresolved issue of whether “indecent” in section 1464 could be defined more narrowly than “obscene.”\textsuperscript{187} Rather, even assuming that the Commission could act against non-obscene speech under section 1464, he relied on \textit{Erznoznick} and \textit{Cohen} to rule the FCC’s Order overbroad and vague in its application of section 1464.\textsuperscript{188}

On appeal, Judge Tamm’s reliance on the prohibition against censorship in section 326 was the opening wedge of Justice Stevens’ opinion for a bare majority of the Court. Based on the common origin and legislative history of section 326 and section 1464,\textsuperscript{189} Justice Stevens concluded that the statutory ban on censorship was inapplicable to the Commission’s authority to sanction obscene, indecent, or profane language. He reasoned further that the Commission’s subsequent review of program content, as opposed to prior review and editing, was not the censorship addressed by section 326.\textsuperscript{190}

\textit{Pacifica} Order in Illinois Citizens Comm. for Broadcasting, 515 F.2d 397, 418 n.48 (statement of Bazelon, C.J.), agreed with Judge Tamm’s result. \textit{See Pacifica}, 556 F.2d at 18. He also would have found a constitutional violation, rejecting broadcast indecency as an additional category of unprotected speech based on the supposedly unique characteristics of broadcasting. \textit{See Pacifica}, 556 F.2d at 24-25. (Bazelon, C.J., concurring).

Judge Leventhal, the third member of the panel, dissented because he construed the Commission’s Order as a narrow, limited one. He also viewed the Commission’s definition of indecency as the “functional equivalent,” in the broadcasting context, of the Supreme Court’s obscenity standard in \textit{Miller}. \textit{See id.} at 32 (Leventhal, J., dissenting).

\textit{Pacifica}, 556 F.2d at 14 (even if it is a “channelling mechanism,” the effect is censorship). The Commission’s nuisance doctrine was probably both inappropriate and outmoded. \textit{See Illinois Citizens Comm. for Broadcasting v. FCC}, 515 F.2d 397, 418 n.48 (D.C. Cir. 1977) (statement of Bazelon, C.J.), \textit{see also supra note 178}. It spawned, however, a porcine analogy whose odor has permeated this area. \textit{See Pacifica}, 56 F.C.C.2d at 98 (“The law of nuisance does not say, for example, that no one shall maintain a pigsty . . . [but] that no one shall maintain a pigsty in an inappropriate place . . . .”); \textit{Pacifica}, 556 F.2d at 17 (“The Commission’s Order is a classic case of burning the house to roast the pig.”); FCC v. \textit{Pacifica Found.}, 438 U.S. 726, 750-51 (1978) (“[W]hen 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.”); \textit{id.} at 766 (Brennan, Marshall, JJ., dissenting) (“‘burn the house to roast the pig’”) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)); Cruz v. Ferre, 755 F.2d 1415, 1420 n.6 (11th Cir. 1985) (In cable indecency case, “[I]f an individual voluntarily opens his door and allows a pig into his parlor, he is in less of a position to squeal.”).

186. \textit{Pacifica}, 556 F.2d at 15.
188. \textit{See id.} at 16-17.
189. \textit{See supra} note 118.
Although the Court may have correctly assessed the relationship between section 326 and section 1464, it completely ignored the substantial, well-recognized censorship effect of a raised FCC eyebrow, let alone a broad Declaratory Order. A licensee's relationship with the FCC is a wholly dependent one, and sanctions imposed on one broadcaster have a chilling effect on all others. Consequently, the Court surely was wrong in refusing to recognize the Commission's Order as a classic example of sweeping censorship, regardless of whether such action ultimately was upheld.

Having thus interpreted section 326, the Court turned to a consideration of section 1464 and the meaning of "indecent," particularly whether it is different from "obscene." This was the major issue on which the FCC, for some time, had sought judicial guidance but which had been previously avoided. Incredibly, in a few quick paragraphs, the Court wholly abdicated its responsibility for constitutional adjudication by relying on the Commission's "long interpret[ation of] § 1464 as encompassing more than the obscene." The Court thus bootstrapped the FCC's previous scant assertions as to the constitutional meaning of indecency, and its forthright requests for judicial guidance on this uncertain and troublesome issue, into authority to determine the very proposition put in question. More incredible still, the Court allowed the Commission's censure renewals in KFKB and Trinity Methodist, nonetheless created a substantial chilling effect on future programming of all broadcasters. See Pacifica, 556 F.2d at 20 n.7 (Bazelon, C.J., concurring); Illinois Citizens Comm. v. FCC, 515 F.2d 397, 422 n.59 (D.C. Cir. 1974) (statement of Bazelon, C.J.). See infra note 193.

191. See FCC v. Pacifica Found., 438 U.S. 726, 735 (1978). Even Bazelon agreed on this point. See Pacifica, 556 F.2d at 20 (Bazelon, C.J., concurring). The Court, however, brushed aside any issue of the Commission's power to impose civil penalties for violation of a criminal statute, see Pacifica, 438 U.S. at 739 n.13, which is far more problematic. See Pacifica, 556 F.2d at 20 n.7 (Bazelon, C.J., concurring); Illinois Citizens Comm. for Broadcasting, 515 F.2d 397, 423 n.62 (statement of Bazelon, C.J.). The Commission has recently announced that, despite past exercise of concurrent jurisdiction to enforce § 1464, it now will "exercise greater restraint in this area" and defer, in obscenity cases, to local authorities. Video 44, 103 F.C.C.2d 1204, 1209-10 (1986) (mem. op. & ord.); see also infra note 232.

192. The Court simply ruled that the Commission's Declaratory Order, although specifically designed to clarify its general principles and standards as to indecent language, see Pacifica Found., 56 F.C.C.2d 94, 94-95 (1975), on reconside, 59 F.C.C.2d 892 (1976), rev'd, 556 F.2d 9 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978), was just a particular adjudication which was all the Court would review. See Pacifica, 438 U.S. at 734-35. The Court thus perpetuated what Chief Judge Bazelon had described as the most pervasive judicial error: failing to acknowledge and appreciate the entire, well-documented policy of Commission censorship by focusing instead on individual Commission actions in isolation. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 421-24 (D.C. Cir. 1977) (statement of Bazelon, C.J.) Cf. infra note 229.

193. Indeed, the Court itself acknowledged that the Commission's Order might lead some broadcasters to censor themselves. See Pacifica, 438 U.S. at 743.

194. See id. at 741 (footnote omitted).

195. Although the Court arguably was engaged simply in statutory construction of § 1464, the definition of "indecent," like the definition of "obscene," is really at the heart of the first amendment issues. For this reason, in an earlier case construing a similar statutory prohibition on obscenity in the mails, the Court interpreted the entire phrase...
interpretation to stand in the face of its own and other strong precedent to the contrary. In other words, the Court allowed what Chief Judge

See Hamling v. United States, 418 U.S. 87, 112 (1974) (quoting Manual Enters., Inc. v. Day, 370 U.S. 478, 482-84 (1962)). This language was, therefore, controlled by the Miller standards, and this assured the statute's constitutionality. See id. at 110-16. Moreover, with regard to a criminal statute such as § 1464, notwithstanding its relationship to civil penalties under the Communications Act, see supra note 191, there was no justification for the Court to defer to a regulatory agency's construction. Such deference was wholly inappropriate with regard to constitutional interpretation. See Pacifica Found. v. FCC, 556 F.2d 9, 22 n.12 (D.C. Cir. 1977) (Bazelon, C.J., concurring), rev'd, 438 U.S. 726 (1978); id. at 35 (Leventhal, J., dissenting); Illinois Citizens, 515 F.2d at 422 n.59 (statement of Bazelon, C.J.).

Indeed, just two months prior to its Pacifica decision the Court ruled: "Deferece to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . [O]therwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); see also Lowe v. SEC, 105 S. Ct. 2557, 2576, 2583-84 (1985) (White, Rehnquist, JJ., and Burger, C.J., concurring) (in striking down on first amendment grounds SEC's construction of Investment Advisers Act, the Court, not the SEC or Congress, has the duty to say what the law is); United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 130 n.7 (1973) (in obscenity cases, Supreme Court has "a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided'.") (citing United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971) (White, J.) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). Accord Johnson v. Robison, 415 U.S. 361, 367-68 (1974) (despite great deference to agency's statutory interpretation, " '[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies'") (quoting Oestereich v. Selective Serv. Sys., 393 U.S. 233, 242 (1968) (Harlan, J., concurring)). In an earlier broadcasting case, Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court stated:

In evaluating . . . First Amendment claims . . . we must afford great weight to the decisions of Congress and the experience of the Commission . . . . That is not to say we 'defer' to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

Id. at 102-03.


If and when such a "serious doubt" [as to constitutionality] is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California. . . .

Id. at 130 n.7 (emphasis added) (citations omitted). See Marks v. United States, 430 U.S. 188, 195 (1977) ("sweeping" language of federal obscenity statute confined within constitutional limits); Dunlop v. United States, 165 U.S. 486, 500-01 (1897) (approving jury instructions construing the language "obscene, lascivious, lewd or indecent" as having one meaning of moral depravity); Swearingen v. United States, 161 U.S. 446, 450-51 (1896) (statutory language prohibiting the mailing of "obscene, lewd or lascivious" mate-
Bazelon referred to “most charitably” in this precise context as the FCC’s “total ignorance of the constitutional definition of obscenity” to govern its own paramount role in interpreting and applying the first amendment.197

The Court thus allowed “indecent” to be distinguished from “obscene” by not requiring appeal to prurient interest as an element of indecency. It therefore followed that the Carlin monologue was indecent under section 1464, and the Court then turned to constitutional arguments.198 The Court, however, declined to consider the overbreadth of

rional construed as a single offense signifying immorality relating to sexual impurity and not encompassing merely coarse and vulgar language). See generally FCC v. Pacifica Found., 438 U.S. 726, 778 (Stewart, Brennan, White, Marshall, JJ., dissenting) (“indecent” under § 1464 properly should be read as meaning no more than “obscene”).

Lower federal courts had reached similar conclusions. See United States v. Simpson, 561 F.2d 53, 60 (7th Cir. 1977) (“‘obscene’ and ‘indecent’ in § 1464 are to be read as part of a single proscription”); see also Tallman v. United States, 465 F.2d 282, 285-86 (7th Cir. 1972) (section 1464 must be construed as harmonious with Roth to preserve its constitutional validity); United States v. Smith, 467 F.2d 1126, 1129 (7th Cir. 1972) (same); Gagliardo v. United States, 366 F.2d 720, 725 (9th Cir. 1966) (failure to define the word “indecent” in § 1464 was reversible error); United States v. Bennett, 24 F. Cas. 1093, 1103 (S.D.N.Y. 1879) (No. 14,571) (approving jury instructions that essentially identified “indecent” and “obscene”).

Finally, at least two Commissioners had expressed grave doubts about the constitutionality of a standard as vague as “indecent” under § 1464. See WUHY-FM, E. Educ. Radio, 24 F.C.C.2d 408, 419 (1970) (Cox, Comm’r, concurring in part and dissenting in part); id. at 422-25 (Johnson, Comm’r, dissenting); Jack Straw Memorial Found., 21 F.C.C.2d 833, 834 (1970) (Cox, Comm’r, dissenting); see also supra note 140.


The Court distinguished Hamling and the other substantial authority for equating “indecent” with “obscene” by finding them inapplicable to § 1464 because of the special meaning the first amendment supposedly has in the broadcasting context. See Pacifica, 438 U.S. at 741-42 n.17. But the cases the Court cited for this proposition all relied squarely on the perceived scarcity of the electromagnetic spectrum as the basis for special first amendment treatment of broadcasting. See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 779-800 (1978); Columbia Broadcasting Sys., v. Democratic Nat’l Comm., 412 U.S. 94, 101 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969). The scarcity rationale, however, not only is irrelevant to the issue of censorship presented in Pacifica, but is antithetical to it. Scarcity and the concommittant need to ensure diversity of expression support an end to FCC censorship and a multiplicity of all types of expression on the airwaves, rather than censorship. See Pacifica, 556 F.2d at 29 (Bazelon, C.J., concurring); FCC v. Pacifica, 438 U.S. 726, 770 n.4 (1978) (Brennan, Marshall, JJ., dissenting). Indeed, in their dissent Justices Brennan and Marshall decried the majority’s “acute ethnocentric myopia” that prevented it from appreciating the “cultural pluralism” in this country, thereby allowing majoritarian tastes to silence diversity of expression. See id. at 775 (Brennan, Marshall, JJ., dissenting).

The Court in Pacifica is commonly thought not to have relied on scarcity as a rationale, which clearly would have been misplaced. See id. at 770 n.4 (Brennan, Marshall, JJ., dissenting). In fact, however, the majority indirectly invoked that rationale at a critical point in an inappropriate attempt to distinguish otherwise controlling precedent. See id. at 741-42.

198. See Pacifica, 438 U.S. at 742-51. Only Justice Rehnquist and Chief Justice Burger joined Justice Stevens’ full discussion here. The remaining members of the majority, Justices Powell and Blackmun, concurred in the conclusion that the Commission’s Order did
section 1464 on its face, because as "indecency is largely a function of context," it limited itself to reviewing the Commission's actions as to the particular broadcast.\textsuperscript{199}

Regarding the constitutionality of regulating nonobscene, indecent broadcasting, Justice Stevens purported to narrow the issue to the facts of the case. He then, however, framed the question in the broadest possible terms: "whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances."\textsuperscript{200} As a result, he easily concluded that the Constitution mandates no such absolute prohibition and that, instead, the context of the language is critical.\textsuperscript{201}

The context that Justice Stevens considered, however, was merely the generalized one of broadcasting's perceived characteristics of unique pervasiveness and unique accessibility to children. Based on these considerations, sketched in one paragraph each,\textsuperscript{202} Justice Stevens concluded that broadcasting presents special first amendment problems that can be addressed by treating it differently than other media.\textsuperscript{203} This abbreviated rationale was enough for Justices Powell and Blackmun to join the majority, holding that the Commission may constitutionally regulate indecent, nonobscene broadcasting.\textsuperscript{204}

The Court thus not only wholly abdicated its proper role in statutory and constitutional interpretation, it also failed to support its conclusions with anything more than superficial analysis of the two basic rationales it asserted. Moreover, although virtually apologetic in emphasizing that its decision was confined to the facts and the program "as broadcast,"\textsuperscript{205} the Court ignored or misstated factors that, according to its own analysis, should have led to a different result.

With respect to the possible presence of children in the audience, the Court made no attempt to define "children." The Court also did not consider at what times any particular number of children might be listening and relate this factor to permissible FCC regulation.\textsuperscript{206} The Court,

---

\textsuperscript{199} See id. at 742; see also supra note 192.
\textsuperscript{200} Id. at 744 (emphasis added). Justice Stevens' apparent predilection is shown by his next sentence expressing his attitude toward the language in question: "For if the government has any such power, this was an appropriate occasion for its exercise." Id.
\textsuperscript{201} See id. at 747-48.
\textsuperscript{202} Id. at 748-50.
\textsuperscript{203} See id. at 750.
\textsuperscript{204} See id. at 755-62 (Powell, Blackmun, JJ., concurring). This concurrence expands somewhat on Stevens' analysis of the uniqueness of broadcasting.
\textsuperscript{205} See id. at 734, 750; id. at 773 (Brennan, Marshall, JJ., dissenting). The Court stresses the narrowness of its holding in one way or another no less than five times. See id. at 734-35, 738-39, 742, 744, 750.
\textsuperscript{206} Cf. Pacifica Found. v. FCC, 556 F.2d 9, 19 n.2 (1977) (Bazelon, C.J., concurring), rev'd, 438 U.S. 726 (1978). Judge Leventhal, dissenting from the Court of Appeals opinion, suggested that issue was not joined as to the Commission's determination that children were undoubtedly in the audience when the Carlin monologue was broadcast.
for example, ignored that the broadcast took place at 2 P.M. on a school day, when one reasonably might expect most children to be in school.\textsuperscript{207} Moreover, while acknowledging the paramount interest of parents' claims to authority in their own households,\textsuperscript{208} the Court did not distinguish children's general access to radio and television from children's \textit{unsupervised} access, which was the only relevant question.\textsuperscript{209} The Court therefore failed to recognize that its decision denigrated rather than supported the right of parents to control the upbringing of their children by supplanting parental discretion and authority with governmental fiat.\textsuperscript{210}

Instead, the Court impliedly relied on the variable obscenity doctrine in \textit{Ginsberg}.\textsuperscript{211} \textit{Ginsberg}, however, arose in the context of direct sale of objectionable material to minors.\textsuperscript{212} \textit{Pacifica}, conversely, dealt with a general, undifferentiated distribution of material intended for adults that could also be obtained by children.\textsuperscript{213} Justices Powell and Blackmun at least tried to deal with this distinction,\textsuperscript{214} but the plurality's opinion glossed over it.\textsuperscript{215} Thus the Court concluded in a footnote, contrary to common sense and long-standing principle, that the Commission's action

\begin{itemize}
\item id. at 37 n.17 (Leventhal, J., dissenting). But the issue certainly went to the heart of the vagueness and overbreadth of the Commission's Order, which was properly reviewable by the Supreme Court on first amendment grounds. \textit{See} id. at 17, 19 n.2 (Bazelon, C.J., concurring).
\item Current statistics show that the percentage of children of ages two to eleven in the television viewing audience has declined from 21\% in 1970 to 14\% in 1984. \textit{See} A.C. Nielsen Co., \textit{Nielsen Report on Television} 4 (1985). For statistics of the days and hours when teenagers and children are watching television, \textit{see} id. at 8-9. \textit{See infra} note 324.
\item Compare \textit{Pacifica}, 556 F.2d at 19 n.2 (Bazelon, C.J., concurring) (FCC's standards vaguely depend on when children may be in the audience) \textit{with} id. at 37 n.17 (Leventhal, J., dissenting) (issue not joined as to FCC's finding that children were undoubtedly in the audience).
\item 207. Compare \textit{Pacifica}, 556 F.2d at 19 n.2 (Bazelon, C.J., concurring) (FCC's standards vaguely depend on when children may be in the audience) \textit{with} id. at 37 n.17 (Leventhal, J., dissenting) (issue not joined as to FCC's finding that children were undoubtedly in the audience).
\item 209. Compare \textit{id.} at 770 (Brennan, Marshall, JJ., dissenting) (some parents might find exposure of their children to the Carlin monologue both healthy and desirable) \textit{with} \textit{Pacifica}, 556 F.2d at 34 n.6 (Leventhal, J., dissenting) (reference to the alleged prevalence of " latchkey children" who often are home alone during the day).
\item 211. \textit{See} \textit{id.} at 749-50; \textit{see also} \textit{supra} notes 87-90 and accompanying text.
\item 212. \textit{See} \textit{Ginsberg} v. New York, 390 U.S. 629, 632-33, 671-72 (1968); \textit{see also} \textit{supra} note 88.
\item 213. The Court also ignored the fact that \textit{Ginsberg} preceded \textit{Miller} and that the Court earlier had raised the question of what portion, if any, of \textit{Ginsberg} had survived \textit{Miller}. \textit{See} \textit{Erznoznik} v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975). The dissent in \textit{Pacifica} specifically raised this issue, \textit{see} \textit{Pacifica}, 438 U.S. at 767-68 (Brennan, Marshall, JJ., dissenting), that the majority ignored even in the face of a substantial argument that the \textit{Miller} standards incorporate the possibility of exposure to juveniles. \textit{See} \textit{Pacifica}, 556 F.2d at 28-29 n.30 (Bazelon, C.J., concurring); Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 418 n.48, 420 n.53 (D.C. Cir. 1975) (statement of Bazelon, C.J.). The problem deserved more careful treatment than the two sentences that the majority used to invoke \textit{Ginsberg}. \textit{See} \textit{Pacifica}, 438 U.S. at 749-50.
\item 214. \textit{See} \textit{Pacifica}, 438 U.S. at 758-59 (Powell, Blackmun, JJ., concurring).
\item 215. \textit{See} \textit{id.} at 749-50.
would not "reduce adults to hearing only what is fit for children."²¹⁶

The Court's discussion of the pervasiveness of radio, particularly in the privacy of one's home, is equally deficient. The Court distinguished an individual having to accommodate himself to public confrontation with indecent, offensive material, and the intrusion of such material into his home.²¹⁷ But the Court never analyzed whether radio is more properly considered an invader into the home or an invited guest. As the dissent put it, an individual's decision to switch on and listen to public broadcasting is a "decision to take part . . . in an ongoing public discourse."²¹⁸ Moreover, as the Court previously had noted, in contrast to other media "[t]he radio can be turned off."²¹⁹ The substantial first amendment inter-

²¹⁶. Id. at 750 n.28; see id. at 760-61 (Powell, Blackmun, JJ., concurring). But see id. at 768-69 (Brennan, Marshall, JJ., dissenting).


The Court's reliance on the availability of Carlin's message in other media for adults who wish to hear it, see Pacifica, 438 U.S. at 750 n.28; id. at 760 (Powell, Blackmun, JJ., concurring), was also factually inaccurate, see id. at 774-75 (Brennan, Marshall, JJ., dissenting), and legally inappropriate. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981) ("[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (quoting Schneider v. New Jersey, 308 U.S. 147, 163 (1939)). Accord Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (availability of alternative forum does not justify restriction on use of a public forum); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1410 (9th Cir. 1985) ("an otherwise invalid restriction on protected activity is not saved by the availability of other means of expression"), aff'd on narrower grounds, 106 S. Ct. 2034 (1986).

²¹⁷. See Pacifica, 438 U.S. at 748-49; see also id. at 759 (Powell, Blackmun, JJ., concurring).

Even so, the Court ignored that the issue of privacy in the home cuts both ways. On the one hand, if one considers broadcast indecency as being thrust on unwilling and embarrassed recipients, then it seems particularly egregious that this offense occurs in the home, where an individual should enjoy the greatest degree of privacy and serenity from the outside world. On the other hand, the momentary offense and embarrassment might be less because it occurs in the privacy of the home, rather than in public and in the company of others. Some people who would be uncomfortable sitting through an "X"-rated film in a theater might not hesitate to watch it at home. Thus, the social setting in which one encounters indecent language or pictures may have a considerable effect on one's offense and embarrassment. If this is true, then the encounter in private, at home, may be more tolerable than in public. See Pacifica Found., 56 F.C.C.2d 94, 107 n.8 (Robinson, Hooks, Comm'rs, concurring).


²¹⁹. Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)). The dissent, see Pacifica, 438 U.S. at 765-66 (Brennan, Marshall, JJ., dissenting), and the court of appeals, see Pacifica, 556 F.2d at 17; id. at 26 (Bazelon, C.J., concurring), made this point, thereby dispelling any notion of a 'captive audience' analysis applied to broadcasting. But see Pacifica, 438 U.S. at 759
ests at stake, therefore, easily should have outweighed the minimal inconvenience in switching off a receiver or changing the station. This is especially so because the problem of momentary discomfort from offensive broadcast language can be further mitigated, as it was in Pacifica, by a proper warning preceding the broadcast.

220. Because of the obvious self-help remedy available to an offended adult listener, the Court focused on the problem of momentary offense to an unwilling listener. See Pacifica, 438 U.S. at 748-49. But the Court was implicitly inconsistent in two respects. First, the Court several times stressed the repetition of the offensive language in Carlin's monologue. See id. at 729, 732, 739. The concurrence called it a "verbal shock treatment." See id. at 757, 761 (Powell, Blackmun, JJ., concurring). Although such repetition might marginally increase the probability that a random scanner landing on station WBAI would hear something that offended him, this probabilistic effect, which the Court never delineated, is far too theoretical and inconsequential. Rather, the repetitive nature of the monologue is irrelevant to the problem of momentary offense. The majority's emphasis of the repetition simply disguised its own value judgment of the material.

Second, the Court noted that a closed-circuit transmission might have required a different result and acknowledged that "[t]he content of the program . . . affect[s] the composition of the audience." Id. at 750. The Court, nevertheless, ignored the facts before it suggesting the likely nature of WBAI's audience. The broadcast was a serious adult program, not one designed to attract children. Further, because Pacifica's stations are listener-supported, the bulk of their regular audience is composed of subscribers who know and appreciate the sort of material that the stations broadcast. See supra note 127. Consequently, their audience is highly non-random and, in fact, approximates that of a closed-circuit transmission. Although these factors do not completely eliminate the possibility of others, including children, tuning in, they probably largely explain why the New York City broadcast elicited only a single complaint.

221. Justice Stevens dismissed as an inadequate remedy a listener's ability to turn off offensive programming. He compared that argument to "saying that the remedy for an assault is to run away after the first blow." Pacifica, 438 U.S. at 748-49. But the similar remedy of an unwilling viewer averting his eyes was central to the Court's decisions in Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) and Cohen v. California, 403 U.S. 15, 21-22 (1971). Moreover, Stevens' analogy entirely misses the point. There is no first amendment protection for assault and battery. There is, however, such protection for speech. It is precisely because we need to give speech far more breathing space than action that the Court consistently has developed and applied, as a matter of constitutional law, higher fault standards for speech torts than for other torts. See, e.g., Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (exhortations of violence cannot be punished unless intended and likely to produce imminent disorder); New York Times Co. v. Sullivan, 376 U.S. 254, 279-81 (1964) ("actual malice" standard for defamation of a public figure).

Justice Stevens also analogized that the ability to "hang up on an indecent phone call . . . does not give the caller a constitutional immunity or avoid a harm that has already occurred." Pacifica, 438 U.S. at 749. This comparison, however, fails to distinguish the voluntary decision to engage in the impersonal, public discourse of broadcasting from the substantially more intrusive nature of a private, unwanted telephone call initiated by another party. The one-to-one nature of the phone call has far more potential to be offensive and even threatening. The inappropriateness of Stevens' comparison is revealed by his citation to the very different problem of harassing debt collection methods by telephone. See id. at 749 n.27.

A far more apt comparison is with the recent development of so-called "dial-a-porn."
Instead of this sort of analysis, the Court cursorily relied on *Rowan v. United States Post Office,*\(^{222}\) for its pervasiveness/privacy argument.\(^{223}\) The Court in *Rowan* upheld a federal statute allowing a householder to require anyone who mails him advertisements for material the householder deems erotically arousing or sexually provocative to remove his name from mailing lists and cease all future mailings to the householder. Construing the statute as vesting complete and unfettered discretion solely in the addressee and thereby avoiding any semblance of governmental censorship, the Court rejected a constitutional attack on the statute. In doing so, the Court specifically analogized to the right of a radio or television viewer to twist the dial and thus stop an offensive or boring communication.\(^{224}\) *Rowan* thus undercuts rather than supports *Pacifica* because it affirms an individual homeowner’s autonomy and exercise of discretion, exemplified by his control over radio; it does not, however, support any feature of government censorship.\(^{225}\)

Finally, although the Court heavily emphasized the context of the program “as broadcast,”\(^{226}\) it failed to consider it as heard. The complainant listened to the program not in a home but in a car where an adult is normally present and where the Court, in other contexts, consistently has

---


\(^{223}\) *Pacifica,* 438 U.S. at 731 n.2.

\(^{224}\) *See Rowan,* 397 U.S. at 737.


maintained that the expectation of privacy is considerably less than in the home. Hence, the Court's decision led to an absurd conclusion. Complainant and his son were entitled to be completely protected from even momentary exposure to the Carlin monologue on the car radio; immediately changing stations or turning off the radio was not a sufficient remedy. Yet, if they stopped in front of Cohen as he crossed the street wearing his emblazoned jacket, or if they drove past Erznoznick's outdoor movie theater, the first amendment would demand that they just avert their eyes or otherwise accommodate themselves to the unwanted offense.

Perhaps the unsupported result in Pacifica was to be expected. The case involved a sensitive topic, and was decided on the last day of the term by a sharply divided Court faced with the hyperbolic specter of what was about to invade living rooms across America. There can be little doubt, however, that the "Court's attempt to unstitch the warp and woof of First Amendment law" richly deserves to be condemned and discarded as a "derelict in the stream of the law." To a good degree

227. See, e.g., California v. Carney, 471 U.S. 386 (1985) (automobile search is an exception to fourth amendment warrant requirement); Carroll v. United States, 267 U.S. 132, 153 (1925) (distinguishing search of house from search of vehicle).

228. The Court glossed over in footnotes this glaring contradiction between Cohen v. California, 403 U.S. 15 (1971) and Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) on the one hand, and Pacifica on the other. See Pacifica, 438 U.S. at 747 n.25, 749 n.27; cf. id. at 759 (Powell, Blackmun, JJ., concurring); id. at 764-66 (Brennan, Marshall, JJ., dissenting).

The Court's anomalous position is reminiscent of Justice Black's comment on the Court's obscenity jurisprudence after it upheld, in Stanley v. Georgia, 394 U.S. 557 (1969), the right to private possession and use of obscenity in the home while still interdicting its importation and distribution for such purposes. See id. at 565-68. Justice Black surmised that Stanley perhaps is "good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room." United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting). Accord United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).

229. See FCC v. Pacifica, 438 U.S. 726, 744 n.19 (1978). The Commission played to this fear by attaching to its petition for certiorari a copy of its recently issued Notice of Apparent Liability to a university radio station, see Trustees of the Univ. of Pa. Radio Station WXPN (FM), 57 F.C.C.2d 782 (1975), containing extended examples of broadcasts of rather puerile and gross sexual material. See Petition for Writ of Certiorari at 17, Pacifica Found. v. F.C.C., 438 U.S. 726 (1978). Pacifica countered by an addendum to its brief listing many examples from great literary works such as the Bible, Chaucer, and Shakespeare that could come within the FCC's definition of indecent and be banned from broadcasting. See Brief for Pacifica Foundation, Addendum, Pacifica Found. v. FCC, 438 U.S. 726 (1978); see also Brief of the American Civil Liberties Union et al., Amici Curiae, Pacifica Found. v. FCC, 438 U.S. 726 (1978). Despite the Court's assertions to the contrary, see supra note 192, and the limits it placed on its opinion, all concerned—the Commission, Pacifica, amici and the Court itself—were clearly arguing about the issue of indecency in broadcasting generally, not just a particular broadcast.

230. 438 U.S. at 775 (Brennan, Marshall, JJ., dissenting).

To the extent, however, that *Pacifica* leaves open the door for the possible restriction of indecent though non-obscene broadcasting, it leaves behind a troublesome legacy. Nowhere is this more apparent than in current attempts to control indecency on cable.

II. THE CABLE INDECENCY CASES AND ASSERTED DISTINCTIONS BETWEEN CABLE AND BROADCASTING

It is not surprising that the increasing maturity of cable television has spawned numerous disputes over allegedly indecent programming. The

---


Until very recently, the desuetude into which *Pacifica* has fallen was most evident at the FCC. Contemporaneous with its initial consideration of *Pacifica*, the Commission sanctioned a university radio station for obscene and indecent language in on-the-air conversations with listeners. See Trustees of the Univ. of Pa., Radio Station WXPN(FM), 57 F.C.C.2d 793 (1976) (designation of pub. hearing for lic. ren.). But immediately after the Supreme Court announced its opinion in *Pacifica*, the Commission interpreted it as affording the FCC "no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding." WGBH Educ. Found., 69 F.C.C.2d 1250, 1254 (1978) (mem. op. & ord.). Thereafter, the Commission consistently maintained this position. See Dena Pictures, Inc., 98 F.C.C.2d 670, 670-71 (1984) (Rev. Bd.); Kenneth L. Gilbert, 92 F.C.C.2d 126, 128 n.5 (1983) (Rev. Bd.) (lic. revoc.); David Hildebrand, 92 F.C.C.2d 1241 (1983) (Rev. Bd.) (reversing prior license revocation); Decency in Broadcasting, Inc., 94 F.C.C.2d 1162 (1983) (mem. op. & ord.); *Pacifica* Found., 95 F.C.C.2d 750, 759-61 (1983) (mem. op. & ord.).

An example of the Commission's general eschewing of any censorship role was its recent refusal to designate programming issues as part of a comparative license renewal hearing for a radio station despite the station's history of racial and anti-Semitic attacks. See Cattle Country Broadcasting, 58 Rad. Reg. 2d (P & F) 1109, 1112 (1985) ("It is well settled that the Commission cannot use its regulatory power to rule material off the air merely because the material may be offensive to many members of the broadcaster's audience."). Subsequently, however, the license was transferred to a competing applicant pursuant to a settlement agreement. See Broadcasting, Sept. 8, 1986, at 129.


Currently in the indecency area, in Video 44, 102 F.C.C.2d 408, 411 (1985) (Rev. Bd.) (mem. op. & order), a prima facie showing was made, under *Miller* and *Illinois Citizens*, of obscene telecasts on subscription television service. On its own motion, however, the Commission reversed this decision. It stated, "We believe that the Commission should not attempt to determine in the first instance whether material is obscene, but rather, should defer to local authorities." Video 44, 103 F.C.C.2d 1204, 1210 (1986) (mem. op. & ord.). The Commission, however, soon began investigating three instances of allegedly indecent radio broadcasts. See N.Y. Times, Nov. 12, 1986, at 11, col. 1. In this context its new general counsel observed: "Any time we get into the First Amendment area, we ought to proceed cautiously .... I don't think we should cast our net too wide." Broadcasting, Jan. 5, 1987, at 64. Nevertheless, the Commission has just voted to vigorously enforce the indecency standard established in *Pacifica*. This likely will lead to new court challenges of the application of this standard. See FCC Acts to Restrict Indecent Programming, N.Y. Times, April 17, 1987 at A1, col. 3.
language problem of radio is compounded by the visual signal cable brings into the home. In most cable communities, the service offers a variety of sexually explicit material, including "R"-rated movies, sexually oriented shows on "adult" channels such as The Playboy Channel, and similar programs on certain public access channels that often come with the basic cable subscription. Moreover, the cable indecency issue is arising in an atmosphere of generally heightened concern over alleged pornography in all media. These factors have contributed to a proliferating number of court battles over indecent cable programming.


These articles indicate that the nature of sexual cable programming varies considerably. On one of the major premium movie channels, Home Box Office, about forty per cent of the film schedule is "R"-rated. See Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y. Times, Oct. 3, 1983, at A1, col. 2, at C22, col. 4 (citing president of Home Box Office's Entertainment Division). Only a few cable systems in the country, however, will show "X"-rated films. See id. (citing National Cable Television Association). Although apparently abandoning a recent attempt at a more mainstream programming format, The Playboy Channel does not plan a "sex-on-demand" philosophy or the showing of "X"-rated movies. See MotEvalli, Playboy and the Erotica Dilemma, Cablevision, Dec. 15, 1986 at 24; Playboy Tries Revitalization, Broadcasting, Nov. 25, 1985, at 42, 43.

234. The concern often is expressed most vocally by groups such as Morality in Media and Citizens for Decency Through Law. See Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y. Times, Oct. 3, 1983, at A1, col. 2, C22, col. 5. Some, but not all, feminist interests claim adverse effects from pornography. These groups have sought local legislation to ban pornography as sexual subordination of, or discrimination against, women. For discussions of this current controversy, see generally Emerson, Pornography and the First Amendment: A Reply to Professor MacKinnon, 3 Yale L. & Pol'y Rev. 130 (1984); Hoffman, Feminism, Pornography, and Law, 133 U. Pa. L. Rev. 497 (1985); MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1 (1985); Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv. J.L. & Pub. Pol'y, 461 (1986); Note, Anti-Pornography Laws and First Amendment Values, 98 Harv. L. Rev. 460 (1984); Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589. The first court to consider such an approach condemned as unconstitutional an ordinance prohibiting pornography defined as the "graphic sexually explicit subordination of women." See American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324, 328 (7th Cir. 1985) (the ordinance is "thought control"), aff'd mem., 106 S. Ct. 1172 (1986).

A. The Cable Indecency Cases

Cable operators generally function under a municipal franchise awarded through a competitive bidding process. Consequently, efforts to restrict indecency on cable usually involve prohibitory local ordinances or contractual provisions in the franchise agreement, sometimes backed by similar state statutes. This regulatory scheme puts the cable operator in the difficult position of acceding to the restrictions or risking his franchise. Although operators have not always been at the forefront of challenges to this content control, a number have attacked such restrictions. These cases unfortunately set the tone for differentiating between cable and broadcasting. One such case, however, Home Box Office v. Wilkinson, is an exception. The remarkable simplicity of the court's analysis demonstrates the feasibility of an alternative approach.

In Home Box Office, cable television distributors and franchisees challenged, on its face, a 1981 Utah statute making it a crime to "knowingly distribute by wire or cable any pornographic or indecent material." In holding the statute unconstitutional, the district court only considered whether Utah's attempt to proscribe indecent cable programming went beyond the obscenity boundaries established in Miller. The court did not consider the specific medium of cable, its accessibility in the home, or the potential for children in the audience. Indeed, although the state relied on Pacifica, the court ignored it. Instead, it strongly indicated that there is no legal distinction between broadcast and cable television or other video media that is relevant to control of indecent programming. Rather the court simply concluded that the statute exceeded the Miller


The citizens of Maine, however, recently defeated, by a more than 2 to 1 margin, a referendum to make selling or promoting obscene material illegal. See Wald, Maine Anti-Obscenity Plan Soundly Defeated, N.Y. Times, June 12, 1986, at 17, col. 1. And the Oregon Supreme Court has just virtually eliminated all obscenity prosecutions in that state. See State v. Henry, 302 Or. 510, 525, 732 P.2d 9, 17-18 (1987).

235. For a description of federal regulation in this area under the 1984 Cable Act, 47 U.S.C. § 529-559 (Supp. III 1985), see infra notes 261-82 and accompanying text.


237. See id. at 989 (quoting Utah Code Ann. §§ 76-10-1229(1) (Supp. 1981)). The terms "pornographic" and "indecent" were defined in related statutes. Id. at 989-90.

238. The court ruled simply: "States may not go beyond Miller in prescribing criminal penalties for distribution of sexually oriented material. For better or worse, Miller establishes the analytical boundary of permissible state involvement in the decision by HBO and others to offer, and the decision by subscribers to receive, particular cable TV programming." Id. at 994-95 (emphasis in original) (footnotes omitted).

239. Construing the statute as possibly criminalizing the presentation over cable of "R"-rated, Academy Award-Winning films that could be exhibited, without violating the statute, in theaters, on broadcast TV, or on videotape or videodisc in the home, the court rhetorically asked, "[W]hat is the rational basis for discriminating against one technology?" Id. at 996 n.18.

In a later passage, without distinguishing broadcasting from cable, the court stated that the transmission and delivery of nonobscene TV programming could not be prohibited by a statute going beyond the Miller standard. See id. at 997.
boundaries, was overbroad, and did not admit a narrower constitutional construction.240

A few months later, however, a very similar issue involving a city ordinance was again before the same court. This time, although it reached the same result, the court significantly altered its analysis by launching into a comparison of broadcasting and cable.241 The city analogized its regulatory power to that of the FCC and relied on Pacifica. The court, however, found Pacifica inapplicable. It noted the "important respects" in which the characteristics of cable and broadcast television differ:242

<table>
<thead>
<tr>
<th>Cable</th>
<th>Broadcast</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. User needs to subscribe.</td>
<td>User need not subscribe.</td>
</tr>
<tr>
<td>2. User holds power to cancel subscriptions.</td>
<td>User holds no power to cancel.</td>
</tr>
<tr>
<td>3. Limited advertising.</td>
<td>May complain to F.C.C., station, network, or sponsor.</td>
</tr>
<tr>
<td>4. Transmittal through wires.</td>
<td>Transmittal through public airwaves.</td>
</tr>
<tr>
<td>5. User receives signal on private cable.</td>
<td>User appropriates signal from the public airwaves.</td>
</tr>
<tr>
<td>6. User pays a fee.</td>
<td>User does not pay a fee.</td>
</tr>
<tr>
<td>8. Distributors or distributee may add services and expanded spectrum of signals or channels and choices.</td>
<td>Neither distributor nor distributee may add services, signals or choices.</td>
</tr>
<tr>
<td>9. Wires are privately owned.</td>
<td>Airwaves are not privately owned but are publicly controlled.</td>
</tr>
</tbody>
</table>

The district court characterized these purported distinctions as reflections of the "[levels and degrees of choice]" available with cable but not broadcasting.243 At a primary level, the contractual choices cable offers include: whether to subscribe initially, which cable services to accept, and whether to continue the subscription.244 On a secondary level, a cable viewer may choose among a larger number of channels and subjects.245 At both levels, the court found broadcast viewers far more constrained, largely because the number of broadcasters is limited and they

240. See id. at 999.
243. See Roy City, 555 F. Supp. at 1170.
244. See id. at 1168.
245. See id.
must operate within the public interest standard.\textsuperscript{246}

The court also distinguished broadcasting and cable by literally and physically applying the \textit{Pacifica} pervasiveness rationale.\textsuperscript{247} On the other hand, the court could perceive no basis for treating a form of communication differently simply because it is pervasive in the sense of being received in the home.\textsuperscript{248}

In short, the court found only \textit{Miller} and not \textit{Pacifica} relevant. But the district court's superficial analysis of the differences between cable and broadcasting soon was adopted wholesale by other courts. It has become virtually the "law of the case" in cable indecency matters. In \textit{Cruz v. Ferre},\textsuperscript{249} for example, the court repeated almost verbatim the above list of distinctions and stressed that a cable subscriber ostensibly has greater viewing control than his broadcast counterpart.\textsuperscript{250} Such control includes a cable subscriber's decision whether or not to bring cable into his home, his ability to avoid surprise in programming by consulting monthly viewing guides, and his ability to protect immature viewers, such as children, from unsuitable programming by the use of parental lockboxes available free from the cable operator. The latter, in particular, was for the court the "death-knell" of \textit{Pacifica}'s applicability to cable.\textsuperscript{251}

On appeal plaintiffs and amici continued to stress the asserted factual distinctions between cable and broadcasting.\textsuperscript{252} The Eleventh Circuit, relying on this means of rendering \textit{Pacifica} inapplicable, affirmed.\textsuperscript{253}

When the issue resurfaced once more in Utah,\textsuperscript{254} another district court

\textsuperscript{246} See id. at 1168-69.

\textsuperscript{247} Thus, the court perceived a difference between broadcasting's electromagnetic waves indiscriminately diffused through the "ether," and cable signals transmitted only by invitation through wires. \textit{Id.} at 1169. For a discussion of the inaccuracy of the term "ether," see infra note 310.

\textsuperscript{248} As the Court stated:

The Court finds great difficulty in distinguishing (other than the popcorn) between going to the movies at a theater and having the movies come to me in my home through electronic transmission over wire. The choice is mine. The location is different. The content is the same. Why should the non-'indecent' on Main Street be transmuted by ordinance and municipal definition into 'indecent' in my home?

\textit{Ray City}, 555 F. Supp. at 1170.


\textsuperscript{250} See \textit{id.} at 132.

\textsuperscript{251} See \textit{id.}


\textsuperscript{253} \textit{Cruz v. Ferre}, 755 F.2d 1415, 1415 (11th Cir. 1985). At least one plaintiff was subsequently awarded attorneys' fees. \textit{See} Broadcasting, Sept. 15, 1986, at 120.

\textsuperscript{254} The Utah Legislature passed, over the Governor's veto, a new act to control cable indecency. \textit{See} Utah Code Ann. §§ 76-10-1701 to 1708 (Supp. 1986). The state construed it as mere time, place, and manner regulation rather than prohibition. \textit{See} Formal Op. No. 83-001, Att'y Gen. of Utah 1, 4-5 (1983). In his veto message, the Governor noted that none of the channels showing "blue" movies or the like were operating in
found inappropriate the Pacifica rationales of pervasiveness and accessibility to children. The court relied on the same perceived factual distinctions asserted in the previous Utah cases and in Cruz. It concluded that cable is not an uninvited intruder into the home "but an invitee whose invitation can be carefully circumscribed."

This factor, therefore, accommodates parental concern for children.

The issue of cable indecency is not likely to be settled soon. Indeed, the appearance in 1982 of The Playboy Channel on cable systems nationwide has fanned the controversy. Thus, although courts so far have

Utah. He also cited the differences between cable and broadcasting and the greater control cable viewers are assumed to have. Letter to Lt. Governor Monson from Governor Matheson, Mar. 30, 1983, Utah S. Journal, Veto Override Session, 1117, 1119-20 (Apr. 20, 1983).

Public sentiment in Utah was reflected in the subsequent electoral defeat, by a margin of 61% to 39%, of a proposed state criminal law controlling cable programming. See Cablevision, Nov. 19, 1984, at 18.

255. Community Television, Inc. v. Wilkinson, 611 F. Supp. 1099, 1113-16 (D. Utah 1985), aff'd per curiam sub nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd mem., 55 U.S.L.W. 3643 (U.S. Mar. 23, 1987) (No. 86-1125). The Tenth Circuit's brief opinion relies almost entirely on the reasoning of the lower court. A lengthy concurrence, however, while agreeing that the Utah law is unconstitutional, finds cable sufficiently similar to broadcasting to be subject to Pacifica type regulation. See Jones, 800 F.2d at 993, 1004-07 (Ballock, J., specially concurring).


At any rate, other states repeatedly have tried to restrict cable indecency through various legislative approaches, and these efforts undoubtedly will continue. See Wolfe, Florida Systems Prepare to Fight 'Obscenity' Ban, Cablevision, Jan. 20, 1986, at 23; see also McGhee v. Village of Vernon Hills, No. 83 C 2486 (N.D. Ill. Mar. 25, 1985) (Kocoras, J.) (agreement between cable operator and village to ban "X"-rated films successfully challenged); Gates v. Ney, F.2d, at No. 85-3110 slip op. (6th Cir. 1986) (plea bargain by indicted cable operator, who agreed not to show "X"-rated material or the equivalent, challenged by cable subscriber but upheld by Sixth Circuit interpreting agreement to reach only obscene material). And the FCC has just reinvigorated its efforts to control indecency. See supra note 232.

kept cable free of indecency controls—albeit, as will soon be argued, for the wrong reasons—cable clearly remains vulnerable to this sort of censorship. Unlike the FCC's actions against broadcasters, however, major communications interests have been at the center of the cable indecency controversy and most likely will remain there.

B. Indecency Provisions of the 1984 Cable Act

Congress, moreover, has assured that cable indecency issues will continue to proliferate by addressing the matter in several unclear and confusing provisions of the 1984 Cable Act. To the extent these provisions preclude or chill constitutionally protected expression, they conflict with one of the basic purposes of the Act: to assure and encourage the "widest possible diversity" of cable programming.

The most general obscenity provision of the Act is section 559, which imposes a fine or imprisonment for the transmission by cable of matter that is "obscene or otherwise unprotected by the Constitution." Although this provision apparently is intended to be the cable analogue...
of section 1464, it replaces "obscene, indecent or profane" with the equally vague "obscene or otherwise unprotected." This same phrase is repeated in section 544(d)(1), which allows a franchising authority and a cable operator to specify in their agreement that obscene or otherwise unprotected cable services "shall not be provided or shall be provided subject to conditions." The legislative history of section 544(d) expressly adopts the Supreme Court's Miller obscenity criteria. It nevertheless indicates that franchising authorities can apply local community standards, even though section 559 appears national in scope and much cable programming is distributed nationally. The history also makes clear that the phrase "otherwise unprotected" expression encompasses "changing constitutional interpretations" that incorporate, for example, indecency standards.

Sections 559 and 554(d)(1), which apply to cable services generally, are complicated by a different provision governing commercial leased access channels required under section 532. Because a cable operator is forbidden to exercise any editorial control over such channels, he is shielded from criminal or civil liability for programming carried on them. A similar rule, in section 531, applies to access channels available for public, educational, and governmental ("PEG") uses.

264. See 47 U.S.C. § 544(d) (1) (Supp. III 1985). Such a provision might be necessary to reserve a role for the franchising authority because the Act, otherwise, generally preempts any inconsistent state or local provision. See id. §§ 544(a)-(f), 556(c). But see id. § 558 (discussed infra note 277).
265. See House Report, supra note 261, at 4706. However, the legislative history of the cognate provision of the Senate predecessor of the Act, S. 66, 98th Cong., 2d Sess. § 607 (1983), seems to adopt a different approach:

This provision of the bill is not intended to permit municipal officials or cable operators to substitute their own concepts of obscene or unprotected speech for judicially determined standards. Nor does it permit the imposition of sanctions or the determination of a breach of the franchise in the absence of a judicial determination that particular speech was obscene or otherwise unprotected by the Constitution.


None of the legislative history, however, addresses the intriguing question of what conditions can or should be imposed on the presentation of obscene or otherwise unprotected programming by § 544(d)(1); nor does it explain how such conditions apply to material that actually is obscene.

268. See id. § 532(c)(2). A cable operator may consider the content of programming on such channels only to establish a reasonable price for its use. See id.; House Report, supra note 261, at 4688-89.
270. See 47 U.S.C. § 531(e) (Supp. III 1985). This section precludes a cable operator's editorial control over such channels, and § 558 shields him from liability.
532(h), however, restricts use of a leased access channel by a cable service that "in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution."\textsuperscript{271} There is no indication of what this amorphous language means, why it expands on the "obscene or otherwise unprotected" formulation of sections 559 and 554(d)(1), or why sole discretion apparently is vested in the franchising authority.\textsuperscript{272} Unless it is narrowly interpreted, this provision is of doubtful validity, particularly because it seems to endorse prior restraint with no procedure for prompt judicial review.\textsuperscript{273} Its practical effect, however, is to create considerable difficulties and uncertainties for those wishing to use the access channels, though not necessarily for the shielded cable operator. Indeed, to the extent an operator can, he has a distinct advantage in keeping questionable material on the access channels, because he is not liable for programming on those channels.\textsuperscript{274}

Finally, section 558 provides that the Act is not to be construed to affect criminal or civil liability under federal, state or local laws regarding "libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws."\textsuperscript{275} There is no indication of the relationship between this section and the other obscenity/indecency restrictions.

By this jumble of provisions Congress apparently sought two goals. First, it attempted to prohibit both obscenity and indecency on cable to the extent constitutionally permissible; that is, to the extent indecency is held "otherwise unprotected" under changing constitutional interpretations.\textsuperscript{276} Second, it tried to avoid preemption and preserve a role for state however, is subject to § 544(d), which allows a franchise agreement to exclude or condition the showing of obscene or otherwise unprotected material. But it does not indicate how that agreement between the cable operator and franchising authority affects the third party user of a PEG channel.


\textsuperscript{272} The brief legislative history on this point uses only the "obscene or otherwise ... unprotected" language and describes § 532(h) as expressly adopting the Supreme Court's resort to local community standards. See House Report, supra note 261, at 4692. Because § 532(h) provides that the proscribed programming shall not be provided, or shall be provided only subject to conditions, it raises the same questions as to the imposition of conditions as § 544(d) (1) raises. See supra note 265.


\textsuperscript{274} The Act, however, tries to prevent operators from defeating the purpose of leased access channels by simply moving to these channels programming that is already on operator-controlled channels. See 47 U.S.C. § 532(c) (3) (Supp. III 1985); see also House Report, supra note 261, at 4691-92; 130 Cong. Rec. at S14,289 (daily ed. Oct. 11, 1984) (App. B).

\textsuperscript{275} See 47 U.S.C. § 558 (Supp. III 1985); see also House Report, supra note 261, at 4732.

and local control, as well as for FCC regulations and other federal enforcement.277 In addition to spawning confusion and uncertainty, however, Congress may have frustrated its own purposes. The only court, so far, to consider a state statute directed against cable indecency in light of the new Act held that the Act preempted the statute.278 The court found that the statute conflicted with the special provisions of sections 531 and 532, and that section 558 covers laws regulating obscenity, but not indecency.279

In addition to these clumsy attempts, Congress adopted in section 544(d)(2)(A) a relatively straightforward approach that should govern the issue of indecency on television.280 This provision requires cable operators to sell or lease to their subscribers, upon request, a lock-box device to restrict children's access to certain cable programming.281 In implementing this program the FCC sensibly stated: “[W]e believe that the provision for lockboxes largely disposes of issues involving the Commission’s standard for indecency and would also be a significant factor in cases related to obscenity and similar offensive programming.”282 Because, as explained in the next section, similar broadcast technology exists, the same approach should be applied to broadcasting as well.

With the unabating trends in the cable indecency area now compounded by chaotic federal legislation, however, courts will almost certainly continue to assert differences between broadcasting and cable to evade Pacifica’s strictures. We therefore now consider why these distinctions are unconvincing and even damaging to expanded first amendment freedom for both cable and broadcasting.

III. THE SIMILARITY OF BROADCASTING AND CABLE

The asserted distinctions between cable and broadcasting may have

277. Senator Goldwater also made it clear that § 558 directly addressed the Supreme Court's preemption decision in Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), and was designed to maintain state and local authority in this area. 130 Cong. Rec. S14,289 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).


279. See id. The court, however, found simply that §§ 531 and 532 authorize more limited state or local regulation of access channels than Utah's broad statutory approach. The court distinguished the inserted Goldwater colloquy, see supra notes 276-77, and relied instead on the “official” legislative history. See Community Television, 611 F. Supp. at 1104-06.


281. See id. Congress specifically cited such devices as one means of limiting exposure of children to such material. See House Report, supra note 261, at 4707.

282. Amendment to Rules Under the 1984 Cable Communications Act, 58 Rad. Reg. 2d (P & F) 1, 36 (1985) (citation omitted). The Commission's lock-box requirements, however, apply only to channels over which a cable operator has editorial control. By thus excluding commercial access, PEG, and must-carry channels, the requirements arguably fail to implement fully congressional policy. See Meyerson, supra note 260, at 603 n.347.
some superficial appeal, but they are not constitutionally significant. This is true at three levels of analysis: a) the asserted factual differences between the media; b) the purported uniqueness of broadcasting thought to follow from these factors; and c) the societal justifications for controlling television program content.

A. The Factual Elements

The factual distinctions between broadcasting and cable fall generally into three non-exclusive categories: i) the physical characteristics of each medium; ii) the choices each medium affords the viewer; and iii) the nature and degree of control a viewer has over each medium.283 None of the asserted distinctions, however, is sufficient to justify different first amendment treatment.

1. Physical Characteristics

Both cable and broadcast programming are distributed by the same physical phenomenon, electromagnetic radiation. Cable signals are transmitted over wires, while broadcasts are transmitted through space. But neither method is more in the public domain than the other. Indeed, the notion of public ownership of the broadcast airwaves is misguided.284

283. In the cable indecency cases, courts also have noted that broadcast television has more advertising. These courts have not, however, explained how this is significant, even if accurate. See supra text accompanying note 242. Presumably, such courts reason that advertisers exert some control over offensive programming in order not to offend potential customers. This rationale is dubious, at best. Even sex-oriented programming like Midnite Blues, on Manhattan Cable's public access channel, attracts advertisers such as escort services, sex clubs, and videocassette stores that seek a particular audience. Moreover, although pay cable lacks the usual television advertising, the programming is the product sold. Consequently, the programming itself is subject to competitive and commercial pressures similar to those exerted on sponsored programming. Finally, even if there were more advertising on broadcast television, the courts' reasoning would support greater freedom from governmental content control for broadcasting, not cable.

284. Although property rights in the use of a portion of the electromagnetic spectrum can and should be protected, the concept of spectrum ownership is, strictly speaking, meaningless. Electromagnetism is simply one of the four fundamental forces of nature, the others being gravity and the "strong" and "weak" nuclear forces. The electromagnetic spectrum, therefore, cannot be owned, publicly or privately, any more than gravity can be owned. No one, for example, would be likely to justify a government tax on automobiles for the privilege of keeping a car "on" the road as a gravity use tax based on the government's ownership of gravity. This analogy is increasingly compelling as modern physics moves to unify the four fundamental forces under one theory. See, e.g., Quigg, Elementary Particles and Forces, Scientific American, April 1985, at 84.

Similarly, property interests in another form of electromagnetic radiation, sunlight incident on one's real property, are limited to the right to use the light without interference, but are not based on ownership of the sunlight itself. See, e.g., Prah v. Maretti, 108 Wis. 2d 223, 233-34, 321 N.W.2d 182, 188 (1982); see also Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 152 (1967) (public ownership of the broadcast spectrum is logically meaningless).

The electromagnetic spectrum, therefore, is not a "natural resource" subject to ownership. Indeed, one could say that it does not exist independently of specific transmitters.
It simply states the conclusion that broadcasting should be subject to government regulation, which needs independent justification to be valid. Applying the same forced rationale, the government could also regulate cable programming because cable wires must use public rights-of-way.\(^{285}\)

Moreover, the bulk of programming distributed by cable operators is produced by others and transmitted to the operator's headend by satellite transmission or land-based microwave relay stations.\(^{286}\) It is then redistributed to subscribers via cable. The entire distribution network for most cable programming, therefore, heavily depends on the use of the same "public" airwaves as broadcasting. This global view of cable programming distribution might shift the focus for regulation from state or local government to the FCC.\(^{287}\) Nevertheless, such programming would still be as vulnerable to regulation as broadcasting.

2. Nature and Degree of Viewer Choice

The case for distinguishing cable from broadcasting is only slightly stronger with regard to the choices that viewers of each medium have. The standard argument is that a cable viewer must choose to subscribe to a cable system, undergo the initial equipment installation, pay originally for the service and continue paying a periodic subscription fee. Moreover, a cable subscriber often may choose additional specialty channels. In particular, the subscriber must specifically order and pay additional fees to receive selected premium programming such as movie or adult channels, which often are at the heart of the indecency controversy. Finally, the subscription to any particular channel, or indeed the entire cable service, can be cancelled at any time. The argument is that, by providing these choices, cable becomes more like a "guest" invited into the home rather than the "intruder" broadcasting is said to be.

As long as individuals have free will and television sets are equipped with on/off buttons and channel selectors, however, these asserted differences of choice are ephemeral. The only significant choice with respect to both cable and broadcast programming is whether to watch. This

\(^{285}\) Such a conclusion could lead to the anomalous result that material could be constitutionally banned from a local cable system but nonetheless could be viewed on the same televisions with videocassette recorders. The length of the cable between the machine playing the tape and the machine displaying the image would be of constitutional dimension. \textit{Cf. supra} note 248.

\(^{286}\) See C. Ferris, F. Lloyd, & J. Casey \textit{supra} note 168, ¶ 25.02, at 25-3. In particular, national programming on the premium movie and adult channels, the common targets of allegations of indecency, is distributed this way. Material on local access channels, however, may originate at the cable headend.

\(^{287}\) Indeed, state or local regulation may be federally preempted. \textit{See supra} notes 6-7, 277-79 and accompanying text. \textit{But see Video} 44, 103 F.C.C.2d 1204, 1210 (1986) (mem. op. & ord.) (Commission will now defer obscenity issues to local authorities). \textit{Cf. supra} note 232.
choice is equally available in each medium. The initial choice is whether to own a television receiver; whether one connects it to a cable, to a dish antenna for direct receipt of satellite transmissions, or to a standard rooftop antenna for traditional broadcast reception is of little consequence. In each case, one must pay for the necessary equipment; differences in the economics of this payment do not produce different viewing choices. In each case, failure to pay either an initial amount or a periodic payment, as a cable subscription payment or an installment payment for television equipment, has the same result of “choosing” not to watch. After making the payments, however, turning on the set is equally an invitation into the home to broadcasting and to cable. Thus, perceived differences in the effort or deliberateness of choosing to watch cable over broadcasting are largely vacuous and irrelevant to the indecency controversy because the deliberateness and effort in choosing not to watch either are the same.

Finally, although a cable subscriber has more channels and therefore more choices, this numerical superiority by itself is irrelevant to deciding whether any of those channels should be subject to content control. In fact, if one believes that, in this sense, broadcasting is a scarcer medium than cable, broadcasting should be entitled to more, not less, protection from indecency regulation than cable to ensure diversity of programming.288

3. Nature and Degree of Viewer Control

The differences between broadcasting and cable seem most apparent with regard to viewer control. Many cable channels are devoted to special formats that appeal to specific groups of viewers. This “narrowcasting” feature largely allows a subscriber to exclude certain programming formats simply by not subscribing to the corresponding channels or to a tier of services including those channels.289 For several reasons, however, the exclusion of indecent or otherwise objectionable cable programming is not so simple.

First, although cable operators use converters and scramblers to prevent normal reception of premium channels by cable subscribers who have not ordered and paid for them, these devices may not adequately screen out offensive material.290 Such problems presumably could be

288. See supra note 197.
289. To the extent, however, that a cable system offers some basic or premium channels only in fixed tiers, a subscriber is precluded from perfect, channel-by-channel discrimination.
290. On many systems, for example, only the video portion of the signal is scrambled. Therefore, a subscriber to the basic tier of such a system could tune in to a televised performance of the Carlin monologue, see supra note 170 and accompanying text, on a pay channel with Carlin’s physical features distorted but his voice clear and discernible. Movie dialogue with similar language also would be available. Moreover, even scrambled video of adult programming with discernible nude bodies and depictions of sexual activity may be too offensive for some.
solved by refined technology, but there are more fundamental limits to the advantages of narrowcasting. Arguably indecent programming is not confined to a few identifiable premium channels and can be eliminated entirely only by removing the television set. The public and leased access channels may also be a fertile source of indecency, even on the basic tier of service. More generally, even those who willingly subscribe to a premium channel to enjoy major, family-oriented movies in their homes will also find a number of adult or "R"-rated movies on the same channel. Indeed, any channel that shows current movies or serious, mature programming also may include "indecent" material.

Viewer guides, available for most cable channels, are frequently cited as a way to avoid unpleasant surprise from unwanted program content. These often provide a short description of scheduled programming, give the MPAA rating for movies, and indicate potentially offensive language,
nudity, or violence. Program guides, however, are also available for broadcast television. Moreover, they are not inherently more useful or effective for cable subscribers than for broadcast viewers. Similarly, equivalent warnings can be given to both cable and broadcast viewers, both before and during potentially offensive programs.

The ultimate control for the cable subscriber is often said to be the cable lock-box or parental discretion unit ("PDU"). This allows parents to lock out, with a key or private code, particular channels likely to contain material they do not want their children to see. The device, required by the 1984 Cable Act, allows parents, even when they are absent, to supervise their children. The PDU, however, is no panacea. Its effectiveness depends on the quality and availability of advance information from program guides. Moreover, even when the devices are advertised to subscribers and readily available at nominal cost, very few subscribers choose to use them. Apparently the need or desire for such control is greatly exaggerated.

To the extent a PDU is useful, however, it can benefit equally cable and broadcasting. Some major television manufacturers already build into certain models timing circuitry by which a parent can block out designated channels, including those for playback of recorded material, for up to 12 hours. More refined control can be provided by a device that responds to a special electronic signal broadcast, for example, with an "R" or "X"-rated movie. This signal could then turn the screen and

294. Many cable operators offer subscribers a programming guide, often without charge. See Guides Gaining Ground, But Questions Remain, Cablevision, Jan. 6, 1986, at 35. National publications such as TV Guide provide the same sort of information on a broader scale. These sources, moreover, merely supplement the cable and broadcasting guides readily available in daily and Sunday newspapers. Some guides, however, may not adequately cover public and leased access programming.

295. In 1975, for example, the FCC noted that, in France, broadcasters placed a small white dot in a corner of the screen during a program to continually warn viewers that it might not be suitable for children. See Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 421 (1975). One commentator has suggested that requiring such a warning would be constitutional as a sort of truth in labeling law. See Nadel, Cable-speech for Whom?, 4 Cardozo Arts & Ent. L.J. 51, 57 (1985).

296. See supra notes 280-82 and accompanying text.

297. In Community Television, Inc., v. Wilkinson, 611 F. Supp. 1099, 1114 (D. Utah 1985), aff'd mem. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), the Utah Attorney General complained that, although cable subscribers were advised of the availability of lock-boxes either free or for less than $20, less than one per cent of plaintiffs' subscribers chose to obtain them. See Jones, 800 F.2d at 1002-03; Defendants' Amended Memorandum on Summary Judgment at 21 nn.8 & 9, Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986); see also Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y. Times, Oct. 3, 1983, at 1, col. 2, at C22, col. 5 (in one California community, only 300 families out of 96,000 subscribers, of whom 10,000 took a special adult subscription service, obtained a free lock-box).

audio blank, scramble it, or switch to a "barker" channel, such as news, public service or the like. Such broadcast technology is entirely feasible, easily available, and relatively inexpensive. Indeed, virtually identical technology already is used in teletext services. These devices, however, have not become widely available because manufacturers are hesitant to make PDU's that respond to broadcast signals that are not

299. The triggering signal would be transmitted on the vertical blanking interval (VBI) of a television broadcast signal. This is the space on a television screen appearing as a black bar when a television picture rolls. It is used already to transmit information such as teletext and close-captioned service, but still can accommodate the additional necessary signals. See Data Transmission Services on the Vertical Blanking Interval, 57 Rad. Reg. 2d (P & F) 832 (1985) (amendment to rules). Networks would not have a problem sending the appropriate signals to their local affiliates because they already send similar signals to indicate when local programming should be inserted. Several knowledgeable industry representatives have confirmed the ease of implementing such a process. See Telephone interviews with: Ric Rowland, Product Manager, Subscriber Products of Magnavox CATV (Oct. 23, 1985) (notes on file with author); Jim Farner, Division Technical Manager, Broadcast Communications Division of Scientific-Atlanta (Oct. 25, 1985) (notes on file with author); Jim Farmer, Division Technical Manager, Broadband Communications Division of Scientific-Atlanta (Oct. 25, 1985) (notes on file with author); Tom Mock, Staff Engineer, Electronic Industry Association (Oct. 14, 1985) (notes on file with author); Bob Woodward, Engineer and Coordinator of Special Projects, Station KAET-TV, Tempe, Arizona (Oct. 17, 1985) (notes on file with author); see also L.A. Times, June 21, 1983, Part VI, at 8, col. 1. Action for Children's Television relied on such technology in a recent petition asking the FCC to require the broadcast of signals allowing home devices to block out commercials on children's television. See Children's Advertising Detector Signal, 57 Rad. Reg. 2d (P & F) 935, 937-38 (1985) (petition for rule-making denied as inadvisable on policy grounds).

The industry representatives contacted indicated that the cost of such a PDU would depend on whether the device were an out-of-set unit needing its own tuner or one built into the television receiver's circuitry. Although a separate unit might cost a few hundred dollars, all the estimates for the in-set unit were between $20 and $25. See W. Baer, Controlling Unwanted Communications to the Home, Rand Paper P-6107, at 18 (1978) (estimating the cost of built-in device responsive to transmitted signals at less than $25 if produced in "large" quantities). The ultimate price would depend on the demand for the product. Nevertheless, the cost could be subsidized, for example, by purchasers of all television sets just as all subscribers of a cable system subsidize "free" lock-boxes.

An alternative system, the practicality and cost of which are unknown, has recently been patented. It would employ a central monitoring and command station that would continually edit what could be watched on a television according to prior instructions from a subscribing viewer. See Broadcasting, June 24, 1985, at 64.


301. In a footnote in its Supreme Court brief, Pacifica cited an announcement, see Technical Brief: Do-It-Yourself, Broadcasting, Feb. 27, 1978, at 83, of a prototype television timing device to counter the argument of unsupervised exposure of children to broadcast indecency. Brief for Appellee at 48-49 n.40, FCC v. Pacifica Found., 438 U.S. 726 (1978). The Court ignored the point, perhaps because the device was not fully developed or radio was the medium in issue. Indeed, one irony of the comparison between cable and broadcast television is that radio may be distinguished from both of them. Radio may be pervasive because its blare often is unavoidable in public places. It is inexpensive and accessible to unsupervised children in a way that television is not. But see Wall St. J., Mar. 5, 1986, at 33 col. 4, describing the advent of mini portable televi-
The networks, in turn, do not have an incentive to promote a system that, they fear, might curtail some of their audience. Moreover, in the current regulated environment, broadcast programming generally has been too bland and noncontroversial to generate much interest in PDU's.

The feasibility of broadcasting PDU's, functionally equivalent to cable lock-boxes, thus destroys the *Pacifica* Court's already misplaced reliance on *Rowan*. These devices provide an individually discriminating mechanism for excluding unwanted broadcast communications from the home. They would be no more burdensome than the "short, though regular, journey from mailbox to trash can" that the Court accepted as an alternative to government censorship in the context of objectionable mailings. Moreover, the simple and practical development of the broadcasting PDU is clearly a less restrictive means of regulation than the *Pacifica* approach. Consequently, broader regulation is not justified simply because the alternative requires new but available methods. Rather, the availability of equivalent technology for broadcasting and cable should preclude different first amendment treatment for the two media based, even in part, on the fallacious assumption of greater viewer control over cable.  

---

303. Such opposition might be short-sighted, however, since the availability of PDU's might easily enable the networks to offer broader programming in competition with cable.
304. *See supra* notes 222-25 and accompanying text.
307. Indeed, the Second Circuit recently rejected the FCC's efforts to regulate dial-a-porn through time-channeling or access code provisions because, with such content based regulation, the Commission had failed adequately to consider less restrictive means that are technologically and economically feasible, such as new ways of selectively screening or blocking such calls especially at customer premises. *See Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 855-57 (2d Cir. 1986); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 122-23 (2d Cir. 1984). In addition, the FCC has just made the "A/B" switch, allowing television viewers to alternate between receiving cable and broadcast signals, a centerpiece of its new must-carry rules. In doing so, the Commission acknowledged that its previous concerns about the inconvenience of such switches and their non-use by consumers were no longer valid in the search for regulatory approaches that are minimally intrusive on first amendment freedoms. *See Must Carry Rules*, 61 Rad. Reg. 2d (P & F) 792, 841 (1986), modified on reconsid., 62 Rad. Reg. 2d (P & F) — (1987).
308. Use of the cable lock-box, which is totally controlled by the viewer, presents no first amendment difficulties. Likewise, the simple timing PDU for broadcasting also should be uncontroversial. With the signal-responsive PDU, however, it would be difficult to determine who should decide which programming should carry which triggering signal and how that decision should be made. Within technical limitations, signals and the programmed responses might differ with the degree of explicit sexual material or
In fact, consideration of the technological comparability of broadcasting and cable highlights that both media present similar challenges. The real issue is the supervision and control that adults exercise over the television viewing habits in their homes. Fundamentally, it is irrelevant whether they exert control by pulling the plug, using lock-box devices, or simply asserting appropriate authority.

B. The “Unique” Characteristics of Broadcasting: Pervasiveness and Accessibility to Children

The asserted distinctions between cable and broadcasting also collapse when measured by the purported “unique” characteristics of broadcasting—pervasiveness and accessibility to children—that largely formed the basis of Pacifica.

1. Pervasiveness

Whatever the Court meant by the “pervasiveness” of broadcasting, cable is similarly pervasive in any reasonable sense of the term. Pervasiveness cannot mean simply that the broadcast medium, the airwaves, are all around us. Such an atavistic notion of an “ether” in which electromagnetic radiation travels is wholly irrelevant to the question of content control. Broadcast transmissions propagate through the air and cable transmissions through wire; but this distinction adds nothing to the dispute over what sort of material should be so distributed or who should decide the issue.

The Court probably reasoned that broadcasting is pervasive in that, at least in the United States, it reaches a nearly universal audience. Any such system would unavoidably perpetuate the difficulties inherent in any content rating system. These would be compounded by government involvement. It is worth noting, however, that, in support of its petition in Children’s Advertising Detector Signal, 57 Rad. Reg. 2d (P & F) 935 (1985), Action for Children’s Television submitted a short memorandum by Professor Laurence Tribe concluding that there was no first amendment obstacle to a signal responsive PDU to block out commercials on children’s television. Dealing with general programming, not just commercial speech specifically directed at children that need not be rated, would be far more complex. Ultimately, however, the system might be as manageable as the current MPAA movie rating system.


312. There are more than 86 million television households in the United States, representing 98% of all households, and an estimated 489 million radio sets 55% of which are
vast majority of this country's population is exposed to a significant amount of television in their daily lives.\textsuperscript{313} Cable television, however, while not yet as universal as its broadcast counterpart, reaches an increasingly substantial portion of the American public.\textsuperscript{314} Estimates for 1990 are that 54\% of television households will have at least basic cable and 35\% will have pay cable as well. Further, about 87\% of all television households will be passed by cable and, therefore, have it available.\textsuperscript{315} The question is not whether cable is as universal as broadcasting, but whether access to cable is so limited that it can be considered a nonpervasive medium. The available current and projected statistics clearly indicate that, on any sensible scale of pervasiveness, the answer is no.\textsuperscript{316} Thus, cable and broadcasting cannot be distinguished because one is quantitatively pervasive and the other is not.

The Court apparently also emphasized that broadcasting is available in the home.\textsuperscript{317} This, of course, is equally true of cable and most other media of mass communication, including movies on videocassettes. But classifying broadcasting as an "invader" into the home and cable as only an "invited guest" is inappropriate.\textsuperscript{318} Moreover, because both broadcasting and cable come into the home where one's privacy interest is greatest, both media should be free from government intervention. A similar privacy concern also supports individual freedom of choice, either to refrain from watching objectionable programming or to allow into one's home, under appropriate supervision, programs one desires, even though others find them offensive. Because such freedom of choice can be exercised equally in either medium, pervasiveness neither distinguishes cable from broadcasting nor supports government censorship.

\begin{itemize}
\item 313. The average daily viewing in television households, during the 1983-84 season, was over seven hours. A.C. Nielsen & Co., supra note 206, at 6. Even the lowest viewing household group spends more time watching television each week — over 40 hours — than most people spend working. \textit{See id.} at 7.


\item 316. Cable and broadcasting cannot be distinguished on the basis that broadcast television is thought to be free while cable might be considered expensive and, therefore, of limited availability. \textit{See Winer, supra} note 3, at 252-54.


\item 318. Any such purported distinction collapses even further to the extent cable is used for the reception of broadcast signals otherwise unavailable (e.g., distant signals imported from broadcast "superstations") or of inadequate quality.
\end{itemize}
2. "The Children, The Children, I'll Not Forget the Children"\textsuperscript{319}

Children are different, and this basic fact is reflected throughout the law.\textsuperscript{320} The Court's rulings in \textit{Ferber} and \textit{Ginsberg} bear this out. And there is a plausible rationale for treating children somewhat differently under the first amendment. Freedom of expression is meaningful only to the extent that both speaker and listener can appreciably understand and evaluate the expression and make choices regarding it. Children may be deemed to lack the full capacity to understand certain kinds of expression such as racial propaganda or sexually explicit material. As a result, one could argue that some restrictions on the unsupervised communication of such material specifically directed at children entail no significant infringement on freedom of expression either of the children as listeners or of others as speakers.\textsuperscript{321}

On the other hand, the Court consistently has maintained that it is improper to reduce the adult population to reading and viewing only what is appropriate for children, so as to protect children from sexually provocative material.\textsuperscript{322} Solicitude for children, then, justifies neither the regulation of indecency on television nor different regulation for broadcasting and cable. Such regulation inevitably abridges adults' first amendment rights, improperly usurps a discretionary parental function with broad governmental fiat, and ignores less restrictive means to protect children equally available in broadcasting and cable.

Completely banning indecency on cable eliminates protected communication. Restricting indecency to late evening and early morning hours, when most people are asleep, also substantially intrudes on the rights of both programmers and viewers by effectively precluding protected expression.\textsuperscript{323} Governmental regulation cannot single out the youthful

\textsuperscript{319} R. Rodgers & O. Hammerstein, \textit{The King and I} (1951).


\textsuperscript{321} \textit{See} \textit{Ginsberg v. New York}, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring); \textit{see also} FCC v. \textit{Pacifica Found.}, 438 U.S. 726, 757-58 (1978) (Powell, Blackmun, JJ., concurring) (children do not have "full capacity for individual choice which is the presupposition of First Amendment guarantees"); \textit{id.} at 768 n.3 (Brennan, Marshall, JJ., dissenting) (children may be incapable of evaluating the content of certain communication).

\textsuperscript{322} \textit{See supra} note 216.

\textsuperscript{323} \textit{See} A.C. Nielsen Co., \textit{supra} note 206, at 8 (showing the dramatic decline in television viewing after 10 P.M.). Such alleged "time, place and manner" regulations must fail because they not only channel expression but, in fact, curtail it. Moreover, they improp-
portion of the viewing audience without impermissibly encroaching on the constitutional rights of adults. 324

In the home, however, parents can more precisely control what their children watch and appropriately balance the rights of adults and the interests of children. Parents are best able to make individualized discriminating judgments concerning household viewing habits, not only with regard to sexual material but also as to excessive or graphic violence or other matters of individual sensibilities. The Supreme Court long has largely deferred to a parent's right to control the development and upbringing of his children. 325 Thus, regulations that would exclude or limit constitutionally protected programming for adults cannot be justified on the basis of what parents choose to do or fail to do.

Parental authority, then, is the proper control over what children watch on television. There is, therefore, no basis for distinguishing between cable and broadcasting for indecency regulation because that authority can be exercised equally well with either medium. This is obvious when direct adult supervision is possible. When children are un-

324. All portions of the viewing day contain a significant children's audience. For example, for all children, the smallest identifiable viewing period is Monday through Sunday, 11 P.M. to 1 A.M. Even so, this period comprises 1% of all television viewing for children aged 2-5, 2% for children aged 6-11, 6% for male teenagers, and 5% for female teenagers. A.C. Nielsen Co., supra note 206, at 8-9. For a description of similar statistics available to the FCC at the time of Pacifica, see Pacifica Found. v. FCC, 556 F.2d 9, 19 n.2 (1977) (Bazelon, C.J., concurring). Time channeling of indecency, therefore, can substantially burden adult viewers but cannot effectively exclude children from the audience. Distribution of cable programming is thus very different from movie theaters, magazines, or videocassette sales, which permit some screening of customers. This is why Ginsberg v. New York, 390 U.S. 629 (1968), which dealt with direct sale of "so-called 'girlie' magazines" to minors, is not applicable in the cable context. See id. at 631. See supra note 88.

325. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (parents may remove children from public school if continued attendance would substantially infringe on legitimate religious beliefs); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("The prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (state may not unreasonably interfere with the right of parents to direct their children's upbringing and education); see also Pacifica Found. v. FCC, 438 U.S. 726, 769-70 (1978) (Brennan, Marshall, JJ., dissenting) (the Court "has consistently been vigilant" in protecting the "time-honored right of a parent to raise his child as he sees fit").
supervised, program guides and the electronic technology available for both cable and broadcasting can provide the desired control. Indeed, the availability of a simple lock to prevent all unsupervised television watching, even without more refined technology, should be an adequate, less restrictive means of control sufficient to preclude any broader government regulation.

C. Societal Justifications for Controlling Indecent Programming

Societal justifications for controlling indecent programming on broadcast or cable television depend on two concerns: a respect for individual tastes and sensibilities, and the harm to society that allegedly flows from the wide availability of indecent material. Neither of these provides a basis for differential treatment of cable and broadcasting. Further, they are insufficient to override the substantial first amendment interests of programmers and willing viewers.

1. Individual Tastes and Sensibilities

No viewer is a captive audience of either cable or broadcasting; he can avoid or turn away from either with equal ease. The concern for individual sensibilities is thus limited to the momentary affront an unwilling viewer may suffer when accosted by offensive material in turning on the set or scanning the dial.

Again there is no significant difference between the media. The large number of channels and diverse programming available on cable may increase the potential incidents of momentary offense. Cable's narrowcasting feature, however, makes it easier to identify which channels are most likely to give offense, and thus to be excluded altogether, avoided, or electronically screened. Moreover, the various prophylactic measures such as program guides, prior or simultaneous warnings and electronic screening are available for either medium.

It is therefore better to preserve first amendment freedoms, even at the expense of some brief incidents of offense to sensitive individuals. Such incidents, after all, are the stuff of daily life that individuals must learn to tolerate. That they occur in the home does not alter this conclusion. By choosing to watch either cable or broadcasting and by ignoring available prophylactic measures, an individual consents to enter into public discourse and must accept the rough edges of that process. A contrary approach would be inimical to first amendment dictates and values. Taste and sensibilities are highly individualistic; sexually graphic material offends one person, violence a second, hard rock movie videos a third, and scenes of starving children in Ethiopia a fourth. Once we

326. See supra note 289 and accompanying text.
328. Al Goldstein, publisher of Screw magazine, powerfully criticizes the arguably
begin cleansing the television screen of all that is even momentarily objectionable to a myriad of living room viewers, there is no end in sight. The first amendment is thus hopelessly eroded and the result is a worthless medium.

2. Harm to Society

Concern for individual tastes and sensibilities is based on direct, immediate, and specific harm to a given individual. Concern for harm to society from a debasement of morals, values and attitudes is, by contrast, vague, general and indefinite and relates only indirectly to harm to any given individual. Centuries of debate have dealt with the evil effects and possible benefits of obscenity.\textsuperscript{329} Decades of debate have dealt with the effects of television programming, especially violence, on viewers in general and children in particular.\textsuperscript{330}

strange values that bar sexually explicit material from the television screen while not restricting brutal scenes of graphic violence, often directed at young women, that is the standard fare of many television movies. Goldstein produces \textit{Midnight Blues}, a late-night sex show aired on Manhattan Cable's public access channel in New York City. He has editorialized on this program by juxtaposing scenes from \textit{Midnight Blues} censored by Manhattan Cable, such as a woman masturbating and two nude women making love, with scenes from movies such as \textit{Friday the Thirteenth} and \textit{Halloween}. Goldstein notes that Home Box Office, Inc., the owner of Manhattan Cable, has no compunction about showing such movies on prime time, even though they include deliberately gory scenes of vulnerable young women being terrified and brutalized by stabbings, strangulations, slashed throats, decapitations, heads split open by hatchets, and violent rape. Goldstein questions the ethics of showing such movies on Home Box Office, which proclaims that while it airs “R”-rated movies it will not allow “X”-rated ones, while censoring totally nonviolent but sexually explicit material. In Goldstein’s more colorful language, blood not sperm is acceptable; penetration with a meat cleaver but not a male sex organ; a breast can be shown only if there is a knife in it. \textit{See} excerpts from \textit{Midnight Blues}, (show No. 404, Mar. 26, 30, 1984) (videocassette on file with the author); \textit{see also} Goldstein, \textit{Cable TV’s Shame: “Gore-nography”}, N.Y. Times, July 3, 1984, at A15, col. 5.


Regardless of the merits of social science research about television, the legal standard should be clear: Any generalized ill effects asserted to result from television programming must be compellingly demonstrated before first amendment rights can be overidden. Indeed, such a rigorous standard has been applied in far more particularized circumstances. \textit{See}, e.g., Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 203-07 (S.D. Fla. 1979) (cause of action by minor, claiming that television networks’ programming stimulated him to duplicate acts of violence, barred by first amendment); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 492-95, 178 Cal. Rptr.
With regard to indecency on television, however, there is a simple approach. The Supreme Court's interpretation of the first amendment, in its evolving concept of unprotected obscenity, delimits what expression can be curtailed. Material that does not sink to the level of obscenity is deemed not to pose a sufficient threat to society or its morals to justify regulation. If Playboy magazine cannot be excluded from newsracks or subscribers' mailboxes, there is no reason to regulate The Playboy Channel either on cable or broadcast television.331

It is highly dubious that similar indecent material is potentially more damaging on a television screen than between the covers of a book or magazine.332 Although material on a television screen is more "alive" and thus has a greater sensory impact, this impact is lessened by the passivity of television watching, which does not require the same purposeful mental involvement that reading or viewing printed matter requires. Television viewing is also a more public activity than reading books or magazines and, therefore, subject to more constraints on its use,

331. One might recoil at the thought of, say, CBS transforming itself into another Playboy Channel. This, of course, is not likely to happen. Too many countervailing commercial, institutional, and societal pressures exist. Indeed, witness the networks' great reluctance to accept condom advertisements despite the many "respectable" advocates for it. See Congress Considers Condom Commercials, Broadcasting, Feb. 16, 1987, at 65; cf. More Stations Accepting Condom Spots, Broadcasting, Feb. 23, 1987, at 41. What might happen, however, is that, for example, mainstream movies will be shown on television without the infamous and disheartening legend "Edited for Television," which always implies that someone at the network knows better than the viewer what he or she should watch. The teaching of the first amendment is that, unless the television medium, both cable and broadcasting, is as free as the print media to be both bad and good, it will remain an inferior medium. Should Time magazine decide to become another Playboy, that might raise some journalistic concerns. It would not, however, be a proper governmental concern. The same should be true for television.

in particular greater parental control. The television set cannot easily be kept under a mattress and quietly watched behind a garage. Books and magazines, however, are more easily obtained, more permanent, available at all hours, and more susceptible to private use. In short, they are more "pervasive" and, therefore, harder to control. Printed material also lends itself to episodic use while television requires more sustained watching, thereby placing any objectionable portions into whatever redeeming context the program offers.

Moreover, the supposed power of television, whether derived from its special psychological or persuasive impact, or simply from the vast audience it reaches, does not justify increased government control. Indeed, such a rationale would invert traditional first amendment theories because the greater exposure or communicative impact a medium has the more it needs, and probably deserves, first amendment protection.

Thus, when the FCC recently argued that broadcasting has particular power and immediacy that justifies its different first amendment treatment, a panel of the District of Columbia Court of Appeals, including Judge, now Justice, Scalia, responded: "Whether or not that is true, we are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection."

In sum, concern for harm to society from the proliferation of indecent material should not distinguish the medium of home television. But even if the nature of this medium is considered important on the basis of an

---

333. A recent study shows that the public prefers television to newspapers as a source of reliable news, but they generally were ranked about equal as to their credibility, accuracy, and completeness. See MORI Research, Inc., Newspaper Credibility: Building Reader Trust, 13, 20, 40-43 (1985) (national study commissioned by The American Society of Newspaper Editors).

334. Chief Justice Earl Warren made this point eloquently in dissenting from a decision that upheld a prior review statute for motion pictures:

[Even if the impact of the motion picture is greater than that of some other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.]

Times Film Corp. v. City of Chicago, 365 U.S. 43, 77 (1961) (Warren, C.J., Black, Douglas, Brennan, JJ., dissenting); see also American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (the assumed power of pornography to affect attitudes and perpetuate subordination of women is no basis for its regulation), aff'd mem., 106 S. Ct. 1172 (1986); Freedom of Expression Act of 1983, Hearings on S. 1917 Before the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2nd Sess. 80 (1984) (statement of Floyd Abrams, attorney) ("The Government should, at the very least, be no more empowered to regulate the means of communication with the most impact on the public than to regulate other modes of communication.").

assumed difference in impact, the impact of cable and broadcasting is the same. Again, there is no reason to treat the two differently.

V. CONCLUSION

In an earlier Article, I argued that cable and broadcast television should be considered a single, unified medium, thereby maximizing the first amendment protection each should enjoy. In fact, the cable and broadcast media thus become constitutionally indistinguishable from the print media. Indeed, I showed that differentiating cable and broadcasting perpetuates problematic government restrictions on each across a range of regulations including economic controls, the fairness doctrine, access provisions, and children's programming.\footnote{The children's programming issue concerns the availability of an adequate amount of age-specific programming for children. This is particularly relevant here because one focus in the indecency area is to distinguish cable from broadcasting based on children's comparatively limited access to cable. Yet the FCC relied on cable to supplement children's broadcast programming in deciding not to mandate the amount of children's programming broadcasters must provide. In doing so, the FCC included some programming directed at children on pay cable services, such as Home Box Office, the same service that has figured prominently in most of the cable indecency cases. The conflicting arguments, therefore, consider Home Box Office both accessible and inaccessible to children. See Advertising & Programming on Children's Television, 96 F.C.C.2d 634, 646 (1984) (rep. & ord.). See generally Winer, supra note 3, at 278-82.}

The cable indecency cases present a problem in this regard. Although so far they have reached the right result of no censorship, these cases unconvincingly assert that cable is fundamentally different from broadcasting. Such arguments are unsupportable and inimical to the preferred, unified approach. To say that one of the two media is pervasive in a meaningful way and that the other is not, or that one is an intruder into the home while the other is an invited guest, or that one is accessible to a substantial and important segment of viewers—children—to whom the other is restricted, contradicts the fundamental notions of their similarity, substitutability, and competitive relationship simply to avoid indecency controls that are more fatally flawed in their own right.