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Second-Best Solution: The First Amendment, Broadcast Indecency, and the V-Chip

Howard M. Wasserman

I. INTRODUCTION

The First Amendment right to freedom of speech and the press has never been considered absolute. Despite the common view of the First Amendment as an important symbol of America, the right of free speech often is abridged to serve the "perceived needs of governance." A good illustration of this principle is the law regulating content on broadcast television and radio, the media that traditionally have "received the most limited First Amendment protection."

1 The First Amendment states, in relevant part, "Congress shall make no law ... abridging freedom of speech, or of the press." U.S. CONST. amend. I.


Under the Supreme Court's First Amendment jurisprudence, the government may regulate based on the content or subject matter of speech if such regulation or restriction is carefully tailored to "promote a compelling interest [through] ... the least restrictive means to further the articulated interest." Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). This standard has been stated several ways by the Court. See Harry T. Edwards & Mitchell N. Berman, Regulating Violence on Television, 89 NW. U. L. REV. 1487, 1528-29 (1995) (quoting the various formulations of the compelling interest standard).


4 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). The Court has supported this different treatment by distinguishing broadcasting from other media. See id. at 748-49 (setting out the "uniquely pervasive presence" of broadcast radio and television and their unique accessibility to children as reasons for treating them differently).

A third rationale for the lesser protection of broadcasting is based on scarcity of space on the broadcast spectrum. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388-89 (1969). The scarcity rationale is beyond the scope of this Comment. Scarcity has been the subject of much scholarly criticism, but it is relevant to the question of required access to air time, rather than to government control of indecent content, which is the focus of this Comment. See, e.g., LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-209 (1987); Laurence H. Winer, The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?, 46 MD. L. REV. 212, 218-40 (1987). But see Turner Broad. Sys. v. FCC, 114 S. Ct. 2445, 2457 (1994) (refusing to reconsider the scarcity rationale despite criticism).
The programming most often at the center of such content regulation is material that is indecent, but not obscene. The government usually justifies its regulation of indecent material based on an independent "interest in the well-being of its children." Combining this interest with the lesser First Amendment protection afforded broadcasting, the Supreme Court has allowed the FCC to punish the broadcast on radio and television of indecent (but not obscene) material at a time when children were in the audience. More recently, in

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5 Both indecent and obscene material are banned from broadcast media under 18 U.S.C. § 1464 (1994) ("Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined . . . or imprisoned."). However, the two categories are distinct.

Obscenity does not receive First Amendment protection and may be proscribed entirely. Roth, 354 U.S. at 485. The Court defined obscenity in Miller v. California, 413 U.S. 15, 24 (1973), as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

The FCC defined indecent material as "language that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." Action for Children's Television v. FCC, 58 F.3d 654, 657 (D.C. Cir. 1995) (en banc), cert. denied, 116 S. Ct. 701 (1996) [hereinafter ACT III] (internal quotation marks and citations omitted). This is a broad category of speech, covering everything from the Playboy Channel to serious discussions about AIDS and homosexuality to fictional stories or comedy routines featuring strong, realistic language or adult themes. J.M. Balkin, Media Filters, the V-Chip, and the Foundations of Broadcast Regulation, 45 DUKE L.J. 1131, 1133 (1996).

Indecent material generally is regarded as fully protected by the First Amendment, although language in some opinions has hinted that it receives lesser protection. Compare Sable, 492 U.S. at 126 ("Sexual expression which is indecent but not obscene is protected by the First Amendment . . . ."), with Pacifica, 438 U.S. at 743 (stating that while some patently offensive indecent material is protected, it "surely lie[s] at the periphery of First Amendment concern"). The Court refused to decide the question of lesser protection in its most recent indecency case. See Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2391 (1996) (plurality opinion of Breyer, J.).

The Supreme Court finally considered and rejected a vagueness challenge to the indecency standard in Denver, 116 S. Ct. at 2389-90. Prior to that decision, lower courts had inferred from the Pacifica Court's use of the indecency standard that the standard was not unconstitutionally vague. See Action for Children's Television v. FCC, 852 F.2d 1332, 1339 (D.C. Cir. 1988) [hereinafter ACT I]. For a discussion of the indecency standard as unconstitutionally vague, see Jonathan Weinberg, Vagueness and Indecency, 3 VILL. SPORTS & ENT. L.J. 221 (1996).

Violent television programming also has been a subject of regulatory concern, although the Supreme Court never has addressed regulation of violent content. Since violent speech also receives full First Amendment protection, similar issues arise; in fact, violence and indecency often are linked in the same regulatory schemes. See Powe, supra note 4, at 187; see generally Edwards & Berman, supra note 3 (providing detailed analysis of the regulation of violent content on television).

6 ACT III, 58 F.3d at 661. The Court established that the government's interest in the well-being of its youth is a compelling interest for controlling speech content in Ginsberg v. New York, 390 U.S. 629, 640 (1968) (upholding state law banning the sale of obscene reading material to children under age seventeen), and affirmed it last term in Denver, 116 S. Ct. at 2391; Id. at 2416 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

7 Pacifica, 438 U.S. at 750.
the *ACT III* decision, the United States Court of Appeals for the District of Columbia Circuit upheld as constitutional a federal law banning indecent programming from the airwaves between the hours of six a.m. and ten p.m.\(^8\)

Professor Jonathan Weinberg argues that the system of broadcast regulation "conflicts, starkly and gratuitously, with conventional free-speech philosophy."\(^9\) This conflict between broadcast regulation and free speech theory is so great, he says, that any government regulatory scheme can be "no better than a second-best solution."\(^10\) Unfortunately, the current scheme is hardly second-best. Rather, current "efforts to regulate indecent programming further evidence how public interest perceptions continue to deviate from constitutional norms, notwithstanding official assertions that the same [F]irst [A]mendment principles should be equally applicable to both."\(^11\)

Current government regulation of broadcast speech—the sixteen-hour ban upheld in *ACT III*—is based on an independent interest in protecting children, resulting in a regulatory scheme that is too far removed from First Amendment law. First, the rationales outlined in *Pacifica* do not justify the lesser protection given to broadcasting compared with other media, nor do they support some general regulatory scheme.\(^12\) Second, the *Pacifica* scheme severely restricts adults' rights to see, hear, and enjoy constitutionally protected speech.\(^13\) Third, the scheme creates "thorny problems . . . in the delicate relationships be-

\(^{8}\) *ACT III*, 58 F.3d at 660-61; see infra section II.B.3.

\(^{9}\) Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1205 (1993). Professor Weinberg explicitly did not present policy solutions that "will solve all of the problems of the broadcasting system," because "no such policy solution can exist." Id. at 1203-04.

\(^{10}\) Id. at 1206.

\(^{11}\) Donald E. Lively, *Modern Media and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599, 615 (1992) (internal quotation marks omitted). As one court put it: "While we apply strict scrutiny to regulations of this kind regardless of the medium . . . our assessment . . . must necessarily take into account the unique context of the broadcast medium." *ACT III*, 58 F.3d at 660. This is the unresolved paradox of broadcast regulation that illustrates the degree of departure between broadcast regulation and the First Amendment. See infra subpart III.B.

\(^{12}\) See *Powe*, supra note 4, at 209-15; Matthew L. Spitzer, *Seven Dirty Words and Six Other Stories* 6 (1986) (finding no justifiable differences between broadcast and print); Edwards & Berman, supra note 3, at 1497 ("[J]ustifications distinguishing broadcast from other media . . . will not hold."); Laurence H. Winer, *The Signal Cable Sends, Part II—Interference from the Indecency Cases?,* 55 FORDHAM L. REV. 459, 522 (1987) ("[N]o basis for distinguishing between cable and broadcasting."). But see *Denver*, 116 S. Ct. at 2386-87 (plurality opinion of Breyer, J.) (applying *Pacifica* factors to cable). For further discussion, see infra subpart III.A.

\(^{13}\) Winer, supra note 12, at 521 ("Solicitude for children . . . abridges adults' First Amendment rights."). The effect is to make "completely unavailable to adults material which may not constitutionally be kept" from them. *Pacifica*, 438 U.S. at 768 (Brennan, J., dissenting). Such a result violates the long-standing principle that the state cannot reduce the adult population to reading only what is fit for children. See Butler v. Michigan, 352 U.S. 380, 383-84 (1957); see also infra section III.B.1.
tween and among parents, children, and the state” by preempting the rights of parents to raise their children and to decide what they see on television.\textsuperscript{14} Finally, the scheme ignores the fact that the context in which the independent protection interest has been established in First Amendment doctrine is inapposite to the regulation of protected speech to a mixed audience.\textsuperscript{15}

The best regulatory scheme, from the standpoint of free speech philosophy, would recognize that non-obscene speech does not justify content-based regulation.\textsuperscript{16} But this is politically unacceptable to legislators who want to “give the public a feeling that ‘something is being done’” to protect children from indecent material in the media.\textsuperscript{17} Thus, the task is to create a regulatory scheme that is more solicitous of free speech while recognizing the political need for some regulation. This Comment seeks to outline that second-best solution.\textsuperscript{18}

The key to any such solution is the fundamental First Amendment presumption that protected speech must be disseminated to be seen, heard, and enjoyed by a willing audience. The government cannot stop speech at the source; rather, all unwilling viewers bear the

\textsuperscript{14} Franklyn S. Haiman, \textit{Speech and Law in a Free Society} 179 (1981). The sixteen-hour ban disturbs that balance by infringing on the right of parents to decide how to raise their children. See Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); see also Pacifica, 438 U.S. at 769-70 (Brennan, J., dissenting); \textit{ACT II1}, 58 F.3d at 670 (Edwards, C.J., dissenting); see infra section III.B.2.

A close look at the cases asserting a protection interest illustrates this point. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (involving indecent speech to a student audience at a school assembly that did not abridge the rights of adults); Ginsberg, 390 U.S. at 636 (involving material obscene as to minors); see infra section III.B.3.

\textsuperscript{16} Winer, \textit{supra} note 12, at 525; see also Pacifica, 438 U.S. at 778 (Stewart, J., dissenting) (arguing that if speech is not obscene, then the Commission “lacked statutory authority to ban it”); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (“Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”); Haiman, \textit{supra} note 14, at 179 (arguing children should be exposed to whatever protected speech they may encounter in the real world and should be given the guidance that will aid them in learning how to respond wisely and healthfully).

\textsuperscript{17} Thomas I. Emerson, \textit{The System of Freedom of Expression} 502 (1970); see also Powe, \textit{supra} note 4, at 187 (discussing pressure on the FCC to “do something”); Shiffrin, \textit{supra} note 3, at 5 (arguing that governmental needs may change the meaning of First Amendment protection); Weinberg, \textit{supra} note 9, at 1206 (“It is insufficient . . . simply to conform our law to ordinary free-speech philosophy.”). Further, the doctrine of lesser protection for broadcasting is well-entrenched, see FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (“[D]ifferences in the characteristics of new media differences in justifications for the First Amendment standards applied to them.”), and the Supreme Court is unwilling to reconsider its justifications for that lesser protection. See Denver, 116 S. Ct. at 2385-87 (applying \textit{Pacifica} rationales to cable); Turner, 114 S. Ct. at 2457 (refusing to reconsider the scarcity rationale despite criticism).

\textsuperscript{18} Weinberg, \textit{supra} note 9, at 1204 (“The better course may be to look for second-best solutions.”).
burden of taking affirmative steps to avoid that speech.19 The solution would employ "institutional safeguards" to provide parents and unwilling viewers with information about programming and the means to avoid those programs if they so choose.20 This Comment argues first that broadcasting should receive the same First Amendment protection as other media.21 Second, it argues that the government's compelling interest when regulating broadcast indecency is not in protecting children—that is a role for parents, not the government.22

19 Pacifica, 438 U.S. at 765-66 (Brennan, J., dissenting) ("Whatever the minimal discomfort suffered by a listener... during the brief interval before he can simply extend his arm and switch stations or flick the 'off' button, it is surely worth the candle to preserve... the right of those interested to receive, a message entitled to full First Amendment protection."); id. at 766 (Brennan, J., dissenting) (rejecting decision that "permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority" of viewers); Winer, supra note 12, at 523 (arguing that individual sensibilities generally are "insufficient to override the substantial first amendment interests of... willing viewers"); id. (arguing that it is "better to preserve first amendment freedoms, even at the expense of some brief incidents of offense to sensitive individuals"); see also EMERSON, supra note 17, at 17 (arguing that "expression must be protected against government curtailment at all points" and "regulations... must be based upon principles which promote, rather than retard" individual expression); Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 624 (1982) ("The point... is to balance with 'a thumb on the scales' in favor of speech."). Any regulations of broadcasting thus must ensure that the protected speech gets out over the airwaves to be heard and enjoyed by willing listeners.

For example, a law requiring a willing recipient of speech to request that certain materials be sent to him was an unconstitutional abridgment on his First Amendment rights. See Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965). Instead, the sensibilities of the unwilling recipient were fully safeguarded by a similar opportunity to request that delivery be stopped. Id. at 310 (Brennan, J., concurring); see also Denver, 116 S. Ct. at 2391 (holding that requirement that viewers request indecent channels in writing restricted viewing by subscribers who feared for their reputations).

Likewise, the Court has never held that the "[g]overnment itself can shut off the flow of mailings to protect those recipients who might potentially be offended." Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983). Instead, the unwilling viewers bear the affirmative duty of "averting their eyes." Cohen v. California, 403 U.S. 15, 21 (1971). Further, the "Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." Erznoznik, 422 U.S. at 210. Finally, it is a cardinal principle of the First Amendment that the remedy to protect the unwilling listener "is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also infra note 127 and accompanying text.

20 SPrr7nR, supra note 12, at 125-26. Another scholar called these "informational filters." See Balkin, supra note 5, at 1132.

21 The rationales used to distinguish broadcasting from other media, particularly cable television, "may sound good but they cannot provide a distinction that sets broadcasting apart." Powe, supra note 4, at 210; see also Winer, supra note 12, at 522-23 ("[T]here is no significant difference between the media."). See discussion infra subpart III.A.

Instead, the sole interest that the government should assert and advance is a facilitation interest: "facilitating parental control" over what their children see and hear. This distinction is vital because the stated interest determines which regulations are the least restrictive means to serve that interest.

This Comment concludes that Congress created the second-best solution with the V-Chip provision in the Telecommunications Act of 1996, by expressly relying on an interest in facilitating parental control over their children's television viewing. The law requires that the television industry rate programs and transmit those ratings with the broadcast signal, that television sets be equipped with a device that reads the signal, and that parents have the means to screen out those programs, channels, or time slots they do not want their children to watch.

Part II of this Comment analyzes the statutory and case law support for the current laws regulating broadcast indecency. It focuses on Pacifica and ACT III, the key decisions upholding content-based regulations. Part III discusses the problems with the current regulatory scheme, concentrating mainly on scholarly criticism of the distinction between broadcasting and other media, and the current scheme's infringement on the First Amendment and other constitutional rights of adults. Part IV analyzes the "facilitation interest" and its support from scholars and judges, and then discusses the V-Chip law and its constitutionality, showing why it is the second-best solution to regulating broadcast indecency.

II. STATE OF THE LAW OF BROADCAST INDECENCY

The statutory power of the FCC to regulate content in broadcasting is derived from an interplay of two statutory provisions. The first makes it a crime to "utter any obscene, indecent or profane language"

23 See Edwards & Berman, supra note 3, at 1563 ("The state's compelling interest lies not in protecting children, but in protecting parenting.").

The government usually asserts both interests in support of its broadcast regulations. See, e.g., Pacifica, 438 U.S. at 749-50; ACT III, 58 F.3d at 660; see also infra Part II. The problem is that these interests do not support the same types of regulations and generally cannot stand together. ACT III, 58 F.3d at 670 (Edwards, C.J., dissenting). Thus, the government should assert only a facilitation interest and should never pass a regulation in the name of guarding children from protected speech in broadcasting. See infra Part IV.

24 Thus, an outright prohibition on indecent programming for sixteen hours each day cannot serve a facilitation interest; such a ban preempts, rather than facilitates, parental control. See ACT III, 58 F.3d at 670-71 (Edwards, C.J., dissenting); see also C. Edwin Baker, The Evening Hours During Pacifica Standard Time, 3 VILL. SPORTS & ENT. L.J. 45, 56 (1996) (noting contradiction between the interests).


26 Id.; see infra subpart IV.B.
via broadcast communications;\(^27\) the second prohibits the FCC from censoring broadcast communications.\(^28\) The Supreme Court has had to step in to resolve the conflict between these provisions, which it did for the first time in 1978.

A. George Carlin and the Seven Dirty Words

On a Tuesday afternoon in October 1973, a New York radio station owned by the noncommercial Pacifica Foundation aired, as part of a program about attitudes toward language, a twelve-minute monologue by comedian George Carlin entitled “Filthy Words,” a discussion of the seven “words you couldn’t say on the public . . . airwaves.”\(^29\) A man who said he stumbled onto the broadcast on his car radio while driving with his young son complained to the FCC.\(^30\) The Commission upheld the complaint, characterizing the language as “patently offensive” and thus indecent and prohibited by 18 U.S.C. § 1464.\(^31\) Pacifica appealed to the D.C. Circuit, which reversed the decision of the Commission, with three separate opinions.\(^32\) The case then went to the Supreme Court, the first and only case in which the Court has dealt with the issue of indecent material in broadcasting.\(^33\)

The Court, in an opinion by Justice Stevens, first resolved the inherent conflict between sections 326 and 1464, interpreting the restriction against FCC censorship to mean the denial of “any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts . . . .”\(^34\) While acknowledging that this

\(^{27}\) 18 U.S.C. § 1464 (1994): “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned.”

\(^{28}\) 47 U.S.C. § 326 (1994): “Nothing in this chapter shall be understood or construed to give . . . the power of censorship over the . . . communications . . . .”


\(^{30}\) See Powe, supra note 4, at 186 (noting that the complainant was John R. Douglas, a member of the national planning board of Morality in Media, an organization working to eliminate indecency from mass media). Professor Powe said Douglas “would have listened, if at all, only with the aim of finding what he did not wish others to hear.” Professor Powe also noted the “young son” was 15 years old. Id.

\(^{31}\) The Commission there established for the first time the legal definition of indecency. See supra note 5. The Commission also emphasized that the monologue was broadcast during the early afternoon, a time when children were likely to be in the audience. Pacifica, 438 U.S. at 732.


\(^{33}\) For a discussion of the Pacifica case in the context of other FCC actions against radio stations for broadcasting material about sex and drugs and of the congressional desire for the Commission to “do something” about television content, see Powe, supra note 4, at 162-90.

\(^{34}\) Pacifica, 438 U.S. at 735.
order “may lead some broadcasters to censor themselves,” Justice Stevens held that in order to give meaning to both provisions, the censorship language of section 326 could not apply to the prohibition of obscene, indecent, or profane material.

The Court then turned to the First Amendment issue, holding that although the speech in question was protected, such language and references “surely lie at the periphery of First Amendment concern.” The Court analyzed the Carlin monologue as if it were not fully protected speech: “If there were any reason to believe that the Commission’s characterization [of the monologue] as offensive could be traced to its political content . . . First Amendment protection might be required. But that is simply not the case. These words offend for the same reasons that obscenity offends.”

The Court then explained that different media receive different levels of First Amendment protection: “[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.” The reasons for this distinction in the indecency context were two-fold.

First, “broadcast media have established a uniquely pervasive presence in the lives of Americans,” particularly in the home, where “the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” Prior warnings, or simply turning the radio off, were insufficient to remedy the injury suffered from hearing the dirty words. Second, “broadcasting is uniquely accessi-

35 Id. at 743.
36 Id. at 738.
37 Id. at 743.
38 Id. at 746. Justice Stevens cited Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), for the proposition that “[s]uch utterances are no essential part of any exposition of ideas, and are of such slight social value.” Pacifica, 438 U.S. at 746.

Note that the opinion did not command a majority on this point; only Chief Justice Burger and Justice Rehnquist joined this portion of the opinion. Justice Powell, joined by Justice Blackmun, said the Justices were not free to decide on the basis of its content which speech is most valuable and hence deserving of more protection, and which is less valuable and hence deserving of less protection. Id. at 761 (Powell, J., concurring in part). The case did not turn on whether Carlin’s monologue was more or less valuable than a campaign speech. Id.

For another opinion by Justice Stevens according lesser protection to indecent speech, see Young v. American Mini-Theatres, 427 U.S. 50, 70 (1976).
39 Pacifica, 438 U.S. at 748. Justice Stevens made much of the context in which speech occurs as determinative of its level of protection, by distinguishing indecent language on the radio in this case from the same language in a public courthouse in Cohen v. California, 403 U.S. 15, 22 (1971) (holding that wearing a jacket emblazoned with the words “Fuck the Draft” inside a courthouse was protected speech). Id. at 747 n.25.
40 Id. at 749.
41 Id. at 748-49. Justice Stevens noted that the balance was tipped towards the speaker when outside the home and that anyone who did not like some speech should turn away. This was reversed inside the home, as illustrated by the greater privacy interest of a homeowner from obscene phone calls. Id. at 749 n.27. This problem is discussed infra, in subpart III.A.
ble to children," and "the government's interest in both the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression."

Justice Stevens responded in a footnote to the argument that the emphasis on protecting children would infringe on the rights of adults to hear the Carlin monologue, noting "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." Finally, Justice Stevens emphasized the "narrowness of our holding," stressing that the monologue was not necessarily banned from broadcast entirely, since the FCC had emphasized the time of day the show was broadcast and the other unique facts of the case.

The FCC did not take Pacifica as a mandate to aggressively enforce the rules against broadcast indecency. Broadcasters, playing it safe, simply avoided repetitive use of the seven words from the Carlin monologue, with a "safe harbor" after ten p.m., a time when few (or fewer) children would be in the audience. The Commission refrained from enforcing the indecency standard between 1978 and 1987.

B. Action for Children's Television: The Nine Year Drama

1. ACT I.—In 1987, the Commission began applying the indecency definition as a generic standard: "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual

42 Id. at 749.
43 Id. at 749-50 (internal quotation marks omitted). Justice Powell's concurring opinion emphasized that the "result [in this case] turns . . . on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes." Id. at 762 (Powell, J., concurring in part).
44 Id. at 750 n.28.
45 Id. at 750.
46 In fact, the FCC disavowed an expansive interpretation of indecency in In re Application of WGBH Education Foundation, 69 F.C.C.2d 1250, 1254 (1978) (ruling that Pacifica "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in Pacifica are broadcast. . . . We intend strictly to observe the narrowness of the Pacifica holding.").
47 Carlin had called the words in his monologue "the words you couldn't say on the public . . . airwaves." Broadcasters' response to Pacifica showed Carlin was not only a "superb comedian; he was also a good prophet." PowE, supra note 4, at 186.
50 For a discussion of the first few years of the drama, see Passler, supra note 48, at 142-66.
The Commission issued three separate warnings against radio station broadcasts. The stations appealed the warnings to the D.C. Circuit in Action for Children's Television v. FCC. The court, in an opinion by then-Judge Ruth Bader Ginsburg, first upheld the new, generic indecency standard, holding that the Commission had explained adequately the reasons for adopting this new enforcement standard because the old standard had been "unduly narrow as a matter of law and inconsistent with its obligation responsibly to enforce section 1464."

The court also rejected a vagueness challenge to the standard. The generic definition was the same definition the Commission had used in Pacifica, and although the Supreme Court had not specifically addressed a vagueness challenge, the Court had quoted portions of that standard with "seeming approval" and had affirmed the Commission's application of that standard. The D.C. Circuit thus "infer[red]... that the [Supreme] Court did not regard the term 'indecent' as... vague." The court next repeated the litany that indecent speech is constitutionally protected, but may be restricted or regulated consis-

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51 See New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 62 Rad. Reg. 2d (P & F) 1218, 1219 (1987); see also Passler, supra note 48, at 137-41.

52 In the first case, a radio station in Los Angeles was warned following a ten p.m. broadcast of a scene from a play called "Jerker," in which two homosexual men discuss anal intercourse. The play itself, about coping with AIDS, was geared to the city's gay population, and was preceded by a warning as to its content. The FCC warned the station that future broadcasts could be actionable under the new, generic indecency standard. See Pacifica Found., 62 Rad. Reg. 2d (P & F) 1191 (1987).

The second warning went to a college station in Santa Barbara, California, which aired a song after ten p.m. called "Makin' Bacon" containing references to sexual organs and activities. The Commission again said a future broadcast, even after ten p.m., would be actionable. See Regents of Univ. of Cal., 62 Rad. Reg. 2d (P & F) 1199 (1987).

The third action was against Infinity Broadcasting for a weekday morning broadcast of Howard Stern's radio program containing sexual innuendo and double entendre, with references to masturbation, ejaculation, and other sexual activities and organs. See Infinity Broad., 62 Rad. Reg. 2d (P & F) 1202 (1987).

For excerpts from the broadcasts, see Passler, supra note 48, at 137-38 nn. 34-39.

53 ACT I, 852 F.2d at 1332.

54 Id. at 1338 (internal quotation marks omitted).

55 Id. at 1338.

56 Id. at 1339.

57 Id. at 1339. Judge Ginsburg added that "if acceptance of 'indecent' as capable of surviving a vagueness challenge is not implicit in Pacifica, we have misunderstood Higher Authority and welcome correction." Id. The Supreme Court formally accepted the indecency definition in Denver Area Education Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2389-90 (1996) (rejecting void-for-vagueness challenge).
tent with the power of the state to control the conduct of children, especially in unique media such as broadcast television and radio. 58

Nevertheless, the court ultimately decided that the Commission did not provide adequate factual or analytic foundation in setting the time for the safe harbor for indecent programming and remanded the cases for "thoroughgoing reconsideration of the times at which indecent material may be aired." 59 The court demanded a "securely-grounded channeling rule [that] would give effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech." 60

2. ACT II.—Congress responded by passing an amendment to a 1989 appropriations bill requiring the FCC to "promulgate regulations in accordance with section 1464... to enforce the provisions... on a 24-hour a day basis." 61 The Commission then passed a total, 24-hour ban on indecent programming on broadcast television and radio. 62 A unanimous panel of the D.C. Circuit rejected the absolute ban in 1991, holding that based on ACT I, "the Commission must identify some reasonable period of time during which indecent material may be broadcast," which means "the Commission may not ban such broadcasts entirely." 63

58 ACT I, 852 F.2d at 1340 & n.12. The court also tried to work the issue of the merit of a program into the standard: "[M]erit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent." Id. at 1340.

59 Id. at 1340-41. The court stressed the importance of a well-reasoned channeling analysis and identification of some reasonable period of time in which indecent material may be broadcast "in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails." Id. at 1341.

60 Id. at 1344. This, of course, overlooks the problem Chief Judge Edwards would later address in his ACT III dissent—if indecent material is channeled to certain times of day, parents who wish their children to see it cannot do so for significant periods of time. Act III, 58 F.3d at 670 (Edwards, C.J., dissenting). But see Baker, supra note 24, at 46 (arguing that Pacifica implicitly approved channeling); see infra subpart IV.A.


The amendment was proposed by Senator Jesse Helms, who, ignoring the protected nature of indecent speech, argued that there was no right to broadcast or receive indecent material on public airwaves. He said that adults who want indecent material should purchase tapes and records, go to theaters and night-clubs, or watch cable television. 134 Cong. Rec. S9,911 (1988). "If adults want this kind of trash they can go to a garbage dump," he added. Id. Senator Helms also rejected the idea of a channeling, saying "[g]arbage is garbage, no matter what the time of day or night may be." Id.


63 ACT II, 932 F.2d at 1504.

64 Id. at 1509. "The fact that Congress itself mandated the total ban... does not alter our view that... such a prohibition cannot withstand constitutional scrutiny." Id. The court also
3. *ACT III.*—After the Supreme Court denied certiorari in *ACT II*, Congress responded with the Public Telecommunications Act of 1992, part of which ordered the Commission to “promulgate regulations to prohibit the broadcasting of indecent programming” between six a.m. and midnight.\(^{65}\) This led to the latest scene in this drama, an en banc decision of the D.C. Circuit that followed the same pattern and reasoning as *Pacifica* and upheld, with modification, the channeling regulations.\(^{66}\) Judge Buckley, writing for an eight-judge majority, began by following *Pacifica* for the proposition that broadcast receives less protection than other media.\(^{67}\) Thus, “[w]hile we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment . . . must necessarily take into account the unique context of the broadcast medium.”\(^{68}\) The court then focused on two of the compelling interests asserted by the Commission: (1) supporting parental supervision of their children; and, (2) concern for children’s well-being.\(^{69}\)

The court emphasized FCC findings about the prevalence of homes in which children had radios or televisions in their own rooms to show that real parental control over what their children saw was impossible,\(^{70}\) and reaffirmed “that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts.”\(^{71}\) The court also found that the two asserted interests were complementary and fully consistent with one another because parents who did wish to expose their children to the material would “have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR

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\(^{66}\) The FCC responded to the mandate by amending 47 C.F.R. 73.3999 to set the safe harbor at midnight to six a.m. 47 C.F.R. 73.3999 (1995).


\(^{67}\) Id. at 659.

\(^{68}\) Id. at 660.

\(^{69}\) Id. at 661. The FCC asserted a third interest in protecting the home against intrusion by offensive broadcasts, but the court did not address this interest because it found the other two sufficient to support the regulation. *Id.* at 661.

\(^{70}\) Id. at 661.

\(^{71}\) Id. at 663.
equipment, and the rental or purchase of readily available audio and video cassettes."\(^7\)

The court then concluded that the ban was narrowly tailored to serve the compelling interests.\(^7\)\(^3\) Relying on FCC findings as to the number of children in the audience during those hours, and the fact that the number of children watching drops after midnight, the court found that the rule "reduces children's exposure to broadcast indecency to a significant degree."\(^7\)\(^4\) Also, the restrictions did not "unnecessarily interfere with the ability of adults to watch or listen to such materials both because [adults] are active after midnight and . . . have so many alternative ways of satisfying their tastes at other times."\(^7\)\(^5\) Finally, the court—although recognizing the burden on the First Amendment rights of adults—held that those rights must "yield to the imperative needs of the young."\(^7\)\(^6\) The court did, however, find the public broadcaster exception to be a "selective exemption" and ordered the FCC to apply the less restrictive, ten p.m. cut-off to all broadcasters.\(^7\)

Today, no radio or television broadcaster may broadcast, between the hours of six a.m. and ten p.m., programs containing "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."\(^7\)\(^8\) These regulations are based in large part on a government interest in protecting children.\(^7\) Analysis of content regulation in broadcasting is clearly different than in other media and other areas of free speech law. The next Part examines the dramatic degree to which the broadcast regulatory scheme departs from First Amendment and other constitutional principles.

### III. Problems with the Law of Broadcast Indecency

Indecent-but-not-obscene speech generally receives full First Amendment protection,\(^8\)\(^0\) although judicial language has hinted at a

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72 Id.
73 Id. at 667.
74 Id. at 655, 657.
75 Id. at 667.
76 Id.
77 Id. at 668-70.
78 New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 2 Rad. Reg. 2d (P & F) 1218, 1219 (1987); see ACT III, 58 F.3d at 660.
79 ACT III, 58 F.3d at 661.
lower level of protection. Even under Justice Scalia's sliding scale, the types of programs at issue on radio and broadcast television still should be fully protected. This Comment thus proceeds on the view that indecent speech in broadcasting receives full First Amendment protection.

A. Pacifica as a First Amendment Anomaly

The current regulatory scheme surrounding broadcast indecency is entirely the child of the Court's decision in Pacifica, so any effort to change the law must begin there. This case has been repeatedly distinguished, criticized, and ignored. It stands alone as a contradic-

part) (stating that the Court is not free to determine which speech deserves more or less protection on the basis of content alone).

81 See Sable, 492 U.S. at 132 (Scalia, J., concurring) (proposing a sliding scale where the more pornographic the indecent material, the less it is protected); Pacifica, 438 U.S. at 743 (stating that indecent material is protected, but that it "surely lie[s] at the periphery of First Amendment concern"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (Stevens, J.) (stating that protection of indecent material is wholly different and of a lesser magnitude than protection of political speech); see also Denver, 116 S. Ct. at 2391 (refusing to decide the question).

82 Indecent material in broadcasting involves, for example, dirty words, Pacifica, 438 U.S. at 730; sexual- or adult-oriented discussions, see Passler, supra note 48, at 137-42; see supra note 52; or, in the case of television, some partial nudity, cf. Erznoznik, 422 U.S. at 213 ("[A]II nudity cannot be deemed obscene even as to minors."). This is not the type of graphic sexuality generally associated with pornography. But see Catharine A. MacKinnon, Only Words 22 (1993) (defining pornography as any "graphic sexually explicit materials that subordinate women through pictures or words").

83 Further, free speech theory would seem to require that any categories falling outside the umbrella of the First Amendment be rigorously, narrowly defined and precisely limited in scope; thus, new unprotected categories should not be created lightly. See, e.g., Emerson, supra note 17, at 9-11; John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1501 (1975); Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 10-11.


85 "[T]he 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 law. To a good degree this is what has happened." Winer, supra note 12, at 501-02 (quoting Pacifica, 438 U.S. at 775 (Brennan, J., dissenting)). As one district judge said, "Time has not been kind to the Pacifica decision." ACLU v. Reno, 929 F. Supp. 824, 875 (E.D. Pa. 1996) (3-Judge Panel) (opinion of Dalzell, J.); see also Powe, supra note 4, at 209-11 (describing problems with Pacifica rationales); Shiffrin, supra note 3, at 80 ("Most people with any First Amendment bones in their bodies are troubled by the Pacifica case."); Baker, supra note 24, at 45 (agreeing with description of Pacifica as "possibly the worst of the Supreme Court's First Amendment decisions").

For case law refusing to apply Pacifica to other media, see Sable, 492 U.S. at 127 (striking down 24-hour ban on Dial-a-Porn service because "private commercial telephone communications . . . are substantially different from the public radio broadcast"); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (distinguishing receipt of offensive material by mail from receipt by broadcast); Cruz v. Ferre, 755 F.2d 1415, 1419-20 (11th Cir. 1985) (distinguishing cable and broadcast); ACLU, 929 F. Supp. at 851-52 (opinion of Sloviter, C.J.) (Internet not like broadcasting); id. at 876-77 (opinion of Dalzell, J.). But see Denver, 116 S. Ct. at 2388 ("[C]able and broadcast television differ little, if at all.").
tion, under which judicial and FCC decisions about broadcasting—based on a perceived need to take affirmative steps to protect children from hearing what the government believes is harmful—"continue to deviate from constitutional norms" by limiting dissemination of expression, based on content, that otherwise would be constitutionally protected.86

Even as to broadcasting, "[i]t takes a lot of extrapolation to move from Pacifica to a full-blown theory of regulation."87 Pacifica was an emphatically narrow holding88 that should be limited to the facts of that case—those seven words in a weekday afternoon radio broadcast.89 The Pacifica Court itself had intimated that Carlin's exact same message could be made as long as it did not use those words.90 The correctness of the result in Pacifica on its facts and context is, perhaps, arguable;91 but it certainly should not support the generic definition the FCC has applied since 1987 or the ban upheld in ACT III.92

Moreover, while the rationales used in Pacifica to distinguish broadcasting from other media initially seem convincing, they are inadequate to permit this lesser degree of First Amendment protection.

86 Lively, supra note 11, at 615; see Pacifica, 438 U.S. at 775 (Brennan, J., dissenting) ("[O]nly an acute ethnocentric myopia . . . enables the Court to approve the censorship of communications solely because of the words they contain"); Erznoznik, 422 U.S., 212 (holding that Constitution does not permit the Court to protect some listeners from protected speech).

87 PowE, supra note 4, at 212.

88 Pacifica, 438 U.S. at 750; see also Sable, 492 U.S. at 127 (emphasizing the narrowness of Pacifica's holding); Bolger, 463 U.S. at 74 (same); Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 784 (3d Cir. 1990) (overturning state restriction on phone sex messages); PowE, supra note 4, at 236 (arguing that extending Pacifica "wrenches [it] from its facts").

89 "The Court's opinion is, in fact, narrowly confined to cases concerning both the precise language conveyed and the particular medium of communication. . . . Pacifica is about dirty words on radio." Thomas G. Krattenmaker & Marjorie L. Esterow, Censoring Indecent Cable Programs: The New Morality Meets the New Media, 51 FORDHAM L. REV. 606, 628 (1983); see also Baker, supra note 24, at 45-46 (noting the narrowness of the Pacifica decision).

90 Justice Stevens noted that avoiding indecent language "will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." Pacifica, 438 U.S. at 743 n.18. This implies that the same protected, indecent-but-not-obscene message, presented using different language, should be permissible. Note that this still raises First Amendment troubles by ignoring the fact that "one cannot forbid particular words without also running a substantial risk of suppressing ideas." Cohen v. California, 403 U.S. 15, 26 (1971); see also Pacifica, 438 U.S. at 773 (Brennan, J., dissenting) ("The idea that the content of a message . . . can be divorced from the words that are the vehicle for its expression is transparently fallacious.").

91 Fifteen years after Pacifica, Justice Stevens argued that "the result might have been different if the broadcaster had simply contended that the particular order was erroneous because the evidence of actual or probable offense to the listening audience was so meager. Instead, however, the station took the position that the Commission was entirely without power to regulate indecent broadcasting. . . . [A] less ambitious strategy might have better served the interests of . . . the law." John Paul Stevens, The Freedom of Speech, 102 YALE L.J. 1293, 1307-08 (1993).

92 See supra subpart II.B.
Consequently, they have been widely and justifiably criticized. Consequently, they have been widely and justifiably criticized.93 There is simply "no significant difference between the media."94

Take, for instance, the unique accessibility of television to children as a justification for greater government regulatory power over broadcasting. Assuming accessibility means children can listen to the radio or watch television without parental supervision, that does not distinguish broadcasting from newspapers, magazines, or the U.S. mail, which children can read as easily as they can see or hear an indecent program on television.95 Likewise, the idea that television and radio are intruders in the home is unrealistic. As Professor Powe argued, "Americans bring radios and television sets into their homes because they desire them [and] there is no law requiring [the sets] be turned on."96 The Court stated in Bolger v. Youngs Drug Products Corp. that the "First Amendment 'does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.'"97 The recipient of objectionable mail could and should simply throw it away; "the 'short . . . journey from mail box to trash can . . . is an acceptable burden, at least so far as the

93 See Powe, supra note 4, at 209-10 (arguing the distinctions "seem silly"); Spitzer, supra note 12, at 6 ("[N]o other differences in the regulatory control of broadcast and print are justifiable."); id. at 123-30 (discussing the Pacifica rationales and arguing that they apply equally to print); Edwards & Berman, supra note 3, at 1497 (noting the "irrationality of granting broadcast television less First Amendment protection than all other media"); Winer, supra note 12, at 513 (arguing that the "asserted differences are . . . ephemeral"); see also ACT III, 58 F.3d at 673 (Edwards, C.J., dissenting) ("Whatever the merits of Pacifica . . . 20 years ago, it makes no sense now."). But see Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2386-87 (1996) (applying Pacifica factors to cable); Minow & LAMAY, supra note 22, at 127-28 (arguing that Pacifica's reasoning is not obsolete).
94 Winer, supra note 12, at 523.
95 Powe, supra note 4, at 209; Spitzer, supra note 12, at 123 (arguing that scanning the broadcast dial is the same as flipping through pages in magazine). The Supreme Court expressly rejected the application of the "uniquely accessible" rationale to the postal service. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (invalidating statute that prohibited the unsolicited mailing of contraceptive advertisements).
96 Powe, supra note 4, at 210. Professor Powe notes that books, which are bought or borrowed and also voluntarily brought into the house, are not intruders and certainly not fit for government censorship, id., so why should broadcast be fit for censorship? Professor Winer takes a harder tack, arguing that because the broadcast media come into the home where the privacy right is greatest, the freedom of the willing listener from government intervention should be greater. Winer, supra note 12, at 520.

Justice Brennan argues that listening to communications over the public airways is an expressive act by the listener. "Because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse." Pacifica, 438 U.S. at 765 (Brennan, J., dissenting). Professor Spitzer assessed Justice Brennan's argument: "If Justice Brennan is correct, as he almost certainly is, then one could say the same thing about subscribing to Penthouse magazine by mail. Similarly, if he is wrong, . . . then the government may invoke these same . . . interests to control the content of printed publications." Spitzer, supra note 12, at 120.
Constitution is concerned.”98 The issue is why the journey to the garbage pail is less burdensome than the equally short journey to the tuning dial on a television or radio, especially when the tuning dial now is operated by remote control.99

Further, television viewers or radio listeners are not prisoners in their homes, forced to listen to indecent speech.100 Broadcast radio and television may be distinguished from a true “home intruder,” which the Court addressed in *Frisby v. Schultz.*101 The focused/general distinction made in *Frisby* illustrates the fallacy in Justice Stevens’s analogy in *Pacifica* between an indecent radio broadcast and an obscene phone call.102 Obscene phone callers are focused picketers, annoying or harassing only the single person called; the caller’s speech arguably can be restricted in the name of protecting residential privacy. But broadcasting, which sends the signal over public airwaves in a wide viewing or listening area to potentially millions of homes at once, is the “more generally directed means of communication that may not be completely banned.”103 A person scanning the dial to find the desired station runs the risk of hearing unwanted material that is sent to the general public.104

Professor Powe viewed the pervasive nature of broadcasting as an issue of power.105 The problem with this view is that *Pacifica* and the warnings in *ACT I* dealt with radio, not television; Professor Powe doubted anyone could “assert that radio is a powerful force in American life.”106 But broadcasting in general “radiated fear”:

With broadcasting—specifically television (I think we have outgrown the belief that radio is powerful)—we are not as sure what the medium is doing to us, and so we attempt to regulate it to prevent it from doing what we do not know it is doing. We may not know the consequences of introducing television into our homes, but there appears to be a regula-

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99 Besides, one could avoid unwanted material, especially on television, by checking program listings in advance or by not turning on the television until the desired channel was selected. *Spitzer,* *supra* note 12, at 123.
100 “As long as individuals have free will and television sets are equipped with on/off buttons and channel selectors,” Winer, *supra* note 12, at 513, the individual always can avoid objectionable speech on radio and television. “No viewer is a captive audience of either cable or broadcasting; he can avoid or turn away from either with equal ease.” *Id.* at 523.
101 *487 U.S. 474, 486* (1988). The Court upheld an ordinance that prohibited “focused picketing,” picketing narrowly directed at a specific household rather than the public. The ordinance banned only those speakers whose purpose was to intrude upon the targeted resident, but not those who sought to disseminate a general message to the public. *Id.*
102 *Pacifica,* *438 U.S.* at 749 n.27.
103 *Frisby,* *487 U.S.* at 486. Further, the listener who tunes in the radio or television is taking part in this general public communication. *Pacifica,* *438 U.S.* at 765 (Brennan, J., dissenting).
104 *Spitzer,* *supra* note 12, at 123.
105 *Powe,* *supra* note 4, at 211.
106 *Id.* at 212.
tory consensus that we don't want those consequences to get out of hand. ... The fear may be irrational, but it is there nevertheless. It does not justify regulation, but it does explain it.\footnote{107}

However, the power rationale for regulation actually inverts traditional free speech theories, which normally would favor greater First Amendment rights for media with greater exposure or communicative impact.\footnote{108}

Despite the apparent similarities between broadcast and cable television,\footnote{109} lower courts have noted several ways in which they differ and have granted cable television full First Amendment protection, unfettered by \textit{Pacifica}-type time restrictions. These differences include the fact that a cable user subscribes, pays a fee, and can cancel the subscription at any time, while a broadcast television user does not subscribe or pay a fee and cannot cancel.\footnote{110} Additionally, cable may utilize lockboxes, available free from the cable company, which allow parents to "lock out" channels or programs they do not want their children to see.\footnote{111} However, in \textit{Denver Area Education Telecommunications Consortium v. FCC},\footnote{112} a divided Supreme Court stated for the first time that, in terms of intrusiveness and pervasiveness, "cable and broadcast television differ little, if at all,"\footnote{113} and that the factors behind the Court's opinion in \textit{Pacifica} were present in the regulation of indecent material on cable.\footnote{114}

\footnote{107}Id. at 214-15; see also Donald E. Lively, \textit{Fear and the Media: A First Amendment Horror Show}, 69 Minn. L. Rev. 1071, 1080-91 (1985) (discussing the problems with regulating media out of fear of their power).

\footnote{108}See Winer, \textit{supra} note 12, at 526 (rejecting argument that "the very effectiveness of speech" should be the "justification for according it less first amendment protection"); Lively, \textit{supra} note 11, at 619 (viewing this as "mock[ing] the notion of press freedom"); see also Denver, 116 S. Ct. at 2407 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that where government is concerned about technology's direction, "it ought to begin by allowing speech, not suppressing it").

\footnote{109}Since many broadcast channels are included on a cable system, most viewers do not know of or care about the difference between broadcast and cable channels. \textit{Minow & Lamay, supra} note 22, at 134; see \textit{Powe, supra} note 4, at 235-38.


\footnote{111}Cruz v. Ferre, 755 F.2d 1415, 1419 n.4 (11th Cir. 1985).

\footnote{112}116 S. Ct. 2374 (1996).

\footnote{113}Id. at 2388.

\footnote{114}Id. at 2386-87; see cases cited \textit{supra} note 110. The application of \textit{Pacifica} to cable was especially surprising after \textit{Turner Broadcasting Sys. Inc. v. FCC}, 114 S. Ct. 2445, 2457 (1994), where the Court refused to apply the scarcity rationale and the "must-carry" rules to cable. Writing for the Court in \textit{Denver}, Justice Breyer distinguished the structural regulations at issue in \textit{Turner} from content regulation designed to protect children. \textit{Denver}, 116 S. Ct. at 2388.
The ultimate effect of Denver is unclear. On one hand, the Court seems to have resolved any distinction between cable and broadcast television by reducing the First Amendment protection afforded cable to the lower degree associated with broadcasting.\textsuperscript{115} Moreover, the Denver Court advocated the use of a less protective level of scrutiny than that typically associated with content-based regulation.\textsuperscript{116} On the other hand, the Court nowhere said that cable, like broadcasting, should receive lesser protection than print media; in fact, Justice Breyer's plurality opinion took great pains to avoid a “rigid single standard” or an analogy to any other media.\textsuperscript{117} Further, the three regulations at issue in Denver—two of which the Court struck down—were far less restrictive than the sixteen-hour ban upheld in ACT III.\textsuperscript{118} Thus, broadcasters could argue that because cable and broadcast differ little if at all, the Court must strike down any regulation more restrictive than those at issue in Denver. This requirement would invalidate a regulation that would totally ban indecent material for sixteen hours of each day.

If broadcast content must be subject to some regulation, the regulatory scheme used should avoid arbitrary attention to ephemeral and unique characteristics, like pervasiveness. Instead courts should focus on pertinent issues to determine whether an interest is compelling, whether regulatory means advance their ends, and whether less restrictive alternatives are available.\textsuperscript{119} There is no real difference between broadcasting and other media with respect to indecency regulation and no reason for the Court to continue to recognize such

\textsuperscript{115} Denver, 116 S. Ct. at 2386-88. The Court thus ignored numerous scholarly attempts to limit Pacifica to broadcasting and fully protect speech on cable. Cf. Powe, supra note 4, at 235-38; Krattenmaker & Esterow, supra note 89, at 627-33; Winer, supra note 12, at 504-11.

\textsuperscript{116} Denver, 116 S. Ct. at 2385 (noting that the regulation must address “an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech”). The application of this less-protective standard seems to create the same problems as the unresolved paradox of strict scrutiny applied to a less-protected medium. See ACT III, 58 F.3d at 660. But see Denver, 116 S. Ct. at 2406-07 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the Court applied essentially the same standard of scrutiny as in other First Amendment cases, but created confusion through the use of inferior synonyms). Furthermore, the Court has described the strict scrutiny test several different ways. See Edwards & Berman, supra note 3, at 1528-29.

\textsuperscript{117} Denver, 116 S. Ct. at 2385; see also id. at 2401-02 (Souter, J., concurring) (arguing that the “appropriate category for cable indecency should be...contextually detailed”).

\textsuperscript{118} The Denver Court upheld a regulation allowing a cable operator to bar material he “reasonably believes” to be indecent from leased access channels. 116 S. Ct. at 2390. The Court struck down two regulations: one required that all indecent programs be placed on separate channels and blocked unless requested by viewers. Id. at 2391. The other allowed cable operators to bar indecent speech from all public access channels. Id. at 2396.

\textsuperscript{119} Lively, supra note 11, at 621. Furthermore, “[t]o minimize the possibility of a paternalistic reversion...it is essential to establish such liberty [to broadcast and receive indecent material] as a function of the Constitution...Effectuation of that end requires eliminating the unusual order of First Amendment interests in favor of universal constitutional standards.” Id. at 620.
differences. Beyond the issue of these media distinctions, the most glaring problem with *Pacifica* and the regulatory scheme it has wrought is the degree to which that scheme departs from First Amendment theory and doctrine, which is the subject of the next section of this Part.

**B. Content Regulation of Broadcasting and the Constitution**

Professor Jonathan Weinberg claims that the inconsistency of our broadcast regulatory system with ordinary free speech thinking makes sense if one imagines ordinary free speech thinking and broadcast regulatory thinking as reflecting two conflicting worldviews. The two worldviews are not easily reconcilable. There does not seem to be any perfect solution that would mediate the two approaches. Ultimately, we can do no better than a second-best solution.

Unfortunately, by banning certain kinds of speech entirely from the airwaves for all but eight hours each day, the regulation upheld in *ACT III* is not a second-best solution; barring speech from the medium for any length of time is a substantial and unacceptable deviation from First Amendment norms.

1. The Right to Hear.—The First Amendment freedom of speech embraces a listener’s right to hear and to receive information and ideas. The Supreme Court has moved from an exclusively

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120 *Powe*, supra note 4, at 209-10 (arguing that the Court’s rationales are “puzzling” and “troublesome” and fail to distinguish other media); Edwards & Berman, *supra* note 3, at 1497 (The “Court will eventually feel forced to bring broadcast television and radio into the First Amendment fold . . . .”); Winer, *supra* note 12, at 522-23 (arguing that “[i]n here is no basis for distinguishing between cable and broadcasting”).

121 Weinberg, *supra* note 9, at 1205-06. The former worldview is based on individualism, nonpaternalism, and a sharp public-private distinction; the latter is based upon altruism, communal nature of values, and paternalism. *Id.*

Professor Weinberg argues that free speech theory, which is based on the former view, is too detached from economic and social reality to be the sole guide for a broadcast regulatory scheme, even if, as he agrees, the current scheme “works badly.” *Id.* at 1206. For the opposite view, see *CBS v. Democratic National Committee*, 412 U.S. 94, 160-61 (1973) (Douglas, J., concurring) (“[O]ne hard and fast principle [of the First Amendment] is that Government shall keep its hands off the press.”); see also *Powe*, supra note 4, at 256 (arguing that “the old-fashioned tradition of freedom [does not] look so bad”); Winer, *supra* note 12, at 523-24 (“Once we begin cleansing the television screen of all that is even momentarily objectionable . . . . the first amendment is hopelessly eroded and the result is a worthless medium.”).

122 See *Lively*, supra note 11, at 615. *But see Baker*, supra note 24, at 60, 64 (arguing that *ACT III* was wrongly decided, but that a more restricted, limited channeling regulation would be permissible).

123 EMERSON, *supra* note 17, at 649-50; Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679, 686 (1982) (arguing that “value [underlying the First Amendment] may be fostered as much by the receipt of expression as by the act of expressing” because there is “little doubt” that viewer or listener benefits from watching or listening to a play or story). *See Pacifica*, 438 U.S. at 766 (Brennan, J.,
speaker-centered view of the First Amendment to one in which the rights of the listener are taken into account.\textsuperscript{124} This shift is most pronounced in the broadcast context.\textsuperscript{125} Professor Burt Neuborne discussed the potential difficulty of a listener-centered view of free speech in that it carries with it the dangerous potential for diluting the rights of speakers. This is especially true when the interests of speakers and hearers are said to diverge.\ldots{} [W]e have not yet developed a metric to weigh the interests of speakers against the interest of hearers and have not decided who should win when the interests diverge.\textsuperscript{126}

The broadcast indecency context raises the more important issue of who should win when the interests of different listeners within an audience diverge. Ordinarily, the fundamental First Amendment presumption prevails: the speech must be disseminated and those listeners who do not want to hear must take some affirmative steps to dissenting) (emphasizing the interests of listeners who wish to hear broadcasts the FCC deems offensive); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (holding that First Amendment freedom "embraces the right to distribute literature \ldots{} and necessarily protects the right to receive it") (citation omitted).

The Supreme Court touched on this aspect of free speech in three cases. In \textit{Lamont v. Postmaster General}, 381 U.S. 301 (1965), the Court invalidated a law requiring people who wanted to receive mail labeled by the government as communist propaganda to specially request it. Id. at 306-07. Justice Brennan, concurring, viewed the right to receive publications as the type of fundamental right that made the express guarantees of the First Amendment meaningful. Id. at 308 (Brennan, J., concurring).

In \textit{Stanley v. Georgia}, 394 U.S. 557 (1969), the Court invalidated a state law making private possession of obscene materials by adults a crime, since it was "now well established that the Constitution protects the right to receive information and ideas." Id. at 564.

In \textit{Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico}, 457 U.S. 853, 867 (1982) (plurality opinion of Brennan, J.), Justice Brennan argued that the "right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." Id. at 867. The Court held that the school board authority to remove books from the school library was limited by the First Amendment rights of students to read these books. Id. at 871-72.

\textsuperscript{124} Burt Neuborne, \textit{Speech, Technology and the Emergence of a Tricameral Media: You Can't Tell the Players Without a Scorecard}, 17 HASTINGS COMM. & ENT. L.J. 17, 30 (1994). "Entire categories of speech arose where the principal justification for the First Amendment protection was the hearer's right to know. The net effect was a quantum shift in the free speech universe to a greater concern with the interest of hearers." Id. at 30-31.

\textsuperscript{125} See \textit{Red Lion Broad. Co. v. FCC}, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners \ldots{} which is paramount.") (citations omitted).

\textsuperscript{126} Neuborne, \textit{supra} note 124, at 31. For examples of the Court's attempts to balance the interests of speakers and listeners, see \textit{Madsen v. Women's Health Center, Inc.}, 114 S. Ct. 2516, 2526-30 (1994) (balancing the rights of protesters at abortion clinic with those of clinic patients and staff); \textit{Frisby v. Schultz}, 487 U.S. 474, 486 (1988) (upholding a ban on residential picketing that targets an individual but permits more general picketing). Efforts to set the time at which indecent broadcasts will be banned also exemplify this balancing of interests. \textit{See}, e.g., \textit{ACT III}, 58 F.3d 654, 667 (D.C. Cir. 1995), \textit{cert. denied}, 116 S. Ct. 701 (1996); \textit{ACT I}, 852 F.2d 1332, 1344 (D.C. Cir. 1988).
avoid it. Conversely, in broadcasting, especially when children are part of the viewing or listening audience, the opposite is the case: the government's asserted interest in protecting children prevails over the rights of those who wish to hear the same, constitutionally protected material.

Government efforts to regulate broadcast indecency under a protection interest should be sharply circumscribed by the "need to fit the restriction pertaining to children into the system of freedom for adults," and by the Supreme Court's warning in *Butler v. Michigan* that government may not "reduce the adult population . . . to reading only what is fit for children." Unlike other forms of expression, such as books, magazines, and movies, it is difficult to withhold broadcast programs from minors without restricting the expression at its source. This emphasis on protecting children tips the balance too far in one direction and restricts from adults too much protected

127 See *supra* note 19 and accompanying text.

128 See, e.g., *Pacifica*, 438 U.S. at 729-30, 749-50 (holding that complaint of one parent and the government's protection interest is sufficient to punish broadcaster for Carlin monologue); *ACT III*, 58 F.3d at 656 (upholding ban on indecent material on radio and television before ten p.m., regardless of how many adults want to see such material). But see *ACT II*, 932 F.2d at 1509 (rejecting 24-hour broadcast ban on indecent material).

129 *EMERSON*, *supra* note 17, at 502.


131 *Id.* at 383. To restrict adult access to speech solely to protect children was "to burn the house to roast the pig." *Id.* The Court has reiterated this principle on several occasions. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126-27 (1989) (quoting Justice Frankfurter's opinion in *Butler*); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

Professor Emerson took this to mean that "while *Butler* stands, laws attempting to restrict the availability of erotic materials for minors are likely to be ineffective." *EMERSON*, *supra* note 17, at 502. Professor Winer argued that regulation based on "[s]olicitude for children . . . inevitably abridges adults' First Amendment rights . . . ." Winer, *supra* note 12, at 521; *see also* Baker, *supra* note 24, at 54-55 (channeling permissible if it does not "materially reduce the availability of the material to adults").

132 See *Pacifica*, 438 U.S. at 749. Thus, bookstores and movie theaters may restrict the access of minors while still making the material available to adults. *Id.* Likewise, the availability of free lock-boxes, or "parental keys," that could keep children out of the audience was a key focus in distinguishing cable from broadcast. *See, e.g.*, *Cruz v. Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985).

Professor Spitzer called these "institutional safeguards." *SPITZER*, *supra* note 12, at 125. Changing the safeguards could alter the broadcast regulatory scheme. Technological advances, such as the V-Chip included in the Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139 (1996) (to be codified at 47 U.S.C. § 303(w)), provide this institutional safeguard for broadcasting by making it possible to screen out parts of the broadcast audience without restricting speech at the source. *See infra* section IV.B.2. *But see* *HAIMAN*, *supra* note 14, at 178-79 (arguing that it is not a wise course to screen out of the speech audience only those incapable of making judgments because of age, especially since younger children likely would not understand material such as the Carlin monologue); *Balkin*, *supra* note 5, at 1164 (expressing fear for technology that filters information in the media).
speech; if a substantial number of children are in the potential audience at a given time, the regulation stands.\footnote{See ACT III, 58 F.3d at 667 ("[M]arginal convenience of some adults . . . yield[s] to the imperative needs of the young."); see also Winer, supra note 12, at 521-22 ("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.").}

In upholding, as modified, the pre-ten p.m. ban in ACT III, the D.C. Circuit focused on the data collected by the FCC as to the number of children (defined as those under age eighteen) in the audience during the times of the ban, and found those numbers substantial enough to create a "reasonable risk that large numbers of children would be exposed to . . . indecent material." Thus, the data supported the restriction of such material.\footnote{Id. at 666. The Pacifica Court expressed this same idea that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear those words." Pacifica, 438 U.S. at 750 n.28.} The court overcame similar statistics about the number of adults in the audience at those times by arguing that (1) adults have "alternative means of satisfying their interest in indecent material,"\footnote{Weinberg, supra note 9, at 1205.} and (2) any chilling effect on adult speech was inherent in section 1464 and Pacifica.\footnote{See Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2391 (1996) (arguing that content-based regulation must be the "least restrictive alternative"); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (stating that a content-based regulation must be the "least restrictive means to further the articulated interest"). Further, the Court has declared that exercise of liberty of expression in appropriate places should not be abridged on the plea that it may be exercised elsewhere. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). The choice of the manner in which a message is received is one the First Amendment prohibits the government from making. Pacifica, 438 U.S. at 775 (Brennan, J., dissenting).}

The apparent ease with which the D.C. Circuit brushed aside legitimate First Amendment concerns illustrates how this system of regulation "starkly and gratuitously" conflicts with conventional free-speech philosophy.\footnote{The availability of alternative media is part of the test for content-neutral regulations, those not justified by reference to the content or subject matter of the regulated speech. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[R]estrictions [must be] 'justified without reference to the content of the regulated speech . . . and . . . leave open ample alternative channels for communication . . . .'") (citations omitted); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1980) (upholding restrictions on speech that are not based on the content of the message and leave open ample alternative channels of communication); cf. Redish, supra note 3, at 117 (arguing that courts should subject all restrictions on expression to critical scrutiny).}

\footnote{See ACT III, 58 F.3d at 665.} First, the availability of alternative media in which speech may be heard is not a consideration when the government makes a content-based regulation of speech.\footnote{Id. at 666. The Pacifica Court expressed this same idea that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear those words." Pacifica, 438 U.S. at 750 n.28.} Second, this approach fails to distinguish between general access by children and
unsupervised access. Professor Winer argues that when "children are unsupervised, program guides and the electronic technology available for both cable and broadcasting can provide the desired control." Third, the ACT III court ignored the fundamental First Amendment presumption of allowing expression for willing viewers and requiring unwilling viewers to avert their eyes, turn the television off, or deal with the brief affront to their sensibilities.

2. The Rights of Parents.—One "difficulty with government censorship of communication to children is the thorny problems it creates in the delicate relationships between and among parents, children, and the state. Few would dispute the right of parents to do what they can . . . to control the communications environment of their minor offspring." The Supreme Court has long recognized the liberty of parents and guardians to direct the upbringing and education of their children as they see fit.

Certainly, this right includes deciding what their children should and should not watch on television, free from government interference. The key question is what happens when some parents (or

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139 The majority in ACT III answered this criticism by finding that there was no real adult supervision, because most children had televisions and radios in their own rooms and tended to watch or listen alone, without parental supervision. 58 F.3d at 661 (citing statistics); see supra section II.B.3. But, Professor Winer argued, "regulations . . . cannot be justified on the basis of what parents choose to do or fail to do." Winer, supra note 12, at 522. Instead, the "Commission assumes that parents are . . . inept at . . . parenting . . . ." ACT III, 58 F.3d at 679 (Edwards, C.J., dissenting).

140 Winer, supra note 12, at 522-23. 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 broader government regulation." Id. at 523.

141 See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (arguing that recipients of objectionable mailings may avert their eyes); Pacifica, 438 U.S. at 765 (Brennan, J., dissenting) ("The radio can be turned off . . . with a minimum of effort.") (citations omitted); see also Redish, supra note 19, at 624 (arguing that courts should strike the balance in favor of letting speech be heard); Winer, supra note 12, at 523 (arguing that it is better to preserve the First Amendment at the expense of a brief incident of offense to sensitive individuals). See supra note 19 and accompanying text.

142 HAIMAN, supra note 14, at 179; Winer, supra note 12, at 521 ("[R]egulation . . . improperly usurps a discretionary parental function with broad governmental fiat."); ACT III, 58 F.3d at 679 (Edwards, C.J., dissenting) ("Government does not generally tell parents what speech their children should and should not hear.").

143 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations."); see also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate."); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[P]arents' claim to authority in their own household to direct the rearing of their children is basic to the structure of our society.").

144 See Winer, supra note 12, at 522:

[Parents can more precisely control what their children watch and appropriately balance the rights of adults and the interests of children . . . concerning household viewing habits,
even a majority of parents) demand the government interfere and help them by banning some speech from the airwaves. Professor Haiman argued that "it may be impossible for the state to assist one group of parents . . . without simultaneously interfering with the rights of other parents who may want a broader exposure for their offspring. That is precisely the effect when a particular communication is cut off at its source by government censorship." Justice Brennan recognized this point in his Pacifica dissent, arguing that the principle of parental rights supports a result directly contrary to that reached by the Court. . . . [P]arents, not the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin’s unabashed attitude towards the seven "dirty words" healthy . . . . Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right . . . does not alter the right's nature or its existence. Only the Court's regrettable decision does that.

If, on the other hand, the government truly has any interest in facilitating parental control over their children’s viewing habits, it cannot achieve that interest by "making completely unavailable to adults material which may not constitutionally be kept even from children." not only with regard to sexual material but also as to excessive or graphic violence or other matters of individual sensibilities. . . . 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.

See also Minow & Lamay, supra note 22, at 164 ("[P]arents must . . . take primary responsibility for what their children see on television.").

145 Haiman, supra note 14, at 180; see Lamont v. Postmaster Gen., 381 U.S. 301 (1965). Under Lamont, the First Amendment presumption should be in favor of the speech and should require the parent seeking to limit his child's access to take affirmative measures in that regard. Id. at 307. See also supra note 19 and accompanying text. The fact that the ban upheld in ACT III shifts the presumption to require the willing parents to take extraordinary steps to enable their children see or hear the programs again shows how unnecessarily far it diverges from First Amendment protections.

146 Pacifica, 438 U.S., 769-70 (Brennan, J., dissenting). As Chief Judge Edwards stated in ACT III, "[M]y right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned . . . from my television." 58 F.3d at 670 (Edwards, C.J., dissenting) (citing Alliance for Community Media v. FCC, 56 F.3d 105, 145 (D.C. Cir. 1995) (Edwards, C.J., dissenting)). See id. at 680 (Edwards, C.J., dissenting) ("[T]he FCC has preempted, not facilitated, parental control . . . ."); see also Baker, supra note 24, at 57 ("[C]omplete ban . . . would thwart, not aid . . . parents."); Balkin, supra note 5, at 1139 ("Parents do not want the government deciding what is best for their children.").

147 The FCC asserted facilitation as a complementary state interest in Pacifica, 438 U.S. at 749-50, and in ACT III, 58 F.3d at 660-61. But see ACT III, 58 F.3d at 678 (Edwards, C.J., dissenting) (arguing that the two interests are irreconcilably in conflict); Baker, supra note 24, at 56-57 (showing why the two interests conflict); see infra section IV.A.1.

148 Pacifica, 438 U.S. at 768 (Brennan, J., dissenting); ACT III, 58 F.3d at 679 (Edwards, C.J., dissenting) ("A complete ban on indecent broadcasts does not facilitate the variety of American parents in supervising their children's exposure to broadcasting.").
3. **Limitation on the Protection Interest.**—The government’s primary asserted interest in broadcast indecency cases has been protecting unsupervised children’s exposure to indecent material. But the government may not “act in loco parentis to deny children’s access contrary to parents’ wishes.” Thus, the government’s “independent interest in the well-being of its youth” should be sharply limited. A closer look at the cases that have developed the protection interest in the First Amendment realm reveals that the interest should not support a ban on protected speech on broadcast television and radio that adults may want to hear or see; the FCC’s reliance on a protection interest when regulating broadcast indecency for a mixed audience of children and adults is misplaced.

_Ginsberg v. New York_, the leading case on this point, dealt with material that was obscene with respect to children, and thus was not constitutionally protected. Because this material lacked constitutional protection, it could have been proscribed entirely. Conversely, indecent material may not be banned entirely, even from children. It is thus impossible to create from _Ginsberg_ a general, independent governmental interest in shielding children from protected speech. In _New York v. Ferber_, where the Court upheld a conviction for the distribution of child pornography, the government’s interest in protecting children was geared toward preventing child exploitation and abuse in the production of the material, not in shielding children or adults from exposure to the material itself. Thus, _Ferber_, like _Ginsberg_, does not support a government interest in shielding children from constitutionally protected speech.

The one situation in which the protection interest perhaps may be asserted to control indecent speech is in public schools. Thus, in

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149 _Pacifica_, 438 U.S. at 749-50; _ACT III_, 58 F.3d at 663; see _supra_ Part II.
150 _ACT I_, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (emphasis omitted); see also Winer, _supra_ note 12, at 522 (“Parents are best able to make individualized discriminating judgments concerning household viewing habits.”).
151 _ACT III_, 58 F.3d at 663 (citing _Ginsberg v. New York_, 390 U.S. 629, 640 (1968)).
154 _Id_. at 641.
156 _ACT II_, 932 F.2d at 1509.
157 _Pacifica_, 438 U.S. at 768 (Brennan, J., dissenting) (citing _Erznoznik v. City of Jacksonville_, 422 U.S. 205, 213-14 (1975)).
159 _Id_. at 756-58. In fact, the Court conceded that the same material, produced without the use of children, would be constitutionally protected. _Id_. at 765.
Bethel School District No. 403 v. Fraser, the Court upheld the punishment of a high school student for an indecent speech made at a school assembly, emphasizing "the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech." However, three aspects of Fraser prevent it from providing a general protection interest for use in regulating broadcast indecency for a mixed audience.

First, because the school was acting in loco parentis, the school had assumed the parental function and could exercise greater control over what speech the students heard without improperly usurping the parental function. Second, the speech in question "undermin[ed] the school’s basic education mission," so the restriction on the speech was not necessarily based on a protection interest. Third, and most importantly, the audience in Fraser consisted of students, so there was no possibility of infringing adult free speech rights; Butler v. Michigan was not implicated. Thus, whatever protection interest was at work in Fraser cannot, consistent with the First Amendment, be carried over to the regulation of broadcasting.

As discussed previously, as a matter of First Amendment theory, the best solution understands that "[m]aterial 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" and thus cannot be curtailed.

161 Id. at 684. The student had made a speech filled with sexual innuendos and double entendres. Id. at 677-78, 687 (Brennan, J., concurring in the judgment).
162 See Winer, supra note 12, at 521 (arguing that restricting speech based on solicitude for children "improperly usurps a discretionary parental function").
163 Fraser, 478 U.S. at 685. In fact, Justice Brennan expressly rejected the Court’s suggestion that the school could punish the speaker in the name of protecting younger students. Id. at 689 n.2 (Brennan, J., concurring in judgment). He stressed that the decision was limited to a situation where the school was teaching a legitimate lesson about public discourse or attempting to maintain civil discourse. Id. at 688-89 (Brennan, J., concurring in judgment).
164 352 U.S. 380, 383 (1957) (holding that government may not “reduce the adult population . . . to reading only what is fit for children”). See supra notes 130-31 and accompanying text.
165 But see Minow & LaMay, supra note 22, at 131 (“[C]onsiderations arise where children are involved that do not arise with adults. Those considerations . . . are always present, always will be, . . . no matter what the medium.”).
166 Winer, supra note 12, at 525; see Pacifica, 438 U.S. at 778 (Stewart, J., dissenting) (arguing that since Carlin’s monologue was not obscene, the Commission lacked authority to regulate it); see also supra note 16.
But that is politically unacceptable to government regulators when children are involved. Complete regulatory freedom is unlikely, so the key is to devise the second-best system, a regulatory scheme that is more in line with First Amendment theory and doctrine than the present scheme. Pacifica and the sixteen-hour ban upheld in ACT III failed to establish that second-best solution; no law that entirely bans protected speech from the medium for any length of time can be that solution. The reasons given to distinguish broadcasting from other media simply do not justify differential treatment. Even assuming that some differential treatment was acceptable, this Comment argues that the departure from First Amendment doctrine and theory is unacceptable. Part IV proposes necessary changes to the law, outlining a new, second-best solution to the problem of regulating indecent broadcasting.

IV. Changing the Law of Broadcast Indecency

The first step of any solution is to grant broadcasting the same First Amendment protection as other media. Scholarly criticism has “drive[n] home the irrationality of granting broadcast television less First Amendment protection than all other media.” With full First Amendment protection granted to broadcasting, the usual free speech doctrines, values, and principles should control, requiring that speech get out to willing listeners, since it is “better to preserve First Amendment freedoms, even at the expense of some brief incidents of offense to sensitive individuals.”

Such a solution is rendered incomplete by the Supreme Court’s decision in Denver Area Education Telecommunication Consortium v. FCC, which applied Pacifica to the regulation of cable indecency and signaled a reluctance to eliminate Pacifica’s rationales. Thus, while the Court should reject the distinction between broadcast and other media, the Court must do more to ensure that indecent material on broadcast receives full First Amendment protection. Subpart A examines what the second-best solution might entail; subpart B analyzes the constitutionality of the V-Chip law, concluding that this law is the second-best solution for the regulation of broadcast indecency.

167 Weinberg, supra note 9, at 1205-06; see supra notes 17-18 and accompanying text.
168 “[I]t is essential to establish such liberty as a function of the Constitution.” Lively, supra note 11, at 620; see discussion supra subpart III.A.
169 Edwards & Berman, supra note 3, at 1497; see ACT III, 58 F.3d at 676-77 (Edwards, C.J., dissenting) (“[C]ritical underpinnings of the decision are no longer present. Thus, there is no reason to uphold a distinction between broadcast and [other] media pursuant to a bifurcated First Amendment analysis.”); see also supra notes 93-94.
170 Winer, supra note 12, at 523; see supra subpart III.B.
172 Id. at 2386-87.
NORTHWESTERN UNIVERSITY LAW REVIEW

A. Elements of the Second-Best Solution

Laws regulating indecent speech on radio and broadcast television are content-based regulations on protected speech that must "promote a compelling [government] interest [through] the least restrictive means to further the articulated interest."\(^{173}\) The second-best solution thus requires that the government rely on a different compelling interest and use different regulatory means to achieve that interest.

1. Facilitation Interest.—The Court first must recognize that there is no compelling, independent government interest in protecting children from the broadcast of constitutionally protected speech geared to an audience comprised of both adults and children.\(^{174}\) Instead, the government's exclusive interest should be in "facilitat[ing] parental supervision of the programming their children watch and hear."\(^{175}\) All statutes and administrative regulations covering indecent material on broadcast television and radio must be the least restrictive means to serve that single interest.\(^{176}\)

Chief Judge Harry Edwards has been a leading proponent of this point: "[T]he state's interest in facilitating parents' ability to control how much [indecent] programming their children watch is compelling. The state's compelling interest lies not in protecting children, but in

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\(^{173}\) Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

\(^{174}\) See Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."). Unfortunately, the Court last term reaffirmed that interest. See Denver, 116 S. Ct. at 2391 ("[P]rotection of children is a 'compelling interest.'"); id. at 2416 (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part) ("Congress does have, however, a compelling interest in protecting children from indecent speech.").

\(^{175}\) ACT III, 58 F.3d at 670 (Edwards, C.J., dissenting). The Supreme Court has accepted facilitation as a compelling interest, holding in Ginsberg v. New York, 390 U.S. 629, 639 (1968), that the parents' authority over their children means "parents ... who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."

\(^{176}\) The government should not be able to assert both interests side-by-side, as it did in Pacifica and ACT III. The two interests generally cannot stand together, since they support different laws and usually are in "fundamental tension." Edwards & Berman, supra note 3, at 1562-63; see ACT III, 58 F.3d at 678-79 (Edwards, C.J., dissenting) (the Commission "cannot simultaneously ... facilitate parental supervision ... and ... protect all children."); Baker, supra note 24, at 56-58 (discussing conflict between the two interests).

A protection interest could be (and has been) used to support some type of ban on speech, while a facilitation interest supports a scheme that provides information, technology, or both, to enable parents to better determine what they and their children can and cannot see. Since the ban on protected speech is unacceptable under First Amendment doctrine, see supra subpart III.B., the government should assert only the facilitation interest in supporting regulations.
protection of parenting." Edwards elaborated on the differences between these interests:

Parents are entitled to . . . assess whether and how to regulate the television watching of their children. It does not matter that some parents might elect to forbid their children from watching a show . . . or that some parents may elect to set no rules; that is their right. Indeed, parents may do what the government may not do—adopt an overbroad prophylactic rule banning their children from watching any program . . . The point is that [such] a regulation . . . undoubtedly will facilitate parenting. Edwards has made similar arguments from the bench. Dissenting in Alliance for Community Media v. FCC, he wrote:

My right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch . . . But Congress surely can, I think, act to help me implement the decisions that I make as a parent.

Edwards elaborated more fully on this point in his dissent from the en banc decision in ACT III, rejecting the flat six a.m. to ten p.m. ban as a means to serve a facilitation interest. First, addressing the fact that the FCC had asserted protection of children in support of the ban, he said: "[N]ot every parent will decide . . . that the best way to raise its child is to have the Government shield children . . . from indecent broadcasts. . . . A complete ban . . . does not facilitate the variety of American parents in supervising their children's exposure to broadcasting."

He next criticized the argument that real parental control is impractical:

The Commission assumes that parents are unavailable or inept at the task of parenting, and essentially establishes itself as the final arbiter . . . . In so doing, the Government tramples heedlessly on parents' rights to rear their children . . . . If facilitating parental supervision means

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177 Edwards & Berman, supra note 3, at 1563.
178 Id. at 1564.
179 Id. at 145-46 (Edwards, C.J., dissenting).
180 ACT III, 58 F.3d at 670 (Edwards, C.J., dissenting).
181 Id. at 678-79 (Edwards, C.J., dissenting). Edwards conceded that there may be occasions when the two interests work in tandem, as in Pacifica, in which a parent complained about the broadcast and the FCC agreed. Id. at 679. However, when parental preferences conflict with the government, parental preferences should prevail absent evidence of harm to the child. Id. at 682; see Pacifica, 438 U.S. at 769-70 (Brennan, J., dissenting) (government cannot override rights of parents who want their children to hear Carlin's monologue); see also HANSEN, supra note 14, at 180 (when government agrees with some parents, it may disagree with others); see supra section III.B.2.
allowing parents to run the household in the manner they choose, then
the FCC has preempted, not facilitated, parental control.183

Edwards concluded, "[i]t would be hard to object to some sort of
regulation of indecency in broadcast as well as other media were it
narrowly tailored to facilitate parental supervision of children’s expo-
sure to indecent material."184 That is what the second-best solution
must do.

2. Institutional Safeguards.—A facilitation interest is furthered
by altering “institutional safeguards” and enabling parents to better
control what their children see and hear on television or the radio.185
One such safeguard is the creation and use of lock-out technology that
enables parents to block particular programs or channels from being
shown at particular times.186 Lock-out technology is a “glorified on-
off switch,”187 allowing a viewer to keep an indecent broadcast out of
his home altogether, whether because he does not want to see it or,
more likely, because he does not want his children to see it.188

The advantage to such technology is that it is consistent with the
fundamental First Amendment presumption that the program should
be broadcast, and it is up to the unwilling viewer or parent to take
affirmative steps to avoid that program.189 One scholar defended
lock-out technology by saying that it

has been for many years the fond wish of many First Amendment schol-
ars, who worry that broadcast regulations designed to protect children

183 Act III, 58 F.3d at 679-80 (Edwards, C.J., dissenting).
184 Id. at 682. A flat ban, even for less that 24-hours, is not the least restrictive means to serve
a facilitation interest. Id. at 682-83; see Baker, supra note 24, at 57 (arguing that a complete ban
would not aid parents who might want their children to be exposed to a program). Rather, a
facilitation interest requires that speech be available in the medium, and that decisionmaking
power be placed in parents’ hands. See supra note 19.
185 Cf. Shitzer, supra note 12, at 125.
186 Pre-program warnings, or warnings published in program guides, as to the content of the
program would seem to be another effective institutional safeguard that would enable unwilling
parents and viewers to avert their eyes. But the radio programs at issue in Pacifica and ACT I
were preceded by similar warnings. See Passler, supra note 48, at 137-38, yet courts refused to
accept warnings as effective. See Pacifica, 438 U.S. at 748-49; Mnow & LAMAY, supra note 22,
at 23-24. Perhaps if the Court will reconsider the lesser protection for broadcasting, it will accept
a system of warnings. See supra subpart III.A.
187 Mnow & LAMAY, supra note 22, at 110. This brings to broadcast television a version of
the lock-boxes that have been in use for cable television and which were a main reason cable had
not suffered from Pacifica-type rationales and time restrictions. See Cruz v. Ferre, 755 F.2d 1415,
1419-21 (11th Cir. 1985); Winer, supra note 12, at 504-06. But see Denver, 116 S. Ct. at 2388
(stating that cable and broadcast are indistinguishable).
188 Because such technology enables a viewer to effectively turn a station off before he suffers
the affront to his sensibilities, it makes stronger the argument, rejected in Pacifica, that “one may
avoid further offense by turning off the radio.” 438 U.S. at 748-49.
Gen., 381 U.S. 301, 310 (1965) (Brennan, J., concurring); see also supra notes 19 & 127 and
accompanying text.
infringe on the First Amendment rights of adults. ... [This technology] ... mak[es] it possible to transfer what courts call the "plain-brown wrapper" principle from print to television. Books, magazines and the like that are clearly not intended for children may be distributed to adults simply by concealing their contents .... [Lock-out technology] would similarly extend the reach of free expression on television, allowing adults to watch whatever suited them while effectively eliminating children from the audience.190

The key to these institutional safeguards is that all control over what material may be seen or heard is placed with the parents or viewers to use the technology or not.191

3. An Alternative Solution.—Professor C. Edwin Baker argued that the solution to the regulation of broadcast indecency was "restricted channeling—a ban that would not extend to the evening when a parent is more likely to be at home and potentially able to supervise children in the house."192 Professor Baker argued that a ban during those hours when parents are not at home, mainly regular working hours, would not significantly impair receipt of the speech, and thus would be an acceptable solution.193

Professor Baker’s proposal has several problems. First, it impermissibly departs from First Amendment doctrine by imposing a restriction on the time at which protected speech can be made based on the content of that speech.194 The second, and greater problem, is that

190 MiNow & Lamay, supra note 22, at 110.
191 See id. at 110-11 (rejecting arguments that enabling parents to monitor their children’s television viewing is unconstitutional); Edwards & Berman, supra note 3, at 1564. Lock-out technology has the further advantage of enabling the government to assist one group of parents in strictly controlling what their children see without simultaneously interfering with the rights of parents who want to give their children broader exposure to speech. See Haiman, supra note 14, at 180.
192 Baker, supra note 24, at 60. Professor Baker suggested that banning indecency during the afternoons would be acceptable, but the ban must end by six or eight p.m. Id. at 55. Thus, he argued ACT III was wrongly decided but only because the time of the ban was too broad. Id. at 64.
193 Id. at 57-58.
194 Time, place, or manner restrictions must be content-neutral, that is justified without reference to the content or subject matter of the regulated speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (upholding city zoning of indecent speech based on "secondary effects" not associated with the message of that speech); see also Turner Broad. Sys. v. FCC, 114 S. Ct. 2445, 2459 (1994) (discussing when a regulation is content-neutral). But see Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976) (upholding city restriction on the places for indecent speech because society’s interest in protecting indecent expression is of a lesser magnitude than its interest in untrammeled political debate). The regulation Professor Baker proposes, aimed at indecent speech alone and justified by the message of that speech and its supposed harm to children, is content-based and thus impermissible as a time, place, or manner restriction. See also Edwards & Berman, supra note 3, at 1504-05 (concluding that such regulations are content-based).
there simply is no time at which an insignificant number of adults will be in the audience; there are adults who do not work and who are in the viewing or listening audience during the afternoon hours or nearly any other time of day.\textsuperscript{195} Thus, Professor Baker's proposed regulation suffers from the same basic problem as does the \textit{ACT III} ban: it will reduce the level of discourse during that time to what would be "suitable for a sandbox,"\textsuperscript{196} thereby restricting adult viewers' access to protected expression.\textsuperscript{197} Alternatively, this proposed scheme would prevail over the authority of those parents who are at home in the afternoon and can supervise their children's viewing.\textsuperscript{198} Either way, this is not the second-best solution to the problem of broadcast indecency. Professor Baker's proposal assumes that it is "entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young."	extsuperscript{199} This Comment disagrees.

The answer instead is that government may not stop protected speech at the source or prohibit it from reaching the broadcast airwaves at any time. To do so would be to "advance public interests by means that suppress protected speech," something Professor Baker agrees that the government cannot do.\textsuperscript{200} The second-best solution thus must adhere to the First Amendment presumption of allowing speech to be heard, by permitting the speech to be broadcast, and then providing ways for parents or unwilling viewers to limit access to that speech.\textsuperscript{201}

\textbf{B. Creating the Second-Best Solution: The V-Chip and the Telecommunications Act of 1996}

Congress finally created the second-best solution with the so-called V-Chip provision of the Telecommunications Act of 1996.\textsuperscript{202} It

\begin{itemize}
  \item The one possible exception to this is Saturday mornings, a time at which broadcasters are showing cartoons to appeal directly to young audiences.
  \item See Bolger, 463 U.S. at 74.
  \item See FCC v. Pacifica Found., 438 U.S. 726, 774-75 (1978) (Brennan, J., dissenting); Winer, supra note 12, at 521-22; see also supra section III.B.1.
  \item Pacifica, 438 U.S. at 769-70 (Brennan, J., dissenting); \textit{ACT III}, 58 F.3d at 678-79 (Edwards, C.J., dissenting); see Winer, supra note 12, at 521 (arguing that such a scheme usurps parental function); see also supra section III.B.2.
  \item \textit{ACT III}, 58 F.3d at 667.
  \item Baker, supra note 24, at 64; see also Emerson, supra note 17, at 17 ("[G]overnment may protect or advance other social interests...but not by suppressing expression.").
  \item See supra note 19.
  \item The V-Chip law finally passed was part of a comprehensive overhaul of federal Telecommunications law signed into law by President Clinton on March 8, 1996. The purpose of the law was "to provide for a pro-competitive, de-regulatory national policy framework" for advanced telecommunication and information technologies. H.R. Conf. Rep. No. 104-458, at 1 (1996). The
\end{itemize}
utilizes lock-out technology, is based on a facilitation interest, and it supports the fundamental First Amendment presumption of allowing protected speech to be disseminated.

1. Provisions of the V-Chip Law.—The law mandates the use of lock-out technology, requiring that all televisions larger than thirteen inches be built with circuitry that will enable a parent to block a program or station. The law gives the broadcast industry one year to create and implement a system for rating programs and transmitting that rating with the broadcast signal. The ratings requirement may be eliminated if and when technology develops that “enables parents to block programming based on identifying programs without ratings.”

Congress also expressly based the law on a facilitation interest. Congress provided findings that parents “strongly support technology that would give them greater control to block video programming in the home;” that there is “a compelling governmental interest in empowering parents to limit the negative influences of video programming;” and that providing parents with the technological tools to block such programming is a narrowly tailored means of achieving that interest. Such findings show Congress inching towards a realization that the government’s role should not be to protect children by

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law included provisions creating open competition for local telephone service, § 102; allowing local telephone companies to provide long-distance service, § 151; allowing telephone companies to provide cable service, § 302; allowing telephone companies to provide video service, § 651; relaxing ownership restrictions and other regulations for broadcasting, §§ 201-202; and restricting indecent speech on the Internet, § 502. The Internet provisions were struck down by a three-judge panel in ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. 1996).

§ 551(e), 110 Stat. at 142. If the industry does not create and implement a ratings scheme, or some equally effective non-ratings-based blocking scheme within one year, the FCC is given the power to create an advisory committee—consisting of industry, parent, and public interest groups—to recommend guidelines and procedures for rating and transmitting programs. § 551(b), 110 Stat. at 140-41. In either case, ratings may not take into account political or religious content. Id. But see Balkin, supra note 5, at 1168-69 (arguing that political judgments unavoidably enter the ratings process).


§ 551(a)(7), 110 Stat. at 140.

§ 551(a)(8), 110 Stat. at 140.

§ 551(a)(9), 110 Stat. at 140.
banning otherwise protected speech,\textsuperscript{209} but to enable parents to assert control over what their children see in the home.\textsuperscript{210} In December 1996, industry leaders announced a ratings system based on age appropriateness.\textsuperscript{211} The industry scheme employs a scale ranging from TV-Y for all children to TV-M for mature audiences; TV-14, meaning inappropriate for children under fourteen years of age, likely would be the most common rating for prime time programs, soap operas, and late-night talk shows.\textsuperscript{212} Broadcasters distributed flyers to family and religious groups defining each category and urged newspapers to publish descriptions of each rating.\textsuperscript{213}

The law did not specify its interplay with the current sixteen-hour ban. Clearly, however, the two laws cannot co-exist because in order for the V-Chip truly to serve its intended purpose of facilitating parental control, indecent material must be allowed over the airwaves; parents who do not want their children to see this material must use the V-Chip to avoid this speech.\textsuperscript{214} Further, once the V-Chip and ratings scheme is in place, the sixteen-hour ban can no longer be upheld as the least restrictive means to achieve any compelling interest.\textsuperscript{215} Finally, to allow the two to stand together would impermissibly impose a “multi-layered” regulatory scheme.\textsuperscript{216} Professor J.M. Balkin’s solution is to maintain the current scheme for a “sunset” period of seven years to give the technology and the ratings time to take effect in the market.\textsuperscript{217} Seven years might be too long a period of time, but Professor Balkin is generally correct. The sixteen-hour ban currently in


\textsuperscript{210} Representative Markey rejected a suggestion that the V-Chip provision created a regime in which a Big-Brother-type government is watching over children: “It's exactly the opposite. It's more like Big Mother and Big Father. Parents take control.” 141 CONG. REC. E1565, E1566 (daily ed. July 31, 1995) (statement of Rep. Markey).


\textsuperscript{212} Id. News and sports will not be rated, although the definition of news was unclear. Id.

\textsuperscript{213} Id.

\textsuperscript{214} The two laws also cannot co-exist if the V-Chip law is truly to preserve the fundamental First Amendment presumption of allowing willing viewers to see these programs. See supra note 19 and accompanying text.

\textsuperscript{215} Cf. Denver, 116 S. Ct. at 2392 (plurality opinion of Breyer, J.) (noting that the V-Chip is “significantly less restrictive” than provisions banning indecent speech).

\textsuperscript{216} Balkin, supra note 5, at 1155.

\textsuperscript{217} Id. at 1155-56. His suggestion that unrated programs be blocked also makes the current time ban unnecessary. See id. at 1162-63; see also supra note 214.
place must be eliminated as early as feasible and the V-Chip must stand as the lone means of regulating broadcast content.

2. Constitutionality of the V-Chip.—The industry’s development of the ratings scheme means that the provision likely will not be challenged in court, barring some impasse. It is nonetheless worth considering whether the law could withstand constitutional challenge.218 The Supreme Court hinted at the result in Denver, noting that the V-Chip provision was “significantly less restrictive” than any provisions involving total bans on indecent speech.219

Any First Amendment challenge to the V-Chip would revolve around the ratings requirement, which essentially forces broadcasters to make some statement or judgment about a program’s content by rating it, for example, for sex, violence, or indecent language, even if the broadcasters disagree with that judgment.220 The right of free speech includes the right to refrain from speaking at all,221 and such compelled speech is a content-based regulation that will be subject to exacting First Amendment scrutiny.222 On the other hand, the V-Chip scheme enhances the First Amendment rights of television viewers, regarded as crucial in broadcasting,223 by eliminating the divergence of First Amendment rights between those viewers who want to see indecent material and those who do not, a divergence that exists under the sixteen-hour ban.224

The constitutional issue will turn on who establishes the rating system and who determines the rating for a particular program.225

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218 As a starting point, there is no constitutional problem with requiring the installation of the V-Chip circuitry in television sets. The federal government in the past has directed industries to make technological changes and innovations. See, e.g., Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 35 (1983) (reversing Department of Transportation recision of regulations requiring airbags in new passenger automobiles).

219 Denver, 116 S. Ct. at 2392. It clearly is less restrictive than the ban upheld in ACT II, 58 F.3d at 669-70, or the narrower ban Professor Baker proposes. Baker, supra note 24, at 57-58.

220 Edwards & Berman, supra note 3, at 1510.


222 Riley v. National Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988) (“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.”) Therefore, the Court treated the Act in question as “a content-based regulation of speech.”); id. at 796-98 (striking down law requiring charitable organizations to release certain information); Wooley, 430 U.S. at 715-17 (requiring compelling interest to uphold law); Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding that law requiring newspaper to publish opposing views on some matters was subject to constitutional limitations).


224 See Pacifica, 438 U.S. at 775 (Brennan, J., dissenting) (expressing concern for the rights of the “many who think, act, and talk differently” from the majority of society). Under the new law, willing viewers simply ignore the ratings, while unwilling viewers may heed the rating and use the V-Chip to avert their eyes. See supra note 19 and accompanying text.

225 See Minow & LaMay, supra note 22, at 110 (“[I]t clearly makes a difference who does the rating, and it should not be the federal . . . government.”); Balkin, supra note 5, at 1174 (sug-
Since the industry developed its own standards within the one year allotted in the Act, the scheme should survive close scrutiny; the Court likely would hold that the risk of censorship associated with a private determination of program ratings is not the same as with a governmental determination.\textsuperscript{226} If, on the other hand, the advisory committee provided for in the law sets the ratings, the scheme would face greater problems with the government declaring the message that a speaker must present.\textsuperscript{227} Finally, the fact that lock-out technology could work without ratings might enable a broadcaster to argue that the ratings requirement is not the least restrictive means to serve the facilitation interest.\textsuperscript{228}

Another objection to a ratings requirement is the concern that the rating would focus attention on one aspect of the program, thus reshaping, biasing, and interfering with the way viewers experience that program.\textsuperscript{229} However, the law does not require that the rating be published or transmitted other than in the broadcast signal.\textsuperscript{230} Unlike a rating or warning on a book or movie poster, no one must necessarily

\footnotesize{greeting the possibility of numerous private ratings services to which a viewer could subscribe); Edwards & Berman, supra note 3, at 1515 (concluding that the best blocking scheme would have the industry drive the standards).

\textsuperscript{226} See Denver, 116 S. Ct. at 2385-87 (closely scrutinizing and upholding a law that allowed a private person, rather than the government, to ban some indecent speech from cable); see also Edwards & Berman, supra note 3, at 1515 (arguing that merely imposing technological obligations "without a government thumb on the scales—cannot be seen to require, proscribe, burden, or significantly affect speech.").

\textsuperscript{227} See Edwards & Berman, supra note 3, at 1515 ("The regulation will raise problems only if the government ordains the program characteristics upon which a lockout mechanism could operate."). The original Senate version of the Act actually called for a government commission to rate the programs. S. 652, 104th Cong. (1995).

Congress perhaps avoided this problem in the final law, however, because the advisory committee is empowered only to provide "guidelines and recommended procedures" for rating programs; the committee cannot determine the rating for a particular program. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b)(1), 110 Stat. 140, (to be codified at 47 U.S.C. § 303(w)). The Conference Committee report emphasized this point: "[N]othing in [this subsection] authorizes, and the conferees do not intend that, the Commission require the adoption of the recommended rating system nor that any particular program be rated." S. Doc. 458, 104th Cong., at 195 (1996). \textit{But see} Balkin, supra note 5, at 1159 (finding constitutional troubles from even the threat of the advisory committee making judgments about program content).

\textsuperscript{228} A lock-out scheme with no program ratings is far less intrusive on the rights of broadcasters—no rating means no compelled speech, thus no First Amendment issue. Congress addressed this possibility by providing for the elimination of ratings if a different, equally effective scheme is developed. \textit{See} supra note 205 and accompanying text.

\textsuperscript{229} Edwards & Berman, supra note 3, at 1508. This concern for possible prejudice motivates objections to labeling in other contexts. \textit{See}, e.g., \textsc{Office for Intellectual Freedom, American Library Association, Intellectual Freedom Manual} 111 (5th ed. 1996) (rejecting labeling of books in libraries as "an attempt to prejudice attitudes" about speech).

\textsuperscript{230} Broadcasters agreed to flash a show's rating for fifteen seconds at the start of each program. Mifflin, supra note 211. However, this was not mandated by the V-Chip law and is voluntary for First Amendment purposes. \textit{See} Edwards & Berman, supra note 3, at 1507 n.92 (arguing...}
ily see a television program’s rating; indeed, under this law many people will only know a program had a particular rating if their V-Chip blocks the show. This avoids the problem of the rating biasing the perception of a program’s message because viewers might not see or know the rating.

Representative Edward Markey, sponsor of the law, along with family and children’s advocacy groups, wanted a ratings scheme that would expressly identify the amount of sex, violence, and language in each program. These groups opposed the age-appropriateness system as ineffective because it did not provide parents with enough information. However, rating for age appropriateness is less offensive to the free speech rights of broadcasters, who are not required to focus on and highlight one aspect of the program’s content, but only to make a general statement about that program’s proper audience based on a variety of factors. This is a more narrowly tailored requirement that still provides parents and the V-Chip technology with enough information.

Professor Balkin focuses on a different issue, expressing his greatest concern with the V-Chip’s influence as an informational filter with great power to shape culture. Since the technology permits parents or viewers to control all the programs that reach their televisions, Professor Balkin fears the creation of “an increasingly fractured community of individuals fixated on their personal programming universe . . . .” While this is perhaps a valid concern, it is overstated. Individuals already maintain their own “personal programming universe[s]” by deciding what to watch, hear, or read; the additional filter that the V-Chip provides will not fracture that culture any further. Moreover, it is likely that the parents who will use the V-Chip are the same parents who would not have watched, or allowed their children to watch, programs containing indecent material; the minority of parents who would want their children to see and hear ideas such as George Carlin’s monologue will simply ignore the filter. Finally, the V-Chip places the decision about how and when to use the filter in the hands of individuals, where it belongs, rather than in the hands of the government, where the sixteen-hour ban puts it.

Other issues concerning the V-Chip involve what might be called a chilling effect on speech. One concern is with self-censorship by

that advisory statements broadcast at the beginning of each program were voluntary and raised no First Amendment problems).

231 Mifflin, supra note 211.
232 Balkin, supra note 5, at 1165.
233 Id. at 1174; see also Haiman, supra note 14, at 179 (arguing that children should be exposed to the protected speech they will encounter in the world).
235 See Edwards & Berman, supra note 3, at 1564 (arguing that parents may adopt overbroad restrictions on their children’s speech, but government may not).
producers to avoid bad ratings, a concern prevalent in the movie and video industries.\textsuperscript{236} Another concern is broadcasters' fears of technology that could eliminate an entire day's or week's programs at the touch of a button.\textsuperscript{237} The key to this law, however, is that a parent or unwilling viewer must program the V-Chip to block these programs. The V-Chip thus supports the fundamental First Amendment presumption that speech should be readily available for willing viewers to see and hear.\textsuperscript{238} So long as the button is controlled by parents or viewers and not by the government, the First Amendment is protected and advanced.\textsuperscript{239}

There are also concerns from the other side. Some might worry that this blocking scheme will be ineffective because some parents will not take advantage of the new technology or the ratings.\textsuperscript{240} But it is the right of parents to choose to set no rules for themselves or for their children.\textsuperscript{241} The V-Chip, unlike the sixteen-hour ban upheld in \textit{ACT III}, leaves viewers and parents free to make that choice.

The V-Chip law to be implemented is the best hope for proponents of regulating indecent speech,\textsuperscript{242} and thus is the second-best solution. It allows protected speech to be broadcast, thus supporting the constitutional rights of willing adult viewers, while at the same time providing a real option to those who do not want themselves or their children to see these programs. This law conforms to the presumption

\textsuperscript{236} \textit{See}, e.g., Richard P. Salgado, \textit{Regulating a Video Revolution}, \textit{7 YALE L. & POL'Y. REV.} 516, 522-25 (1989) (discussing examples of self-censorship by movie producers to avoid 'X' ratings); Balkin, \textit{supra} note 5, at 1171 ("Any system of ratings will produce self-censorship . . . ."). This concern actually arises in any compelled speech situation: the fear that the speaker will avoid all speech to avoid having to make the counter-message. \textit{See} Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974).

\textsuperscript{237} Mi\textit{now} \& La\textit{May}, \textit{supra} note 22, at 25 (quoting Motion Picture Association of America President Jack Valenti). The response of Mi\textit{now} and La\textit{May}: "So long as a parent controls the on-off switch, does it really matter where it is? If the V-Chip is unconstitutional, so is a remote-control device—and so, too, are parents who control what their children watch." \textit{Id.} at 25-26.

\textsuperscript{238} \textit{See supra} notes 19 \\& 127 and accompanying text.

\textsuperscript{239} \textit{See Mi\textit{now} \& La\textit{May}, \textit{supra} note 22, at 26 ("If we truly believe that . . . parents [do not] have a duty or the right to intercede on their [children's] behalf, then we have converted the First Amendment from a sword of freedom into a shackle of bondage."). The same is true for unwilling listeners who want to avoid even brief exposure to indecent material.

\textsuperscript{240} Mi\textit{now} \& La\textit{May}, \textit{supra} note 22, at 166.

\textsuperscript{241} Edwards \& Berman, \textit{supra} note 3, at 1564; Winer, \textit{supra} note 12, at 522 ("Parental authority, then, is the proper control over what children watch on television."). Supporters of the V-Chip recognize, as the \textit{Pacifica} Court did not, that "in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities." \textit{Pacifica}, 438 U.S. at 775 (Brennan, J., dissenting); \textit{see also} Mi\textit{now} \& La\textit{May}, \textit{supra} note 22, at 166 (arguing that "so long as Congress sees to it that [parents] have every opportunity to block programs they do not want their children to see" the system is effective and constitutional).

\textsuperscript{242} Edwards \& Berman, \textit{supra} note 3, at 1566; \textit{see also} Mi\textit{now} \& La\textit{May}, \textit{supra} note 22, at 164-66.
of letting protected speech get over the airwaves, and it properly puts the onus on the unwilling listeners to take affirmative steps to avoid the speech.

Some might think it unwise to create a policy designed to screen out part of the audience, or to create special rules governing protected speech. This Comment agrees that if free speech theory controlled broadcasting, those criticisms would be valid and this law unnecessary and possibly unconstitutional. Unfortunately, theory does not control. Thus, the V-Chip law, based on a compelling interest in facilitating parental control over what their children see and hear in the broadcast media, is the best course possible given the conflict between principles of free speech and the demand for Congress to show that "something is being done." The key is that this law upholds the fundamental First Amendment presumption of allowing the speech to get out over the airwaves.

V. CONCLUSION

"We have, as a society, legitimate and contradictory goals in regulating speech. The doctrines that move us toward one set of goals move us away from the other." Ultimately, "we can do no better than a second-best solution." The current sixteen-hour ban on indecent broadcasts, upheld in ACT III, has subverted the free speech rights of willing listeners and broadcasters to the "perceived needs of governance"—in this case, an independent interest in protecting children from speech. As a matter of free speech philosophy, the best solution is the rule that if the speech is protected, it cannot be regulated. But given the desire for the government to show that "some-

243 See HAIMAN, supra note 14, at 178 (arguing against such a policy); MINOW & LAMAY, supra note 22, at 25 (discussing broadcasters who did not want people to have the power to completely block-out some programming); Balkin, supra note 5, at 1165 (expressing concern with creation of informational filters).

244 See Pacifica, 438 U.S. at 778 (Stewart, J., dissenting); SHIFFRIN, supra note 3, at 80-81; Winer, supra note 12, at 525. But see MINOW & LAMAY, supra note 22, at 131 (discussing the "child's First Amendment" and arguing that "considerations arise where children are involved that do not arise with adults").

245 See supra note 16 and accompanying text.

246 See supra note 17 and accompanying text.

247 EMERSON, supra note 17, at 502; see also POVE, supra note 4, at 187; Weinberg, supra note 9, at 1206.

248 See supra note 19 and accompanying text.

249 Weinberg, supra note 9, at 1206.

250 Id.

251 SHIFFRIN, supra note 3, at 5.

252 Pacifica, 438 U.S. at 778 (Stewart, J., dissenting); see supra note 16 and accompanying text.
thing is being done."\textsuperscript{253} it is politically impossible "to conform our law to ordinary free-speech philosophy" entirely.\textsuperscript{254}

This Comment sought and outlined the second-best solution, one with more respect for First Amendment theory and doctrine than the current system.\textsuperscript{255} First, this Comment showed the stark and gratuitous conflict between the current system of regulation and the First Amendment: the lesser protection afforded broadcasting despite the lack of justification and the subversion of the constitutional rights of all adults, and parents in particular, as the government makes parental decisions and cuts off protected speech at the source.\textsuperscript{256}

Second, this Comment outlined the key elements of a regulatory scheme more in touch with the First Amendment while providing unwilling listeners with realistic options. The most important of these is adherence to the fundamental First Amendment presumption that protected speech must be allowed out over the airwaves to be seen by willing viewers; the government cannot stop this speech at the source.\textsuperscript{257} Other elements discussed included granting broadcasting full First Amendment protection; recognizing that Congress's sole interest was in facilitating parental control over their children's television viewing;\textsuperscript{258} and employing institutional safeguards to enable parents to regulate what their children see and hear.\textsuperscript{259} Finally, this Comment concluded that Congress had created the second-best solution with the V-Chip provision of the Telecommunications Act of 1996.

This is not simply conforming regulation to speech law, as Professor Weinberg feared.\textsuperscript{260} Rather, the V-Chip law supports the fundamental First Amendment presumption by permitting protected speech to reach the willing viewer, and by placing a real choice in the hands of the individual or parent. This is the second-best regulatory scheme: the only workable way to reconcile two worldviews that are not easily reconcilable,\textsuperscript{261} while respecting some of the underlying ideals of both.

\textsuperscript{253} Emerson, supra note 17, at 502.
\textsuperscript{254} Weinberg, supra note 9, at 1206.
\textsuperscript{256} See supra Part III.
\textsuperscript{257} See supra note 19 and accompanying text.
\textsuperscript{258} See supra section IV.A.1.
\textsuperscript{259} See supra section IV.A.2.
\textsuperscript{260} Weinberg, supra note 9, at 1206.
\textsuperscript{261} Id.; see supra subpart IV.B.