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Regulation of Programming Content to Protect Children After Pacifica

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NOTES

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I. INTRODUCTION

At approximately two o'clock in the afternoon on October 30, 1973, radio station WBAI-FM broadcast a twelve minute satirization of contemporary attitudes toward seven " 'words you couldn't say on the public . . . air waves . . . .' "[1] The satirization was part of a "general discussion of contemporary society's attitude toward language . . . ."[2] Four days later, a father who had been listening to the program with his son filed a complaint with the Federal

1. FCC v. Pacifica Foundation, 438 U.S. 726, 729 (1978). The segment was part of a monologue, entitled *Filthy Words,* recorded by comedian George Carlin on his album, *George Carlin, Occupation: Foole.* Immediately preceding the broadcast, the station, which was licensed to the Pacifica Foundation, warned that controversial language would be used and advised listeners to change stations during the broadcast. *Id.* at 730. A transcript of the monologue may be found in the appendix of the Supreme Court's decision. *Id.* at 751-55.

2. Pacifica Foundation v. FCC, 556 F.2d 9, 11 (D.C. Cir. 1977), *rev'd,* 438 U.S. 726 (1978).

Communications Commission (FCC) protesting that the program's language was offensive.[3] After receiving WBAI's reply,[4] the FCC held that the language "as broadcast" was not obscene, but was indecent and therefore prohibited by 18 U.S.C. section 1464.[5] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed.[6] In a five to four decision, the Supreme Court reversed the Court of Appeals and upheld the FCC's power to sanction broadcasters of indecent speech.[7]

Like the father in *Pacifica,* the courts have expressed concern over the language to which children are exposed. These courts have developed a "protect the children" rationale to justify restrictions on the speech to which children may be subjected.[8] Application of this rationale to broadcasting, however, raises difficult first amendment questions because the broadcast media are both subject to extensive regulation[9] and protected by the first amendment.[10] The Supreme Court has recognized the unique status of the broadcast media and approved regulation of program content that could not be applied constitutionally to other media.[11]

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3. The complaint stated in relevant part: "Any child could have been turning the dial, and tuned in to that garbage. . . . Incidentally my young son was with me when I heard the above." Pacifica Foundation, 56 F.C.C.2d 94, 95 (1975), 32 RAD. REG. 2d 1331, 1332 (P&F), *rev'd,* 556 F.2d 9 (1977), *rev'd,* 438 U.S. 726 (1978). John R. Douglas, a member of the national planning board of Morality in Media, filed the sole complaint. *See WBAI Ruling: Supreme Court Saves the Worst for the Last,* BROADCASTING, July 10, 1978, at 20.

4. In its response Pacifica described Carlin as a "'significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl'" and stated that Carlin was "'merely using words to satirize as harmless and essentially silly our attitudes towards those words.'" 56 F.C.C.2d at 96, 32 RAD. REG. 2d at 1333-34.

5. *Id.* at 98-99, 32 RAD. REG. 2d at 1336-39. *See* notes 13-16 *infra* and accompanying text. Section 1464 makes the radio broadcast of "any obscene, indecent, or profane language" a criminal offense.

6. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), *rev'd,* 438 U.S. 726 (1978); *see* notes 17-22 *infra* and accompanying text.

7. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). *See* notes 23-28 *infra* and accompanying text.

8. *See, e.g.,* 438 U.S. at 749-50.

9. The Federal Communications Commission is empowered to exercise broad regulatory authority over both substantive and technical aspects of radio and television broadcasting. Its statutory foundation is 47 U.S.C. §§ 151-609 (1976). *See generally* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103-11 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-77 (1969); B. SCHMIDT, JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS 125-31 (1976).

10. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). *See* Part IV of this Note. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67 (1967); Note, Pacifica Foundation v. FCC: *"Filthy Words," the First Amendment and the Broadcast Media,* 78 COLUM. L. REV. 164 (1978).

11. *Compare* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), *with* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

This Note examines the "protect the children" rationale as justification for the regulation of program content to determine if it is likely to withstand future challenges. Initially, the Note reviews the *Pacifica* decisions to illustrate how the rationale recently has been employed. The Note then considers this rationale in light of traditional first amendment analysis and the interface of that analysis with the rights of children, concluding that the rationale does not justify abridgment of the first amendment. The Note then considers the effect of broadcasting's "unique characteristics" upon this analysis,[12] concluding that this added element does not tip the balance in favor of "protection". Finally, the Note examines other areas in which programming content has been regulated to protect children and offers proposals as to how children constitutionally may be protected from potentially harmful broadcasts.

II. PROTECTIONISM AND THE *Pacifica* DECISIONS

Cognizant that "indecent"[13] language had never been prohibited under section 1464 prior to the instant case, the FCC did not sanction WBAI but stated that it would keep the Order in the station's license file for possible sanctioning should further complaints be received.[14] The FCC later clarified its holding, stating that the Order was not an absolute prohibition of "indecent" language but an attempt to "channel" it to times when children were less likely to be in the listening audience.[15] The strong link between the prohibition of indecent speech and the protection of children was evident from the Commission's reasoning that "the concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive . . . sexual or excretory activities and organs, at times of the day when there is a reasonable risk

12. This Note does not address the broad statutory powers of the FCC to control the broadcast media. The primary focus, therefore, will be on the first amendment and other constitutional aspects of regulation.

13. The courts' discussion of the indecent/obscene dichotomy in this case as well as the proper construction of 18 U.S.C. §§ 326, 554(e), and 1464 is beyond the scope of this Note. Instead, this Note will examine solely the courts' protection justification.

14. 56 F.C.C.2d at 99, 32 RAD. REG. 2d at 1337. This was much more serious than a mere warning because substantiated complaints are considered in the license renewal process to evaluate whether a station has served the public interest in compliance wth 47 U.S.C. § 307 (1976). The FCC has denied license renewal or has granted only a short term license renewal in many instances, largely as a result of such complaints. *See, e.g.*, Jack Straw Memorial Foundation, 21 F.C.C. 2d 833, 18 RAD. REG. 2d 414 (P&F) (1970) (short term renewal); Palmetto Broadcasting Co., 33 F.C.C. 250, 23 RAD. REG. 2d 483 (P&F) (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964) (denied license renewal).

15. Pacifica Foundation, 59 F.C.C. 2d 892, 36 RAD. REG. 2d 1008 (P&F) (1976)..

that children may be in the audience."[16]

The United States Court of Appeals for the District of Columbia Circuit reversed the Commission's Order.[17] Judge Tamm, writing for the court, held that the Order was censorship regardless of the channeling language because the Commission had stated that even if the broadcast exhibited literary, artistic, political or scientific value, it could not have been broadcast at a time when great numbers of children were in the audience. Judge Tamm pointed out that because large numbers of children are in the broadcast audience until 1:30 a.m.,[18] the seven four-letter words could never be broadcast.[19] Alternatively, Judge Tamm held the Order to be overbroad.[20] Judge Leventhal, dissenting, argued that the Commission could regulate the material " '*as broadcast*'."[21] Justice Leventhal stressed that the family should be allowed to choose what its children hear. Injury could occur, not only from hearing indecent language, but also from exposure to the idea that such language has official indorsement.[22]

In a five to four decision, the Supreme Court reversed the Court of Appeals, holding that the FCC constitutionally could regulate indecent speech. Justice Stevens, writing for the plurality, found the presence of children in the listening audience a primary factor in determining that broadcasting has only limited first amendment

16. 56 F.C.C.2d at 98, 36 RAD. REG. 2d at 1336. The Supreme Court noted the FCC's suggestion that if an offensive broadcast had literary, artistic, political or scientific value, and was preceded by warnings, it might not be indecent in the late evening, but would be during the day when children were in the audience. 438 U.S. at 730 n.5.

17. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

18. *Id.* at 13 n.7.

19. *Id.* at 14. Judge Tamm also noted that because serious literary, artistic, political, or scientific value was irrelevant to the ban, the Commission's Order proscribed "the uncensored broadcast of many of the great works of literature including Shakespearian plays," contemporary plays that "have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*." *Id.*

Chief Judge Bazelon agreed with Judge Tamm on this point. Noting that roughly one-half of the nation's AM licensees operate only during the daytime, Chief Judge Bazelon reasoned that channeling was an unacceptable alternative because the order effectively prohibited such stations from airing the material at all and made the material unavailable to many other potential listeners who, if the material is aired too late, will have gone to bed. *Id.* at 20 nn.5 & 6. In support of the latter proposition, Chief Judge Bazelon cited a Nielsen survey finding that 70% of television households watch television between 9:00 and 10:00 p.m., 46% at 11:00 p.m., and 25% at midnight. *Id.* at 20 n.6 (citing *Nielsen Television*, 1975, at 7). Chief Judge Bazelon also concluded that § 1464 must be construed narrowly to prohibit only that speech, such as obscenity, which is unprotected by the first amendment. *Id.* at 24-30.

20. *Id.* at 18-20.

21. *Id.* at 31 (emphasis in the original).

22. *Id.* at 37 & n.18. Judge Leventhal felt that children's values are protected as long as children know that pornography is not approved of by either parents or society.

protection and therefore may be regulated more stringently than other forms of communication.[23] Justice Stevens noted that broadcasting is a uniquely pervasive form of communication that reaches "the citizen, not only in public, but also in the privacy of the home . . . ."[24] Justice Stevens reasoned that broadcasting, unlike books and magazines, cannot be withheld from children while remaining accessible to adults. Thus, because broadcasting's unique accessibility to children interfered with "the government's interest 'in the well being of its youth' and in supporting [the] 'parents' claim to authority in their household,'"[25] Justice Stevens concluded that regulation of "indecent" expression was justified. In addition, the Court approved both channelling[26] and the FCC's characterization of "indecent" language[27] as acceptable methods of regulation. Justice Stevens also emphasized that the Court's holding was limited to the facts surrounding WBAI's broadcast because indecency can be accurately ascertained only in the context of a particular broadcast.[28]

III. First Amendment Considerations

Throughout our nation's history, first amendment rights have held a "preferred place" in our society.[29] The first amendment expressly prohibits the government from abridging an individual's freedom of speech.[30] The strength of this restriction is embodied in the statement that "[t]he power of a state to abridge freedom of speech . . . is the exception rather than the rule."[31]

A. Content Neutrality as a Fundamental Concept

Government abridgment of free speech occurs in two forms.[32] First, the government may indirectly restrict the free flow of ideas and information while pursuing other acceptable goals unrelated to

23. 438 U.S. at 749-50.

24. *Id.* at 748.

25. *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

26. *See* text accompanying notes 15 & 16 *supra.*

27. 438 U.S. at 746.

28. *Id.* at 742 (plurality opinion only). The Court listed variables that would be relevant in determining if indecent speech may be prohibited. These variables include: Time of day, content of the program and the differences between radio, television, and closed circuit transmissions. *Id.* at 750 (majority opinion).

29. Thomas v. Collins, 323 U.S. 516, 530 (1945).

30. The first amendment states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

31. Herndon v. Lowry, 301 U.S. 242, 258 (1937).

32. For an in-depth discussion of the two categories by which courts analyze freedom of speech problems, see L. Tribe, American Constitutional Law §§ 12-2 to 3 (1978).

the content of speech. These restrictions are characterized as content-neutral and include time, place, and manner restrictions that, although aimed at noncommunicative impact, nevertheless inhibit communication.[33] When confronted with a content-neutral restriction, the Court examines the facts surrounding the restriction and balances the government's regulatory interests against the need for freedom of expression.[34] Under this analysis, a time, place, and manner regulation is tolerated if it does not unreasonably restrict the flow of ideas and information.[35]

The second type of governmental abridgment is action that directly restricts undesirable information or ideas because of the specific message expressed or the effect the message will have when distributed. These direct regulations are presumed to be contrary to the first amendment[36] because the government may not "restrict expression because of its message, its ideas, its subject matter, or its content"[37] regardless of its adverse public effects.[38] Thus, courts confronting content-based regulation do not balance the interests as they do when confronted with content-neutral restrictions. Instead, courts utilize a strict scrutiny analysis that requires the government to prove that the regulation furthers a compelling state interest or that the restricted speech is unprotected under traditional first amendment analysis.[39] This strict scrutiny analysis also requires

33. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (upholding ceilings on campaign contributions); Kovacs v. Cooper, 336 U.S. 77 (1949) (government prohibiting use of loud speakers in residential areas). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

34. *See* Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961).

35. *See* Cox v. New Hampshire, 312 U.S. 569 (1941). The Court in *Cox* stated: "[T]he question in a particular case is whether . . . [a] control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communications of thought." *Id.* at 574.

36. *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966) (invalidating a prohibition against discussing a political candidate on the last days of election); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a ban on the teaching of a foreign language). *See* L. TRIBE, *supra* note 32, at § 12-2.

37. Police Dep't. v. Mosley, 408 U.S. 92, 95 (1972).

38. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

39. As the Court stated in Roth v. United States, 354 U.S. 476 (1957), "the First Amendment was not intended to protect every utterance." *Id.* at 483. Those words deemed unprotected by the first amendment are obscenity, libel, fighting words, and speech constituting a clear and present danger to the public. This rigid categorical approach to the protected-unprotected dichotomy originated from dicta in Chaplinski v. New Hampshire, 315 U.S. 568 (1942). The two-level approach still wholly applies to obscenity and fighting words, but one commentator feels the demise of the rigid categorization is imminent. Goldman, *A Doctrine of Worthier Speech: Young v. American Mini Theatres, Inc.*, 21 ST. LOUIS U.L.J. 281, 282 (1977).

that the regulation be tailored to the permissible state objective such that no reasonable alternative would have a less onerous impact on fundamental rights.[40] Moreover, once determined to be content-based, a regulation may not be justified by a claim that the content of the message has been adequately voiced by other speakers or that the expression may be voiced in another place, at another time, or in another manner.[41]

The equality of ideas doctrine is a corollary to the principle that government may not discriminate among protected communications on the basis of content. When dealing with protected communication, the Court has consistently held that all ideas are equally important and deserving of first amendment protection.[42] Thus, the Court does not distinguish speech based upon quality, subject matter, or the personal preferences of the Justices once the speech is determined to be protected by the first amendment.

A recurring debate in first amendment jurisprudence is whether the requirement of content neutrality is absolute. Justice Black, who took an absolute approach, originally articulated the requirement. Justice Black argued that the first amendment phrase "no law" meant just that and that any content-based regulation was unconstitutional.[43] The Court as a whole, however, often has adopted the concept of content neutrality without accepting Justice Black's absolute approach. For example, in the landmark decision upholding the requirement of content neutrality, *Police Department of Chicago v. Mosley*,[44] the Court invalidated an ordinance that proscribed all picketing of schools except peaceful labor picketing, reasoning that the ordinance was content-based because it distinguished between the different messages expressed by the picketers.[45]

40. Note, *Constitutional Law—First Amendment—Content Neutrality*, 28 CASE W. RES. L. REV. 456, 473 (1978).

41. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974).

42. Although it has been suggested that speech on public issues mandates greater protection than private speech, A. MEIKLEJOHN, FREE SPEECH 92-107 (1948), the Court has refused to distinguish speech on theoretical levels. For example, the Court in Thomas v. Collins, 323 U.S. 516 (1945) stated that: "Great secular causes, with small ones, are guarded. . . . And the rights of free speech and a free press are not confined to any field of human interest." *Id.* at 531. Justice Powell, as recently as 1975, agreed that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener. . . ." Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975).

43. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 398 (1967) (Black, J., concurring); Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950) (Black, J., dissenting).

44. 408 U.S. 92 (1972).

45. *Id.* at 99-102.

Justice Marshall, writing for the Court, qualified his application of the neutrality principle by holding that a state could prohibit picketing in certain circumstances "to protect public order," but noted that "these justifications for selective exclusions from a public forum must be carefully scrutinized."[46] The majority, applying a strict scrutiny analysis, found that although there was a substantial governmental interest, the nexus between means and ends was insufficient. Thus, the *Mosley* Court's ban on content-based distinctions, while not absolute, raises a presumption against their validity by subjecting them to the rigorous strict scrutiny test.[47]

A more recent decision, *Erznoznik v. City of Jacksonville*,[48] applied *Mosley's* equal liberty of expression standard. The *Erznoznik* Court invalidated an ordinance that prohibited drive-in theatres with screens " 'visible from any public street or place' "[49] from showing any movie that contained nudity. In rejecting the city's argument that the ordinance was intended to eliminate a nuisance,[50] Justice Powell stated that "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."[51] Finding that the ordinance's objectives failed to justify the regulation of nonobscene speech on the basis of content, the Court declared the statute invalid. Although this balancing technique seems less stringent than the *Mosley* analysis, the Court nevertheless maintained a presumption of invalidity for content based distinctions, which, to survive, must "satisfy the rigorous constitutional standards that apply when government attempts to regulate expression."[52]

In *Young v. American Mini Theatres, Inc.*,[53] the Court deviated from the *Mosley* principle and upheld a zoning ordinance that restricted the locations of new theatres showing sexually explicit "adult" movies. The ordinance required an examination of the content of the movies to determine whether to characterize them as "adult." Upholding the ordinance, a plurality of the Court pur-

46. *Id.* at 98-99.

47. One commentator praised the Court's decision for "explicitly adopt[ing] the principle of equal liberty of expression." Karst, *supra* note 33, at 28. He acknowledged that, although "absolute equality is a practical impossibility," deviation from this basic assumption is permitted "only upon a showing of substantial necessity." *Id.*

48. 422 U.S. 205 (1975).

49. *Id.* at 207 (quoting the ordinance).

50. The city used protection of juveniles as another justification, but the Court found the total ban on nudity overinclusive. *Id.* at 212-14.

51. *Id.* at 209.

52. *Id.* at 217.

53. 427 U.S. 50 (1976) (plurality opinion by Stevens, J.).

ported to establish a lower standard of protection for admittedly nonobscene but nevertheless "erotic materials." The new standard permitted content-based distinctions when the "record discloses a factual basis for . . . [achieving] the desired effect."[54]

Prior to *Young,* the Court had not found a state's interest in protecting its citizens from less than obscene speech sufficient to justify content regulation. Citing *Erznoznik,* Justice Stewart, in dissent, espoused the traditional view that content distinctions were simply not permitted under the first amendment[55] and that the plurality's decision constituted a "drastic departure from established principles."[56] The *Young* Court, consistent with precedent,[57] could have reached its desired result without adopting a new standard by acknowledging the presumptive unconstitutionality of the ordinance and applying either *Mosley's* strict scrutiny analysis or *Erznoznik's* rigorous balancing.

In terms of first amendment jurisprudence, the *Young* plurality took a new and somewhat unusual approach. Although recognizing that precedent demanded content-neutral regulation, the plurality gave two justifications for its variation from this principle. First, the Court contended that the "paramount obligation of neutrality" was not violated because the ordinance did not restrict the location of the theatres solely because of the particular movie's point of view.[58] Second, the plurality deemed sexually explicit erotic expression to be of "lesser" value than other protected speech, particularly political debate.[59] To support this contention, Justice Stevens gave examples of unprotected speech to show that the first amendment is not absolute.[60] Justice Stevens then cited several cases to illustrate that "[e]ven within the area of protected speech, a difference in content may require a different governmental response."[61] The Court's examples of speech whose content warranted less protection included

54. *Id.* at 71. Justice Stevens categorized this protected speech as outside the realm of "ideas of social and political significance" and therefore not worthy of full protection. *Id.* at 61. Justice Powell did not accept the plurality's view on this point, but provided the fifth vote for reversal of the lower court on a zoning theory. *Id.* at 73 (Powell, J., concurring).

55. *Id.* at 85-88 (Stewart, J., dissenting).

56. *Id.* at 84 (Stewart, J., dissenting).

57. *See* text accompanying notes 44-52 *supra.*

58. 427 U.S. at 70. *See also* Greer v. Spock, 424 U.S. 828, 838-839 & n.10 (1976).

59. 427 U.S. at 70. Justice Powell joined all but this part of the plurality opinion; Justices White, Rehnquist and Chief Justice Burger joined in the entire opinion.

60. *Id.* at 66 nn.23-24. *See, e.g.,* Bond v. Floyd, 385 U.S. 116, 133-34 (1966) (speech involving incitation to crime); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (incitation to violence by "fighting words"); Near v. Minnesota, 283 U.S. 697, 716 (1931) (publication in time of war of the number and location of troops).

61. 427 U.S. at 66.

libel,[62] commercial speech,[63] a captive audience on public rapid transit systems,[64] and materials that are obscene only when distributed to juveniles but not to adults.[65] The plurality, applying a balancing test, thus ruled in favor of the city on the ground that the ordinance's restriction on theatre location did not greatly inhibit access to protected sexually explicit expression because the ordinance left enough theatres to accommodate the viewing public.[66]

The portion of *Young* asserting that some protected expression has "less value" than others is clearly contrary to the equality of ideas doctrine[67] and traditional first amendment jurisprudence. The plurality applied a subjective popularity test to determine whether the particular speech was worthy of full protection. The plurality's test fails to recognize an important need for the first amendment—the protection of speech that is offensive to the majority of the community.[68] Because a majority of the Court did not accept the plurality's test,[69] however, lower courts are not bound to follow this potentially dangerous test. Thus, *Young's* influence on the *Mosley, Erznoznik*, and absolute approaches to the construction of the content neutrality doctrine is uncertain.

B. Protecting Children and the First Amendment

The protection of children is often offered as justification for not complying with the commands of the first amendment. This justification enables the Court to make special concessions and exercise a more subjective approach in cases that threaten to adversely affect minors. Because of this subjectivity, the Court's utilization of

62. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

63. *But see* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

64. *E.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

65. Ginsberg v. New York, 390 U.S. 629 (1968).

66. 427 U.S. at 62-63.

67. *See* note 42 *supra* and accompanying text. Mr. Justice Harlan, also supporting this doctrine, wrote that once the expression is deemed protected, it must be recognized that:

> much linguistic expression serves a dual communicative function. . . . In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message communicated.

Cohen v. California, 403 U.S. 15, 26 (1971). Thus, Justice Harlan felt that particular words chosen by a speaker must not be substituted for because the words have an emotive as well as cognitive effect that the speaker intends to convey.

68. *See* Note, *supra* note 40, at 480. *See also* Ginsberg v. New York, 390 U.S. 629, 655-56 (1968) (Douglas & Black, JJ., dissenting).

69. *See* notes 54 & 59 *supra*.

this rationale varies according to society's current attitude toward the role of parent and government in child development. One problem that is particularly susceptible to these changing attitudes is how to resolve the conflict between the right of the government to assist parents in protecting the child from something thought to be harmful and the right of the child to be exposed to the diverse expression of ideas.[70]

Since colonial times, society has excluded children from the civil rights movements in this country because children were generally classified with "the adjudged lunatic" because they did not "possess the faculty of forming a judgment on their own interests . . . ."[71] Statesman and philosopher John Locke explained this premise in terms of capacity rather than age. Locke thought it obvious that, unlike adults, children lacked a capacity of knowing the law of reason.[72] Nature imposed an obligation upon parents to nourish, protect, educate and influence the values of their children to assure that they attain a mature and rational capacity. Children were to be protected both from the improvident actions of others and from themselves.[73]

The prevalence of this protectionist attitude throughout our country's growth is demonstrated by Justice Frankfurter's statement that "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children."[74] Locke acknowledged, however, that this duty gave parents neither unlimited nor unbridled power to control or dispose of their children's lives and liberties. He felt that, regardless of age, once sufficient capacity had been developed discrimination against a child because of physical immaturity was no longer justified.

Traditionally, courts have regarded parental power as virtually absolute—prevailing over the claims of the state, other outsiders,

70. *See generally* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. REV. 605.

71. H. MAINE, ANCIENT LAW 164 (1st American ed. 1864).

72. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 59 (1948). *Accord,* J. MILL, ON LIBERTY 11 (1975). The law assumes capacity is essential as is evidenced by restrictions on the freedom of children to marry, vote, drive, or enter contracts and other binding decisions.

More recently, Justice Blackmun recognized the role of capacity as he acknowledged that the state has somewhat broader authority to regulate the activities of children than of adults. He concluded, however, that a *competent, mature* minor has a right to make personal choices notwithstanding parental authority. Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

73. J. LOCKE, *supra* note 72, at § 58.

74. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

and the children themselves unless there exists some compelling justification for interference[75] such as abandonment, neglect, abuse, or some other action that threatens the health or safety of the child. The Supreme Court adopted this view by establishing a strong presumption in favor of parental control over state intervention.[76] Although the parent has primary authority, this authority may be delegated to the state to carry out parental objectives.[77] One commentator queried whether these cases "mean that parents have a constitutionally sanctioned role in their children's lives," or whether they "mean that the state has a constitutionally limited role in child rearing that typically, but not necessarily, is enforced by deference to parents?"[78] Many cases approach this question from the standpoint of enforcing the parents' constitutional rights or permitting the parent to assert the child's rights based upon societal preferences. This approach often necessitates constitutional limitations on the state's role in child rearing. For example, in *Pierce v. Society of Sisters,*[79] the Court, in striking down a compulsory education statute that in effect prevented private school attendance, stated that children are not mere wards of the state, but are the responsibility of parents who have the right and the obligation to prepare the child for his place in society. Similarly, in *Meyer v. Nebraska,*[80] the Court, invalidating a Nebraska state statute that prohibited foreign languages from being taught to young school children, held that parents had the right to direct their children's education despite the state's contention that good citizenship and patriotism would be fostered by requiring that young children learn only English. In so holding, the Court also noted that if the state attempted to completely replace the family in its child rearing capacity, it would do "violence to both letter and spirit of the Constitution."[81]

The general principle enunciated in *Pierce* and *Meyer* was restricted in *Prince v. Massachusetts.*[82] The *Prince* Court upheld the

75. *See In re* Guardianship of Faust, 239 Miss. 299, 305-06, 123 So.2d 218, 220 (1960); Matarese v. Matarese, 47 R.I. 131, 132-33, 131 A. 198, 199 (1925); Hafen, *supra* note 70, at 619-26.

76. *E.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

77. Parents have allowed the state to govern in areas such as child labor, public education, and juvenile delinquent behavior. Hafen, *supra* note 70, at 618.

78. *See* Burt, *Developing Constitutional Rights Of, In, and For Children,* 39 LAW & CONTEMP. PROB. 118, 135 (Summer 1975).

79. 268 U.S. 510 (1925).

80. 262 U.S. 390, 400 (1923).

81. *Id.* at 402.

82. 321 U.S. 158 (1944).

conviction of a child's guardian for violating the state's child labor law statute. The guardian had taken the child, with her consent, to sell Jehovah's Witness literature. Acknowledging the conflict between the state's interests and the "sacred private interests" of the parents,[83] the Court nevertheless held that the state, under its *parens patriae* power, was obligated to limit parental authority in order to protect children from potentially harmful public activity.[84] The Court reasoned that the state's authority over children was broader than its authority over adults, because, whereas parents could make choices for themselves, children must possess the requisite capacity before making their own choices.[85]

In *Ginsberg v. New York,*[86] the Court upheld a New York statute prohibiting the sale of pornographic magazines to minors under seventeen years of age, even though the magazines were not obscene to adults. The Court reasoned that the restrictions were justified because, first, parents have a constitutionally recognized claim of authority to rear their children,[87] and second, "[t]he state also has an independent interest in the well-being of its youth."[88] Because parental control over access to the magazines could not be assured, the Court found that the second rationale justified banning distribution of the material to children even though it was not obscene to adults. This theory of "variable obscenity" demonstrates the different degrees of protection given to adults and minors. *Ginsberg* also illustrates that both parents and the state have important interests in protecting children.

In *Wisconsin v. Yoder*[89] the Court reaffirmed the principle that parents have the primary interest in their children's welfare. The *Yoder* Court, basing its holding on religious freedom and parental rights to mold their children's values, excused children of the Amish religion from compulsory school attendance after completion of the eighth grade. Thus, after *Yoder,* it was clear that state interference with parents' interests in raising their children, such as that in *Prince,*[90] would be justified *only* in the event of "harm to the physi-

83. The Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166.

84. *Id.* The Court listed compulsory school attendance and regulating child labor as examples of this authority.

85. *See id.* at 170.

86. 390 U.S. 629 (1968).

87. *Id.* at 639.

88. *Id.* at 640.

89. 406 U.S. 205 (1972).

90. *See* notes 82-85 *supra* and accompanying text.

cal or mental health of the child or to the public safety, peace, order, or welfare"[91] or of "a potential for significant social burdens."[92]

These cases demonstrate that parents traditionally have had the primary responsibility for guiding children in the formation of their values and protecting children from adverse influences. Parents typically have enforced this responsibility by asserting both the child's and the parent's constitutional rights. Within the last decade, however, the Supreme Court, beginning with *In re Gault,*[93] has approached several cases from the standpoint of the child's rather than the parent's constitutional rights. The *Gault* Court, establishing the precept that minors are to be afforded basic procedural due process in juvenile court proceedings,[94] determined that there is no justification for treating minors differently than adults in the due process context.

Gault, however, should not be interpreted more broadly than the Court intended. Later decisions have clarified the majority's position. Minority status is now considered to be a valid differentiation. The Court, by guaranteeing minors certain constitutional rights, has not conferred upon minors *all* the constitutional rights that are conferred upon adults.[95] Instead, minors are given only those constitutional rights that protect them.

The Court has extended certain constitutional rights to children in *Brown v. Board of Education,*[96] *In re Winship,*[97] *Goss v.*

91. 406 U.S. at 230. As an example of when health and safety may be jeopardized, the Court, citing *In re* Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied,* 377 U.S. 978 (1964), suggested the giving of a blood transfusion to a Jehovah's witness against his consent. 406 U.S. at 230.

92. 406 U.S. at 234. In contrast, Justice Douglas, dissenting, insisted that the wishes of the children must be considered. *Id.* at 245-46 (Douglas, J., dissenting). Only one of the children stated that her religion required her to leave school after the eighth grade. Justice Douglas dissented as to the other two children who had not testified. *Id.* at 243. (Douglas, J., dissenting). Justice Douglas cited *In re* Gault, 387 U.S. 1 (1967), West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), and Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), for the proposition that children had been afforded the protections of the Bill of Rights. *Id.* at 243-44. (Douglas, J., dissenting).

The Majority also suggested that a parental claim lacking explicit religious content would command less deference. *Id.* at 235-36.

93. 387 U.S. 1 (1967).

94. *Id.* at 13.

95. The Court has attempted to clarify its position by saying that it "has not yet said that *all* rights constitutionally assured to an adult accused of crime . . . are . . . available to the juvenile." McKeiver v. Pennsylvania, 403 U.S. 528, 533 (1971). The *McKeiver* Court refused to grant the right to trial by jury to juveniles in juvenile court proceedings because that right did not provide a form of protection beneficial to minors in light of the paternalistic attitude of the juvenile court.

96. 347 U.S. 483 (1954) (applying the equal protection clause for school desegregation).

97. 397 U.S. 358 (1970) (proof beyond a reasonable doubt required when a juvenile is charged with an act that would be a crime if committed by an adult).

Lopez,[98] *West Virginia State Board of Education v. Barnette*[99] and *Tinker v. Des Moines School District*.[100] *Tinker* lends perhaps the strongest support to the proposition that the Bill of Rights should be extended uniformly to children. In *Tinker* the Court upheld the first amendment rights of three students to wear black armbands in sympathetic protest against the Vietnam War despite a school order prohibiting such conduct. The majority stated that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."[101] Without further elaboration, it is unclear whether the Court meant that "fundamental" rights extended to children without qualification. Dissatisfaction with this expansive language led Justice Stewart to conclude that he could not accept that such rights are coextensive with those of adults. Indeed, Justice Stewart cited *Ginsberg v. New York* as establishing that children and adults do not have the same constitutional rights.[102] To Justice Stewart there was no question that a state could precisely delineate areas in which a child is "not possessed of that full capacity for choice which is the presupposition of First Amendment guarantees."[103] Justice Stewart apparently felt that the recognition of students' free speech rights in *Tinker* was not equivalent to granting minors full constitutional power because the exercise of such rights did not require assumption of binding obligations such as voting, marriage or contracting. These activities would still require a minimum age.

Tinker also may be distinguished as representing another parental rights decision because the parents encouraged their children to wear the armbands and were instrumental in the ensuing litigation. Thus, although the Court has extended some constitutional rights to minors, these rights have been those that afford the minor protection and therefore arguably can be supported by both the parents' and the state's interest, leaving intact the basic presumption of legal incapacity of minors.

98. 419 U.S. 565 (1975) (requiring notice and an opportunity for a hearing before being suspended from school).

99. 319 U.S. 624 (1943). In *Barnette*, a majority of the Court affirmed the validity of protecting the freedom of worship of children, *id.* at 642, and held that state compulsion of Jehovah's Witnesses to salute the flag was unconstitutional. Justices Black and Douglas, concurring, agreed that the teenage children had standing to claim first amendment protection. *Id.* at 643-44 (Douglas & Black, JJ., concurring).

100. 393 U.S. 503 (1969).

101. *Id.* at 511.

102. *Id.* at 515 (Stewart, J., concurring) (citation omitted). *Accord*, Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting). *See* notes 86-88 *supra* and accompanying text.

103. 393 U.S. at 515 (citing Ginsberg v. New York, 390 U.S. 629, 649-50 (1968)).

Further defining the boundaries of first amendment protection for minors, the Court, in *Rowan v. United States Post Office,*[104] upheld a federal statute that allowed an addressee to forbid delivery of sexually provocative mail to his home. The majority, asserting that a man's home is his castle, held that a homeowner should be protected from the risk of unwanted offensive material coming into his children's hands through the mail.[105] Justice Brennan, however, argued that the right of a mailbox holder to be taken off the mailing list might properly be restricted in order to protect the rights of minors who also used that mailbox.[106] Although recognizing the need for privacy and the right not to be an unwilling captive in one's home, Justice Brennan believed that the head of the household should not make the decision for everyone living there.[107] Reflected in Justice Brennan's opinion is the growing emphasis in first amendment analysis on the minor's right to know.[108] In dealing with the right to know, the emphasis is not on a person's age,[109] but on his capacity to engage in meaningful discussion and his ability to use the information in a way protected by the first amendment.[110] Justice Douglas, in his *Yoder* dissent,[111] insisted that the proper inquiry was the extent to which young persons may invoke first amendment protection. It is uncontroverted that parental authority to control and mold a child's attitudes should take precedence during a minor's early years before independent, mature and rational

104. 397 U.S. 728 (1970). The Court reasoned that the sender's right to communicate was outweighed by the right of an individual to keep objectionable material out of his home. *Id.* at 737-38. *Rowan* held that the right to privacy included the right of the addressee to refuse objectionable mail.

105. *Id.* at 738.

106. *Id.* at 741 (Brennan, J., concurring).

107. *Id.*

108. *See, e.g.,* Minarcini v. Strongville City School Dist., 541 F.2d 577, 580-83 (6th Cir. 1976) (school board may not remove novels from school library if it impairs student's right to receive information). *Accord,* Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978). *See* Meiklejohn, *The Reconciliation of First Amendment Freedoms with Local Control Over the Moral Development of Minors,* 12 SUFFOLK U.L. REV. 1205 (1978); *cf.* Note, *First Amendment—Free Speech: Right to Know—Limit of School Board's Discretion in Curricular Choice—Public School Library as Marketplace of Ideas,* 27 CASE W. RES. L. REV. 1034, 1055 (1977) (public school students capable of dealing with controversial subjects).

109. *Cf.* Butler v. Michigan, 352 U.S. 380 (1957) (Michigan statute prohibiting distribution of sexually explicit material to adults because of potential adverse effect on children would reduce population to reading only what is fit for children).

110. The right to receive information has long been accorded constitutional protection. *See* Kleindeinst v. Mandel, 408 U.S. 753, 762-65 (1972) (first amendment rights of public as listeners); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969) (rights of viewers to receive balanced views on subject of public interest outweighed business interest).

111. *See* note 92 *supra.*

thought is present. The question is when does an individual attain this level of development. Although the answer is uncertain, some psychologists maintain that by age fourteen children approach the moral and intellectual maturity of an adult.[112] Irrespective of the particular age, such evidence suggests that the first amendment mandate of free expression precludes the exclusion of minors from the entire realm of free discussion. Furthermore, prohibiting a minor from taking part in the free exchange of information could foreseeably hinder the youth's powers of unconstrained, independent thought, leaving him inadequately prepared to enter the world with adult responsibilities of open discussion and judgments.

The importance of first amendment protection in promoting the right to know has been acknowledged in several recent lower court decisions. In one case, the Sixth Circuit prohibited a school board from removing novels from the school library, holding such removal to be an unconstitutional invasion of the students' right to know.[113] A federal district court in New York also recently held that a state's prohibition against promoting, selling, distributing, or disseminating sexual material to a child was an overbroad infringement of first amendment rights because it prevented children's access to certain sex education material.[114] Although acknowledging legitimate state interests, the court found that, because of the nonobscene nature of the publications, the statute did not provide the least drastic means of effectuating its objective.[115]

One commentator has expressed concern about the fate of children and the family should the Court go beyond its present bounds and allow minors more constitutional rights than those that merely provide protection.[116] The argument is that children lack the capacity of adults and have a right to the nurture and protection of parents in order to fulfill special psychological and emotional needs until they attain maturity and independence. "Liberating" the children may destroy the family and be to the ultimate detriment of children if policies that restrict parental prerogatives are enforced. These policies could create a noncommittal parental attitude if parents no longer have the obligation and right to direct their children. Should this parental withdrawal result, the argument concludes,

112. Wisconsin v. Yoder, 406 U.S. at 245 n.3 (citing D. ELKIND, CHILDREN AND ADOLESCENTS 75-80 (1970); W. KAY, MORAL DEVELOPMENT 172-83 (1968); J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1948)).

113. 541 F.2d at 582-83.

114. St. Martin's Press, Inc. v. Carey, 440 F. Supp. 1196, 1207 (S.D.N.Y. 1977).

115. *Id.* at 1205-07.

116. Hafen, *supra* note 70, at 651-56.

child-rearing will be left to the state, which has proven to be less than successful in rearing children.[117] Minors would truly be abandoned to their rights.

C. Analysis

It is clear that a conflict exists between rights to protect children and first amendment principles. Using the facts of *Pacifica* as illustrative of this conflict brings these disparate theories more vividly into focus. Disregarding the unique characteristics of broadcasting,[118] the *Pacifica* Court seems to have reached a conclusion completely contrary to first amendment jurisprudence.

The Court gave little weight to the presumptive unconstitutionality of content discriminations and made no attempt to apply either *Mosley*'s strict scrutiny analysis or the rigorous balancing test of *Erznoznik*.[119] Arguably, the FCC's *Pacifica* Order would have passed neither of these tests. Justice Stevens' plurality opinion in *Pacifica* appears to have reaffirmed his unfortunate view in *Young* concerning the "lesser" value of sexually-explicit expression.[120] The opinion also resurrected the bifurcated *Young* theory of first amendment subjectivity based upon whether the content and the context of the particular expression has a higher or lower value. The plurality apparently found that the offensive speech broadcast by WBAI-FM merited only the lesser level of protection. As the dissent argued, this view threatens to "unstitch the warp and woof of First Amendment law."[121]

Justice Stevens' view, however, has been expressly disclaimed by a majority of the Court. In both *Pacifica* and *Young* those Justices that otherwise concurred in the result dissented as to the more controversial aspect of Justice Stevens' opinions.[122] The justification offered by Justice Stevens—that the FCC does not object to the point of view of Carlin but to the way he expresses it[123]—is clearly the antithesis of the first amendment reasoning that the Court articulated in *Cohen v. California*: "we cannot indulge the facile as-

117. *Id.* at 655, citing Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 992-1000 (1975).

118. The broadcasting effects in a situation similar to that of *Pacifica* will not immediately be discussed. For these effects see Part IV *infra*.

119. *See* notes 44-52 *supra* and accompanying text.

120. 438 U.S. at 746-48; *see* note 54 *supra* and accompanying text.

121. 438 U.S. at 775 (Brennan, J., dissenting).

122. 438 U.S. at 761-62 (Powell & Blackmun, JJ.); *id.* at 762 (Brennan & Marshall, JJ.); 427 U.S. at 73 n.1 (Powell, J.); *id.* at 86 (Stewart, Brennan, Marshall, & Blackmun, JJ.).

123. 438 U.S. at 743 n.18 (Stevens, J., joined by Burger, C.J., & Rehnquist, J.).

sumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[124]

Thus, the question remains whether, if protected speech cannot be constitutionally regulated on the basis of its content without meeting careful scrutiny, it may be so regulated to protect children in the listening audience. The *Pacifica* Court, although refusing to hold the monologue obscene, nevertheless banned the communication because of its potential degrading and harmful effects upon children.[125] The majority upheld the Order's interference with protected expression because the government has an interest in the "well being of its youth" and in supporting parental authority in their own household.[126]

The *Pacifica* Court's view is consistent with *Ginsberg*'s recognition that the government has the right to aid parents in protecting their children from commercialized appeals to prurient interest. The *Ginsberg* majority's standard, however, was much less stringent than traditional first amendment analysis, requiring only that there be no evidence that the statute is not rationally related to the objective of safeguarding minors. *Pacifica*'s broadcast obviously differs because it was not a commerical appeal to prurient interests but rather an intellectual program discussing society's attitudes toward language. Under the *Ginsberg* "variable" standard,[127] such a broadcast could be deemed unprotected as obscene in the given context. The *Pacifica* Court, however, failed to even mention this "variable obscenity" theory to justify its result.

Even acknowledging the parents' right to bring up their children safe from harmful influences[128] and the state's interest in the welfare of those children,[129] courts should not ignore traditional first amendment doctrines. Indeed, the *Ginsberg* dissent advocated the standard absolutist position—that the first amendment forbids censorship even when the communication may result in harm.[130] Justices Black and Douglas go so far, in that dissent, as to deny the

124. 403 U.S. 15, 26 (1971). *See* note 67 *supra* and accompanying text. Justice Harlan further stated in *Cohen* that "verbal tumult" and "offensive utterance" are "in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve." 403 U.S. at 24-25.

125. 438 U.S. at 749-51.

126. *Id.* at 749 (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)). *See* notes 87-88 *supra* and accompanying text.

127. Whether the "average person" element of the Miller v. California, 413 U.S. 15 (1973) standard will impair *Ginsberg's* variable formulation remains undecided.

128. *See* Part III(B) *supra.*

129. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

130. *Id.* at 652-53 (Douglas & Black, JJ., dissenting).

validity of the adult-minor distinction, arguing that the first amendment was designed to protect that communication which would otherwise be censored because it was harmful.[131] Justices Black and Douglas reasoned that one could be corrupted or led into delinquent behavior by hearing certain expressions regardless of one's age. The dissenters sympathized with parents who were concerned about their children's exposure to possibly harmful material, but determined that there is a crucial difference between acceptable parental involvement and censorship by the state.[132] The dissent also found that censorship necessarily implied a limitless subjective impostion of one's tastes upon others whether it be by the state or by a court.[133]

The *Ginsberg* dissent is based on the premise expressed in *Tinker* that minors should be able to take part in free and open exchange of independent thoughts. This approach, buttressed by the view that capacity rather than age should be determinative,[134] gives mature minors the right to know and be stimulated into independent thinking by the free exchange of ideas with others.[135] Society as well as the minor benefits from the increased maturity and capacity for original thought gained through exposure to different ideas and attitudes. Moreover, a parent, although in the minority, might want his child exposed to all communication to give him a well rounded view of society. There is no guarantee that parents will side with the state in these so-called protectionist policies.

A workable analysis for cases in which rights of child protection are asserted against the first amendment would recognize that state restrictions should be upheld if they are designed to protect children in making binding and permanent decisions such as marriage and voting until such time as the minor is clearly competent to express his views and fully understand the consequences of his undertaking. For other decisions, parental upbringing and nurturing remains very important to the minor's growth and development. This development is likely to be influenced by the expression with which the child comes in contact. The state should not be permitted to regulate otherwise protected expression for the purpose of safeguarding minors from expression it regards as harmful. Parents would be able to decide how their child is to be raised and to allow their child to be exposed to as little or as much expression as they feel he has the

131. *Id.* at 655-56. (Douglas & Black, JJ., dissenting).
132. *Id.* at 655.
133. *Id.* at 656.
134. *See* note 71, 72, 108, & 108 *supra* and accompanying text.
135. *See* notes 110-14 *supra* and accompanying text.

capacity to absorb. The child's right to know and receive information would also be protected from state interference.

The *Pacifica* Court held that government could help parents protect their children from offensive language even though other parents who perceived the language to be educational rather than offensive might want their child exposed to the communication. Justice Stevens' opinion could be construed as allowing the government to act *as* a parent rather than merely to aid parents, in keeping harmful language from children. Justice Brennan, however, observed that this deprives minors of first amendment rights, citing *Erznoznik* for the principle that protected speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks is unsuitable for them."[136] If legislatures or government agencies were allowed to exempt certain speech from first amendment protection without articulating any workable standards, these statutes could foreseeably be changed with every incoming legislature. These statutes could also vary as applied to different types of material depending on whether the legislators subjectively felt that the material was harmful. Besides being arguably unconstitutional, there would be massive additional amounts of legislation or agency action spelling out whether certain expression in a specific context is or is not permissible.

The *Pacifica* Court's approval of the FCC's channeling plan as an appropriate mode of regulation is also inconsistent with traditional first amendment jurisprudence. Because the plan merely mandates that Carlin's monologue be broadcast at a time when there are fewer children in the audience, the plan fails to protect *all* children. If the state's interest in protecting children from this speech is sufficient to justify abridging the first amendment, then the plan adopted should achieve that interest. The only means to adequately achieve that interest would be to ban the monologue totally from being broadcast. By settling for less than such a ban, the *Pacifica* Court unnecessarily abridged first amendment principles without achieving the goal that purportedly justified such abridgment.

Thus, it is clear that the protect-the-children rationale, as articulated in *Pacifica,* is inconsistent with traditional first amendment analysis. Much of the *Pacifica* opinion, however, stresses the additional factor of broadcasting and its unique accessibility to children as justifying the FCC's Order. This Note will now examine

136. 438 U.S. at 768. (Brennan & Marshall, JJ., dissenting) (citing Erznoznik v. Jacksonville, 422 U.S. 205, 213-14 (1975)).

whether this additional factor justifies government regulation of speech to protect children.

IV. THE EFFECT OF BROADCASTING ON THE FIRST AMENDMENT—PROTECTION OF CHILDREN DICHOTOMY

Courts have consistently distinguished broadcasting from the press[137] when confronted with the mandate of the first amendment.[138] This distinction was first enunciated in *Red Lion Broadcasting Co. v. FCC*,[139] in which the Court upheld the "fairness doctrine," which requires broadcasters to provide adequate and fair coverage to those with opposing points of view on controversial subjects. As one commentator noted, "instead of scrutinizing government regulation of broadcasting in light of the print media cases and our traditional reservations about government oversight of the press, the Court in *Red Lion* regarded broadcasting as a 'unique medium' that needed a distinctive first amendment analysis."[140] Although the Court recognized that broadcasting is protected by first amendment standards,[141] it reasoned that those standards might differ because of broadcasting's particular characterisitics.

The Court interpreted the first amendment to guarantee that government may not interfere with newspaper content in *Miami Herald Publishing Co. v. Tornillo*.[142] In *Tornillo* the same "fairness

137. *See* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

> During the past half century there have existed in this country two opposing constitutional traditions regarding the press. On the one hand, the Supreme Court has accorded the print media virtually complete constitutional protection from attempts by government to impose affirmative controls such as access regulation. On the other hand, the Court has held affirmative regulation of the broadcast media to be constitutionally permissible, and has even suggested that it may be constitutionally compelled. . . . [T]he Court in one context has insisted on the historical right of the editor to be free from government scrutiny, but in the other it has minimized the news director's freedom to engage in 'unlimited private censorship.'

Id. at 1, (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)).

138. The first amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Judges and journalists tend to vary as to the interpretation of this amendment. Journalists perceive it as absolute and prefer to read it in a vacuum, whereas judges find it somewhat ambiguous and weigh its requirements against other rights and duties found in the Constitution. *See* H. SIMONS & J. CALIFANO, JR., THE MEDIA AND THE LAW 1 (1976).

139. 395 U.S. 367 (1969).

140. Bollinger, *supra* note 137, at 6.

141. *See, e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948). Any argument that first amendment protection extends only to speech that is informational on its face, such as political discussions, but not to entertainment, was rejected in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

142. 418 U.S. 241 (1974).

doctrine" that was upheld as to broadcasters in *Red Lion* was deemed an unconstitutional invasion of the first amendment when applied to print media. The *Tornillo* Court, however, ignored *Red Lion* and its apparent inconsistencies. This diverse treatment has led media authorities to conclude that the two decisions imply that print media fully qualifies for first amendment protection while the broadcast media does not.[143]

Many arguments have been presented by courts and the FCC to justify increased regulation of broadcasting. The "unique" characteristics that purportedly set broadcast media apart from print media include: First, the means of broadcast communications are publicly owned and are part of the public domain administered in trust for the public interest; second, the use of the airwaves is a privilege rather than a vested right; third, electronic media are uniquely influential and pervasive; and last, the number of available channels is finite due to scarcity of spectrum space.[144]

A. Scarcity of Spectrum Space

The scarcity of channels doctrine was first articulated by Justice Frankfurter in *National Broadcasting Co. v. United States*[145] in which he stated: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characterisitic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[146] This theory rests upon the assumption that technical and economic limitations on providing an infinite number of frequencies necessitate governmental allocation of those available frequencies in order to promote first amendment goals of diverse expression and an uninhibited marketplace of ideas.[147] Government assignment of frequencies must be done on a rational basis in accordance with Congress' "public interest" standard.[148] After FCC

143. The Court has recently reaffirmed the double standard in FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978), finding contentions that cross-ownership rules violated the Constitution untenable because the argument "ignores the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' " *Id.* at 799 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)).

144. *See* Robinson, *supra* note 10, at 151.

145. 319 U.S. 190 (1943).

146. *Id.* at 226.

147. In *Red Lion,* note 139 *supra* and accompanying text, the Court stated: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every citizen to speak, write, or publish." 395 U.S. at 388.

148. 47 U.S.C. § 307(a) (1976). The FCC may promulgate guidelines to illustrate what programming practices it deems to be in the public interest. Banzhaf v. FCC, 405 F.2d 1082,

review of the applicant's programming practice, the FCC will grant or renew those licenses that most benefit the public interest.[149]

The validity of the scarcity rationale has been the subject of much debate. Critics of the rationale point out that the first amendment guarantee of a free press is not tantamount to a guarantee of a free and numerous press and that the relatively limited number of newspapers has not led to regulation of print media.[150] In fact, many more radio and television stations exist than newpapers. If there indeed were a scarcity, it could be remedied by expansion of cable television and UHF, both of which have unlimited channel capability. These critics assert that regulation and constant observation by the FCC inhibits coverage of controversial points of view, which in turn hinders rather than helps a free marketplace of ideas.

Although the scarcity rationale is less persuasive with the advent of cable television, UHF and other technological improvements, it is nevertheless foreseeable that a surplus of potential broadcasters would compel the government to choose applicants based upon the amount and quality of past or proposed "public interest" programming. This justification, however, would apply to regular, periodic evaluations of a broadcaster's overall performance in providing public interest programming rather than examination of specific broadcasts for certain words. Daily policing of broadcasts would not appear to be the perfect balance between the public interest in decent programming and first amendment commands.

The Supreme Court has stressed the importance of editorial discretion in programming decisions, holding that self-restraint should be achieved through the editor's judgment rather than from immediate, constant oversight by the FCC.[151] In maintaining the spirit of free editorial choice, the FCC should be limited to periodic, post hoc evaluation of broadcasters' use or misuse of allocated air space rather than scrutiny of specific broadcasts for particular of-

1095 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

149. Notwithstanding the broad powers granted to the FCC, Congress did not authorize the FCC to regulate or license broadcasters "upon the basis of their political, economic or social views, or upon any other capricious basis." 319 U.S. at 226.

150. *See* Bazelon, *FCC Regulation of the Telecommunications Press,* 1975 DUKE L.J. 213, 218-34.

151. *See* the discussion of Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), at Part V *infra.* In Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court stated: "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided." *Id.* at 124-25. For a discussion of this case and its emphasis on editorial autonomy, see B. SCHMIDT, JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS 174-82 (1976).

fensive words, as in *Pacifica.* This scrutiny tends to constrain editorial discretion to a greater extent than is allowed by the first amendment.

B. The Pervasiveness of the Broadcasting Medium and its Accessibility to Children

Two aspects of broadcasting, its pervasive presence in American lives and its unique accessibility to children, were of paramount importance to the Supreme Court in *Pacifica,* prompting the Court to assert that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[152] Justice Stevens' words might be construed to suggest the questionable proposition that broadcasting is subject to regulation that is impermissible when applied to other media simply because it is the most effective form of communication. That proposition, which seemingly turns first amendment values upside down when read in context, is actually addressed at the fact that the broadcast media penetrates the privacy of the home.

When addressing the pervasiveness-privacy justification, the Court went beyond its previous generalizations about the home being the one place in which people have a right to be unassaulted by uninvited, offensive sights and sounds.[153] In public one may be required to avert one's eyes to avoid offensive but protected messages so that others may remain free to exercise their first amendment rights.[154] In the home, however, it is unnecessary for one to be burdened so that others might enjoy protected speech.[155] The

152. 438 U.S. at 748.

153. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Cohen v. California, 403 U.S. 15, 21 (1971); Rowan v. United States Post Office Dep't. 397 U.S. 728 (1970).

154. The Court in Cohen v. California, 403 U.S. 15 (1971), ruled that a strongly worded message on the back of defendant's jacket could not be constitutionally restrained because offended viewers could simply avert their eyes to avoid the offensive message. Similarly, in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court found governmental restraint of nudity on a drive-in movie screen visible from the public streets to be improper because eye aversion was available. *But see* Young v. American Mini Theatres, 427 U.S. 50 (1976). *Cohen's* test for whether speech may be proscribed "solely to protect others from hearing it" was whether "substantial privacy interests are being invaded in an essentially intolerable manner." 403 U.S. at 21.

When someone is a captive and unable to avoid the offensive sight or sound, such as someone either riding on a city bus or subjected to sound amplifiers in public places, the speech may be constitutionally restricted. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Kovacs v. Cooper, 336 U.S. 77 (1949). Thus, there are varying degrees of captivity, and in every case the extent of captivity must be measured and the interest of the audience balanced against the value of tolerating the expression and the benefits of avoiding governmental regulation of the message.

155. Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Stanley v. Georgia, 394 U.S. 557 (1969). *See* notes 104-07 *supra* and accompanying text.

Pacifica Court agreed with the FCC's conclusion that the home listener should not be put to even the minimal momentary discomfort of enduring offensive speech while changing the channel or turning off the set because the Court deemed this discomfort sufficient to override the interests of other listeners who wanted to hear the afternoon monologue and who might not have been able to hear it at another time. The Court reasoned that once the offensive speech was heard, the harm was done and that warnings could not remedy the possible injury because, unlike a book or movie which can have warnings on its cover or marquee, the nature of broadcasting is such that warnings given at the beginning of the broadcast could not warn those subsequently tuning in.[156]

The Court's use of this pervasive-quality-of-broadcasting justification seems to ignore several arguments. First, although an individual is entitled to substantial privacy rights in his home, this interest should lessen when one affirmatively invites communication into the home through radio or television. Because the airwaves are a public medium, one who turns on his radio or television is as effectively entering the public domain as one who walks onto the street. Second, although the Court in *Rowan* protected the individual addressee's right to bar offensive mail from his mailbox, banning certain broadcasts from the airwaves has a much more harsh effect on first amendment guarantees. In the latter case, the ban not only protects the offended listener but also imposes his preferences on others who were not offended and who desired the free exchange of communication. Third, like the unwilling observers in *Cohen* and *Erznoznik* who could avert their eyes when confronted by an offensive message,[157] sensitive listeners could remedy the pervasiveness of the medium by merely changing stations or turning the radio off. The slight degree of offensiveness to which one is subjected until one can turn the dial seems a small price for free expression.[158]

In *Rowan,* the Court stated that it made no sense to say "that a radio or television viewer may not twist the dial to cut off an offensive . . . communication and thus bar its entering his

156. 438 U.S. at 748-49.

157. *See* note 154 *supra* and accompanying text.

158. As a compromise between offensive language and the first amendment one scholar proposed the general rule that *"the law should not attempt to insulate any persons in our society, no matter how willing or unwilling an audience they may be, from the initial impact of any kind of communication, but that the law should protect their right to escape from a continued bombardment by that communication if they wish to be free from it."* Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?,* 67 NW. U.L. REV. 153, 193 (1972) (emphasis in original).

home."[159] Although the majority in *Pacifica* found this alternative unacceptable,[160] such a holding would be more in line with first amendment jurisprudence than a total prohibition excluding those listeners who did not find the broadcast offensive. Indeed, "in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege . . . fundamental societal values are truly implicated."[161] Furthermore, the use of pre- and mid-broadcast warnings could considerably lessen the likelihood of even these few offensive moments.

The alternative and more persuasive rationale for regulation given by many courts is broadcasting's unique accessibility to children. As this Note concluded in Part III, protection of children, without more, is an insufficient justification for completely circumventing the first amendment. It is contended, however, that the additional element of broadcasting's unique characteristics provides the additional factor enabling this rationale to withstand constitutional challenge.

Broadcasting is significantly more accessible to children than is print media because unlike print media, which requires the consumer's purchase of each publication, a radio or television, once purchased by a household, provides a variety of broadcasts to children at no additional cost.[162] The only additional burden is turning it on and selecting the channel. The cash needed to purchase books and magazines, however, tends to limit children's access as does the vendor's ability to selectively choose those to whom he distributes the material. Broadcasting provides neither of these safeguards.

Moreover, parents may be unable to control what their children view or hear because radios and televisions are comparatively immobile and thus cannot be easily removed from children's proximity as can printed material. Additionally, with increasing numbers of parents working during the day, children left at home cannot be relied upon to switch channels should the material become offensive. Thus, it is argued that governmental regulation is needed to aid parents in supervising their children.

It is also contended that children, as a passive audience, are analogous to the captive audience and thus warrant more protection than adults. When persons are "captive"—physically unable to

159. 397 U.S. at 737.

160. *See* note 156 *supra* and accompanying text.

161. Cohen v. California, 403 U.S. at 25.

162. As Judge Leventhal noted in *Pacifica* at the Court of Appeals level, "[r]adio is relatively inexpensive in initial capital cost, and a virtually free good in terms of operating expense." 556 F.2d at 34.

avoid the offensive speech being exercised by another—courts have held that the speech may be consitutionally restricted.[163] The rationale for this "captive" exception is that these persons are unable to exercise the free choice presumed to be the basis of first amendment guarantees.[164] Similarly, it is argued that offensive speech may be constitutionally regulated when children are likely to be in the audience because children lack full capacity to engage in independent, free expression and make deliberate choices whether to receive such speech.[165] Children are thus assumed to be more likely to accept the message articulated by radio or television because of the combination of their immaturity and the dramatic and immediate nature of the medium.[166]

As discussed in Part III, one must ascertain who is being protected by regulation of offensive speech because statistics show that children as young as fourteen are fully capable of accepting free expression.[167] Because the degree of "captivity" is relative to the age and maturity of the child, the older the child the more likely he is to have the maturity to make the decision whether to change the channel. The degree of harm to this child is probably slight since he can change the channel quickly if he is unwilling to hear the message. Moreover, it is arguable that a school age child could change the channel just as easily as he could walk away from offensive language spoken by other children at school. A younger child, with less capacity and therefore more susceptibility, would, of course, warrant greater protection.[168] Such a child, however, probably will not be left totally unsupervised so that he may turn on a radio or television without someone being close enough to change the channel. Furthermore, if he is young enough to merit full protection, he will probably be unharmed by the language because he cannot fully understand what it means.

The *Pacifica* Court seems to have placed no discernible limits upon the right of the FCC to ban offensive speech in order to protect children. What the FCC subjectively deems offensive remains for

163. *See* note 154 *supra* and accompanying text.

164. *See* note 158 *supra* and accompanying text.

165. "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (footnote omitted).

166. Justice Jackson argued in Kunz v. New York, 340 U.S. 290, 307-08 (1951), (Jackson, J., dissenting), that "[t]he vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests."

167. *See* note 113 *supra* and accompanying text.

168. *See* notes 109-12 *supra* and accompanying text.

future determination, with the attendant possibility that a majority of parents might not approve of the FCC's determination. This potentially limitless discretion could justify a ban of great literary and artistic works that contain words that, taken out of context, would be offensive.

Therefore, it appears that the added element of broadcasting does not justify tipping the balance in favor of abridging the first amendment rights of adults and minors with sufficient capacity to receive information judiciously in order to protect children who have not attained this level of capacity. Parents rather than government may best protect the latter. The parent may choose whether to permit the child to listen to offensive broadcasts or to change the channel. As discussed earlier, the same immature children that the FCC seeks to protect probably will be supervised, if not by a parent, by someone designated by a parent. Thus, the need for government protection is not acute. In addition, channeling does not solve the problem because significant numbers of children are likely to remain in the listening audience long after many adults have gone to bed.[169]

V. SELF-REGULATION OF BROADCASTERS TO PROTECT CHILDREN: THE FAMILY VIEWING HOUR

Censorship in the broadcast media is undeniable. Acknowledging *Red Lion* and its justifications of scarcity of the airwaves, public trust, and pervasiveness of the medium,[170] Congress empowered the FCC to safeguard the public interest in programming and thus restricted broadcasters more than their print media counterparts. Pursuant to this goal, the FCC, through its licensing and other powers, ensures that broadcasting will never function inconsistently with the "public convenience, interest, or necessity."[171] Though forbidden to act as a censor,[172] the FCC, through its licensing practices[173] and rules and regulations directed at the sub-

169. *See* note 16 *supra* and accompanying text.

170. *See* notes 139-40 & 144 *supra* and accompanying text.

171. The Communications Act of 1934 grants the FCC the power to regulate in the "public convenience, interest, or necessity." 47 U.S.C. § 303 (1976).

172. 47 U.S.C. § 326 (1976) provides in full:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Id.

173. 47 U.S.C. § 307(a) (1976). 47 U.S.C. § 307(d) (1976) governs the FCC's power to renew licenses "if the Commission finds that the public interest, convenience, and necessity

stantive content of broadcasting, has dramatic influence upon program content. Due to the first amendment, the most comprehensive censorship is achieved without formal government regulation. This takes the form of elaborate self-imposed broadcast industry standards that the FCC encourages vigorously through warnings, veiled threats of license revocation, and advisory letters.[174]

A week after issuance of the initial *Pacifica* order,[175] the FCC made public its *Report on the Broadcast of Violent, Indecent, and Obscene Material.*[176] The report suggested an expansion of the Commission's authority to ban indecent and obscene programming from radio, television, and cable television. Broadcast indecency and obscenity required "direct governmental action," and the FCC vowed to "meet its responsibilities in this area."[177]

Perhaps coincidentally, television networks simultaneously opened their 1975 season with a new twist—the family viewing hour.[178] This policy, which restricted program content during the early evening hours, was adopted in part as a response to increasing public concern about the effects of television on children. More influential, however, was the interest of two other audiences—the FCC and Congress.[179] The new policy took the form of an amendment to the National Association of Broadcaster's [NAB] Television Code, stating that,

> [E]ntertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later time periods contain material that might be disturbing to significant segments of the audience.[180]

The purpose of the family viewing hour was to prohibit the broadcast of sex and violence during the hours of 7:00 to 9:00 p.m.[181]

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would be served thereby." *See* notes 147-49 *supra* and accompanying text.

174. *See* Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity,* 61 VA. L. REV. 579, 605-06 (1975).

175. Pacifica Foundation, 56 F.C.C.2d 94, 32 RAD. REG. 2d (P&F) 1331 (1975).

176. 51 F.C.C.2d 418, 32 RAD. REG. 2d (P&F) 1367 (1975).

177. *Id.* at 419, 32 RAD. REG. 2d at 1368-69.

178. This policy has also been called the "family hour," the "9:00 rule," and the "prime time censorship rule." Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

179. *See* Note, *It's All in the Family: Family Viewing and the First Amendment,* 7 N.Y.U. REV. L. & SOC. CHANGE 83 (1978).

180. NATIONAL ASSOCIATION OF BROADCASTERS, THE TELEVISION CODE 2-3 (18th ed. 1975) *quoted in* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

181. *Id.*

E.S.T. and to require all programs to be appropriate for general family viewing.[182]

A. *Rejection of Governmental Interference in Programming Content:* Writers Guild

The United States District Court for the Central District of California dealt with an immediate challenge to the validity of the family viewing hour policy in *Writers Guild of America, West v. FCC.*[183] The court found that the family viewing hour policy, although ostensibly self-regulation, was actually adopted as a direct result of extreme pressure by the FCC rather than as an individual decision by licensees, and therefore violated the first amendment. Absent government interference, the decision by licensees would have been "inherent to the broadcasting function and constitutionally protected."[184] The element of government coercion, however, made the decision a violation of the first amendment.

Concern with potential harmful effects of television upon children has been prevalent in the more than two decades since the public originally voiced its discontent with programming to Congress.[185] Extensive studies were made in the 1960's, and although experts do not agree as to the precise effects of television content on children of different developmental stages, there is consensus that viewing does have a significant impact.[186] This impact can be illustrated by actual time spent viewing this medium. It is estimated that ninety-seven percent of all American households own one or more television sets[187] and that television viewing averages over seven hours each day per family.[188] Pre-school children as young as three years old become avid, regular viewers and, by the time

182. *Id.*

183. 423 F. Supp. 1064 (C.D. Cal. 1976). In the first suit, Writers Guild of America, the Director's Guild of America, the Screen Actors Guild, and a number of independent creators, writers, and producers, such as Norman Lear, filed a lawsuit against three major television networks (ABC, NBC, and CBS), the NAB, the FCC, and the FCC Commissioners. Complaint of Writers Guild of America, West, Inc. at 1-4. In a companion suit which was consolidated with *Writers Guild,* Tandem Productions, Inc. sought $10,000,000 in damages against CBS because "All in the Family" was moved out of its strategic 8:00 p.m. time slot allegedly due to the family viewing hour policy. Tandem Prod., Inc. v. CBS, Inc. 423 F. Supp. 1064 (C.D. Cal. 1976).

184. 423 F. Supp. at 1064-65.

185. *Id.* at 1094.

186. TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE, REPORT TO THE SURGEON FROM THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND VIOLENCE 24 (1972).

187. BROADCASTING YEARBOOK 1976, at C-300.

188. *Stand-off at Van Deerlin's Session on TV Violence,* BROADCASTING, March 7, 1977, at 52.

they graduate from high school, will have watched television twice as long as they will have spent studying, and longer than anything else other than sleeping.[189] Child psychologist Robert M. Liebert maintains that television "has changed childhood more than any other social innovation in the history of the world."[190] Thus, the high degree of children's viewing more than justifies a close inquiry into programming content and possible self-regulation by the broadcast industry.

The public pressure on Congress that resulted from these studies on children and broadcasting led both the Senate[191] and the House of Representatives[192] to request that the FCC issue a report on what it intended to do, within constitutional limits, to reduce the large number of programs that were unsuitable for children. In response, FCC Chairman Richard E. Wiley, asked the NAB to strengthen its stand against television violence.[193] Although this request was rejected, it marked the first government attempt to interfere with broadcast licensees' discretion in the area of programming content. In the latter part of 1974, however, Chairman Wiley sought and received proposals from his staff suggesting possible FCC action to protect children from undesirable programming. These proposals included issuance of policy statements, notice of inquiry, and proposed rulemaking.[194] Rather than on formal measures, emphasis was placed on jawboning.[195] In addition, industry self-regulation was to be looked upon favorably as being consistent with the "public interest" standard applied to licensees.[196]

Conscious of first amendment limitations upon formal government action, Chairman Wiley attempted personal informal pressure on the industry in the form of public speeches that called for industry self-regulation,[197] meetings with network executives,[198] a proposal

189. Lublin, *The Television Era: From Bugs to Batman, Children's TV Shows Produce Adult Anxiety,* Wall St. J., Oct. 19, 1976, a 1, col. 1 & 37, col. 1.

190. *Id.* at 37, col. 1.

191. S. REP. No. 1056, 93d Cong., 2d Sess. 19 (1974).

192. H.R. REP. No. 1139, 93d Cong., 2d Sess 15 (1974).

193. 423 F. Supp. at 1096.

194. *Id.*

195. Jawboning is a form of moral suasion involving an appeal to industry spirit and sometimes including vague threats. In this context, it refers to the great persuasive power of the FCC over the individual licenses. *See* Note, *supra* note 179, at 90 & n.61.

196. 423 F. Supp. at 1096-97.

197. *Id.* at 1098, 1117-18, 1121. Typical of Chairman Wiley's personal lobbying and veiled threats was his comment in a speech to the Illinois Broadcasters Association in which he declared "[i]f self-regulation does not work, governmental action to protect the public may be required—whether you like it or whether I like it." *Id.* at 1098.

198. *Id.* at 1098-99, 1122.

of a joint statement by the networks on the subject of sex and violence,[199] and a suggestion that the NAB code express a new position on this topic.[200] As a result, all three networks began work on policy statements, consulting with FCC staff to determine what provisions would satisfy both Wiley and the FCC.[201] The NAB was thought to be the appropriate body to formulate the new policy in order to accomplish industry-wide compliance as well as to prevent any competitive advantage a network might gain by refusing to comply with the policy.[202]

When the NAB Code Board met to discuss proposed amendments to the Television Code, however, the primary focus was not on the need to protect children from potentially harmful programming, but rather on the possible consequences should the NAB fail to act in a manner acceptable to the FCC.[203] The NAB approved amendments embodying the family viewing hour policy in time for their inclusion in the FCC *Report on the Broadcast of Violent, Indecent, and Obscene Material.*[204] The report endorsed the NAB amendments yet effectively sidestepped a direct confrontation with the first amendment by stating: "Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems."[205]

In April 1975, after more speeches, press releases, and meetings with network officials, the Television Board of the NAB formally adopted the family viewing hour policy as an amendment to its Television Code.[206] Although Chairman Wiley sought to characterize his influence in the matter as personal, the court in *Writers Guild* found it to be official in nature because there was persuasive circumstantial evidence that the Chairman "was acting on behalf of, and with the approval of, the Commission."[207] The court held that a licensee is free to adopt the family viewing hour policy if its decision is based on its independent judgment that the family viewing hour policy is valuable in promoting the public interest.[208] Having

199. *Id.* at 1099.
200. *Id.*
201. *Id.* at 1098-100.
202. *Id.* at 1094, 1100, 1108 n.63, 1110-11, 1125.
203. *Id.* at 1110-11.
204. 51 F.C.C.2d 418, 32 RAD. REG. 2d (P&F) 1367 (1975).
205. *Id.* at 420, 32 RAD. REG. 2d at 1370.
206. 423 F. Supp. at 1119.
207. *Id.* at 1120. A construction as official rather than personal is significant in a finding that it was *governmental* restrictions that are prohibited by the first amendment.
208. *Id.* at 1130. This would apply "even if the source of the idea is governmental, and

found governmental coercion by the FCC and its Chairman, however, the court invoked the first amendment, stating that: "[I]t is clear that the adoption of the family viewing policy was caused substantially by governmental pressure. The adoption of the policy was not the kind of independent decision required by the First Amendment. Instead the networks served in a surrogate role in achieving the implementation of government policy."[209]

B. *First Amendment Problems*

The problems inherent in accommodating the first amendment in the broadcasting context were stated ably by Judge J. Skelly Wright:

> [In] some areas of the law it is easy to tell the good guys from the bad guys. . . . In the current debate over broadcast media and the First Amendment . . . each debator claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication . . . the answers are not easy.[210]

The *Writers Guild* court carefully avoided the issue of the constitutionality of the family viewing hour policy by stating that although the desirability of the family viewing hour was not at issue, the method of its adoption clearly was. The court found that programming decisions must be made independently by broadcasters rather than as a result of government coercion.[211] The court characterized the question as "who should have the right to decide what shall and shall not be broadcast and how and on what basis should these decisions be made."[212]

It is doubtful that the FCC, using formal rulemaking procedures, could constitutionally promulgate a family viewing hour rule that prohibited sex and violence in programming during a certain time period. Although it is uncontroverted that broadcasting's unique characteristics merit regulation that would be intolerable in other media,[213] the first amendment standard used for broadcasting forbids complete censorship of programming content,[214] even for the

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even if government officials have encouraged the policy." *Id.* Some network officials already favored curbing the amount of sex and violence on television. This is evidenced by the statement of one CBS official that "not only . . . [did CBS think] there was a problem, but, in fact, they were already in the process of doing something about it." *Id.* at 1100.

209. *Id.* at 1140.

210. F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 198 (1975). Judge Wright made this statement in a speech given before the National Law Center at George Washington University in June 1973.

211. 423 F. Supp. at 1140.

212. *Id.* at 1072.

213. *See* notes 140-41 *supra* and accompanying text.

214. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 118 (1973); Farmers Educ.

purpose of protecting children. Although *Red Lion* justifies broad governmental regulation in the public interest,[215] such regulation is not without limit.

In *CBS Inc. v. Democratic National Committee,* the Court noted that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act."[216] The *CBS* Court further stated that the licensee has broad discretion in deciding how he will meet his obligation of public interest programming.[217] The *Writers Guild* court also acknowledged the limitations on the broad public interest standard, observing that although the FCC has the power to regulate through the use of this standard, "no roving power to screen out inappropriate material has been tendered."[218] The court also noted that the FCC made the concession itself in policy statements.[219]

Drawing clear distinctions based upon program content is impermissible when the content sought to be censored during the family viewing hour is protected by the first amendment, even though it may be unsuitable for family viewing.[220] *Pacifica* and *Writers Guild* both seem to focus on this issue. Both cases present the problem of accommodating the first amendment and the regulation of broadcasting: How far could the FCC go in regulating program content under the guise of assuring that licensees operate in the public interest? In *Writers Guild* the court refused to allow regulation in the name of the public interest to abridge the first amendment. As this Note has shown, courts confronted with a *Pacifica*-type situa-

& Coop. Union v. WDAY, Inc., 360 U.S. 525, 527-30 (1959); Sonderling Broadcasting Corp., 41 F.C.C.2d 777, 784, 27 RAD. REG. 2d (P&F) 1508, 1517 (1973) ("This Commission has consistently adhered to the Policy that it will not—indeed cannot—insist that licensees abandon program material because it is offensive to some or even a substantial number of listeners.")

215. *See* notes 139-40 *supra* and accompanying text.

216. 412 U.S. 94, 110 (1973).

217. *Id.* at 111.

218. 423 F. Supp. at 1147.

219. *Id.* (citing Children's Television Report and Policy Statement, 50 F.C.C. 2d 1, 3 (1974)); *see* Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C. 2d 418, 418-20, 32 RAD. REG. 2d (P&F) 1367, 1368-70 (1975); Report and Statement of Policy Re: Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2313, 20 RAD. REG. (P&F) 1901, 1911-12 (1960). The facts in *Writers Guild* reveal that Chairman Wiley felt any formal FCC intervention to be of questionable constitutionality. 423 F. Supp. at 1097 & n.39. This is further evidenced by the fact that Wiley deliberately took the more arduous informal coercion route rather than direct regulation.

220. *See* Part III(A) *supra.*

tion should reach the same conclusion.

It is arguable that the FCC could constitutionally impose a family viewing hour if a direct correlation could be shown between sex and violence on television and increased aggressive or violent behavior in children to such a degree that it could be said to injure public health.[221] Because this correlation has never been demonstrated,[222] however, the first amendment prohibitions against censorship would seem to proscribe such a rule.

Thus, under this Note's analysis, an FCC imposed family viewing hour would violate the first amendment, even if imposed with the purpose of protecting children. Those children who lack sufficient capacity may be adequately supervised by their parents, and those not so supervised arguably have the maturity and capacity to make their own decisions concerning programming. The family viewing hour policy obviously is concerned that children do not have the capacity to make a mature choice whether to watch a particular program. Thus, the policy places the power to determine what is appropriate for children's viewing in the Code Board rather than the family. Such a policy, like the *Pacifica* channeling plan, impairs parents' rights to oversee their children's activities and choices. Those parents desiring that their children be exposed to more mature themes on television would have their wishes thwarted by the family viewing hour.

In the case of television, more protection may be afforded children through the use of warnings both before broadcasts and during commerical breaks. Moreover, new technology may allow the use of channel locks to provide safeguards.[223] It has also been suggested that a white dot be broadcast continuously in the upper corner of the television screen during potentially harmful broadcasts so that even an instant of offensiveness may be avoided.[224] There are, there-

221. It is questionable in light of the first amendment whether even a showing of injury to public health is sufficient to support a programming content regulation such as the family viewing hour. Apart from the case of cigarette advertising in which regulation was justified by harm to public health and traditionally low levels of protection given advertising, such a justification is unprecedented. The district court, in upholding the cigarette advertising ban, specifically stated that FCC regulation of programming content cannot be a broad ban of anything which might conceivably be injurious to the public health, but must be drawn narrowly to exclude only unprotected speech. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585 (D.D.C. 1971), *aff'd mem. sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972). Thus, it appears that the public health rationale could not constitutionally justify congressional or FCC regulation such as the family viewing hour to limit expression. *See* Note, *Writers Guild of America, West, Inc. v. FCC: A First Amendment Blow to FCC Jawboning,* 20 ARIZ. L. REV. 315, 332-33 & n.130 (1978).

222. *See* note 186 *supra* and accompanying text.

223. *See* Note, note 10 *supra,* at n.97.

224. *See* Note, note 179 *supra,* at 105. FCC Chairman Wiley mentioned the use of the

fore, many opportunities for the supervising parent or more mature unsupervised child to be protected even if the communication is found offensive.

Of course, if formal regulation by the government cannot be achieved consonant with the first amendment, action by private licensees resulting from informal coercion and pressure, if extreme enough to be deemed equivalent to state action, such as that in *Writers Guild,* is also prohibited. Informal FCC influence on broadcasters must be closely scrutinized by courts to determine when that influence is tantamount to government action. Such action has a far more insidious effect in chilling electronic media expression because a licensee must repeatedly justify his programming decisions in renewing his license, and is usually all too willing to follow the guidelines and "suggestions" of the FCC concerning the kind of programming that will be looked upon with favor.[225] A letter to the station or even a call to the station's Washington counsel indicating concern over a particular practice of the licensee quickly motivates policy reconsideration.[226]

Future courts should follow *Writers Guild* in prohibiting programming decisions that in reality are direct results of agency coercion rather than independent judgment. The courts should, however, go further and establish concrete standards by which to distinguish helpful from threatening "suggestions" so that the agency as well as the licensee will know the boundaries. If the licensee makes

white dot during November 1974, but it was not pursued. 423 F. Supp. at 1099 n.44.

225. A former FCC Commissioner, Glen O. Robinson describes the effect of the constant review for license renewal:

> The effectiveness of the renewal process in influencing a licensee's operations, including his program operations, arises from two facts. First, the *licensee* has the burden of coming forth . . . to show compliance with Commission standards and fulfillment of prior promises; second, this process is routine and relatively frequent, thereby eliminating any doubt that the Commission will scrutinize the actual performance of the station in relation to the performance promised.

Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67, 119-20 (1967) (emphasis in original).

226. Another former FCC Commissioner described the process as "regulation by the lifted eyebrow":

> [A] prudent and responsible broadcaster is likely to be very responsive to the views of the FCC Commissioners and staff, regardless of his own judgment as to public needs or demands. . . . [T]he fact has become a stereotype of FCC thinking which is reflected in the cliché of "regulation by the lifted eyebrow." This simply indicates recognition of the fact that occasional martyrs or heroes will assert their independence regardless of consequences to themselves; but, in general, people will bend to the will of those who wield power over them, and the independence of individuals and enterprises will be inversely proportional to the power government thus exerts.

Loevinger, *Free Speech, Fairness, and Fiduciary Duty in Broadcasting,* 34 LAW & CONTEMP. PROB. 278, 291 (1969).

an independent programming decision, then the weighing of interests between licensee-government protection of the public interest (children) and the first amendment rights of viewers to diverse programming[227] and full discussion of public issues will determine whether the family viewing hour policy can withstand constitutional challenge.

Family viewing hour, however, may still prove not to be in the best interests of children because it could deteriorate into what one organization termed the "family blandness hour."[228] This might result because the phrase "unsuitable for family viewing" usually is a catch-all to exclude not only violence or obscenity, but controversy in the form of social issues or mature themes as well.[229] Not only did the family viewing hour tend to prevent both adults and children from viewing more complex issues, a result arguably prohibited by *Butler v. Michigan*,[230] it also deprived both groups of the opportunity to mutually explore difficult and topical issues during a time period when families would most likely be together and able to engage in such discussions.[231] Many parents would probably prefer that the child see or hear programs on complex or controversial issues in their presence in order that they may provide appropriate explanations and interpretations.

Moreover, the family viewing hour policy may inadequately serve the purpose for which it is intended. If the purpose is to shelter children from sexual and violent communication, the scheme must fail. As shown in this Note's *Pacifica* analysis, children can never be removed from this communication without total prohibition of the message because millions of children remain in the audience after the arbitrary cutoff point of 9:00 p.m.[232]

If the family viewing hour policy is designed to provide children with stimulating shows developed specifically for their benefit, it will likely still fail because children are traditionally the most neg-

227. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

228. Pre-Trial Memorandum of National Citizens Committee for Broadcasting and Action for Children's Television as Amici Curiae at 37, Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976).

229. *Id.*

230. 352 U.S. 380 (1957). *See* note 109 *supra* and accompanying text.

231. Pre-Trial Memorandum, note 228 *supra*, at 6.

232. *See* Pre-Trial Memorandum, note 228 *supra*, at 41 (citing T.V. GUIDE, Apr. 26, 1975, at 6). Nielsen demographics for the fall 1975 schedule showed that the family viewing hour had minimal impact. For the first two weeks of that fall, total adult viewing in that time slot fell 6% from the previous year while the size of the children's share of the viewing audience increased 4%. Significantly, the number of teenagers watching television in the post-family viewing hour period of 9:00-11:00 p.m. increased 14% from the previous year. BROADCASTING, Oct. 6, 1975, at 24. *See* Note, note 179 *supra*, at 104 n.169.

lected audience and are offered the least amount of programming for their age or interest.[233] Moreover, special programming designed specifically for children rather than for a wide audience range would not be shown during prime time because it would not be economically advantageous. Prime-time programming would more likely be a toned-down adult show, leaving both the adult and child with inferior quality programming. Furthermore, the family viewing hour policy seems to contradict both *Red Lion*'s as well as the FCC's own mandate of program diversification.[234] Thus, the family viewing hour policy would fail for practical as well as constitutional reasons.

VI. CONCLUSION

Throughout the nation's history courts have been faced with the problem of protecting children from potentially harmful expression consistent with the demands of the first amendment. *Pacifica,* the Supreme Court's most recent decision in this continuing struggle between two worthwhile objectives, resolved the question in favor of protectionism. This Note, however, argues that the protection of children, while a desirable goal, is an insufficient justification for overriding the clear mandate of the first amendment.

Traditional theories that deal with children give the parent the right to govern the type of expression to which his child is exposed. Courts in situations similar to that in *Pacifica* should not allow the government, rather than the parent, to abridge the child's constitutional right to know and engage in the free exchange of information. This is particularly true since the Court has banned offensive, rather than obscene, speech despite the longstanding principle in first amendment jurisprudence that prohibits content-based censorship of protected speech unless it could withstand strict scrutiny.

Although the "unique characteristics" of broadcasting justify greater regulation than in the case of print media, such regulation has a more deleterious effect on first amendment standards. Due to the "all or nothing" nature of broadcasting and its technological limitations, total protection of children from offensive speech would require the message to be withheld from adults and children whose parents desire them to be exposed to it. The first amendment forbids such total prohibition of protected speech. Channeling, the proposed compromise, fails to accomplish its purpose because many children who go to bed at a later hour would still be subjected to

233. *See* Pre-Trial Memorandum, note 228 *supra,* at 41.

234. Broadcasters have an obligation "to provide diversified programming designed to meet the varied needs and interests of the child audience." Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 5 (1974).

the allegedly harmful message. Thus, the *Pacifica* Court's rationale for its holding fails both practically as well as constitutionally.

Offensive speech still is protected speech and should be aired at the broadcaster's discretion without government censorship. A minor capable of mature, independent judgment will thereby be exposed to diverse messages, enabling him to better take part in the world of reason and the free exchange of ideas. A minor possessing insufficient capacity should be guided in selecting the messages that he will hear according to the tastes and values of his parents who possess the right to mold their child's values and environment.

It is more consonant with the first amendment for someone who is confronted by offensive speech in the broadcasting context to simply avert his eyes or ears or change the channel. That short moment of discomfort to someone who arguably invites the speech by turning on the broadcast does not justify riding roughshod over the first amendment. Furthermore, warnings before and during the broadcast as well as a white dot in the television medium could minimize the chances of being offended.

In a speech to broadcasters two weeks after the *Pacifica* decision, FCC Chairman Ferris told his audience: "I do not want that case to lead to timidity in your coverage of controversial subjects."[235] In an effort to placate critics of *Pacifica,* he pointed to the Commission's decision of July 20, 1978, regarding WGBH-TV's license renewal proceeding[236] as illustrative of the restraint the FCC intends to exercise when dealing with future indecency complaints.

In that proceeding, Morality in Media of Massachusetts filed a petition asking the FCC not to renew WGBH's license because the station was "consistently broadcasting offensive, vulgar and otherwise material harmful [sic] to children without adequate supervision or parental warnings."[237] The Commission denied the petition, rejecting the notion that the viewers' subjective opinions of what is or is not good programming rather than specific showings of inconsistency with the public interest should be the basis for denying license renewal. The Commission further stated that: "The Supreme Court's decision in [*Pacifica*] affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of

235. Speech by FCC Chairman Charles D. Ferris to New England Broadcasters Association, Boston, Mass., July 21, 1978, *cited in* Note, *Morality and Broadcasting: FCC Control of "Indecent" Material Following* Pacifica, 31 FED. COM. L.J. 145, 169 & nn.105-07 (1978).

236. WGBH Educ. Foundation, 69 F.C.C.2d 1250, 43 RAD. REG. 2d (P&F) 1436 (1978).

237. *Id.* at 1250, 43 RAD. REG. 2d at 1438.

the *Pacifica* holding."[238]

Apparently, the FCC's present intention is to construe the *Pacifica* decision very narrowly. This approach, however, has not been shared by past Commission majorities, and what a Commission comprised of new members will subjectively find to be prohibited, although not obscene, is uncertain.[239] The Court or the FCC should establish definite regulations or guidelines to minimize the subjectivity of case-by-case adjudication with its inherent danger of abridgment of first amendment freedoms through inhibition of licensees' programming discretion. With explicit criteria as to what communication will be prohibited, broadcasters will be better prepared to provide the diverse programming contemplated by the first amendment.

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238. *Id.* at 1254, 43 RAD. REG. 2d at 1441. In announcing the decision, the FCC left the programming decisions up to the licensee and said that its review was limited to whether a licensee's overall programming adequately served the public interest, rather than whether any particular program met this test.

239. The *WGBH* opinion is not as strong as one might think because *Pacifica* and *WGBH* are clearly distinguishable. *WGBH* involved license renewal in which a finding of indecency would have resulted in much harsher consequences than in *Pacifica.*