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FCC v. Pacifica Foundation

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COMMENT

FCC v. PACIFICA FOUNDATION

CONSTITUTIONAL LAW—*Freedom of Speech*—*Federal Communications Commission sanctions against a radio station that broadcasts language the Commission finds “indecent,” although not “obscene,” do not violate the first amendment.* 98 S. Ct. 3026 (1978).

Although “the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,”¹ recent cases demonstrate that, where individual privacy interests are implicated, “reasonable time, place, and manner regulations applicable to all speech irrespective of content”² may be imposed. In addition, the Supreme Court has described certain types of speech as “unprotected” by the first amendment. Among these are statements of secret information to foreign governments,³ “fighting words,”⁴ and obscene utterances and publications.⁵ Defamatory remarks have been accorded varying degrees of protection.⁶

In *FCC v. Pacifica Foundation*,⁷ the Court held that the Federal Communications Commission (Commission) may impose sanctions against a radio station for broadcasting language found “indecent,”⁸ though not obscene. This Comment analyzes the Court’s

1. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

2. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). *See also Pell v. Procunier*, 417 U.S. 817 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

3. *See, e.g., United States v. Rosenberg*, 195 F.2d 583 (2d Cir.) (Espionage Act, 18 U.S.C. §§ 793, 794 (1976), upheld), *cert. denied*, 344 U.S. 838 (1952).

4. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

5. *See, e.g., Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Roth v. United States*, 354 U.S. 476 (1957).

6. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel actions against media defendants subject to constitutional limitations); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding Illinois statute forbidding exhibition of lithographs that portray lack of virtue in class of citizens). *See also Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940) (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .”).

7. 98 S. Ct. 3026 (1978).

8. A primary consideration in determining whether broadcast language is inde-

rationale in *Pacifica* against a backdrop of earlier cases permitting suppression or regulation of expression. This discussion considers the impact of the Court's decision on broadcasters and the public.

FCC V. PACIFICA FOUNDATION

On October 30, 1973, Pacifica's⁹ New York radio station, WBAI, as part of its "Lunchpail" program, broadcast "Filthy Words,"¹⁰ a comedy monologue by satirist George Carlin which examines "the language of ordinary people."¹¹ The selection, which contains words described by Carlin as those "you couldn't say on the public . . . airwaves, . . . the ones you definitely wouldn't say, ever,"¹² was aired at approximately 2:00 P.M.

A complaint about the broadcast was received by the Commission on December 3, 1973. The complainant¹³ heard the "Filthy Words" monologue while driving through New York City accompanied by his young son. The complaint characterized the comedy routine as "garbage"¹⁴ and expressed concern that "[a]ny child could have been turning the dial, and tuned in."¹⁵

Pacifica Foundation, commenting on the complaint, indicated that, in the "Filthy Words" piece, Carlin was "not mouthing obscenities, he [was] merely using words to satirize as harmless and essentially silly our attitudes towards those words."¹⁶ Pacifica pointed out that listeners were advised about both the nature of the upcoming material and its length so that they could "tune out"

cent is the likelihood that children are in the audience. For discussion of the distinction between indecent and obscene language, see text accompanying notes 23-28 & n.24 *infra*.

9. The Pacifica Foundation is licensee of six noncommercial radio stations: KPFA and KPFB, Berkeley, California; KPFK, Los Angeles, California; KPFT, Houston, Texas; WBAI, New York, New York; and WPFW, Washington, D.C.

10. G. CARLIN, *Filthy Words*, in OCCUPATION: FOOLE, side 2, cut 5 (1973), transcript printed in 98 S. Ct. at 3041 app. The "Lunchpail" program aired that day involved a discussion of society's attitude toward the use of certain words.

11. Pacifica Foundation, 56 F.C.C.2d 94, 96 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 98 S. Ct. 3026 (1978).

12. G. CARLIN, *supra* note 10, at side 2, cut 5. Carlin identified seven words that were never to be said on the air: "The original seven words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Id.*

13. The complainant was Mr. John R. Douglas, a member of the national planning board of Morality in Media. See *WBAI Ruling: Supreme Court Saves the Worst for Last*, BROADCASTING, July 10, 1978, at 20.

14. 56 F.C.C.2d at 95 (quoting complainant).

15. *Id.* (quoting complainant).

16. *Id.* at 96 (quoting Pacifica's comments on complaint).

for that period rather than be subject to language they might find offensive.¹⁷

The Commission, recognizing that congressional restraints prohibit censorship or interference with the right to free speech by means of radio communication,¹⁸ nonetheless issued a declaratory order granting the complaint.¹⁹ The FCC based its decision on two sections of the United States Code: Section 1464 of Title 18,²⁰ which prohibits broadcasting obscene, indecent, or profane language, and section 303 of Title 47,²¹ which directs the Commission to promote effective use of radio in the public interest. Although the Commission can impose sanctions to enforce section 1464,²² it decided not to assess a fine against the station and placed a copy of its order in WBAI's file.

The Commission found the Carlin monologue, as aired over WBAI, to be "indecent": It consists of "patently offensive language"²³ broadcast at a time "when there [was] a reasonable risk that children [might] be in the audience."²⁴ In addition, the Com-

17. *Id.* (quoting Pacifica's comments on complaint).

18. 47 U.S.C. § 326 (1976) provides:

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.

19. 56 F.C.C.2d at 99-100. Presumably, the order will be considered by the Commission in ruling on Pacifica's subsequent application for renewal of WBAI's license.

20. "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1976).

21. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . (g) study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . ." 47 U.S.C. § 303 (1976).

22. Congress has given the Commission authority to revoke a station's license, 47 U.S.C. § 312(a)(6) (1976), issue a cease and desist order, *id.* § 312(b)(2), or impose a monetary forfeiture, *id.* § 503(b)(1)(E), for a violation of 18 U.S.C. § 1464 (1976). The Commission can also deny license renewal applications or grant short-term license renewals. 47 U.S.C. §§ 307, 308 (1976).

23. 56 F.C.C.2d at 98.

24. *Id.* (footnote omitted). To reach this result, the Commission redefined "indecent" and determined that

the concept of "indecent" is intimately connected with the *exposure of children* to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or ex-

mission distinguished "indecent" from "obscenity," suggesting that indecent material, unlike obscene material, does not appeal to prurient interests and cannot be redeemed by claims of literary, artistic, political, or scientific value.²⁵

The Pacifica Foundation appealed the Commission's order to the Court of Appeals for the District of Columbia Circuit.²⁶ The panel for the appeal was Chief Judge Bazelon and Circuit Judges Tamm and Leventhal. Judge Tamm, announcing the judgment of the court, noted that a significant number of children remain in the broadcast audience until 1:30 A.M.,²⁷ and therefore determined that using this criterion would significantly interfere with broadcasters' programming discretion. Thus the court held that the Commission's order violates the censorship prohibition and free speech guarantee of section 326 of the Communications Act,²⁸ as interpreted in *Writers Guild of America, West, Inc. v. FCC*.²⁹

Chief Judge Bazelon agreed with the result reached by Judge Tamm,³⁰ but based his concurrence on a finding that the order abridges the first amendment. He found that the words contained in the monologue would have been constitutionally protected had they appeared in any other medium.³¹ The Chief Judge concluded that the characteristics of radio and television do not warrant different treatment.³²

cretory activities and organs, at times of the day when there is a *reasonable risk that children may be in the audience*.

Id. (emphasis added).

25. *Id.* Cf. *Miller v. California*, 413 U.S. 15, 25 (1973) (establishing criteria for obscenity).

26. *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 98 S. Ct. 3026 (1978). For discussion of the circuit court's decision, see Note, *Pacifica Foundation v. FCC: First Amendment Limitations on FCC Regulation of Offensive Broadcasts*, 56 N.C. L. Rev. 584 (1978).

27. 556 F.2d at 13-14.

28. 47 U.S.C. § 326 (1976). For the text of § 326, see note 18 *supra*.

29. 423 F. Supp. 1064 (C.D. Cal. 1976). In *Writers Guild* the court held that enforcement of the Commission's so-called "family viewing" policy through the licensing process would violate the first amendment. *Id.* at 1161.

30. 556 F.2d at 18 (Bazelon, C.J., concurring).

31. *Id.* at 20-24 (Bazelon, C.J., concurring).

32. *Id.* at 24-30 (Bazelon, C.J., concurring).

Unlike the sound truck whose noise cannot be eliminated from the home even if desired, radio makes no sound unless a person voluntarily purchases it, bring [*sic*] it home and then switches it "on." Having done these things, having elected to receive public air waves, the scanner who stumbles onto an offensive program . . . can avert his attention by changing the channels or turning off the set.

Id. at 26 (Bazelon, C.J., concurring) (footnote omitted).

Judge Leventhal filed a dissenting opinion which analyzed the case in first amendment terms. He construed the Commission's order narrowly,³³ bringing it within limitations on speech already sustained by the Supreme Court.

The Commission appealed to the Supreme Court.³⁴ The Court reversed the circuit court's decision and upheld the Commission's order. Writing for the majority, Justice Stevens broke new ground by holding that broadcasting speech which is "patently offensive," though not obscene, may be restricted.³⁵ The majority found that: (1) Commission consideration of a radio station's past programming when judging the licensee's renewal application does not constitute censorship within the meaning of the Communications Act;³⁶ (2) the word "indecent" as used in section 1464 of Title 18 is not synonymous with the word "obscene," and therefore speech need not appeal to the prurient interest in order to qualify as indecent;³⁷ and (3) of all media, broadcasting merits the most limited first amendment protection.³⁸

33. *Id.* at 31-32 (Leventhal, J., dissenting). Judge Leventhal viewed the Commission's order as involving only the language "as broadcast" in the early afternoon. He considered the Commission's definition of indecency to be similar to the Supreme Court's definition of obscenity and noted that such speech is not protected by the Constitution.

34. Certiorari was granted January 9, 1978. *FCC v. Pacifica Foundation*, 98 S. Ct. 715 (1978).

35. *FCC v. Pacifica Foundation*, 98 S. Ct. 3026 (1978) (5-4 decision). The complexity of the case and the difficulty of its resolution is demonstrated, to a large extent, by the number of opinions filed at each stage of the controversy. Four opinions were filed at the Commission level, where the case was heard by seven Commissioners. Each of the three District of Columbia Circuit Court judges filed a separate opinion. In the Supreme Court, Justice Stevens wrote the opinion of the Court and a further opinion in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 3037 (Stevens, J., concurring). Justices Blackmun and Powell concurred in the opinion of the Court and Justice Powell wrote a separate concurrence joined by Justice Blackmun. *Id.* at 3043 (Powell, J., concurring). Justice Brennan, finding that the majority's opinion represented a patent "misapplication of fundamental First Amendment principles," *id.* at 3047 (Brennan, J., dissenting), filed a dissenting opinion which Justice Marshall joined. *Id.* (Brennan, J., dissenting). A further dissent, joined by Justices Brennan, White and Marshall, was filed by Justice Stewart, *id.* at 3055 (Stewart, J., dissenting), who felt that the constitutional issue addressed by the majority was reached unnecessarily. He believed the majority mistakenly construed § 1464 of Title 18, pursuant to which the Commission acted, in a manner requiring a constitutional decision. *Id.* (Stewart, J., dissenting).

36. *Id.* at 3033-35.

37. *Id.* at 3035-36. A work's prurient appeal is one factor in deciding whether it is obscene. *Miller v. California*, 413 U.S. 15, 25 (1973).

38. 98 S. Ct. at 3039-41.

THE CENSORSHIP ISSUE

Broadcasters' Right to Disseminate

The Communications Act of 1934,³⁹ which created the Federal Communications Commission, explicitly forbids the Commission from censoring radio broadcasts or using its authority to interfere with the right to free speech by means of radio communication.⁴⁰ The language contained in the Act comes directly from the Radio Act of 1927.⁴¹ It has been suggested that this provision, now embodied in section 326 of Title 47 of the United States Code, should be viewed as a "statutory reiteration of the Constitutional guarantees of freedom of speech in the regulation of broadcasting by the Commission."⁴²

Much of the litigation arising under section 326 and its predecessor has involved construction of the word "censorship" as used in the statute.⁴³ An early case is illustrative. In *KFKB Broadcasting Association v. Federal Radio Commission*,⁴⁴ the KFKB broadcasting facility was controlled by a doctor who used the station as a medium to prescribe medical preparations to listeners who wrote letters to the station discussing their medical problems; the prescriptions were for products manufactured by a pharmaceutical association in which the doctor held a large financial interest. The Federal Radio Commission, the FCC's predecessor, refused to renew the radio station's broadcasting license because the public interest, convenience, and necessity would not be served by granting the renewal. Answering the doctor's charge of FRC censorship, the circuit court held that "[t]here has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release [T]he commission has

39. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976).

40. 47 U.S.C. § 326 (1976). For the text of § 326, see note 18 *supra*.

41. Act of Feb. 23, 1927, ch. 169, § 27, 44 Stat. 1162. For discussion of the legislative history of the Act's anticensorship provision, see 2 A. SOCOLOW, *THE LAW OF RADIO BROADCASTING* § 561 (1939).

42. 2 A. SOCOLOW, *supra* note 41, § 561.

43. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (public interest rulings regarding specific program content do not constitute censorship), *cert. denied*, 396 U.S. 842 (1969); *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.) (failure to grant license for construction of microwave system does not constitute censorship), *cert. denied*, 375 U.S. 951 (1963); *Bay State Beacon, Inc. v. FCC*, 171 F.2d 826 (D.C. Cir. 1948) (examination of applicant's proposal regarding number of "sustaining" programs is not censorship).

44. 47 F.2d 670 (D.C. Cir. 1931).

merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship."⁴⁵

This decision has been criticized. One commentator argues that

[i]t is difficult to perceive on what ground the court bases its statement, in [*KFKB Broadcasting*] that appellant's station had not been censored. It is true, as the court says, that none of appellant's broadcasting matter, released in the past, was actually required to be approved before its release. But appellant's application was denied because of appellant's past conduct. The only reason that past conduct was a matter of any concern is because it was assumed that future conduct would be the same; had it been proved that future conduct would be different and would meet the most rigid requirements of public interest, convenience, or necessity, one can scarcely believe that the commission would have had the right to deny the application. The inference is irresistible that the application was denied because of what the appellant intended to release in the future; the commission was in the position of saying that in view of appellant's past conduct they knew what the future conduct would be as well as if the actual program had been submitted to them, that they had considered those (future) programs, had disapproved of them, and would not license appellant to release them. This is not something resembling censorship, it is censorship in fact, the very essence of it. To say, under these circumstances, that because past releases had not in fact been subjected to prior scrutiny, therefore there was no censorship, is a misconception of the practical effect of the decision as well as of what constitutes censorship.⁴⁶

KFKB exemplifies the clash between section 326's prohibition against censorship by the Commission and the Commission's mandate to issue licenses only where the public interest is served. Despite the apparent protections of section 326, censorship occurs both because any evaluation of past programming is in fact prior restraint and because broadcasters, concerned about the Commission's view of past programming at license renewal, will *ensor themselves* rather than risk denial of their renewal applications.⁴⁷

45. *Id.* at 672. The Supreme Court has agreed with this construction. "The term censorship . . . as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of 'objectionable' material." *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 527 (1959) (emphasis in original).

46. Caldwell, *Censorship of Radio Programs*, 1 J. RADIO L. 441, 470 (1931).

47. The Supreme Court has never held that the FCC's license renewal powers constitute "prior restraint" on broadcasters. In *Red Lion Broadcasting Co. v. United*

The possibility of self-censorship is critical, for, as the Court has stated, imprecise regulation of speech which "chills" the exercise of first amendment rights will not withstand constitutional scrutiny.⁴⁸

Listeners' Right To Receive

It is well established that the first amendment protects the right to *receive* information and ideas.⁴⁹ Indeed, the Court has held that this right is fundamental to a free society and applies regardless of the social worth of the ideas sought to be received.⁵⁰ Thus, any Commission activity that limits what the radio audience can hear constitutes interference with the *audience's* right to free speech and therefore is invalid under the Constitution and section 326 of the Communications Act. Otherwise, as the respondent in *Pacifica* argued, the Commission's order banning use of certain words when children may be in the audience will reduce the content of radio and television to the level of children.⁵¹

Pacifica's argument is compelling, especially in light of *Butler v. Michigan*.⁵² In *Butler*, the Court reversed a bookseller's conviction under a state law prohibiting the sale of certain books, magazines, and other materials. The state justified the statute as shielding "juvenile innocence" and promoting the general welfare. The Court found the statute overbroad, tending to reduce the adult population of Michigan to reading only what is fit for chil-

States, 395 U.S. 367 (1969), the Court considered the argument that such powers might lead to self-censorship by broadcast licensees and agreed that such censorship would be a "serious matter." The argument was dismissed, however, the Court describing fears of self-censorship as "speculative." *Id.* at 392-93. *But see* Comment, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967 (1931).

[A]lthough the Commission may have no power to scrutinize and reject programs prior to their release, the power to revoke or refuse the renewal of a license is in many cases so effective a means of "censorship" as to make unconvincing any legalistic distinction between "previous restraint" and a refusal to renew a license because of the character of past programs.

Id. at 968 (footnote omitted). *See also* Note, *The Freedom of Radio Speech*, 46 HARV. L. REV. 987 (1933).

48. *See, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

49. *See, e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *See also* *Brooks v. Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969); *Figari v. New York Tel. Co.*, 32 A.D.2d 434, 441, 303 N.Y.S.2d 245, 253 (1969).

50. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 510 (1948).

51. Brief for *Pacifica Foundation* at 47, *FCC v. Pacifica Foundation*, 98 S. Ct. 3026 (1978).

52. 352 U.S. 380 (1957).

dren.⁵³ It is difficult to distinguish the effect of the Michigan statute involved in *Butler* from that of the Commission's order in *Pacifica*.⁵⁴

Similarly, the Federal Communications Commission has expressed the view that the presence in the broadcast audience of the easily offended or the young does not justify suppressing certain types of programming; ironically, this is best illustrated by an earlier Commission decision involving the Pacifica Foundation.⁵⁵ While considering Pacifica's application for one initial radio license and three license renewals in 1964, the Commission's attention was called to several programs, alleged to have been "filthy" and offensive, which had been broadcast by the Pacifica stations seeking renewal. The Commission discounted these charges and granted the Pacifica licenses as serving the public interest:

We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole."⁵⁶

More recently, the Commission expressed the view that the existence of children in the audience does not justify program suppression.⁵⁷ For example, when KCOP Television, Inc. sought renewal of its license to operate KCOP-TV, Los Angeles, the Commission chose to overlook the complaint of the National Association for Better Broadcasting that a weekly wrestling program had an adverse affect on children. The Commission declared: "Section 326 of

53. *Id.* at 383. "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig." *Id.*

54. See 98 S. Ct. at 3050-51 (Brennan, J., dissenting).

55. Pacifica Foundation, 1 RAD. REG. 2d (P & F) 747 (1964).

56. *Id.* at 750 (quoting in substance *Editorializing by Broadcast Licensees*, 25 RAD. REG. (P & F) 1901, 1901 (1949) (Commission report)).

57. See KCOP Television, Inc., 37 RAD. REG. 2d (P & F) 1051 (1976).

the Communications Act of 1934, as amended, specifically prohibits 'censorship' by this agency. Therefore, this Commission does not censor the materials broadcast by its licensees. Thus, no further Commission action is warranted."⁵⁸

This position is not without support from the Supreme Court. In *Red Lion Broadcasting Co. v. FCC*,⁵⁹ the Court recognized that restraints may not be placed on the public's right to a free flow of social, political, esthetic, moral, and other ideas. The Court asserted:

[T]he people as a whole retain their interest in free speech by radio and their collective right to have that medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself, or a private licensee. . . . That right may not constitutionally be abridged either by Congress or by the FCC.⁶⁰

In *Pacifica*, only Justice Brennan, joined by Justice Marshall, acknowledged the censorship ramifications of the Court's decision. Citing *Butler*, Justice Brennan refused to share the optimism of Justice Powell, who recognized that in *Pacifica* lurks the potential for reducing the adult population to hearing only what is fit for children, but felt the Commission would prevent realization of these fears.⁶¹ Justice Brennan further asserted that responsibility for guarding against incursions on the free-speech guarantee rests with the Court and not with the Federal Communications Commission.⁶²

The majority, however, found no censorship problem, noting that adults who wish to hear material like the Carlin routine are

58. *Id.* at 1054.

59. 395 U.S. 367 (1969). *Red Lion* involved a challenge to Commission rules requiring broadcasters to supply response time to persons "attacked" over their airwaves. See notes 101 & 102 *infra* and accompanying text.

60. 395 U.S. at 390 (citations omitted).

61. 98 S. Ct. at 3051 (Brennan, J., dissenting) (discussing *id.* at 3046 (Powell, J., concurring)). Indeed, it is difficult to see how Justice Powell can agree that the *Butler* argument is "not without force" and dismiss it with the statement that "it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case." *Id.* at 3046 (Powell, J., concurring).

62. *Id.* at 3051 (Brennan, J., dissenting).

free to purchase tapes and records or go to theatres.⁶³ Thus the Court first indicates that listeners cannot be required to turn a radio dial to avoid offensive language,⁶⁴ and then suggests that those wishing to exercise their first amendment right to receive ideas may be required to invest in recording equipment and theatre tickets. This is a high price indeed for the exercise of rights said to be in a "preferred place";⁶⁵ it is no less high when compared with the price for a listener's invaded privacy right—a moment's offense before the dial is turned, the volume muted. Likewise, the majority's conclusion that the Commission's order will affect the form rather than the content of serious communication, since words more tasteful than Mr. Carlin's can be used to express most ideas,⁶⁶ itself recognizes that the free speech right is being violated.⁶⁷

SECTION 1464: DEFINITION OF INDECENT

For its order against Pacifica Foundation, the Commission relied on section 1464 of Title 18, which prohibits the broadcasting of "obscene, indecent, or profane language."⁶⁸ The statute fails to define what is meant by "indecent," thereby leaving the Commission

63. *Id.* at 3041 n.28.

64. *Id.* at 3040. *But cf.* *Cohen v. California*, 403 U.S. 15 (1971). "Those [who might be confronted by something offensive] could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21. Cohen's infamous "Fuck the Draft" jacket was displayed in a public courthouse. The argument that people should not have to "avert their ears" to avoid offensive language within the confines of their homes, *see* 98 S. Ct. at 3040, fails to recognize that the language is invited into the house when the radio is turned on. *See* text accompanying notes 115-118 *infra*.

65. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *Follett v. Town of McCormick*, 321 U.S. 573, 575 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). Furthermore, this appears contrary to the Supreme Court's language in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . ." *Id.* at 757 n.15.

66. *See* 98 S. Ct. at 3037 n.18.

67. Just how Mr. Carlin was to do a routine about "words" without using the very words he was satirizing was never explained by the Court. Certainly Paul Cohen, who wore a jacket bearing the words "Fuck the Draft" into a Los Angeles courthouse, could have used less offensive words to convey his attitude toward conscription. Cohen's conviction on charges of disturbing the peace was reversed by the Supreme Court; the Court cited "the usual rule that governmental bodies may not prescribe the *form* or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971) (emphasis added).

68. *See* note 20 *supra*.

to formulate its own definition.⁶⁹ Rejecting *Pacifica's* argument that "indecent" material must have prurient appeal, Justice Stevens merely examined the "plain language" of section 1464,⁷⁰ and looked at the dictionary definition of the word "indecent."⁷¹

This approach is inappropriate to the extent it disregards the rationale of *United States v. 12 200-Ft. Reels of Super 8mm. Film*.⁷² In that case the Court, noting that federal statutes should be construed to avoid constitutional decisions, stated:

If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, . . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California*. . . .⁷³

After *12 200-Ft. Reels* it appeared the concept of "indecent" was "swallowed up" by obscenity, at least where the terms are used to describe regulated material in federal criminal statutes.⁷⁴

69. See notes 23-25 *supra* and accompanying text.

70. See 98 S. Ct. at 3035. "The words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning." *Id.*

71. "Webster defines the term as 'a: Altogether unbecoming; contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly . . . b: not conforming to generally accepted standards of morality . . .'" *Id.* at 3035 n.14 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1147 (3d ed. 1966)).

72. 413 U.S. 123 (1973).

73. *Id.* at 130 n.7 (citations omitted). In *Miller v. California*, 413 U.S. 15 (1973) (vacating conviction under California law making knowing distribution of obscene matter misdemeanor) the Supreme Court formulated new criteria for determining whether material is obscene:

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

Id. at 24 (citations omitted).

74. This was the view taken in *United States v. Simpson*, 561 F.2d 53 (7th Cir. 1977). Defendant had been convicted under 18 U.S.C. § 1464 (1976) for using a CB radio to transmit what the Seventh Circuit referred to as "explicit references to sexual activities, descriptions of sexual and excretory organs, and abusive epithets directed to other radio operators with whom he was communicating, all in street vernacular." 561 F.2d at 55. The Seventh Circuit, assuming that the Supreme Court would interpret "indecent" in § 1464 as it had in § 1462, held that "obscene" and "indecent" in § 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to the prurient interest. *Id.* at 60.

Moreover, the rules of statutory construction suggest that any definition of "indecent" should include an element of prurient appeal. It is an accepted tenet of statutory construction that

[w]here the same language is used repeatedly in a statute in the same connection, it is presumed to bear the same meaning throughout the act; but this presumption will be disregarded where it is necessary to assign different meanings to the same terms in order to make the statute sensible, consistent, and operative.⁷⁵

The Supreme Court has endorsed this view.⁷⁶ This rule combined with the prior *12 200-Ft. Reels* definition of "indecent" as it appears in section 1462 suggests that the term should be similarly defined for the purposes of section 1464; nothing in the *Pacifica* decision indicates a basis for construing "indecent" under the exception to the presumption stated above.

Further suggesting definition of "indecent" to include an element of prurient appeal is the legislative history of section 1464's prohibition of broadcasts containing "obscene, indecent, or profane language."⁷⁷ The proscription was originally enacted in the Radio Act of 1927.⁷⁸ This language was subsequently construed by the Ninth Circuit in *Duncan v. United States*.⁷⁹ Congress, presumptively

75. H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 53 (2d ed. 1911). See also 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 53.01 (4th ed. 1973). "[H]armony and consistency are positive values in a legal system by reason of serving the interests of impartiality and minimizing arbitrariness. The practice of construing statutes by reference to other statutes is based upon the sound policy of advancing those values." *Id.* (footnotes omitted).

76. In *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932), the Court stated:

[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Id. at 433 (citation omitted). This suggests that the word "indecent" in § 1464 should be construed consistently with the construction that word has received where it appears in other sections of Title 18, unless broadcasting constitutes a circumstance so dissimilar to the mails as to warrant the opposite conclusion. For discussion of this issue, see text accompanying notes 94-130 *infra*.

77. 18 U.S.C. § 1464 (1976).

78. Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162.

79. 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). The defendant in *Duncan* was prosecuted under § 29 of the Radio Act of 1927, ch. 169, 44 Stat. 1162, which provided:

aware of that decision, reenacted the proscription in the Communications Act of 1934⁸⁰ and later incorporated this provision into Title 18.⁸¹

In *Duncan*, appellant was charged with violating section 29 by “[k]nowingly, unlawfully, willfully, and feloniously uttering obscene, indecent, and profane language by means of radio communication.”⁸² The court affirmed appellant’s conviction on the ground that the broadcasts for which he was convicted were profane.⁸³ However, when it addressed the question whether the words broadcast were obscene or indecent, the court stated that “the language used, while extremely abusive and objectionable, has no tendency to excite libidinous thoughts on the part of the hearers.”⁸⁴ The court continued:

[W]e do not wish to be understood as approving in any degree the language used by the appellant. The question for our consid-

Nothing in this Act shall be understood or construed to give the licensing authority 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 licensing authority which shall interfere with the right to free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Id. § 29. Seven years after approving this statute, Congress, recodifying the law of communications, transferred this language, almost verbatim, to § 326 of the Communications Act of 1934, ch. 652, 48 Stat. 1064. Compare *id.* with Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162. (In the 1934 Act, the word “Commission” was substituted for the words “licensing authority” where those words were used in the earlier Act. In addition, the word “communication” was used to end the first sentence of the 1934 Act while the word “communications” was used at this point in the 1927 statute. The two statutes are otherwise identical.) The substance of the second sentence of § 326, which prohibits utterances of “any obscene, indecent, or profane language by means of radio communication,” was subsequently incorporated into Title 18. See Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683 (codified at 18 U.S.C. § 1464 (1976)). The codification of this provision in Title 18 was viewed by the *Pacifica* majority as one of form only. “That rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the anticensorship provision.” 98 S. Ct. at 3034 (citations omitted). See also *id.* at 3035 n.13.

80. Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064 (codified at 47 U.S.C. § 326 (1976)).

81. Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683 (codified at 18 U.S.C. § 1464 (1976)).

82. 48 F.2d at 129.

83. The statements allegedly made by the appellant included “You’re the infernal gang that put in and turned the dairy industry over to that damn scoundrel.” *Id.* at 133. Other statements were, “You’re a fine example, by God, for the children of this school district,” and, “He will do anything, there’s nothing in God Almighty’s world that *** wouldn’t do.” *Id.*

84. *Id.* at 132.

eration is whether Congress has prohibited the use of such language over the radio. We must conclude that the language used is not covered by the statutory prohibition against the use of obscene and indecent language.⁸⁵

The *Duncan* opinion was written three years prior to congressional adoption of the 1934 Act which readopted the language of section 29 construed in *Duncan*.⁸⁶ Reenactment of a statute subsequent to judicial construction of the statutory language constitutes legislative adoption of that construction.⁸⁷ Thus, *Duncan's* interpretation of the phrase "obscene or indecent" should be considered part of the legislative history of section 1464 and therefore should have been considered in *Pacifica*.⁸⁸

The Court's treatment of the statutory interpretation of "indecent" is flawed in two other respects. First, the majority violated its own admonition that unnecessary decision of constitutional issues is to be avoided⁸⁹ by construing section 1464 so as to require constitutional adjudication: The Court's discussion of the first amendment issue was unnecessary. A number of cases demonstrate that the phrase "obscene or indecent" may be construed other than as chosen by the *Pacifica* majority⁹⁰ and in a manner which would avoid decision of the constitutional issue.

Second, although the Court attempted to distinguish the words "obscene" and "indecent" by citing *Webster's New Interna-*

85. *Id.* at 133.

86. See text accompanying notes 78-80 *supra*.

87. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 500 (1933). See also H. BLACK, *supra* note 75, § 175. Some authorities, however, require previous construction of the statutory language by the court of last resort. For a brief discussion of this issue, see 82 C.J.S. *Statutes* § 370 (1953).

88. The Court rejected *Pacifica's* construction of the statute: "[N]either our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language." 98 S. Ct. at 3036. *Duncan's* definition of "indecent" was recently followed in *United States v. Simpson*, 561 F.2d 53 (7th Cir. 1977).

89. 98 S. Ct. at 3032-33. The "cardinal principle" is that when the validity of a congressional act is questioned on constitutional grounds, the Court will first ascertain whether a construction of the act is possible by which the constitutional question may be avoided. See, e.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

90. Statutes regulating "obscene" or "indecent" material have been held to constitute a single proscription requiring prurient appeal. See *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Simpson*, 561 F.2d 53 (7th Cir. 1977); *Duncan v. United States*, 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931).

tional Dictionary,⁹¹ the Court omitted the words “being or tending to be obscene” when quoting the Webster definition.⁹² Thus, the “plain language” of the statute does not call for rejection of *Pacifica*’s argument that the Carlin monologue is not indecent under section 1464.⁹³

BROADCASTING: MOST LIMITED FIRST AMENDMENT PROTECTION

The *Pacifica* majority stated that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”⁹⁴ Distinguishing broadcasting from other media, the Court pointed to the “uniquely pervasive presence [of radio and television] in the lives of all Americans”⁹⁵ and suggested that the broadcast media are “uniquely accessible to children.”⁹⁶

Proper analysis of the facts in *Pacifica* demands a “balancing test”⁹⁷ to determine if *Pacifica*’s interest in broadcasting the Carlin comedy routine and the interest of some New York area radio listeners in hearing it must be subordinated to the privacy interest of those New Yorkers who prefer not to have “Filthy Words”⁹⁸ com-

91. 98 S. Ct. at 3035 n.14 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 1147 (3d ed. 1966)).

92. WEBSTER’S NEW INTERNATIONAL DICTIONARY 1147 (3d ed. 1966) (emphasis added). Compare *id.* with 98 S. Ct. at 3035 n.14.

93. 98 S. Ct. at 3035. See also Brief for *Pacifica* Foundation at 25-33, *FCC v. Pacifica Foundation*, 98 S. Ct. 3026 (1978). In fact, earlier editions of the dictionary cited by the majority indicate that the words “obscene” and “indecent” are synonymous. See, e.g., WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1957). In addition, some synonym books indicate likewise. See, e.g., S.I. HAYAKAWA, MODERN GUIDE TO SYNONYMS AND RELATED WORDS (1968). Hayakawa gives the following description of the word “indecent”: “Primarily, it connotes condemnation of obscenity or licentiousness” *Id.* at 302. See also WEBSTER’S NEW DICTIONARY OF SYNONYMS (1968) (describing “indecent” and “obscene” as “analogous words”).

94. 98 S. Ct. at 3040. *Broadcasting*, a trade publication, quoted a CBS spokesperson as calling the decision “a serious cause for concern,” and quoted a spokesperson for the National Association of Broadcasters as calling the decision “a harsh blow to the freedom of expression of every person in this country.” *WBAI Ruling: Supreme Court Saves the Worst for Last*, BROADCASTING, July 10, 1978, at 20, 21. Elsewhere in the same issue, a *Broadcasting* editorial characterized *Pacifica* as putting the broadcaster “in a niche inferior to that of the sidewalk evangelist proclaiming the imminent end of the world or of the soapbox orator demanding the overthrow of capitalism.” BROADCASTING, July 10, 1978, at 58.

95. 98 S. Ct. at 3040.

96. *Id.*

97. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-09 (1975), the Court prescribed such a test for use in cases in which first amendment rights of speakers are pitted against the privacy rights of those who may be unwilling viewers or audiences.

98. G. CARLIN, *supra* note 10, at side 2, cut 5.

ing into their homes through their radio speakers. Examination of first amendment cases⁹⁹ supports the position advocated by Pacifica Foundation and rejected by the Supreme Court.

It is well established that those speaking over the public airwaves do not shed their first amendment rights.¹⁰⁰ However, the Supreme Court has indicated that broadcasters' constitutional rights may be narrower than those of others. In *Red Lion Broadcasting Co. v. FCC*,¹⁰¹ the Court, while recognizing that "broadcasting is clearly a medium affected by a First Amendment interest," held that the "differences in the characteristics of new media justify differences in First Amendment standards applied to them."¹⁰²

The scarcity of frequencies in the electromagnetic spectrum¹⁰³ and the need to restrict the number of broadcasters to avoid interference among them¹⁰⁴ have historically been used to justify governmental interference with free speech rights in the broadcasting context. However, prior to *Pacifica* the Supreme Court had never held that pervasiveness or accessibility to children rendered a medium generally subject to restrictions on free expression.¹⁰⁵

The majority cited *Rowan v. United States Post Office Department*¹⁰⁶ to support its position that the pervasive nature of broadcasting permits interference with broadcasters' first amendment

99. See, e.g., *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); *Butler v. Michigan*, 352 U.S. 380 (1957); *Martin v. City of Struthers*, 319 U.S. 141 (1943). See text accompanying notes 106-125 *infra*.

100. See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *American Broadcasting Co. v. United States*, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954).

101. 395 U.S. 367 (1969). *Red Lion* involved a constitutional attack on the "fairness doctrine," which requires that public issues be presented by broadcasters and that each side of those issues be given fair coverage. *Id.* at 369-70. The Court, noting that broadcasters are required to operate in the public interest, upheld the Federal Communications Commission's rules requiring "fairness" and noted that "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." *Id.* at 392.

102. *Id.* at 386 (citation omitted) (footnote omitted). The Court's holding that characteristics of a medium affect the scope of its first amendment protection is supported by the reasoning in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (reaffirming *Joseph Burstyn*).

103. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

104. See *Todisco v. United States*, 298 F.2d 208 (9th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); *United States v. Borgese*, 235 F. Supp. 286 (S.D.N.Y. 1964).

105. See text accompanying notes 122-125 *infra*.

106. 397 U.S. 728 (1970).

rights when these rights conflict with the individual's right to be let alone in the privacy of the home.¹⁰⁷ *Rowan* involved an attack on section 4009 of Title 18 of the United States Code¹⁰⁸ which permitted a person who receives sexually provocative advertising through the mail to request that the Postmaster General order the sender of the offending mail to refrain from sending additional material to that particular individual. The Court upheld the statute, finding that individuals have a right "to be let alone,"¹⁰⁹ thus permitting them to control unwanted mail.¹¹⁰ The Court continued:

[N]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's house is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the rec-

107. 98 S. Ct. at 3040 (citing *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970)).

108. Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, § 301, 81 Stat. 613, as amended by Postal Reorganization Act of 1972, Pub. L. No. 91-375, 84 Stat. 719 (current version at 39 U.S.C. § 3008 (1976)). Section 4009 provided in part:

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

109. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970).

110. *Id.* "It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive." *Id.*

ognized exceptions includes any right to communicate offensively with another.¹¹¹

The majority's reliance on *Rowan* is misplaced. Unlike *Pacifica*, *Rowan* permits individuals to decide for themselves what materials are offensive and then to request that similar materials no longer be sent;¹¹² individuals with no objection to the materials can continue to receive them. Indeed, *Rowan* analogized contacting the Postmaster General for a section 4009 order to a "twist [of] the dial to cut off an offensive or boring communication" by means of radio or television.¹¹³ The *Pacifica* majority discounted that a radio can, without significant effort, be turned off.¹¹⁴

The majority's holding in *Pacifica* necessarily implies that a broadcast is an "intruder." But while radio and television waves do pervade the atmosphere, including the interiors of our homes, we must "invite" them to make them apparent. That is, the radio and television must be turned on; they cannot trespass on our senses without that invitation. And, just as the radio and television may be turned on, they may be turned off.¹¹⁵ Justice Brennan's dissent is compelling:

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

111. *Id.* at 737 (citation omitted).

112. *Id.* See generally *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But 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. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

Id. at 209 (citations omitted) (footnotes omitted).

113. 397 U.S. at 737.

114. See 98 S. Ct. at 3040.

115. Indeed, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), there is language recognizing that radio differs from billboards and streetcar placards in that "[t]he radio can be turned off." *Id.* at 302 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)). See also *Public Utils. Comm'n v. Pollack*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting). "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes." *Id.*

interested to receive, a message entitled to full First Amendment protection.¹¹⁶

Martin v. City of Struthers,¹¹⁷ decided by the Supreme Court more than thirty-five years ago, lends further support to the position that one person's right to be let alone does not outweigh the right of another to disseminate or receive information. The City of Struthers, Ohio, approved an ordinance making it illegal to summon a person to the door of his or her house for the purpose of delivering a handbill, circular, or other advertisement.¹¹⁸ Reversing a conviction under the ordinance, the Court considered the conflicting interests of appellant, who sought to distribute literature on a door-to-door basis, and city residents, who wanted to be free of the intrusion. The ordinance was invalidated as violative of the constitutional guarantees of free speech and press.

Pacifica and *Struthers*, taken together, suggest that people who want to be let alone are not required to reach for a radio dial to tune out offensive broadcasts but are required to respond to a knock at the door for the benefit of one distributing literature which they may find offensive. Since it is the privacy interest of the individual which the Court is seeking to protect, this result is irrational.

A major rationale for the Court's decision in *Pacifica* is broadcasting's unique accessibility to children.¹¹⁹ Certainly, the government may make reasonable regulations regarding expressive activity in order to further significant governmental interests;¹²⁰ the reasonableness of regulations is determined by the nature of the activity and the place in which it occurs.¹²¹ However, while it

116. 98 S. Ct. at 3049 (Brennan, J., dissenting). See also *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 406 (D.C. Cir. 1975). "[T]he Commission must pay careful attention to ensure that the freedom of substantial numbers of the listening public is not curtailed because of possible offensiveness to particularly sensitive listeners who retain the option of switching off the offending broadcasts." *Id.*

117. 319 U.S. 141 (1943).

118. *Id.* at 142. The ordinance provided:

It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements they or any person with them may be distributing.

Id. (quoting ordinance).

119. *Id.* See 98 S. Ct. at 3040.

120. See *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

121. *Id.* at 116. See also *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

is arguable that protecting children from objectionable language is a significant governmental interest under *Ginsberg v. New York*,¹²² there are significant differences between that situation and the Commission's order in *Pacifica*. *Ginsberg* involved a series of New York statutes which made selling obscene material to persons under the age of seventeen a misdemeanor.¹²³ The Supreme Court affirmed the conviction of the store owner stating, "The well-being of its children is . . . a subject within the State's constitutional power to regulate . . ."¹²⁴ However, the Court pointed out that the statutes permit the sale of all materials to adults and consequently are not invalid under *Butler v. Michigan*: They do not reduce the entire community to reading only that material fit for children.¹²⁵

The *Ginsberg* rationale is inapplicable to the Federal Communications Commission's order against the Pacifica Foundation. The Commission argued that it is not restricting the utterances involved, but merely "channelling" them.¹²⁶ The Commission's action, however, effectively bans the broadcasting of certain words when there is a reasonable chance that children are in the audience. Thus, notwithstanding *Butler's* admonition that the content of material available to adults should not be reduced to that fit for children, radio programming is, for a substantial part of the day, reduced to *what the Commission has decided* is suitable for the ears of children.¹²⁷

Even assuming that radio communication should be regulated to protect children from certain types of language, the guidelines established in *Pacifica* are irrational. The guidelines stress the time of the broadcast and not the nature of the station from which the broadcast emanates. The Commission should recognize that within the medium of radio, the likelihood of finding children in the audience of any particular station varies with the type of programming

122. 390 U.S. 629 (1968).

123. N.Y. PENAL LAW §§ 235.20-.22 (McKinney 1967) (current version at N.Y. PENAL LAW §§ 235.20-.21 (McKinney 1967 & Supp. 1978-1979)).

124. 390 U.S. at 639.

125. *Id.* at 634-35. For a brief description of *Butler*, see text accompanying notes 52 & 53 *supra*.

126. Petitioner's Reply Brief at 7, *FCC v. Pacifica Foundation*, 98 S. Ct. 3026 (1978). The Commission insists that the effect of its order is not to impose a flat ban on any words, but is rather to "channel" certain language out of time periods when young, unsupervised children may be in the audience. *Id.*

127. In fact, the order will prevent some stations from broadcasting such language. Some broadcast licensees, for technical reasons, are required by the Commission to leave the air during nondaylight hours. See 47 C.F.R. §§ 73.73, 73.79 (1978).

regularly offered. For example, it may be questioned whether the Carlin monologue would be likely to reach children (who might be "harmed" by it) when broadcast over an "all-news" station, or on a station which regularly airs music of a type not generally appreciated by children.¹²⁸ Recognizing this, it is unlikely that a 2:00 P.M.¹²⁹ broadcast over WBAI would reach many children (who might be harmed by what they heard).¹³⁰

CONCLUSION

It is too early to predict how broadcasters and the Federal Communications Commission will respond to the *Pacifica* holding.¹³¹ Almost certainly, the case will result in some self-censorship among radio and television licensees in an effort to retain their privilege to use the public airwaves.¹³² Meanwhile, the broadcast industry and the public must wait to see whether the new technol-

128. The Court recognized that radio station format should be considered. Thus, in response to the argument that the Commission's order in *Pacifica* would prohibit a broadcast of Chaucer's *The Miller's Tale*, the Court pointed out that such a broadcast, "[e]ven [during] prime time . . . would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected." 98 S. Ct. at 3041 n.29.

129. There is evidence that of the five "day-parts" used by audience researchers, the period 10:00 A.M. to 3:00 P.M. is second only to the midnight to 6:00 A.M. period in terms of having fewest listeners between the ages of 12 and 17. See STATISTICAL RESEARCH, INC., FALL 1976, RADAR REPORT ON RADIO USAGE 1.

130. WBAI, like the other five radio stations licensed to the *Pacifica* Foundation, engages in "educational" broadcasting, offering a variety of "alternative" programs. One commentator has described the station as "directed primarily at avant garde intellectuals, unemployed Ph.D.s and other overeducation malcontents who, depending on your politics, may be juvenile in spirit but certainly not in age." Von Hoffman, *Final Word on Dirty Words*, N.Y. Daily Press, Aug. 23, 1978, at 11, col. 2 (strike paper).

131. However, one situation has already developed which suggests the absurdity of the *Pacifica* decision. Georgia gubernatorial candidate J.B. Stoner, in a paid political announcement aired over television stations in Atlanta, expressed his fear that if the incumbent was reelected he would "pass more civil rights that take from the whites and give to the niggers." The Atlanta NAACP sent a telegram complaining about the use of the word "nigger" to the Federal Communications Commission; the NAACP termed the word "offensive and obscene to at least one-fourth of Georgia's population." In response, the Commission pointed out that it could not censor "political" broadcasts unless they posed a clear and present danger of violence. The NAACP threatened that, unless some action was taken by the Commission, it would purchase time for a candidate who would take to the airwaves with a recital of Carlin's seven dirty words. The threat was never carried out. See *Is "Nigger" a Dirty Word? FCC's Hands Tied in Racist Candidate Ad Case*, Radio & Records, Aug. 4, 1978, at 1, col. 1.

132. See *Cleaning Up After Dirty Words*, N.Y. Times, July 31, 1978, at A14, col. 1.

ogy that makes it possible for parents to control the viewing and listening of their children¹³³ will mean an early reversal of the *Pacifica* holding or whether additional words will be added to Carlin's original list of seven as language that offends the Commission's sensibilities is broadcast.

The role that *Pacifica* will play in shaping constitutional law in the area of free speech is unclear. It is likely, however, that *Pacifica* signals a new era in which those media that are "pervasive" and to which children have access will be subject to regulation notwithstanding the admonition of the Framers that no law shall be made abridging the freedom of speech.¹³⁴

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133. The technology is available. See *Technical Briefs, Do-It-Yourself Censor*, BROADCASTING, Feb. 27, 1978, at 83, col. 1. A New York firm has developed what it calls the "Video Proctor" which, when connected to a television set, permits a parent to preprogram the set for a week's viewing. The television, when tuned to a program not approved in advance by the parent, remains silent, its screen dark.

134. See U.S. CONST. amend. I.

