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In the Interest of Children: Action For Children's Television v. FCC Improperly Delineating the Constitutional Limits of Broadcast Indecency Regulation

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NOTE

IN THE INTEREST OF CHILDREN: ACTION FOR CHILDREN’S TELEVISION v. FCC IMPROPERLY DELINEATING THE CONSTITUTIONAL LIMITS OF BROADCAST INDECENCY REGULATION

Freedom of expression is a fundamental right protected by the First Amendment to the Constitution. The scope of this right may be limited, however, when the Government finds regulation necessary for the furtherance of a compelling state interest. According to the United States Supreme Court, the state maintains a compelling interest in the physical and psychological well-being of children.

With greater urgency and increasing frequency, parents, physicians, journalists, and congressmen claim that children should be protected from a ris-

4. See Claudia Puig, Three L.A. Stations Bar Condom Ad, L.A. Times, Nov. 14, 1991, at Fl (discussing station managers’ conundrum in deciding not to air condom ads following the recent revelation that L.A. Laker’s basketball star Magic Johnson has contracted HIV); Herbert Rotfeld, Why don’t we see many condom ads? Because we don’t want to, Chi. Trib., December 16, 1991, at 23 (“Young people need to be informed about high-risk behaviors, but parents object to the radio or TV broadcasting sex or drug-related messages to their children . . . [because it is] seen by many as encouraging promiscuity and drug abuse.”); A Weekly Checklist of Major Issues, Nat’l J., July 21, 1991, at 1786 (discussing the twenty-four-hour ban on indecency); Nathan Cobb, Prime Time Sex, Boston Globe Mag., Apr. 30, 1989, at 20.
ing tide of violent and sexually explicit broadcasts. Escalating competition within the media marketplace, as well as a common belief that such shows attract greater audiences, are, in part, responsible for a shift in broadcast programming. Although legislators and agencies make attempts to protect children through their support of broadcast content standards, these measures consistently fail to overcome concerns that such regulation impermissibly infringes upon the media’s First Amendment rights.


6. E.g., Harry A. Jessell & Patrick J. Sheridan, What’s It All Mean?, BROADCASTING, July 8, 1991, at 25 (“[t]he market has changed dramatically over the past 15 years . . . . Increased competition has changed the traditional underlying economics of the broadcasting business . . . . The result is that . . . broadcaster[s] will have increasing difficulty competing [for revenue].”). This increased competition presumably leads broadcasters to air more explicit programming. See Julia Reed, Raunch ‘n’ Roll Radio is Here to Stay, U.S. NEWS & WORLD R., May 4, 1987, at 52; see also Ray Quintanilla, Congress Seeks Reduction in TV Violence, INVESTOR’S DAILY, Feb. 5, 1990, at 17 (quoting Senator Paul Simon’s statement that “[v]iolence adds ratings points and audience share . . . . It moves numbers” (alteration in original)).

7. See supra note 5 (discussing Senator Paul Simon’s efforts and FCC rulemakings).

8. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989). The Court in Sable held:
Unlike newspapers, broadcasters owe the public a fiduciary duty. The Federal Communications Commission (FCC) is required to regulate the broadcast industry in a manner consistent with the public interest. Since 1927, federal law has empowered the government to prohibit the broadcast of obscene, indecent, or profane language. Despite this broad congressional directive, the FCC has historically restricted its application; the agency has limited both the scope of indecency's statutory meaning and the extent to which the prohibition was enforced. By the late 1980s, however,

Sexual expression which is indecent but not obscene is protected by the First Amendment. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."}

Id. at 126 (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976)) (citations omitted).

9. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969). The public trustee model rests on the premise that the broadcast frequencies are a limited public resource. See id. at 389. Since spectrum scarcity exists, broadcast licensees are considered a public trust, subject to government regulation. See id. Overall, the FCC has recognized four reasons broadcasters deserve "special treatment": first, "children have access" to the medium and may be "unsupervised by parents"; second, radio and television "receivers are in the home," a location "where people's privacy interest is entitled to added deference"; third, "unconsenting adults may tune in a station without any warning that offensive language is being . . . broadcast"; and fourth, the "scarcity of spectrum space, the use of which the government must . . . license" and insure is used "in the public interest." FCC v. Pacifica Found., 438 U.S. 726, 731 n.2 (1978).


11. See infra note 40 and accompanying text. Indecency should be distinguished from obscenity. Obscene broadcasts are those which: (1) "the average person, applying contemporary community standards' would find . . . taken as a whole . . . appeal[] to the prurient interest"; (2) "depict[] or describe[], in a patently offensive way, sexual conduct"; and (3) "taken as a whole, lack[] serious literary, artistic, political or scientific value." Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). Indecency need not satisfy either the first or third prong of the Miller test, only some version of the second prong. John Crigler & William J. Byrnes, Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy, 38 Cath. U. L. Rev. 329, 330 n.6 (1989).

12. See In Re Pacifica Found., Memorandum Opinion & Order, 95 F.C.C.2d 750, paras. 17-18 (1983) (failing to penalize a licensee for both the broadcast of "offensive" and "vulgar" programming as well as occasional use of the words such as "fuck," "shit," and "assholes"); In Re WGBH Educ. Found., Memorandum Opinion & Order, 69 F.C.C.2d 1250, paras. 4-5 (1978) (refusing to deny license renewal for, among other things, the broadcast of nudity, profanity and "vulgar""); Crigler & Byrnes, supra note 11; see also infra notes 47-122 and accompanying text.
the FCC concluded that its policy regarding indecent broadcasts was both "unduly narrow" and inconsistent with its enforcement responsibilities. In 1987, expressing a concern for the welfare of children, the agency began a two-stage expansion of its indecency policy. First, through the introduction of a "generic" standard, the FCC broadened its interpretation of the statutory prohibition against broadcast "indecency." The generic standard, unlike its predecessor, permits consideration of a broadcast's context and tone, rather than simply the identification of specific proscribed words.

Second, the agency intensified enforcement efforts. In *Action for Children's Television v. FCC (ACT)*, a large coalition of broadcast interests sought review of the FCC's new restrictions on broadcast indecency before the United States Court of Appeals for the District of Columbia Circuit. The coalition made two claims: first, that the agency's

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14. *Id.* The FCC stated that "although enforcement was clearly easier under the former standard, it could lead to anomalous results that could not be justified." *Id.* In particular, the Commission noted that under its former standard, broadcasters could avoid charges simply by avoiding "certain words." *Id.* According to the FCC, "[t]hat approach, in essence, ignored an entire category of speech by focusing exclusively on specific words." *Id.* The FCC concluded that because this former approach "made neither legal nor policy sense...[it] must take the more difficult approach to enforcing Section 1464." *Id.*; see infra notes 104-18 and accompanying text.

15. *Indecency Recon. Order*, supra note 13; see FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (noting the ease with which children may gain access to radio broadcasts). The agency also expressed its concern with the duties of broadcasters to children in a 1974 Policy Statement. *See In re Action for Children's Television (ACT)*, *Report & Policy Statement*, 50 F.C.C.2d 1 (1974). The FCC indicated that children, "because of their immaturity, require programming designed specifically for them." *Id.* at para. 16. The FCC encouraged licensees to make a "meaningful effort," *id.* at para. 20, to improve (1) the quantity of adequate children's programming, (2) the amount of educational and informational programming, (3) the extent of age-specific programming directed to the intellectual development of pre-school and school-age children, and (4) the scheduling of programming, balancing children's programming between weekends and weekdays, and not confining all or most of children's programming to Saturday and Sunday mornings. *See generally id.* at 6 (discussing these concerns); *supra* note 3 and accompanying text.

16. See *infra* notes 104-18 and accompanying text.

17. See *infra* notes 90-97, 104-09 and accompanying text.

18. See *infra* notes 119-22 and accompanying text.


20. Petitioners consisted of "commercial broadcasting networks, public broadcasting entities, licensed broadcasters, associations of broadcasters and journalists, program suppliers, and public interest groups." *Id.* at 1334.

21. *Id.* The United States Court of Appeals for the D.C. Circuit "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of...all final orders of the Federal Communications Commission made reviewable by Section 402(a) of title 47." 28 U.S.C. § 2342(1); see also 47 U.S.C. § 402(a) (1988); *infra* notes 123-41 and accompanying text.
broader “generic” definition of indecency was unconstitutionally vague and overbroad and second, that a curtailment of the hours when indecent programs may be broadcast was unconstitutional. While upholding the FCC’s more expansive “generic” definition of indecency, the court held that content-based restrictions could be sustained only when they are narrowly tailored to serve a compelling state interest. Although recognizing that the protection of children is a compelling interest, the court lacked sufficient evidence to justify further restrictions on broadcast indecency. The court, therefore, instructed the FCC to reconsider a suitable “safe harbor” period during which nonobscene programs containing indecent speech could be broadcast.

Shortly after ACT I was decided, Congress passed the Helms Adult Radio Amendment, compelling the FCC to promulgate rules instituting a twenty-four-hour ban on indecent broadcast programming. Despite concerns regarding the ban’s constitutionality, the FCC subsequently issued an order requiring broadcasters to comply with the Congressional mandate.

Following its issuance, the D.C. Circuit Court of Appeals granted a petition for review of the FCC order. In *Action for Children’s Television v. FCC* 22, *ACTI*, 852 F.2d at 1334. An overbroad statute is designed to burden or punish activities that are not protected by the Constitution, yet, nonetheless, includes within its scope constitutionally protected free speech activities. *See Nowak & Rotunda*, supra note 1, § 16.8. A statute may also be void for vagueness. *Id.* at § 16.9. Vague statutes fail constitutional scrutiny because of the principal that laws must give adequate notice to citizens as to what is actual criminal activity and because police authority must be restricted to the arrest of persons for actual violations of the law. *Id.* Therefore, the vagueness “doctrine consists of a strict prohibition of statutes that burden speech in terms that are so vague as to either to allow including protected speech in the prohibition or leaving an individual without clear guidance as to the nature of speech for which he can be punished.” *Id.; see also infra* notes 126-27 and accompanying text.

22. *ACT I*, 852 F.2d at 1334. An overbroad statute is designed to burden or punish activities that are not protected by the Constitution, yet, nonetheless, includes within its scope constitutionally protected free speech activities. *See Nowak & Rotunda*, supra note 1, § 16.8. A statute may also be void for vagueness. *Id.* at § 16.9. Vague statutes fail constitutional scrutiny because of the principal that laws must give adequate notice to citizens as to what is actual criminal activity and because police authority must be restricted to the arrest of persons for actual violations of the law. *Id.* Therefore, the vagueness “doctrine consists of a strict prohibition of statutes that burden speech in terms that are so vague as to either to allow including protected speech in the prohibition or leaving an individual without clear guidance as to the nature of speech for which he can be punished.” *Id.; see also infra* notes 126-27 and accompanying text.

23. *See ACT I*, 852 F.2d at 1334-35; *infra* note 123 and accompanying text.

24. *ACT I*, 852 F.2d at 1335; *see also infra* notes 104-22 and accompanying text (discussing the nature and development of a “generic” indecency standard).


27. *Id.* at 1343.


the same petitioners who brought ACT I challenged the constitutional legitimacy of the congressionally mandated ban. While briefing for ACT II was underway, however, the United States Supreme Court issued its opinion in Sable Communications of California v. FCC. The Court's decision in Sable held a complete ban on indecent commercial telephone messages unconstitutional. Believing that Sable was significant to the outcome of ACT II, the D.C. Circuit Court of Appeals granted the FCC's request for a remand to assemble data supporting the constitutionality of the ban. After soliciting public comments on the validity of the ban, the FCC issued a report finding that significant numbers of children ages seventeen and under listen to broadcasters at all times of the day without parental supervision. The FCC "concluded that no alternative to a total ban would effectuate the government's compelling interest in protecting children from broadcast indecency."

In ACT II, the D.C. Circuit Court of Appeals struck down as unconstitutional the FCC's statutorily mandated enforcement of a twenty-four-hour ban on indecent programming. At the same time, however, the court upheld the FCC's "generic" definition of indecency. In prohibiting the twenty-four-hour ban, the unanimous court relied upon its reasoning in ACT I, where it had held that the FCC "must identify some reasonable period of time during which indecent material may be broadcast."

This Note explores the history of cases and regulations affecting the broadcast of indecent programming and analyzes how the court's reasoning in ACT II may affect the future of broadcast content regulation. The Note

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31. Id. at 1507.
33. Id. at 126-28.
34. ACT II, 932 F.2d at 1507.
35. In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report of the Commission, 5 FCC Rcd. 5297 (1990) [hereinafter Enforcement Report] (proceeding terminated). The study found that "more than 'a few of the most enterprising and disobedient young people'" are in the audience for radio and television at all times of the day and night. Id. at para. 65 (quoting Sable, 492 U.S. at 130). As evidence, the Enforcement Report indicated that, "'[a]lthough . . . 12 to 17 year olds listening between midnight and 6 a.m. . . . make up only 0.35% of the total population, this figure represents 716,000 children." Id. (footnotes omitted). The Enforcement Report also noted the prevalence of VCR's and audio tape recording devices which might also be used by enterprising children. Id. at para. 55.
36. ACT II, 932 F.2d at 1507 (citations omitted).
37. Id. at 1510.
38. Id. at 1508.
39. Id. at 1509. The court noted that its "holding in ACT I . . . necessarily means that the [FCC] may not ban [indecent] broadcasts entirely." Id.
first examines the FCC's struggle to define "indecency," as well as the agency's more recent efforts to establish a liberal construction of the term. The Note then explores the agency's shift from the limited enforcement of indecency to a twenty-four-hour-a-day standard. Next, this Note examines how the United States Supreme Court's prohibition of a total ban on indecent telephone messages affected the outcome of ACT II. This Note considers the ACT II decision and concludes that the court's reasoning in ACT II was flawed because the court failed to consider all relevant issues in a manner wholly consistent with Supreme Court precedent.

I. REGULATING INDECENCY

Indecent radio and television broadcasts are prohibited under 18 U.S.C. § 1464.\textsuperscript{40} Stations violating this provision are subject to fines,\textsuperscript{41} criminal penalties,\textsuperscript{42} and the non-renewal or revocation of their license to broadcast.\textsuperscript{43} Critics emphasize, however, that the FCC has failed to provide broadcasters

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\item \textsuperscript{40} 18 U.S.C. § 1464 (1988). Section 1464 provides "[w]hoever 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." \textit{Id.; see also} Radio Act of 1927, ch. 169, § 29, 44 Stat. 1172, 1173 (1927) (prohibiting the broadcast of "obscene, indecent, or profane language"). Section 1464 appears to contradict § 326 of the Federal Communications Act. Section 326 states that "no regulation or condition shall be promulgated or fixed by the [FCC] which shall interfere with the right of free speech by means of radio communication." Communications Act of 1934, 47 U.S.C. § 326 (1988). Nonetheless, the Supreme Court found that these statutes were not in conflict. See FCC v. Pacifica Found., 438 U.S. 726, 738 (1978).

Obscene broadcasts, although not the focus of this Note, are also proscribed under § 1464 and should be distinguished from those characterized as indecent ones. See supra note 11 (distinguishing obscenity from indecency).

\item \textsuperscript{41} See 18 U.S.C. § 1464 (providing for criminal penalties up to $10,000). The FCC also maintains authority to issue a Notice of Apparent Liability for a monetary forfeiture pursuant to § 503(b)(2) of the Communications Act of 1934. 42 U.S.C. § 503(b)(2) (1988). Under § 503(b), the FCC may assess forfeitures up to $25,000 for each violation or each day of a continuing violation. \textit{Id.} This dollar amount was increased by Congress in 1989. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 3002(i)(2), 103 Stat. 2106, 2131-32. However, the FCC currently authorizes a $12,500 penalty, subject to upward or downward adjustment, for an indecent or obscene broadcast. See \textit{In re} Standards for Assessing Forfeitures, \textit{Policy Statement}, 6 FCC Rcd. 4695 (1991). This penalty is typically levied against the registered licensee. See, e.g., \textit{In re} Petition for Recon. Concerning Liability of Evergreen Media Corp., \textit{Memorandum Opinion & Order}, 6 FCC Rcd. 5950 (1991) (ordering the licensee to forfeit $6,000 for broadcasts of indecent material).

\item \textsuperscript{42} See 18 U.S.C. § 1464 (authorizing the issuance of jail terms up to two years for violations of the statute).

\end{itemize}
with clear guidelines for determining compliance with the statute or with agency rules. As a result, critics maintain that broadcasters' inability to measure standards keeps them in constant risk of violation or, in the alternative, forces them to refrain from broadcasting questionable programming which might nonetheless pass agency scrutiny.

A. The Public Interest Standard

Prior to 1978, the FCC determined whether a broadcast licensee violated indecency prohibitions on a case-by-case basis. In making such determinations the agency often held stations in violation of its indecency policy without specific findings that the station had violated the statutory requirements of § 1464. Rather, the agency justified penalties using nebulous “public interest” and public trust standards.

In In Re Jack Straw Memorial Foundation, for example, station KRAB-FM in Seattle, Washington, was penalized by the FCC for the single incident of a broadcast of “three so-called four-letter words [that] were used . . .

44. See, e.g., In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Comments of Cohn & Marks, MM Docket No. 89-494 (Feb. 20, 1990) [hereinafter C&M Comments]. In a survey of 75 broadcasters, 52 believed that the FCC should “provide more specific guidance to broadcasters about what types of programming will be considered ‘indecent.’” Id., attachment 2, at 1; see also id., attachments 2, 3. In objecting to the imposition of criminal penalties for the distribution of obscene materials to consenting adults, Justice Brennan stated that:

45. See C&M Comments, supra note 44, attachments 2, 3.

46. See id. Broadcasters, because of their uncertainty concerning indecency standards, have felt forced to do the following: edit feature films, “stay on the safe side,” edit lyrics, edit an “acclaimed” Irish drama, refuse to air commercials, and refrain from airing a National Public Radio program on sex between blind persons. Id., attachment 3, at 3.

Upon receipt of an indecent broadcast complaint and following a staff review, the FCC may issue a Letter of Inquiry requesting that a licensee respond to the allegations. See, e.g., Letter from the FCC to Goodrich Broadcasting, Inc. (WVIC-FM), 6 FCC Rcd. 2178, 2178-79 (1991) (discussing the issuance of the Letter of Inquiry). Upon the receipt of a reply, and following further determination, the FCC may issue a Notice of Apparent Liability. See id. at 2178. The licensee is typically afforded 30 days to pay the penalty or to show why the penalty should not be imposed or should be reduced. See id. at 2178-79. If the licensee responds to the Notice of Apparent Liability, the FCC, will consider all relevant information and issue a final order. See generally 47 C.F.R. § 1.80 (1991) (discussing forfeiture proceedings in detail).

47. See infra notes 51-67 and accompanying text.

48. See infra notes 51-67 and accompanying text.


50. See infra notes 51-67 and accompanying text.

several times"52 during the broadcast of a thirty-hour taped autobiographical novel.53 Although the majority of commissioners failed to identify the incident as a violation of § 1464, the agency nonetheless punished the station with a limited one-year renewal of its license based on a violation of the public trust.54 Opposing the penalty, Commissioner Cox called the decision "arbitrary and capricious."55

Similarly, in In Re WUHY-FM, Eastern Education Radio,56 the Commission penalized station WUHY-FM in Philadelphia, Pennsylvania, for its broadcast of an interview with Jerry Garcia, member of the California musical group, the "Grateful Dead."57 During the course of the interview, Mr. Garcia, in addition to stating "his views on ecology, music, philosophy, and interpersonal relations," used numerous "four letter" expletives.58 Although the majority of commissioners ruled that the language could be interpreted as violations of § 1464's prohibition against indecency, it held that its authority to act was clearly justified under a "public interest" standard.59 Under this standard, material that was patently offensive by contemporary community standards and without redeeming social value could be sanc-

52. Id. at 834 (dissenting statement of Commissioner Cox).
53. Id.
54. See id. at 833-34 (majority opinion). Indeed, the majority specifically noted "that the critical consideration [for it was] not whether or not action under 18 U.S.C. 1464 [was] warranted." Id. at 833.
55. Id. at 837 (dissenting statement of Commissioner Cox). The Commissioner noted that, under the majority's reasoning, broadcasters were required to observe "an undefined standard—indeed, a nonexistent standard." Id. In his vigorous dissent, Commissioner Cox unknowingly summarized the logic and emotion behind the critics of the FCC's "generic" definition of indecency.

[L]icensees do not know even now what the dangerous words [which are forbidden] are because the majority have not listed them . . . . And no one—probably not even the majority—knows what other words will bring down the Commission's wrath upon a licensee who permits their broadcast—regardless of frequency, context, social value, or even knowledge by the licensee that they were to be used. . . . But failure to publish the list may have even more chilling effect upon broadcast programming, because licensees may avoid the use of many, many more words out of fear that they may be on the Commission's secret list.

Id. at 837-38.
57. Id. at para. 2.
58. Id. at para. 3. During the 50 minute interview, Mr. Garcia interspersed the words "fuck" and "shit," using them as adjectives, introductory expletives, or as substitutes for the term "et cetera." See id.
59. Id. at paras. 6, 10, 13. The majority of commissioners reasoned that "the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the 'public interest in the larger and more effective use of radio.'" Id. at para. 6; see also Palmetto, supra note 43, at paras. 20, 25-27 (reasoning that indecent transmissions may be penalized under generalized public interest standards without regard to violations of 18 U.S.C. § 1464).
tioned. After concluding that there was no evidence that Garcia's language "in some way served the needs and interests of the area," the agency fined the station one hundred dollars.

Again, Commissioner Cox disagreed in part with the majority's conclusion. The Commissioner reasoned that the language used by Garcia was not indecent and that the station did not violate the public interest with the broadcast of the interview. Cox noted that the programming should not be considered indecent because "certain language not normally heard in polite circles, was uttered." Similarly, he stated that the programming should be considered in the public interest because the basic subject matter of the broadcast was decent and of obvious interest to the public. In this sense, Cox reasoned that the interview was a documentary which could not be "deemed indecent because the subject incidentally used strong or salty language."

In sum, the public trust standard proved to be too imprecise for both broadcasters and the FCC. This imprecision arguably led to the imposition of penalties when there was no actual violation of the standard. Furthermore, the standard's vagueness created an incentive for broadcasters to avoid the transmission of questionable speech, and thereby chilled the broadcast of otherwise permissible programming.

B. FCC v. Pacifica Foundation: Seven "Filthy Words"

The 1978 Supreme Court decision in FCC v. Pacifica Foundation significantly contributed to the creation of a more definitive standard for determin-

60. See Eastern, supra note 56, at para. 13.
61. Id. at 414, para. 14 n.8.
62. Id. at para. 16.
63. Id. at 417 (dissenting statement of Commissioner Cox).
64. See id. at 419.
65. See id. (quoting the licensees argument).
66. See id. at 420-21. Additionally, Cox reasoned that the language of Mr. Garcia reflected his personality and lifestyle. See id. at 418.
67. Id. at 419 (quoting argument made in letter from licensee). Commissioner Cox's concern with the chilling effects of the Commission's actions was echoed in the following statement:

I think we may find that the majority are wrong in stating . . . that we can exercise these words from radio "without stifling in the slightest any thought which the person wishes to convey." One safe course for the timid will be simply to avoid interviewing people who can be expected to use troublesome language, or inviting them to participate in panels, or asking them to comment on current developments. This may be "safe" for the licensee but I'm not sure it will be safe for our society.

ing which programming would be considered "indecent" for purposes of penalties arising under § 1464.69 Pacifica arose out of a complaint from a motorist who claimed he and his "young son" inadvertently heard comedian George Carlin's "Filthy Words"70 monologue at two o'clock in the afternoon over radio station WBAI-FM in New York City.71 The FCC subsequently issued a declaratory ruling against Pacifica, but refrained from issuing other sanctions.72 The agency determined, first, that the monologue depicted "sexual and excretory activities and organs in a manner patently offensive" and, second, that the broadcast occurred at a time of day when there were many children in the audience.73 The Commission noted, therefore, that the monologue was indecent and prohibited under § 1464.74 The FCC concluded, however, that "patently offensive language" such as Carlin's monologue, should be channeled to those times when children are not listening, rather than being prohibited altogether.75

The D.C. Circuit subsequently reversed the FCC order.76 The Supreme Court thereafter reversed the appellate court and reaffirmed the original FCC order.77 The Court held that the FCC's action did not constitute cen-

69. See generally id. (proscribing seven words from broadcast).
70. The seven words used in George Carlin's monologue were: "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." Id. at 751.
71. Id. at 729-30.
73. 56 F.C.C.2d at para. 14.
74. See id. The ruling was associated with the station's license file. Id. While avoiding any immediate penalty, such action may detrimentally effect a licensee at renewal time. See id.
75. See id. at para. 11. The FCC concluded that offensive material which has "serious literary, artistic, political, or scientific value" should be prohibited at those hours when children are likely to be in the audience. See id. at para. 16; see also id. at para. 11. Similarly, such material might be permitted, if children are not likely to be in the audience at the time of broadcast. See id. at para. 16; see also In re Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found., Memorandum Opinion & Order, 59 F.C.C.2d 892 (1976) (denying reconsideration of this issue).
76. Pacifica Found. v. FCC, 556 F.2d 9, 18 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978). Of the three-judge panel, Judge Tamm concluded that the agency's action was invalid either on the ground that the order constituted censorship, expressly forbidden by § 326 of the Communications Act of 1934, or on the ground that the agency's opinion was the equivalent of a rule which was vague and overbroad. See id. at 10-18. Chief Judge Bazelon concluded that § 1464 covers only language that is obscene or otherwise unprotected. See id. at 24-30. Judge Leventhal, however, dissented and concluded that the daytime broadcast was indecent. Id. at 31.
sorship, forbidden under § 326 of the Communications Act, and that speech which is not obscene "may be restricted as 'indecent' under the authority of . . . § 1464." In affirming the FCC's order, the Court concluded that while the prohibition against censorship under § 326 precludes advance editing by the Commission, it does not forbid the review of completed broadcasts. The Court also reasoned that the legislative history of the statute supports the finding that § 326 was not intended to limit the FCC's power to regulate broadcasts of obscene, indecent, or profane language. Rejecting Pacifica's challenge to § 1464, the Court concluded that the broadcast was indecent and that it fell within the scope of § 1464. The Court dismissed Pacifica's assertion that the standard was so vague that it would lead to the "chilling" of permissible speech. The Court concluded that the standard would deter only the broadcast of offensive sexual references.

Thus, the Court in Pacifica held that the government could, under § 1464, constitutionally regulate indecent broadcasts. The Court justified its position by recognizing the uniqueness of the broadcast medium. Broadcasters' pervasive presence in the home and children's access to the medium justified the greater restrictions. Because alternatives exist for adults to

78. See id. at 735-38. Section 326 provides that:

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.


79. Pacifica, 438 U.S. at 735; see also id. at 735-41.

80. Id. at 735.

81. See id. at 738.

82. Id. at 741. The Court rejected Pacifica's claim that the broadcast was not indecent because it failed to contain "prurient appeal." Id. The Court reasoned that the normal definition of indecent merely refers to "nonconformance with accepted standards of morality." Id. at 740. The Court also rejected Pacifica's claim that § 1464 was overbroad. Id. at 742.

83. Id. at 740-41.

84. Id. at 743.

85. Id. (holding that the rule "will deter only the broadcast[ ] of patently offensive references to excretory and sexual organs and activities").

86. Id. at 743-44.

87. Id. at 748 (noting that "each medium of expression presents special First Amendment problems").

88. Id. at 748-49. Broadcasters, occupying a "uniquely pervasive presence" in the home, id. at 748, and maintaining "accessibility] to children, even those too young to read," were reasonably subject to stronger restrictions than other media. Id. at 749. The Court found the regulation of broadcast indecency similar to Ginsberg v. New York, a case involving adult publications. Id. In Ginsberg, the Court also recognized the government's interests in youth and the "parents' claim to authority in their own household" as justification for prohibiting the distribution of the publications to children. Ginsberg v. New York, 390 U.S. 629, 639 (1968); see also id. at 639-40.
gain access to such material, the Court noted that the Commission's action did not "reduce adults to hearing only what is fit for children." 89

Although the Pacifica decision upheld the FCC's authority to regulate indecent broadcasts, the scope of the ruling was limited in several respects. First, the plurality opinion in Pacifica was narrowly drafted and widely interpreted as applying only to the unique facts of the case. 90 For this reason, Pacifica's definition of indecency, the "repetitive, deliberate use" 91 of words that refer to "excretory or sexual activities or organs" in a "patently offensive," 92 but non-obscene manner, became synonymous with the repeated use of one or more of Carlin's seven "filthy words." 93 Technically, innuendo and double entendre were outside the scope of indecency under the Pacifica standard. 94 Additionally, the Court in Pacifica reserved its judgement as to whether indecent broadcasts would be permissible at times when few children were in the audience. 95 Adopting a nuisance rationale, 96 the Court quoted Justice Sutherland's analogy that nuisance, or in this instance, indecent programming broadcast at an inappropriate hour, is "like a pig in the parlor instead of the barnyard." 97

Consistent with the Court's narrow holding in Pacifica, the FCC limited its enforcement of the indecency standard to broadcasts beginning before ten p.m. 98 The FCC assumed that broadcasts after ten p.m. would not be rea-

89. Pacifica, 438 U.S. at 750 n.28.
91. Pacifica, 438 U.S. at 739.
92. Id.
94. See Passler, supra note 90, at 140.
95. Pacifica, 438 U.S. at 750 n.28. See also Crigler & Byrnes, supra note 11, at 330.
96. Pacifica, 438 U.S. at 750; see also Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (affirming view that reasonable time, place, and manner restrictions may be placed on the distribution of indecent material consistent with the First Amendment); Young v. American Mini Theaters, 427 U.S. 50 (1976); New Indecency Enforcement Standards to Be Applied to All Broadcast and Amateur Radio Licensees, Public Notice, 2 FCC Rcd. 2726 (1987) [hereinafter New Enforcement Standards] (reasoning by analogy, that if the owner of a theater may permissibly separate adults from children, and the book store owner is able to refuse the sale of publication of books to children, indecent broadcast material may also be channelled). The Commission noted, "[f]or the broadcast medium . . . the only practicable means for separating adults from children . . . is to impose time restrictions." Id.
97. Pacifica, 438 U.S. at 750 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926)). Justice Sutherland stated that indecency "may be merely a right thing in the wrong place." Id.; see also, Rocio De Lourdes Cordoba, To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting, 42 Hastings L.J. 635, 654-60 (1986).
98. Crigler & Byrnes, supra note 11, at 330.
reasonably likely to be heard by children. Indecent broadcasts after ten p.m. were thus sheltered by a constitutional "safe harbor." Following the *Pacifica* decision, the FCC's enforcement of indecent broadcasts waned. In 1986, however, several interest groups began pressuring the agency's chairman to take stronger action. The Commission responded in April 1987 by simultaneously attempting to broaden the definition of indecency and narrow the "safe harbor" period which protected the broadcast of "indecent" programming after 10 p.m.

C. Three Shots Across the Bow: "Generic" Standards and the Shrinking "Safe Harbor"

In moving to extend the scope of § 1464, the FCC promulgated a "generic" standard of indecency; the new standard reflects the Commission's desire to move beyond the limitations of *Pacifica* and to include a wider

100. See Crigler & Byrnes, *supra* note 11, at 330, 352. This limited ban was sufficiently tailored to satisfy the Court's requirements that it be the least restrictive means available to satisfy the state interest in question.
101. See *id.* at 345. According to the Comment's authors, following *Pacifica*, the FCC received approximately 20,000 complaints annually alleging obscene or indecent broadcasts. The agency, however, took no action against the broadcasters involved. *Id.* Presumably, the broadcasts complained of did not fall within the narrow definition of indecency.
102. See *id.* at 344-48. According to Crigler and Byrnes, the picketing of the FCC's Washington offices by Morality in Media in June 1986 appears to have been a catalyst for the policy shift. *Id.* at 343. The group was protesting the renomination of Mark Fowler as the agency's chairman. *Id.* at 344. Until the protests, Mark Fowler carried "the rallying cry of... 'deregulation.'" *Id.; see also* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982) (championing former FCC Chairman Mark Fowler's deregulatory viewpoint). In July, 1986, however, Chairman Fowler appeared to have reached an agreement with Morality in Media and the National Decency Forum, two groups responsible for the picketing. Crigler & Byrnes, *supra* note 11, at 345. In a letter dated July 9, 1986, the National Decency Forum advised the Chairman that "his organization would discontinue the planned picketing for the following week." *Id.* The letter reflected the organization's understanding that the FCC General Counsel would cooperate on sending a message to broadcasters by bringing some decency actions and investigations. *Id.* On July 21, 1986, the National Decency Forum and Morality in Media met with Mr. Fowler. *Id.* Morality in Media subsequently passed along advice, provided by the FCC's General Counsel, to its supporters. *Id.*
range of material.\textsuperscript{104} Under the FCC's new "generic" standard, indecency includes those broadcasts describing sexual and excretory organs and activities in a manner that is "patently offensive as measured by contemporary community standards for the broadcast medium"\textsuperscript{105} at times when there is a "risk that children may be in the audience."\textsuperscript{106}

In April 1987, the FCC began to apply this more expansive standard.\textsuperscript{107} In three instances,\textsuperscript{108} the agency issued warnings to commercial radio stations concerning the broadcast of material violative of a "generic" indecency standard.\textsuperscript{109} The first warning, Pacifica Foundation (Pacifica II), involved two complaints against station KPFK-FM Los Angeles for the broadcast of excerpts from the unpublished play "Jerker" as well as a live broadcast entitled "Shocktime U.S.A."\textsuperscript{110} The live program allegedly contained profane remarks.\textsuperscript{111} The play, aimed at listeners in the local gay community, contained explicit conversation and descriptions of anal intercourse.\textsuperscript{112} Although the station warned its listeners that the play contained material that some might find offensive, and although ratings indicated that few young listeners tuned into the broadcast, the FCC nonetheless persisted with its charges.\textsuperscript{113}

The second warning was directed at the Regents of the University of California and involved student-run radio station KCSB-FM's broadcast of a song called "Makin' Bacon."\textsuperscript{114} The broadcast made clear reference to sexual activities and organs, but unlike the Carlin monologue, it did not make repetitive reference to the "seven filthy words."\textsuperscript{115}

\textsuperscript{104} See Crigler & Byrnes, supra note 11.
\textsuperscript{105} See Infinity, 2 FCC Rcd. at 2705.
\textsuperscript{106} See id.
\textsuperscript{107} See infra note 109. Recognizing that the broadcasters were subject to an unforeseen shift in policy and that the broadcasts at issue would not have violated the former definition of indecency, the FCC issued only warnings to each licensee. See New Enforcement Standards, supra note 96, at 2731-32. The Commission stated, however, that further violations would subject a licensee to more severe sanctions. Id. at 2732.
\textsuperscript{108} A fourth instance involved an amateur radio operator. See New Enforcement Standards, supra note 96, at 2737.
\textsuperscript{110} See Pacifica Found., 2 FCC Rcd. 2698 at paras. 3, 5.
\textsuperscript{111} Id. at para. 3. The complaint concerned a narration and song containing the words "eat shit," and "mother fucker." Id. The complaint did not allege whether the words were used in a repetitive fashion. Id.
\textsuperscript{112} Id. at paras. 19-28.
\textsuperscript{113} Id. at para. 6.
\textsuperscript{114} See Regents, 2 FCC Rcd. 2703.
\textsuperscript{115} See Passler, supra note 90, at 137-38.
The third warning, Infinity Broadcasting, charged WYSP-FM with the broadcast of sexual innuendo and double entendre.\(^{116}\) The broadcasts occurred during the Howard Stern morning show.\(^{117}\) In emphasizing the more expansive nature of the "generic" indecency standard, the FCC noted that sexual innuendo and double entendre are actionable if mixed with explicit references that make the understanding of the discussion "capable only of one meaning."\(^{118}\) In applying its new "generic" indecency standard, the FCC once again significantly increased broadcasters' potential exposure to liability while failing to mitigate concerns that the applicable standard for determining broadcast indecency is both vague and overbroad.

Concurrent with its 1987 shift to a "generic" standard, the FCC also sought to step up enforcement and narrow the "safe harbor" for indecent broadcasts.\(^{119}\) The agency asserted that, despite its prior assumptions, recent evidence indicated that children remained in the broadcast audience after 10 p.m.\(^{120}\) Consistent with its intensified enforcement policy, the FCC, in both Regents and Pacifica II, warned stations of indecent programming broadcast after ten p.m.\(^{121}\) The agency later indicated that it found children's risk of exposure sufficiently reduced after midnight.\(^{122}\)

\(^{116}\) See Infinity, supra note 103.

\(^{117}\) Id. at para. 2.

\(^{118}\) Id. at para. 9.

\(^{119}\) See New Enforcement Standards, supra note 96; Enforcement Report, supra note 35, para. 6. Separate from the question of indecency standards is the issue of enforcement. Literally interpreted, § 1464 authorizes a ban on both obscene and indecent broadcasts. 18 U.S.C. § 1464 (1988). Prior to 1987, however, the FCC limited the statutory prohibition against indecent broadcasts to those aired after ten p.m.; the hours following ten p.m. were considered to be a "safe harbor" for the broadcast of indecent or questionable material. See Enforcement Report, supra note 35, para. 6. The "safe harbor" was justified by the FCC's assumption that children were not in the broadcast audience following 10 p.m. See id. at para. 3.

\(^{120}\) See New Enforcement Standards, supra note 96. The FCC declared "despite prior assumptions that children were not in the broadcast audience at 10:00 p.m., recent evidence for the markets involved indicates that there is still a reasonable risk that children may be in the listening audience." Id. at 2726.


\(^{122}\) See Indecency Recon. Order, supra note 13, at para. 27.
II. CHALLENGING THE NEW INDECENCY POLICY: ACT I

A. The ACT I Decision

In *Action for Children’s Television v. FCC* \(^{123}\) (*ACT I*), a group of broadcasters, associations, program suppliers, and public interest groups\(^{124}\) challenged the FCC’s new regulatory scheme for indecency.\(^{125}\) In contesting the FCC’s indecency standard, the petitioners charged that the new standard was unconstitutionally vague\(^{126}\) and that it was overbroad.\(^{127}\) In challenging the agency’s enforcement policy, the petitioners also claimed that the current post-midnight “safe harbor” had no adequate factual foundation and that the policy was arbitrary and capricious.\(^{128}\)

1. Generic Standards Upheld

In upholding the FCC’s generic definition of indecency, the court found the petitioners’ vagueness and overbreadth challenges without merit.\(^{129}\) The court concluded that *Pacifica* previously addressed the vagueness issue and that, as a lower court, it remained confined by the Supreme Court’s implicit

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\(^{123}\) 852 F.2d 1332 (D.C. Cir. 1988).


\(^{125}\) *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988), vacated, 932 F.2d 1504 (D.C. Cir. 1991).

\(^{126}\) *Id.* at 1334. Petitioners claimed that while the Commission, following *Pacifica*, had tailored the indecency standard to make it reasonably certain and to afford “breathing space,” the new “generic” standard is “‘inherently vague.’” *Id.* at 1338. Specifically, the petitioners claimed that the FCC failed to provide broadcasters with a “meaningful guide identifying the category of material subject to regulation” and that the agency’s definition “adds nothing significant in the way of clarification.” *Id.*; see *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that a statute or regulation is void for vagueness if it “either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application”).

\(^{127}\) *ACT I*, 852 F.2d at 1339. The intervening American Civil Liberties Union (ACLU) made this assertion. *Id.* The ACLU based its charge upon the FCC’s failure to exempt works of “serious merit” from its definition of indecency. *Id.* The ACLU claimed that the agency’s standard for indecency should properly include an assessment “that the ‘work, taken as a whole, lacks serious literary, artistic, political, or scientific value.’” *Id.* (quoting Brief of Intervenors ACLU et al. at 30, *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (No. 88-106) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973))). The FCC, while considering “merit” as a factor in a determination concerning broadcast indecency, “‘reject[ed] an approach that would hold that if a work has merit, it is per se not indecent.’” *Id.*

\(^{128}\) *Id.* at 1335.

\(^{129}\) *Id.*
conclusion that a "generic" standard was capable of surviving a vagueness challenge.\footnote{130}{Id. The court stated that "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in Pacifica, we have misunderstood Higher Authority and welcome correction." Id. at 1339.}

In rejecting the overbreadth challenge, the court noted that although indecent speech qualifies for First Amendment protection, the state maintains extraordinary power to protect children's interests.\footnote{131}{The court stated, "[c]hildren's access to indecent material . . . may be regulated, because 'even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."'" Id. at 1340 (quoting Ginsburg v. New York, 390 U.S. 629, 631 (1968) (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).} Therefore, the court reasoned that while material may have significant social value, it may nonetheless contain language or descriptions offensive and harmful to children.\footnote{132}{According to the court, the material "may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value." Id.}

Since the merit of a work will not necessarily mollify the impact of particular words or phrases on children, the court refused to strike down as overbroad the FCC's practice of treating merit as one factor in an overall determination of whether broadcast material is patently offensive.\footnote{133}{The court stated: "We agree that, in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn. We therefore vacate, in the Pacifica Foundation and Regents of U.C. cases, the FCC's ruling that the broadcast under review was actionable, and we remand those cases to the agency for thoroughgoing reconsideration of the times at which indecent material may be aired." Id. The court, however, affirmed the declaratory ruling in Infinity because the actionable portions of a talk show aired from 6 to 10 a.m. Id.}

2. Protecting the "Safe Harbor"

While dismissing the petitioners' attacks upon the FCC's generic definition of indecency, the ACT I court did find merit in their claim that the agency failed to substantiate its reasons for narrowing the "safe harbor" during which indecent speech may be broadcast.\footnote{134}{Id. at 1341. The court noted that the FCC's use of listener data to indicate the number of teens in the overall audience was not determinative of the number of children in the audience when the radio station aired the questionable material. Id. at 1341-42. Furthermore, the court noted that there was no basis for a comparison between the number of teens in the listening audience and the total number in the listening area. Id. at 1342.} Specifically, the court found that the FCC used listener data to reach unjustifiable conclusions.\footnote{135}{Id. at 1341.} Similarly, the FCC gave no explanation as to why, contrary to previous in-
stances, it included twelve to seventeen year-olds in its definition of "children" subject to protection under the standard. The court instructed the FCC to substantiate its post-midnight channeling policy through a notice of proposed rulemaking. Moreover, the court directed the FCC to ensure that, in the future, it accommodated the competing interests of government, parents, broadcasters, and adult listeners.

**B. Congressional Action: The Helms Adult Radio Amendment**

While broadcasters challenged the restrictiveness of the FCC's indecency regulations in court, Senator Jesse Helms of North Carolina began to work within Congress to ensure that the FCC would take an even tougher stance. Long before the *ACT I* decision, the Senator began numerous inquiries into the agency's limited enforcement policy. Specifically, the

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136. The court noted that "the FCC ventures no explanation why it takes teens aged 12-17 to be the relevant age group for channeling purposes." *Id.* at 1341. The FCC had previously reasoned that:

"Age 12 was selected since it is the accepted upper limit for children's programming in the industry and at the Commission. The Commission considered using the generally recognized age of majority—18—but concluded that it would be virtually impossible for a broadcaster to minimize the risk of exposure to 18-year-olds."

*Id.* at 1342 (quoting 122 CONG. REC. S33,367 n.119 (1988)). In sum, the court concluded, "[i]f... the FCC continues to consider children under 12 as the age group of concern, it should either supply information on the listening habits of children in that age range, or explain how it extrapolates relevant data for that population from the available ratings information." *Id.*

137. *Id.* at 1343.

138. *Id.* (quoting *Indecency Recon. Order, supra* note 13, at para. 27 n.47) (noting that the government "has a compelling interest in protecting children from indecent material").

139. *Id.* The court noted that parents "are entitled to decide whether their children are exposed to such material if it is aired." *Id.* (quoting *Indecency Recon. Order, supra* note 13, at para. 27 n.47).

140. *Id.* Broadcasters, according to the court, "are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience." *Id.* (quoting *Indecency Recon. Order, supra* note 13, at para. 27 n.47).

141. *Id.* Adult listeners, according to the court, "have a right to see and hear programming that is inappropriate for children but not obscene." *Id.* (quoting *Indecency Recon. Order, supra* note 13, at para. 27 n.47).

142. See *Crigler & Byrnes, supra* note 11, at 354.

143. On April 7, 1988, Senator Helms contacted the Heritage Foundation, a conservative "think-tank." *See id.* at 352-54. The Senator requested assistance concerning: the requirements of the "safe harbor" rule, the requirements of *Pacifica I*, the validity of the FCC's statement that Supreme Court precedent precludes it from a total ban of non-obscene broadcast programming, and whether *Pacifica I* prohibits a ban on the broadcast of indecent material intended for adults as well as children. 134 CONG. REC. S9913-15 (daily ed. July 26, 1988).
Senator expressed his concern regarding the channeling of indecent speech into the late-night "safe harbor."  

On July 26, 1988, Senator Helms introduced an amendment to an appropriations bill that required the FCC to promulgate regulations enforcing a twenty-four hour ban on indecent programming by January 31, 1989. In sponsoring the amendment, Senator Helms expressed his concern regarding children's inadvertent exposure to "unacceptable" language. Furthermore, he attacked the broadcast of "trash," particularly when it directly contravenes § 1464's outright prohibition against all obscene and indecent speech. Additionally, Helms contended that channeling indecent material to periods after midnight was futile because of home taping technology. The Senate subsequently supported Helms' amendment with little discussion, and President Reagan later signed the bill into law.

144. Although the Helms amendment may be viewed as a Congressional endorsement of free speech restrictions in the broadcast medium, it may also be seen as simply another, more restrictive, channeling measure. Under the Helms amendment, indecent material is channeled to non-broadcast sources. Arguably, therefore, the restrictions of the amendment are less objectionable on constitutional grounds, and the amendment is not inconsistent with Pacifica because alternatives remain for adults to gain access to indecent material, albeit not within the broadcast medium. See supra note 80 and accompanying text. Supporters of the amendment argue that the Act does not "reduce adults to hearing only what is fit for children," Pacifica, 438 U.S. 726, 750 n.28 (1978), because adults may go to other easily accessible forums where such communication is permissible. Helms wrote former FCC Chairman Dennis Patrick concerning the agency's "safe harbor" policy. 134 CONG. REC. S9912 (daily ed. July 26, 1988). In his letter, the Senator asked whether material which the FCC had found indecent would, nonetheless, be considered non-actionable if it fell within the post-midnight window. Patrick responded that it was "very unlikely" that the agency would have found that the broadcasters violated the indecency proscription if the questionable programming was aired after midnight. Id.


146. The amendment required that "[b]y January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." Id.

147. In defending his amendment, the Senator asked:

[What] happens [sic] when a child unintentionally tunes in and hears or sees material describing, by innuendo, how to have sex? Or when an 8-year-old girl turns on her radio to hear the deejay describe sex acts by the use of metaphors? Or when a 10 year old boy who hears a recitation of how homosexuals do their perverted acts? How much damage will be done?


148. Id. at S9911-12.

149. Id.

150. See id.

C. Judicial Response to Administrative Action: Stemming the Tide of a Twenty-Four-Hour Ban

On December 21, 1988, the FCC issued an order indicating that it must enforce a twenty-four-hour ban on indecent broadcast programming,\textsuperscript{152} effective January 27, 1989.\textsuperscript{153} Furthermore, the agency noted its intent to continue defining indecency generically.\textsuperscript{154} Because Congress mandated the new rule, the FCC terminated the proceedings required by the court in \textit{ACT I} and denied any opportunity for public comment.\textsuperscript{155} Despite concern over the ban's constitutionality, the FCC passed the rule because the Helms Amendment provided no other alternative.\textsuperscript{156}

In \textit{ACT II}, the FCC's order was subsequently challenged by numerous media and citizens groups.\textsuperscript{157} In challenging the order before the D.C. Circuit Court of Appeals, the petitioners first sought to stay the effective date of the ban.\textsuperscript{158} Judge Ruth Ginsburg, who authored the court's opinion in \textit{ACT I}, was part of the three judge panel hearing the argument.\textsuperscript{159} During the course of the proceeding, it became apparent that the court had no change-of-heart; it was not amenable to the agency's case.\textsuperscript{160} Within an hour after the conclusion of oral argument, the three-judge panel granted a stay of the congressionally mandated twenty-four-hour ban on indecency pending fur-
ther judicial review by the circuit court. For the time being, the FCC was limited to the 10 p.m. standard required by ACT I. As the FCC prepared for a full judicial review of the twenty-four-hour prohibition against indecent broadcasts, the Supreme Court issued a relevant decision in the related area of telephone regulation.

III. THE PERMISSIBLE LIMITS OF TELEPHONE INDECENCY REGULATION IN SABLE COMMUNICATIONS OF CALIFORNIA v. FCC

In Sable Communications of California v. FCC, the Supreme Court of the United States considered the constitutionality of § 223(b) of the Communications Act, which banned indecent and obscene interstate commercial telephone messages. In Sable, the Court held that although the ban on obscene interstate telephone messages was lawful, the ban on indecent speech was nonetheless constitutionally impermissible.

In Sable, Sable Communications offered sexually oriented pre-recorded telephone messages, otherwise known as "dial-a-porn." The messages were accessible to both local and long-distance callers. Fearing criminal or civil penalties under the statute, however, the company subsequently filed

161. Id.
162. See Passler, supra note 90, at 148.
163. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989). Because of the factual similarities between the cases, the outcome of Sable had considerable impact upon the court's decision in ACT II.
165. See 47 U.S.C. § 151 (1988). Amended in April 1988, § 223(b) of the Communications Act prohibits indecent and obscene interstate commercial telephone communications. The statute in question at the commencement of Sable read:

"(b)(1) Whoever knowingly—

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

"shall be fined not more than $50,000 or imprisoned not more than six months, or both."

166. Id. at 117.
167. Id. at 124.
168. Id. at 125.
170. Sable, 492 U.S. at 118.
suit in district court for declaratory and injunctive relief against the enforcement of § 223.\textsuperscript{171}

 Rejecting Sable’s argument that the statute “was unconstitutional because it created a national standard of obscenity,”\textsuperscript{172} the district court refused to issue an injunction against enforcement of the statute’s prohibition against obscene telephone messages.\textsuperscript{173} Nevertheless, the court concluded that the statute’s ban on indecent speech was both overbroad and unconstitutional.\textsuperscript{174} Therefore, the court ordered an injunction “prohibiting enforcement of § 223(b) with respect to any communication alleged to be ‘indecent.’”\textsuperscript{175}

 On June 23, 1989, the United States Supreme Court affirmed the appeals court’s decision\textsuperscript{176} and upheld the appeals court’s injunction against § 223’s ban on indecent telephone messages.\textsuperscript{177} The government may constitutionally limit individual freedom of expression; however, it must use the least restrictive means necessary to achieve the state’s articulated compelling interest.\textsuperscript{178} In this instance, the Court reasoned that although shielding minors from potentially harmful messages is a compelling state interest, the regulation was not “designed to serve those interests without unnecessarily interfering with First Amendment freedoms.”\textsuperscript{179}

 In striking down the statutory ban on indecent telephone messages, the Court summarily rejected the government’s reasoning.\textsuperscript{180} First, the Court

\textsuperscript{171} Sable brought the action to protect itself from any criminal investigation, prosecution, or civil action initiated by either the FCC or Justice Department. Id.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id. at 119.

\textsuperscript{176} Id. at 115. First, the Court rejected Sable’s contention that the statute created an impermissible national standard for obscenity. Id. at 124. The Court compared § 223 with federal statutes permissibly prohibiting the mailing of obscene materials. Id. at 124-25; see Hamling v. United States, 418 U.S. 87 (1974). Additionally, the Court noted that although Sable Communications might incur substantial costs tailoring their messages to “contemporary community standards,” such a burden does not make the statute constitutionally impermissible. The Court suggested means by which Sable Communications could tailor its messages to meet “contemporary community standards.” The Court’s suggestions included the use of operators to screen the locale of incoming calls, or block calls from certain areas. Sable, 492 U.S. at 126.

\textsuperscript{177} Sable, 492 U.S. at 126.


\textsuperscript{179} Sable, 492 U.S. at 126 (quoting Hynes, 425 U.S. at 620).

\textsuperscript{180} First, the government argued that Pacifica justified a complete ban on indecent telephone messages. Id. at 127. Second, it contended that there were no alternative means to prevent children from gaining access to the indecent messages. Id. at 128. The government claimed “enterprising youngsters” might gain access to the messages. Id. Lastly, the government maintained that Congress, by passing legislation mandating a complete ban on the
rejected the government’s attempt to use *Pacifica* as justification for a total ban. 181 *Pacifica* did not involve a total ban on indecent broadcasts. 182 Similarly, “[t]he Court in *Pacifica* was careful ‘to emphasize the narrowness of [its] holding.’” 183 *Pacifica*, therefore, could not be used to support the government’s case in *Sable*. 184 In addition, the Court characterized as “quite unpersuasive” the government’s suggestion that no alternative to a total ban existed. 185 Pointing to the FCC’s own findings, the Court indicated that personal credit card numbers, access codes, and scrambling rules were satisfactory less restrictive measures. 186 Finally, in spurning the government’s suggestion that the Court should defer to Congress, the Supreme Court held that it was within its legitimate function to determine the constitutionality of the law. 187

Within the Court’s rejection of the government’s case in *Sable* was an implicit expression of disapproval for the FCC’s prohibition of broadcast indecency. 188 Although *Sable*’s immediate effect was to make it more diffi-

messages, had determined that the FCC’s rules were insufficient. The government argued that, in this instance, the Court must defer to Congress. *Id.* at 129.

181. *Id.* at 127. The Court also noted that *Pacifica* relied upon the “uniquely pervasive” nature of the broadcast medium to justify the levied restrictions. *Id.* Private commercial telephone messages, however, fail to involve a “captive audience.” *Id.* at 128. The messages at issue in *Sable* typically will not involve unwilling listeners. Clearly, “[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message . . . [D]ial-a-porn service[s] are] not so invasive or surprising that [they] prevent[] an unwilling listener from avoiding exposure to it.” *Id.* at 128.

182. *Id.* at 127.

183. *Id.* at 128.

184. See Passler, supra note 90, at 155-56.

185. *Sable*, 492 U.S. at 128.

186. *Id.*

187. The Court held that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.” *Id.* at 129.

188. Justice Scalia highlighted the underlying value judgement made by the Court in *Sable*:

> The conclusion of the reasoning in . . . our opinion is as follows:
> “For all we know from this record, the FCC’s technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.” We could as well have said:
> “We know from this record that the FCC’s technological approach to restricting dial-a-porn messages to adults who seek them would be inadequate, since some enterprising and disobedient young people would manage to secure access to such messages. Since this is the case, it seems to us that § 223(b) is a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.”

*Id.* at 131-32 (citation omitted).

Thus, Justice Scalia suggests that the Court, in deciding the validity of the statutory prohibition, engaged in a balancing test. In this instance the Court measured the gravity of the
cult for the government to legitimize a twenty-four-hour ban on indecent broadcasting, subsequent decisions have had the apparent effect of narrowing the Court's holding.

harm to fall upon those few enterprising young persons exposed to the indecent messages and weighed it against the social utility of allowing those numerous adults and commercial entities to exercise their constitutionally protected right to receive and transmit indecent speech. See id. The Justice also noted, however, that:

where a reasonable person draws the line in this balancing process—that is, how few children render the risk unacceptable—depends in part upon what mere "indecency" includes. The more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the more reasonable it becomes to insist upon greater assurance of insulation from minors.

Id. at 132.

When applying this analysis to the twenty-four-hour ban on broadcast indecency, the Court's outcome seems less certain. It would appear that, at least according to Scalia, the Court must seriously consider the number of children that would be exposed to indecent broadcasts in spite of the mandated channeling measures as well as the proximity of the speech considered indecent to that considered obscene.


189. See Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 112 S. Ct. 966 (1992). The effect of Dial was to require those individuals who wish access to dial-a-porn services to file a written request with their phone company. See id. Following Sable, Congress amended 47 U.S.C. § 223(b)(2)(A) of the Communications Act to prohibit "any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call." Dial, 938 F.2d at 1539. The statute affords a "safe harbor" exception to those telephone providers that restrict access by requiring that the subscriber file a written request for access to dial-a-porn services. Id. In Dial, a dial-a-porn provider sued in federal court charging "that the law requiring written subscriptions would hurt business and unfairly restrict individual rights." Ruth Marcus, Justices Clear the Way for 'Dial-a-Porn' Shield, WASH. POST, Jan. 28, 1992, at A6. In holding that the regulation passed constitutional scrutiny, the court first looked to Sable and noted that "[t]he government is empowered to 'regulate the content of constitutionally protected speech in order to promote a compelling government interest if it chooses the least restrictive means to further the articulated interest.' " Dial, 938 F.2d at 1541 (quoting Sable, 492 U.S. at 126). Accordingly, the court reasoned that in order for Dial to prevail, it must show that there are other less restrictive approaches that are "just as effective in achieving its goal of denying access by minors to indecent dial-a-porn messages." Id. (emphasis added). In holding that the district court erred in ruling that the less restrictive voluntary blocking system was adequately protective, the court pointed to a study showing that even after voluntary blocking became available in the New York area, only four percent of the 4.6 million residential telephone lines were blocked. Id. at 1542. In conclusion, the court noted that "voluntary blocking would not even come close to eliminating much of the access of children." Id. Further, the court stated "[t]he means must be effective in achieving the goal. . . . [In this instance] voluntary blocking . . . clearly is not an effective means." Id.

190. It is unclear from the court's holding in Dial whether the less restrictive means proposed by the regulation's opponents must be "just as effective" as the government's regulation,
IV. CHALLENGING THE TWENTY-FOUR-HOUR BAN ON INDECENCY: ACT II

A. Justification for a Total Ban on Broadcast Indecency: FCC Concludes that a Total Ban on Broadcast Indecency is Constitutionally Permissible

Following the Court's decision in Sable, the FCC asked the circuit court of appeals for a remand of ACT I.\footnote{191 ACT II, 932 F.2d 1504, 1507 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281-82 (1992).} The remand would permit the agency to gather a more complete record of relevant data concerning children's viewing habits and the propriety of indecent broadcasting.\footnote{192 Id. at para. 16.} In September 1989 the court granted the request.\footnote{193 Id. All interested parties were to be allowed an opportunity to submit relevant information. Id.}

On remand, the FCC solicited public comment on the twenty-four-hour ban upon broadcast indecency.\footnote{194 Id. Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Notice of Inquiry, 4 FCC Rcd. 8358 (1989) [hereinafter Notice of Inquiry].} Specifically, the agency requested data on children's access to broadcast sources, their viewing habits, alternative means of restricting children's access, and the availability of indecent material for adults in non-broadcast media.\footnote{195 Id. at para. 1 n.6. Almost 88,000 responses supported a 24-hour prohibition. Id.}

On August 6, 1990, the FCC issued its report,\footnote{196 Id. Enforcement Report, supra note 35. The FCC received over 92,500 responses. Id. at para. 1 n.6. Almost 88,000 responses supported a 24-hour prohibition. Id.} concluding that, under Sable, the twenty-four-hour-ban on broadcast indecency was constitutionally permissible.\footnote{197 Id. at para. 2. The FCC stated that the indecency ban "comports with the constitutional standard the Supreme Court enunciated in Sable for the regulation of constitutionally protected speech." Id.} It determined there was a reasonable risk that significant numbers of children are tuned to broadcasters at all hours.\footnote{198 Id. Enforcement Report, supra note 35, at para. 2. In reaching its conclusions the FCC addressed two critical issues: the pervasiveness and accessibility of the broadcast medium to children, id. at paras. 34-65, and whether any less restrictive means could accomplish the government's goal of protecting children from indecent broadcasts. Id. at paras. 69-89.}

In addressing the issue of broadcasters' pervasiveness, the FCC examined the statistical data for both radio and television. The data indicated that over 10% of the radio listening audience from midnight to 6 a.m. consists of 12-17 year olds.\footnote{199 Id. at paras. 39, 49.} The data regarding television demonstrated that the percentage of children aged 12-17 during the late evening audience is equal to or greater than that of adults. Id. at para. 51.

The FCC, however, failed to squarely address the issue of whether exposure to indecent broadcasts actually harms children. While both evidence to support and rebut the conclusion was presented to the agency during the course of their inquiry, id. at para. 17, the FCC stated that "[i]rrespective of the continuing social science debate . . . as a legal matter, it is well
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concluded that "[n]either time channeling nor ratings and warning devices permits effective parental control . . . and technologies that may permit control are not currently available." The agency also noted that alternative sources for indecent material were available to consenting adults. Because of these alternatives, the FCC concluded that the twenty-four-hour prohibition would not result in significant interference with adults wishing to view or listen to indecent programs.

B. ACT II: Twenty-Four Hour Ban on Indecent Broadcasts Rejected

In ACT II, the United States Court of Appeals for the District of Columbia followed the reasoning of the ACT I court and unanimously invalidated the FCC's congressionally mandated rule banning indecent broadcasts on a 24-hour basis. In reviewing the agency's order, the court found merit in the petitioners' constitutional attack upon the ban. The court, however, rejected the petitioners' contention that the FCC's definition of indecency was both vague and overbroad.

The court in ACT II only briefly revisited the issue of vagueness and overbreadth. Using reasoning similar to that in ACT I, the court concluded that exposure of children to such material may be harmful, even if that effect has not been completely proven scientifically. "Id. at para. 18; see also Ginsberg v. New York, 390 U.S. 629, 642 (1967) ("[w]hile these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either. 'We do not demand of legislatures 'scientifically certain criteria of legislation.' ") (quoting Magrath, The Obscenity Cases: Grapes of Roth, 1966 SUP. CT. REV. 7, 52).

199. See Enforcement Report, supra note 35, at para. 2. Addressing the issue of whether the twenty-four-hour-ban was tailored in a sufficiently narrow manner to survive constitutional scrutiny, the FCC examined the effectiveness of the previous time-channeling enforcement policy, id. at paras. 70-75, ratings or warnings, id. at paras. 76-79, and other technological methods for limiting children's access to indecent broadcasts, id. at paras. 80-83. The agency concluded time-channeling and warnings were flawed because they relied on parental supervision. Id. at paras. 70, 79. Additionally, ratings and warnings were considered ineffective because listeners often "graze" stations. Id. at para. 79. This random tuning behavior, the agency determined, would likely render ineffective any warnings. Id. Lastly, the FCC concluded that no current technology could restrict children's access to indecent broadcast programming. Id. at 80.

200. Enforcement Report, supra note 35, at paras. 84, 86.

201. Id. at para. 92 (concluding that "[a]dults . . . have other [non-broadcast] means to access such [indecent] material should they so desire"); id. at 86. Such access includes the media of cable television, id. at para. 84, satellite programming, id. at para. 87, books, magazines, and video or audio cassettes, id. at para. 88.


203. Id. at 1508-09.

204. Id. at 1508.

205. See id.
the issue was resolved in Pacifica.\textsuperscript{206} As before, the court rejected the legitimacy of either argument.\textsuperscript{207}

In renouncing the total ban on broadcast indecency, the court found that the ban did not pass strict scrutiny.\textsuperscript{208} Moreover, the fact that Congress itself mandated the ban did not affect the court's view that such a prohibition could not withstand constitutional scrutiny.\textsuperscript{209}

Addressing the developments since the court's decision in \textit{ACT I}, the court noted that nothing had reduced the "precedential force" of its prior decision.\textsuperscript{210} In sum, the court held that neither the FCC's ban on indecent broadcast material, nor the congressional mandate could pass "constitutional muster."\textsuperscript{211} The court subsequently remanded the proceeding to the FCC, directing the agency to resume its plan to redetermine the times during which indecent material may be broadcast.\textsuperscript{212} Despite the government's request, the Supreme Court voted 6-2 not to rehear the case.\textsuperscript{213}

\begin{itemize}
  \item \textsuperscript{206} \textit{Id}. The court stated that it had "already considered and rejected a vagueness challenge to the Commission's definition of indecency. In \textit{ACT I}, we noted that the Supreme Court, entertain[ed] a similar challenge in Pacifica. . . . In our view, the Supreme Court's decision in Pacifica dispelled any vagueness concerns attending the definition." \textit{Id}. (citing \textit{ACT I}, 852 F.2d 1332, 1339 (D.C. Cir. 1988), vacated, 932 F.2d 1504 (D.C. Cir. 1991)).
  \item \textsuperscript{207} \textit{Id}.
  \item \textsuperscript{208} \textit{Id}. at 1509 (failing to provide further reasoning other than to state that "neither the Commission's action prohibiting the broadcast of indecent material, nor the congressional mandate that prompted it, can pass constitutional muster under the law of this circuit").
  \item \textsuperscript{209} \textit{Id}. at 1505.
  \item \textsuperscript{210} \textit{Id}. at 1509.
  \item \textsuperscript{211} \textit{Id}.
  \item \textsuperscript{212} \textit{Id}. at 1510. The court stated, "[o]ur decision today effectively returns the Commission to the position it briefly occupied after \textit{ACT I} and prior to congressional adoption of the appropriations rider." \textit{Id}. The court directed the FCC to specifically consider "the appropriate definitions of 'children' and 'reasonable risk' for channeling purposes, the paucity of station- or program-specific audience data . . . and the scope of the government's interest in regulating indecent broadcasts." \textit{Id}.
  \item \textsuperscript{213} Children's Legal Found. v. Action for Children's Television, 112 S. Ct. 1281-82 (1992). While the justices failed to indicate their reasons for denying certiorari, the arguments advanced by the respondents were largely procedural. See Brief for the Respondents, Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), \textit{reply to petition for cert. filed}, (U.S. Dec. 16, 1991) (U.S. Nos. 91-833, 91-952), \textit{cert. denied}, 112 S. Ct. 1281-82 (1992). The respondents, in arguing that the Court has no basis for granting certiorari, note that the ban was previously endorsed by seven individual judges without any dissent, \textit{id}. at 12, that there is no conflict among the circuits, \textit{id}. at 12, 14, that a grant of certiorari would "be undesirable" because of the likelihood that Justice Thomas would be unable to review this case due to his earlier participation in the appeals court's decision, \textit{id}. at 19 n.38, that certiorari is inappropriate to determine if the lower court reached a proper result on the facts, \textit{id}. at 17, and also, because the appeals court remanded the case to the FCC for further proceedings, the matter lacks finality, \textit{id}. at 12, 18-19. The court's denial of certiorari, however, has no precedential value. See Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366 n.1 (1973).}
\end{itemize}
V. ANALYSIS: ACT II'S FLAWED REASONING

The court in ACT II failed to undertake a proper appraisal of the constitutionality of the FCC's broadcast indecency regulation. The court, in an opinion almost devoid of analysis, reached a foregone conclusion without addressing factual circumstances which should have been considered.214 The Court in ACT II relied too heavily upon the court's previous analysis and factual conclusions in ACT I and thereby compromised the validity of its conclusions.215

A. Factual Deficiencies

The court in ACT II fails to consider the unique role of broadcasters as a public trustee216 as well as the medium's pervasive presence in society.217 Additionally, ACT II fails to address the significant factual record compiled by the FCC and mandated by the court following ACT I.218 This record evinces both the broadcasters' significant influence among young children and the harmful effects of their exposure to indecent broadcasting.219

Thirdly, ACT II fails to consider adequately the state's compelling interest in protecting the privacy of the home.220 First recognized in Pacifica, an individual's right to privacy and to be left alone outweigh the First Amendment concerns of an intruder.221 The privacy challenge was not at issue before the ACT I court,222 therefore, in adopting the court's analysis in ACT I, the ACT II court failed to consider this issue.223 Finally, the court failed to distinguish radio and television from dial-a-porn or magazines.224 Radio and television, unlike other media, may, without any prior warning as to the

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214. In holding that "nothing else in the intervening thirty-four months" reduced the force of its holding in ACT I, the court evidences its failure to address certain relevant factual considerations. ACT II, 932 F.2d at 1509.
215. Id. at 1508 (stating that "circuit precedent [ACT I] compels our rejection today of a total ban on the broadcast of indecent material").
216. See supra notes 9, 87 and accompanying text.
217. See supra notes 9, 88 and accompanying text. Not only is broadcasting pervasive, it, unlike dial-a-porn, or indecent magazines, is "uniquely accessible to children, even those too young to read." FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).
219. See supra notes 193-213 and accompanying text.
221. Pacifica, 438 U.S. at 748.
222. See ACT II, 932 F.2d at 1505.
224. See ACT II, 932 F.2d at 1509 (relying on Sable's total ban on indecent commercial telephone messages to illustrate "the strict constitutional standard that government efforts to regulate the content of speech must satisfy").
program's content, inadvertent exposure an audience member to a potentially offensive or harmful message. By failing to recognize that broadcasters operate within a uniquely regulated medium, the court ignores Supreme Court precedent holding that broadcasters are subject to "restrictions on indecent speech that might be impermissible for other media." In sum, these four factual omissions prevented the ACT II court from conducting an appropriate legal analysis.

B. Analytical Inadequacies and Inappropriate Conclusions

The ACT cases are unique because they involve a direct conflict between a compelling state interest and a fundamental constitutional right. In such instances, the government may serve its interest, but it must do so through narrowly drawn regulations in which the means are carefully tailored to achieve the articulated ends. Since both ACT I and ACT II recognize the state's compelling interest in protecting children from indecent speech, the central issue in both cases revolves around the degree of precision to which the state's regulation must be tailored. According to Sable, these regulations are permissible if they are the "least restrictive means [necessary] to further the articulated interest." The court in ACT II first should have thoroughly considered both the nature and weight of the state's compelling interests. The court failed to weigh the state's additional fundamental concern with privacy, the new evidence of children's exposure to broadcasters at all hours, and the de-

226. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 124 (1989). While the individual receiving the broadcast may turn the receiver off, the individual nonetheless does not avoid the initial effects of the offensive programming. Similarly, in the instance of children, they may, of course, not choose to end the transmission.
228. See generally ACT I, 852 F.2d 1332 (D.C. Cir. 1988) (involving a conflict between the state's compelling interest in children and the fundamental right of free speech); ACT II, 932 F.2d at 1504 (involving a conflict between the state's compelling interest in children and the fundamental right of free speech).
229. Sable, 492 U.S. at 126.
230. See, e.g., ACT II, 932 F.2d at 1506.
231. Sable, 492 U.S. at 126.
232. See supra note 220 and accompanying text.
233. See supra notes 198-99 and accompanying text.
gree of harm incurred by children exposed to indecent broadcasts.\textsuperscript{234} If the court had examined these issues, it would have found the government's interests more compelling than it previously did in \textit{ACT I}. Second, the court should have weighed the relative effectiveness of channeling against the effectiveness of a total ban.\textsuperscript{235} Doing so would clearly show that a total ban is more effective. Third, the court should have considered the fact that broadcasting is a unique forum in which speech may be regulated to a greater extent than other media.\textsuperscript{236} Lastly, the court should have balanced the utility of the government's aforementioned compelling interests against the resultant infringement upon the fundamental right to free speech.\textsuperscript{237} Of course, a problem remains as to how to balance these interests. The Supreme Court has noted that "where a reasonable person draws the line in this balancing process—that is, how few children render the [infringement upon fundamental rights] unacceptable—" depends upon the degree of harm evidenced.\textsuperscript{238} Indeed, according to Justice Scalia such a process necessarily involves "value judgement[s]."\textsuperscript{239} In this case, it is sufficient to conclude that under an appropriate analysis, the courts or Congress should acknowledge the constitutional permissibility of greater restrictions upon the broadcast of indecent programming.

\section*{VI. CONCLUSION}

Freedom of expression is a fundamental right protected by the First Amendment to the Constitution. Children's interests, however, remain compelling to both parents and the government. It becomes a difficult, value-laden task when courts must arbitrate a conflict between the two.

In \textit{Action for Children's Television v. FCC}, the United States Court of Appeals for the D.C. Circuit directed the FCC to cease enforcement of a congressionally mandated twenty-four-hour ban on indecent broadcasts. In holding that the ban was unconstitutional, the court failed to properly consider critical factual considerations. These omissions prevented the court from accurately weighing the state's compelling interest within a uniquely regulated medium. The court in \textit{ACT II}, therefore, inappropriately reached its conclusion that the FCC's ban was not the least restrictive means necessary to achieve the government's compelling interests. Under an appropriate analysis, a total ban likely remains unconstitutional, however, the weight of

\begin{thebibliography}{99}
\bibitem{234} See supra notes 198-99 and accompanying text.
\bibitem{235} See supra note 188 an accompanying text.
\bibitem{236} See supra note 227 and accompanying text.
\bibitem{237} See supra note 188 and accompanying text.
\bibitem{238} Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 132 (1989) (Scalia, J., concurring); see supra note 188.
\bibitem{239} Sable, 492 U.S. at 131 (Scalia, J., concurring).
\end{thebibliography}
the government's compelling interests and the unique nature of the broadcast medium permits the FCC to constitutionally further constrict the current "safe harbor" for indecent broadcasts.

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