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REGULATION OF INDECENCY IN POLITICAL BROADCASTING

The First Amendment guarantees of freedom of speech and of the press have long been in tension with the public’s right to be free from invasions of privacy. Nowhere has the tension been sharper in recent years than in the area of governmental intervention into the affairs of the broadcast media. Indecency in political broadcasting is one situation in particular in which these values are likely to come into conflict. This article examines this situation; specifically, it considers whether the government can proscribe “indecent” political commercials and broadcasts.

Two recent legal disputes highlight the problem. In \textit{FCC v. Pacifica Foundation},\textsuperscript{1} the Supreme Court upheld Federal Communications Commission (FCC) sanctions against a radio station for an “indecent” broadcast of words which the Commission found to be sexually offensive. In so holding, the Court reaffirmed the government’s authority to regulate the broadcast media.

The problem of regulation of indecency in political broadcasting arose again during the 1978 gubernatorial primary in Georgia. J.B. Stoner, a candidate for the Democratic nomination, sponsored a series of television commercials which included the assertion that “[i]f Busbee [Stoner’s opponent] is re-elected, he will pass more civil rights that take from the whites and give to the niggers.” Responding to a complaint filed by Julian Bond, a well-known black politician, the FCC determined that it could not restrict such broadcasts.\textsuperscript{2} Bond compared Stoner’s use of the word “nigger” to the indecency which was broadcast in \textit{Pacifica}. The FCC rejected his claim, noting that the Supreme Court limited the application of the statutory prohibition in \textit{Pacifica} to sexual or excretory “indecency.”\textsuperscript{3}

This article focuses on two situations in which the First

\textsuperscript{1} 438 U.S. 726 (1978). The Supreme Court upheld the imposition of a $100 fine against a New York radio station, WBAI, for a midafternoon broadcast of a comedy routine written and performed by George Carlin which featured a number of “profane” words. The routine, entitled “Filthy Words,” concerned society’s attitude toward certain words, particularly those highlighted in the monologue. (For a transcript of the monologue, see 438 U.S. at 751-55). After receiving a complaint from one listener, the FCC determined that the broadcast violated the ban on indecent language imposed by 18 U.S.C. § 1464 (1976).

\textsuperscript{2} Julian Bond, 69 F.C.C. 2d 943 (1978).

\textsuperscript{3} Id. at 944.
Amendment guarantees of freedom of speech and of the press may conflict with the countervailing right of the public to be free from exposure to certain types of speech: first, the government's ability to extend its prohibition against indecency to offensive speech not currently prohibited, such as that used by Stoner; second, the use of "indecent" language, as defined in *Pacifica*, by a political candidate.

The article considers both the constitutional and statutory aspects of the regulation of indecency in political broadcasting. The discussion is limited to considering "indecency," a term excluding obscenity or incitement to violence, because the government's power to regulate these types of speech is well established. Indecent speech would be protected if used in the print media, since it does not fall within the established First Amendment exceptions. The basic constitutional question, therefore, is whether the broadcast media are inherently different from the print media, so as to justify different treatment of indecent political speech. This article will contend that they are not inherently different.

In the constitutional analysis, both sexual and non-sexual forms of indecency will be considered. The Supreme Court has, thus far, defined the prohibited statutory indecency to include only excretory and sexual language. This standard is not constitutionally mandated. The contention underlying Bond's complaint is that non-sexual offensiveness should also be subject to regulation by the government. Whatever legitimate state interests are furthered by the prohibition of sexual indecency may also be served by the broader regulation of other offensive speech. The article contends that, in determining what forms of speech may be regulated as "indecent," it is improper summarily to exclude non-sexual speech as the FCC has done.

The second aspect of the problem concerns statutory interpretation. If it is constitutionally permissible to regulate indecent political speech, do the applicable statutes authorize such interference? Certain federal statutes prohibit the broadcast of indecent speech, while others prohibit censorship by the FCC and broadcasting stations. In resolving this conflict, this article concludes that indecent political speech is generally not within the reach of the statutes banning indecency.

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4 See notes 22-41 and accompanying text infra.
5 See Part IA1 infra.
6 *Pacifica*, 438 U.S. at 739.
7 See notes 147-49 and accompanying text infra.
The governmental interest asserted in regulation is the need to protect the public from unwanted, indecent speech. This claim requires an examination of the scope of indecency and the justifications for its suppression.

1. Relation to unprotected speech—Some speech is so offensive to society that it is absolutely unprotected. This category of speech—obscenity—is limited strictly to "works which, taken as a whole, appeal to the prurient interest in sex [as determined by the application of contemporary community standards], which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Since obscenity does not have constitutional protection, it is subject to full regulation within the context of the broadcast media, as well as within the contexts of other media.

The only indecency standard adopted by the Supreme Court proscribes offensive references to "excretory or sexual activities or organs." This standard, based on offensiveness and application to sexual references, indicates that indecency, at least as it is understood by the FCC in the cases it prosecutes, is strongly related to obscenity. Since the FCC includes only sexual indecency within the statutory prohibition, the Court has never had to deal with justifications for regulating other sorts of offensive speech. Therefore, one approach to determine the reach of "indecency" is to examine the reasons for the prohibition of obscenity.

Not only sexually-offensive speech, but also non-sexual speech, such as racial and religious epithets, may be offensive. For example, many people find the word "nigger" deeply offensive. In *Beauharnais v. Illinois*, the Supreme Court upheld prohibition

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* Miller, 413 U.S. at 24.
* For a discussion of this "two-level" theory, see notes 61-64 and accompanying text infra.
* Pacifica, 438 U.S. at 739. See notes 155-63 and accompanying text infra. Indecency, at least in the broadcast sense, is a superset of obscenity.
* See Part IA2 infra.
* 343 U.S. 250 (1952). *Beauharnais* involved speech which, if directed at an individual, could be deemed libelous and thus unprotected. The leaflets distributed by the defendant called on the Chicago government to "halt the further encroachment, harassment, and invasion of white people . . . by the Negro" and claimed that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns, and marijuana of the negro, surely will." 343 U.S. at 252.
of such an epithet as a form of group libel. While \textit{Beauharnais} is of dubious precedential value,\textsuperscript{14} it raises the issue of whether racist speech, while offensive to many, can properly be regulated. The threat posed by most racist speech is twofold: offensiveness to the general audience and disparagement of the target racial or religious group. Furthermore, such speech subverts fundamental American principles of equality. \textit{Beauharnais}, however, was based on group libel, not the offensiveness of the speech, and is therefore distinguishable from indecency cases where the speech is proscribed precisely because it is offensive. In group libel cases, the evil to be avoided is breach of the peace.\textsuperscript{15} The mere offensiveness of such epithets is not a justification for regulation, however, since it is the idea and not the speech which gives offense.\textsuperscript{16}

Nevertheless, the Supreme Court has held that where the speech itself causes harm, it may be regulated. Words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are unprotected by the First Amendment.\textsuperscript{17} While this "fighting words" doctrine may seem able to subsume racially offensive speech, there are two problems with including such speech within its scope. First, in order for spoken words to be considered "fighting words," they must be void of any valid communicative function.\textsuperscript{18} But the use of racially offensive terms should be viewed as a communication of ideas. It is the racist thought which give such words their offensive nature, and if it is the idea that gives offense, then the speech is protected.\textsuperscript{19} Second, in order for spoken words to constitute "fighting words" they must tend to provoke an immediate breach of the peace. It is questionable whether racial epithets have that tendency, especially in the broadcast situation. The FCC has determined that under the circumstances of Stoner's 1972 Senate campaign they did not.\textsuperscript{20}

\textsuperscript{14} See Collin v. Smith, 447 F. Supp. 676, 697-98 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978), in which the court upheld the right of American Nazis to march in a predominantly Jewish suburb of Chicago. In voting to grant certiorari in Collin, Justices Blackmun and White noted the need to resolve the possible conflict with \textit{Beauharnais} as to the prohibition of racially-offensive speech. 439 U.S. at 919.

The Court has noted that racial overtones do not strip speech of its First Amendment protection. See Bond v. Floyd, 385 U.S. 116, 134 (1966).

\textsuperscript{15} \textit{Beauharnais}, 343 U.S. at 254.

\textsuperscript{16} See notes 72-75 and accompanying text infra.

\textsuperscript{17} Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940).

\textsuperscript{18} Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).


An examination of the justifications for the prohibition of unprotected speech demonstrates that the reasons for the prohibition of indecency are closely related to those for the prohibition of obscenity. As the Court itself noted in Pacifica, "[indecent] words offend for the same reasons that obscenity offends." The justifications for the prohibition of "fighting words," it has been shown, do not lend themselves to the regulation of indecency.

2. Rationales for the prohibition of obscenity and indecency—In Miller v. California, a leading obscenity case, the Court concentrated on establishing a test for obscenity; minimal reference was made to the reasons for its prohibition. The only such explanation given by the Court was that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." That statement, however, is of little help in determining why obscenity alone is regulated. It fails to state a legitimate state interest different from that which would mandate regulation of any offensive speech.

Professor Kalven has suggested four justifications for the regulation of obscenity: "(1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values." He summarily dismissed the second justification as unfit for governmental concern: the state has no reason to care about adult sexual fantasies. The first justification, incitement of antisocial conduct, "evaporates in light of the absence of any evidence to show a connection between the written word and overt sexual behavior." Kalven’s
doubt has not been resolved since this formulation. A major government study found little if any effect of erotic material on sexual behavior. 27

The fourth justification, advocacy of improper sexual values, is easily dismissed as an improper target of regulation. In Kalven's words, "[i]t is hard to see why the advocacy of improper sexual values should fare differently, as a constitutional matter, from any other exposition in the realm of ideas." 28 All societal values are subject to criticism, including sexual values. The Supreme Court has permitted such advocacy; 29 it is only when the material itself violates the norm that it is subject to regulation. 30 Although Kalven also dismisses the arousal of disgust and revulsion as "an impossibly trivial base for making speech a crime," 31 this justification seems to be the one subsequently adopted by the Court. 32

One justification not suggested by Kalven is the maintenance of society's moral standards. Arguably, the state has a legitimate interest in preventing moral decay. The Supreme Court, in upholding a ban on obscene films, indicated that the government can legislate to maintain "the quality of life and the total community environment . . . ." 33 This view has been supported by a number of commentators, 34 and extends to the protection of an individual from self-harm and society from the effects of wide-

27 "In general, established patterns of sexual behavior were found to be very stable and not altered substantially by exposure to erotica. When sexual activity occurred following the viewing or reading of these materials, it constituted a temporary activation of individuals' preexisting patterns of sexual behavior." THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 25 (1970) [hereinafter cited as OBSCENITY REPORT]. The Commission also could "not conclude that exposure to erotic materials is a factor in the causation of sex crimes or sex delinquency." Id. at 27. The Commission noted that in Denmark, "the increased availability of explicit sexual materials has been accompanied by a decrease in the incidence of sexual crime." Id.


29 In Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89, the Court stated: It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.

30 Pacifica, 438 U.S. at 746 n.22; Robert Bork, Thomas M. Cooley Lectures, University of Michigan Law School (Panel Discussion, February 7, 1979).

31 Kalven, supra note 24, at 4.

32 See note 23 supra; Pacifica, 438 U.S. at 748-49. See also H. CLoR, supra note 28, at 198; W. Lockhart, Y. Kamisar & J. Choper, supra note 28, at 989.


spread moral decay. The thesis underlying this position is that society shares certain values which serve a cohesive function. The origins of these values are irrelevant; it is their general acceptance that gives them their current validity.35

The need to protect against moral decay, a justification for regulation, can be refuted by the inherent right of society to change its standards. Society's moral values have changed,36 particularly in the past two decades. Advocacy is permitted, in part, so that society can alter its values. If there is a right to make this choice, there must be a right to exercise it. The underlying assumption is that after considering the alternatives, society will indicate its choice by the general behavior of its members. One response to this argument is that it is the responsibility of the legislatures to gauge society's standards, and that some people may favor imposition of stricter standards than they would follow if left to decide for themselves. Another argument against regulation of indecency under this justification is that the best remedy for moral decay may not be to ban it but to counter it with speech.37

The effect which indecency has on children provides another rationale for its regulation. In considering obscenity cases, the Court has upheld a stricter standard of obscenity for material available to children.38 Regulation of otherwise protected speech thus depends on the audience as well as content; its availability to children may bring offensive speech within the scope of permissible regulation.39 Protection of children is not an absolute justification for regulation, however, since there is little evidence to support the contention that exposure to pornography is harmful to juveniles.40

The justifications for regulating obscenity which seem both to have been adopted and to be reasonable are its offensiveness to the public, the prevention of moral decay, and the protection of children. All of these can also be bases for regulation of indecency,41 which is offensive to many and violative of established

35 The separation of church and state does not prevent the imposition of Biblical or other religious standards which have been adopted by society as a whole and are not limited to any particular group. Henkin, supra note 34, at 407-11.

36 H. Cloer, supra note 28, at 192.

37 But see id., ch. 5.


41 See Pacifica, 438 U.S. at 748-50; Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Haiman, Speech v. Privacy: Is There a Right Not to be Spoken To?, 67 NW.
societal norms.

3. The relationship between indecency and offensiveness—Speech related to sex has historically been regulated. There are many types of speech or broadcasts, however, which are offensive but not generally subject to regulation. The Court has devised no justification for this peculiar treatment of sexual matters, yet it continues to uphold the same regulation by community standards which would be unconstitutional if applied to other forms of speech, such as violence, sacrilege, vulgarity, and prejudice. 42

The approach established by the Court in *Pacifica* for the regulation of offensive speech appears to involve two steps. First, the Court determines whether the speech is indecent. Second, if the speech is deemed indecent, the Court determines if it is the message and not just the method of expression which gives offense. If it is only the former, the speech has value to society and is protected despite its indecent nature. 43

Under the first part of this test, it is possible to determine that non-sexual material is indecent. The sexual and excretory limitation in *Pacifica* is the result of the FCC's interpretation of the statute, not a constitutional standard. 44 Indecency, according to the Court, is a general term which "merely refers to nonconformance with accepted standards of morality." 45 Nothing in this definition specifically includes sex and eliminates other subjects.

The justification for the regulation of indecency is the public's desire to be free from offensive communications. People find certain words or subjects upsetting and do not want to be confronted by them. Whatever the nature of a person's sensibilities, they represent individual values and choices and so deserve some deference. It is impossible, however, to defer to every individual's judgment without stripping our conversations and broadcasts of all their color and emotive force. 46 Therefore, protection must be limited to regulation of "patently offensive" speech—speech which many or most people find extremely offensive. This standard would probably be most applicable to sexual or excretory references, since they are traditionally regarded as most likely to

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43 *Pacifica*, 438 U.S. at 746-47.
44 The Court in *Pacifica* was only choosing between the FCC standard of patently offensive sexual or excretory references and *Pacifica*'s argument for an obscenity standard. Therefore, it did not consider whether the prohibition could be broader than that urged by the FCC. *Id.* at 738-39.
45 *Id.* at 740.
46 See notes 76-79 and accompanying text *infra.*
give offense.  

In the second part of the test for offensive speech which is subject to regulation, sexual references are less likely to be considered as carrying messages than other forms of potentially offensive speech. Offensive displays of violence, for instance, may raise questions and convey messages about our society. Sexual references, on the other hand, may or may not carry any messages.

There is no universal definition of "indecent speech." At a minimum, it is offensive speech relating to sexual or excretory matters which is not within the obscenity standard. It is possible to include non-sexual offensive speech, but only if it is generally valueless. The more offensive the speech, the more likely it will be found "indecent"; the greater its social value, the less likely it will be found "indecent." The context in which it is presented, such as the time of day or program, also bears on its "indecency." The limitation is that it must be the speech itself, not the ideas conveyed by the speech, that gives offense.

B. Protection of Political Speech

Opposing the interest in protecting citizens from unwanted offensive speech is the commitment to free speech enunciated in the First Amendment. It is necessary to examine both the reasons for protecting speech and the scope of speech to be protected.

1. Types of First Amendment analysis—One theory of free speech is "absolutist": the language of the First Amendment prohibits all governmental interference with speech. This position has been rejected by the Supreme Court in a large number of cases both upholding and rejecting restraints on speech. Close
to the "absolutist" position is the "maximum protection" theory proposed by Professors Dorsen and Gora, under which only certain "rigorously defined" categories of speech are subject to regulation, and then only under narrow circumstances. 52

Another theory, espoused by Professor Robert Bork, is that the only speech afforded First Amendment protection should be speech related to self-government. 53 Since the Constitution itself provides no clue as to the meaning of the First Amendment, the Court must look to the document as a whole. Since, in Bork's view, the purpose of the Constitution is to insure self-government, only speech relating to that function is protected by the First Amendment. 54 This narrow construction of the Constitution has been rejected by the Supreme Court. In contrast, the Court has held that the First Amendment protects non-political as well as political speech. 55

Regardless of which interpretation of the First Amendment is adopted, speech relating to the conduct of government is protected. The Court has clearly included the discussion of public affairs within the scope of the First Amendment. The underlying concept is that encouragement of the discussion of all viewpoints leads to the proper resolution of questions. The Court noted in Red Lion Broadcasting v. FCC, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," 56 and in another leading

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52 Address by Norman Dorsen, "The Burger Court and Free Expression: Property Rights or Maximum Protection," Thomas M. Cooley Lectures, University of Michigan Law School (February 6, 1979). These narrow circumstances include only military secrets, trade secrets, commercial misrepresentation, and assaultive or shocking speech "equivalent to a slap in the face."

53 Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 24-25 (1971). In discussing Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 257, 275 (1927) (Brandeis & Holmes, J.J., concurring), Professor Bork notes four benefits of free speech protection. These are:

1. The development of the faculties of the individual;
2. The happiness to be derived from engaging in the activity;
3. The provision of a safety valve for society; and,
4. The discovery and spread of political truth." Bork, supra.


56 395 U.S. 367, 390 (1969). This "marketplace of ideas" theory was first enunciated in
case, the Court mentioned the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Thus, political speech merits special protection. For the purposes of this article, "political speech" refers to any words used by a candidate for elective office in seeking that office. Paid political commercials, such as those sponsored by Busbee, are especially relevant to this discussion because they are totally within the candidate's control and are thus most likely to be reflective of the candidate's true beliefs and traits.

2. Applicable test—After establishing that the First Amendment protects discussion of public issues, it is necessary to determine which standard of review to apply to a particular regulation. The "clear and present danger" test, first enunciated in Schenck v. United States, is no longer dispositive. Although it has not been expressly overturned by the Court, Professor Kalven notes that it has fallen from use.

Another approach suggested for First Amendment questions is the "two-level" theory. Under this theory, speech is categorized

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57 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Prof. Kalven considers the Sullivan case to be the crucial opinion in First Amendment analysis because it identifies the discussion of public issues as the activity central to free speech.

The Amendment has a "central meaning"—a core of protected speech without which democracy cannot function, without which, in Madison's phrase, "the censorial power" would be in the Government over the people and not "in the people over the Government." This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt about why it is protected. The theory of the freedom of speech clause was put right side up for the first time.

Kalven, supra note 54, at 208. This conclusion is based on the Court's absolute rejection of seditious libel laws. He further states that "[t]he touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy." Id. at 209.

58 See text accompanying notes 2-3 supra.

59 249 U.S. 47 (1919). Under this test created by Justice Holmes, "[t]he question in every case is whether the words used are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. at 52. In obscenity cases, the "substantive evils" being prevented are those discussed in notes 22-41 and accompanying text supra.


Kalven also asserts that the Court in Sullivan rejected the concept of less strict scrutiny of state enactments than of acts of the federal government, which is another approach for First Amendment scrutiny of regulation. This standard, however, is inapplicable to the discussion of broadcast regulation, which is a federal issue. See Kalven, supra note 54, at 218-19.
as either protected or unprotected. Protected speech is free from almost all governmental interference whereas unprotected speech can be prohibited. The first category of speech is “that which is worthy enough to require the application of First Amendment protection” and the second category is beneath First Amendment concerns.” Due to its rigidity, this strict dichotomy is no longer valid in most areas. In New York Times Co. v. Sullivan, the Court held the dichotomy inapplicable to libel, one of the former bastions of the test. “Fighting words,” while putatively within this unprotected area, are excluded only if maintenance of the peace outweighs freedom of speech in the context in which they are used. Kalven asserts that “[n]o matter how speech is classified, there must still be First Amendment consideration and review. No category of speech is any longer beneath the protection of the First Amendment.”

The final approach is the balancing test. Professor Kalven rejects this approach, but his rejection is limited to the use of balancing for “sanctions . . . imposed for the specific purpose of restricting speech . . . , ” as they are in the case of defamation (the subject of Sullivan). A balancing approach is permissible, according to Kalven, in those cases in which “control of speech is a by-product of government action that is otherwise permissible.” It is unclear which of these two categories, as described by Kalven, would encompass regulation of the broadcast media. On the one hand, broadcast media regulation is “otherwise permissi-
ble” due to the need to allocate frequencies. On the other hand, regulation based on the offensive nature of the content is “imposed for the specific purpose of restricting speech.” However, even in Sullivan, as Kalven noted, the Court did not actually refuse to balance the interests of free speech and injury to reputation. Rather, it held that the “absolute” rule of non-liability for defamation of public figures does not include statements made with “actual malice.” Thus, the balancing approach seems to remain viable in broadcasting, if not for all media.

Finally, there is the approach which guarantees absolute protection for speech related to governmental functions. This analysis, offered by Kalven, is inadequate because it ignores countervailing interests. No matter how valuable speech of “governing importance” may be, it seems unreasonable to permit it when it is intended to and likely to cause an imminent breach of the peace or other “lawless action.”

The Court appears to have established a continuum of protected speech. It has rejected the Bork thesis, but has elevated speech concerning public issues to the status of most protected. The safeguards of the First Amendment have been most stringently applied to speech of “governing importance.” This policy is consistent with all the theories of free speech. Whether or not one believes that self-fulfillment and self-expression are important First Amendment values, these values and the “marketplace of ideas” principle are served by the stringent protection of “governing” speech. It serves the need of the speaker to express his or her views and the need of the audience to hear all ideas. The weight given to speech in the balancing test depends on the locus of the speech on the continuum. The more it relates to government, the more worthy it is of protection.

67 Id. at 217.

One author states that “[s]ince the guarantees for speech and press in the first amendment were intended to safeguard and promote effective self-government by the American people, then if our speech is to be effective to that end, our freedom of speech must embody the essential freedom to hear what is said. . . .” Comment, Freedom to Hear: A Political Justification of the First Amendment, 46 WASH. L. REV. 311, 328 (1971). See also Powe, Or of the [Broadcast] Press, 55 TEx. L. REV. 39 (1976).
The public's need to hear is greatest during electoral campaigns. In voting, the electorate utilizes the knowledge gained and the opinions formed in the campaign "marketplace." As the Supreme Court stated, "[i]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application to the conduct of campaigns for political office." 71

3. Aspect of speech to be regulated—A further question in the political speech area is how far regulation may intrude into the message. If political speech can be regulated when it is indecent, then it is necessary to sever the political content of the speech from the method of delivery. The difficult problem is what effect regulating the choice of words has on the content of the message. Offensiveness of content is not subject to regulation. 72 In Pacifica, the Supreme Court stated that

if it is the speaker's opinion that gives offense, that consequence is a reason for affording it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four letter words—First Amendment protection might be required. 73

This standard supports the FCC's approach in the complaints against Stoner. 74 The word "nigger" is offensive precisely because of the political and social meaning attached to it. Under the Court's interpretation of the First Amendment, the use of this racial epithet, despite its offensiveness to many, is protected. 75

As the Court's opinion in Pacifica 76 indicated, the use of profan-

72 See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).
73 Pacifica, 438 U.S. at 745-46.
74 Bond's complaint was the second such plea for FCC action against Stoner. In his 1972 bid for the Democratic Senatorial nomination, Stoner used commercials claiming that "[t]he main reason niggers want integration is because they want our white women." The FCC refused to prohibit these commercials, reasoning that the complaint was based on potential violence, not indecency. Atlanta NAACP, 36 F.C.C.2d 635 (1972).
76 438 U.S. at 746 n.22. The Court stated: "The Commission objects, not to [Carlin's]
ity can play an essential role in the discussion of public issues. The intensity of a candidate’s feelings plays an integral role in the message he or she presents. Words which provide emotive impact deserve protection. It is as unacceptable to control the choice of words as it is to control the ideas expressed, since controlling words results in controlling ideas. The Supreme Court adopted this position in noting that a state is not only prohibited from preventing a person’s expression of anti-draft sentiment, but cannot punish his display of the words “Fuck the Draft” on his jacket to express this viewpoint.\(^77\) The Court held that choice of words is an integral part of communication; the emotions attached to the word “fuck” were indeed part of the concept the defendant was trying to communicate.\(^78\) Moreover, the Court warned against assuming that “one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”\(^79\)

It is possible, however, to distinguish the prohibition of certain words in *Pacifica* from their permissibility in a situation similar to *Cohen*. In *Pacifica*, according to the Court, the “indecent” words were not a part of any exposition of ideas.\(^80\) When the same point of view, but to the way in which it is expressed.” The Court also stated: “A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.” *Id.* at 743 n.18.


\(^78\) *Id.* at 26. The Court stated that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message to be communicated.

As Professor Haiman notes, “it can hardly be maintained that phrases like ‘Repeal the Draft,’ ‘Resist the Draft,’ or ‘The Draft Must Go’ convey essentially the same message as ‘Fuck the Draft.’ Clearly something has been lost in the translation.” *Haiman, supra* note 41, at 189.

\(^79\) *See also Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam opinion upholding the right of a student to print the word “motherfucker” in a school newspaper); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (high school cannot prohibit teacher’s use of the word “motherfucker” in an educational context).

\(^80\) *Id.* at 26.

\(^81\) 438 U.S. at 746. It is possible to dispute the Court’s finding that the use of the “patently offensive” references to sexual or excretory functions and organs is not in itself political. In a footnote to the opinion, the Court analogized the use of indecency in discussing societal attitudes toward language to the use of obscene material in discussing societal attitudes toward obscenity. This analogy is unpersuasive, however, since obscenity, as a legal term, lacks serious political value; obscene or pornographic printed material, on the other hand, may be protected under some circumstances. Yet the Court in *Pacifica* summarily dismissed the possibility that the broadcast of Carlin’s monologue had any political or social value, despite the fact that it was part of a larger discussion of society’s treatment of profanity. *Id.* at 746.
words are used in the context of a discussion of public issues, as in *Cohen*, they are protected as a part of that discussion. 81 An alternative explanation is that the Court in *Pacifica* deliberately ignored the *Cohen* decision. This interpretation accounts for the Court's questionable determination that Carlin's use of indecent words was not part of his message. *Pacifica* may also indicate that the Court is retreating from *Cohen*.

The third aspect of the content offensiveness is the use of indecency in conjunction with, but not as an inherent part of, a political message. This type of speech has some political value because a candidate's choice of words and campaign techniques may be relevant factors in the voters' determination of the candidate's fitness for office. As for the relationship of the indecent speech to the message conveyed, however, the speech is much less a part of the "exposition of ideas" than is the indecent speech discussed above. The use of indecent speech for shock value bears little relation to protected political speech. As such, it is more liable to be regulated and weighs less heavily on the side of free speech. First Amendment principles, however, seem to require that any doubt as to the political nature of speech be resolved in favor of its permissibility.

Finally, protection only extends to speech made in the context of the campaign. One's status as a candidate for public office does not confer on the candidate a right to be free from the general restraints imposed on the public. The protection extends only to his or her candidacy, not to the candidate personally. A campaign cannot, for example, legitimize the distribution of obscene material by a candidate who happens to be seeking office.

II. **First Amendment Status of The Broadcast Media**

If indecency is not coextensive with obscenity, 82 the question of the constitutionality of broadcast media regulation of "indecent" speech arises. Because the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," 83 any regulation of the media, except for obscenity, 84 libel of private persons, 85 "fighting words," 86 viola-

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81 "[I]ndecency is largely a function of context—it cannot be judged in the abstract." *Id.* at 742. As the FCC later noted, "[t]he Supreme Court's decision in FCC v. Pacifica Foundation . . . affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast. . . ." WGBH Educ. Foundation, 69 F.C.C.2d 1250, 1254 (1978).

82 See notes 155-63 and accompanying text infra.

83 U.S. CONST. amend. I.

tions of national security, and certain advocacy of unlawful acts or violence appears to be unconstitutional. It is well established, however, that broadcasting, although within the scope of the First Amendment, is subject to regulation which may include a broader degree of content control than other speech. The Supreme Court has ruled, for example, that Congress may impose a right of reply requirement for persons or viewpoints attacked on television or radio, but that a similar state requirement imposed on newspapers violated freedom of the press.

This limitation on the protection of the broadcast media does not sanction unlimited regulation. Any interference must be justified to the extent that it interposes legitimate state interests in place of First Amendment values. It is therefore necessary to examine the reasons why "broadcasting . . . has received the most limited First Amendment protection" and to determine if those reasons justify regulating indecency in political broadcasts. These reasons, which will be considered separately, are the limited number of broadcast frequencies and the pervasive nature of the broadcast media.

A. The Scarcity Doctrine

The primary justification offered for the different treatment of broadcast media is the limited number of stations physically able to broadcast within a given area. The scarcity doctrine justifies

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66 Pacifica, 438 U.S. at 748.
67 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabbreviageable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." This doctrine originally appeared in National Broadcasting Co. v. United States, 319 U.S. 190, 226-227 (1943). See also Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). Many commentators have also noted its acceptance as a major justification for regulation. See Bazelon, FCC Regulation of the Telecommunications Press, 1975 DUKE L.J. 213 (1975); Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial
Congress' decision to award licenses to stations operating in the public interest. The basic rationale is that the government had to devise some method of allocating the limited number of available frequencies. While a number of systems were possible, such as awarding licenses to the highest bidder or by lottery, Congress elected to license those stations which best serve the public interest. The decision as to who would be the best licensee was vested in the FCC, which has the power to consider broadcasting content when determining whether the public interest is served. There are, however, two reasons why the scarcity doctrine does not justify the regulation of indecency in political broadcasting: the lack of a logical nexus between scarcity and content regulation, and the vagueness of the public interest standard.

1. Scarcity as a justification for content control—The scarcity doctrine has come under very strong criticism as a justification for content control. First, it is questionable whether radio and television frequencies actually are scarce resources. With the possible exception of a few major cities, there are no television markets in which the spectrum of available frequencies is saturated. It would be possible, from a purely technological standpoint, vastly to increase the number of stations in every market, especially given the recent development of a broad cable "spectrum." Economic rather than technical limitations have prevented the expansion of station ownership. In distinguishing between the print and broadcasting media, the problem of scarcity is misleading. There are only slightly fewer licensed television stations in the country than there are newspapers, and the addition of cable television will probably equalize the numbers.

Regulation of the Mass Media, 75 Mich. L. Rev. 1 (1976); Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Powe, supra note 70.


Id.


While some radio markets may be saturated, there is no scarcity of radio stations when compared with print outlets. See text accompanying note 102 infra.


Powe, supra note 70, at 57.

Id. at 56. Professor Powe goes on to state that if the concept of scarcity includes any consideration of intramedia competition, then newspapers . . . become more likely candidates for regulation. Virtually all cities have competition among at least three television stations and a dozen radio signals. Yet in only one of every twenty-five cities is there a competing daily newspaper available.

Id. at 57.
The 1768 daily newspapers in the country are far exceeded by the 
8034 licensed radio stations. Thus, scarcity of resources speaks 
no more forcefully for the regulation of broadcasting than it does 
for the regulation of the print media.

Even if there is scarcity of available frequencies, it is not appar­
ent that this situation justifies any content regulation. Despite 
the Supreme Court decisions upholding content control, there 
is nothing inherent in the need for frequency allocation which 
justifies interference with the content of a particular commercial 
broadcast. The general need to allocate does not justify such 
 thorough regulation of the broadcast media.

Professor Kalven offers a useful analogy for the allocation prob­
lem. The FCC's power to control access to broadcast frequencies 
is like the power held by a town meeting chairperson who can 
prevent two participants from speaking simultaneously but has 
no right of control over what they say in their allotted times. 
Content control of political commercials would not serve this allo­
cation function. The town meeting chairperson's duty is to insure 
that different points of view are considered. This function is best 
 served by allowing all candidates to speak freely. The chairperson 
exceeds his or her responsibility as much by interfering with the 
way a speaker's views are presented as by controlling what is said.

The mistake in using the scarcity doctrine as a rationale for 
content regulation lies in the assumption that once regulation is 
imposed, it can be expanded beyond its original purpose. Judge 
Bazelon has noted that the key to the doctrine "is the limited 
number of frequencies and not the mere existence of licensing." 
It is not apparent how the method of expression of a particular 
broadcast relates to the function of frequency allocation. At the 
extreme, it is conceivable that repeated use of indecency on the 
air justifies awarding a license to a new owner at renewal time, 
since licensing is related to allocation. It is wrong, however, to 
associate the imposition of a fine, such as that in Pacifica, with

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102 Id. at 56.
103 See cases cited in note 94 supra.
104 See Bollinger, supra note 94; Kalven, supra note 94, at 37. It is interesting, as 
Professor Kalven notes, that the broadcast media have generally accepted the regulation 
of content. "First, the industry has under-estimated its legal position and given up too 
soon. Second, on the assumption that its legal position is weak, it has neglected the 
possibility of building policy, not legal arguments, upon the First Amendment." Kalven, 
supra note 94, at 24 (emphasis in original).
105 Id. at 47-48.
106 Bazelon, supra note 94, at 223.
107 "[The argument] that technical scarcity necessitates licensing of broadcast facili­
ties, does not compel the conclusion that program content may be regulated." Note, supra 
note 42, at 1351. See also Kalven, supra note 94.
the need to allocate scarce resources.\textsuperscript{108}

2. \textit{The "public interest" as a justification for content control}—In choosing criteria for allocation of frequencies, Congress decided to grant licenses to those stations which best serve the public interest.\textsuperscript{109} This standard is vague, since the statute does not define the term "public interest." For example, the public has a strong interest in knowing all it can about the candidates for public office. Therefore, it is at least arguable that the public interest is better served by allowing candidates to say whatever they wish than by showing a censored version of the broadcast. A candidate's decision to use "indecent" language is one factor the voters may wish to take into account. If a voter finds a particular term grossly offensive, whether it is the word "nigger" or one of the words proscribed in Pacifica, he or she may decide to vote against a candidate for using it. In addition, the emotive force behind some words is as important to the speech as the idea. To prohibit Stoner from saying "nigger" would deny the voters of Georgia the chance to judge the depth of his racism; to prevent another candidate from using vulgarity would deny voters the chance to judge the strength of the candidate's feelings. The public interest is best served when freedom from offensive speech yields to the needs of the electoral system. Seen in this light, the decision to meet the need for frequency allocation by regulating in the public interest does not justify any control over the content of political broadcasts. Thus, the scarcity doctrine is a weak justification for content control, particularly in a political context.

B. \textit{Pervasive Nature}

The second justification for controlling the broadcast media is their "pervasive presence in the lives of all Americans."\textsuperscript{110} There are two aspects to this theory: the "captive" nature of the audience and the great influence of the broadcast media.

1. \textit{Captive audience}—Under one prong of the pervasive na-

\textsuperscript{108} As one author suggested in a discussion of the Court of Appeals' decision in Pacifica, "[t]hat governmental evaluation of program content might be necessary in this limited context [specific licensing decisions] ... by no means supports proscription of specific words or a specific broadcast." Comment, \textit{Pacifica Foundation v. FCC: "Filthy Words," the First Amendment, and the Broadcast Media}, 78 \textit{COLUM. L. REV.} 164, 177 (1978).

\textsuperscript{109} 47 U.S.C. § 307(a) (1976) provides: "The Commission, if public convenience, interest, or necessity will be served thereby ... shall grant to any applicant therefor a station license provided for by this chapter."

\textsuperscript{110} Pacifica, 438 U.S. at 748; Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). See also Bazelon, supra note 94, at 221 ("It is simply impossible to exaggerate the impact of TV in particular on our lives and the lives of our children.").
ture approach, regulation is permitted because of the "passive" nature of the audience's reception of the message. A commercial, for instance, is thrust upon the viewer of an entertainment program. The commercial is, to a degree, an involuntary exposure to material which may be indecent.

The right to privacy may in some circumstances justify governmental intrusion into broadcast content. Courts have applied it to protect the viewer or listener from language deemed "indecent" under 18 U.S.C. § 1464.111 In such a situation, the First Amendment is balanced against the right of the viewer to be free from the intrusion of unwanted messages.112 The Supreme Court has noted that "the right of every person 'to be let alone' must be placed on the scales with the right of others to communicate. . . . [N]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit. . . ."113 This right, however, has limited applicability to the broadcast media. While the right "to be let alone" has been applied to justify content regulation,114 television and radio constitute a voluntary exposure to possibly unwanted messages. The audience is aware of the potential offensiveness of commercials or regular programming, whether the offensiveness is sexual, racist, violent, or sexually stereotyped. By watching television, the viewers voluntarily expose themselves to the possibility of being offended. The Supreme Court has noted that even by stepping out into public people risk being offended,115 but the sudden confrontation with indecency can be ended immediately. Thus, the burden is on the viewer "to avoid bombardment of [his] sensibilities by simply averting [his] eyes"116 because turning on a television or radio is as voluntary an act as walking outside.

In recognizing a right to be free from unwanted mailings, the Court analogized to the right of a television viewer or radio listener to "twist the dial to cut off an offensive or boring communication and thus bar its entering his home."117 Unlike unsolicited mail, television is not an unwanted intruder into the home. Nev-

111 See notes 155-63 and accompanying text infra.
112 See, e.g., Haiman, supra note 41.
114 See note 110 supra.
ertheless, the Supreme Court in *Pacifica* held that this privacy interest justified the Congressional ban on indecency over the airwaves. The suggestion by Justice Brennan in dissent that the offended listener could simply turn off his or her radio was rejected.\(^{118}\) The Court cited *Rowan v. United States Post Office Department*\(^{119}\) in applying the privacy interest,\(^{120}\) yet ignored its specific direction that the proper remedy is to shut off the television or radio.\(^{121}\) If this option is insufficient to deal with the offense thrust upon the audience, the stations could be required to issue warnings before the broadcast.\(^{122}\)

The *Pacifica* holding relied heavily on the Court's finding a lack of political or social value in the broadcast.\(^{123}\) Political broadcasts, however, since they are intended to influence the outcome of elections, have the requisite political value to remove them from the sphere of broadcasting which may be regulated. It is in these circumstances that the First Amendment's prohibition should be fully applied.\(^{124}\)

2. *Influence of broadcasting*—The second prong of the pervasive nature approach is the power of the broadcasting media to influence the audience.\(^{125}\) The mere fact that a medium influences

\(^{118}\) 438 U.S. at 765-66 (Brennan, J., dissenting).


\(^{120}\) Id. at 748.

\(^{121}\) See note 117 and accompanying text supra. "[N]o one is ever legally required to listen or watch, and the captive audience rationale only has meaning within a context in which the listener is without choice." Powe, supra note 70, at 65.

\(^{122}\) Note, supra note 42, at 1365. For example, the stations broadcasting ""Scared Straight,"" a documentary about a program involving convicts and juvenile offenders, warned the audience about the use of "street language" which was essential to the broadcast. The number of people tuning in after the warning but during a commercial would probably be too small to warrant consideration; in a longer broadcast, the warning could be repeated.

\(^{123}\) 438 U.S. at 745-46. The decision in *Pacifica* is questionable for this reason. Carlin's routine itself clearly has a political or social value, since it is a discussion of society's treatment of certain words. The particular broadcast by WBAI was part of a program about society's attitude toward language. The Court attempted to separate the idea from the mode of its expression. To find the words offensive, however, required a rejection of Carlin's viewpoint. Carlin described the seven words as "the words you couldn't say on the public airwaves"; apparently he was at least partially correct.

It is interesting to note that the FCC intends "strictly to observe the narrowness of the *Pacifica* holding." WGBH Educ. Foundation, 69 F.C.C.2d 1250, 1254 (1978).


\(^{125}\) Bazelon, supra note 94, at 220-24; Note, supra note 99, at 995: "Television is perhaps the most powerful and persuasive medium for, by its nature, it engenders a high degree of participation from its audience. In addition, television can assemble an enormous audience for its presentations, particularly during prime time." See generally M. McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).
people does not, however, justify its regulation. As Judge Bazelon stated, it is wrong "to suggest that the force of a particular mode of speech in and of itself permits a generalized regulation of speech."128 Freedom of the press would be a useless principle if the press were unable to exert any influence on the public.127

The power of television and radio to influence the audience actually is a reason to prohibit regulation, especially when considering political broadcasts. It is undeniable that broadcasting has a tremendous impact on political campaigns and elections.128 Any interference with political broadcasting therefore constitutes interference with an important element of the electoral process. If the electoral process is a highly protected First Amendment interest and broadcasting is essential to modern political campaigns,129 it follows that political broadcasting should be among the most protected interests. Thus, the free speech interest should weigh heavily against the interest in freedom from offensive speech. When these interests are balanced, it appears that the constitutional dangers involved in restraining political broadcasts are not justified by the right to be free from occasional unexpected indecent words. Indecent words, even if used for their shock value, should not be regulated since they play a genuine, though perhaps minor, role in political discussions.

128 Bazelon, supra note 94, at 222.
127 See J. Brown & P. Steir, The Art of Politics (1976); R. MacNeil, The People Machine: The Influence of Television on American Politics (1968); J. McGuiness, The Selling of the President, 1968 (1968); G. Pomper, Voters' Choice 34 (1975); W. Roper, Winning Politics 110 (1978); T. White, The Making of a President—1968 196-97 (1969); T. White, The Making of a President—1960 279-95 (1961); Alexander, Communications and Politics: The Media and the Message, in The New Style in Election Campaigns 368 (R. Agranoff ed. 1972) ("[T]he most influential tool of the new communications has been television."); National Journal, Policking on Television, in The New Style in Election Campaigns 280 (R. Agranoff ed. 1972) ("Political power is measured in terms of access to TV.") (quoting N. Johnson, How To Talk Back To Your Television Set 1970)); Note, supra note 99, at 936. But see Powe, supra note 70, at 58-59, in which the author questions the impact of television on the formation of political views. But Professor Powe goes on to state that television tends to reinforce established views: "[t]he potential power of television probably derives more from the power to persuade further the already persuaded than from the power to influence the uncommitted." Id. at 59. This effect is an important measure of television's influence, however, since further persuasion may motivate the already persuaded to register their views on Election Day.
129 Kaufman, The Medium, the Message, and the First Amendment, 45 N.Y.U.L. Rev. 761, 773 (1970) ("In a large metropolitan area, a candidate without television time is not a candidate at all."); National Journal, supra note 128, at 279; Note, supra note 42, at 1351 ("Political elections are won and lost on television; a 'media blackout,' or even poor coverage, makes election to important offices virtually impossible for the victim.").
C. Presence of Children in the Audience

Another justification given for differing treatment of the broadcast media is that "broadcasting is uniquely accessible to children, even those too young to read."130 This rationale is unique to Pacifica. The dissenting opinion noted that it expanded a doctrine previously confined to cases of obscenity. With the exception of erotic materials appealing to the prurient interests of minors, the government had previously left judgments of propriety to parents and had not attempted to determine what children should see or hear.131

In addition to making decisions which have formerly been left to parental discretion, this extension differs significantly from the use of less stringent obscenity standards for minors. In establishing the different standards, the Court in Ginsberg v. New York upheld a state prohibition against the sale of pornography to minors,132 but in no way interfered with the right of adults to purchase such materials.133 Thus, the state did not "reduce the adult population . . . to reading only what is fit for children."134 In broadcast regulation, however, the government achieves this very result. Under Pacifica adults can see or hear only that which the government deems appropriate for minors, at least at certain times of the day.

The interest in preventing exposure of children to indecency is a valid concern; even the most diligent parent may find it difficult to "screen" all of the material available to his or her children. Instead of totally eliminating offensive matter in a broadcast, however, warnings could be issued for programs which are not "suitable" for children. As in Pacifica, the time of day is a factor in political broadcasts,135 but a candidate is unlikely to target his or her advertising to time slots filled by children's programming. There is little likelihood, for example, that the offending commercial would be broadcast during Saturday morning cartoon programs. Therefore, the protection of children from this "evil," which has never been proven harmful,136 should not be allowed to interfere with freedom of political speech.

130 Pacifica, 438 U.S. at 749.
131 Id. at 767-70 (Brennan, J., dissenting); Note, supra note 42, at 1366; Comment, supra note 108, at 182.
133 Id. at 634-35.
135 The Court held that the time of day (two o'clock in the afternoon in Pacifica) is one relevant factor in the "host of variables" to be considered. 438 U.S. at 750.
136 See notes 39-40 and accompanying text supra.
D. Partial Regulation Theory

An interesting approach to the broadcast/print media distinction has been suggested by Professor Bollinger.\(^{137}\) He points out that there are no valid differences between the two forms of communication justifying differing constitutional treatment, but that Americans have almost universally accepted regulation of television and radio.\(^{138}\) There are two incompatible yet desirable interests competing in determining the proper extent of media regulation. On the one hand, enforcing a degree of open access to the media supports the goals of the First Amendment by preventing monopolization of communications channels, a possibility which is as dangerous as government censorship. Open access regulation, on the other hand, is by definition a restraint on the press. Professor Bollinger notes three adverse effects of access regulation:\(^{139}\)

1. The necessity of providing reply time would have a "chilling effect" on the licensees' motivation to cover and discuss political matters.
2. The administrative mechanism may be abused in order to manipulate the opinions espoused by the media.
3. Once regulation is permitted for a legitimate, limited purpose, it may tend to escalate into broader regulation. This is known as the "camel's-nose-in-the-tent" phenomenon. These factors threaten the policy that "debate on public issues should be uninhibited, robust, and wide-open."\(^{140}\)

The proper approach to the difference in treatment, according to Bollinger, is to realize that different standards exist precisely because there is no rational distinction between the two media forms. Instead of balancing the two competing interests or adopting one to the exclusion of the other, each interest is assigned to a single media form. The commitment to open access is represented by the system of broadcast frequency allocation and the right of reply guarantees (the Equal Time provision and the Fairness Doctrine\(^ {141}\)) imposed on the broadcasting media.\(^{142}\) The bene-

\(^{137}\) Bollinger, supra note 94.

\(^{138}\) Id. at 17. Professor Bollinger suggests that this public acceptance may be based on the history of judicial rejection of the First Amendment's applicability to broadcasting, the entertainment orientation of the broadcast media, uncertainty as to the technical nature, capabilities, and dangers of broadcasting, and an exaggerated reaction to the need for frequency allocation. Id. at 18-20. See also Kalven, supra note 94, at 16.

\(^{139}\) Bollinger, supra note 94, at 29-31.


\(^{142}\) Bollinger, supra note 94, at 27-29.
fits of non-regulation, on the other hand, are preserved by the stricter ban on governmental interference with the print media. Analyzing the issue in terms of the two media forms "facilitate[s] realization of the benefits of two distinct constitutional values, both of which ought to be fostered." 143

We now ask how this scheme of partial regulation, "unknowingly" adopted by the Court, 144 would affect the analysis of indecency in political broadcasting. It is useful to apply an analysis similar to Professor Bollinger's by substituting the audience's privacy interest for the access factor as the interest opposing non-regulation. Regulation may be justifiable in the broadcast media in order to protect the privacy interest in being free from unwanted, offensive communications. 145 The opposing interest in unregulated political speech would still find a home in the print media. As Professor Bollinger contends, an exclusionary balancing test would be unnecessary since each interest would be protected.

While this resolution may be theoretically satisfactory, it is unworkable in a practical political situation. Bollinger's approach requires that the two media forms be equal. Any inequality between them would make balancing necessary, so that the more valuable interest would be allocated to the more effective media form. In the political context, however, the broadcast media have a much stronger impact and a much broader audience than their nonbroadcast counterparts. 146 The approach suggested by Professor Bollinger would deny the use of the preferable campaign media to the "preferred" interest of political speech. This policy would not, therefore, yield a fair allocation of resources.

The alternative application of the Bollinger approach, regulating the print media instead of the broadcast media, is equally unattractive. It would not satisfy those asserting the privacy interest because the print media do not present the sudden, unavoidable messages delivered by television or radio. Furthermore, regulation of the print media is blatantly repulsive to our constitutional history. 147

143 Id. at 36.
144 Id. at 27. Professor Bollinger contends that the Court reached the correct result (partial regulation) for the wrong reason (supposed differences between the media forms).
145 See Part II B supra.
146 See, e.g., Kaufman, supra note 129, at 773: "Some media are particularly effective for the expression of certain specific messages, and the prohibition of those media would greatly impair the ability of speakers effectively to advocate those causes." See also Bazelon, supra note 94; Powe, supra note 70, at 45; Note, supra note 99, at 936 (60% of adult Americans rely on television for news); Note, supra note 42.
147 Regulation of broadcasting may be more palatable than regulation of print because broadcasting, as a relatively new method of communication, has not had the long free
The normal justifications for regulation of broadcast political speech which the Court has adopted for prohibitions imposed on the broadcast media must be balanced against the ultimate First Amendment goal of free political speech. When these interests are compared, the need for a fully-informed electorate should outweigh the right to be free from unwanted communications from an invited source and the other justifications for differing treatment. Therefore, the constitutional standard of free speech should apply even to the broadcast media. One commentator has stated that "[t]he search for an intellectual rationale to support broadcast regulation is in reality a post hoc attempt to explain the status quo." The mere existence of regulation cannot serve as a justification for overriding an integral constitutional value. It is unwise to allow regulation which eliminates only the indecent aspect of the communication, since this constitutes interference with free political speech. The First Amendment guarantee protects the way in which ideas are expressed as well as the content of those ideas. In all but a few circumstances, indecency serves an important function in the candidate's message. It may add emotive impact to what is being said, as in Cohen; it might show the depth of a candidate's feelings, as in Stoner's campaign; or it may merely reflect an aspect of the candidate's personality which the voters may wish to consider. In all of these circumstances it serves a role in the electoral process which deserves protection.

III. Statutory Issues

If it is assumed that some regulation of political broadcasting is constitutional, it is necessary to determine whether the existing statutes permit such regulation. A variety of conflicting statutes are presently in effect. These include a ban on indecent lan-

speech history associated with newspapers. As Professor Kalven notes, "we all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication." Kalven, supra note 94, at 16.

148 Powe, supra note 70, at 62. See also Bollinger, supra note 94, at 17-20; Kalven, supra note 94, at 16; Note, supra note 99, at 984.

149 Most of the relevant ones are from the Communications Act of 1934, 48 Stat. 1064, codified in Title 47 of the United States Code. For a comprehensive discussion of the current FCC regulations and statutes governing political broadcasting, see National Association of Broadcasters, The Political Catechism (8th ed. 1976).

A bill was introduced in the House of Representatives by Representative Van Deerlin to revise the Communications Act for the first time since 1934. H.R. 3333, 96th Cong., 1st Sess. (1979). This bill would eliminate the public interest standard of regulation. Two bills to amend the 1934 act have been introduced in the Senate. One, by Senator Hollings,
guage, and a prohibition of censorship by the FCC, and a section on the responsibility of stations towards political candidates. When all of the statutory factors are considered, however, neither the FCC nor individual stations have power to control the content of political commercials. Moreover, stations are not liable for that content. The status of non-commercial political broadcasts is less certain, but the relevant regulatory power is weak.

A. Prohibition of Indecency

Section 1464 of the Federal Criminal Code makes it unlawful to "utter any obscene, indecent, or profane language by means of radio communication. . . ." This article has assumed the existence of broadcast "indecency" in the foregoing discussion of the constitutional issues. At this point it is appropriate to discuss the term as used in the statute.

Despite decisions to the contrary, it is now well established that indecency is not coextensive with the constitutional standard for obscenity. Unlike the obscenity standards, the standard for indecency in broadcasting does not require an appeal to prurient interest. The basic elements of indecency are its "nonconformance with accepted standards of morality" or offensiveness by contemporary community standards.

Except for the two FCC decisions ruling that Stoner's use of the


155 See notes 180-81 and accompanying text infra.
154 The prohibition of station content regulation in § 315(a) is limited to paid commercials.
152 United States v. Simpson, 561 F.2d 53 (7th Cir. 1977); Duncan v. United States, 48 F.2d 128 (9th Cir.), cert. denied, 283 U.S. 863 (1931).
151 See text accompanying notes 8-12 supra.
150 Pacifica, 438 U.S. at 739-41; Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); Eastern Educ. Radio, 24 F.C.C.2d 408 (1970). In Hamling v. United States, 418 U.S. 87 (1974), the Supreme Court held that indecency is identical to obscenity in mailing cases under 18 U.S.C. § 1461. Pacifica distinguished the standards for broadcasting on the grounds that broader standards can, under the Constitution, be adopted under § 1464 than under § 1461, since the mail is subject to full First Amendment protection, while broadcasting is not. 438 U.S. at 740-41.
149 Id. at 740.
word "nigger" was not indecent,\textsuperscript{181} all other reported section 1464 cases involved references to sexual subjects. The \textit{Pacifica} decision, in holding that the statute was not unconstitutionally vague, held that "[a]t most . . . the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities."\textsuperscript{182} Therefore, situations such as the Stoner commercials would be outside the realm of "indecent" speech, as currently defined by the FCC, despite its offensiveness to many.

The problem thus becomes one of determining which words dealing with sex or excretion are indecent. One important factor is the context in which the particular offensive words were used, a factor on which \textit{Pacifica} relies heavily.\textsuperscript{183} The use of offensive or excretory terms for their shock value at a time when children would be expected to be in the audience could thus bring a political commercial within the prohibition of section 1464.\textsuperscript{184}

\textbf{B. FCC Enforcement Authority}

If a political commercial contains indecency proscribed by section 1464, it is necessary to consider the authority of the FCC to prevent or sanction its broadcast. Because section 326 of the Communications Act of 1934 precludes the FCC from imposing any censorship,\textsuperscript{185} the FCC cannot prevent the broadcast of "indecent" material. This section "unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise materials considered inappropriate for the airwaves."\textsuperscript{186}

Under the Act, however, the FCC may enforce its sanctions

\begin{itemize}
\item \textsuperscript{181} Julian Bond, 69 F.C.C.2d 943 (1978); Atlanta NAACP, 36 F.C.C.2d 635 (1972).
\item \textsuperscript{182} 438 U.S. at 743.
\item \textsuperscript{183} See note 81 \textit{supra}.
\item \textsuperscript{184} See \textit{Pacifica}, 438 U.S. at 749-50.
\item \textsuperscript{185} 47 U.S.C. § 326 (1976) provides:
Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communication 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.

This prohibition would not be affected by the proposed revisions of the Communications Act discussed in note 149 \textit{supra}. The House bill provides that "nothing in this Act shall be construed to give the Commission the power to censor or otherwise regulate the content of any transmission . . ." except for a few inapplicable exceptions. H.R. 3333, 96th Cong., 1st Sess. § 422 (1979).
\item \textsuperscript{186} \textit{Pacifica}, 438 U.S. at 735. The FCC has indicated that \textit{Pacifica} did not grant it broad authority to intervene before the broadcast of words identical to those used by Carlin. WGBH Educ. Foundation, 69 F.C.C.2d 1250, 1254 (1978); Julian Bond, 69 F.C.C.2d 943 (1978).
\end{itemize}
against indecency. The Commission has three available remedies for violations of section 1464: license revocation, issuance of a cease and desist order, and fines of up to $1000. This authority, despite its possible "chilling effect," is not inconsistent with section 326. Thus, while the FCC may not censor "indecent" broadcasts, it may punish them after the broadcasts.

The FCC's remedial sanctioning authority can only be exercised against the licensee station or stations broadcasting the indecent matter, not against the sponsoring candidate. The Supreme Court, however, has held that the stations are immune from criminal prosecutions for defamation in political commercials due to the contradictory mandates of the law. Stations should be equally immune from all FCC sanctions under section 1464.

C. Station Responsibility and Liability

The major question regarding indecency in political commercials involves section 1464 and other statutes governing political broadcasts. Section 315(a) of the Communications Act of 1934 completely bars content control by the stations.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this subsection. No obligation is imposed under this section to allow the use of its stations by any such candidate.

The proposed revision of the Communications Act would continue the ban on station censorship. "Such television broadcasting station licensee shall have no control over the content or format of any material broadcast under the provisions of this section." H.R. 3333, 96th Cong., 1st Sess. § 463(a)(2) (1979). This new "equal opportunity" section, however, would only apply to paid commercials, not to time donated by the station.
though section 315(a) is generally known as the Equal Time provision, the prohibition on censorship applies to "first uses"—political statements not made in reply to previous broadcasts—as well as to time which is required to be sold or given under this section. Moreover, stations cannot reject commercials or cancel sales of air time due to the content of an advertisement. Thus, licensee stations are faced with a dilemma: one provision, section 315(a), prevents them from exercising any control over the content of political commercials, while another provision, section 1464, makes them responsible for the broadcast of any indecent material.

Since it imposes no obligation to accept any political advertising, section 315(a) seems to leave the option of refusing all political broadcasts. If this tactic were the only alternative, however, in practice most political commercials would be eliminated. This result is incompatible with the goal of an informed electorate. In fact, despite the disclaimer in section 315(a) of any affirmative obligation to accept political commercials, stations are now partially obligated to do so. The Federal Election Campaign Act of 1971 amended the Communications Act of 1934 by adding a new ground for denial of an application for license renewal, which is "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

The best solution to this dilemma is to hold the prohibitions against indecency inapplicable to political commercials. This policy is justified by the canon of statutory construction prefer-

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Footnotes:


178 During a separate but related problem, the Supreme Court held that the Fairness Doctrine did not impose an obligation on stations to accept paid editorial advertisements. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). But see note 178 and accompanying text infra.

179 Pub. L. No. 92-225, § 103(a)(2)(A), 86 Stat. 3 (1971). In addition, § 315(a) was changed so as not to conflict with the new requirement: "The second sentence of section 315(a) . . . is amended by inserting 'under this subsection' after 'No obligation is imposed.'" Id. § 103(a)(2)(B).

The proposed revision of the act should not affect this provision since the non-obligation construction is limited to "[t]he provisions of this section. . . ." H.R. 3333, 96th Cong., 1st Sess. § 463(b) (1979).

ring the more specific of two conflicting provisions. One provision of the Communications Act of 1934 punishes indecency, thus giving stations an inherent right and responsibility to control the content of what they broadcast, which extends to all broadcast material, including entertainment and commercials. The non-censorship provision of section 315(a) is narrower, however, since it only applies to content control of political commercials. Therefore, section 315(a) should take precedence, rendering section 1464 inapplicable.

The second justification for this interpretation is the Supreme Court's grant of immunity from libel actions for broadcasts covered by section 315(a). The rationale behind this immunity applies as much to punishment of indecency as it does to defamation. The rationale is that "the section would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." It would be equally senseless to impose administrative or criminal sanctions on broadcasters caught in this web after selling commercial time for political advertisements.

The situation is more difficult, however, in cases not involving time purchased by or donated to the candidate for his or her personal use, because section 315 is limited to these cases. In such circumstances, section 1464 applies fully. Stations are thus liable for the broadcast of indecent language in a news forum or in a commercial supporting a candidate which features someone other than the candidate.

The broadcast of offensive language, including "profanity," would not, however, necessarily result in punishment of the licensee. The FCC must consider the circumstances under which the broadcast was made and would be unlikely to punish a station for broadcasting a candidate's remarks in an interview or speech. In pre-recorded broadcasts, stations might be required to issue warnings of the offensive nature of some of the comments. Commercials made by persons other than the candidate may indeed be punished, even though the Commission has determined that the station is serving the public interest by allowing the commercial to be aired so that the electorate is more aware of the nature of the campaign and the candidate.

181 360 U.S. at 531.
CONCLUSION

It is generally impermissible, under both the Constitution and existing statutes, to censor or sanction broadcast political speech because of its indecent content. Because of the substantial interest in protecting political speech, the generally-accepted notion that the First Amendment does not fully protect the broadcast media fails to justify regulation of political broadcasts. The traditional justifications for differing treatment of the broadcast and print media do not outweigh the degree of protection afforded political speech. Even if regulation were constitutionally permissible, the relevant existing statutes only permit regulation in very narrow circumstances. Both the FCC and the stations are powerless to control content. The constitutional guarantees protecting the free discussion of political issues should consequently remain paramount.

—Jonathan Golomb