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Introduction - Safe Harbors and Stern Warnings: FCC Regulation of Indecent Broadcasting

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Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium... It is the right of the viewers and listeners, not the right of the broadcasters, that is paramount.¹

For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.²

This symposium is quite timely. FCC broadcast indecency policy is in chaos. The indecency policy of the agency has changed four times in the last twenty years.³

In 1978, the Supreme Court upheld application of FCC indecency policy to an afternoon radio broadcast of George Carlin's Filthy Words dialogue in Pacifica v. FCC.⁴ Following Pacifica, the Commission formally adopted a policy that prohibited indecent

material if aired before ten o'clock p.m. The period from ten o'clock p.m. to six o'clock a.m. was considered a safe harbor for broadcast indecency. This safe harbor was changed to midnight to six o'clock a.m. and was then found unconstitutional by the United States Court of Appeals for the District of Columbia Circuit. Congress then mandated that the FCC reject the concept of safe harbor for indecent speech and extend the prohibition to the whole broadcasting day. The twenty-four hour prohibition was also found unconstitutional by the D.C. Circuit. Congress then mandated that the FCC institute a safe harbor policy from ten o'clock p.m. to six o'clock a.m. for public broadcasting stations that go off the air at or before midnight, and a midnight to six o'clock a.m. policy for all other radio and television broadcast stations. On June 30, 1995, seven members of the D.C. Circuit found the midnight portion of the policy unconstitutional and directed the FCC to revise its safe harbor policy from ten o'clock p.m. to six o'clock a.m.\(^5\) The FCC could constitutionally extend the ban until midnight if the ban was applicable to all broadcasters. Four members of the Court that heard the case en banc dissented and would have declared the total ban on indecent material from six o'clock a.m. to ten o'clock p.m. or midnight unconstitutional.\(^6\)

The current controversy over governmental regulation of indecent speech that is broadcast over radio or television is centered around the question of whether broadcast speech is provided the same protection under the First Amendment as speech expressed in the non-broadcast media. Most indecent and offensive speech is fully protected by the First Amendment and may not be restricted by the government in the absence of compelling justification.\(^7\) This

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\(^6\) ACT IV, 58 F.3d at 683 (Edwards, C.J., dissenting).

\(^7\) See Cohen v. California, 403 U.S. 15 (1971) (holding that prosecution of Cohen under an “offensive conduct” statute for wearing a jacket in a courthouse that bore the words, “Fuck The Draft” violated Cohen’s right to freedom of speech). In Cohen, the Court rejected California’s claims that the prosecution was a justifiable restriction of Cohen’s speech as fighting words, as a clear and present danger to the draft, as a breach of the peace, as obscenity, or as necessary to protect significant privacy interests. See also Hess v. Indiana, 414 U.S. 105 (1973) (holding that disorderly conduct prosecution of Hess for using words “we’ll take the fucking street later” violated the First Amendment because speech did not direct that anyone take immediate action and did not constitute a clear and present danger to public disorder).
is because standard First Amendment theory is based on the view that the value and worth of speech is determined by subjecting the speech to the free marketplace of ideas. 8

Several important principles have been generated from the free market place theory. One principle is that editors, not the government, should decide what to publish. 9 Another principle is the harm principle, namely, that speech may not be punished on the basis of its content unless the restriction of speech is necessary to prevent harm to individuals or institutions. 10 In applying the harm principle, the Court has not considered the psychological or emotional injury that occurs from offensive speech as harm. This separation of harmful and offensive speech has spawned a subsidiary principle that provides that speech may not be punished solely on the basis that it is offensive to individuals or groups in society. 11

8. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that "ultimate good desired is better reached by free trade in ideas — that the best test of truth is power of thought to get itself accepted in the competition of market"); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis and Holmes, JJ., concurring) (commenting that through discussion and processes of education, falsehoods and fallacies will be exposed and the remedy to be applied is more speech, not enforced silence).

9. See Miami Herald v. Tornillo, 418 U.S. 241 (1974) (holding that right of reply statute requiring print media to publish paid political advertisement violated freedom of press). The Court stated: "Compelling editors or publishers to publish that which reason tells them should be published is what is at issue in this case." Id. at 256.

10. The harm principle is embodied in several standard First Amendment tests that are applied to laws regulating the content of expression. In cases where speech that advocates violence is punished the Court has required that the speech reach the brink of the harm that is advocated before it may be suppressed. See Brandenburg v. Ohio, 395 U.S. 444 (1969); Justice Holmes' and Justice Brandeis' exposition of the Clear and Present Danger Test in Whitney, 274 U.S. at 377, and Abrams, 250 U.S. at 630. In other contexts where the content of speech has been regulated, the Court has read the First Amendment to require that the government demonstrate that the law be carefully tailored to serve substantial governmental interests other than protecting persons or groups against offense. See Police Dep't. of the City of Chicago v. Mosley, 408 U.S. 923 (1972) (invalidating restriction on picketing within 150 feet of a primary or secondary school that exempted labor unions); Simon & Schuster, Inc. v. Members of The New York State Crime Victims Board, 502 U.S. 105 (1991) (holding that New York's Son of Sam law violated guarantees of freedom of press because law was content based and state had not shown that law was narrowly drawn to serve compelling state interests — insuring that victims of crime be compensated, ensuring criminals do not profit from their crimes and preventing wrongdoers from dissipating assets).

11. See Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the first amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").
Attempts to restrict racist, hate or vulgar speech have been found to violate the First Amendment when they are based upon laws that are designed to prevent offense.\(^{12}\)

Within this traditional regime, an exception to the harm principle was created for obscenity. Three decades ago, the Court rejected the harm principle and chose a definitional scheme for determining the boundaries of constitutional authority to regulate sexually erotic expression. Speech that was adjudicated as obscene, as defined by the Court, was not speech entitled to First Amendment protection.\(^{13}\) Obscenity has always been tied to the sexual content of the speech. Initially, obscenity was defined as prurient and highly offensive speech.\(^{14}\) Later, the Court refined the definition to depictions of explicit sexual acts that were prurient in appeal and highly offensive. The obscenity exception is a limited one. Only speech that is adjudicated to come within the judicial definition of obscenity is exempt from First Amendment protection.\(^{15}\) Sexually erotic expression that falls short of obscenity, pornography, or other forms of indecent, violent, offensive or dehumanizing speech enjoys full blown First Amendment protection.\(^{16}\) The Court has recognized the governmental authority to define obscenity somewhat differently when erotic expression is directed at minors and found that the First Amendment did not protect the right of


13. Roth v. United States, 354 U.S. 476 (1957). In Roth, the Court rejected the claim that regulation of sexually erotic speech should be evaluated under the clear and present danger test, noting that “implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance.” Id. at 484. Roth adopts the premise that obscenity is valueless speech that is not protected under the First Amendment. Id. at 484-85.

14. The Roth test for obscenity was: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appears to prurient interest. Id. at 489.

15. In Miller v. California, 413 U.S. 15 (1973), the Court revised the Roth test and adopted the current test for obscenity: (a) whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value. Id. at 24. The examples specifically defined sexual conduct provided by the Court for part (b) of the test were: (1) patently offensive representations or descriptions of ultimate sexual acts, actual or simulated; (2) patently offensive representation or descriptions of masturbation, excretory functions and lewd exhibitions of the genitals. Id. at 25.

16. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding Federal Statute banning dial-a-porn sex messages that were indecent but not obscene unconstitutional).
persons to sell or distribute obscenity that was harmful to minors. However, child obscenity protection laws must be narrowly drawn and do not provide a constitutional basis for enacting laws that prevent adults from access to First Amendment protected speech.17

Historically, the FCC has restricted broadcast licensees from airing offensive indecent speech that falls short of obscenity.18 The Commission has defined indecent material, since 1987 as, “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”19 Current federal policy on regulation of non-obscene programming that contains indecent speech has not fared well recently against First Amendment challenges in federal courts. Several commentators in this symposium discuss the constitutionality issues raised by FCC indecency policy. Edythe Wise’s and Jeremy Lipschultz’s articles trace the policies and practices of the federal government in regulating indecent speech through its licensing of radio and television from the beginning in the Federal Radio Act of 1927 to the recent actions of the Federal Communications Commission.20 Both authors also describe the role the federal appeals court in the District of Columbia has played in providing a rocky constitutional road for FCC policy.21 Professor Baker analyzes indecency policy under First Amendment decisions providing for “strong protection” for speech and finds support for a narrow channelling rule in the concept of reasonable time, place and manner regulations of speech.22 Professor Weinberg addresses the question of whether the definition of indecency and practices of enforcement of the Commission satisfy the precision and certainty requirements of the First Amendment vagueness doctrine.23 He concludes that FCC

18. See generally Wise, supra note 3.
   For a discussion that compares the FCC’s definition of indecency with the Supreme Court’s definition of obscenity, see Jonathan Weinberg, Vagueness and Indecency, 3 VILL. SPORTS & ENT. L.J. 221 (1996).
21. See generally Wise, supra note 3; Lipschultz, supra note 20.
23. See generally Weinberg, supra note 19, at 221-58.
policy does not satisfy the requirements of the vagueness doctrine as it has developed in ordinary First Amendment cases.\(^ {24}\)

The constitutional problem facing the Commission is that the foundation of early Court precedent that gave broadcasters second class status under the First Amendment is rapidly eroding. The result is an emerging view that broadcasters have full blown First Amendment rights. Proponents of the view that the government may prohibit the broadcasting of indecent speech short of obscenity rely on Supreme Court precedent upholding FCC regulations of broadcasting that were challenged on First Amendment grounds. In 1969, the Court upheld FCC regulations that required broadcasters to provide access for persons to reply to broadcasted attacks against them.\(^ {25}\)

Right to reply requirements violate the First Amendment if enacted against the print media because they violate the core First Amendment principle that editors, not the government, should decide what to publish.\(^ {26}\) In the "Right to Reply" FCC case, the Court clearly grounded greater constitutional authority to regulate the broadcast media on the basis of the limited radio frequencies that were available for the transmission of radio and television signals.\(^ {27}\) This scarcity rationale has been severely eroded by changes in broadcasting technology.

FCC indecent speech policy was upheld against constitutional challenges in *FCC v. Pacifica Foundation*, decided in 1978.\(^ {28}\) The Court upheld a Commission ruling sanctioning a radio station for airing George Carlin's filthy words dialogue.\(^ {29}\) However, the Court was divided regarding the basis for expanded constitutional authority for regulating "indecent" broadcast speech.\(^ {30}\) The FCC sanctions in *Pacifica* applied to a scatologically filled comedic dialogue that was aired on the radio in the afternoon.\(^ {31}\) Five members of the Court found that the pervasive and uncontrollable nature of the broadcast media justified limited restrictions on indecent speech in order to protect children listeners and unwilling adults from inde-

\(^{24}\) Id. at 255-56.

\(^{25}\) See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (viewers' and listeners' right to have medium function consistently with ends and purposes of First Amendment is paramount to right of broadcasters).


\(^{27}\) Id.


\(^{29}\) Id. at 750.

\(^{30}\) Id. at 745, 759 (Powell, J., concurring in part and concurring in judgment), 762-63 (Brennan, J., dissenting), 778-79 (Stewart, J., dissenting).

\(^{31}\) Id. at 729.
cent speech in their homes. Justice Stevens was joined by two members of the Court in the view that the content of the speech, while not obscene, was of lesser First Amendment value than fully protected speech. In addition, the Court emphasized that it was limiting its ruling to the precise facts before it, specifically, application of indecency policy to afternoon airing on radio of the Carlin dialogue. The nuisance rationale of the majority in *Pacifica* has replaced the scarcity rationale and is the central plank of the FCC’s argument in support of the regulation of indecent speech. As observed by Justice Stevens: “When the Commission finds that a pig has entered the parlor, the exercise of discretion does not depend on proof that the pig is obscene.”

The significance of *Pacifica* as precedent for special authority to regulate broadcast speech has been diminished by subsequent Supreme Court decisions. A majority of the Court took the view that a federal prohibition of indecent speech that is short of obscenity, over the telephone violates the First Amendment. Further, it clearly seems to hold that cable television is entitled to the same First Amendment protection as the print media. If broadcasters have full blown First Amendment rights then, under tests developed for other First Amendment actors, the FCC would have to demonstrate that the particular indecency policy furthered compelling governmental interests in a way that was the least detrimental to protected speech.

Edythe Wise is Assistant Chief of the Enforcement Division of the FCC. Her article reflects the current position of the FCC, namely, that the agency’s evolving policy of regulating indecent speech on broadcasting is not unconstitutionally vague and not impermissible content regulation under the First Amendment. Ms. Wise carefully traces the evolution of FCC indecency policy from the 1920s to the 1990s. During this period, court opinions “created a foundation for the balancing of rights” that is reflected in

32. Id.
34. Id. at 750-51.
35. Sable Communications, Inc. v. FCC, 492 U.S. 105, 127 (1989). The *Sable* Court held that a total ban on indecent telephone communications did not pass the strict scrutiny test because it was not narrowly tailored. Id. at 131. See also Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (holding that First Amendment principles do not vary from medium to medium).
36. See Wise, supra note 3, at 15.
37. Id.
38. Id. at 19-43.
current FCC policy. She describes what is balanced as: (1) the privacy of the home, (2) parental rights to protect children from objectionable material, and (3) the free speech rights of broadcasters and their audiences. Ms. Wise's article contains an interesting account of the history of FCC indecency policy and of the political and judicial influences on that policy. The bone of contention with FCC policy in the D.C. Circuit has been over the adequacy of the Commission's demonstration that the safe harbor policy is strictly tailored to protect parental rights to shield their children from objectionable material. In 1990, the Commission claimed that available data established that unsupervised children view television and listen to the radio twenty-four hours a day. Therefore, the Commission contended a twenty-four hour ban on indecent speech was necessary to the preservation of the parental right to protect their children from harmful material. In finding the total ban unconstitutional, the D.C. Circuit rejected this argument.

Ms. Wise observes that FCC indecency policy has been molded by impetus from Congress and court decisions that developed traditional First Amendment doctrine as well as court decisions defining the First Amendment status of broadcast licensees. Currently, the Commission defends its indecency policy on standard First Amendment grounds; the channeling policy is necessary to protect important constitutionally recognized interests. As several of the symposium authors note, however, indecency policy may be fatally overbroad under the strict First Amendment requirements for fully protected speech. Any blanket prohibition for speech defined as indecent by the Commission, even for a limited period of viewing time, denies adult viewers access to such speech and also deprives some parents of the right to choose to supervise their children by allowing them to view indecent material. Judge Buckley, writing for the majority, in the most recent venture of the D. C. Circuit into the troubled constitutional waters of FCC indecency policy found that the Commission had demonstrated that a safe harbor policy from midnight to six o'clock a.m. was the least restrictive means of furthering the compelling governmental interests of supporting paren-

39. Id. at 33.
40. Id. at 43.
41. Wise, supra note 3, at 32 & 39.
42. Id. at 40-41.
43. For a discussion on FCC indecency policy in regards to safe harbor provisions, see Wise, supra note 3, at 40-42.
44. See generally id. at 17-26.
45. See id. at 22-28.
tal supervision of children and in promoting the well being of minors. According to the majority, the Commission had satisfied the requirements of this strict First Amendment test by showing that a large segment of minors under eighteen did not watch television after midnight while a large segment of adults did.46 Chief Judge Edwards, writing in dissent, concluded that evidence of viewing habits of adults and minors was not even close to the kind of demonstration that was applied in standard First Amendment cases applying the least detrimental alternative means test. The Commission under strict First Amendment tests needed to show that there were not ways to provide parents with control over broadcast indecency other than a complete ban during the early and prime time hours of television viewing.

As the current controversy in the D.C. Circuit suggests, and the commentary in this symposium affirm, full First Amendment status may require that the focus of FCC policy move away from air time prohibitions to a policy that provides adults greater access to and control over speech in the privacy of the home. The availability of blocking technology that provides parents with control over what their children are exposed to on television or radio during the unsupervised time should be considered in formulating indecency policy if broadcasters are considered first class First Amendment players.

Professor Baker brings a fresh look to the discussion. He stakes out the position that a carefully tailored safe harbor policy that channels indecent speech to the morning and afternoon hours is consistent with what is a "strong protection for speech."47 Professor Baker takes the view that First Amendment principles do not vary from media to media and that principles that provide strong protection for speech apply to regulation of the broadcast media. Professor Baker does not find the rationales by the Commission and others that are commonly attributed to Pacifica sufficient to support the constitutionality of a safe harbor policy.48 He argues that Pacifica is one of a series of Supreme Court cases that sanction the channelling of speech by the government in circumstances where the channelling does not constitute government suppression or abridgment of speech. If the government's rule that channels speech does not interfere with the public's access to the content of expression there is no suppression of speech and strong protection

46. ACT IV, 58 F.3d 654, 665 (D.C. Cir. 1995).
47. See Baker, supra note 22, at 52-60.
48. Id. at 54-55.
of speech values are not implicated. 49 Professor Baker relies on Supreme Court cases which uphold laws that limit speech with a certain content to a particular time and place. 50 Historically, the government may require that constitutionally protected expression be limited to a particular time or place and be expressed in a particular manner without running afoul of the First Amendment. Zoning laws that regulate the time, place and manner of speech have been upheld if they do not restrict the overall availability of protected speech. Thus, Professor Baker concludes that in some circumstances a channelling policy is a form of time, place and manner regulation that would be consistent with a strong sense of speech rights as long as the policy did not restrict the overall availability of First Amendment protected speech to adults. 51 The FCC policy that restricts indecency during the bulk of prime time would be unconstitutional suppression of speech because the policy materially interferes with the availability of speech to adults; while an indecency policy that stopped at the early evening hours would not.

Professor Weinberg’s article examines whether FCC indecency policy satisfies the traditional First Amendment requirement that laws regulating the content of speech be sufficiently clear in marking the boundaries of the speech that is the subject of the regulation to satisfy the vagueness doctrine. 52 Vague laws that regulate the content of speech violate the First Amendment because they invite arbitrary enforcement and self censorship. 53 There was no discussion of vagueness in Pacifica. The D.C. Circuit and the FCC read the decision by the Court in Pacifica as implicitly holding that the indecency policy before it was not unconstitutionally vague. Weinberg engages in the analysis that is not undertaken by the Court in Pacifica and evaluates FCC indecency policy under vagueness rules that have developed in ordinary First Amendment cases. 54 He concludes that the FCC definition of indecent material fails stringent First Amendment vagueness requirements. 55 Weinberg contends that the meanings of “indecent” and “highly offen-

49. Id. at 58.
50. Id. at 58-60.
52. See Weinberg, supra note 19 at 224.
53. Id.
54. Id. at 227.
55. Id. at 225.
"Savage" in the FCC definition relies so much on "notions of good taste" that if evaluated under ordinary First Amendment vagueness standards, they would fail the requirements of predictability and clarity that the Supreme Court has developed.\textsuperscript{56} Weinberg points to the arbitrary enforcement of indecency policy by the FCC as further grounds for First Amendment vagueness concerns. Howard Stern has been a focus of FCC indecency policy and daytime talk shows have not. Weinberg suggests that the failure of the FCC to take action against such shows demonstrates that enforcement of FCC indecency policy is arbitrary. Anyone familiar with the content of many popular daytime talk shows should find Weinberg's position compelling.\textsuperscript{57} Ultimately, Professor Weinberg concludes that any vigorous enforcement of indecency standards would likely not satisfy the stringent requirements of the First Amendment vagueness doctrine.\textsuperscript{58}

Professor Levi's article examines the interface of FCC indecency policy and statutory prohibitions against censorship and requirements to provide media access.\textsuperscript{59} Professor Levi's article focuses on a Commission ruling that found broadcasters had discretion to channel political ads that contained graphic abortion images to late hours if the decision to do so was viewpoint neutral and based upon a good faith belief that such advertisements were harmful to children.\textsuperscript{60} The ruling also interpreted the indecency policy to be limited to sexually offensive material and therefore not applicable to the type of politically offensive speech that is found in the graphic images contained in some political ads on the abortion controversy.\textsuperscript{61} Professor Levi thoroughly examines the arguments in support and against the Commission's positions.\textsuperscript{62}

Professor Levi's article demonstrates the complexity of the indecency issue.\textsuperscript{63} The Commission was faced with facts that implicated several federal regulations, First Amendment caselaw, and administrative law.\textsuperscript{64} Indecency policy, laws requiring broadcasters to provide reasonable access to political candidates, and laws

\textsuperscript{56} Id. at 227.

\textsuperscript{57} Weinberg, supra note 19, at 229-31.

\textsuperscript{58} Id. at 257.


\textsuperscript{60} See id. at 99-106.

\textsuperscript{61} See id. at 106-20.

\textsuperscript{62} See id. at 181-218.

\textsuperscript{63} See id. at 181-218.

\textsuperscript{64} See generally Levi, supra note 62, at 85-220.
prohibiting broadcaster censorship came together in the case.\textsuperscript{65} Professor Levi carefully considers the implications of the Commission's choice to deal with the case as a matter of broadcaster discretion and not indecency policy.\textsuperscript{66} She points out the benefits of this strategy, especially in avoiding First Amendment problems, but ultimately disagrees with the soundness of the decision both as a matter of legal doctrine and public policy.\textsuperscript{67} The problems of the potential for censorship of Commission sanctioned channelling based upon broadcasters determination of harm to children weigh heavily in Professor Levi's analysis.\textsuperscript{68} On balance, she concludes that a serious commitment to free political speech over radio and television requires a policy that mandates airing of shocking political ads even in the face of concerns about children.\textsuperscript{69}

Professor Hammond's article places FCC broadcast indecency policy in the broader context of laws and proposed legislation that regulated indecent and obscene speech that is communicated over cable television, the telephone and computer networks.\textsuperscript{70} He describes the central features of current and proposed legislation designed to regulate indecency in all of available media technology, including the controversial Communication Decency Act of 1995 that is currently being considered by Congress.\textsuperscript{71} This new regime of regulating indecency over media technology other than broadcasting features leaving the initial choice to carry indecent speech to the discretion of the network operators.\textsuperscript{72} If the operator opts to allow programming of indecent speech it must be blocked until the consumer requests that an indecent program be reversed.\textsuperscript{73} FCC regulations promulgated pursuant to the 1992 Cable Television Consumer Protection and Competition Act imposes such a scheme on cable television operators. On June 6, 1995, in \textit{Alliance for Community Media v. FCC},\textsuperscript{74} the D.C. Circuit sitting en banc upheld the FCC blocking regulations, again, as in the FCC indecent broadcasting decision, the court was divided. Seven judges voted with the

\textsuperscript{65.} See id.
\textsuperscript{66.} See id. at 189-204.
\textsuperscript{67.} See id. at 210-17.
\textsuperscript{68.} See id. at 184-86.
\textsuperscript{69.} See Levi, supra note 62, at 218-20.
\textsuperscript{71.} Id. at 259-61.
\textsuperscript{72.} Id. at 271-2.
\textsuperscript{73.} Id.
majority and four dissented. The Majority found no state action with respect to the regulations generally because the cable operators were private actors when they followed the regulations. Although regulations requiring blocking for mandated leased channels for public access did constitute state action, the mandated blocking rule was found to be the least restrictive means for furthering the government's interest in limiting access of children to indecent programming.

A central feature of the two recent D.C. Circuit opinions upholding regulation of indecency is the holding that the safe harbor and mandatory and reverse blocking rules are the least detrimental means for the government to prevent harm to children from the material that the Commission has defined as indecent. The strict First Amendment test that was found satisfied by the court generally imposes a heavy burden on the government. Yet, as Professor Hammond critically observes, the best view of these cases is that the government did not demonstrate, through credible evidence, that indecent speech causes harm to children. Harm was in fact presumed by the majority when it concluded that failure to establish the absence of a causal connection coupled with parental concern was sufficient.

Deference to legislative judgments about harm is not a feature of standard First Amendment case law and the effect of such deference in the indecency speech cases provides the appearance of granting broadcasters and cable operators full First Amendment speech status when the reality is quite different. Professor Baker is also critical of the harm to children aspect to the D.C. Circuit indecent broadcasting case. He finds it inconsistent with the strong speech principle that proscribes the government from furthering legitimate purposes by means that reduce adults to the level of children. Yet, as Professor Hammond observes, the net effect of the D.C. Circuit cases and Pacifica is that the government may substantially limit access by adults to constitutionally protected speech providing it does not adopt a policy of totally banning indecent

75. Id. at 109.
76. Id. at 123.
77. Id. at 125.
78. See ACT IV, 58 F.3d 654, 660-61 (D.C. Cir. 1995); Alliance for Community Media, 56 F.3d at 125.
79. See Hammond, supra note 73, at 279.
80. See ACT IV, 58 F.3d at 662; Alliance for Community Media, 56 F.3d at 127-28.
81. See Baker, supra note 22, at 61-62.
82. Id. at 63-64.
speech. The Supreme Court has accepted review of the D.C. Circuit cable operator blocking regulations case. Stay tuned.

83. See Hammond, supra note 73, at 279.