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THE EVENING HOURS DURING PACIFICA STANDARD TIME

C. EDWIN BAKER*

_FCC v. Pacifica Foundation_1 has been described as possibly the worst of the Supreme Court's First Amendment decisions.2 I have no interest in disagreeing. Here, however, rather than critiquing _Pacifica_, I want to take another tack and ask one theoretical and one practical question about the decision. First, to what extent is it consistent with a strong interpretation of First Amendment guarantees? Second, to what extent does it recognize governmental power to channel indecent broadcast expression? For example, does it authorize barring indecency from prime time evening hours?

To begin, note the constitutional issue presented in the case. Justice Stevens' plurality decision3 emphatically and repeatedly stated that review was “limited to the question whether the Commission has the authority to proscribe this particular broadcast;”4 or as later stated, whether the government has “any power to restrict the public broadcast of indecent language in any circumstances.”5 According to Justice Powell's concurrence, the Court reviewed only “the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon.”6 Likewise, in the one opinion in the court below that voted to uphold the Federal Communication Commission's (FCC) order, and hence the only opinion below favoring suppression and consistent with the

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* Nicholas F. Gallicchio Professor of Law, University of Pennsylvania Law School. The view presented in this talk substantially corresponds to arguments I presented in a brief filed for the American Civil Liberties Union, the National Federation of Community Broadcasters, Pen American Center and Allen Ginsberg in Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

1. 438 U.S. 726 (1978). The Court held that the FCC had the power to restrict as indecent Pacifica's broadcast of George Carlin's monologue entitled "Filthy Words" at two o'clock on a weekday afternoon. _Id._ at 748-49.

2. See Thomas G. Krattenmaker and L.A. Powell, Jr., _Televised Violence_, 64 VA. L. REV. 1123, 1280 (1978) (describing _Pacifica_ as "decision to war with several key strands of First Amendment thought").

3. Note that Justice Steven's opinion at points was that of the Court and at other times was a plurality opinion.

4. _Pacifica_, 438 U.S. at 742. Justice Stevens went on to state that the FCC itself emphasized that its order was "issued in a specific factual context." _Id._

5. _Id._ at 744. Justice Stevens argued that if the First Amendment grants the government any power to circumscribe the public broadcast of indecent language, this situation was a proper time for the exercise of this power. _Id._

6. _Id._ at 755-56 (Powell, J., concurring).
Supreme Court's resolution of the issue, Judge Leventhal read the FCC order as limited to "afternoon" broadcasts. Judge Leventhal noted that, while the FCC disclaimed an intent to block such broadcasts in "late hours of the evening," it left unexamined the propriety of restricting the broadcast in the "early evening," which Judge Leventhal thought raised different issues. In any event, the Court only held that the two o'clock p.m. broadcast could be barred.

Both the plurality and concurrence implicitly approved channeling. Justice Stevens concluded by invoking the nuisance rationale in support of the broadcast restriction, a rationale that the FCC had explained speaks "to channeling behavior more than actually prohibiting it." Both Justices Powell and Stevens observed that "[o]n its face, [the FCC's holding] does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience."

The permissible extent of channeling depends on the explanation for why it is constitutionally acceptable. In this Article, I will suggest two different explanations for permitting the channeling of speech - one consistent with only what I will describe as "weak" speech protection, the other consistent with "strong" speech protection. While the Pacifica opinions offer each some support, I will argue that only strong speech protection accords with precedent and, moreover, only strong protection accords with various factors emphasized in the Court's opinions.

I. Weak Protection

All Justices agree that the First Amendment protects indecent speech. The Court in Pacifica noted earlier holdings that made this assertion clear. Thus, the Court's decision not to protect indecency requires explanation.

8. Id. at 30. Justice Powell seemed largely to agree with Judge Leventhal's approach and described Judge Leventhal's opinion as "thoughtful." Pacifica, 438 U.S. at 757 n.1.
10. Id. at 731 (quoting In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975)) (emphasis in original).
11. Pacifica, 438 U.S. at 760. See also id. at 750 n.28 (explaining effects of Commission's actions on adults).
12. See id. at 746-47 (citing Hess v. Indiana, 414 U.S. 105 (1973) and Cohen v. California, 403 U.S. 15 (1971) to demonstrate that offensive or indecent speech is not without First Amendment protection).
Any one of three premises that derogate from strong speech protection could support the Court's decision not to provide strong protection for the speech at issue in *Pacifica*. First, maybe the First Amendment does not call for strong protection here because "each medium of expression presents special First Amendment problems" and broadcasting "receive[s] the most limited First Amendment protection." 13 Second, maybe the First Amendment does not require strong protection because indecent speech "surely lie[s] at the periphery of First Amendment concern," 14 which leaves the Court uninterested in applying "[strong] medicine to preserve the vigor of patently offensive sexual and excretory speech." 15 Third, maybe freedom of speech is only protected to the extent that it is not outweighed by other concerns; especially when considerations, such as the broadcasting context or indecency's lesser value, reduce the weight on the speech side, and various government interests, such as an interest in protecting children, outweigh the speech rights. 16

Each explanation, although embedded in the Court's opinion, is deeply controversial, arguably inconsistent with precedent and possibly inconsistent with some features of *Pacifica* itself. Thus, I will consider whether the Court's holding can be understood as independent of each of the proffered explanations. First, however, I will note several objections to these three points.

Reduced First Amendment protection cannot be properly explained on the ground that *Pacifica* is a broadcasting case. Until *Pacifica*, the only general reason why broadcasting was said to receive different and lesser constitutional protection than other media related to its supposed scarcity. As the dissent points out, a concern with scarcity only justifies regulation to assure access for speech (or speakers) that otherwise would be left out. 17 Scarcity hardly justifies suppressing any form of speech, including indecent speech. The Court wisely chose not to rely on it. Thus, broadcasting precedent hardly explains the reduced First Amendment vigor exemplified by *Pacifica*. 18

13. *Pacifica*, 438 U.S. at 748. The Court here cited Burstyn v. Wilson, 343 U.S. 495, 502-03 (1952), where the Court followed its famous language about each method presenting peculiar problems with the statement: "But the basic principles of freedom of speech and the press . . . do not vary." *Id.*
15. *Id.*
16. *Id.* at 749-50.
17. *Id.* at 770 n.4 (Brennan, J., dissenting).
18. The Court invoked other arguments concerning the special nature of broadcasting, but their weakness coupled with the lack of reliance on them, sug-
Elsewhere, I have challenged the assumption that a careful examination of Court precedent will show the Court justifying reduced or different protection for broadcasting. 19 I argued that a close reading of Red Lion Broadcasting Co. v. FCC 20 shows that the broadcast regulation was not justified by any scarcity unique to broadcasting, but rather was a response to the problem of the "commons." 21 However, without legal regulation, usually in the form of property rules, this problem of commons would also exist for resources used by print media and for most other valuable resources that have been the subject of property law. This reading of Red Lion as not based on principles unique to broadcasting why, at three critical points in its analysis, the Court relied on precedent from the print media, namely Associated Press v. United States, 22 which upheld the government's right to engage in structural regulation of the media in support of a better communication order. Of course, this is not contrary to the observation that "each medium of expression present special First Amendment problems." 23 For example, the way that the government can permissibly aid parents in controlling their children's access to indecency will vary depending on the media. Similarly, the government may act on the belief that a category of theaters when geographically concentrated often does, while television does not, attract people who are likely to create predictable problems for a particular geographical area. 24 But these observations are not equivalent to saying that different principles apply or that each medium should receive a different degree of First Amendment protection. Rather, the expectation is that whatever restrictions the Constitution imposes on channeling will be the same for all media, despite the fact that the permitted channeling itself can take different forms depending on the nature of the medium.

22. 326 U.S. 1 (1945).
Further, *Pacifica* itself is not special as a broadcasting case. Both Justices Stevens' and Powell's opinion relied on *Ginsberg v. New York*, an earlier non-broadcasting case that approved a type of channeling. In *Ginsberg*, the law at issue prohibited bookstores from selling material to minors that the state considered obscene for children but that was constitutionally protected for adults. The Court upheld this combination of space and age zoning of sexually explicit materials, thus providing a perfect print analogy to the broadcast regulation in *Pacifica*.

Even more tellingly, two years before *Pacifica*, the Court employed almost identical reasoning to reach an almost identical conclusion in another non-broadcasting case. In *Young v. American Mini Theaters, Inc.*, the Court approved a zoning regulation that required the dispersal of theaters showing "adult movies" - a category of indecent but largely protected speech. Although *Pacifica*’s channeling involved time zoning and *Young*’s involved space zoning, both cases approved zoning because each needed to advance a government purpose unrelated to restricting adult access to protected speech. The plurality and concurrence, constituting the five member majority in both cases, engaged in similar analyses to reject the same constitutional objections to the government channeling. For example, both cases rejected the complaint that being content-based made the law invalid. The overwhelming similarities suggest that the two cases should be read together to create a single doctrinal edifice - an edifice independent of any premise of lesser protection for broadcasting.

25. *390 U.S. 629 (1968).*
26. *See Pacifica, 438 U.S. at 749-50 (Stevens, J., plurality), 757 (Powell, J., concurring).*
28. *Id. at 629.*
29. *427 U.S. 50 (1976).*
30. *Id. at 69. As in *Pacifica*, the plurality in *Young* described *Ginsberg* as "directly on point," further illustrating the Court's recognition that certain zoning in each of the three mediums - print, theater and broadcast - will be acceptable. *Id.*
31. *Pacifica, 438 U.S. at 755; Young, 427 U.S. at 50. In both cases, Justice Powell argued that the government regulation was not content-based. *Pacifica, 438 U.S. at 755; Young, 427 U.S. at 73. Justice Blackmun concurred with this view in *Pacifica, 438 U.S. at 755-62 (Blackmun, J., concurring). In contrast, Justice Stevens, partly for the Court in both cases, but in this regard for a plurality, viewed the law as content-based, but concluded that it was not an objectionable form of content discrimination. Young, 427 U.S. at 71-73.*

The Justices roles stayed the same, with the same authors of plurality and concurring opinions except that Justice Blackmun and Justice White switched places: Justice Blackmun voting with the majority in *Pacifica*, while Justice White voted with the majority in *Young*. 

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Second, the premise concerning low value speech receives - at best - disputed support in *Pacifica*. Justices Powell and Blackmun, two of the five Justices supporting the FCC's order, explicitly rejected the view that the Constitution permits the government to distinguish between speech which "is most ‘valuable’ and hence deserving the most protection, and speech which is less ‘valuable’ and hence deserving of less protection."\(^{32}\) Rather, the concurring Justices stated, "[t]his is a judgment for each person to make ...."\(^{33}\) Thus, Justices Powell and Blackmun argued that "the result ... does not turn on whether Carlin's monologue ... [has] more or less ‘value’ than a candidate's campaign speech."\(^{34}\)

The view of these two Justices, when combined with the dissent, was the majority view in *Pacifica*. It also represents standard First Amendment theory. Of course, not all content-based regulation will or should be invalidated.\(^{35}\) Still, any universal condemnation of content discrimination is implausible. Usually, the critique takes the form of showing that not all such regulation should be


33. Id.

34. Id.


Speaking for the Court, Justice Scalia came close to recommending that all content discrimination, with a few special exceptions, be considered impermissible in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). He argued content discrimination was impermissible even in the context of speech, specifically, fighting words, not protected by the First Amendment. *Id.* at 385-87. Suppression of presumably protected commercial speech on the basis of content, however, is routinely allowed even without that strong of a government interest. *See, e.g.*, United States v. Edge Broadcasting, 113 S. Ct. 2696 (1993); *Posadas de P.R. Assoc. v. Tourism Co.* of P.R., 478 U.S. 328 (1986). In other words, he protects unprotected speech more than the Court protects commercial speech. Justice Scalia's odd position can be seen in a better light, however, by remembering even nonverbal activities might be protected if engaged in for expressive reasons and if the government's regulation was “[related] to the suppression of free expression.” United States v. *O'Brien*, 391 U.S. 367, 377 (1968) - which is presumably an objection to a government interest involving suppression of content. Under the *O'Brien* approach, however, the question should be whether the government's interest in prohibiting racially-based fighting words (presumptively an activity not protected by the First Amendment) was related to its interest in suppressing their expressive aspect or their “fighting” aspect. If the government regulation was not designed to show "special hostility towards the particular biases," *R.A.V.*, 505 U.S. at 396, but rather out of fear that these fighting words create an unusually great danger of violence, his argument collapses. In addition, his argument requires an explanation of why the government's interest in suppressing particular commercial speech does not invalidate those regulations. A possible answer, but not one the Court has yet given, is that, unlike either the draft card burner in *O'Brien* or the fighting words speaker in *R.A.V.*, commercial speakers do not have First Amendment rights of their own.
equated with *suppression* of disfavored content; that is, with "*abridgment*" of the constitutional freedom. Routinely, the government chooses to subsidize speech based on its content - for example, classroom materials or National Endowment for the Arts grants. Arguably, the mandate that broadcasters include public affairs programming or children's programming should likewise be treated more as a constitutionally permissible subsidy than an abridgment.

In contrast, a balancing analysis using the notion of "lesser valued speech" to determine whether to permit government suppression can result in upholding the government-dictated conformity that the First Amendment should be seen to guard against. The prominence of Justice Harlan's opinion in *Cohen v. California* lies not only in his view that the First Amendment "put[s] the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." It also lies in his recognition of the often vitally important "emotive function" of speech and his refusal to "indulge the facial assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Regulation of "lesser valued" speech generally offends each of these concerns. Protection of speech that majorities view as less-valued is the key function of the First Amendment. Only this protection provides for an inclusive politics and a process of societal and personal change that is not limited to electoral politics. Thus, putting aside the universality of any purported principle objecting to content discrimination, government suppression of less-valued speech should be constitutionally objectionable. It follows that a defense of *Pacifica* on grounds other than the premise that indecency is less-valued and, therefore, permissibly suppressed would be much more consistent with First Amendment theory.


38. 403 U.S. 15 (1971). The Supreme Court overturned Cohen's conviction for disturbing the peace by walking through a courthouse corridor wearing a jacket with the words "Fuck the Draft" appearing on it. *Id.* at 16.


40. *Cohen*, 403 U.S. at 26. According to Justice Harlan, the emotive function of individual speech is often the more important element of the all-inclusive message the communicator sought to express. *Id.*
Finally, the balancing premise for weak protection should be troubling. At least one reason why many of the strongest free speech advocates have opposed balancing - even though they often argue about what expression the First Amendment protects - is their assumption that balancing, especially in a process that permits judges and majorities to consider different speech as having different value, will be particularly ill-suited to protecting the dissenters whom the First Amendment should be seen as primarily designed to protect. Of course, a speaker is wise to balance considerations in favor of or against his or her expressive choices. Balancing can hardly be disparaged if equated with judgment, but the constitutional question is the allocation of authority to make judgments. The fear is that the government's or the majority's evaluation of particular speech will differ from that of the speaker or listener, particularly when this is the potential speaker or listener who, a dissident from the majority's perspective, appears offensively crazy or irrational. Inevitably, balancing depends on who does it - such that government officials and judges will seldom place the same value on the speech of dissidents as the dissidents would place on their own speech.

This is the point that Justice Harlan gets to when he argues for leaving the decision in "the hand of each of us." Thus, it would be nice if Pacifica could be explained as something other than a balancing decision. And that might be possible. The argument need not be that the weak interest in indecent speech is outweighed by a government interest in suppression, if channeling in this context should not be seen as suppression or abridgment at all.

II. STRONG PROTECTION

The question becomes whether any reading of Pacifica is consistent with strong protection of speech and what elements of the opinion support this interpretation. Surely, a strongly speech-protective principle would not allow suppression merely because the government concludes that the speech is either unimportant or objectionable. This conclusion should apply in any communications.
medium. Strong protection would not balance an abridgment against other government interests; rather, the only constitutional question should be whether the government action amounts to an abridgment.

Whether channeling amounts to an abridgment may depend on the context and on the nature of the channeling. For example, effective advocacy often requires that the advocates speak or demonstrate at places or times that their desired audience is available. The government would undermine the advocates’ expressive activity or, in doctrinal language, it would fail to leave ample alternatives if it channeled their expression to a location where the demonstrators could not confront their audience. Moreover, a demonstrator’s public speech often depends on its location or time for its meaning. In these circumstances, channeling that interfered with the advocates’ goals should be impermissible. The determinative value should be the advocates’ expressive freedom.

These concerns were not present in either *Pacifica* or *American Mini Theaters*. In the latter, Justice Powell noted precisely this point. In down-playing the First Amendment significance of the zoning ordinance, he stated that the regulated “communication . . . is not of a kind in which the content or effectiveness of the message depends in some measure upon where or how it is conveyed.”44

The most obvious parallel between *Pacifica* and *American Mini Theaters* is that they are both media cases.45 The primary constitutional function of the media is to provide the public with the information, opinion, and vision they want or need.46 Presumably, the


45. Justice Powell described *Young* as involving “commercial zoning” of commercial entities. This, he argued, was “not analogous to cases involving expression in public forums or to those involving individual expression.” *Young*, 427 U.S. at 76. At least in this commercial media context - i.e., he again cites only media cases for the proposition—”the central First Amendment concern remains the need to maintain free access of the public to the expression.” *Id.* at 77. In contrast, Justice Powell cites speech cases involving individuals as illustrating a factor not involved here - i.e., situations where “the content or effectiveness of the message depends in some measure upon where or how it is conveyed.” *Id.* at 78 n.2.

46. My claim might be considered controversial in its breadth. For example, possibly the key constitutional function of the media is to perform a “checking function.” See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (discussing free exchange as valuable due to checking function). However, these more restricted views of the media’s function justify no greater, and possibly less, protection in this context.
question concerning abridgment should be whether the channeling in any significant respect interferes with the public's access to the media content. Sometimes the answer will be yes. Surely the content, meaning or value of "news" relates to when it is made available. Thus, arguably any time - channeling of news would significantly interfere with access if it prevents media organizations from presenting news as quickly as they choose. In this regard, the Court noted the FCC's indication that it would not automatically hold a licensee responsible for indecency in public events covered live. On the other hand, limited channeling does not necessarily have objectionable consequences for either the content or availability of commercial entertainment. Unlike with many demonstrators or political advocates, the media typically seeks to present entertainment only to an audience that wants the content offered. For example, theaters seek only audiences willing to make an effort to receive the expression - i.e., an audience willing to come to the theater and pay.

The government clearly abridges freedom of the press if it "suppresses" what the press can communicate. But the issue is whether there is suppression here. For example, is the public in any serious way restricted if the government requires that Carlin's monologue not be broadcast until after six o'clock or in the evening? This question is properly posed since the Court's holding, as it repeatedly emphasized, was only that the government could restrict the monologue at two o'clock in the afternoon.

So what would be an appropriate analysis from the perspective of strong speech protection? First, setting aside the question of the First Amendment rights of children, surely any government restriction aimed at minor children would be inconsistent with the First Amendment if it significantly restricted adult's access to protected expression. Strong protection requires at least the principle articulated in Butler v. Michigan, that the state cannot enact laws that "reduce the adult population . . . to reading only what is fit for children." Applying this principle to broadcast channeling, the apparent rule would be that a channeling which serves the state's interest may be upheld if it does not materially reduce the availability of the material to adults. Keeping FCC-defined indecency out of the bulk of prime time television would restrict its availability to

48. Id. at 760.
50. Id. at 383.
many working adults. At least it would if many working adults often go to bed not much later than ten o’clock p.m. and certainly would not routinely plan to watch a two hour program starting at ten o’clock p.m.\textsuperscript{51} Thus, I suggest, any channeling consistent with strong-speech protection and with the \textit{Butler} principle must cease at least by the early evening hours of six o’clock or maybe eight o’clock p.m.

\section*{A. \textit{Pacifica} and Permissible Channeling}

There are two reasons to conclude that the FCC can impose only restricted channeling, such as programs during the afternoon but not banning during the evening hours: first, if restricted channeling is most consistent with the purpose that the Court concludes justifies channeling; or second, if the Court accepts a strong speech principle. The Court’s limited holding in \textit{Pacifica} is not conclusive on either point, but perhaps the best reading supports both reasons.

In \textit{Pacifica}, the Court appeared to jumble two quite different government purposes, although sometimes the second seemed to be merely a careless description of the first. Justice Powell described the FCC’s “primary concern” as “prevent[ing] . . . the broadcast from reaching the ears of \textit{unsupervised} children.”\textsuperscript{52} He quoted a lengthy passage (also cited by Justice Stevens) from \textit{Ginsberg v. New York},\textsuperscript{53} where the Court upheld a prohibition on selling certain sexually explicit but constitutionally protected publications to minors.\textsuperscript{54} In this passage, the \textit{Ginsberg} Court explained that the law was “designed to aid” parental (and others such as teachers’) authority in deciding what materials to make available to their children.\textsuperscript{55} Justice Powell, extrapolating from \textit{Ginsberg}, stated that society may decide to “leav[e] to parents the decision as to what speech of this kind their children shall hear and repeat.”\textsuperscript{56} Or, as the majority put it, “the concerns recognized in \textit{Ginsberg} amply justify spe-

\footnotesize{\begin{itemize}
\item \textsuperscript{51} Admittedly, this may have been more true in the small town in Kentucky where I grew up than in New York City where I now live.
\item \textsuperscript{52} \textit{Pacifica}, 438 U.S. at 757 (Powell, J., concurring in part and concurring in judgment) (emphasis added).
\item \textsuperscript{53} 390 U.S. 629, 639 (1968).
\item \textsuperscript{54} \textit{Pacifica}, 438 U.S. at 758 (Powell, J., concurring in part and concurring in judgment). \textit{Compare id.} at 749-50.
\item \textsuperscript{55} \textit{Ginsberg}, 390 U.S. at 639.
\item \textsuperscript{56} \textit{Pacifica}, 438 U.S. at 758 (Powell, J., concurring in part and concurring in judgment).
\end{itemize}}
cial treatment of indecent broadcasting," including "supporting parents' claim[s] to authority in their own household." At times, however, the Court in *Pacifica* invokes an arguably quite different government purpose. The majority described *Ginsberg* as justified by the "government's interest in the 'well-being of its youth.'" Additionally, Justice Powell, in his concurrence, asserted that "society may attempt to shield its children" from indecent material. Such assertions suggest that society has an interest in keeping indecency from children independent of its interest in supporting parental authority. However, if the Court is truly accepting this second purpose rather than merely sloppily referring to the first, its acceptance would be a startling constitutional development, which gives some reason to doubt that the Court's causal undeveloped and undefended statement really amounted to such a commitment. Moreover, such a purpose would have significantly different consequences for government's regulation of broadcast indecency than does support for parental authority or any of the narrowing aspects of its holding. For example, a societal purpose of shielding children from indecent material would be served by - in fact, might require - a law prohibiting a parent from allowing her child to hear Carlin's dialogue. Such a law, of course, would directly contradict the first purpose - supporting parental authority in the household.

Not only is there little reason to think the Court in *Pacifica* seriously intended to accept the implications of this second purpose, the language from *Ginsberg* upon which it relied is easily read to suggest that the second purpose would itself be unconstitutional. There the Court stated that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own

57. *Id.* at 750 (quoting *Ginsberg*, 390 U.S. at 629).
58. *Id.* at 749 (quotations omitted).
59. *Id.*
60. *Id.* at 758 (Powell, J., concurring in part and concurring in judgment).
61. The tendency to conflate these two purposes is ubiquitous. In *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia Circuit noted that the FCC had asserted both a "compelling interest in protecting children from indecent material" and an interest in "parents, who are entitled to decide whether their children are exposed to such material if it is aired." *Id.* At oral argument, the FCC "clarified the government's interest: it is the interest in protecting unsupervised children from exposure to indecent material; the government does not propose to act in loco parentis . . . ." *Id.*
household to direct the rearing of their children is basic in the structure of our society."

The two purposes lead to different observations about appropriate channeling. Only a complete ban on broadcast indecency could fully serve a governmental purpose of eliminating broadcasting as a route for children to obtain access to indecency since some children will inevitably be in the audience at any hour. I am surely not unique in having parents who allowed me to have a transistor radio in my room which I could turn on at low volume at any time of night - and I am told that today's children sometimes even have a television in their room. Although a child might follow parental directives as to appropriate use of the radio or television, nothing but a complete ban on indecency could effectuate a state purpose to shield such a child. But obviously, a complete ban contradicts Pacifica's assumption that only channeling was approved.

In contrast, support for parental supervision has very different implications for the extent of permissible and justifiable channeling. Although a complete ban could serve those who do not want their children exposed to any broadcast indecency, it would thwart, not aid, the possibly significant numbers of parents who would choose either to expose their children to the Carlin broadcast or to give the choice to the child. There is no channeling "fix" that completely or uniformly serves all parents. Still, a focus on hours when most parents are not at home could make sense. Assuming, which is not at all clear, that a significant number of parents are quite concerned with FCC-defined indecency, but are not otherwise concerned with what their children watch, restricting indecency


63. See Action for Children's Television, 852 F.2d at 1334 n.21 (discussing argument that parental authority enhanced by regulation).

64. Of course, these parents might merely bar their children from watching television or listening to radio during hours they are not at home or bar them from doing so except for specifically approved programs or stations - resulting in no need for channeling. But even accepting this naive conception of people's real options, channeling would still be beneficial to the extent that many parents who do not want their children exposed to broadcast indecency would prefer to be able to allow their children unrestricted access to broadcasting during the day. Expecting most parents to exercise extensive supervision when they are present may also be naive but no more than the expectation that, even if there were no indecency on broadcasting, parents who wish to shield their children from indecent language will have much success.

On the other hand, many parents may seriously doubt whether FCC-defined indecency has any specially negative impact on children as compared to violent programming or to "proper," that is, not legally indecent, but sexually suggestive, often overtly sexist, programming and advertising. Social science data suggests that the FCC's indecency rules may aim at the wrong target - violent programming
during all or a portion of adults' regular working hours could be almost parent optimal as compared to an unregulated realm. Many parents would appreciate being able to depend on a period of the broadcast day during which they could confidently allow unsupervised listening or viewing by children without fear that the children would be exposed to this type of indecency. On the other hand, those parents with broader notions of what broadcasting is appropriate for their children to watch, or those adults with broader tastes for their own viewing, would not have their interests in the receipt of expression significantly impaired. They could watch - or allow their children to watch - the restricted programs during the evening.

From the perspective of a strong theory of the First Amendment, totally impairing the option to receive unrestricted expression would be an "abridgment." Barring indecency only during the afternoon broadcasts, however, would not significantly intrude on individuals' access to expression. And it might significantly support parental control. For these reasons, it might be permissible while more extensive channeling should not be.

B. Back to the Decisions

Despite contrary dicta noted above, the best reading of Pacifica supports, and is certainly consistent with, the strong speech-protective interpretation of the First Amendment. As noted, Pacifica and American Mini Theaters should be read in combination. American Mini Theaters implicitly accepted the strong speech-protected principle embodied in Butler - that the zoning of constitutionally protected material must not restrict the availability of protected speech, at least to the adult audience that has the constitutional right in relation to the material. There, the Court noted that the "ordinances are not challenged on the ground that they being the category that creates serious harms. Since the FCC has shown little support for the notion that substantial numbers of parents share the concerns that the FCC attributes to them as opposed to concerns about the total amount of television their children view or the violence they see, the FCC's channeling may not actually further any legitimate purpose.

65. Those who neither want to view nor have their children view indecency will be disadvantaged as compared to a regime with a complete ban - but I assume the First Amendment makes the unregulated environment the appropriate baseline from which deviation is permitted, but only deviations in ways that do not suppress speech.

66. See, e.g., supra notes 55 & 56 and accompanying text.

impose a limit on the total number of adult theaters" and then observed that, even given this zoning regulation, "the market for this commodity is essentially unrestrained." The plurality explained that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Justice Powell's concurrence further emphasized that "there is no indication that . . . [the Ordinance] has the effect of suppressing production of or, to any significant degree, restricting access to adult movies." Both Justices Stevens and Powell relied on the district court's findings that the zoning had not restricted availability.

Pacifica had no obvious occasion to explicitly adopt the Butler principle, which presumably would permit only limited channeling by the FCC, since it continually emphasized how limited, how fact specific, was its holding that the FCC could ban monologue. Still, in its final substantive paragraph, where it again "emphasiz[ed] the narrowness of [its] holding," and again referred to the "nuisance rationale" and noted the importance of the "time of day" of the broadcast, the Court asserted in a footnote that the FCC's action did not violate the Butler principle. The concurrence was even more explicit. Noting the Butler principle, Justice Powell cautioned that "[t]he Commission certainly should consider it as it develops standards in this area." Justice Powell properly observed that the principle was "not sufficiently strong to leave the [FCC] powerless to act in circumstances such as those in this case," which he described as barring "Carlin's monologue over the radio in the early afternoon hours." After noting various examples of language practices not covered, the concurrence accepted the FCC's order "on the facts of this case." When Justice Powell concluded with the observation that he "doubt[s] whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so," he essentially accepted the mandate of Butler. At such a point, any constitutional challenge will reduce to

69. Id. at 62.
70. Id. at 71 n.35.
71. Id. at 77 (Powell, J., concurring in part).
72. Id. at 71 n.35 & 79 (Powell, J., concurring in part).
74. Id. at 760 (Powell, J., concurring in part and concurring in judgment).
75. Id.
76. Id.
77. Id. at 761.
78. Pacifica, 438 U.S. at 762.
an empirical dispute over whether the chosen form of channeling will or will not suppress protected speech.

CONCLUSION

I have claimed that the governmental purpose that most clearly supports the channeling approved in *Pacifica* only calls for a restricted channeling - a ban that would not extend to the evening when a parent is more likely to be at home and potentially able to supervise children in the house. Moreover, *Pacifica*'s analysis stays consistent with the constitutional principles implicit in a strong-speech protective interpretation of the First Amendment. This interpretation would permit limited channeling because this does not significantly impair and thus does not abridge the media's right to make its programming available to an audience. But it would rule out channeling that significantly reduces the availability of broadcast indecency to adults (or to children whose parents would allow them to listen or watch).

POSTSCRIPT

Since this talk was given, the United States Court of Appeals for the District of Columbia Circuit decided *Action for Children's Television v. FCC*. The en banc decision invalidated the ban on commercial stations' broadcasts of indecency for the two hours between ten o'clock p.m. and midnight only because some public stations were allowed to broadcast indecent materials during that period. In its primary discussion, however, the court of appeals upheld in principle a ban on indecency except for a "safe harbor" between midnight and six o'clock a.m. This decision represents a rejection of the strong speech position and is not required by *Pacifica*. Although my talk aimed at a theoretical understanding of the propriety of channeling rather than a current statement of the law, some comment about this decision seems merited.

Two aspects of the majority's approach diverge from the requirements for strong speech protection: first, its reliance on the government's asserted interest in the well-being of children as a justification for barring broadcasts of indecency from six o'clock a.m. to midnight; and second, its doctrinal commitment to upholding

79. 58 F.3d 654 (D.C. Cir. 1995) (en banc) [hereinafter *ACT IV*].
80. *Id.* at 669.
81. *Id.* at 664-69.
82. *Id.* at 660-63. The majority of the court of appeals, sitting en banc, found the government's interest in "support for parental supervision of children[ ]" and
a suppression of protected speech if the regulation promotes a compelling governmental interest by the least restrictive means.83

A. Governmental Purpose

Strong protection is consistent with channeling to achieve a purpose that does not require abridgment of First Amendment rights. Such a purpose was identified in Pacifica. Channeling during a portion of the day aids parents by providing a period of time during which those parents who want to keep their children unexposed do not have to monitor their children’s viewing while also leaving ample time for broadcasting any protected speech chosen by the broadcaster, thus not disabling broadcasters from providing parents a broader range of choice for themselves and, if they want, for their children.

Strong protection is inconsistent with pursuing any purpose that requires reducing adults to the level of children. The court of appeals, however, upheld a six o'clock a.m. to midnight ban on the basis of a state purpose to shield children from broadcast indecency. Possibly, Pacifica credited this purpose because it saw no difference, or at least no conflict, between this interest and parental control in the context of Pacifica’s two o’clock p.m. broadcast. The court of appeals, however, concluded that this purpose supports an extensive ban. It cited data indicating that approximately twenty-one percent of teenagers watched television between eleven o’clock and eleven-thirty p.m., over fifteen percent between eleven-thirty p.m. and one o’clock a.m., but only about five percent between one forty-five a.m. and two o’clock a.m.84 The fall-off of viewing during late hours, however, did not differ that much from the viewing by adults. For example, only about fifteen percent of Chicago’s adult viewers were in the audience at midnight.85 Thus, the channeling that shields most kids equally shields most adults, effectively reducing them to the level of kids.

This second purpose also conflicts with parental authority for those parents who think that their children (or the older ones) should be able to view (at least some) indecent broadcast programming or who want to teach their children self-discipline in respect

“a concern for children’s well-being . . .” compelling enough to uphold the restriction. Id. at 660-61.

83. Id. at 663-64.
84. ACT IV, 58 F.3d at 665.
85. Id. at 666.
to their viewing habits. In no case has the Supreme Court ever found a state purpose concerning children compelling or even acceptable when it involves the state prevailing over parental authority within the home unless the injury to the child is relatively indisputable.

Other problems with the Court's reasoning do not go to the theoretical points discussed here. For example, the Court should have found it difficult to accept either the claim that the purpose of shielding children from these indecent broadcasts is compelling or is effectively advanced by the channeling. Unlike the considerable evidence that shows the harmful effects of violent programming on children, the government was unable to cite any social science evidence showing harmful effects of indecent programming. Likewise, the government did not seriously pursue that purpose. The reason channeling is okay, the government argued, is that it would be entirely ineffective in respect to any child whose parents are willing to allow the viewing of such programming.

86. Chief Judge Edwards aptly stated that:

my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming.


87. "[Constitutional] interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." ACT IV, 58 F.3d at 678 (Edwards, J., dissenting) (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).

88. ACT IV, at 663. The court cited Ginsberg for its claim that the Supreme Court treated the two purposes as complementary rather than as in conflict. Characterizing the purposes as complementary makes sense in Ginsberg, where the regulation only applied outside the home, but not here, where the government limits the programming that comes into the home during hours when children (and adults) are usually awake, thereby taking choice away from parents. Oddly, the court quoted Justice Brennan's observation that the ban did not bar parents from purchasing the material for their children - in other words, it did not prevent parents from doing what it barred children doing on their own. Id. This observation implicitly recognizes parental control, not shielding children, as paramount. Id. Only by discrediting parents' interest in using free broadcast television to provide their children access to some indecent materials was the court able to find parental control not compromised by a six o'clock a.m. to midnight ban. Id.

89. ACT IV, 58 F.3d at 681-82 (Edwards, J., dissenting). But see id. at 661 (arguing that Supreme Court has never held that "scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech").

90. Id. at 682.
B. Abridging Speech to Promote a Governmental Interest

Strong protection of speech requires that the government pursue the public interest by means that do not abridge speech freedom. Most Supreme Court cases upholding speech claims follow roughly that approach. They determine whether protected speech is regulated and, if so, whether the regulation should be considered an abridgment. Some regulation, for example, time, place and manner regulations are considered less problematic. Other regulation, for example, according to some theories, content regulation, is presumptively invalid unless it fits some narrow and theoretically justified category of non-protected speech.

Nevertheless, the relatively recent Supreme Court practice, followed by the court of appeals, applies the test of whether the government regulation advances a compelling governmental interest by the least restrictive means. This equal protection test has, Justice Kennedy observed, "found its way into our First Amendment jurisprudence of late, even where the sole question is, or ought to be, whether the restriction is in fact content-based." 91 But applying this equal protection test to First Amendment questions is surely misguided.

Even in the equal protection area, the compelling-governmental-interest least-restrictive-means test is uninformative - laws are only really struck down when they manifest an impermissible purpose. And the test should be and usually is ignored if it suggests the wrong result, and it is regularly manipulated - the Court regularly and disingenuously describes a law's purpose as being one that the law does not advance when the Court recognizes that the law should be struck down because its real purpose is impermissible. 92 Still, in the equal protection context, at least the notion of respecting people's equality might be maintained if a law that disadvantages a "discrete and insular minority" is justified by a compelling interest that could even convince members of the disadvantaged group, the worst off, that they are better off with the disadvantageous law because the purpose is important even for them - like temporary racial segregation during a prison race riot. In the First Amendment context, however, the norm of respecting people's liberty can not be advanced by a law that restricts that liberty.

Most unconstitutional limitations on free speech have been designed, usually quite narrowly, to advance interests that many people consider very important—certainly as important as the “compelling” purpose of ineffectively shielding children from material not shown to be harmful to them. If applied honestly, this equal protection tailoring standard would require the Court to uphold most regulations of speech that it has struck down. Of course, by characterizing the government interest as insufficiently important or by manipulating its description so that it appears not well served, courts can, when they want, use this standard to strike down virtually any suppression. The test, however, neither encourages serious protection nor properly focuses the constitutional inquiry.

The civil libertarian premise is that the government must not advance public interests by means that suppress protected speech. And the civil libertarian doubts that the government either wisely or effectively advances legitimate interests by suppressing individual liberty. Justice Kennedy had it right when he argued that when

[t]he regulated content has the full protection of the First Amendment . . . [this] is itself a full and sufficient reason for holding the statute unconstitutional . . . . [I]t is both unnecessary and incorrect to ask whether the State can show that the statute “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”

Justice Kennedy's assertion, of course, either requires invalidation of channeling, as the dissents in Young and Pacifica argued, or, as I argued here, upholding channeling but only if the version upheld cannot be persuasively characterized as abridging speech. Arguably, channeling does not abridge if it does not substantially impair adult audiences' access to movies or broadcast indecency. But by this standard, ACT IV was wrongly decided.