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To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting

by
Rocio-de Lourdes Cordoba*

"The court jester who mocks the King must choose his words with great care."

Recent events have reinforced the truth of this maxim within the realm of the federal government's funding of the expression of ideas. While the funding activities of the National Endowment for the Arts (NEA) have received a great deal of attention, broadcasting also has become the target of legislation that highlights the federal government's morality campaign.

The late 1980s appear to signal the apex of a forceful, yet ironically silent, campaign to remove indecency from the airwaves at any time, and in any shape or form. Despite an alleged era of broadcast deregulation begun during the Reagan administration, Congress and the Federal Communications Commission (FCC) gradually have tightened their grasps on "indecent" broadcasting to the point of completely banning this constitutionally protected form of speech from the public airwaves. After almost a decade of limiting its definition of

* Member, Third Year Class; B.A. 1985, University of Southern California. The author wishes to thank the staff of the General Counsel's Office at National Public Radio for allowing her to witness the workings of public radio firsthand as a law clerk.

2. See generally Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tax. L. Ray. 207 (1982). Former FCC Chairman Fowler and his assistant Brenner argue that the licensing scheme creates the perception that broadcasters are community trustees and that licensing should be eliminated, thereby allowing broadcasters to act like, and be perceived as, marketplace participants. Id. at 209. The authors further state that "in light of the first amendment's heavy presumption against content controls the Federal Communication Commission should refrain from insinuating itself into the program decisions made by licensees." Id. at 210.
3. Congress largely has delegated the regulation of radio and television stations to the FCC, which grants licenses to operate within this limited spectrum. 47 U.S.C. § 301 (1988).

The FCC notes that although "[i]t is well established that the First Amendment does not protect obscene speech," the Supreme Court has determined that "[s]exual expression which

[635]
indecency to the use of seven "filthy words" broadcast prior to 10 p.m. and after 6 a.m.,\(^5\) in 1987 the FCC announced a change of heart in three simultaneously released opinions.\(^6\) The new FCC ruling shifted the legal time to begin broadcasting "indecent material" from ten p.m. to midnight.\(^7\) Broadcasters, however, complained that the FCC never fully defined indecency.\(^8\) No longer was indecency limited to certain prohibited words; instead, the FCC had reverted to its former "generic" definition of indecency.\(^9\)

is indecent but not obscene is protected by the First Amendment." \(^{id.\text{ para. 12 (quoting Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829, 2836 (1989)). Nevertheless, the FCC concluded that a congressionally mandated 24-hour prohibition of indecent speech in broadcasting adheres to the constitutional standard for regulating broadcast indecency articulated by the Court in Sable because "the compelling government interest in protecting children from indecent broadcasts would not be promoted effectively by any means more narrowly tailored than a 24-hour prohibition." Id. para. 2; see also Enforcement of 18 U.S.C. \(\S\) 1464, 47 C.F.R. \(\S\) 73.3999 (1989) (restricting transmission of obscene or indecent language on a 24-hour basis). But cf. FCC v. Pacifica Found., 438 U.S. 726, 748-51 (1977) (FCC may regulate patently indecent broadcasts only when exposure of children and unwilling adults is unavoidable); see infra Part II.B.

5. In re Infinity Broadcasting Corp., 3 F.C.C. Rec. 930, para. 4 (1987) (noting that in the 10 years following Pacifica, 438 U.S. at 726, "[un]stated, but widely assumed ... was the belief that only material that closely resembled the George Carlin monologue [of seven 'filthy words']" broadcast prior to 10 p.m. would be indecent under the FCC's indecency test); see infra notes 136-137 and accompanying text.


7. Id.; cf. Action for Children's Television v. FCC (ACT I), 852 F.2d 1332 (D.C. Cir. 1988) (court held that the FCC must provide broadcasters with clear notice through prospective rulemaking of reasonably determined times during which indecency may be aired safely). See infra notes 195-202 and accompanying text.

8. Following the 1987 Indecency Rulings a consortium of broadcasters filed a Petition for Clarification and Reconsideration, claiming the FCC's indecency definition was "unconstitutionally vague and overbroad" and suggesting revisions. See infra notes 220-226 and accompanying text.

9. In a Public Notice announced after the 1987 Indecency Rulings, the FCC adopted the "generic" standard of indecency as: "language or material that depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." New Indecency Enforcement Standards, 52 Fed. Reg. 16,386 (1987). Furthermore, it specified that such indecency would be actionable if broadcast "at a time of day when there is a "reasonable risk that children may be in the audience."" Id. (quoting FCC v. Pacifica Found., 438 U.S. 726, 732 (1978) (quoting Pacifica Order, 56 F.C.C.2d 94, 98 (1975))). In FCC v. Pacifica Found., 438 U.S. 726 (1978), the Court noted that while the FCC standard articulated in the 1975 Pacifica Order, 56 F.C.C.2d 94 (1975) [hereinafter 1975 Pacifica Ruling], "may lead some broadcasters to censor themselves," the FCC definition will, at most, "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities." Pacifica, 438 U.S. at 743; see also 1990 Indecency Prohibitions, supra note 4, para. 5 n.8 (FCC defines generic standard); In re Enforcement Prohibitions Against Broadcast Indecency in 18 U.S.C. \(\S\) 1464, 4 F.C.C. Rec.
Indecency regulation after 1987 has transcended FCC action. Asserting that post-midnight indecent programming might blemish public airwaves during the so-called “safe harbor” period in the wee hours of the morning, Senator Jesse Helms, a Republican from North Carolina, attached to an FCC appropriations bill an amendment mandating the FCC to enforce a total prohibition against indecent broadcasting.11 "Garbage is garbage, no matter what the time of day or night may be," he told the Senate.12 The Senate adopted the proposed bill, which included Senator Helms’ amendment, with little discussion and President Reagan signed it into law October 1, 1988.13

The signal against broadcast indecency became loud and clear in October 1989, when the FCC announced it was “taking action” on ninety-five indecency complaints filed and pending against radio and television stations during the past two years.14 In December 1989, the FCC codified the 24-hour ban of indecency as defined by a yet uncertain standard.15

A group of senators immediately supported the FCC's indecency enforcement actions as an “appropriate balance between the protection of the First Amendment rights of free expression and the need to protect our nation's children from harmful material.”16 Broadcasters, however, continue to perceive indecency standards as arbitrary and vague.17 They fear the government is “becoming too concerned” with program content on radio and television.18

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11. Helms Amendment I further provided: “By January 31, 1989 the Federal Communications Commission shall promulgate regulations in accordance with Section 1464, Title 18, ... to enforce the provisions of such Section on a 24 hour per day basis.” Id. at S9913.
12. Id. at S9912.
17. See Making the Call on Offensive Language is Murky Ground, Chicago Trib., Dec. 8, 1989, at 1; Debating Indecency: Panel Features Religious Broadcasters and First Amendment Advocates, Broadcasting, Sept. 18, 1989, at 28 [hereinafter Debating Indecency]. Barry Lynn of the American Civil Liberties Union claimed that “the fear that is set loose within the broadcast industry when the FCC comes to town ... may well inhibit more free and open
One may easily draw a parallel between the new governmental scrutiny of indecency in publicly aired material and the recent intolerance toward obscene depictions in publicly funded art. Both require striking a balance between the right to freedom of expression and the federal government's interest in determining what it will or will not fund. While the anti-indecency debate generally has not received attention outside the broadcasting community, however, the visual arts controversy, pitting free speech advocates against legislators unwilling to spend tax dollars on controversial art exhibits, has become increasingly visible.

In June 1989, Congress began to signal its disapproval of certain federally funded art. Consequently, discontented arts proponents and civil libertarians began to ask whether first amendment rights are being sacrificed for federal dollars. Senator Helms's proposed amendment to a $10.9 billion Interior Department appropriations bill initiated the debate over federal arts funding. The proposed amendment would restrict National Endowment for the Arts (NEA) grants that "promote, disseminate or produce . . . obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts." Although the House of Representatives defeated the Helms Amendment by a vote of 264 to 153, the Senate approved the amendment by a voice vote. The onslaught of heated debate in both houses prompted Congress to form a House-Senate task force to determine whether the amendment’s language was consistent with the Supreme Court's obscenity standards set out in \textit{Miller v. California}. By Oc-

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18. 1990 Indecency Prohibitions, \textit{supra} note 4, para. 71 n.94 (citing broadcasters' comments at 23) (broadcasters asserted that a 24-hour indecency ban "places government in the position of deciding what children should see and hear"); \textit{see also} Reversing a Dark Trend, \textit{Electronic Media}, Nov. 6, 1989, at 10; \textit{Debating Indecency, supra} note 17, at 28.

19. 135 \textit{Cong. Rec.} S6858 (Daily ed. June 19, 1989). Senator Helms, responding to a newspaper editorial criticizing "reactionary politicians" for their disapproval of federal funding of controversial art exhibits, stated: "I've got news . . . [all across America, good decent taxpaying citizens are up in arms. If that's 'chilling censorship,' there are a lot of folks around who intend to make the most of it." \textit{Id.} (statement of Sen. Helms).


25. 413 U.S. 15 (1973). \textit{Miller} established the basic guidelines for defining obscenity:
tober, the conferees reached a compromise and adopted a milder version of the original amendment.26 The final restrictions barred NEA funding of exhibits containing “obscene material” that “taken as a whole” lack “serious literary, artistic, political or scientific value” as determined by local community standards.27 In essence, Congress eliminated reference to indecency and adopted the Supreme Court’s Miller standard.28

(a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (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; see Helms Amendment II, supra note 24, at H6519-26; see also Compromise is Proposed on Helms Amendment, N.Y. Times, Sept. 28, 1989, at A14, col. 3 (proposition that House reach compromise between the standards Helms originally proposed, see supra note 22 and accompanying text, and Supreme Court standards by appointing a legislative commission to review NEA grants while “keeping in mind” the obscenity standards of the Court).


27. In announcing the revised amendment, Representative Regula stated that its “language came from the Miller case in which the Supreme Court has spoken very clearly. This is tough language.” Id.; see also Congress Passes Bill Curbing Art Financing, N.Y. Times, Oct. 8, 1989, § 1, at 27, col. 1 (reporting that Helms's original strict obscenity standards were rejected in favor of the more liberal Miller standards).

28. Immediate repercussions were felt in the wake of the conferees’ “Helms Amendment.” Although less stringent than the original proposal, the final anti-obscenity bill placed the NEA's funding activities under intense political and public scrutiny. It prompted Congress to form an Independent Commission to monitor the NEA's grant-making process and to determine within 180 days whether alternative standards should be adopted for federally funded art. Helms Amendment II, supra note 24, at H6519-26. Under the previous standards, the NEA was required to fund projects that “in the experts' view foster excellence, are reflective of exceptional talent and have significant literary, scholarly, cultural or artistic merit.” House Passes Compromise on Federal Arts Financing, N.Y. Times, Oct. 4, 1989, at C19, col. 1 (quoting National Foundation on the Arts and Humanities Act, Pub. L. No. 89-209, § 10, 79 Stat. 852 (1965) (codified as amended at 20 U.S.C. § 959(a) (1988))). The conferees, however, resolved that “[n]one of the funds authorized to be appropriated for the [NEA] . . . may be used to promote, disseminate, or produce materials which in the judgment of the [NEA] . . . may be considered obscene.” Helms Amendment II, supra note 24, at H6526. In addition, the arts institutions that organized the exhibits leading in large part to the arts funding controversy were placed on a 30-day probation period while Congress reviewed any future NEA grant proposals. Id. at H6519-26. The monitored art institutions include the Institute for Contemporary Art at the University of Pennsylvania, which organized a retrospective of Robert Mapplethorpe photographs described as “homoerotic,” and the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina, which organized an exhibit by Andres Serrano containing a controversial piece titled “Piss Christ” that depicted a crucifix in a jar of urine. See House Passes Compromises on Federal Arts Financing, supra at C19, col. 1. The first visible sign of change at the NEA took place nearly a month after the bill became law. John Frohnmeyer, the newly appointed NEA chairman, suspended a $10,000 grant to a New York gallery exhibit on AIDS and asked that the NEA not be listed as one of its sponsors. See The Endowment vs. The Arts: Anger and Concern, N.Y. Times, Nov. 10, 1989, at C33, col. 3. Although claiming that some of the works were in “questionable taste,” Frohnmeyer's primary complaint was against the “political” nature of the show's
Although broadcasting and the arts are distinct media with diverse interests, they both share similar first amendment concerns regarding governmental scrutiny of the content of their works. These concerns become particularly urgent in the context of federal funding. For example, Jesse Helms's 24-hour indecency ban on public broadcasting was introduced as an amendment to an appropriations bill for funding federal agencies.\(^{29}\) Unlike the NEA amendment's restriction of unprotected speech, however, the broadcasting provisions restricting protected speech passed quickly and were not greeted with a national debate.\(^{30}\) Given this antagonism toward broadcasters' freedom of expression, public radio and television broadcasters, like visual arts providers, will be vulnerable to conditioned federal funds.\(^{31}\) When Congress drafted the Public Broadcasting Act of 1967,\(^{32}\) it developed a statutory framework for appropriating federal funds to noncommercial broadcasters via the Corporation for Public Broadcasting (CPB).\(^{33}\) If Congress decides to limit its condition of the CPB in an effort to thwart indecent programming, as it has limited the NEA, public broadcasters may find themselves without federally appropriated funds if they do not comply with imposed conditions.

Although public broadcasters and visual artists share first amendment concerns, the degree of governmental intervention varies. For example, the existence of obscene material would render an artist ineligible to receive an NEA grant, but the revised NEA amendment does not specifically target indecency; nor does it affect non-publicly funded works. By contrast, Congress has banned broadcast indecency—a protected form of speech—altogether. Another significant difference lies in the nature of public broadcasting, which is statutorily protected from governmental interference under the Public Broadcasting Act.\(^{34}\) While the Act authorizes federal subsidies for public broadcasting, it

catalogue, which contained an essay criticizing political and religious figures, including Senator Helms. See id. Frohnmeyer stated that the catalog “is a very angry protest against the specific events and individuals involved over the last eight months in the most recent arts legislation in Congress. It's very inflammatory.” Id. Heavy criticism from the arts community, however, persuaded Frohnmeyer to reverse his decision and to restore the grant for the exhibit, but not the catalogue. See National Arts Chief, In a Reversal, Gives Grant to AIDS Show, N.Y. Times, Nov. 17, 1989, at A1, col. 1. As these events illustrate, the NEA funding climate remains uncertain.

29. See supra note 10 and accompanying text.
30. See supra notes 11-13 and accompanying text.
31. See infra Part III.
33. Id.
34. See infra Part I.A.
strictly limits political intervention in program content. These “insulating” provisions were meant to ensure that public broadcasting remain free from political pressure and continue to educate and inform diverse and underrepresented audiences. Furthermore, because the Supreme Court has recognized that public broadcasting forms a part of “the press,” it arguably enjoys a heightened degree of protection from governmental intervention under traditional first amendment principles. These two factors should grant public broadcasters a unique freedom to produce programming unobstructed by federal editorial influences despite the broadcasters’ dependence on federally appropriated funds. Conditioned federal funds for public broadcasting dependent on program content, therefore, potentially may violate the constitutional and statutory protections afforded broadcasters’ speech.

This is especially relevant within the context of indecency. The 24-hour ban on broadcast indecency could dangerously chill important educational and cultural broadcast programs generally, and specifically those aired on public broadcasting stations. For example, an AIDS educational segment aimed at teens would render a broadcaster liable if the broadcast language is deemed indecent. Likewise, under the current status of indecency law, a documentary on “hate speech” among public law school campuses utilizing “dirty words” to relay a realistic message could lead the FCC to sanction the public broadcaster airing this type of program. Public broadcasters, therefore, remain in a precarious position. First, because they continue to perceive the current indecency definition as vague, broadcasters remain unclear as to when fully protected speech ends and actionable indecency begins. A public broadcasting station, therefore, may choose to alter its programming to protect itself from an indecency action.

35. Id.
36. Id.
37. See FCC v. League of Women Voters, 468 U.S. 363, 382 (“[T]he special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press, of which the broadcasting industry is indisputably a part [citations omitted] carries out a historical, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs . . . .”).
38. See supra note 4.
39. See infra Part III.
41. The advent of the rise of hate crimes, and neo-nazism in the Pacific Northwest, for example, was recently the subject of an Oregon Theater production covered by NPR. See Audiences See a Troubled Reflection; At Oregon’s Shakespeare Festival, “God’s Country” Focuses on Neo-Nazism Both On and Off Stage, L.A. Times, Aug. 12, 1990, at 50 (Sunday home ed.).
This practice could have a chilling effect on non-indecent and fully protected programs that are erroneously deemed to be indecent by a broadcaster. Furthermore, until the 24-hour ban is reviewed by the Supreme Court, its constitutionality remains uncertain. Even if the Court were to strike down the ban as unconstitutional, Congress might attempt an alternate method of eliminating indecency in public broadcasting. If Congress observes rampant indecency among public broadcasting as it did with the arts, legislators may try to curb this practice by conditioning or completely restricting the appropriation of funds to the CPB. Conditioned federal subsidies to public broadcasting stations that refrain from airing indecent programs would be a method for Congress to regulate indirectly what it could not reach directly.

Several issues arise from the controversies surrounding the federal anti-indecency campaign as it relates to public broadcasters' funding vulnerability. First, is a total ban on broadcast indecency an unconstitutional infringement of protected speech? Second, if the ban were to be held unconstitutional by the Supreme Court, would public broadcasting be subject to the same federal scrutiny applied to art by legislators who wish to guard federal funds? If so, would conditioning federal funds upon alteration of program content violate public broadcasters' first amendment right to free speech?

This Note explores these issues by examining actions taken by Congress, the FCC, and the Supreme Court that have shaped the freedom of expression afforded public television and radio.42

Part I discusses the history of public broadcasting and the manner in which noncommercial broadcasters receive federally appropriated funds through the CPB. It further examines the legislative intent of the Public Broadcasting Act's "insulating" provisions to maintain public broadcasting program content free from governmental control. Part II examines whether the first amendment guarantee of free speech is a constitutional "right" under traditional doctrines of federal broadcast regulation. Furthermore, it analyzes the current status of federal indecency regulation, and concludes that a 24-hour indecency ban unconstitutionally chills protected speech. Part III argues that a legislative scheme conditioning public broadcasters' eligibility for federal funds on their agreeing not to air any indecent programming would alter their right to engage in protected speech and therefore result in an unconstitutional condition. The Note concludes that absent a clear

42 Because the Note takes a federal rather than state or local viewpoint in its analysis, "public broadcasting" refers to the Public Broadcasting Service and National Public Radio: national representatives of the majority of noncommercial radio and television stations in the United States. See infra notes 72-74 and accompanying text.
determination by the Supreme Court regarding the constitutionality of a total indecency ban, and until the courts and the FCC provide broadcasters with narrowly tailored guidelines as to what constitutes indecency, protected speech—including important educational, cultural, and news programs presented on public broadcasting—will be chilled from the airwaves.

I. The Evolution of Public Broadcasting in the United States

Public broadcasting in the United States has evolved from a sampling of educational television and radio stations into a national system of federally funded broadcasting entities. This Part describes the historical and current framework of this system. Section A examines the legislative history of the Public Broadcasting Act of 1967 and the principal provisions regulating today’s noncommercial television and radio broadcasters. Section B illustrates the mechanics of the Public Broadcasting Act’s funding scheme via the CPB. It demonstrates Congress’ intent to foster public broadcasting by providing financial assistance that would develop an alternative means of communication reaching diverse and underrepresented audiences. Section C demonstrates a clear congressional intent to insulate public broadcasters’ editorial decisions from governmental control.

A. Federal Regulation of Public Broadcasting

(1) Public Broadcasting Prior to 1967

Under the Radio Act of 1927 and the Communications Act of 1934, Congress made no special provisions for noncommercial, educational broadcasting stations. The increase of radio licensees during the 1930s, however, resulted in a decrease of noncommercial stations because noncommercial stations could not compete effectively with their commercial counterparts. In an effort to encourage noncommercial broadcasting, the FCC reserved certain frequencies for edu-

45. See FCC v. League of Women Voters, 468 U.S. 364, 367 (1984) (before 1939, both educational and commercial stations were subject to the same licensing requirements).
46. Id.
cational radio in 1939 and for educational television in 1952. At that time, noncommercial stations depended on state and local governments, private donations, and foundation grants for their funding. Congress did not provide federal assistance until 1962, when it established a matching grants program for educational television through the Secretary of Health, Education, and Welfare, to be implemented with the assistance of the FCC. The scheme provided for five-year matching grants of up to $32 million, with an aim toward constructing educational television facilities throughout the United States. These facilities were to "serve the greatest number of persons . . . in as many areas as possible . . . which are adaptable to the broadest educational uses." By 1967, the number of educational television stations had doubled to 189 and reached 155 million American viewers. Noncommercial radio, likewise, was expanding. Beginning in 1963, an increase of two new stations per month resulted in a total of 346 noncommercial stations operating by 1967. This unprecedented growth


48. Id.; see also PUBLIC TELEVISION: A PROGRAM FOR ACTION: THE REPORT AND RECOMMENDATIONS OF THE CARNEGIE COMM’N ON EDUCATIONAL TELEVISION 33-37 (Bantam ed. 1967) [hereinafter 1967 CARNEGIE COMM’N REPORT] (concluding that federal financing should augment financing by state and local governments, private donations, and foundation grants).


The Report noted, “unless the process of getting educational television stations on the air is speeded up, the demand to use these channels for commercial purposes may become irresistible and thus they will be irretrievably lost to education.” Id. (quoting Educational Television Act of 1962, supra note 49). This situation prompted the FCC to set aside frequencies for the exclusive use of noncommercial stations.

Likewise, the Senate Report stated that the FCC had reserved 329 station channels for educational television by 1966, increasing to 633 set-asides by 1967. S. REP. No. 222, 90th Cong., 1st Sess. 6 [hereinafter 1967 SENATE REPORT], reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS 1772, 1774. Educational radio stations, however, were not eligible to receive allocated funds through the Educational Television Facilities Act of 1962. Id. at 5. Nevertheless, 346 educational stations were operating by 1967, with construction permits granted to an additional 18. The Senate noted that “this legislation should encourage that growth.” Id.

52. The first noncommercial television broadcast was in 1953; only 90 noncommercial stations followed through 1962. Id. Congress stated that “these statistics amply demonstrate the need for and the success of the initial term of the facilities act of 1962.” Id. Note, however, that a total of approximately 745 stations, noncommercial and commercial, were operating under FCC licenses. See 1967 HOUSE REPORT, supra note 51, at 9.


54. Id.
prompted the Carnegie Corporation to sponsor a study by the Carnegie Commission on the status of public broadcasting in 1967 and to suggest congressional action. The Carnegie Commission found that although educational broadcasting was expanding, it was seriously underfinanced. It recommended that the federal government establish a nonprofit, nongovernmental "Corporation for Public Television" to provide financial support for noncommercial broadcasting. The funding was to aid program production, distribution to local stations, and establishment of satellite interconnections.

(2) The Public Broadcasting Act of 1967

Pleased with the Carnegie Commission's report, President Johnson recommended that Congress act upon the Commission's proposals. During the congressional hearings, the Carnegie report received widespread approval and became the framework for the Public Broadcasting Act of 1967. The House of Representatives heartily supported the appropriation of federal funds for public broadcasting, noting:

55. The Carnegie Commission was formed in 1964 to "conduct a broadly conceived study of noncommercial television ... [and to] recommend lines along which noncommercial television stations might most usefully develop during the years ahead." 1967 CARNegie COMM'N REPORT, supra note 48, at vii. President Johnson endorsed the Commission's proposed study, noting: "From our beginnings as a nation we have recognized that our security depends upon the enlightenment of our people; that our freedom depends on the communication of many ideas through many channels." Id. at vii.

56. See id. In its summary, the Commission stated that it had reached the conclusion that a well-financed and well-directed educational television system, substantially larger and far more pervasive and effective than that which now exists in the United States, must be brought into being if the full needs of the American public are to be served. This is the central conclusion of the Commission and all of its recommendations are designed accordingly. Id. at 3. Among its proposals were: "Immediate Action to Extend and Strengthen Educational Television," id. at 4; "A New Institution for Public Television," id. at 5; "Enlarged Federal Support for Public Television," id. at 8; and "Continuing Study to Improve Instructional Television," id. at 9. See also FCC v. League of Women Voters, 468 U.S. 364, 368 (1984) (noting that the Carnegie Report provided the impetus for expanded federal involvement in educational television).

57. See generally 1967 CARNegie COMM'N REPORT, supra note 48.

58. See id. at 36-41.

59. See id. Section 397(3) of the Public Broadcasting Act defines "interconnection" as "the use of microwave equipment, boosters, translators, repeaters, communication space satellites, or other apparatus or equipment for the transmission and distribution of television or radio programs to public telecommunications entities." 47 U.S.C. § 397(3) (1990).

60. 1967 SENATE REPORT, supra note 51, at 3. See also 1967 HOUSE REPORT, supra note 51, at 10, 24.

The rewards which are reasonably to be expected from this seed program cannot be measured in money alone. Who can estimate the value to a democracy of a citizenry that is kept fully and fairly informed as to the important issues of our times and whose children have access to programs which make learning a pleasure?

The program support provided by . . . the bill will, among other things, enable the noncommercial educational broadcast stations to provide supplementary analysis of the meaning of events already covered by commercial newscasters.62

On November 7, 1967, the Public Broadcasting Act of 1967 became law.63 Today, it structures public television and radio, providing funding mechanisms and insulating safeguards that protect public broadcasting from federal government intrusion.64

The Act outlines the establishment, mandate, and organization of the CPB, created to "facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control."65 The CPB is not an "agency or establishment of the federal government,"66 must remain "nonprofit and nonpolitical,"67 and is authorized to obtain grants from federal, state, and public agencies that will enable it to carry out its stated purposes.68

During the adoption of the Public Broadcasting Act, Congress noted that it is in the public interest to encourage development of public broadcasting facilities and programming that is "primarily designed for educational or cultural purposes and not primarily for amusement or entertainment purposes."69 In essence, Congress envisioned public

64. Id.; see infra Part II.
66. Id. § 396(b).
67. Id. § 396(f). Section 396(f) provides:
(1) The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.
(2) No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, employee, or any other individual except as salary or reasonable compensation for services.
(3) The Corporation may not contribute to or otherwise support any political party or candidate for elective public office.
68. Id. § 396(g)(2)(A).
69. See 1967 House Report, supra note 51, at 16. In addressing program content, the House Report stated:
Notwithstanding the difficulties of defining entertainment, the committee deems such a provision advisable in order to preclude the Corporation from granting funds for programs which are designed primarily to amuse and for no other purpose. Education is often entertaining as it is enlightening; indeed it is often more palatable if it is.
television and radio programming as filling a gap left by commercial broadcasting. Unlike the bulk of entertainment-oriented commercial programming, public broadcasting should inform, educate, and take "creative risks [that] . . . address[] the needs of unserved and underserved audiences."

Congress created the Public Broadcasting Service (PBS) in 1969 to carry out "interconnection facilities suitable for distribution and transmission" of public television to local stations. Within a year, Congress established National Public Radio (NPR) pursuant to the Public Broadcasting Act's mandate that a "substantial amount" of CPB funding be made available to noncommercial radio. Organized as a private, nonprofit corporation, NPR was to perform a service analogous to PBS for public radio stations, while retaining greater flexibility than PBS for national program production.

For example, Shakespeare, Toscanini, Gilbert and Sullivan, and Will Rogers all have been great teachers as well as absorbing entertainers, and their works would, of course, not be excluded by this definition. In short, [the Act] is not intended to inhibit programs which coat the philosophic pill with innocent merriment.

Id. 70. Id. at 16-17. But cf. 1967 Senate Report, supra note 51, at 6 (reiterating that commercial broadcasters also have a duty to operate in the public interest).

71. 47 U.S.C. § 396(g)(1), (6) (1988); see also 1967 Carnegie Comm'n Report, supra note 48, at 1 (distinguishing commercial television, which "seeks to capture the large audience . . . [and] relies mainly upon the desire to relax and to be entertained," from public television, which "includes all that is of human interest and importance which is not at the moment appropriate or available for support by advertising"); also noting that public television programs "do not, and are not intended to, have the mass appeal of commercial TV shows. Public television was conceived as an alternative to commercial television, and its legislative mandate to achieve excellence in programming [citation omitted] has been invoked to push it away from entertainment programs that edge close to the commercial [citation omitted]"); Note, Editorial Discretion of State Public Broadcasting Licensees, 82 Colum. L. Rev. 1161, 1165 (1982) (authored by Susan D. Charles) (same observation).


73. 47 U.S.C. § 393(c) (1988); see also Note, supra note 71, at 1167 nn.38-39 ("'Public radio' includes only those stations eligible for CPB funding . . . [and] considered as a whole provides diverse high-quality program alternatives to commercial radio.'").

74. See FCC v. League of Women Voters, 468 U.S. 364, 369 n.5 (1984). NPR was "created . . . and charged . . . with the responsibility for the production and national distribution of high quality radio programs." National Public Radio: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 241 (1984) (statement of CPB). Furthermore, NPR was founded to provide certain services that the CPB could not offer directly under provisions of the Act. NPR "would produce and deliver programs to broadcast stations, protected by the First Amendment freedom of the press, and would also represent its member stations' institutional interests. These were compelling reasons for the CPB to give NPR flexibility and to recognize
B. Federally Appropriated Funds Under the Public Broadcasting Act

Federal funding under the Public Broadcasting Act takes several forms. Public broadcasting facilities receive yearly appropriations for planning and construction through grants from the Secretary of Commerce. After consulting with the CPB and other public telecommunications entities, the Secretary establishes the appropriate criteria for grant approval. Generally, an applicant must be either: a non-commercial telecommunications entity; a nonprofit foundation, corporation, institution, or association organized primarily for educational purposes; or a state or local government agency or division. The applicant's primary purpose must be to operate public telecommunications facilities and further, the applicant must provide assurances that it will make "the most efficient use" of federal grants.

The CPB also is authorized to obtain grants from or contract with individuals, private and governmental agencies, organizations and institutions, or make grants to public telecommunications entities, to assist them in providing programs of "high quality, diversity, creativity, excellence and innovation."

The United States Treasury has established a Public Broadcasting Fund, to be administered by the Secretary of the Treasury. The Fund receives appropriations equal to a percentage of the total amount of non-federal financial support received by public broadcasting entities during each fiscal year. These funds are used first by the CPB for its corporate identity, independence, and control by member stations.


76. Id. §§ 391-394.
77. Id. § 392(a).
78. Id. § 392(a)(6).
79. Id. § 396(g)(1)(A).
80. See id. § 396(k)(1)(A)-(C) (Congress has authorized that 40% be appropriated to the Fund through 1993).
administrative expenses; the remainder goes to public television and public radio in proportion to their expenses.\textsuperscript{81}

The Public Broadcasting Act clearly demonstrates Congress’ intent to nurture an alternative means of public communication both locally and nationwide.\textsuperscript{82} As the Act’s history indicates, the federal government recognized the need to provide financial assistance for the development of noncommercial television and radio. Congress’ comprehensive, long-term appropriations scheme undoubtedly provides a consistent source of federal funding for public broadcasters. Whether this aid comes with strings attached or could have strings attached in the future without violating the Constitution or congressional intent, however, remains an unanswered question.

C. Public Broadcasting and the CPB: “Insulation vs. Dependence”

This section discusses the Public Broadcasting Act’s express statutory safeguards against governmental interference with program content. Known as the “insulating provisions,” these features of the Act distance congressional appropriations to the CPB from public broadcasters’ program production and distribution.

The Public Broadcasting Act’s legislative history reveals a congressional objective to insulate public television and radio from federal government control. In his message to Congress prior to the enactment of the Public Broadcasting Act, President Johnson said, “Noncommercial television and radio in America, even though supported by Federal funds, must be absolutely free from any Federal Governmental interference over programming.”\textsuperscript{83} The Senate Report further emphasized the need for noncommercial stations to retain editorial control.\textsuperscript{84} Likewise, the House Report stressed the need for adopting a

\textsuperscript{81} Id. § 396(k)(3)(A).
\textsuperscript{82} See supra notes 72-74 and accompanying text.
\textsuperscript{83} 1967 Senate Report, supra note 51, at 4.
\textsuperscript{84} It is clear . . . that the programs presented need to be of the highest attainable quality if educational broadcasting stations are to make optimum use of the scarce channels they occupy and the facilities with which they have been provided. There is general agreement that for the time being, Federal assistance is required to provide the resources necessary for quality programs. It is also recognized that this assistance should in no way involve the Government in programming or program judgments. An independent entity supported by Federal funds is required to provide programs free of political pressures. The Corporation for Public Broadcasting, a nonprofit private corporation . . . provides such an entity.

. . .

We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should and should not broadcast.

\textit{Id.} at 4, 11.
mechanism that would provide a source of funds for the development of public broadcasting without controlling the "final product."85

To allay its fear that public broadcasting would become a propaganda vehicle for the federal government, Congress included in the Public Broadcasting Act specific provisions designed to preserve licensees' "tradition of autonomy and community orientation" while providing them with the necessary funding.86 Congress carefully drafted the Act to ensure that the CPB would not operate the public broadcasting networks in the same way that the commercial television and radio networks operate in order to keep the CPB even further from the station's editorial function.87 Congress noted that prohibiting the CPB from owning or operating noncommercial broadcasting stations or producing programs for public distribution would serve to steer public broadcasting stations that receive grants from the CPB away from economic competition with the commercial networks.88

The CPB's corporate structure further demonstrates Congress' intent to maintain the CPB as a politically neutral entity. The CPB board consists of ten directors who may serve a maximum of two five-year terms and are appointed by the President with the consent of the Senate.89 No more than six directors may belong to the same political party.90 They are to comprise "eminent" members involved in education, cultural and civic affairs, the arts, radio, and television, and "are to be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talents and experiences."91 Congress stressed that the CPB is "expressly prohibited" from engaging

85. 1967 HOUSE REPORT, supra note 51, at 15. Conveying this consensus, the House Report stated:

    Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation, directed by a Board of Directors, none of whom will be Government employees, will provide the most effective insulation from Government control or influence over the expenditure of funds.

Id.


87. In enacting 47 U.S.C. § 396(g)(3), Congress assumed that the CPB may not have "a staff of producers, commentators, announcers, and others directly associated with program production; a system of fixed schedule broadcasting; ownership or operative authority over program production equipment, studios, or interconnection facilities; or station affiliates."

1967 HOUSE REPORT, supra note 51, at 19.


89. Id. § 396(c)(1), (2), (5).

90. Id. § 396(c)(1).

91. 1967 HOUSE REPORT, supra note 51, at 15.
in any political activities,\(^9\) including “applying political tests in any personnel actions or endorsing political candidates.”\(^9\) The CPB board’s role must remain “solely advisory in nature”: without exception it may not control the daily management or operation of any station.\(^9\)

In addition to designing an internally politically neutral CPB management framework, the Public Broadcasting Act prohibits any federal department, agency, officer, or employee from interfering with the operation of either the CPB or any public broadcasting station.\(^9\) Interference with the “content or distribution” of public telecommunications programs or services is specifically prohibited.\(^9\) Congress expressed its hope that eventually “the people of the United States,” rather than the federal government, would provide the major source of funding for public broadcasting.\(^9\)

The insulating provisions and their corresponding legislative history signify Congress’ intent to shield public television and radio from governmental interference. Appropriating federal funds to public broadcasting, therefore, does not give Congress editorial control over program content under the Act. Nevertheless, the current legislative scheme under the Public Broadcasting Act places public broadcasting in the paradoxical position of needing to rely on federal funds while desiring to remain editorially independent, at least theoretically. The issue then arises whether these two forces may remain in balance. In order to assess this question, the next Part will address the issue of editorial discretion within the context of federal broadcast regulation over indecency. It will consider whether the first amendment right to free speech applies to broadcasters generally, and whether this right extends to the broadcast of indecent material.

II. Do Broadcasters Effectively Enjoy Free Speech as a Constitutional “Right”?\(^9\)

This Part examines the extent of broadcasters’ right to protected speech. It provides a general overview of the justifications for federal broadcast regulation and demonstrates varying degrees of first amendment protection granted to broadcasters by the Supreme Court, Congress, and the FCC.

\(^{92.}\) Id. at 19.
\(^{93.}\) 1967 Senate Report, supra note 51, at 7.
\(^{95.}\) Id. § 398(a) (1988).
\(^{96.}\) Id. § 398(c).
\(^{97.}\) See 1967 Senate Report, supra note 51, at 8.
A. Traditional Doctrines Within Federal Broadcasting Regulation

Although the broadcast and print media both are members of the "press," the Supreme Court has treated them disparately.98 Unlike newspapers and magazines, radio and television broadcasters are regulated by Congress and the FCC. This section examines underlying rationales utilized by the Court in upholding broadcasting regulation.

(1) The Broadcast Spectrum: A "Scarce Resource"

Courts historically have utilized the "scarcity doctrine" as a means to justify Congress' power to regulate broadcasting.99 The broadcast media is subject to the "inherent physical limitation" of broadcast frequencies, which are a "scarce resource"; not all applicants, therefore, may obtain broadcast licenses.100 In Red Lion Broadcasting Co. v. FCC,101 for example, the Court distinguished broadcasters' peculiar first amendment position from that of the print media by pointing to the scarcity rationale:

[It] is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring li-


99. See generally Ferris & Leahy, Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment, 38 CATH. U.L. REV. 299, 308 (1989) (discussing the Court's differing approaches toward different forms of media when affording constitutional protections); Dyk, Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer, 5 YALE J. ON REG. 299 (1988). Mr. Dyk provides the following commentary regarding the stated versus actual effect of the first amendment:

The guiding principle of the First Amendment could not have been clearer. Its purpose was to protect the press from the government. It was not designed to protect the government from the press or to authorize government regulation of the press under the guise of protecting first amendment values. This principle applies at all times to all media. However, the courts have yet to recognize this obvious truth.

Id. at 300.

100. See Columbia Broadcasting Sys., 412 U.S. at 101 (citing Red Lion, 395 U.S. at 388); League of Women Voters, 468 U.S. at 375.

censes to broadcast by and limiting the number of licenses so as not to overcrowd the spectrum.102

Despite what appears to be an inherent spectrum limitation, the scarcity doctrine increasingly has been criticized. The doctrine's critics primarily emphasize that although demand for new stations far exceeds the supply of frequencies, modern communications technologies make the doctrine obsolete.103 As early as 1973, the Court in Columbia Broadcasting System, Inc. v. Democratic National Committee recognized that the rapidly evolving electronic technology complicates broadcast regulation. It noted that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded [ten] years hence."104 The availability of alternative communications systems such as cable television, multichannel multipoint distribution service, satellite master antenna systems, and home videocassette recorders not only increases broadcasters' competition in the marketplace, but also serves to dilute scarcity as a justification for broadcast regulation.105 Former FCC Chairman Mark Fowler has challenged the scarcity doctrine as a false and artificial justification for broadcast media regulation.106 Likewise, Professor Pool asserts that spectrum space could have been allocated according to market forces rather than government intervention because spectrum the shortage is a man-made problem, not a technical one.107 He suggests that even during the time of Red Lion it was technically possible to provide the cable television channels for which consumers would be willing to pay.108

(2) Broadcasters as Public Trustees

Because the scarcity doctrine limits the number of licenses, Congress has sought to ensure through the FCC that only applicants acting in the "public interest, convenience and necessity" are granted a license to broadcast.109 The Court in Red Lion recognized broadcasters' role as the trustees of the public's first amendment rights:

[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently

102. Id. at 388-89. Likewise, the Court in Columbia Broadcasting Sys. recognized that the broadcast média poses "unique and special problems not present in the traditional free speech case." 412 U.S. at 101 (citing Red Lion, 395 U.S. at 388).
105. See Ferris & Leahy, supra note 99, at 314.
106. See Fowler & Brenner, supra note 2, at 221-26.
108. Id. at 142.
with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.\textsuperscript{110}

The Court further held that because the public has a right to have access to "social, political, aesthetic, moral, and other ideas and experiences," neither Congress nor the FCC may constitutionally abridge that right.\textsuperscript{111} In resolving any first amendment issue, the interest of the public is the Court's foremost concern.\textsuperscript{112} The first amendment must inform and give shape to the manner in which Congress exercises its regulatory power over broadcasting because, unlike common carriers and other federally regulated entities, "broadcasters are entitled to exercise 'the widest journalistic freedom consistent with their public duties.'"\textsuperscript{113}

(3) \textbf{Public Broadcasters' Procedural Limits}

Although unlike the print media the broadcast media is subject to federal regulation, it nevertheless retains a high degree of first amendment protection in its furtherance of serving the public interest. The first amendment rights of noncommercial broadcast licensees, however, are more restricted than those of their commercial counterparts. For example, public broadcasting stations may not "make [their] facilities available to any person for the broadcasting of any advertisement,"\textsuperscript{114} express the views of any person regarding matters of public concern, or support political candidates."\textsuperscript{115} Furthermore, the FCC has full authority to regulate the use of business or institutional logograms\textsuperscript{116} in public broadcast announcements.\textsuperscript{117}

Recognizing public broadcasters' need to diversify funding sources, however, the FCC in recent years has relaxed original fundraising res-

\textsuperscript{111} Id.
\textsuperscript{112} Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973); cf. Carter, \textit{Technology, Democracy, and the Manipulation of Consent} (Book Review), 93 YALE L.J. 581, 598 (1984) (stating that the market is really the rationing force as those with different degrees of wealth have different degrees of access to the media of communication).
\textsuperscript{115} Id. § 399b(a)(2), (3).
\textsuperscript{116} A business or institutional logogram is defined as "any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization." Id. § 399a(a).
\textsuperscript{117} See id. § 399a(b).
trictions. In a 1981 Second Report and Order, the FCC stated that acknowledgment of corporate grants and gifts may be "proper and possibly necessary to assure the continuation of such funding." It further found that "promotion of goods and services without consideration can in some instances further the public interest." Nevertheless, the FCC reiterated that public broadcasters must continue to maintain their essential noncommercial character as provided by the Public Broadcasting Act.

In addition to relaxing fundraising regulations, the FCC's Second Report and Order recognized the need to uphold public broadcasters' broad editorial freedom. To this end, the FCC supported a trend away from federal funding or any other concentrated mode of contribution. Instead, it suggested that public broadcasting entities diversify their funding sources to avoid financial dependence upon any one distributor and the resulting vulnerability. One such vulnerability is the dependence on federally appropriated funds. As this Note discusses later in more detail, public broadcasters' reliance on federally appropriated funds potentially may lead to changes in program content under a statutory scheme that conditions such funds.

B. Is Indecent Speech on the Airwaves Like a "Pig in the Parlor"?

While the Court has recognized broadcasters' freedom to broadcast issues of public concern absent a compelling governmental interest to limit such freedom, it has not extended comparable first amendment protection to broadcast indecency. Although recognizing that indecent speech is protected by the first amendment, the Court has balanced this against the effect that the prevalence of indecent broadcasting programs would have on unsupervised children in the listening audience. The uncertain standards for regulation of indecent broadcast speech have led to an ongoing controversy between broadcasters and

119. Id. para. 4.
120. See id. para. 3.
121. See id. at 164.
122. Id.
123. See infra Part III.
124. See infra notes 148-166 and accompanying text.
125. See Sable Communications v. FCC, 109 S. Ct. 2829, 2836 (1989) (noting that while indecency retains first amendment protection, "there is a compelling interest in protecting the physical and psychological well-being of minors"); Pacifica Found. v. FCC, 438 U.S. 726, 749 (1977) (Although not entirely outside first amendment protection, patently offensive, indecent material broadcast on radio may be regulated in furtherance of "government's interest in the 'well being of its youth.'") (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)).
At issue are contradictory federal statutes that both prohibit program censorship and penalize broadcasts of indecent speech. Section 326 of the Communications Act, for example, prohibits the FCC from censoring radio programming if that censorship would interfere with broadcasters' right to free speech. Nevertheless, section 1464 of the United States Criminal Code imposes civil and criminal penalties on whoever broadcasts any "obscene, indecent, or profane" language over the radio. Furthermore, if a broadcaster violates section 1464, section 312 of the Communications Act empowers the FCC to impose civil sanctions including warnings, fines, and in extreme cases the revocation of broadcasting licenses. Because the definition of indecency has evolved over the past decade to a current standard that broadcasters perceive as vague, the possibility of invoking section 1464 has become a difficult threat for broadcasters to assess. As a result, broadcasters may choose to refrain from airing programs that may be held to be indecent but, in fact, contain fully protected speech. This chilling effect could amount to the type of "censorship" that section 326 was aimed at protecting. Nevertheless, the Supreme Court's interpretations in *FCC v. Pacifica Foundation* and *Sable Communications v. FCC* holding that "indecent" speech as distinguished from obscenity retains first amendment protection, is still controlling precedent.

(1) Broadcast Indecency Pre-1987: Pacifica and Seven "Filthy" Words

A listener complaint prompted the FCC to examine a 1973 broadcast of comedian George Carlin's twelve-minute monologue entitled "Filthy Words" to determine whether the FCC would impose sanctions based on section 1464 of the United States Criminal Code. In its *Memorandum Opinion and Order*, issued in 1975, the FCC interpreted section 1464 as proscribing "indecent" language, defined as
language that "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." This broad definition has become known as the FCC's "generic" standard of indecency.

In developing a rationale for indecency regulation, the FCC adopted a nuisance theory, thereby "channelling behavior" to certain times of the day rather than prohibiting it altogether. Under this rationale, the FCC suggested that if an otherwise offensive broadcast had "serious literary, artistic, political or scientific value" and was preceded by warnings, it might be indecent only if broadcast when children were likely to be in the audience. Because the offensive words in the Carlin monologue were broadcast in a repetitive manner during the early afternoon, the FCC found the broadcast indecent and thus prohibited by section 1464.

Responding to a petition for clarification, the FCC in 1976 issued another Memorandum Opinion and Order in which it attempted to explain its nuisance theory announced in the 1975 Pacifica ruling. The FCC stated that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." The FCC refrained from commenting on hypothetical situations proposed by the petitioners, emphasizing that its "declaratory order was issued in a specific factual context." Nevertheless, it noted that in some instances, such as a live news coverage in which there is no opportunity for prebroadcast editing, it would be "inequitable ... to hold a licensee responsible for indecent language."

The United States Court of Appeals for the District of Columbia Circuit struck down the FCC's 1975 Pacifica ruling based upon findings of prohibited censorship and overbreadth. Applying the Su-

133. 1975 Pacifica Ruling, supra note 9, at 98.
134. Id.
135. Id.
136. Id.
137. Id. at 99.
139. Id.
140. Id. at 893.
141. Id. at 893 n.1.
preme Court's obscenity standard adopted in *Miller v. California*, the court found that although the Carlin monologue may be "crude and vulgar by most standards it is not obscene." The court added that the FCC ruling was overbroad because proscribing the specific words used in the Carlin broadcast would render many accepted historical and literary works indecent. Moreover, because the FCC failed to define "children," the court held that the FCC standard failed for vagueness. The court concluded: "To whatever extent we err, or the [FCC] errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste." The court thus agreed with the broadcasters' vagueness challenge of the FCC's indecency standard. The District of Columbia Circuit's interpretation, however, soon was overruled.

In *FCC v. Pacifica Foundation*, the United States Supreme Court upheld the former FCC indecency restrictions announced in the 1975 *Pacifica* ruling. The Court stated that although "[the] prohibition against censorship [under section 326] unequivocally denies the Commission any power to edit proposed broadcasts in advance and to exercise material considered inappropriate for the airwaves," the FCC may regulate broadcasts already aired. The Court determined that the legislative history of the Communications Act clearly indicates that Congress did not intend to limit the FCC's power to regulate indecent language in broadcasting. The Court concluded that section 326 fully authorizes the FCC to sanction indecent broadcasting.

Having recognized the FCC's regulatory power, the Court then attempted to define indecency under section 1464. It noted that because the statute is written in the "disjunctive . . . each [word] has a separate meaning." Regarding Pacifica's assertion that the FCC standard probably would lead to self-censorship, the Court rationalized that the standard "will deter only the broadcasting of patently

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143. 413 U.S. 15 (1973); see supra note 25.
144. *Pacifica Found.*, 556 F.2d at 16.
145. *Id.* at 17 n.19 ("clearly every use of the seven words cannot be deemed offensive, even as to minors").
146. *Id.*
147. *Id.* at 18.
149. *Id.* at 735.
150. *Id.* at 735-38.
151. *Id.* at 737.
152. *Id.* at 738.
153. *Id.* at 739-40.
offensive references to excretory and sexual organs and activities." The Court rejected Pacifica's claim that the broadcast was not indecent solely because it did not contain "prurient appeal," stating that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." The Court also rejected Pacifica's assertion that the FCC's interpretation of section 1464 is overbroad, emphasizing the fact that indecency regulation is "largely a function of context—it cannot be adequately judged in the abstract."

Although upholding a limited regulation "channeling" indecent speech to appropriate contexts, the Court nevertheless afforded indecency more first amendment protection than obscenity, which has no first amendment protection. Relying on its previous ruling in Miller v. California, the Court recognized that obscene speech differs from indecent speech because obscene speech is considered to be offensive to contemporary moral standards. Noting that the first amendment is meant to allow a free exchange within the "marketplace of ideas," the Court stated that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is reason for according it additional constitutional protection." Thus the sole fact that a program contains speech that some persons may find offensive—but falls short of being obscene—is an insufficient reason to ban the program from the airwaves altogether. Instead, the speech may only require "channeling" the program away from an audience consisting of unsupervised children.

Applying this standard to the facts at issue, the Court held that although the Carlin monologue might be protected in another setting, since it was broadcast in a setting easily accessible to children, it could be banned by the FCC. The Court listed a number of variables leading to this conclusion, including the time of day, the program content, the composition of the audience, and the differences between radio, television, and closed-circuit transmissions. The Court ac-

154. Id. at 743.
155. Id. at 743 n.18.
156. Id. at 739-40.
157. Id. at 742.
158. Id. at 745-46.
159. Id.
160. Id. at 745.
161. Id. at 750.
162. Id. at 750-51.
163. Id. at 750.
cepted the FCC's nuisance rationale and, quoting Justice Sutherland, noted that a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." The Court held that "when the [FCC] finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." Pacifica extends first amendment protection to indecent speech that is broadcast during times of the day when there is no reasonable risk that children will be in the audience. Until 1987, the FCC took a limited approach to enforcing indecency prohibitions through its staff rulings. The test adopted by the FCC for indecency apparently had been reduced to determining whether the material at issue amounted to the broadcast of Carlin's seven filthy words prior to 10 p.m.

The FCC's reassessment of indecency in three 1987 decisions demonstrated a broadening of the agency's exercise of regulatory power over indecency.

(2) Post-1987: Actionable Indecency Under the "Generic" Standard

Former FCC Chairman Mark Fowler's term during the Reagan Administration heralded an era of deregulation, which included fewer intrusions into broadcasters' editorial decisions. Since 1987, however, FCC indecency regulation policy has become more stringent.

Three simultaneous FCC rulings issued in April 1987 reverted the definition of indecency from Carlin's seven filthy words at issue in Pacifica to the "generic" standard previously adopted by the FCC in

164. Id. (quoting Euclid v. Amber Realty Co., 272 U.S. 365, 368 (1926)).
165. Id. at 751.
166. The Court reasoned that broadcasting, in addition to being a "pervasive" medium capable of entering the privacy of one's home, is "uniquely accessible to children" and therefore "amply justifies] special treatment of indecent broadcasting." Id. at 749-50.
167. See Reconsideration Order, 3 F.C.C. Rec. 930, paras. 2-6 (1987) (summarizing the status of FCC indecency rulings following the Supreme Court's decision in Pacifica).
168. Id. para. 4.
169. See infra notes 171-194.
170. Crigler & Byrnes, supra note 13, at 344 ("For the eight years of the Reagan Presidency, the rallying cry of the FCC was 'deregulation.' . . . The institution of a complex and highly intrusive new indecency policy runs directly contrary to these goals."); see also Comment, The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality From the Airwaves, 43 U. MIAMI L. REV. 871, 873 (1989) (authored by Jay A. Gayoso) ("Ironically, the FCC's more intrusive, regulatory approach comes during a period when the Commission is making significant strides in deregulating the broadcast industry and suggesting that broadcast content should get heightened first amendment protection.").
its 1975 ruling. The FCC gave notice of these rulings in a Policy Statement issued to broadcast licensees. The FCC’s public notice also set forth new time restrictions for broadcasting indecent speech.

In November 1987, the FCC responded to petitions for clarification and reconsideration filed by a consortium of broadcasters, trade organizations, and public interest agencies and issued a Reconsideration Order affirming the April rulings. The petitioning broadcasters asserted that the standards resulting from the April 1987 rulings were unconstitutionally “vague and overbroad” because they established no clear lines between indecency and obscenity and would chill broadcasters’ editorial freedoms.

The FCC acknowledged the dilemma it faces when making indecency determinations. It must be careful to balance the competing interests of broadcasters’ right to free speech against its mandate to regulate indecent radio programming. Although the FCC emphasized the important governmental policy of “safeguarding children from patently offensive descriptions or depictions of sexual or excretory activities or organs,” thus enabling parents to choose the material their children will see or hear, it recognized that the first amendment limits the extent to which it may regulate indecency.

Although one element of the FCC’s generic indecency standard was that the program must be “patently offensive,” the FCC avoided defining this term by saying that the meaning would be “construed with reference to specific facts,” as it was in the April rulings. This

172. See supra notes 9, 133-134 and accompanying text; see also cases cited supra note 6.
175. Id. para. 7.
176. Id. Among broadcasters’ recommended revisions to the FCC indecency standards was a request that the agency “provide more precise guidance as to the elements pertinent to whether material is ‘patently offensive’ and violates ‘contemporary community standards.’” Id.
177. Id. para. 26.
178. Id. para. 10 (“We must always be mindful of the first amendment limitations on the government's ability to regulate the content of speech.”).
179. Id. para. 11.
180. Id. para. 14, 16. Emphasizing that an indecency determination will be made on a
imposes a burden upon broadcasters to decide what is indecent, absent any prospective rules, and to air programs at the risk of being sanctioned if the FCC subsequently judges the program to be indecent.\textsuperscript{181} Reviewing broadcasters’ “editorial judgments” within the generic standard, however, led to contradictory decisions by the FCC in the April rulings. When discussing the KPFK-FM broadcast of “Jerker,” a dramatic depiction of Acquired Immune Deficiency Syndrome (AIDS) and its effects on the gay and lesbian community, the FCC said the subject matter alone did not render the broadcast indecent; rather, the show was indecent because the subject matter was presented in a “patently offensive” manner.\textsuperscript{182} Nevertheless, the WYSP-FM broadcast of a morning talk show with Howard Stern was held indecent because it involved “innuendo and double entendre” susceptible to varying interpretations.\textsuperscript{183} The FCC said the broadcast “dwelt on sexual and excretory matters in a pandering and titillating fashion,” and therefore may have encouraged unsupervised children who tuned in to continue listening.\textsuperscript{184} The FCC defined “contemporary community standards” as being those of the average broadcast viewer or listener.\textsuperscript{185} Unlike the Supreme Court’s obscenity test in \textit{Miller v. California},\textsuperscript{186} which adopts a more narrow “local” standard as one of the factors for determining whether a work is obscene,\textsuperscript{187} the FCC broadened the meaning of indecency to include material that would be found offensive by a “standard for broadcasting generally.”\textsuperscript{188} Given the wide ranging mores of listeners throughout the United States, however, the FCC’s standard leaves broadcasters with the responsibility of measuring possible indecency against an impossibly defined “average” listener. The FCC also rejected an approach that would find

\textsuperscript{181} See id. paras. 7, 14, 15. In their petitions the broadcasters had requested that the FCC issue prospective rulings. \textit{Id.} para. 7. See also Commission Announces Action on 95 Indecency Complaints, supra note 14; supra notes 14-15 and accompanying text (responding to listener complaints regarding allegedly indecent programming, FCC imposed sanctions).

\textsuperscript{182} In re Infinity Broadcasting Corp., 3 F.C.C. Rec. 930, para. 19 (1987).

\textsuperscript{183} Id. para. 20.

\textsuperscript{184} Id.

\textsuperscript{185} Id. para. 24.

\textsuperscript{186} 413 U.S. 15 (1973).

\textsuperscript{187} The first prong of the \textit{Miller} test examines “[w]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . .” \textit{Id.} at 24; see supra note 25.

\textsuperscript{188} Infinity Broadcasting Corp., 3 F.C.C. Rec. 930, para. 24.
a work "per se not indecent" if it has merit, because merit is only one of the contextual factors that the FCC and broadcasters must con-
sider.\textsuperscript{189} Because the issue of news broadcasts was not directly before it, the FCC declined to rule whether it would exempt all news broad-
casts from indecency findings, noting that a finding would always de-
pend on context.\textsuperscript{190}

In addition to defining the nature of indecent speech, the FCC dis-
cussed the times of day that would lead to actionable broadcast indecency. The FCC extended the time period for actionable indecent pro-
gramming from 10 p.m. to midnight.\textsuperscript{191} The FCC determined that it is reasonable to expect that midnight "is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience."\textsuperscript{192} The FCC stated that even if a broadcaster is "chilled" from airing a program that actually is not indecent when there is a reasonable risk that children will be in the audience (that is, before midnight), it is not an "inappropriate chill." The FCC did not extend the time period per petitioner Morality in Media's recommendation that it ban indecency entirely because a 24-
hour ban would "run afoul" of the constitutional mandate in \textit{Pacifica}.\textsuperscript{193} In \textit{Pacifica}, noted the FCC, the Supreme Court interpreted section 1464 to allow only "the imposition of reasonable time, place and manner restrictions," not a content-based ban that would preclude all access by interested adults.\textsuperscript{194} Despite the breadth of its indecency standard, therefore, the FCC recognized the Court's willingness to extend some first amendment protection to indecent speech.

In 1988, broadcasters, trade organizations and public interest groups petitioned the United States Court of Appeals for the District of Columbia Circuit to review the FCC indecency enforcement stan-
dard espoused in the 1987 \textit{Reconsideration Order}.\textsuperscript{195} In \textit{Action for Children's Television v FCC (ACT I)}, the court held that the FCC must give broadcasters clear notice of reasonably determined times during which indecency may be safely aired through a properly pro-
posed rulemaking procedure.\textsuperscript{196} The court further rejected the FCC's suggestion of replacing the post-midnight "safe harbor" period with

\textsuperscript{189} \textit{Id.} para. 17.
\textsuperscript{190} \textit{Id.} para. 16.
\textsuperscript{191} \textit{Id.} para. 27.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.} para. 12.
\textsuperscript{194} \textit{Id.} But cf. infra note 206 and accompanying text (24-hour indecency ban passed by the FCC in December 1988).
\textsuperscript{195} \textit{Action for Children's Television v. FCC,} 852 F.2d 1332 (D.C. Cir. 1988).
\textsuperscript{196} \textit{Id.} at 1342-43.
case-by-case channelling determinations because these case-by-case determinations might have a chilling effect on broadcasters.\textsuperscript{197}

The appeals court recognized that the standard adopted by the FCC in the 1987 Reconsideration Order used the same generic indecency definition approved by the Supreme Court in Pacifica;\textsuperscript{198} like the FCC, the court said “serious merit” was a relevant though not decisive factor for determining patent offensiveness.\textsuperscript{199} The court rejected the FCC’s expanded time period, however, because the statistics upon which the FCC claimed to rely did not sufficiently demonstrate that “children” would be in the audience until midnight.\textsuperscript{200} Furthermore, the court noted that the FCC had failed to provide a rational basis for its definition of “children.”\textsuperscript{201} Although the court reiterated that “indecent but not obscene material qualifies for first amendment protection,”\textsuperscript{202} the court failed to shed additional light on the definition of indecency.

(3) On the Hill: Senator Helms Steps In and the Indecency Ban Expands to Twenty-Four Hours.

On July 26, 1988, Senator Helms introduced an amendment mandating that “[b]y January 31, 1989, the [FCC] shall promulgate regulations in accordance with Section 1464 . . . to enforce the provisions [against broadcast indecency] . . . on a 24 hour per day basis.”\textsuperscript{203} The

\textsuperscript{197} Id. at 1342.
\textsuperscript{198} Id. at 1338.
\textsuperscript{199} Id. at 1340.
\textsuperscript{200} Id. at 1341-42.
\textsuperscript{201} Id. The FCC defined “children” as those aged 12 to 17 years. Id. at 1341. The court vacated and remanded the FCC’s Pacifica and Regents of University of California rulings at issue in the Reconsideration Order with instructions that the FCC reconsider the espoused channeling times after a “full and fair hearing.” Id. at 1341, 1344. Because the Infinity broadcast occurred between 6 a.m. and 10 a.m., implicating the “parent-child concerns” of indecency regulation, the court held that under the Supreme Court’s Pacifica decision it was compelled to affirm the FCC’s Infinity ruling. Id. at 1341.
\textsuperscript{202} Id.
\textsuperscript{203} Helms Amendment I, supra note 10, at S9912-13. Dissatisfied with the status of broadcast indecency following the April 1987 Reconsideration Order, Senator Helms wrote then-FCC Chairman Dennis Patrick asking whether the FCC’s current indecency standards set forth in the 1987 Reconsideration Order meant that indecent material may be broadcast after midnight. Id. at S9912. Receiving an affirmative answer from the FCC, Senator Helms continued to investigate the issue, stating that despite the safe harbor time period, indecency “comes directly into our . . . living rooms and assaults the millions of Americans that still find this filth repugnant.” Id.

Subsequently, Senator Helms wrote the Heritage Foundation, a conservative lobbying group, expressing his concern about the FCC standards announced in the Reconsideration Order, and inquiring about the constitutionality of a complete indecency ban. Id. at S9913. The Heritage Foundation replied that the Pacifica ruling did not provide a definitive status for indecency and recommended that a strong policy argument could be made to support a total indecency
amendment was attached to an appropriations bill for funding federal agencies, including the FCC. As noted earlier, the Senate adopted the Helms amendment with little discussion, and the President signed it into law on October 1, 1988.

On December 28, 1988, the FCC promulgated the requisite regulation enforcing the indecency restrictions of section 1464 twenty-four hours a day. Since that time, indecent programming surfaced as a primary issue during the nominating hearing of Alfred C. Sikes as FCC chairman in 1989. In the months following his appointment, Chairman Sikes declared to Congress and to industry groups that indecency enforcement is one of the FCC’s primary missions.

(4) The FCC, the District of Columbia Circuit, and the Status of Indecency

The FCC’s 24-hour ban on broadcast indecency, promulgated pursuant to Senator Helms’s amendment, was challenged in the Court ban. Id. In his response to Senator Helms, Bruce Fein, President of the Heritage Foundation, suggested, “[i]n these circumstances, the strong Congressional custom is to enact a constitutionally uncertain law if it is thought to promote sound public policy, and make the federal judiciary the final arbiter regarding its validity.” Id.

204. Id. at S9912-13.
205. Id.

See Congress Asserts its Dominion Over FCC, Broadcasting, Aug. 7, 1989, at 27 (“From the tenor of the hearing it was . . . clear that lawmakers wanted the FCC to assign priority status to the regulation of indecent and violent programming.”); FCC Nominees Hit With Stern Warning, ELECTRONIC MEDIA, Aug. 7, 1989, at 3 (Senator Daniel Inouye, Chairman of the Senate Communications Committee, said he is “well aware of the filth and garbage which American people are almost required to see . . . . What is happening to Americans, especially young Americans, is criminal.”); FCC, Senate Commerce Reports FCC Nominations Despite Religious Groups’ Pleas for Delay, Daily Rep. for Executives (BNA) § Regulation, Economics and the Law (Aug. 2, 1989).


209. See, e.g., Alfred C. Sikes, Remarks Before the National Association of Broadcasters Annual Convention (Apr. 3, 1990) (proposing broadcasters’ “self-regulation over government controls” in many areas, including indecency); Alfred C. Sikes, Remarks Before the Television Association Convention (Jan. 5, 1990) (speaking about the FCC’s action on pending indecency cases, stating: “It remains my hope that the industry will, through a code, make a values statement . . . .”); see also FCC Chief Welcomes Participation of Nation’s Religious Broadcasters, Wash. Times, Feb. 2, 1990, at B5 (assuring religious broadcasters that children will be adequately protected from adult programming and inviting religious broadcasters to scrutinize the FCC).
of Appeals for the District of Columbia Circuit in *Action for Children's Television v. FCC (ACT II).* The court stayed enforcement of the ban pending judicial review and remanded the case to the FCC, which accordingly issued a Notice of Inquiry "to build a factual record and solicit public comment relevant to a judicial determination of a total ban on broadcast indecency." In an effort to uphold Congress' intent in passing the Helms Amendment, the FCC fashioned its inquiry to determine how to further the policy of protecting children from indecent broadcasts. The FCC attempted specifically to solicit information regarding "children's listening and viewing habits, particularly with respect to whether there is a reasonable risk that children will be in the audience at all times of the day or night."214

The FCC was influenced by Justice Scalia's concurring opinion in *Sable Communications of California, Inc. v. FCC,*215 which suggested that a total ban on indecent communications may be constitutionally permissible if "data [can] be found demonstrating the infeasibility of alternate means to provide . . . adequate protection of minors." The majority in *Sable,* however, extended full first amendment protection to indecent speech.217 Moreover, it held that the government may only regulate protected speech to promote a "compelling" governmental interest if it adopts the "least restrictive means" to effectuate that interest.218 Under this guidance, the FCC sought data demonstrating that a 24-hour ban would pass this heightened judicial scrutiny.219 Broadcasters, industry groups, and public interest agencies (Broadcasters) collectively introduced data that, they asserted, would

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211. *See* Notice of Inquiry, paras. 1-3, 11, 14.
212. *Id.*
213. The FCC defined "children" as consisting of persons aged 17 years and under. *Id.* para. 20.
214. *Id.* para. 21.
215. 109 S. Ct. 2829 (1989). Although the *Sable* opinion specifically concerned obscene and indecent telephone messages, the Court addressed the general issue of sexual expression that is indecent but not obscene. *Id.* at 2836.
216. Notice of Inquiry, *supra* note 211, para. 13 (quoting *Sable,* 192 S. Ct. at 2840 (Scalia, J., concurring)).
217. 109 S. Ct. at 2836.
218. *Id.*
219. The FCC's Notice requested statistics relating to
   (1) children's access to the broadcast media as well as their actual viewing and listening habits;
   (2) the feasibility of alternative means of restricting children's access to broadcasts, including time channeling alone or in conjunction with parental supervision, ratings or warning devices or alternative broadcast technologies; and
   (3) the availability of indecent material for adults through non-broadcast means.
Notice of Inquiry, *supra* note 211, para. 17.
fatally undermine justifying a complete ban on broadcast indecent speech. The Broadcasters argued that the Supreme Court’s *Pacifica* and *Sable* rulings extend first amendment protection to indecent speech; that there is not legitimate governmental interest in protecting adults from indecent material; that a total ban on indecent material under the FCC’s indecency standard “encompasses a broad and diverse range of material of potential social value”; and that total suppression of indecent speech is not the least restrictive alternative for protecting children from the “supposed harm” caused by indecent broadcasts. Finally, the Broadcasters asserted that the FCC’s indecency standard is unconstitutionally vague and that the FCC improperly applies a national instead of a local standard to determine whether material is indecent.

Despite the Broadcasters’ contentions that a 24-hour ban is constitutionally impermissible, the FCC’s assessment of the response to its Notice of Inquiry concluded that a total ban of indecent broadcast material “is the most narrowly tailored means of protecting children from indecent material.” To ensure that indecent programming remains inaccessible to children, it determined that a station faced with an indecency complaint should be required to demonstrate that “children in fact are not in the broadcast audience for the entire market, not just the particular station, at the time it aired the allegedly indecent material.” This requirement, however, might unfairly prevent a sta-


221. *Id.* at 4-5.

222. *Id.* at 5-6.

223. *Id.* at 6-7.

224. *Id.* at 18. Additionally, the Broadcasters criticized the FCC’s assumption that “the relevant question is whether there are substantial numbers of children in the overall broadcast audience throughout the day,” rather than whether there is a reasonable risk that the specific audience affected by a potentially indecent program contains children. *Id.* at 26. As an example, the Broadcasters cited statistics demonstrating that National Public Radio member stations have “no measurable audience” of children during the hours of 6 a.m. to 10 a.m. and 6 p.m. to 6 a.m. *Id.* at 26 & n.65. The Broadcasters further disagreed with the FCC’s view that parents do not have an opportunity to supervise their children “unless they are actually watching or listening with the children or have specific knowledge of their children’s viewing or listening.” *Id.* at 29 & n.79. Instead, the Broadcasters suggested that “[a]s long as parents or other adults are with children, they have the opportunity for supervision.” *Id.* at 31.

225. *Id.* at 35-40.

226. *Id.* at 40-44.


228. *Id.* para. 90.
tion with no measurable children's audience from airing a program containing potentially indecent material if children are present in its overall market.229

The foregoing events demonstrate several problems surrounding the current status of indecency regulation as it relates to broadcasters' first amendment rights. First, in both *Pacifica* and *Sable*, the Supreme Court held that speech that is indecent but not obscene is protected by the first amendment.230 Given this constitutional standard, the Court further determined that the government may only regulate indecent speech in order to effectuate an important governmental interest.231 While the Court recognized the interest of protecting children from exposure to indecent material in both *Pacifica* and *Sable*, each decision framed the mode of promoting this interest in a different manner. In *Pacifica*, the Court upheld time, place, and manner restrictions that would "channel" indecent broadcast materials to times of the day when there is no reasonable risk that children will comprise the viewing or listening audience.232 *Sable* adopted a higher degree of scrutiny, requiring the government to demonstrate that its regulation of indecency not only promotes a "compelling" governmental interest, but also adopts the "least restrictive" means to do so.233 A complete ban on indecent speech goes beyond the channeling approach espoused in *Pacifica* and unconstitutionally contradicts the Court's assertion that indecent speech should not be banned from the air altogether.234 A statute that bans indecency 24-hours a day is overbroad. Because it leaves broadcasters without an alternative time to air programs containing indecent material, the regulation prevents adults from ever viewing or listening to protected speech, even during times of the day or on particular programs that have no measurable children's audience.235 Additionally, the 24-hour ban fails under the *Sable* standard.236 Although one may agree that protecting unsupervised children's access to indecent broadcasts is an important governmental interest, a total ban is not the least restrictive means of protecting that interest. As

229. See id. paras. 47-48. For example, Pacifica Foundation submitted statistics demonstrating that children between the ages of 12 and 17 years comprise a 0.2% share of the public radio listening audience, and only 1.5% of children in this age group "tun[e] into public radio for 5 minutes during an average week." Id. para. 28 & n.62 (citing Pacifica Comments at 23-25 and Attachment 4).

230. 1990 Indecency Prohibitions, supra note 4, para. 12; see also supra notes 158, 217.
231. See supra notes 161, 218 and accompanying text.
232. See supra note 166 and accompanying text.
233. See supra note 218 and accompanying text.
234. See supra notes 160-161 and accompanying text.
235. See 1990 Indecency Prohibition, supra note 4.
236. See supra note 218 and accompanying text.
broadcasters have asserted,237 the channeling option would be a more constitutionally permissible method of protecting children, particularly if presented as a prospective FCC rule that established clear guidelines for broadcasters to follow. Additional methods, such as pre-broadcast warnings,238 rating codes,239 and broadcast technologies that assist parental supervision,240 would offer alternatives to a total ban. These would allow parents, and not the government, to supervise their children.

A statutory ban on indecency 24 hours a day therefore unconstitutionally restricts protected speech from the airwaves. Although enforcement of the ban has been stayed pending further review,241 it nevertheless has been upheld by the FCC as the least restrictive means of effectuating a compelling governmental interest.242 Both the 24-hour ban and the FCC interpretation of the ban, therefore, should be struck down as unconstitutional infringements of the first amendment.

A second problem with the current status of indecency regulation concerns the operable definition of indecency. The “generic” standard,243 as originally defined in the FCC’s 1975 Pacifica ruling,244 subsequently, upheld by the Supreme Court in Pacifica,245 and most recently adopted by the FCC in its 1990 Indecency Prohibitions decision,246 remains vague and overbroad. As broadcasters have continuously asserted, although the standard requires that material be “patently offensive,”247 neither the courts nor the FCC have clearly defined this term. The FCC has merely asserted that a determination will always depend on context.248 Furthermore, it has stated that while the subject matter of a program alone may not render it indecent, it will be considered as such if “presented in a manner that is patently offensive.”249 Neither of these explanations offers clear guidance as to what exactly constitutes offensiveness. Adding to this difficulty is the requirement that the material’s offensiveness be measured according to “contemporary community standards.”250 While this may

237. See supra note 224 and accompanying text.
238. See 1990 Indecency Prohibitions, supra note 4, para. 69.
239. Id.
240. Id.
241. See supra note 211 and accompanying text.
242. See supra note 227 and accompanying text.
243. See supra note 9 and accompanying text.
244. Id.
245. See supra notes 148-150 and accompanying text.
246. 1990 Indecency Prohibitions, supra note 4.
247. See supra note 9.
248. See supra note 180 and accompanying text.
249. See supra note 182 and accompanying text.
250. See supra note 9.
appear to describe the standard of a particular community listening
to a specific broadcast, the FCC has interpreted this factor to mean
a national standard for "broadcasters generally." As previously dis-
cussed, this standard is broader than the local standard adopted by
the Supreme Court in the Miller obscenity test when determining
whether a work appeals to the "prurient interest." The Miller Court
recognized that uniform standards do not factor in differences among
communities. Because a national standard would preclude adults in
communities that would not consider a program offensive from ever
hearing or seeing it, the standard fails as overbroad.

An additional problem with the generic indecency standard is its
failure to specifically address a program's literary, artistic, or social
value when determining whether the speech is patently offensive. Again,
the Miller obscenity test adopts a work's value in these contexts as
one of the three factors to consider when determining whether it is
obscene. Because the indecency standard is silent with regard to this
factor, it leaves broadcasters without clear guidance as to the extent
of the relevance of a program's literary, artistic, or social merit. Be-
cause the current standard could erroneously encompass, and there-
fore lead to the suppression of, fully protected speech that has serious
literary, artistic, or social value, the standard is unconstitutionally ov-
erbroad.

Based on the foregoing discussion, a statutory ban of broadcast
indecency 24-hours a day would have a chilling effect on fully pro-
tected speech and should be struck down if reviewed by the Supreme
Court. Furthermore, because the operable definition of indecency re-
results in a vague and overbroad method of regulation, it, too, should
fail under first amendment principles.

III. May Congress Constitutionally Condition the Receipt of
Federal Funding?

Even if the Supreme Court were to strike down the 24-hour ban
as an unconstitutional mode of indecency regulation, public broad-

251. See supra note 188 and accompanying text.
252. See supra text accompanying notes 186-189.
253. See supra notes 186-87.
254. 413 U.S. at 32-33 ("It is neither Constitutionally sound to read the First Amendment
as requiring that the people of Miami or Mississippi accept public depiction of conduct found
tolerable in Las Vegas, or New York City. [citation omitted] . . . People in different States
vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism
of conformity.").
255. See supra note 135 and accompanying text.
256. See supra note 25.
Casters still could be subject to indirect government regulation based on their reliance on federally appropriated funds. As illustrated by congressional action taken against the NEA in order to curb obscenity in federally funded art, a similar situation could face public casters earmarked to receive federally appropriated funds. This Part discusses the implications of a hypothetical situation in which Congress attempts to indirectly regulate indecency in public broadcasting programming by conditioning its allocation of funds to casters on their agreeing to refrain from airing indecent programs. It examines the doctrine of unconstitutional conditions and the Supreme Court's decision in *League of Women Voters v. FCC*, in which the Court struck down an editorializing ban directed at public broadcasting stations that received CPB grants as an unconstitutional mode of restricting protected speech. This Part concludes that a legislative scheme that would infringe public broadcasters' right to air protected speech in an indirect manner would result in an unconstitutional condition.

A. The Doctrine of Unconstitutional Conditions

The doctrine of "unconstitutional conditions" states that the government may not grant a benefit on the condition that a beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. Although the doctrine was established initially within the context of economic activities in *Lochner v. New York*, the Supreme Court eventually extended the doctrine to protect

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Consequently, the right to free speech is protected from impositions of unconstitutional conditions. The unconstitutional conditions doctrine itself has not been applied uniformly; in the context of government spending, the Supreme Court has tended to examine cases individually in determining whether "coercive conditions"—those altering a recipient's conduct—exist rather than establishing a broad doctrine of unconstitutional conditions.

In determining whether an unconstitutional condition exists, the Court has examined the nature of the governmental benefit and the constitutional right involved. It then has analyzed how and the extent to which the condition has infringed upon the recipient's right. The types of benefits that implicate an unconstitutional conditions analysis are "[t]hose that the government is permitted, but not compelled to extend." Among the types of individual rights protected by the doctrine are those that "depend on some sort of exercise of autonomous choice by the rightholder." Generally, an unconsti-

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259. Sullivan, supra note 257, at 1416, 1433 ("[u]ntouched by the falling rubble as the New Deal leveled and rebuilt the substantive priorities of constitutional liberty, the doctrine of unconstitutional conditions reemerged under the Warren Court to protect personal liberties . . . as it had once protected the economic liberties of foreign corporations and private truckers")

260. Id. at 1416; see, e.g., FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking down an editorializing ban by public broadcasting stations receiving federally appropriated funds (see infra notes 284-307 and accompanying text)); Tinker v. Des Moines, 393 U.S. 503, 506 n.2 (1969) (striking down a public school regulation prohibiting students from wearing black armbands in opposition to the Vietnam War, the Court stated in dicta that the government may not "impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees"); Speiser v. Randall, 357 U.S. 513 (1958) (Court struck down tax exemption statute conditioned upon recipients' vow to suppress certain forms of speech (see infra notes 270-273 and accompanying text)). For a comprehensive analysis of unconstitutional conditions within free speech rights of abortion clinics, see Comment, The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics, 77 Calif. L. Rev. 1181 (1989) (authored by Andrew McCarthy).

261. Sullivan, supra note 257, at 1416-17.

262. Rosenthal, supra note 257, at 1121.

263. Sullivan, supra 257, at 1421-26. Professor Sullivan labels this as the "'exchange' between the conditioned benefit and the 'affected' constitutional right." Id. at 1422. Because the imposition of a burden on a constitutional right would heighten a court's degree of scrutiny, Professor Sullivan notes that the doctrine examines "how much government justification is to be demanded" for the conditioned benefit rather than determining "whether that demand has been met." Id. at 1422 n.22 An alternative view that focuses on the "allocation of the benefit," however, receives "deferential review." Id. at 1422.

264. Id. at 1454 (noting that "government action that inhibits short of 'coercion' has long been held . . . to infringe constitutional rights"); id. at 1462 (discussing "the power of germaneess" of the condition).

265. Id. at 1422.

266. Id. at 1426.
tutional conditions analysis examines whether the constitutional interests at stake amount to "preferred" rights, thereby compelling the court to adopt a strict standard of scrutiny. A regulatory scheme that would compel a recipient to alter her mode of behavior within the context of a "constitutionally-prohibited choice" could generate an unconstitutional conditions problem.

Because the first amendment right to free speech has been held to be fundamental, it requires a heightened degree of governmental justification to support its abridgment. The Court has analyzed regulatory schemes that condition the benefit of federal funding upon the recipients' surrendering of first amendment privileges under a heightened level of scrutiny. In Speiser v. Randall, for example, the Court held that granting a tax exemption conditioned upon the taxpayers' vow to suppress political speech placed an unconstitutional limit on their first amendment right to free speech.

Although the condition in Speiser arguably was coercive because it would have altered the recipients' conduct within the context of a constitutionally protected right, a condition need not be ""inherently coercive"" for the court to find it unconstitutional. Because ""chill-

267. Id. at 1427. Professor Sullivan notes that while the doctrine does not ""define the content of constitutional liberties, rank their importance, or set the level of state justification demanded for their infringement,"" it defines the government's method of ""burden[ing] those liberties, triggering a demand for especially strong justification by the state."" Id. at 1419.

268. Id. at 1426-27 (""[s]uch schemes allow one to opt into the beneficiary class by choosing one course of behavior over another"). In defining ""autonomous choice,"" Professor Sullivan distinguishes situations in which the government discriminates based on a person's ""unalterable characteristics such as race or sex"" (not an unconstitutional conditions problem because there is no advent of choice), from those that involve an ""alterable characteristic normally within the constitutionally protected discretion of the citizen,"" and therefore implicate ""pressure on autonomous choice."" Id. at 1426.

269. See, e.g., FCC v. League of Women Voters, 468 U.S. 364, 375-76 (1984) (""expression of editorial opinion on matters of public importance ... is entitled to the most exacting degree of First Amendment protection"); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505-06 (1969) (""pure speech... entitled to comprehensive protection under the First Amendment").


271. Id. at 518. Speiser involved honorably discharged World War II veterans who challenged a California tax statute requiring any person or organization applying for a tax exemption to sign a statement pledging that it ""does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities."" Id. at 516 n.2.

272. Sullivan, supra note 257, at 1454 & n.162 (quoting United States v. Jackson, 390 U.S. 570, 581-83 (1968)). Professor Sullivan notes that defining ""coercion"" within unconstitutional conditions analysis is ""riddled with problems."" Id. at 1420. She acknowledges that ""[t]he question cannot be a narrow empirical one about causation: did the government make a beneficiary do something?"" Id. Instead, determining at what point a governmental benefit
ing” protected speech poses a “burden” on the speaker, it also may be an unconstitutional mode of infringement.\(^{273}\) In *Regan v. Taxation With Representation*,\(^{274}\) for example, the Court upheld a federal statute that restricted political speech by denying federal subsidies in the form of tax exemptions to nonprofit organizations engaged in lobbying.

Appellant Taxation With Representation (TWR), a nonprofit corporation organized to promote the “public interest” in federal taxation,\(^{275}\) claimed that conditioning its receipt of tax benefits on refraining from lobbying\(^{276}\) posed an “unconstitutional condition” upon its first amendment right to free speech.\(^{277}\) The majority reasoned that because TWR was not denied funds to support its nonlobbying activities,\(^{278}\) the statute did not deny TWR “any independent benefit on account of its intention to lobby.”\(^{279}\) The Court distinguished *Speiser*,\(^{280}\) in which the state tax statute in question would have completely banned war veterans’ political speech, by noting that in *TWR* the federal government merely had decided not to “subsidize” lobbying through tax deductions.\(^{281}\)

Justice Blackmun’s concurring opinion recognized the argument that the statute in question “denies a significant benefit to organizations choosing to exercise their constitutional rights” to lobby.\(^{282}\) Because TWR still could create a lobbying affiliate under the statute, however, becomes coercive, and distinguishing “wrongful from permissive constraints on choice becomes a peculiarly elusive task.” Id. Coercion therefore is not the only mode by which the government can “impermissibly pressure preferred liberties.” Id.

273. Id. Professor Sullivan defines a resulting “chilling effect” on speech under the doctrines of vagueness and overbreadth as a type of governmental “burden.” Id. Similarly, situations in which a speaker is “required to obtain a license” (citing City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138, 2143 (1988)), “reveal his identity” (citing Talley v. California, 362 U.S. 60, 64 (1960)), or “confine his speech to media that leave no litter on the public square” (citing Schneider v. Irvington, 308 U.S. 147, 162 (1939)), have been held to constitute burdened speech. Id. at 1454-66.


275. Id. at 541.

276. See 26 U.S.C. § 501(c)(3) (1990) (exempting from taxation the receipt of contributions by nonprofit corporations “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of (or opposition to) any candidate for public office”).

277. 461 U.S. at 545.

278. TWR was the successor to another organization of the same name that was organized under Internal Revenue Code section 501(c)(4), which allows lobbying but does not provide tax-exempt status. 461 U.S. at 543-44.

279. Id. at 545.


281. 461 U.S. at 545.

282. Id. at 552 (Blackmun, J., concurring).
he believed TWR's constitutional right to lobby remained protected.283

B. Public Broadcasters' Editorial Ban Held Unconstitutional in FCC v. League of Women Voters

The ability to separate protected speech activities that are federally subsidized from those that are not was examined again in FCC v. League of Women Voters.284 In League of Women Voters, a regulation conditioning federal funds upon relinquishment of the right to free speech was held unconstitutional.285 The Court held that section 399 of the Communications Act,286 which at that time prohibited editorializing by noncommercial broadcasting stations that received grants from the CPB,287 was not narrowly tailored to achieve state interests that would justify abridgement of speech.288

In order to determine the extent of the constitutional right at issue, the Court first examined the nature of public broadcasters' right to free speech. Given broadcasters' important journalistic role,289 as recognized by the Court in Red Lion Broadcasting v. FCC,290 broadcasting the discussion of public issues is one of their paramount rights. The Court in League of Women Voters emphasized that "the expression of editorial opinion ... lies at the heart of First Amendment protection"291 because editorial speech "informs and arouses the public [while] criticizing and cajoling those who hold government office in order to help launch new solutions to the problems of the time."292

Because section 399 of the Public Broadcasting Act prohibited editorializing by any noncommercial broadcasting station that received

283. Id. at 552-54.
284. 468 U.S. 364 (1984); see also Comment, supra note 260, at 1193-94 (discussing the "Separate Affiliate Doctrine" within the context of TWR and League of Women Voters).
285. 468 U.S. at 402.
288. 468 U.S. at 398. The Court held that "even if some of the hazards at which § 399 was aimed are sufficiently substantial, the restriction is not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgement of speech worked by the . . . broad ban on editorializing." Id. at 399.
289. The Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), noted that broadcasters, as members of the press, are imposed with the journalistic duty of informing the public in an "uninhibited marketplace of ideas in which truth will ultimately prevail." Id. at 390 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting)).
290. See supra notes 110-113 and accompanying text.
292. Id. at 382.
funds through the CPB, the Court in *League of Women Voters* struck the statute down as unconstitutional.\textsuperscript{293} Because section 399 specifically restricted the type of speech that the framers of the Constitution sought to protect, the Court recognized the need to be "especially careful" when balancing the asserted governmental interests in support of the restriction and when determining how narrowly tailored the editorial ban is crafted to effectuate such interests.\textsuperscript{294} The Court thus used a heightened degree of scrutiny. The Court noted that the public's right to be fully informed on important public issues through public broadcasting was not well served by the editorializing ban because it diminished, rather than increased, the ability to broadcast these controversial issues.\textsuperscript{295} Accordingly, the Court held that even if some of the hazards at which section 399 was aimed were sufficiently substantial, completely banning editorial speech was not narrowly tailored to justify this significant abridgement of public broadcasters' speech.\textsuperscript{296} The Court rejected government arguments that the editorializing ban was necessary to prevent public broadcasting stations from becoming propaganda instruments of the federal government or special interest groups or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of the government.\textsuperscript{297}

In reaching its conclusion, the Court pointed to the Public Broadcasting Act's "insulation" from governmental influence through structural safeguards,\textsuperscript{298} including long-term appropriations for the Corporation for Public Broadcasting, with "specified portions" of funds that go directly to local stations.\textsuperscript{299} Furthermore, because of the large number of noncommercial stations throughout the United States, the Court said it appeared likely that "editorial voices . . . will prove to be as distinctive, varied, and idiosyncratic as the various communities they represent."\textsuperscript{300} When examining the effect of the editorializing ban, the Court distinguished section 399's proscription from the one at issue in *TWR*. Unlike TWR, a nonprofit organization that could retain funding by creating a separate affiliate to lobby, a public broadcasting station is not able to segregate its editorializing activities

\textsuperscript{294} 468 U.S. at 383 (citing Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).
\textsuperscript{295} Id. at 399.
\textsuperscript{296} Id. at 398.
\textsuperscript{297} Id. at 384-95.
\textsuperscript{298} Id. at 388-89; see supra Part I.C.
\textsuperscript{299} Id. at 389-90.
\textsuperscript{300} Id. at 391.
According to its funding sources. Because noncommercial broadcasters rely on various funding entities, including the federal government, the Court reasoned that upholding section 399 would absolutely bar editorializing by a noncommercial station even if it received only one percent of its funding from the CPB. The Court conceded that if Congress were to allow noncommercial broadcasters to establish affiliate, privately financed organizations through an amended version of section 399, "such a statutory mechanism would plainly be valid under the reasoning of TWR." In the absence of such a scheme, however, the Court held that the TWR rule does not apply to section 399. Conditioning federal funds upon public broadcasting program content to an extent that completely prohibited editorializing, therefore, was held unconstitutional because the interests the state sought to advance were not substantial enough to outweigh the "important journalistic freedoms which the First Amendment jealously protects."

Given the unconstitutionality of the editorializing ban, League of Women Voters establishes that public broadcasters' right to engage in editorial speech is fully protected under the first amendment and the Court will use the heightened level of scrutiny when analyzing a statute that results in the abridgment of this right.

301. Id. at 400.
302. See supra Part I.B.
303. 468 U.S. at 399-400.
304. Id. at 400.
305. Id. at 401. In distinguishing League of Women Voters from TWR, the Court further stated that:

Here, by contrast, the editorializing ban in § 399 directly suppresses not only political endorsements but all editorial expression on matters of public importance; it applies to independent, nongovernmental entities rather than to the Government's own employees; and, it is not grounded in any prior governmental experience with less restrictive means.

Id. at 401 n.27.
306. The government's arguments for upholding the editorializing ban centered upon two principal concerns. First, the government asserted that it was "necessary . . . to protect noncommercial educational broadcasting stations from being coerced, as a result of federal financing, into becoming vehicles for Government propagandizing or the objects of governmental influence;" and furthermore, that it would "keep the[] stations from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints." Id. at 385.
307. Id. at 402; but cf. Rosenthal, supra note 257, at 1122 (suggesting that "[t]he majority opinion [in League of Women Voters] seemed to treat the case as though it involved direct regulation challenged on first amendment grounds and apparently gave no weight to the fact that the prohibition was predicated upon the provision of federal funds").
308. The Court acknowledged that both Congress and the FCC may regulate the "content, timing, or character of speech by noncommercial educational broadcasting stations," so long as the regulation is narrowly tailored to justify substantial abridgement of free speech. 468 U.S. at 402.
In contrast, Justice Rehnquist urged in dissent that Congress has the right to withhold federal funds for editorializing because the editorializing ban was a rational exercise of the power granted to Congress to condition the receipt of federal funding. The editorial speech at issue, he asserted, is content-neutral. He suggested, therefore, that government allocation of public funds requires only a rational relation to Congress' purpose in providing federal funds, as opposed to the strict scrutiny required by the majority. In a separate dissent, Justice Stevens asserted that the statute was sufficiently tailored because it did not chill editorial opinions by individual commentators on a noncommercial broadcasting program. Rather, the statute only prohibited the station from broadcasting statements agreeing or disagreeing with individual commentators' opinions. The dissenting justices, therefore, would have upheld the editorializing ban on public broadcasting stations that receive federal funds. Given the closeness of this decision and the revised make-up of the Court since the time of League, the dissenting Justices' sentiments signal the possibility of the current Court's upholding future intervention of public broadcasters' right to free speech.

Although League of Women Voters was decided in the context of editorial speech, it appears that the broader question of protecting public broadcasters' "journalistic freedoms" was the real issue at stake. The Court stated that "the press, of which the broadcasting industry is indisputably a part carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs." Furthermore, League of Women Voters illustrates the Court's intolerance toward a regulatory scheme that prohibits editorial speech by recipients of federal funds such as public broadcasters. Given public broadcasters' important role in informing the public "on matters of public importance," the Court was unwilling to uphold a restriction on this sort of speech that was

309. Id. at 403 (Rehnquist, J., dissenting). Justice Rehnquist added that in creating the CPB, Congress did not leave "its creature ... free to roam at large in the broadcasting world, but instead imposed certain restrictions ... on CPB's authorization to grant funds." Id. at 404.

310. Id. at 407.

311. Id. at 412-13 (Stevens, J., dissenting).

312. Notably, this was a closely divided (5-4) decision.

313. Justices Anthony Kennedy and David Souter have been appointed to the Supreme Court since the League of Women Voters decision.

314. See 468 U.S. at 402.

315. Id. at 382.

316. Id. at 399.
not crafted "with sufficient precision" to alleviate governmental concerns.

As the foregoing discussion demonstrates, the doctrine of unconstititutional conditions serves to safeguard government beneficiaries' constitutional right to free speech from being subject to governmentally imposed conditions. A legislative scheme that would condition funds based on public broadcasters' refraining from indecent programming therefore would result in an unconstitutional mode of infringement. As the congressional activity surrounding the NEA illustrates, this indirect mode of regulation is not impossible to imagine. Furthermore, the problem with a statutory scheme that conditioned funds on the absence of indecency, like the flaw in the 24-hour indecency ban, is the vagueness and overbreadth of the definition of indecency. If public broadcasters were to erroneously air a program that later was held to be indecent, they would be subject to sanctions under the present system. A statute that would condition the future receipt of federally appropriated funds has the danger of chilling nonindecent, and fully protected, speech. This unconstitutional mode of altering public broadcasters' programming not only would contravene the Court's holding in *League*, but also would result in an unconstitutional condition.

**Conclusion**

Given the above arguments, the 24-hour federal indecency ban and the "generic" standard of indecency should be challenged as unconstitutionally vague and overbroad. In their place, the FCC should create well-defined guidelines for indecency through prospective rules that would place broadcasters on more certain notice. These rules should suggest a range of words and settings that may lead to a finding of indecency, and should provide clear examples of contexts that could constitute indecency. Furthermore, the possibility that a program may contain indecent speech should not condition public broadcasters' receipt of federally appropriated funds. This could lead to an unconstitutional chilling effect on important news and educational programs that, in fact, contain protected speech.

For example, public broadcasters should be free to present programs in which distasteful or vulgar speech may not only be appropriate, but necessary and protected. Congress stated during the Public Broadcasting Act hearings that noncommercial broadcasting programs are meant to educate, not merely to entertain.317 Requiring an edu-

317. See supra Part I.A.(2).
cational program addressing serious social problems to tread ever so lightly in its language for fear of causing the broadcaster to lose the right to broadcast altogether, or to lose federal dollars, is unrealistic. For example, segments on AIDS, teen pregnancy, domestic violence, urban crime, and the national and international war on drugs or alcoholism may take viewers and listeners to contexts with which they are not familiar. Conversations taking place in these situations may not always be delicate and may even require distasteful or vulgar speech. Nevertheless, it would be unconstitutionally impermissible to bar such educational programs from the air altogether if they contain a segment deemed "indecent," which, in fact, may be fully protected.

Likewise, live newscasts and documentaries are not meant to provide an edited version of the way things could have been said or may have taken place. Instead, under journalistic ethics, the news media—of which public broadcasters are a part—have the duty to represent events as they occur. A report on gang warfare or international human rights violations may trigger a sense of distaste in delicate viewers or listeners. Yet, as the Supreme Court has continuously held, the first amendment was designed to protect these important journalistic freedoms. Even in nonviolent settings, reality may require that "indecent" or "offensive" matter become part of the programming if a public broadcaster is to retain any credibility. Portraits of artistic and historical figures or dramatizations of provocative literary works may contain one of Carlin's infamous "dirty words." But as the repetitive use of these words during certain times of the day alone is no longer a guide for actionable indecency, readings from the works of Chaucer or James Joyce may be kept off the radio altogether with the resulting "chill" created by a 24-hour indecency ban.

Furthermore, given the possibility of federal funds being conditioned on refraining from airing of indecent material, public broadcasting stations should seek to expand alternative funding sources to avoid reliance on federally appropriated funds. These sources include state and local agencies that are sensitive both to local programming needs and to public broadcasting's mission of presenting alternative


319. See supra notes 210-211 (discussing the D.C. Circuit's recognition of a possible chilling effect from a total indecency ban in ACT I).
programming, community residents and businesses,\textsuperscript{320} public interest groups, nonprofit organizations, and foundations. Obtaining such funding would diffuse potential governmental influence and control over program content.

As Congress stated during the Public Broadcasting Act hearings, public broadcasting should fill the gap left by commercial broadcasting and should take creative risks to serve diverse and underrepresented audiences. To thwart the continuation of public radio and television's ability to heed this challenge by conditioning federal funds on program content would be a tragic compromise for the millions of listeners and viewers who depend on this unique form of communication.

\textsuperscript{320} See, e.g., \textit{ACORN Channel: Public Television without Public Broadcasting Service}, San Frán. Bay Guardian, Oct. 11, 1989, at 14 (reporting on KCAH, a public television station in Watsonville, Cal., which is the first to operate without CPB funds or PBS programming); \textit{see also Radio Bilingue Gives a Voice to Valley Farm Workers}, L.A. Times, Aug. 20, 1989, at 3. This article profiles Hugo Morales, a Harvard Law School graduate who created “Radio Bilingue,” a non-profit FM radio station broadcast, engineered, and managed almost entirely by current and former migrant farm workers. Morales began the Spanish-language public radio station with wholly local donations.