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THE INFLUENCE OF THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT ON BROADCAST INDECENCY
POLICY*

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The “politics” of broadcast regulation — namely, the influence of various political players — can be clearly seen in the case of broadcast indecency policy.¹ While the Federal Communications Commission (FCC or the Commission), Congress, the White House, the United States Supreme Court, citizens groups and industry lobbyists have played a part in the unfolding drama, this article asserts that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has played the most important role in the evolution of broadcast indecency policy. The purpose of this article, then, is to explore the rulings of the D.C. Circuit during the past decade.

I. HISTORICAL CONTEXT OF BROADCAST REGULATION

Mass media historian Louise Benjamin has found that even before the Radio Act of 1927,² American courts were influential in defining broadcast regulatory principles.³ When a state court pro-

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1. For a full discussion of the politics of broadcast regulation, see ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* (3d ed. 1982).

2. 47 U.S.C. §§ 81-109 (repealed 1934). Section 109 of the Act states in pertinent part that, “no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.” 47 U.S.C. § 109, *quoted in*, Milagros Rivera-Sanchez, *Developing an Indecency Standard, The Federal Communications Commission, And the Regulation of Offensive Speech, 1927-1964*, 20(1) *JOURNALISM HISTORY* 3 (1994). Congress repealed the Radio Act of 1927 in 1934, but this prohibition was transferred into the Communications Act of 1934. Milagros, *supra* at 3 (citing 47 U.S.C. § 326). In 1948, this same clause was incorporated into § 1464 of Title 18 of the United States Code. *Id.* at 4. Section 1464 attached to the prohibition punishment of a “fine of not more than \$10,000 or imprisonment of not more than two years or both.” *Id.* at 3-4 (quoting 18 U.S.C. 1464 (1984)).

3. Louise M. Benjamin, *The Precedent That Almost Was: A 1926 Court Effort to Regulate Radio*, 67(3) *JOURNALISM QUARTERLY* 578, 585 (1990). The Benjamin arti-

tected the signal of WGN, Chicago, from interference, the decision was "hailed . . . as a means of clearing up the ether."⁴

Prior to 1927, Congress had passed only two laws regarding radio: the Wireless Ship Act of 1910 and the Radio Act of 1912.⁵ However, because the laws were not aimed at mass audience broadcasting, Secretary of Commerce Herbert Hoover found that self-regulation of frequency usage was not working.⁶ But before the Second Radio Conference of 1923,⁷ "Hoover's attempts to regulate were seriously undermined when the D.C. Circuit ruled that the secretary of commerce lacked legal discretion to withhold licenses from broadcast stations."⁸

cle discusses the impact of a case decided prior to the enactment of the Radio Act of 1927. *Id.* at 579-85. The *Tribune Co. v. Oak Leaves Broadcasting* decision settled a dispute between two radio stations broadcast over closely located frequencies whose broadcasts caused interference. *Id.* at 579 (citing *Tribune Co. v. Oak Leaves Broadcasting*, Circuit Court of Cook County (Chicago), General No. B 136864, Nov. 17, 1926, in National Archives Record Group (NARG) 173, Box 83, FCC, File 1102). The court found in favor of the plaintiff, the owner of station WGN, who had been operating on its frequency for a longer period of time than the defendant's station, WGES. *Id.* at 582-83. Judge Wilson, writing for the Circuit Court of Cook County, Illinois, reasoned that priority of rights in broadcasting was similar in many ways to priority of rights in trademarks and in water rights. *Id.* at 583. Relying on parallel precedent, the court held that because WGN was established and accepted by the public as the station broadcast at that particular frequency, WGN had a right of priority and WGES was required to find a new frequency. *Id.*

4. Benjamin, *supra* note 3, at 583. The American Bar Association, the National Radio Coordinating Committee and newspapers from around the country endorsed the decision. *Id.* at 583-84. While it was believed that broadcasters possessed no vested rights against the government regarding ownership of broadcast airwaves, this decision was seen as acknowledging that broadcasters did have such rights against other broadcasters. *Id.* at 584. Similar suits were planned in other cities, but before they could be initiated, Congress passed the Radio Act of 1927. *Id.*

5. KRASNOW, *supra* note 1, at 10. Both acts primarily dealt with ship-to-shore and ship-to-ship maritime communications. *Id.* at 10-11. The acts did not, however, deal with use of offensive language or with indecency. Milagros Rivera-Sanchez, *The Origins of the Ban on "Obscene, Indecent, or Profane" Language of the Radio Act of 1927*, 149 JOURNALISM & MASS COMMUNICATIONS MONOGRAPHS 1, 6-7 (1995).

6. KRASNOW, *supra* note 1, at 11. In 1922, Hoover convened a broadcaster conference, the First Radio Conference, which, after two months of study, unanimously decided that leaving regulation to private enterprise alone was inadequate and recommended legislation authorizing government control over allocation, assignment and use of broadcast frequencies. *Id.*

7. *Id.* Hoover called the Second Radio Conference in 1923 to address the problem of reception interference caused by the crowding of stations after Congress failed to enact legislation putting the recommendations of the First Radio Conference into effect. *Id.*

8. *Id.* at 11 (citing *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923)). The court ruled that Congress had never intended that the secretary of commerce hold such authority. *Id.*

It is clear, therefore, that before a Federal Radio Commission or a Federal Communications Commission ever existed, the political struggle over who would control the airwaves, as well as how they would be regulated, was underway. Many of the defining moments in broadcast regulation policy came through judicial decision-making rather than from actions of Congress or the FCC. In *National Broadcasting Co. v. United States*,⁹ for example, the Supreme Court dealt with the "public interest" standard¹⁰ and the right of the FCC to manage the public airwaves.¹¹ Later, in *Red Lion Broadcasting Company v. FCC*,¹² the rights of viewers and listeners were argued to be more important than the rights of broadcasters.¹³ In the area of broadcast indecency, a sharply divided Court in *FCC v. Pacifica Foundation*¹⁴ upheld FCC attempts to consider the content of broadcast speech on a case-by-case basis.¹⁵ But lack of clarity in that opinion, coupled with FCC ambiguity, led to a twenty year period of regulatory confusion. In such a climate it should not be surprising that the courts, specifically the D.C. Circuit, became major participants in the political process.

9. 319 U.S. 190 (1943). The *National Broadcasting Co.* suit was brought to enforce enforcement of the FCC's chain broadcasting regulations. *Id.* at 193.

10. *Id.* at 216. The "public interest" standard was set forth in the Communications Act of 1934, as a criterion for the exercise of power by the FCC. *Id.* The Court stated that "[t]he 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'" *Id.* (quoting the Communications Act of 1934, 47 U.S.C. § 309 (g)).

11. *Id.* The Court determined that the FCC's authority to regulate was not limited to "technical and engineering impediments to the 'larger and more effective use of the radio in the public interest.'" *Id.* at 217. The Court found, however, that nothing in the Communications Act precluded the FCC from exercising licensing and regulatory powers consistent with the "public interest" standard. *Id.* at 218.

12. 395 U.S. 367 (1969). *Red Lion* was brought to challenge the constitutional and statutory bases of the FCC's "fairness doctrine," and to challenge the application of the doctrine to a particular broadcast. *Id.* at 370-71.

13. *Id.* at 390. The Court held that the FCC's "fairness doctrine" requiring broadcasters to afford political candidates who have been criticized over the broadcaster's facilities an equal opportunity to respond did not violate the First Amendment. *Id.* at 392. The Court reasoned that "[i]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount." *Id.* at 390 (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 361-62 (1955)).

14. 438 U.S. 726 (1978).

15. *Id.* at 750. At issue in *Pacifica* was the FCC's determination that a certain broadcast aired during the afternoon was "patently offensive." *Id.* at 731-33. The FCC issued a declaratory warning order, stating that future broadcasts of the type at issue could result in the assessment of penalties. *Id.* at 730 (citing *Pacifica Found.*, 56 F.C.C.2d 94, 99 (1975)). The majority called indecency a "function of context," not to be "judged in the abstract." *Id.* at 742. Consequently, the FCC's decision to characterize the broadcast as "patently offensive" rested "on a nuisance rationale under which context is all important." *Id.* at 750.

II. POLITICS AND THE D.C. CIRCUIT

The influence of the D.C. Circuit appeared to become increasingly important in the late 1960s with respect to broadcast regulatory policy.¹⁶ First Amendment challenges — especially those core challenges that the Supreme Court has tended to avoid — have been frequently considered by three-judge panels of the D.C. Circuit.¹⁷ Commentators such as Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry argued that “the vague public interest standard embodied in the Communications Act by Congress has offered the courts the opportunity for a significant role in overseeing the FCC.”¹⁸

III. THE D.C. CIRCUIT AND BROADCAST INDECENCY POLICY

In order to understand the influence of the D.C. Circuit on broadcast indecency policy, the court's reaction to other political institutions in a series of cases beginning in the late 1980s must be examined.

A. ACT I

The D.C. Circuit attempted to sort out the post-*Pacifica* world of broadcast indecency in *Action for Children's Television v. FCC (ACT I)*.¹⁹ In the 1988 *ACT I* case, the court held that the FCC had changed its enforcement standard in 1987, stating, “[w]e uphold

16. KRASNOW, *supra* note 1, at 63. This increasing importance is a result of citizen groups raising questions “that have never been subjected to the crucible of judicial review.” *Id.*

17. *Id.* Usually, the constitutional challenges raised against FCC rulings consist of allegations that the Commission in some way violated the First Amendment provisions for freedom of speech or freedom of the press. *Id.*

18. *Id.* at 64. The Supreme Court stated:

Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vague, penumbral bounds expressed by the standard of “public interest.” It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear . . . in the public interest.

Id. (quoting *FCC v. RCA Communications Inc.*, 346 U.S. 86, 91 (1953)).

19. 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter *ACT I*]. In December 1987, the FCC issued a Reconsideration Order which affirmed three previous FCC rulings and changed the hour after which “indecent programming may be aired” (the “safe harbor” period) from ten o'clock p.m. to midnight. *Id.* at 1334. Previously, the “safe harbor” period was from ten o'clock p.m. until six o'clock a.m. *Id.* The three rulings at issue concerned previous FCC determinations that certain aired material was indecent, even though the material did not violate the test previously used by the FCC. *Id.* at 1336 (citing *Pacifica Found.*, 2 F.C.C.R. 2698 (1987); *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *Infinity Broadcasting Corp.*, 2 F.C.C.R. 2705 (1987)).

the generic definition the FCC has determined to apply, case-by-case, in judging indecency complaints, but we conclude that the Commission has not adequately justified its new, more restrictive channeling approach, *i.e.*, its curtailment of the hours when non-obscene programs containing indecent speech may be broadcast."²⁰

In an opinion filed by Circuit Judge Ruth Bader Ginsburg, the court seemed to remind the FCC that indecent speech is protected by the First Amendment, and the "avowed objective is not to establish itself as censor but to *assist parents* in controlling the material young children will hear."²¹ Although the D.C. Circuit appeared constrained by the precedent of *Pacifica* with respect to vagueness challenges to the indecency policy, the court volleyed the issue back to the FCC by holding there was insufficient evidence to support time channeling to late night hours as an effective method of protection for children.²² The court found that while indecency has First Amendment protection, the FCC may regulate children's access to the questionable material.²³ Specifically, the court stated that "[b]roadcasting is a unique medium; it is not possible simply to segregate material inappropriate for children, as one may do, *e.g.* in an adults-only section of a bookstore. Therefore, channeling must

20. *ACT I*, 852 F.2d at 1334. Petitioners, consisting of commercial broadcasting networks, public broadcasting entities, licensed broadcasters, associations of broadcasters and journalists, program suppliers and public interest groups challenged the constitutionality of the order. *Id.* Petitioners argued that the new safe harbor period violated the First Amendment by denying adults access to constitutionally-protected material. *Id.* at 1335. Specifically, petitioners alleged that the order was facially invalid on the grounds of vagueness and overbreadth and that the order was arbitrary and capricious. *Id.* at 1334. The court vacated and remanded those cases involving post ten o'clock p.m. broadcasts, finding that the FCC failed to offer sufficient evidence in support of the new safe harbor period. *Id.* at 1335.

21. *Id.* at 1334 (emphasis added). The FCC argued that the government's interest was limited to "protecting unsupervised children from exposure to indecent material." *Id.* at 1343. The court voiced its concern by instructing the FCC to formulate a channeling rule to promote parental control rather than government censorship. *Id.* at 1344.

22. *Id.* at 1335. Petitioners argued that the new standard was "inherently vague" and was installed without any evidence of a problem justifying a thickened regulatory response." *Id.* at 1338 (citing Petitioners' Brief at 39).

23. *Id.* at 1340. Specifically, the court held that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . ." *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))). Consequently, the court reasoned that the offensive impact of certain words or phrases on children will not necessarily be overridden by the overall social value of the program. *Id.*

be especially sensitive to the First Amendment interests of broadcasters, adults, and parents."²⁴

The D.C. Circuit utilized the decision as a vehicle to inform the FCC that it "would be acting with utmost fidelity to the First Amendment were it to reexamine, and invite comment on, its daytime, as well as evening, channeling prescriptions."²⁵ The court instructed the FCC that it needed evidence to support a rule for promoting parental, not governmental control: "A securely-grounded channeling rule would give effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech."²⁶ The *ACT I* case, however, settled little and was only the beginning of the D.C. Circuit's attempt to influence the political process.

B. *ACT II*

In the 1991 case of *Action for Children's Television v. FCC (ACT II)*, the D.C. Circuit upheld its *ACT I* decision in spite of an FCC twenty-four hour ban ordered by Congress.²⁷ The court had ordered the FCC to hold hearings and determine when stations could broadcast indecency, but "[b]efore the Commission could carry out this court's mandate, Congress intervened."²⁸ Two months after the *ACT I* decision, the 1989 funding bill contained a "rider" requiring the FCC to enforce indecency regulation "on a 24 hour per day basis."²⁹ Faced with new orders, the FCC abandoned plans to follow the *ACT I* orders.³⁰ Then, in 1989, the Supreme Court in *Sable Com-*

24. *Id.* at 1340 n.12. Historically, regulation of the broadcast industry has been based on the unique characteristics of the medium such as scarcity of resources. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). The broadcast medium is subject to a scarcity of resources. *Id.* at 396. Due to a limited number of available frequencies, not all those speakers who wish to gain access to broadcast have the capability. *Id.* Thus, the FCC has utilized the "scarcity rationale" to justify its regulation of the broadcast industry. *Id.*

25. *ACT I*, 852 F.2d at 1341.

26. *Id.* at 1344. The court stated that such a clearly stated position would help broadcasters understand what they were expected to do and what the legal requirements were to which their conduct was expected to conform. *Id.*

27. 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) [hereinafter *ACT II*].

28. *Id.* at 1507.

29. *Id.* (citing Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988) (emphasis added)).

30. *Id.* In following congressional directive, the FCC promulgated a new rule banning all broadcasts of indecent material. *Id.* (citing Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464, 4 F.C.C.R.

munications, Inc. v. FCC rejected a “blanket ban on indecent commercial telephone message services” while distinguishing dial-a-porn services from broadcasting.³¹

The *ACT II* court re-stated its *ACT I* admonishment, declaring that “[b]roadcast material that is indecent but not obscene is protected by the first amendment; accordingly, the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear.”³² The court additionally stated that “[w]hile ‘we do not ignore’ Congress’ apparent belief that a total ban on broadcast indecency is constitutional, it is ultimately the judiciary’s task, particularly in the First Amendment context, to decide whether Congress has violated the Constitution.”³³

The court rationalized that congressional action came before the *ACT I* decision, “thus, the relevant congressional debate occurred without the benefit of our constitutional holding in the case.”³⁴ The court argued that the precedent of *ACT I* and of *Sable Communications* guaranteed adult access to indecency, and limited regulation to that which would “restrict children’s access.”³⁵ The court agreed with one FCC commissioner who had called the mandate unconstitutional.³⁶ The court stated, “neither the Commission’s action prohibiting the broadcast of indecent material, nor the congressional mandate that prompted it, can pass constitutional muster under the law of this circuit.”³⁷ Then the court spoke

457, codified at 47 C.F.R. 73.9999 (1990)). The court recognized that the FCC is bound by the orders of the legislative branch. *Id.* at 1509.

31. *Sable Communications Inc. v. FCC*, 492 U.S. 115 (1989). The *Sable* Court held that a total ban on indecent telephone communications did not pass the strict scrutiny test because it was not narrowly tailored. *Id.*

32. *ACT II*, 932 F.2d at 1508 (quoting *ACT I*, 852 F.2d at 1344). For a complete discussion of *ACT I*, see *supra* notes 19-26 and accompanying text.

33. *Id.* at 1509 (citing *Sable Communications*, 492 U.S. at 129).

34. *Id.* Thus, despite the congressional mandate banning broadcast indecency, the court asserted that such a prohibition cannot survive constitutional scrutiny. *Id.* (citing *Sable Communications*, 492 U.S. at 126).

35. *Id.* The court looked to the Supreme Court’s decision in *Sable Communications* in support of its affirmation that indecent material does receive First Amendment protection and a total ban on indecent material does not comport with the Constitution. *Id.*

36. See Separate Statement of Comm’r Patricia Diaz Dennis, Dec. 12, 1988 (citing *Pacifica* and *ACT I*).

37. *ACT II*, 932 F.2d at 1509. In order for a regulation to be constitutionally permissible, it must be carefully tailored to serve a compelling government interest. *Id.* The government carries the burden of establishing a compelling interest. *Id.*

directly to the political tangle the FCC found itself in over the blanket ban:

We appreciate the Commission's constraints in responding to the appropriations rider. It would be unseemly for a regulatory agency to throw down the gauntlet, even a gauntlet grounded on the Constitution, to Congress. But just as the FCC may not ignore the dictates of the legislative branch, neither may the judiciary ignore its independent duty to check the constitutional excesses of Congress. We hold that Congress' action here cannot preclude the Commission from creating a safe harbor exception to its regulation of indecent broadcasts.³⁸

The court had flexed its political muscle and cloaked it in judicial responsibility. The D.C. Circuit clarified that, even though Congress had the original responsibility of regulating broadcasting as interstate commerce, and had delegated that authority to the FCC, it was the D.C. Circuit that was charged with protecting the First Amendment of the United States Constitution.³⁹ While the court was not establishing its own absolutist ground, it was essentially fashioning a limited regulatory scheme — one that would need to be additionally supported by forthcoming data. In the end, the remand of the *ACT II* case volleyed the political ball back to the FCC and set the stage for *ACT III*.

C. *ACT III*

In 1993, a three-judge panel of the D.C. Circuit again reviewed broadcast indecency regulation, in *Action for Children's Television v. FCC (ACT III)*.⁴⁰ In *ACT III*, a group of broadcasters, programmers, listeners and viewers had challenged a provision in the Public Telecommunications Act of 1992 — the public broadcasting funding bill — which directed the FCC to ban indecent material daily between six o'clock a.m. and midnight.⁴¹

38. *Id.* at 1509-10. This decision returned the FCC to the same position it was in following the *ACT I* decision. *Id.* at 1510. The court concluded its opinion by instructing the FCC to resume its plans to address the concerns raised by the court in *ACT I*. *Id.* See also *ACT I*, 852 F.2d 1332 (detailing discussion of concerns to be addressed by FCC).

39. *ACT II*, 932 F.2d at 1509.

40. 11 F.3d 170 (D.C. Cir. 1993), *vacated in* *Action for Children's Television v. FCC*, 15 F.3d 186 (D.C. Cir. 1994).

41. *Id.* at 171. The challenge was in response to the Public Telecommunications Act of 1992. *Id.* at 171 n.1 (citing Public Telecommunications Act of 1992, Pub. L. No. 102-356 § 16(a), 106 Stat. 949, 954, codified as *In re Enforcement of*

In *ACT III*, the court refused to accept the notion that much had changed since its previous decisions, stating, “[w]hile we break some new ground, our decision that the ban violates the First Amendment relies principally upon two prior decisions of this court in which we addressed similar challenges to FCC orders restricting the broadcasting of ‘indecent’ material, as defined by the FCC.”⁴² In reviewing the FCC’s 1993 implementation order, the D.C. Circuit agreed that children need to be protected from indecency and that parents might need help from the government in protecting their children from indecent broadcasts.⁴³ The D.C. Circuit, however, rejected the idea — restated from *Pacifica* — that both children and adults need to be protected from “indecent material in the privacy of their homes.”⁴⁴ The court stated, “we accept as compelling the first two interests involving the welfare of children, but in our view, the FCC and Congress have failed to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards.”⁴⁵ The D.C. Circuit then identified its curious political position as a buffer between FCC actions and Supreme Court interpretations: “While *ACT I* acknowledges that *Pacifica* ‘identified’ an interest in ‘protecting the adult listener

Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 (1993)). The provision reads in pertinent part:

BROADCASTING OF INDECENT PROGRAMMING

SEC. 16. (a) FCC REGULATIONS —The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. at 954.

42. *ACT III*, 11 F.3d at 171 (citing *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988); *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991)). For a discussion of the prior decisions, see *supra* notes 19-39 and accompanying text.

43. *Id.* at 177.

44. *Id.* at 171. The FCC asserted three goals to justify its 1993 Implementation Order: (1) “ensuring that parents have an opportunity to supervise their children’s listening and viewing of over-the-air broadcasts,” (2) “ensuring the well being of minors” regardless of parental supervision, and (3) protecting “the right of all members of the public to be free of indecent material in the privacy of their own homes.” *Id.* (quoting *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705-06, ¶¶ 10, 14 (1993)).

45. *Id.* at 171.

from intrusion, in the form of offensive broadcast materials, into the privacy of the home,' it does not endorse its legitimacy."⁴⁶

The *ACT III* court, rather than emphasizing the narrow First Amendment view of *Pacifica*, took a much more expansive position. The court wrote that the government has no general interest in protecting adults "primarily because the official suppression of constitutionally protected speech runs counter to the fundamental principle of the First Amendment 'that debate on public issues should be uninhibited, robust, and wide-open.'"⁴⁷ Significantly, the court chose to select a print media case to interpret the First Amendment. The suggestion is made in the first three *ACT* cases that a narrow regulatory slice has been carved — one that will only be justified when the governmental interest of protecting children is supported with hard data. The burden is on the government, and it is substantial. Even if the case can be made, the opinion accepts the notion of parental responsibility:

Viewers and listeners retain the option of using program guides to select with care the programs they wish to view or hear. Occasional exposure to offensive material in scheduled programming is of roughly the same order that confronts the reader browsing in a bookstore. And as a last resort, unlike residential picketing or public transportation advertising "the radio [and television] can be turned off."⁴⁸

The D.C. Circuit struck a solid blow to the foundation of broadcast regulation in its view that broadcast speech has core First Amendment value. In challenging the notion of the intrusion of broadcast signals into one's home, the court pointed out that listeners and viewers have controls that can be exercised without turning to the government.⁴⁹

Left with the government interest in protecting children from broadcast indecency, the D.C. Circuit restrained the FCC by apply-

46. *Id.* at 174 n.6 (citing *ACT I*, 852 F.2d at 1344 n.20).

47. *ACT III*, 11 F.3d at 175 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The court went on to note that the First Amendment protects the rights of all listeners and viewers, "not just of that part of the audience whose listening and viewing habits meet with governmental approval." *Id.* Thus, as long as obscenity is not involved, "[the Supreme Court] ha[s] consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983)).

48. *Id.* at 176 (citing *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)).

49. *Id.*

ing a “least restrictive means” test.⁵⁰ Any ban would have to survive such a test, and according to the court, “the government did not properly weigh viewers’ and listeners’ First Amendment rights when balancing the competing interests in determining the widest safe harbor period consistent with the protection of children.”⁵¹ While some sort of safe harbor might survive judicial scrutiny, the court wrote: “we are at a loss to detect any reasoned analysis supporting the particular safe harbor mandated by Congress.”⁵² As a matter of political power, the court of appeals effectively stopped Congress and its administrative agency in their regulatory tracks.

On the issue of parental supervision and the validity of a safe harbor, the court clearly rejected the FCC argument when it wrote: “one could intuitively assume that as the evening hours wear on, parents would be better situated to keep track of their children’s viewing and listening habits.”⁵³ The FCC argument is grounded in the notion that parents cannot effectively supervise the television and/or radio habits of their children. The court’s response is clear:

[T]he government has not adduced any evidence suggesting that the effectiveness of parental supervision varies by time of day or night, or that the particular safe harbor from midnight to 6 a.m. was crafted to assist parents at specific times when they especially require the government’s help to supervise their children. The inevitable logic of the government’s line of argument is that indecent material can never be broadcast, or, at most, can be broadcast during times when children are surely asleep; it

50. *Id.* at 177. The court found that the government had failed to prove that a six o’clock a.m. to midnight prohibition of the broadcast of indecent material was the least restrictive means to advance its interests in the protection of children. *Id.* (citing *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

51. *ACT III*, 11 F.3d at 177. *See also id.* at 177, n.12 (“As conceded at oral argument, petitioners do not challenge the FCC’s authority to regulate ‘indecent’ material in the broadcast media by creating a safe harbor outside of which indecent material may not be broadcast.”).

52. *Id.* at 177.

53. *Id.* at 178. The FCC argued that “parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening at all times.” *Id.* (citing Respondents’ Brief at 30-31). Because this type of supervision is not practical, the FCC also stated that “parents who seek to avoid exposing their children to indecency face a nearly impossible task if such material is broadcast.” *Id.* (citing Respondents’ Brief at 26). The court noted, however, that the FCC argument assumes that “regardless of the time of day or night, parents cannot effectively supervise their children’s television or radio habits.” *Id.*

could as well support a limited 3:00 a.m.-to-3:30 a.m. safe harbor as one from midnight to 6 a.m.⁵⁴

The protection of children argument is further tempered by the conclusion that *Pacifica* addressed only the need to protect children under the age of twelve.⁵⁵ The FCC, instead, had attempted to treat "teens aged 12-17 to be the relevant age group for channeling purposes" in the *ACT* cases.⁵⁶ The D.C. Circuit noted that "[w]hen the government affirmatively acts to suppress constitutionally protected material in order to protect teenagers as well as younger children, it must remain sensitive to the expanding First Amendment interests of maturing minors."⁵⁷

Circuit Judge Harry Edwards, in a concurring opinion, also discussed the complicated issue of indecency regulation. Beyond not knowing what effects indecent content might have on which children, Judge Edwards considered what would happen if "most parents would prefer to retain the right to decide."⁵⁸

[C]ould Congress still ban the showing of indecent material? If so, on what terms? Would it be prompted by a "moral judgment" that indecent material is bad for all children of all ages? And, if so, how can that be squared with the Supreme Court's rulings that distinguish between unprotected "obscene" and protected "indecent" materials, and suggest that the ages of minors must be considered in assessing the vulnerability of children?⁵⁹

54. *ACT III*, 11 F.3d at 178.

55. *Id.* at 178-79. The FCC contended that *Pacifica* provided the government with the power to restrict the broadcast of indecent speech to minors regardless of age. *Id.* at 179 n.14. The FCC therefore proposed that the First Amendment rights of minors need not be considered with regard to regulating indecent material in the broadcast media. *Id.* (citing Respondents' Brief at 37-38). Neither *ACT I* nor *Pacifica* involved the First Amendment rights of teenagers. *Id.* Additionally, while the Supreme Court has stated that "the protection of children includes 'preventing minors from being exposed to indecent' material, it ultimately struck down the ban on indecent telephone messages because it was not narrowly tailored to serve that interest." *Id.* (citing *Sable Communications*, 492 U.S. at 131).

56. *Id.*

57. *ACT III*, 11 F.3d at 180. The court stated that at some point, "the government's independent interest in shielding children from offensive material no longer outweighs the First Amendment interests of minors in receiving important information." *Id.* (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 n.30 (1983); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1977)).

58. *ACT III*, 11 F.3d at 185 (Edwards, J., concurring).

59. *Id.*

Judge Edwards argued that the government's interest "is tied directly to the magnitude of the harms sought to be prevented."⁶⁰ Yet, the FCC failed to show "precisely what those harms are."⁶¹ In short, the *ACT III* opinion might have been a powerful weapon against *any* broadcast indecency regulation if the panel's 1993 decision had not been vacated in 1994. Instead, a regulatory position re-emerged.

IV. INTERPRETATIONS OF THE OPINION

Legal scholar Jeffrey Stein isolated four questions emerging from the *ACT III* decision:

- A. Is the "generic" definition of indecency too vague?
- B. Should the FCC pursue establishing "safe harbors" for indecent content?
- C. Should the FCC pursue a total ban on broadcasting indecency?
- D. Would the FCC be better served by pursuing case-by-case enforcement of the generic indecency definition instead?⁶²

Stein argued that vagueness should continue to be challenged by broadcasters, that a safe harbor is without empirical support, that a total ban is not constitutional and that case-by-case decisions run the risk of being found inconsistent.⁶³ Surprisingly, Stein's proposal called for abandonment of content regulation in favor of a return to "criminal prosecution . . . rather than administrative agency proceedings."⁶⁴ He wrote that "it would allow triers of fact to review local standards in local communities to determine if violations have occurred."⁶⁵ Proposing that criminal prosecutions are a solution to the indecency quagmire, seems to be an admission that the current

60. *Id.*

61. *Id.* In the FCC's 1993 Implementation Order, the FCC asserts that "harm to children from exposure to [indecent] material may be presumed as a matter of law." *Id.* (citing 1993 Order, 8 F.C.C.R. at 706-07, ¶¶ 17-18). The FCC also referred to studies demonstrating certain undefined "negative effects of television on young viewers' sexual development and behavior." *Id.* (citing 1993 Order, 8 F.C.C.R. at 706-07, ¶¶ 17-18). Judge Edwards stated that this evidence does not, however, provide a significant basis for analyzing possible First Amendment intrusions. *ACT III*, 11 F.3d at 185.

62. Jeffrey L.L. Stein, *The FCC's 'Indecent Proposal': A Drama in Three 'Acts,'* Address at 1994 National Convention of the Association for Education in Journalism and Mass Communication, Law Div., at 36.

63. *Id.* at 36-45.

64. *Id.* at 46.

65. *Id.*

policy system is a mess, suggesting that the FCC should retreat to license renewal analysis in such indecency violations. This proposal models a weaker role for the FCC. Stein's view fails to recognize that the FCC may serve an important function in protecting broadcasters from indecency complaints.

One cannot assume that the FCC has failed to protect the First Amendment rights of free speech for broadcasters. The regulation of broadcast indecency occurs, not in local communities of interest, but in the nation's capital. Locked in the political milieu that is Washington, D.C., an offending broadcaster may escape direct scrutiny. Even where FCC review leads to a fine, these economic sanctions rarely can be seen as significant to corporate group owners. When the President and CEO of Infinity Broadcasting (Infinity), Mel Karmazin, agreed in late 1995 to pay \$1,700,000 to settle Howard Stern's indecency complaints, a move designed to clear the record for a new round of multi-million dollar transactions, he told *Broadcasting & Cable* magazine: "we want to have a good relationship with the government without in any way, shape or form compromising what we believe to be our First Amendment rights."⁶⁶

V. POLITICAL GENERALIZATIONS

The authors of *The Politics of Broadcast Regulation* identified seven generalizations about regulatory policy-making.⁶⁷ These may help us to analyze recent developments and make predictions about future action. The case of "shock jock" Howard Stern is a recent example of the process.

1. *Participants seek conflicting goals from the process.*

In the case of broadcast indecency regulation, it is not feasible for all involved parties to achieve their objectives. The protection of children, if possible, would come at the expense of diminishing free speech rights for broadcasters and adult listeners. The various positions ranging from absolute free speech to a total ban, suggest the political reality that a compromise with the broadcast industry is likely. The FCC and Infinity can settle their public dispute while First Amendment loyalists can continue obscure legal battles in the federal courts.

66. Donna Petrozello, *Kamazin: FCC Settlement Clears Way for Station Buys*, BROADCASTING & CABLE, Sept. 11, 1995, at 9.

67. KRASNOW, *supra* note 1, at 138-41.

2. *Participants have limited resources insufficient to continually dominate the policy-making process.*

Broadcasters interested in challenging FCC regulatory initiatives must make an economic decision about the value of their actions. Likewise, programmers must weigh their options. The sheer slow pace of regulatory change is in stark contrast to rapid media change.

3. *Participants have unequal strengths in the struggle for control or influence.*

The D.C. Circuit, largely because the Supreme Court has avoided further significant review of broadcast indecency, is the forum with essentially the final opportunity for judicial review in indecency cases. However, the court of appeals' authority ends with the publication of its decisions. During the current decade-long struggle, the FCC has refused the court's suggestion to collect and analyze hard data on damaging effects. The FCC, to its credit, recognized that media effects research results have been inconclusive. The latest round of decision-making in mid-1995, as is shown, appears to acknowledge that the FCC is the administrative agency which must, in the end, answer to Congress on broadcast indecency.

4. *The component subgroups of participant groups do not automatically agree on policy options.*

The absolutist First Amendment view of Howard Stern's broadcast group, as well as others representing shock jock deejays, is not shared by all broadcasters. In fact, there have been those who have argued that such blue radio is bad for the long-term health of the industry. Likewise, members of the court of appeals and the FCC have disagreed over the years about the rights associated with free speech. The *Pacifica* decision of the Supreme Court is perhaps the best example of division. Infinity Broadcasting continues to hold the position in court that FCC indecency rules are unconstitutional.

5. *The process tends toward policy progression by small or incremental steps rather than massive changes.*

In a sense, the dispute over broadcast indecency arose because the FCC attempted something larger than incremental policy change in the late 1980s. The reaction from interest groups was swift. Judicial review slammed the brakes on any attempt at massive

change in policy. In one round of decision making, the primary question was simply whether a "safe harbor" should begin at eight o'clock p.m., ten o'clock p.m. or midnight.

6. *Legal and ideological symbols play a significant role in the process.*

The perception of children as defenseless against indecent broadcasting is perhaps the most potent symbol in this process. Freedom and autonomy are also important ideological symbols in the indecency debate. Precedent is perhaps the most significant legal symbol, and it surfaces when the court of appeals expresses being bound by it. Likewise, judicial review is an important legal symbol in the process.

7. *The process is usually characterized by mutual accommodation among participants.*

Early on, it was difficult to see much mutual accommodation on broadcast indecency. As a highly polarized issue, the middle-ground for compromise seemed difficult to discover. But developments in 1995 did, as the political model predicts, lead participants toward accommodation. In the case of Howard Stern's broadcasts, Infinity won a clear, expunged record, and the FCC won the public perception that they were protecting children by regulating the public airwaves.

VI. RECENT DEVELOPMENTS

By May of 1995, the FCC was poised to clarify its current policy on broadcast indecency. *Broadcasting & Cable* magazine wrote:

The FCC is putting the finishing touches on a broadcast indecency report it hopes will give TV and radio stations a better idea of what's actionable, agency officials say. The FCC agreed to write the report as part of last year's settlement of an indecency case against Evergreen's WLUP(AM) Chicago. Since Chairman Reed Hundt arrived in November 1993, the FCC has not aggressively enforced the indecency statute. But it hasn't ignored it, either. Indeed, late last Friday it slapped WGRF (AM) Buffalo with a \$4,000 fine for an off-color 1993 broadcast.⁶⁸

68. *Indecency Guide*, BROADCASTING & CABLE, May 8, 1995, at 113.

Whether there is a legitimate dichotomy between what the FCC judges as "actionable" and "non-actionable" with respect to pending complaints has long been at issue. The FCC's position has been that broadcasters should be able to see a distinction, but the case-by-case review policy only tends to increase ambiguity. Further complicating matters is the fact that broadcast indecency policy revision comes as the Congress debates a series of controversial broadcast deregulation proposals.⁶⁹

VII. POLITICAL IMPLICATIONS OF RECENT COURT ACTIONS

Without significant action from the Supreme Court on broadcast indecency policy, it appears that the D.C. Circuit will continue to hold an upper-hand in setting long-term boundaries for free broadcast speech. In a seven to four decision in the summer of 1995 (*ACT IIIb*), the court of appeals granted the FCC authority to channel indecent broadcasts from ten o'clock p.m. to six o'clock a.m. local time.⁷⁰ The court of appeals wrote, "[w]e are dealing with questions of judgment; and here, we defer to Congress' determination of where to draw the line"⁷¹ Commentators have noted that recent decisions such as *ACT IIIb* act as reminders of broadcasters' second-class citizen status in terms of the First Amendment.⁷² The court of appeals followed the decision with yet another ruling (*ACT IV*) in July 1995 that upheld lengthy FCC review of complaints — from nine months to seven years.⁷³ With-

69. *Telcom bill advances in House*, BROADCASTING & CABLE, May 22, 1995, at 10-11.

70. *Action for Children's Television v. FCC*, 58 F.3d 654 (1995) [hereinafter *ACT IIIb*]. "Parents and the public are the winners," FCC Chair Reed Hundt told the press. First Amendment lawyers said they were "deeply disappointed." Christopher Stern, *Appeals Court Upholds FCC's Safe Harbor*, BROADCASTING & CABLE, July 3, 1995, at 10.

71. *ACT IIIb*, 58 F.3d at 667. In August 1995, an FCC Final Order on Broadcast Indecency was promulgated, deferring to the court of appeals' latest ruling and establishing the safe harbor time period from ten o'clock p.m. to six o'clock a.m. 47 C.F.R. pt. 73 (1995). "The Commission is amending its rules on enforcement of prohibitions against broadcast indecency so as to be in compliance with the instructions given by the United States Court of Appeals for the D.C. Circuit in *Action for Children's Television v. FCC*." *Id.*

72. See Robert Corn-Revere, *The Great Satan: A Free Cyberspace*, BROADCASTING & CABLE, Mar. 13, 1995 (discussing impact of communications decency legislation on broadcasting); Joe Flint, *Commercial Speech Faces Supreme Test*, BROADCASTING & CABLE, Oct. 19, 1992 (broadcasting of advertisements often not entitled to constitutional protection).

73. Christopher Stern, *Court Adds 'Certainty' to Indecency Policy*, BROADCASTING & CABLE, July 24, 1995, at 65. (citing *Action for Children's Television v. FCC*, 59 F.3d 1249 (1995)). Hundt said the ruling "further empowers parents to shield children from indecent programming." *Id.* It was clear that the support for FCC regu-

out insulation from the court of appeals, broadcasters will face FCC regulation driven by a climate of political pressures. The FCC, a creature of Congress with White House influence through the appointment process, is very much dependent upon the general political climate in Washington toward regulation.

VIII. POLITICS OF BROADCAST REGULATION IN THE 1990s

The generalizations made in *The Politics of Broadcast Regulation* seem to aptly apply to the case of broadcast indecency policy-making in the 1990s. Still, one can argue that a systems model approach for understanding the process favors description over prediction. Needed is more comprehensive theory-building in the area of normative media concerns. Any political model needs to build upon social theory, which in turn, would help predict how regulation functions on an economic landscape.

IX. IMPLICATIONS FOR FUTURE STUDY OF POLICY-MAKING

Future research on broadcast indecency regulations should recognize previous generalizations and begin to link them to larger social theories of mass communication. Missing from most previous analyses is a grounding in social theory. The emphasis has been on summarizing and describing court decisions. These legal analyses fall short of providing an understanding of the law in a social context.⁷⁴

Legal commentators would do well to look to law reviews and scholarly communication journals for analyses that link broadcast indecency regulation to what we know about governmental and social control of communication messages.

In addition, much has been made of deregulation through technological innovation. For example, Edwin Diamond, Norman Sandler and Milton Mueller, argued that scrambling devices could be employed to protect children from harmful media messages.⁷⁵

lation by the court of appeals probably was a factor leading to the Infinity settlements. Chris McConnell, *Infinity Pays the \$1.7 Million*, BROADCASTING & CABLE, Sept. 4, 1995, at 6.

74. See, e.g., NEAL J. FRIEDMAN AND ROBERT D. RICHARDS, COMMUNICATIONS LAW: REGULATION OF THE ELECTRONIC MASS MEDIA, 340-41 (1995) (abstracting ACT III, but providing no commentary except quote from Commissioner Quello suggesting FCC will ensure that Howard Stern and Infinity follow law).

75. EDWIN DIAMOND ET AL., TELECOMMUNICATIONS IN CRISIS: THE FIRST AMENDMENT, TECHNOLOGY AND DEREGULATION (1983). See also *Industry Battles Ratings, V-chip*, BROADCASTING & CABLE, June 26, 1995, at 16 (reporting on congressional debate over television industry ratings and V-chip technology).

If reason is to guide broadcast indecency policy, then “deregulation” must be distinguished from “policy-making.” In the words of one analyst: “communications deregulation lacks not only an agreed upon definition, but also an agreed upon goal.”⁷⁶ The future of deregulation and policy-making should be grounded in historical First Amendment free speech principles and theoretic predictions about the limitation of content regulation in a free society.

76. JEREMY TUNSTALL, COMMUNICATIONS DEREGULATION, THE UNLEASHING OF AMERICA'S COMMUNICATIONS INDUSTRY 283 (1986).