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Applicability of Content-Based Time, Place, and Manner Regulations to Offensive Language: The Burger Decade, The Supreme Court History Project: The Burger Court

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THE APPLICABILITY OF CONTENT-BASED TIME, PLACE, AND MANNER REGULATIONS TO OFFENSIVE LANGUAGE: THE BURGER DECADE

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I. INTRODUCTION

Analyzing the Supreme Court's treatment of constitutional issues relating to freedom of expression in the last decade is troublesome, for the Court has adopted an inconsistent attitude toward previously developed judicial techniques in the free speech area. The Court is apparently extending first amendment protection to some types of expression which, because of either the form used to convey the message or the content of the message itself, traditionally have not been considered first amendment speech at all.[1] At the same time, the Court sanctioned the regulation of admittedly protected speech, i.e. time, place, and manner restrictions based upon the content of speech, a practice that historically has been constitutionally forbidden.[2]

Yet the Court's approach, on further analysis, may not be so inconsistent. It may instead be viewed as a judicial attempt to recognize certain previously ignored free speech values without compromising governmental interests particularly threatened by these newly recognized types of speech. These threatened interests are the same ones that led earlier courts to consider this newly recognized expression to be unworthy of constitutional protection.[3]. In effect, the Court has created

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1. Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) (commercial speech); Bigelow v. Virginia, 421 U.S. 809 (1975); Cohen v. California, 403 U.S. 15 (1971) (offensive speech).

2. FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Young v. American Mini-Theaters, 427 U.S. 50 (1976). *But see* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

3. For example, Valentine v. Chrestenson, 316 U.S. 52 (1942), held that com-

certain categories of expression which are partially protected by the first amendment. In so doing, however, the Court has given itself a difficult, and perhaps ill-conceived, task of deciding the quantum of partial protection that any given type of speech warrants. The Court must value particular speech to decide how much state regulation should be sanctioned.

The purpose of this article is to take a retrospective look at the treatment of these issues during the first ten years of the Burger Court. The article will attempt to trace the development of this analytical approach, concentrating on that particular area of expression often called "offensive language," to determine whether such speech has been given constitutional protection, how much protection it has been given, and under what conditions such speech may be restricted or suppressed. Finally, the approach itself, and the difficulties in applying it, will be evaluated, with a consideration of where the Burger Court may ultimately be heading.

II. THE WARREN COURT LEGACY

The Warren Court consistently treated the dual themes of this article as totally separable issues. In deciding whether any particular form of expression deserved to be constitutionally protected, the Warren Court adopted, and indeed perfected, a "two-tier" approach to the analysis of free speech issues.[4] Those tiers were defined as: (1) speech that deserved full first amendment protection and (2) speech that deserved no protection at all. Concurrently, and without reference to the considerations which were used in relegating a given expression to its proper tier, the Warren Court also confirmed the principle that speech falling within the upper tier could not be subjected to any content dependent restrictions relating to the time, place, or manner of its dissemination.[5]

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mercial advertisements were not protected by the first amendment when prohibited by a municipal ordinance. Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976), held that the consumer's right to information in a commercial advertisement outweighed the state's interest in regulating the conduct of a professional group like pharmacists.

4. This has been referred to in commentary as a "two-level" theory of speech protection. *See* Kalven, *Metaphysics of the Law of Obscenity*, 2 PUBLISHING ENTERTAINMENT ADVERTISING L.Q. 439 (1963).

5. *See, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966); Cox v. Louisiana (I), 379 U.S. 536 (1965).

A. *The Two-Tier Theory*

The creation of the two-tier theory allowed the Warren Court to decide free speech questions with a convenient two-step approach. The first step consisted of deciding whether the expression involved in the case , be it verbal expression or the communicative aspects of conduct,[6] deserved either first-tier or second-tier protection. If the speech was found to belong to one of the narrowly defined classes of unprotected expression, it was not deemed first amendment speech at all.[7] As such, it could be regulated or suppressed by the state so long as the state's action was sufficiently rational to satisfy minimal substantive due process limitations.[8] If the speech involved did not fall within one of the classes of unprotected speech, and a regulation was based in any way on the message aspect of such speech, the first amendment drastically limited the state's power to regulate such expression.[9] Thus, the first step of the Court's analysis was strictly definitional, and it offered an approach that was attractive, if for no other reason than its apparent simplicity. The analysis presumed that the Court would not have to involve itself in the mire of judicial balancing that is so often criticized as legislative second-guessing.[10] It would not have to engage itself in a case-by-case consideration of the relative value of the regulated expression weighed against the state's justification for such regulation.

Yet the apparent simplicity of the two-tier approach may have been something of a false promise. Admittedly, the

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6. The degree of protection given the communicative aspects of conduct is beyond the scope of this article. *Compare* Cox v. Louisiana (II), 379 U.S. 559 (1965) *with* Edwards v. South Carolina, 372 U.S. 299 (1963). The relationship between manner of expression and form of expression is relevant, however. The use of loudspeakers might be considered conduct or a manner of expression. *See,* Kovacs v. Cooper, 336 U.S. 77 (1949). A speaker's choice of words might be considered a manner of expression or a form of expression, and the classification may determine the degree to which the state may control such choice. *Compare* Cohen v. California, 403 U.S. 15, 25-26 (1971) *with* FCC v. Pacifica Foundation, 438 U.S. 726, 743 n.18 (1978).

7. Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity not constitutionally protected); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words not protected).

8. *See* Ginsberg v. New York, 390 U.S. 629, 642-43 (1968); Beauharnais v. Illinois, 343 U.S. 250, 266-67 (1952).

9. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1942) (grave and immediate danger); Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (emergency).

10. *See,* Southern Pac. Co. v. Arizona, 325 U.S. 761, 784-90 (1945) (Black, J., dissenting); Roe v. Wade, 410 U.S. 113 (1973) (Rehnquist, J., dissenting).

Court has had little difficulty labeling the classes of speech that are not deserving of first amendment protection.[11] Perhaps aware that the result of an actual case may be preordained by such classification, the Court has had great difficulty defining the contours of unprotected classifications,[12] as well as in applying definitional contours to particular facts even when the definitional boundaries were thought relatively precise.[13]

In fact, it may be argued that the two-tier approach has not enabled the Court to escape the painful burden of balancing after all. Rather, a hidden balancing of free speech values versus permissible state interests may be covertly occurring in the "classification" step of the analysis rather than overtly occurring in the later "regulation justification" step. The Court thus approaches the second step with the scale tipped. In many classes of unprotected speech, the Court has deemed the underlying value of the speech to be so classified so as to be negligible, if not nonexistent,[14] and consequently, that such expression has no place in the "marketplace" of ideas.[15] In others, the Court has presumed such speech to pose a sufficient potential harm[16] to justify suppression, and thus has ac-

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11. Those classes, prior to the Burger Court, were: offensive or fighting words (Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)); obscenity (Roth v. United States, 354 U.S. 476 (1957)); commercial speech (Valentine v. Chrestenson, 316 U.S. 52 (1942)); libel (Beauharnais v. Illinois, 343 U.S. 250 (1952)); and, arguably, advocacy of lawless action (Schenck v. United States, 249 U.S. 47 (1919)).

12. *Compare* Roth v. United States, 354 U.S. 476 (1957) *with* Miller v. California, 413 U.S. 15 (1973) (definition of obscenity). *Compare* Beauharnais v. Illinois, 343 U.S. 250 (1942) *with* New York Times v. Sullivan, 376 U.S. 254 (1964) (definition of actionable libel). *Compare* Schenck v. United States, 249 U.S. 47 (1919) *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (definition of illegal advocacy).

13. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring, admitting he could never intelligibly define obscenity, but stating that he knew it when he saw it).

14. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (Murphy, J.): "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *See* Roth v. United States, 354 U.S. 476 (1957) (no redeeming social value).

15. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

16. It is arguable that the Court never deemed commercial speech to be totally without social value, but rather that it felt the danger of false or misleading advertisements posed special problems that justified enhanced state control in the area. *See* Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976). Similarly, in the area of illegal advocacy, the Court has seemed to base its decision on the fact that such expression poses potentially severe harm rather than on the fact

cepted the state's rationale for suppressing the speech interest without strict judicial scrutiny.[17]

However, toward the end of the Warren era[18] and to an even greater extent in the early years of the Burger Decade, the Court's attitude appears uncertain towards the asumption that the certain types of expression that meet the definitional criteria can be said to have absolutely no free speech value. The Court has come to recognize that commercial speech,[19] speech once considered subject to common law slander or libel liability,[20] and indecent or offensive speech,[21] may have valid communicative value in certain contexts, even if they do pose the harmful threats the Court has also described. If these types of expression have *some* value, then they deserve at least *some* first amendment protection. However, the Court itself may not clearly comprehend what "some" means in this context. The remainder of this article deals with this question in the context of offensive language. It examines how the Burger Court has treated such language, given that it *may* have some value, but also may still pose harm.

B. *The Use of Content-Oriented Regulation of Expression*

Given the preferred position[22] of speech among the rights directly or indirectly protected by the Constitution, it has been generally accepted by modern Supreme Courts that the content of protected expression may be regulated by the state only if the state can present an exceptionally worthy or compelling[23] justification for doing so. Yet the Court has recognized that a state may have valid interests totally indepen-

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that it is totally valueless. *See* Schenck v. United States, 249 U.S. 47 (1919).

17. Beauharnais v. Illinois, 343 U.S. 250, 266-67 (1952); Ginsberg v. New York, 390 U.S. 629, 642-43 (1968) (extreme judicial deference to possible justifications).

18. The Warren Court was the first to reassess the protection given libelous expression. *See* New York Times Co v. Sullivan, 376 U.S. 254 (1964).

19. Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Viginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

20. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

21. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971).

22. Palko v. Connecticut, 302 U.S. 319, 326-27 (1937); *see* United States v. Carolene Products. Co., 304 U.S. 144, 152-53 n.4 (1938); *see also* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

23. *See* note 8 *supra*. *See also* NAACP v. Button, 371 U.S. 415, 438 (1963).

dent of the content of speech that would never be considered compelling.[24] The Court historically has allowed the state to protect neutral interests through regulations in pursuance thereof,[25] so long as applied equally to all forms of expression, irrespective of the content, meaning, or message of the speech involved.[26] Such statutes are aimed at the conduct that often accompanies the dissemination of ideas, though there are speech-neutral regulations that are aimed at the manner of expression rather than accompanying conduct.[27] So long as such statutes are not aimed at the suppression of a particular message, nor treat different speakers differently based upon their message, the Court has subjected those statutes to a lesser degree of judicial scrutiny than applicable to restrictions of particular content. However, the Court has never adopted a position of complete judicial deference to the state when free speech is involved. Even when the state is regulating conduct, or neutrally regulating speech, the Court will invoke an independent judicial weighing of competing interests if the statute has an inhibitory, even though only incidental, effect upon speech interests.[28]

If there existed any particular area of speech where state attempts to regulate the time, place, or manner of expression would become inevitably involved with speech content, the area of indecent or offensive language would have appeared predestined. Though arguably a case where the manner of expression, rather than the content of the message, impinges on

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24. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972) (disruption near school grounds); Kovacs v. Cooper, 336 U.S. 77 (1948) (limits on noise); Cox v. New Hampshire, 312 U.S. 569 (1941) (control of streets).

25. Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939).

26. Hudgens v. NLRB, 424 U.S. 507 (1976); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972). *See generally*, Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976).

27. Such laws, however, are often related to the physical manner of dissemination, which independently could be treated as a form of conduct. *See* Saia v. New york, 334 U.S. 558 (1948) (loudspeakers). *Cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 n.9 (1975) (law aimed at preventing light or sound from drive-in movie theaters). *See* note 5 *supra*.

28. Konigsberg v. State Bar of Cal., 336 U.S. 36, 50-51 (1961). The independent balancing will often result in a finding that the particular state interest thought to be valid, is not sufficient to overcome the incidental deterrent effects of the regulation upon expression. *See, e.g.*, Talley v. California, 362 U.S. 60 (1960) (interest in preventing fraud will not justify requirement of identification on handbills).

particular state interests,[29] that manner nevertheless relates to the words or images involved in conveying the message rather than the manner of its physical dissemination. Thus, offensive language cases are quite unlike situations involving the use of loudspeakers, where the state is regulating the physical means by which the words that communicate a message are projected.[30]

So long as offensive language is considered to be unprotected speech, the state may rationally regulate it or prohibit it altogether without forcing a court to discern whether the state is restricting only the manner or form of expression, as distinguished from content. However, if offensive language is deemed to have sufficient social worth to deserve constitutional protection, the problem becomes more complex. If such speech is given full first-tier protection, then the state's power to restrict its content is narrowly limited. To allow the state the power to excise offensive words, and call such excision a neutral regulation of the manner of speech, presumes that form of expression and message content are totally separable. Such an approach presumes that a state can purify the form without altering the content.

If the two-tier theory of the Warren Court is retained, and a court finds that form and content are not so easily separated, a dilemma will occur. If offensive language is given first-tier protection, the state will have no power to regulate offensive words without a showing that they pose a clear and present danger. If the courts abandon the two-tier approach, however, there is an alternative. An intermediate class of partially protected speech could be created, one that would allow the state to determine the time, place, and physical manner of disseminating speech based upon the verbal form of expression or the content of the message.

The degree to which the state may look to the content of speech in applying a time, place, or manner regulation constitutes the second major theme of this article. Both this issue, and the other major element of the article, the judicial treatment of offensive language, surfaced in the early years of the Burger Court, but they continued to be treated indepen-

29. Compare the majority opinion in FCC v. Pacifica Foundation, 438 U.S. 726, 742 n.18 (1978) (Stevens, J.), with the dissent, *id.* at 772-76 (Brennan, J., dissenting).

30. Kovacs v. Cooper, 336 U.S. 77 (1949).

dently. It was not until the later years of the Burger Decade that the limited protection given offensive expression, and the allowance of content-oriented judgments concerning time, place, and manner statutes, would dovetail into significant constitutional cases.

III. The Early Burger Court

A. *Offensive Language*

The Burger Court, in *Chaplinsky v. New Hampshire*,[31] appeared to give birth to the doctrine that certain speech could be prohibited solely for its offensiveness; however, the opinion said little concerning the state interests that might justify such action. Beyond the implication that, by definition, the mere utterance of such speech could be said to inflict an injury to its recipients' sensibilities, the state interests were not critically examined.[32]

The Burger Court squarely faced the question of state interests in *Cohen v. California*,[33] both in a manner and with a result that has cast doubt upon the position of offensive speech in two-tier analysis, and perhaps the whole use of the two-tier doctrine. In *Cohen*, the Court was faced with speech that it recognized as being phrased in a potentially offensive manner,[34] but which it also recognized as conveying a message.[35] Having done so, the Court made it clear that a state's ability to render certain words as beyond the pale of the first amendment merely by classifying them as indecent or offensive *per se* would not be tolerated. It clearly rejected the concept that the form of expression could be prohibited merely upon a showing that such form was used.[36] Rather, the Court explicitly adopted a balancing process, concentrating on the facts of the particular case. The circumstances surrounding

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31. 315 U.S. 568 (1942).

32. *Id.* at 572.

33. 403 U.S. 15 (1971).

34. The defendant in *Cohen* entered a courthouse wearing a jacket bearing the words "Fuck the Draft." There were women and children present in the corridor. The defendant testified he intended to inform the public of the depths of his feelings against the Vietnam War and the draft. *Id.* at 16.

The Court recognized that the particular word involved here was "perhaps more distasteful than most others of its genre." *Id.* at 25.

35. *Id.* at 18.

36. *Id.* at 20, 26.

the use of such words would have to be considered, the state interests justifying regulation enunciated, and a proper balance struck between the state's interests and the restrictions on free speech.

In *Cohen*, the Court addressed, at least indirectly, nearly all of the possible institutional justifications for regulating offensive language. They are generally: (1) the protection of audience sensibilities, the interest most obviously suggested by *Chaplinsky*;[37] (2) the protection of substantial privacy interests, an issue normally associated with an unwilling recipient;[38] (3) the protection of children;[39] (4) the enhanced power of the state to regulate expression due to the nature of a particular forum;[40] and (5) the state's power to exorcise certain offensive language from the public discourse in the interest of public morality.[41]

With respect to the state's interest in protecting the sensitivities of unwilling or unsuspecting viewers, Justice Harlan felt that so long as such viewers were outside of the home, the speaker's right of expression must prevail, given that members of the audience could avoid a distasteful expression merely by averting their eyes.[42] His analysis, however, appeared to be aimed at the problems presented by the unwilling viewer, rather than the unsuspecting viewer. His solution protected audience sensitivities from further offense, but it did not protect them from the initial offense. Thus, one might argue that the Court felt this latter harm to be somewhat insubstantial.[43] However, if the audience were truly captive, avoidance could

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37. 315 U.S. 568.

38. *See* Saia v. New York City, 334 U.S. 558 (1948) (Frankfurter, J., dissenting); *see also* Black, *He Cannot Choose but Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953); Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken to?*, 67 NW. U. L. REV. 153 (1972).

39. *See* Ginsberg v. New York, 390 U.S. 629 (1968) (obscenity re children); Butler v. Michigan, 352 U.S. 380 (1957) (obscenity; overturned as too restrictive of adult rights).

40. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (broadcasting media); Adderley v. Florida, 385 U.S. 39 (1966) (jailhouse); *see also* Greer v. Spock, 424 U.S. 828 (1976) (military base); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (municipal bus system).

41. A similar form of protection has since been recognized by the Court in its treatment of obscene expression thought not limited to the linguistic atmosphere. *See* Paris Adult Theaters I v. Slaton, 413 U.S. 49, 69 (1973).

42. 403 U.S. at 21.

43. *Id.* (unwitting as opposed to unwilling listeners). *But cf.* FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978) (avoiding assault after the first blow).

be impractical or impossible, and the state might have the power to limit the use of certain forms of expression.[44] Moreover, should such expression invade the sanctuary of the home, substantial privacy interests could be invaded.[45]

Significantly, the Court left open the question of whether the plaintiff in *Cohen* could have been punished for violating a statute narrowly designed to specifically protect the interests of children.[46] Similarly, the Court implied that a statute designed to specifically protect the decorous atmosphere of a courthouse might have been valid in this case.[47]

The majority opinion dealt more decisively with the claim that a state may act to protect the level of public discourse by excising certain words from the public vocabulary. In effect, Justice Harlan recognized the normally insurmountable difficulty in separating form from content: suppressing certain words without suppressing the underlying ideas themselves.[48] Although it may be asserted that the plaintiff in *Cohen* could have stated his message in a different way, it is less assertable that he could have as effectively conveyed it. Even if the Court deemed itself capable of making the latter judgment, which is a debatable assumption, a decision upholding the state's power to limit the words a speaker may use gives no weight to the speaker's right to choose the form of expression which is deemed to be most effective, either in carrying the message to the audience,[49] or in best-evoking the speaker's

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44. *Cohen*, 403 U.S. at 22. *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (inability of listener to shut out loudspeaker); *See, e.g.*, Lehman v. Shaker Heights, 418 U.S. 298 (1976) (Douglas, J., concurring).

45. 403 U.S. at 21.

46. The Court quoted the California Penal Code which provided, at § 415:

> Every person who maliciously and wilfully disturbs the peace or quiet . . . by tumultous or offensive conduct . . ., or who use[s] any vulgar, profane, or indecent language within the presence or bearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor . . . .

403 U.S. at 16 n.1. Section 415 was amended in 1974 to eliminate the reference to "women or children." CAL. PENAL CODE § 415 (Deering 1975). In *Cohen*, defendant was convicted of disturbing the peace by offensive conduct. 403 U.S. at 16.

47. 403 U.S. at 19 (statute makes no distinction between locations; no fair warning).

48. Gratuitously offensive language, *i.e.*, the use of indecent words that are merely appended to the actual message of the speaker, could be treated differently. *See In re* WUHY-FM, Eastern Educational Radio, 24 F.C.C. 2d 408 (1970).

49. 403 U.S. at 25. While distinguishing between the cognitive and emotive value of particular words, the Court assumes that the latter value may protect the

own feelings. This latter right, to express a message in a manner that best connotes the inner mixture of the speaker's thoughts, emotions, and feelings, creates a theoretical impossibility for the state or a court to substitute its judgment.

Certainly, *Cohen* left a number of questions unanswered. The decision does not explicitly elevate offensive language to the level of other protected speech. Rather, it is an endorsement of judicial balancing, carrying with it the possibility that, in certain circumstances, such language might be subject to sanctions inapplicable to other first amendment expression. Yet, *Cohen* still must be viewed as taking a stance decidedly in favor of free speech. Even if no more than a matter of form, the Court's approach expresses a judicial decision to overtly demonstrate the balancing process that may have been used covertly in earlier cases that merely classified speech as either protected or not. But, if offensive language has not been given full first amendment protection, then the *Cohen* decision poses problems in its application. The case did not clarify whether the language was not offensive at all, or whether it was offensive but nonetheless justified in the particular situation. In the former case, the Court had not abandoned its definitional approach after all; it had merely undertaken the task of deciding in particular instances whether the expression involved should be considered offensive, an approach which has proved markedly unsuccessful in the regulation of obscene language.[50] In the latter case, *Cohen* seems to leave open the possibility that the protection of offensive speech may be balanced away. If so, a variety of factors not clearly placed into the balance become very relevant, including those that the Court left open in *Cohen* and those that the Court did not mention: the availability of alternate forums for the speaker, the rights of a willing audience to receive rather than to avoid certain messages, and the relevance of the speaker's intent.[51]

Yet the basic holding of *Cohen*, that it is beyond the

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former. *Id.* Which value is the source of the state's harm deserves consideration. If it is the cognitive or denotative meaning, meanings will change and expand, causing the state's harm to become imprecise. Certainly, Cohen's expression could not be given its clear denotative meaning. *See* Pacifica Foundation v. FCC, 556 F.2d 9, 23 n.17 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

50. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 78-93 (1973) (Brennan, J., dissenting).

51. *See* Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (Powell, J., dissenting mem.).

power of the state to impose general standards of acceptability on communications,[52] has been confirmed.[53]

B. *Content-Oriented Speech Regulations*

In a case which, at the time, had little relationship to the issues posed in *Cohen*, the Burger Court gave a strong endorsement to the proposition that attempts by the state to regulate the time, place, and manner of protected expression must be content-neutral. That is, the state, when faced with first amendment speech, could not channel such expression toward or away from any particular time or place if the direction depended on the content or message of the speech. *Police Department of Chicago v. Mosley*[54] involved a city ordinance that forbade picketing near school buildings during school hours. The ordinance specifically exempted picketing by labor organizations if a school were involved in a labor dispute.[55] This exemption, in effect, excluded one type of message from the ordinance's overall prohibition. The Court found the statute impermissible as written, since it effectively granted a certain group the right to exercise free expression at a time and place prohibited to all other groups, solely on the basis of the content of the message. As Justice Marshall stated: "The operative distinction is the message on a picket sign. But, above all else, the First Amendment means government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[56]

This holding was heavily buttressed by the equal protec-

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52. 403 U.S. at 25; *See* Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971).

53. Brown v. Oklahoma, 408 U.S. 914 (1972); Gooding v. Wilson, 405 U.S. 518 (1972) (invalidating law prohibiting opprobrious words or abusive language on grounds of overbreadth since not limited to the punishment of fighting words). Rosenfeld v. New Jersey, 408 U.S. 901 (1972). *See also* Lewis v. New Orleans, 415 U.S. 130 (1974); Plummer v. Columbus, 414 U.S. 2 (1973).

54. 408 U.S. 92 (1972).

55. CHICAGO, ILL., MUN. CODE c.193-1(i) (March 26, 1968), provided:

> A person commmits disorderly conduct when he knowingly . . . [p]ickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute.

56. 408 U.S. at 95.

tion clause of the fourteenth amendment,[57] as well as by the first amendment. But, in either case the opinion indicates that the real dangers presented by a *Mosley*-type statute are two-fold: (1) it can demonstrate, upon its face or as administered, state approval of certain content and/or disapproval of other content; and, (2) it is improper for the state to "select which issues are worth discussing or debating in public facilities."[58] Even the most narrow interpretation of the first amendment prohibits a state from acting in a manner that would support or favor a particular point of view or side of an issue.[59] While not specifically stated by the Court, certainly the exclusion of controversial issues of political or social import from public forums would tend to preserve the status quo on such issues, in itself possibly furthering institutional points of view.

The Court did not base its opinion on the finding of an exhibited state point of view. Instead, the decision affirmed the position that the subject matter of expression cannot be considered, no matter how impartially, in determining the application of time, place, and manner statutes. However, the relevance of *Mosley* to the issue of a state's power over offensive language was unclear. *Mosley* concerned expression that unquestionably merited full constitutional protection. At the time of the *Mosley* opinion, the status of offensive speech was still ambiguous. Moreover, the opinion in *Mosley* definitively protected expresssion only in terms of "its message, its ideas, its subject matter, or its content."[60] Thus, regulations regarding parades or picketing may, consistent with *Mosley*, channel

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57. Arguably, the equal protection clause would give speech a lesser degree of protection, and a state the power to enforce content oriented regulations, even when contrasted to the absolutist protection read into the first amendment by Justice Marshall. Certain speech may pose special dangers only because of the relationship of its content to certain audiences, or because disseminated at a certain location. Even under the strict scrutiny of laws regulating fundamental speech rights, a state could justify differing treatment based on content if compelling state interests could be shown. A prime example of a time, place, and manner restriction analyzed in such equal protection terms can be found in American Mini-Theaters v. Gribbs, 518 F.2d 1014 (6th Cir. 1975). *See also* Carey v. Brown, 447 U.S. 455 (1980); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29 (U. of Chicago); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1976).

58. 408 U.S. at 96; Carey v. Brown, 447 U.S. at 462 n.6; Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 537 (1980).

59. 408 U.S. at 96; 447 U.S. at 463; *see* Young v. American Mini-Theaters, 427 U.S. 50, 70 (1980).

60. 408 U.S. at 95.

the manner in which a message is physically disseminated, so long as the constitutional position of fully protected content is not compromised.[61] But *Mosley* left open the issue whether the words or form of expression in which a speaker chooses to phrase his message can be treated merely as one more manner of dissemination, such as parades or picketing, or truly involved content.

Moreover, the authoriy of *Mosley* is weakened by the case of *Lehman v. Shaker Heights*.[62] *Mosley* never maintained that the forum in question, the school grounds, need be opened to all speech.[63] Rather, *Mosley* held that if the forum *were* opened to speech, the state could not discriminate as to the speech that could be presented on the basis of content. Even if certain state interests might justify enhanced control over particular forums, the decision to exercise such control could not be based on speech content.[64] In *Lehman*, the Court held that when a truly non-traditional forum is opened up to some expression,[65] the state does retain the power to disallow other expression on the basis of subject matter. With little regard to *Mosley*, the Court, by concluding that the municipally owned bus system was not a public forum, failed to present a persuasive first amendment analysis.[66] Instead, the Court devoted itself to an equal protection treatment of the question;

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61. Traditionally, the state is concerned with preserving traffic or crowd control against problems caused by a speaker's conduct. *See* note 24 *supra*.

A more complex situation arises when the speaker's message poses threats to the public safety or welfare. *Compare* Feiner v. New York, 340 U.S. 315 (1951) *with* Edwards v. South Carolina, 372 U.S. 229 (1963). Arguably, the state would still be strictly limited in channeling speech due to such content. *See* Collin v. Smith, 578 F.2d 1197, *cert. denied*, 439 U.S. 916 (1978). *But see* 439 U.S. at 919 (Blackmun, J., dissenting).

62. 418 U.S. 298 (1974).

63. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

64. *Mosley* clearly states: "*Once a forum is opened up to assembly or speaking by some groups*, government may not prohibit others from assembling or speaking on the basis of what they intend to say." 408 U.S. at 96 (emphasis added).

65. The Court considered the bus system a commercial venture, much like a newspaper or the broadcasting media, yet admitted that its policies involved state action. 418 U.S. at 303. *But see* CBS v. National Comm., 412 U.S. 94, 114-21 (1973).

66. The Court relied heavily on Packer Corp. v. Utah, 285 U.S. 105 (1932). *Packer* concerned cigarette advertising, described as "commerical speech" proposing only a business transaction. At that time, such speech was not constitutionally protected. Though *Lehman* involved advertising, the subject matter was political. The fact that one must purchase space in which to place a message does not determine its constitutional status; the content or the message does so. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

one exhibiting a relatively low level of judicial scrutiny, somewhat inexplicable in a case involving the asserted infringement of a fundamental right.[67]

The Court conceded national reasons for limiting bus advertising to non-controversial issues, including the prevention of an appearance of political favoritism and the protection of a captive audience.[68] Until this case, however, the Court had never allowed a state to selectively protect such audiences from a specific subject matter.[69] In *Lehman* the Court overtly recognized the ability of the state to judge which messages will and will not offend viewers, and it sanctioned this practice with regard to speech which normally would have the fullest first amendment protection.[70] The decision might be dismissed as an exceptionally clever case of class drawing in the equal protection context.[71] The two classes of speech involved, commercial and political, were not considered to be similarly situated in equal protection terms; the Court assumed that the transit system could treat them differently so long as the justifications were rational. Only if the system were to treat two examples of speech within the same class differently, *i.e.* the offerings of two different political candidates, would the state be required to meet the compelling justifications required by the strict scrutiny equal protection approach.

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67. The system advertising policies were required not to be "arbitrary, capricious, or invidiuous." 418 U.S. at 303.

Even though the transit system is not a public forum, and the opportunity to advertise therein is merely a gratuitous benefit, the state may not dispense such benefit in a manner that discriminates on the basis of a fundamental right without a compelling reason. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

68. 418 U.S. at 304.

69. *But see* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). In *Rowan*, the Court found that while 39 U.S.C. § 4009 was phrased in terms of protecting a homeowner from lascivious or pandering mail, the statute allowed the homeowner to prevent further mailing from any sender whatsoever regardless of subject matter. 397 U.S. at 737. Moreover, it was the individual who made the decision, not the government. *Id.* at 735.

Arguably, Justice Douglas, whose concurrence in *Lehman* was based exclusively on the capitve audience element, would not allow transit advertising and was not sanctioning the allocation of ad space on a content-oriented basis. 418 U.S. 305-08 (Douglas, J., concurring).

70. *See, e.g.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

71. Frequently, the Court has avoided troublesome equal protection problems by interpreting statutes in a manner that does not discriminate on the basis of "disfavored" classes. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (aliens v. non-aliens); Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnant women v. all non-pregnant people).

Moreover, even if the state's actions in *Lehman* were content-oriented, they were arguably not value-oriented. There was no recognition by the Court either that the transit system considered some speech content as being more worthy of propagation than others,[72] or that the transit system had the power to do so. The bus system certainly could not have been charged with having taken a stance supporting one side of a particular issue. Yet the city might still have been charged with speech valuing in at least one sense. Though the Court certainly did not say that political speech had less social worth than commercial advertising, it did indicate that political speech did not have sufficient value to overcome the particular problems that that type of speech might cause. To sanction such an approach with regard to fully protected speech opens the door to similar, if not more, state power to regulate speech of less clear constitutional protection, such as offensive language,[73] or casts the regulation in terms of the form of expression, rather than its content. Even if *Lehman* can be limited to those forums in which the government has enhanced power to control,[74] it is the first Supreme Court case permitting the granting of dissemination rights on the basis of the subject matter of the expression.

IV. THE BURGER COURT'S MIDDLE YEARS

A. *Dovetailing of the Issues: A Collision Between Offensive Expression and Content Neutrality*

In *Erznoznik v. City of Jacksonville*,[75] the Court was called upon to resolve a confrontation between a state's power to regulate offensive expression, if any such power remained after the *Cohen* case, and the state's duty to frame the interests that it desired to protect in a content neutral manner. The holding reaffirmed both the approach taken in, and the result of, the *Cohen* case. The Court gave offensive language

72. 418 U.S. at 304.

73. At the time of *Lehman*, purely commercial speech was still of questionable constitutional value itself, though political speech was not. *Compare* Valentine v. Christenson, 316 U.S. 52 (1942) *with* Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

74. *See* Greer v. Spock, 424 U.S. 828 (1976) (military base may discriminate). *But see* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipally managed city theaters).

75. 422 U.S. 205 (1975).

first amendment protection, though it did not require compelling state interests to justify the regulation. The Court also appeared to restate the rule that the applicability of time, place, and manner regulations could not be based on content. In *Erznoznik*, the challenger was convicted of violating a city ordinance which prohibited the showing of films depicting human nudity in drive-in theatres with screens visible from public streets.[76] While ultimately reversing the conviction on grounds of overbreadth,[77] the Court weighed the specific facts of the case, as it had done in *Cohen* and balanced the state's justifications for the ordinance against the degree of infringement on first amendment interests.

In response to the city's claim that it was attempting to protect citizens against an unwilling exposure to offensive material, Justice Powell's majority opinion stated:

> [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.[78]

The Court did not totally denigrate the importance of an unwilling viewer's sensibilities. Rather it expressed that the damage to those sensibilities, and the ease with which the viewer could avoid further harm, were insufficient to balance away the right of willing viewers to receive such expression,[79] an interest not expressly considered in *Cohen*. The Court supported viewers' rights to see such movies at a drive-in thea-

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76. Section 330.313 of the Jackonsville, Florida, Municipal Code (Jan. 4, 1972) provided that:

> It shall be unlawful and it is hereby declared a public nuisance . . . to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such . . . is visible from any public street or public place.

77. 422 U.S. at 216.

78. *Id.* at 209 (citations omitted).

79. *But see* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). In *Rowan*, the Court determined that the right of an unwilling viewer to avoid further offense by being removed from a mailing list in no way lessened the access of willing viewers. *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (homeowners' challenge affecting rights of others to hear denied).

tre;[80] it did not appear to be important that the willing viewer might easily find alternate access to the message.[81] The Court also limited its concern for the unwilling viewer's sensibilities by emphasizing the ability to avoid further offense, rather than the right to avoid the initial offense.[82] Yet the result can be considered merely a case of a one-sided balance between two relatively minor degrees of inconvenience rather than a specific holding that, in balancing the interests of the willing and the unwilling recipient, a position supporting free speech should always be adopted.

Aside from the Court's explicit recognition of the rights of the willing recipient,[83] the decision also confronted an issue not fully considered in *Cohen*: a state's power to protect children. While recognizing the state's interest in its children, the Court's analysis implied that the only government interest involved in this case was that of the state acting as parent to supervise the development of minors, rather than the role the state may also play in supporting the actual parent's decision-making role in raising a child.[84]

The Court seemed to view the city ordinance as an attempt to protect the child from viewing nudity *per se*, and therefore the ordinance was held to be overbroad. While implicitly affirming the state's power to adopt a standard of obscenity for children more lenient[85] than the adult standard set

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80. 422 U.S. at 211 n.7.

81. The ordinance clearly left indoor theatres unaffected. *Id.* at 208. *Cf.* Schneider v. State, 308 U.S. 147, 163 (1939) (alternate access not ground for limiting expression).

82. 422 U.S. at 210-11 (speaking in terms of "further" bombardment). *See also* Spence v. Washington, 418 U.S. 405 (1974).

83. The majority also cited the rights of the theater operator in question to show these films. 422 U.S. at 217 n.16. *See also* Joseph Burstyn Co. v. Wilson, 343 U.S. 495, 502 (1962). *But see* Young v. American Mini-Theaters, 427 U.S. 50, 78 n.2 (1976) (rights of theater operator are merely economic and therefore deserving of little first amendment protection).

84. *Compare* Prince v. Massachusetts, 321 U.S. 158 (1944) (interest of state in child may supersede parent's rights to direct child's behavior) *with* Ginsberg v. New York, 390 U.S. 629 (1968) (state interest in assisting parent when latter not available to control child's decisions).

85. *See* Ginsberg v. New York, 390 U.S. 629 (1968). That standard requires that such material: "(i) predominantly appeals to the prurient, shameful, or morbid interest of minors, (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." *Id.* at 632-33.

forth in *Miller v. California*,[86] clearly every example of human nudity would not be held to *per se* violate such a standard.[87] Yet the Court's position left open the question of whether legitimate grounds for protecting minors might justify limitations on expression that would also affect adults. As stated by Justice Powell:

> Clearly all obscenity cannot be deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths *nor subject to some other legitimate proscription* cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.[88]

There is an implication that the state could justify a comparable regulation, if drawn in narrower terms and presenting a "more particularized and compelling reason for its action."[89] A statute narrowly directed at expression that was deemed to be offensive or indecent to minors, even though not obscene, might be a legitimate proscription.[90]

Erznoznik also presumes that any time the state looks to individual images, in this case nude images, in deciding the applicability of its regulation, the statute must be considered content-oriented. It can be argued, however, that in such cases, the state has not looked at the particular message con-

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86. 413 U.S. 15, 24 (1973). To be deemed obscene, those standards require, determination of whether: (i) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (ii) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (iii) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Even though pre-dating *Miller*, the statute involved in *Ginsberg* did specifically define the conduct prohibited. *See* N.Y. PENAL LAW § 235.20 (McKinney 1980).

The effect *Miller* may have on the third element of the *Ginsberg* standard has not been faced by the Court. *See Erznoznik*, 422 U.S. at 213 n.10. § 235.20, however, had been amended in 1974 to substitute the phrase "[C]onsidered as a whole, lacks serious literary, artistic, political, and scientific value for minors" for "Is utterly without redeeming social importance for minors." 1974 N.Y. LAWS, ch. 989 § 3.

87. 422 U.S. at 213. The Court suggested, as examples, newsreel scenes of the opening of an art exhibit or the nude body of a war victim. To be obscene, "such expression must be, in some significant way erotic." *Id.* at 213 n.10.

88. *Id.* at 213-14 (emphasis added).

89. *Cohen*, 403 U.S. at 26.

90. *But see* 422 U.S. at 216 n.15 (only saving construction would be to limit ordinance to movies obscene as to minors).

veyed,[91] but has merely considered the manner or form of conveyance. Recognizing that form of expression as well as content may deserve constitutional protection[92] does not compel a finding that form and content necessarily deserve the same degree of protection. The City of Jacksonville could certainly argue that, in banning public visibility of all film nudity, it never looked to the substance of such movies, let alone made an attempt to judge the messages that such films may have been trying to convey. Rather, it adopted a "content-neutral" posture, and only sought to regulate a certain manner of expression. Thus, in evaluating this arguably content-neutral regulation of expression, the Court applied standards of review far more stringent than the law would call for.[93]

The actual holding in *Erznoznik* may be viewed as supporting either, or both, of two speech-protective approaches: The first may be a recognition of the fact that form and substance are not easily separable, that the protection announced in *Cohen* implies that questions concerning how best to express an idea, an image, or a message are best left to the speaker or artist. No one else can know precisely the message sought to be conveyed and therefore how best to convey it. For the state or the Court to attempt to edit that message would convert the message into one phrased by the state or the Court, respectively, and not the speaker at all. Even though the state may not approve or disapprove the message conveyed,[94] nor even consider substance at all, the effect of the editor's scissors may be the same. The message may be diluted, or at least altered. Form is content, and for the state

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91. 422 U.S. at 223 (Burger, C.J., dissenting) (regulations of content of certain types of display not a restriction of any messasge).

92. *Cohen*, 403 U.S. at 25-26.

93. In the case of content-neutral statutes, the Court generally has balanced the interests involved without an initial presumption against the law's validity. Nor has the Court necessarily required a state to adopt the least restrictive alternative in serving its interests. *See* Konigsberg v. State Bar of Cal., 353 U.S. 252, 258-62 (1957); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. OFF. 204, 222 (1972). Thus, such statutes have been frequently upheld, even though restricting speech, but the Court has used more than a rational basis standard. *Compare* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding prohibition against using loudspeakers in a residential area) *with* Schneider v. State, 308 U.S. 147 (1939) (overturning ordinance prohibiting distribution of handbills to prevent litter).

94. *Compare* Young v. American Mini-Theatres, 427 U.S. 50 (1976) (Regulation may be based on content if city is supporting no point of view) *with* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (the regulation of subject matter, even if no point of view is supported, is prohibited).

to regulate form, it must present reasons sufficiently compelling to justify regulating the substance of any expresssion held to be otherwise protected by the first amendment.

An alternate, and perhaps more pragmatic, view of *Erznoznik* is that the Court determines whether the state regulation was improperly content-oriented by judging whether the harm the state was seeking to prevent was caused by the content or form of expression, or was caused by the physical means of dissemination. This approach avoids resolving the difficult issue of whether content-oriented regulations are motivated by the state's intent to give approval or disapproval to particular content or expressive form. The Court could recognize that form and content are inseparable, but if either caused a truly neutral harm, the state could act to alleviate such harm.

Thus, in *Erznoznik*, the Court may have recognized the state's power to regulate drive-in theatres solely predicated upon an ever-changing pattern of light emanating therefrom which causes distractions to traffic.[95] This would clearly be a content-neutral regulation of message or manner of presentation. Had the state been able to demonstrate that images of nudity caused greater traffic distraction than did other screen images, then, under this approach, the state would have demonstrated a content-neutral justification, even though an analysis that totally equated form with substance might not consider it such.[96] This was not the case in *Erznoznik*. There, the state was concerned with the substance of the form, even if not the substance of the message or the underlying themes of the films in question. The state considered the image of nudity to be a harmful image. Given that fact, the state, even if not attempting to express a point of view regarding the overall value of such an image, should be required to satisfy the high standard of justification needed to substantively regulate first amendment speech.

However interpreted, and even though *Erznoznik* was ultimately decided on a claim of fatal overbreadth, the decision must be regarded as significantly speech protective. It af-

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95. 422 U.S. at 215 n.13.

96. The City of Jackonsville did in fact attempt to justify its ordinance as promoting traffic safety. As such, the Court felt it was under-inclusive in singling out nudity, unconvinced that other scenes on the screen would be any less distracting. *Id.* at 214-15.

firmed the pro-speech balance announced in *Cohen*; it severely limited the state's permissible interests, such as the protection of children and its means to further them, issues not fully faced in *Cohen*; and it recognized pro-speech values, such as speaker and listener access, that *Cohen* had not fully recognized. Thus, although its ground of decision did not state that offensive or indecent speech had climbed to the upper tier of the Court's two-tier analysis, the Court did indicate that it had not faced a situation that persuasively argued against such an eventual recognition.

B. *An Immediate Retrenchment or a Clarification of Approach: Zoning as a Neutral Time, Place, and Manner Regulation*

Neither the *Cohen* case nor *Erznoznik* found competing personal interests sufficient justifications for suppressing offensive language. Concurrently, both *Erznoznik* and *Mosley* treated content-oriented time, place, and manner regulations harshly, at least in situations not affording an argument for enhanced state regulatory power because the state was controlling access to a non-traditional forum. Yet such a content-oriented regulation of offensive expression was upheld a year after the *Erznoznik* decision in *Young v. American Mini-Theatres*.[97] Most surprisingly, the state's support for such a regulation was based on the protection of economic and property values, rather than personal interests.[98]

The City of Detroit's zoning ordinance clearly singled out a particular form of expression for special treatment in deciding the physical location at which such expression could be disseminated.[99] This particular form of expression, depicting

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97. 427 U.S. 50 (1976).

98. The basic harm that the city was attempting to alleviate was the creation of skid-row areas that attracted undesirable transients, lowered property values, caused an increase in crime, and caused residents and businesses to move elsewhere. *Id.* at 55. Justice Stevens, the last member to join what may be considered the modern Burger Court, wrote the majority opinion. Only Justice White of the last Warren Court joined the 5-4 majority. Only Justice Blackmun, of the post-Warren appointees, joined the dissent. *Id.* at 88-96 (Blackmun, J., dissenting).

99. The ordinance classified "adult" theaters as a "Regulated Use" which could not be located within 1000 feet of any two other regulated uses, or within 500 feet of a residential area. The term "Regulted Use" included ten other types of establishments, although only one, adult book stores, could be said to pose similar first amendment problems. *Id.* at 52 n.3. *See* DETROIT, MICH., ZONING ORDINANCE, §

certain film images clearly defined within the statute, was classified as adult entertainment[100] and, in all fairness, could be considered offensive.[101] Having so classified such material, the state restricted both the number and geographic location of sites allowed to exhibit such films.

The case presented a confrontation of issues posing a significant dilemma. Given recent decisions that precluded state restrictions on offensive language even when the state presented plausible personal interests that might be threatened, it would be difficult for the Court to uphold a regulation that indicated its intent was to preserve property values rather than personal values. Moreover, the Court had made clear its hostility toward regulations which vary in impact according to the content of the speech to which they apply.[102]

66.0000 (November 2, 1972).

To be considered an adult establishment, the theater must present material distinguished or characterized by an emphasis on depicting, describing, or relating to "Specified Sexual Activities" or "Specified Anatomical Areas." 427 U.S. at 53 n.5. *See* DETROIT, MICH. ZONING ORDINANCE, § 32.0007 (November 2, 1972).

100. The fact that the Court has treated expression as entertainment rather than information has never lessened its constitutional protection. Winters v. New York, 333 U.S. 507, 510 (1948). *See also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1962).

101. The ordinance defined the term "Specified Sexual Activites" as: "(1) Human genitals in a state of sexual stimulation or arousal; (2) Acts of human masturbation, sexual intercourse or sodomy; (3) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast." 427 U.S. at 53, n.46; *See* DETROIT, MICH., ZONING ORDINANCE, § 32.0007 (November 2, 1972). Compare the examples of material which the Court has expressed would satisfy the element of patent offensiveness in its present definition of obscenity:

> a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.
>
> b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller v. California, 413 U.S. 15, 25(1973).

102. *See* text accompanying notes 54-61 *supra*. The Court, however, did not directly address the equal protection issue that *Mosley* implied was apparent in *Young*. The court of appeals had discussed the issue, and while finding the ordinance generally permissible under the general business laws of the jurisdiction, held that it violated the equal protection clause. It found that the infringement on free speech was not merely incidental, but that the ordinance was applied to theaters solely with reference to the content of the constitutionally protected material they presented. The court therefore applied a strict scrutiny approach due to the fundamental right involved. While conceding that Detroit might be attempting to further a compelling interest, it deemed that the means chosen was not necessary. American Mini-Theaters v. Gribbs, 518 F.2d 1014 (6th Cir. 1975). *But cf.* Nortown Theatre v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974).

Nevertheless, the statute in *Young* was upheld on a rational basis standard, with little if any balancing of competing first amendment interests. While constitutionally questionable, if one can accept the Court's rationale, the result is not as logically incomprehensible as it may appear. For while the Court admitted that the films subject to the Detroit ordinance would not necessarily meet the *Miller* obscenity standard[103] so as to be considered, under traditional two-tier analysis, totally unprotected speech, the expression involved was judged to be of lesser constitutional importance than most other types of speech. In effect, the Court set forth the proposition that the boundary line between the two tiers was no longer an absolute one. As the majority opinion stated:

> Even within the area of protected speech, a difference in content may require a different governmental response. . . .[104] Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's[105] immortal comment.[106]

Thus, the Court officially recognized its own power to determine that some speech deserves relatively greater first amendment protection than other speech. Given the facts in *Young*, the Court clearly indicated that, while offensive language may not always be punishable for its mere utterance, it may be treated quite differently from other protected speech by a state's regulatory statutes, at least if such statutes are phrased in a manner restricting only the time, place, and manner of disseminating such expression. This enhanced state power rests directly on the premise that some institutional body has the ability to determine the relative value of different types of speech, or even of different messages, and to rank

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103. There was no requirement that the material regulated either be found, under contemporary community standards, to appeal to the prurient interests when taken as a whole nor when taken as a whole, be found to lack serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 21, 26 (1973).

104. 427 U.S. at 68.

105. Voltaire's immortal comment was: "I disapprove of what you say, but I will defend to the death your right to say it." *See Id.* at 63 (citing S. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1907)).

106. 427 U.S. at 70.

such speech in a hierarchy of varying protection. Its relative position in that hierarchy determines the degree to which the state can control or restrict that particular expression.

Analytically, there are flaws in the Court's reasoning in *Young*. Much of the support for sanctioning the enhanced power of Detroit to control offensive materials is based upon cases clearly involving speech historically lacking first amendment protection.[107] *Cohen* and *Erznoznik* imply that offensive language no longer belongs in that company. Certainly the Court has the power to reconsider those decisions, and the degree of judicial deference given the Detroit ordinance might suggest that it implicitly did so. But to assert that Detroit, or the Supreme Court, may evaluate the social worth of various types of speech, and may thereafter accord such expression limited, and perhaps variable, degrees of first amendment protection, is a quite different proposition that will not rest on precedent.

Aside from the paucity of case support for such a proposition, the Court cites no philosophical or social support for its position. It might be fair to assume that the majority of the populace feels offensive language to be less worthy of protection than other speech, but in free speech, as in many fundamental constituional rights, majoritarian feelings are, as often as not, the reason that the Supreme Court is a non-political body.[108] Traditionally, unless the Court found, in good faith, certain expression totally without social worth, it had generally assumed the role of protecting unpopular speech against the shifting vagaries of majoritarian tastes.[109]

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107. The opinion cited Ginsberg v. New York, 390 U.S. 629 (1968), which dealt with juvenile obscenity, and Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973), concerning problems caused to children by material that is obscene even for adults. More in point were cites to the Court's treatment of commercial speech: Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

108. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (citing courts' special role in both protecting those rights intertwined with the political processes, such as the dissemination of information, and also protecting discrete and insular minorities). *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). *Cf.* H.S. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1944).

109. *E.g.*, *Young*, 427 U.S. at 87-88 (Stewart, J., dissenting) (upholding a theater's right to show adult movies, despite local zoning ordinances); Brandenberg v. Ohio, 395 U.S. 444 (1969) (speech and assembly by Ku Klux Klan and members encouraging racism and violent attitudes towards the government); Street v. New York,

Further, assuming that a regulator of speech, or the Court itself, should be given the power to evaluate the worth of particular expression, the Court offers no guidance on how that power is to be exercised, on what factors such an evaluator should consider, and how relevant any given factor should be. Even if it is conceded that it has the power to do so, the practical difficulties of overseeing such a process, in light of the opportunity for censorship by the evaluator, would seem a judicial burden the Court would not want to assume.[110] The Court has always been alert to the threat of time, place, and manner statutes written in language sufficiently ambiguous to afford those applying them to consider speech content, and thus impose message censorship in the guise of furthering totally content-neutral state interests.[111] The difficulty of adequately supervising such applications becomes truly intractable when the regulator is given authority not only to look to subject matter, but to evaluate its worth in determining the degree or manner in which the expresion will be disseminated to the public.

The implications of *Young* can perhaps be limited. While, at first glance, *Young* appears to elevate property interests above personal interests, this very fact may narrow its precedental effect. *Young* can be viewed as a decision somewhat peripheral to the evolving speech protection which *Cohen* and

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394 U.S. 576 (1969) (individual's protest of the slaying of a civil rights leader by "cast[ing] contempt upon [an American flag] by words . . ."; Bond v. Floyd, 385 U.S. 116 (1966) (state legislator openly criticizing United States' involvement in Vietnam; Edwards v. South Carolina, 372 U.S. 229 (1963) (speech and assembly protesting racial discrimination).

110. The burden would arguably be worse than that which the Court has faced for twenty years in trying to determine the boundaries of obscene expression, in cases where, theoretically, only a single line between protected and unprotected speech need be drawn. *See* Paris Adult Theatre I v. Slaton, 415 U.S. 49, 78-93 (1973) (Brennan, J., dissenting). In *Miller*, the Court altered the requirement that unprotected speech be "utterly without redeeming social value," to a requirement that it need only lack "serious literary, artistic, political, or scientific value." 413 U.S. at 26. This increase in both the ambiguity of that element and in the institutional stress resulting therefrom, led Justice Brennan to argue in *Paris Adult Theatre I*, that the Court should abandon, for the most part, its role in enforcing general obscenity proscriptions. 415 U.S. at 112-13.

111. Niemotko v. Maryland, 340 U.S. 268 (1951) (ordinance required a religious group to obtain a park permit before holding congregational meeting); Cantewell v. Connecticut, 310 U.S. 296, 305-07 (1940) (state statute prohibiting solicitation for a religious cause without a permit); Lovell v. Griffin, 303 U.S. 444, 450-53 (1938) (ordinance restricting the distribution of pamphlets without a permit).

Erznoznik considered. Detroit was, in effect, arguing that its regulation was no more than an attempt to find a means to divert or dilute those harmful elements associated with adult entertainment that might depreciate property values, regardless of the sources of such depreciation. Thus, the harm that Detroit sought to avoid was several steps removed from either the content, or the form, of the expression that was being regulated. Detroit was not attempting to suppress any message or even the form of its conveyance. It is arguable that Detroit was not even attempting to suppress a harm directly caused by a message. The impact on any particular listener of the message, or its form, was not the harm; the harm was the deterioration of the particular neighborhood. That deterioration was caused by the atmospheric attraction of such areas to undesirable activity that was related only incidentally, if at all, to particular individuals who may have been recipients of the expression in question. In other words, Detroit never maintained that exposure to this particualr speech, in either content or form of expression, had hurt anyone at all. In fact, the activity with which Detroit was concerned may have been caused by individuals who had never even been exposed to this speech. The speech merely created an atmosphere or expectation. That atmosphere seemed to create a concentration of undesirable individuals. That concentration ultimately caused a depreciation in property values.

Moreover, in attempting to prevent damage to property interest, Detroit tailored its remedy strictly in property terms. Its solution was to regulate the location of property at which such expression might be disseminated.[112] Thus, both the harm and solution were property-oriented, rather than speech-oriented, and were closely inter-connected.

Even under this analysis, however, it could be argued that the Court exhibited a negligible degree of concern for both the rights of a given speaker and the rights of the potential audience than previous cases might have warranted even if these interests were only incidentally affected. For example, in equating the speaker's interest to that of the economic motives of the film's exhibitors,[113] the Court acted somewhat glibly in two respects. First, the rights of the creator of a given

112. *See* note 99, *supra*.
113. 427 U.S. at 78 n.2.

expression, rather than the rights of the mere messenger, should be examined. Second, the fact that either the creator or purveyor of a given message has an economic motive has never been held to justify a lesser degree of first amendment protection.[114] The author, the recording artist and the screenwriter all have economic motives. Few, if any messages, beyond idealistically political messages, could survive such a test.

In assessing the rights of the speaker's potential audience, the Court concluded, without a detailed consideration of the regulation's possible effects, that alternate access was available to that audience.[115] No particular media forum was foreclosed to speaker or listener, no time of day prohibited, no manner of conveyance precluded, and particular locations foreclosed only in a limited sense.[116] The potential viewer would have had to leave the home and seek out the material in a public place in any event. Nor would the ordinance move *all* particular theaters to an area truly inconvenient to a willing viewer, if they had not been so located prior to the ordinance.

The fact that the ordinance is based on the message, whether such basis is expressed as form or content, is troublesome no matter how viewed. If one thought the decision were truly a "neutral" zoning ordinance and not speech-based at all, the implication is that such ordinances could begin to control the time, place, and manner of all expression. On the other hand, if one regards it as a regulation permissible only toward particular messages or forms thereof, it is difficult to say that such regulations are content-oriented, but not in a disapproving sense. Even if one could regard Detroit as not conveying any point of view toward the expression involved, the Supreme Court, in order to uphold the city's ordinance, expressed the attitude that the speech involved did not deserve much first amendment protection.

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114. *See* Joseph Burstyn Co. v. Wilson, 343 U.S. 495, 502 (1962).

115. *But see* Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 757 n.15 (1976) (alternate auditor or viewer access not justification for suppressing advertising of prescription drugs); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Spence v. Washington, 418 U.S. 405, 411 & n.4 (1974); Schneider v. State, 308 U.S. 147, 163 (1939) (alternate access to speaker cannot justify abridging liberty of expression in appropriate places).

116. 427 U.S. at 53 n.3.

V. THE PRESENT COURT'S POSITION

A. *Offensive Radio Broadcasts: The Clear Demise of Content Neutrality*

If *Young* is viewed as a partial withdrawal of the first amendment protection granted offensive speech in *Cohen* and in *Erznoznik*, that withdrawal was taken a full step further in *FCC v. Pacifica Foundation*.[117] *Pacifica* involved the daytime broadcast in New York City of a record cut entitled "Filthy Words."[118] It is clear that under any fair definition of words that contemporary society might feel are offensive to an average listener, the words frequently used in the broadcast would have to be considered as such.[119] The broadcast was aired as a portion of a program discussing contemporary attitudes toward the use of language, and was preceded by a station-warning to listeners that the cut would contain sensitive language that might be considered offensive.[120] The FCC received a citizen's complaint concerning the broadcast, found that Pacifica had violated programming standards relating to the broadcast of indecent or offensive material,[121] and associated the complaint with the station's license file.[122]

The court of appeals reversed the FCC's action,[123] though it made no definitive statement concerning the Commission's power to generally prohibit or regulate the radio broadcasting of offensive language in all cases.[124] On further appeal, the Su-

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117. 438 U.S. 726 (1978).

118. *George Carlin, Occupation: Foole*, Cut 5, Side 2, entitled "Filthy Words" (Little David Records, 1973).

119. For a transcript of the broadcast itself, *see* 438 U.S. at 751-55 app.; Pacifica Foundation v. FCC, 556 F.2d 9, 37-40 (D.C. Cir. 1977); *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 100-02 (1975).

120. 438 U.S. at 729; 556 F.2d at 11; 56 F.C.C.2d at 94-95.

121. *In Re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94 (1975). The station was held in violation of 18 U.S.C. § 1464 (1970), which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both."

122. For a detailed consideration of this practice, *see* Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 21 (1967). For an excellent discussion of both the possible sanctions applicable to Pacifica and the questionable procedural stature of the case when reviewed by the Supreme Court, see Note, *FCC Empowered to Regulate Radio Broadcasts that are Indecent But Not Obscene*, 52 TEMP. L.Q. 170 (1979).

123. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977).

124. The FCC for the first time interpreted 42 U.S.C. § 1464 to prohibit the

preme Court was presented with a constitutional issue concerning the degree of protection afforded this radio broadcast by *Cohen* and *Erznoznik*. It was also called upon to refine its position on the degree to which time, place, and manner restrictions could be based on content, should previous positions granting offensive language constitutional protection be followed.

The Court reversed the lower court's decision, affirming the right of the FCC in this particular case to consider the broadcast a violation of 18 U.S.C. § 1461.[125] In so doing, two

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broadcast of language that was not obscene. In effect it held that the definition of indecent language was not subsumed by the standards of *Miller v. California*. *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 97 (1975).

The Commission defined the word "indecent" in § 1464 to include patently offensive language even if it had social value, and even if there was no appeal to prurient interests. It issued a declaratory order pursuant to 5 U.S.C. § 544(e) and 47 C.F.R. § 12, and directed all licensees to refrain from broadcasting such material when it was likely that a reasonable number of children might be in the audience. The FCC did suggest that a broadcast in the late evening hours, prefaced by a warning to the audience at such time, might be permissible, provided the material had serious literary, artistic, political, or scientific value. 56 F.C.C.2d at 98-100.

Thereafter, the Commission explicitly affirmed that its original ruling was intended only to channel indecent broadcasts to times of day when children most likely would not be exposed to it, and not to place an absolute prohibition on such broadcasts. *In re* Petition for Clarification or Reconsideration of Citizens Complaint Against Pacifica Foundation Station WBAI (FM), 59 F.C.C.2d 892 (1976).

The court of appeals reversed the FCC order in a 2-1 decision. Justice Tamm, writing for the majority, heavily emphasized 47 U.S.C. § 326 (1970). Section 326 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Justice Tamm asserted that the Commission's position was a form of censorship prohibited by § 326. Moreover, judging the FCC action as an order, and not solely in reference to the Pacifica program as broadcast, he felt the order was overbroad. He was concerned that, by deeming social value irrelevant, the FCC could prohibit the broadcast of any material, be it Chaucer or Hemingway, that might include indecent language. Pacifica Foundation v. FCC, 556 F.2d 9, 17 n.19 (D.C. Cir. 1977).

Justice Bazelon expressed that the first amendment itself would prohibit any restriction on the broadcast of protected speech regardless of context. He would not allow the FCC to restrict any expression that, no matter how indecent, could not be judged obscene under present constitutional standards. 556 F.2d at 20 & n.8.

125. The Court majority discussed attacks on the FCC's power based upon: (1) the limitations imposed on the Commission by 47 U.S.C. § 326; (2) the Commission's interpretation of 42 U.S.C. § 1464; and, (3) any limit imposed by the first amendment. Considering the first two issues as somewhat interdependent, the Court upheld the FCC's position that § 1464 need not be interpreted to limit regulation to language

different approaches, each of which would have sanctioned the FCC action could have been adopted. First, it could have held offensive language to merit full constitutional protection and yet have found that the state here had presented compelling reasons for restricting its dissemination. This approach would have been an expression of a very speech protective attitude,[126] and would have implied that the FCC's future activities in this area should be narrowly proscribed. Further, this would have also avoided both the constitutional implications of, and the difficulty in, assigning comparative values to different types of speech, the approach that *Young* had appeared to sanction. Thus, while conceding that the compelling justifications for regulatory action may depend on the content of speech, the initial presumption of the degree of constitutional protection would not depend on the Court's assigning a value to the speech relating to the worth of its message or the acceptability of its form of expression.

The second approach would have been to afford speech that involved offensive language a lesser place on the ladder of first amendment protection. In so doing, the Court could have balanced the same interests that it found compelling enough to subdue protected speech in any case, but this approach would demonstrate a less speech protective attitude. It could also encourage further oversight of the media by the FCC on a content-oriented basis, while strengthening the speech-valuing approach originated in *Young*.

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only considered obscene, thus implying that restrictions in furtherance of § 1464 should not be considered beyond the discretion of the Commission with due respect for § 326.

But cf. Hamling v. United States, 418 U.S. 87 (1974). The Court there held that 18 U.S.C. § 1461, forbidding the mailing of "obscene, lewd, lascivious, indecent, filthy, or vile" material, should be held to restrict only that material which could be considered obscene under present constitutional standards. *Id. See also* United States v. Twelve 200-Ft. Reels, 413 U.S. 123 (1973) (interpreting 18 U.S.C. § 1462).

A majority of the Court also conceded that the Commission's actions with regard to Pacifica Foundation were not constitutionally prohibited, even though only a plurality joined the lead opinion. The Court, however, in treating the Commission's decision only as an adjudication of the impropriety of the station's program as broadcast, shed no light on the question of whether it was only sanctioning the "channeling" of such material to certain limited times of day, or whether it was approving a total ban of the material from the broadcast media. Justice Rehnquist interpreted the decision as a total ban. *See* Carey v. Brown, 447 U.S. 455, 477-78 (1980).

126. Given that the result of a particular case might be unchanged, the Court's attitude in approaching cases may have its own value. *See* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

The Court appears to have taken the latter position, even though its analysis of the FCC's power to prohibit indecent or offensive language could be said to have been an affirmance of the balancing approach previously utilized in *Cohen*. The plausible state interests to be furthered by such regulation are basically the same as those posed in *Cohen*, although these interests take differing dimensions in light of the form used, in *Pacifica* a public radio brroadcast.[127]

B. *Protection of Privacy Interests*

In *Pacifica*, the Court gave little value to the protection of audience sensibilities *per se*,[128] but the fact that radio broadcasts enter the sanctuary of the home has been given great importance.[129] Such broadcasts might create an invasion of substantial privacy interests, an issue discussed by the Court, but factually lacking, in *Cohen*.[130] *Pacifica* could be read to have given privacy of the home an almost absolute inviolability; yet, the opinion appears tp show more concern for the harm offensive language might pose to the unsuspecting listener, rather than to the captive audience.[131] If the radio does in fact invade the privacy of one's home, it does so only at the listener's invitation.[132] Unlike a sound truck, no sound

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127. *See* text accompanying notes 37-41 *supra*. The Court's opinion, however, while recognizing the intrusive nature of radio broadcasts, did not rely on the frequent argument that the limited number of available frequencies justifies enhanced regulation of the broadcast media. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

This "spectrum scarcity" argument, however, is normally asserted to secure a balance of speech interests or a fuller expression of ideas, rather than to justify limits imposed upon broadcasting freedom. *See In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 107 n.7 (1975) (Commissioner Robinson, concurring); CBS v. Democratic Nat'l Comm., 412 U.S. at 101-02 (rejecting claim of guaranteed access for political editorials); Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390 (supporting fairness doctrine).

128. 438 U.S. at 749 n.27.

129. *See* Gregory v. Chicago, 394 U.S. 111 (1969) (Justice Black, concurring, stating the Court's recognition of the sanctity of the home and the right of an individual to be let alone in that "last citadel of the tired, the weary, and the sick." *Id.* at 125.). *See also* Carey v. Brown, 447 U.S. 455, 471 (1980) (protection of the well-being, tranquility, and privacy of the home of the highest order); Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970).

130. 403 U.S. at 21.

131. Compare text accompanying notes 42-43 & 79-82, *supra*.

132. *See* Packer Corp. v. Utah, 285 U.S. 105, 112 (1932) (distinguishing the intrusiveness of billboards from news media; there must be some seeking out by those reading the latter).

enters the home without the listener's permission.[133] Moreover, even if the listener finds the invitation a mistaken one, one has only to turn the radio off,[134] or tune to another station to avoid further offense. In addition, though recognizing a person's right to be insulated from distasteful experiences in the home[135] as opposed to more public forums,[136] there are countervailing free speech interests which should be weighed, interests belonging to both the speaker and the potential listener.

The foremost of these rights would surely be that of potential listeners to receive the broadcasts in question.[137] Certainly the *Pacifica* opinion did not totally prevent a willing auditor from receiving Carlin's message. But requiring a listener to search out such a broadcast in the form of tapes or records, which would certainly entail financial outlay,[138] or

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133. *See* Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York City, 334 U.S. 558 (1948). *See also* Pacifica Foundation v. FCC, 556 F.2d 9, 27 (D.C. Cir. 1977).

134. Packer Corp. v. Utah, 285 U.S. 105 (1932). In justifying state regulations of billboards, Justice Brandeis stated that "[t]he radio can be turned off, but not so the billboard or street car placard." *Id.* at 110. *See also* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (upholding right of mail recipient to force sender to discontinue sending unwanted material).

135. The only party to complain about the broadcast happened to be driving in a car, thus outside the home, when he was offended. 438 U.S. at 730; Pacifica Foundation v. FCC, 556 F.2d 9, 11 (D.C. Cir. 1977); *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 556 F.C.C. 2d 94, 95 (1975).

136. *See, e.g.*, Cohen, 403 U.S. at 21; Public Utils. Comm'n. v. Pollack, 343 U.S. 464 (1952). The basis for the Court's distinction is difficult to perceive if it was anything more than the listener's expectations. Certainly, by leaving the home, one does not willingly surrender the right not to be offended, nor can the Court realistically impose upon one the duty to remain at home in order to avoid offense. If the listener is expected to prepare for offense when leaving home, preparation is useless if the indecent assault is confronted unexpectedly. Such a risk would seem no different than that taken when the radio is voluntarily turned on. The listener made thedecision to let in the outside world. *See, e.g.*, Pacifica Foundation v. FCC 556 F.2d 9, 27 (D.C. Cir. 1977) (Bazelon, J., concurring).

137. Though the right to receive information is often considered to go hand in hand with the right to speak, it does not necessarily depend on the former. Even if Carlin had no first amendment right that was infringed upon, the willing listener's right exists. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (right to receive material from foreign sources beyond protection of first amendment); *cf.* Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess unprotected pornography).

138. Such a holding will fall most heavily upon the poor, which has often led the Court to act cautiously before approving otherwise normal time, place, and manner regulations. *See, e.g,* Martin v. Struthers, 309 U.S. 141, 146 (1943) ("[d]oor to door distribution of circulars is essential to the poorly financed causes of little people."); *see also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30 (U. of Chi. Press). Compare the Court's treatment of other state

confining the radio listening period to one which the FCC has deemed appropriate for such broadcasts,[139] may present a degree of inconvenience to that listener far more tangible than that caused to the unwilling auditor who must merely turn the radio dial. Moreover, such channeling may prevent the listener from receiving and appreciating the message in the context in which it was presented.[140] In *Young*, on the other hand, the real effect of the decision was to merely change the physical location of the forums where a willing recipient might find the material he wished to view. In any case he was forced to venture out into the world, and pay a specific fee to view the material involved. In *Pacifica*, the Court approved the closing of a specific type of forum to the willing recipient, forcing him to undergo burdens he would otherwise not have dealt with to receive the material involved. Given the floating limits that yet exist with *Pacifica*,[141] it may be that a willing recipient will be forced out of the home to receive such offensive, but non-obscene, material. The willing recipient has thus had to forego a certain degree of his own privacy.[142] Even if one believes that the unwilling auditor deserves to be protected from the initial unexpected exposure[143] to offensive

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laws which seem to infringe fundamental rights on the basis of wealth, *e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Douglas v. California, 372 U.S. 353 (1963) (right to criminal appeal).

139. For a discussion of appropriate periods, *see* note 161 *infra*.

140. The expression in the instant case was aired during the course of a regularly scheduled live discussion program entitled "Lunchpail." The program consisted of commentary as well as analysis regarding contemporary society's attitude toward language. The Carlin material was keyed into the general discussion. *In re* Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975).

141. The court speaks of alternative audience access in terms of going to a Carlin concert or buying records. 438 U.S. at 750 n.28; *Id.* at 760 (Powell, J., concurring). The Court makes clear it did not confront the issue of whether the FCC would be justified in totally suppressing the material in question rather than merely channeling it. *Id.* at 750 n.28. *See* note 124, *supra*.

142. *Cf.*, Stanley v. Georgia, 394 U.S. 557 (1969). *Stanley*, however, while protecting the individual's right to possess and presumably receive the input from obscene material once obtained, did not actually protect the right to obtain the material without leaving the home. *See* Hamling v. United States, 418 U.S. 87 (1974) (affirming validity of 18 U.S.C. § 1461 which forbids mailing obscene material, even to willing recipient).

143. *See* 438 U.S. at 748-49. "To say that one may avoid further offense by turning off the radio . . . is like saying the remedy for an assault is to run away after the first blow." *Id. See also, Id.* at 760 n.2 (Powell, J., concurring). "It is true that the radio listener quickly may tune out speech that is offensive to him." *Id.* In a potential audience of millions of listeners, however, only one complaint was received by the

material when at home, it is questionable whether the harm caused by that unexpected assault to a select few should substantially restrict the access of a potentially greater pool of willing viewers.[144] To do so is a somewhat extreme advancement of the doctrine of audience censorship.

Moreover, there are additional speaker interests that are severely harmed by the suppression of radio broadcasts. Foremost may be the speaker's right to reach a willing audience in as many reasonable or convenient forums as possible.[145] Yet, even assuming the speaker can reach a willing audience, it can further be argued that the unwilling auditor, even in his own home, may not have an absolute right never to hear a broadcast that may upset him, even if there were no problems of audience censorship. While an unwilling auditor may have the right to escape an objectionable message once heard or recognized as objectionable, the Constitution may not necessarily insulate such listeners from any new message, no matter how distasteful such message may turn out to be in hindsight.[146] To allow the speaker initial entry would be a compromise that respects both the rights of the possibly willing auditors and those of the speaker. If the speaker has a message, perhaps he deserves the right to reach those who are least receptive to it. Though the speaker who entertains may only wish to reach willing listeners, the speaker who wishes to persuade probably feels no overwhelming need to persuade those who are already in agreement with him. Thus, aside from the interests of those who may be familiar with Carlin and may want to hear him, but are discouraged by the inconvenience that the government has imposed upon them, one must consider Carlin's right to reach listeners who are not familiar with his work. In fact, if the Court's recognition of alternative listener access is taken

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FCC. Pacifica Foundation v. FCC, 556 F.2d 9, 11 (D.C. Cir. 1977).

144. *But cf.* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). Title 39, section 4009 of the United States Code (Supp. IV 1964), allows the recipient of unwanted mail to force the sender to remove his name from the sender's mailing list. Such action, however, does not infringe on the rights of willing recipients to receive such mail. *Rowan* also supports the position that the individual, rather than the government, has the responsibility to censor his input. 397 U.S. at 735. *Cf.* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

145. *See* note 115 and cases cited therein *supra.*

146. *But cf.* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970), where the recipient of the unwanted message normally acted only after receiving an initial mailing. *See also* Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken to?*, 67 NW. U.L. REV. 153 (1972).

literally,[147] then the people whom Carlin will ultimately reach are those to whom his message has least significance, those who are already attuned to his point of view. When viewed in this light, it can be said that the FCC's action substantially abridged the dissemination of Carlin's message, regardless of whether one is viewing it from the perspective of the speaker or the potential listener. Whether or not the speaker's rights in this regard should overbalance the privacy interests of the unwilling auditor, the Court should recognize such rights in order to effect a truly fair balancing of all interests involved.

C. *Protection of Children*

Perhaps the most persuasive state justification for controlling offensive language is the protection of children, presumably on the assumption that, in situations calling for mature judgment or decision-making where substanial harm might result from an improper decision, the state may step in and exercise judgment for those lacking such maturity.[148] In so doing, the state may act in two different roles. The first presumes that the state itself has an interest in the development of its young, which interests will be furthered by controlling the input of potentially harmful material to children from any source. Alternately, the state may be acting to support, rather than supplant, the child-rearing role of the parent by controlling the input of controversial material to the child in situations where the actual parent may be unable to fully exercise his own choice.[149]

In *Pacifica*, the Court failed to clarify the role in which the state is presumed to be acting. If the state is attempting to promote or protect its own interest in the development of children, the limits of its power has been clearly expressed in *Ginsberg v. New York*.[150] In *Ginsberg*, the Court indicated

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147. A willing audience would have to make a substantial affirmative effort to receive the materials in question. *See* note 124 *supra*; note 161 *infra*. A fair presumption is that a number of people have foregone listening to or viewing material of some interest because of the financial outlay or physical effort involved in obtaining it.

148. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72-75 (1976) (pregnant minor's right to abortion without parental permission); Ginsburg v. New York, 390 U.S. 629 (1968) (sales of obscene magazines to minors); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting minors from selling merchandise in public places).

149. Ginsburg v. New York, 390 U.S. 629, 640 (1968).

150. 390 U.S. 629 (1968).

that a state's authority to protect a child from exposure to ideas or images deemed potentially harmful is limited to expression defined as obscene. This definition is parallel, though not equivalent, to the definition of obscenity relating to the dissemination of such material to adults.[151] Implicit in the Court's formulation of the adult definition was the conclusion that obscene language carried so little social value that it was not first amendment speech at all, and could therefore be restricted by the state for any rational reason.[152] The same approach was applied to the minors' standard. However, all expression that failed this standard was deemed totally unprotected as to children, and therefore the state was empowered to restrict the dissemination of such material to minors so long as it could rationally believe that the material presented a harm to children.[153]

One might argue that *Pacifica* implied an analogous approach for controlling offensive expression. A state might impose a definitional standard for language offensive to children encompassing expression that would not be deemed offensive to adults. Yet to justify total suppression of that language as to children poses doctrinal difficulties. The Court has judged that offensive language is not absolutely prohibitable, that such speech can have social utility and therefore deserves some constitutional protection.[154] Although loosening the definition of obscene language while applying it to children increased the scope of unprotected speech, an analogous loosening of the definition of offensive language does not automatically deem *that* language unprotected. Analytically, then, to suppress such expression even as to children, the Court should carefully scrutinize the interests involved, either at the definitional stage or at the stage of balancing the competing state and countervailing free speech interests. At one stage or the other, the Court should require the regulator to clearly present and substantiate the existence of the harm it is attempting to prevent. Instead, in *Pacifica*, the Court did not question the Federal Communications Commission's assumption that offensive language presents some speculative harm

151. *See* note 85 *supra*.

152. Roth v. United State, 354 U.S. 476 (1957).

153. 390 U.S. at 643 (not irrational for legislature to find such material harmful to minors).

154. Cohen v. California, 403 U.S. 15 (1971).

to the young. The justification for the restriction seemed little more than acceptance of the presumption that a child is too young to appreciate the full capacity of choice that is the presupposition of first amendment guarantees.[155]

Had the Court, in *Pacifica*, treated offensive expression as presumptively protected, it should have demanded compelling reasons for suppression. It should have also placed a burden upon the regulator to demonstrate why the remedy of further discussion, even with respect to the child auditor, would insufficiently protect the government's interest.[156] Implicit in such a position is the presumption that the first amendment rights of children also deserve recognition sufficient to force the regulator to justify its abridgement of those rights.[157] This would seem especially so if the speech in question relates, in nonviolent terms, to social attitudes, values, or mores. Unless one assumes that the present status quo satisfies the visions of those who authored the Constitution, one must presume that they foresaw that values, mores, and questions of acceptability would change, and probably be changed, by the fullest discussion of all issues, not only by those whose systems of values were fully formed, but also by those whose value systems were in the process of forming.[158] To preclude the young from hearing or considering new, radical, or even distasteful images of the possible future, would be to affirmatively preserve the status quo. That would appear to be a constitutionally impermissible interest advanced through the suppression of speech.

Pacifica differed from the *Ginsberg* case in one other obvious regard. The difference between the adult and juvenile definitions set forth in *Ginsberg* did not restrict adult access to material protected as to them.[159] After *Ginsberg*, the adult

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155. 390 U.S. at 648-50 (Stewart, J., concurring). *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 496-97 (1970).

156. *See* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (quoting Justice Brandeis in Whitney v. California, 247 U.S. 357, 377 (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.")

157. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); *Erznoznik*, 422 U.S. at 212-13. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach German in schools resting partly on opportunities of students to acquire knowledge).

158. *See* Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149, 1158 (1967).

159. *But cf.* Butler v. Michigan, 352 U.S. 380 (1957).

found access to such material in the same places where it had always been found. After *Pacifica*, the means adopted to promote minors' interests curtails adult access to material which as to them is protected by the first amendment.[160]

An alternative analysis of the FCC's assertion of the importance of protecting children is that the Commission is preserving parental prerogatives to decide acceptable input into the child's developmental process in situations that the parents are unable to control, either because they are not present for certain periods of time or because of the inherent impracticability of controlling certain forms of media such as radios. If the Supreme Court opinion in *Pacifica* is viewed as sanctioning no more than the FCC's ability to channel offensive language to certain times of day,[161] this contention might be the strongest support for the holding. Such channeling would not be a total suppression of the speech involved, even with respect to children. Total suppression would be an implicit admission by the FCC that it was not acting in a manner that would truly preserve parental prerogatives, for it must be assumed that there are some parents who would wish their children to receive Mr. Carlin's message, irrespective of the stance the FCC might take regarding the message's acceptability.[162]

There are, however, analytical difficulties inherent in this position. If the FCC is acting in the role of parental support,

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160. *See* Cohen v. California, 403 U.S. 15 (1971) (protection of minors not adequate to justify supression of nonobscenity); text accompanying notes 33-53 *supra*.

161. The original FCC order banned indecent speech whenever it was reasonably likely that children would be in the audience. *In re* Citizens Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 98-99. Presumably, that may have prevented the broadcast of the material in *Pacifica* except in the very early morning, though the order did suggest that during the late evening hours a different standard "might conceivably be used." *Id.* Upon reconsideration, the FCC states it "never intended to place an absolute prohibition on the broadcast of" indecent language; rather it "sought to channel [the broadcast] to times of day when children most likely would not be exposed." *In re* Petition for Clarificaiton or Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 59 F.C.C.2d 892, 892 (1976). The court of appeals' opinion seemed to treat the FCC order as improper, regardless of whether it was read as an absolute ban or mere channeling. Pacifica Foundation v. FCC, 556 F.2d 9, 13 (D.C. Cir. 1977) (Tamm, J.); *Id.* at 27 n.28 (Bazelon, C. J., concurring).

The Supreme Court's treatment of the question is no more definitive. While treating the FCC's action as only an adjudication that Pacifica had acted improperly, the opinion left unstated whether the material involved could properly be broadcast at a later listening hour. *See* note 124 *supra*.

162. *Pacifica*, 438 U.S. at 770 (Brennan, J. dissenting).

it has either assumed that most parents would not wish their children to be exposed to such material, or it has decided that a minority group of parents should be able to exert at least a limited degree of audience censorship, imposing the burden upon the majority of parents seeking alternate access for the child.[163] In either case, however, this position may be more defensible than controlling adult access. In instances of parental censorship, the child may be a willing listener, without the full capacity to comprehend what he is hearing, but the issue of willingness truly belongs to the parent, who is not available to turn the radio dial. Such an argument supports the particular means adopted by the regulator in *Pacifica*, though the argument must still rest upon the prevention of a harm that the case did not clearly enunciate. Moreover, accepting such means as workable[164] should not cloud the fact that countervailing interests in *Pacifica* may have been severely infringed. If the real interest being furthered in *Pacifica* is the protection of parental prerogatives in the raising of a child, admittedly an important state interest, this interest has historically been offered to support the fundamental right to speak and the right to listen, rather than to overbalance them.[165] Therefore, parents willing to have their children receive the widest array of available input could argue that those same fundamental rights, to speak and to listen, have been infringed. Thus, the Court may face a "zero sum" argument, making it even more questionable why the Court should allow the Federal Communications Commission to tip the balance in favor of the unwilling parent, given the negative effect of such a po-

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163. *See* text accompanying note 108 *supra*.

164. Arguably, channeling the material involved to as late as 11:00 P.M. or 12:00 A.M. would still not prevent substantial numbers of minors from receiving the program in any reasonably sized metropolitan area. *See* Pacifica Foundation v. FCC, 556 F. 2d 9, 19 n.2 (D.C. Cir. 1977) (Bazelon, J., concurring). Conversely, a significant number of adult listeners or viewers may have ceased listening at these hours. *Id.* at 20 n.6.

165. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parental right to have child receive parochial education); Meyer v. Nebraska, 262 U.S. 390 (1923) (parental right to have child receive instruction in German language). *See also* Runyan v. McCrary, 427 U.S. 160 (1976) (parental right to have child hear policies of white supremacy supported even though right to receive segregated education is not). Even in *Ginsberg*, regarding unprotected speech, the Court pointed out that the law involved did not prevent a given parent from purchasing the material in question and giving it to the child. 390 U.S. at 639.

sition on adult interests.[166]

Oddly enough, *Young* suggests an approach that might resolve the dilemma caused by *Pacifica's* apparent content-oriented regulation of adult access to protected expression. If *Pacifica* is confined to approving only the FCC's right to protect the interests of children, and, despite the actual opinion, is read to require compelling reasons for restricting child access, then any effect of the FCC order on adult access could be treated as merely incidental. The FCC order could then be interpreted as only content-based in terms of the harmful effect of offensive language upon children. Therefore, the FCC expressed no point of view regarding the acceptability of the material to adults, nor did it attempt to prevent any harm to adults that was speech-related. In *Young*, the city ordinance was concerned with the effect of speech upon property, not listeners. Here, the FCC would argue that it is concerned with the effect of speech upon children, not adult listeners. The effect of the order on children's rights, it is once more presumed, would require a showing of compelling need. Even though adult interests might also be affected, such effect is incidentally caused by a regulation that is speech-neutral regarding adult rights and speech-related harms.

While such an analysis could reduce *Pacifica* to little more than an application of *Young*, it is a different analysis than that used by the Court. Rather, the Court seemed to treat the expression in *Pacifica* as presumptively unprotected speech with regard to children, with little consideration for the competing interests of either the child or adult listener.

D. *Assessing the Value of Speech*

Assuming the validity of various governmental interests in limiting the broadcast in the *Pacifica* case, the Court never referred to such interests as compelling. The Court's ultimate opinion appeared to rest on the fact that the offensive language used could be abridged on lesser grounds than speech that is afforded full first amendment protection.[167] In essence,

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166. Perhaps recognizing this effect, a proposed legislative draft to protect children from obscenity included the following proviso: "Exemption for Broadcasts—The prohibition of this section shall not apply to broadcasts or telecasts through facilities licensed under the FCC Act, 47 U.S.C. § 301, *et seq.*" *See*, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, 66-67 (1970).

167. The plurality opinion cited Justice Murphy's statement in *Chaplinsky*

the Court must have decided either that words chosen to express an idea are not truly related to content,[168] or else, assuming that words are content, that some content is of less worth than others.[169] In support of the former position, Justice Stevens stated that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[170] There may arise cases where this is so;[171] where, in effect, the Court can say it has done no more than regulate the manner of the speaker's expression. But, in such cases the words are truly gratuitous, unrelated to the speaker's message.[172] In the *Pacifica* case, the words the speaker chose were in no way prefatory or casually spoken. The words were selected because the content of the message concerned those very words: content dictated manner.[173] To say that the elimination of such words would have not diminished the import or effect of the message requires a judgment the Court is ill-equipped to make, and perhaps one the Court should not have the authority to make. The assertion that form and message are separable may depend on what the message is. In *Pacifica*, the majority opinion never appeared to consider the intent of Carlin's message. This lack of consideration highlights the one free speech interest the *Pacifica* Court apparently neglected: the particular artist's choice of

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which implied that such language deserves no protection but appeared to ultimately balance some protection away. *See* text accompanying notes 129-165 *supra*.

168. 438 U.S. at 761 (Powell, J., concurring).

169. The plurality opinion would admit that the FCC order was based on content. *Id.*at 744. It adds that, historically, the Court has looked to content and context in judging the validity of state regulations on expression. Its precedental support, however, consists of cases concerning speech that is outside the first amendment, *e.g.*, Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel of private citizens), with two exceptions, Young v. American Mini-Theaters, 427 U.S. 50 (1976) (zoning to restrict "adult" entertainment) and Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (commercial speech).

170. *Pacifica*, 438 U.S. at 736 n.18 (Stevens, J., in separate opinion).

171. *See, e.g.*, WUHY-FM, Eastern Educ. Radio, 24 F.C.C.2d 408 (1970).

172. *Id.* at 415 (use in speech of phrase "S__t, man" evaluated as a repetitive introductory phrase and "f_____g" or "mother f_____g" as repetitive adjectives).

173. Any version of Carlin's message would be difficult to present with any degree of precision without using some of the offensive language he used. *See* George Carlin, Occupation; Foole, Cut 5, Side 2, entitled "Filthy Words" (Little David Records) (1973); 438 U.S. at 751-55.

the mode in which to express his message or point of view.[174] The words that a particular speaker chooses "may often be the more important element of the overall message. . . ."[175] The *Pacifica* case is one of the best examples of form and content, or more accurately stated, form and message, totally merged. The message in that particular instance concerned the harmlessness of certain words. Perhaps the speaker intended no more than a childish challenge to authority in stating them. If so, he phrased his message very effectively. Alternatively, his purpose may have been to offend his audience;[176] to show them how truly harmless their sensibilities were.[177] His intent may have been to show that words utilized in modern conversation are rarely used to denote the particular objects or images that the state is attempting to suppress by restricting those words.[178] Whatever the speaker's intent may have been, it is questionable to assert that the message would have been equally effective if phrased in different terms. In *Pacifica* it would have been virtually impossible to have disassociated the form of expression, if such was defined in terms of the words used, from the message to be conveyed.

On the other hand, if form and content are inseparable, it can be argued that the Court actually sanctioned an approach to "offensive" speech that truly assigns a value to the message itself.[179] To allow the suppression of certain words, while admitting that such suppression may impinge or destroy the effectiveness of the underlying message, assumes that the Court has placed a relative value on the underlying message that is

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174. Note Justice Holmes' statement that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

175. 438 U.S. at 774 (Brennan, J., dissenting) (quoting *Cohen*, 403 U.S. at 26). The *Cohen* Court also noted that "one man's vulgarity is another's lyric." *Id.* at 25.

176. Should the Court consider intent a relevant factor, whether the Court would focus upon the speaker's immediate, presumably harmful, intent or upon the ultimate intent is unclear. *See* Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (mem.) (Powell, J., dissenting).

177. *See* Pacifica, 438 U.S. at 746 n.22. A comparison to the use of obscene language while proselytizing the harmlessness of obscene words is not totally apt because obscenity is constitutionally unprotected.

178. Pacifica Foundation v. FCC, 556 F.2d 9, 23 n.17 (D.C. Cir. 1977) (Bazelon, C.J., concurring).

179. Under that assumption, apparently five Justices did value the speech content, despite Justice Powell's disclaimer. 438 U.S. at 761-72. (Powell, J., concurring opinion).

inferior to certain state interests. However, these same interests are deemed insufficient to justify suppressing fully protected speech. Thus, the Court has upheld the government's power to treat offensive forms of expression differently from fully protected speech, regardless of the fact that form may be fully equated with content.

In those terms, the Court's desire to devalue such speech in order to allow regulation is understandable. By admitting that form and content are inseparable while supporting the FCC order, the Court would be approving regulation based upon content. However, the Court does not authorize such content-consciousness in controlling all speech. Thus, offensive speech must be devalued so that its different treatment is justified without upsetting the presumption that protected speech may be suppressed only for the most compelling reasons.

If given expression has any protection at all, the Court presumably would neither allow the subject matter to be withdrawn from the arena of public debate, nor, under any interpretation of *Young*, allow a state to express its point of view with respect to that subject. But in *Pacifica*, by allowing the partial or total foreclosure of a given means of disseminating the message, it could be argued that the FCC *has* been allowed to withdraw this subject matter from the arena of public debate. In doing so, it has implicitly adopted a point of view. It has asserted that these particular words are harmful and in fact pose the very dangers that Carlin's message professed to denounce. Moreover, the state has taken a position that will certainly tend to preserve the status quo, to insure the continued conception of the words in question as posing a degree of harm and thus implicitly justifying the state's own continued authority to suppress them. Therefore, it is not only expressing a point of view but one that will perpetuate the state's own interests.

E. *The Most Recent Word: Content Oriented Regulations*

In *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York*,[180] the Court established that governmental restrictions on the time, place, or

180. 447 U.S. 530 (1980).

manner of exercising free speech rights can be based only upon the content of a message deemed to deserve less than full constitutional protection. The majority opinion, in fact, seemed to go further, disallowing all content-oriented regulation unless narrowly drawn and justified by a compelling state interest.[181] In effect, the Court appeared to retreat to the equal protection approach central to the *Mosley* case.[182] Thus, it could be argued that *Pacifica* was something of an aberration; that the proper judicial approach would be to consider all speech deemed worthy of first amendment protection to be of equal value, allowing differing governmental treatment based upon content to be supported only under the tightly limited standards of strict scrutiny.

However, the case is also open to the interpretation that the specific expression involved, clearly political in nature[183] and phrased in a non-offensive form, was assumed by the Court to be the most highly valued first amendment speech, and, the Court intended to imply that lesser-valued expression was subject to different standards of governmental regulation. Alternatively, the Court may have intended that its prohibition of content-orientation be taken literally, implicitly regarding *Pacifica* as pertinent to the form of the message and not involving true content regulation. In *Consolidated Edison,* the value of the underlying message was not the distinguishing factor, but rather the fact that the message was conveyed in an unoffensive manner.[184] In either case, *Consolidated Edison* is also significant because in surveying the compelling state interests that might justify content-based reulation, the Court clearly dismissed the state's interest in protecting the unwilling audience, even from exposure within the confines of the home. Notwithstanding the privacy interests granted the sensitive auditor in that situation, the Court stated that the rights of the speaker outweighed the momentary offense potentially imposed upon the unsuspecting recipient.[185] As such,

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181. *Id.* at 540.

182. *See* text accompanying notes 54-61, *supra.*

183. The utility company had inserted material in monthly bills advocating the benefits of nuclear power. 447 U.S. at 532.

184. Justice Stevens was the only member of the Court to argue this distinction. He asserted that the regulation was based on content, but viewed *Pacifica* as involving a form of communication that was "too ugly in a particular setting." *Id.* at 547 (Stevens, J., concurring).

185. *Id.* at 541-42. If the offensive message is mailed, however, the unwilling

the case seemed to remove one of the basic underpinnings of the *Pacifica* case, reducing the supportable state interests in that case to those of protecting the rights of children. However, it is unclear whether *Consolidated Edison* would apply to a case where the form of the expression, rather than the content of the message, was the source of the unwilling recipient's harm.

Although some questions were left open, *Consolidated Edison* does indicate that the concept of content valuation condoned in *Young* and *Pacifica* will not be carried over to diminish the protection afforded to those types of expression traditionally held fully protected by the first amendment. *Consolidated Edison* may indicate that the Burger Court has set out upon a one-way street, giving historically unworthy speech some protection, while making it clear that it in no way intends to withdraw protection from speech that has always been fully protected.

VI. The First Ten Years of the Burger Court

The Court's treatment of offensive language during the last ten years has been somewhat mixed. On one hand, the Court has taken a cautious step in favor of free speech interests in affording offensive language at least limited first amendment protection.[186] On the other hand, the Court seems to have taken a significant step backward by sanctioning the use of content-oriented time, place, and manner regulations in restricting any expression that has been afforded first amendment protection.[187] The Court's willingness to engage in the relative valuing of different kinds of speech must be regarded as a major element of this retreat.[188]

Even the cautious step forward should be viewed with a degree of skepticism. If the Burger Court had elevated offensive language from the second tier in the two-tier analysis,

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viewer need only be offended once; further offenses may be precluded without giving up the right to receive mail generally. This would be more difficult with radio broadcasts, though avoidance of "offensive" frequencies might suffice. *Id.* at n.11. *But cf.* Bowan v. United States Post Office Dep't, 397 U.S. 728 (1970).

186. In *Pacifica*, however, the plurality opinion quotes the portion of *Chaplinsky* that has traditionally been relied on to justify the exclusion of offensive language from all first amendment protection. 438 U.S. at 746. *See* note 14 *supra*.

187. Compare the judicial attitude expressed in *Mosley*. *See* text accompanying notes 54-62 *supra*.

188. *See Pacifica*, 438 U.S. at 743; *Young*, 427 U.S. at 70-71.

half-way through its first decade, offensive speech has since fallen into some middle tier of partially protected speech. In fact, the only true advancement made by the Court may be the apparent willingness to overtly balance free speech values in this limited area, rather than to covertly balance those issues at the definitional stage of its analysis. However, it may be argued that this middle level of protected speech does not exist,[189] for, if offensive speech had truly been given constitutional protection, the Court would require regulating bodies to produce "compelling" rather than merely "rational" reasons for curtailing such expression. Thus, the judicial standard set is little higher than that relating to totally unprotected speech.[190]

For example, the *Pacifica* decision did not specifically address the issue of harm that offensive language may pose to children.[191] To assert that the state has a greater interest in protecting the young than in protecting adults may be both philosophically and legally supportable,[192] but that contention does not address the particular harm which is sought to be avoided. The harm was never clearly enunciated, nor was it based upon legislative facts that would support its existence.[193] This degree of judicial leniency is typically associated with a minimal substantive due process analysis, another indication that the Court was not dealing with the infringement of a fundamental right.

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189. The impact of this statement may be limited to offensive language only. In contrast, the Court's more recent holdings in the area of commercial speech have solidified, rather than undermined, the position that commercial speech deserves a differing degree of constitutional protection than that afforded to expression resting on either of the traditional two tiers. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (affirming protection of commercial speech but subject to regulation furthering "substantial" state interest). *But cf.* Friedman v. Rogers, 440 U.S. 1 (1979) (prohibiting use of misleading trade names).

190. *Consolidated Edison*, 447 U.S. at 540 (law regulating speech content must be precisely drawn to serve compelling state interest).

191. 438 U.S. at 746 n.23. The Court quoted the Federal Communications Commission's findings that the language involved had the effect of "debasing and brutalizing human beings by reducing them to their mere bodily functions." *In re* Citizen's Complaint against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975). It added that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749.

192. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

193. *But cf. Ginsberg*, 390 U.S. at 642. There, the Court admitted that the threatened harm was subject to disputed scientific debate but sanctioned the state regulation as a rational attempt to restrict unprotected speech. *Id.* at 641, 643.

In addition, assuming the existence of legitimate state interests conceivably harmed by the unrestricted use of offensive speech, it is not at all clear that the Court is balancing the value of the countervailing free speech interests against those potential harms. The fear of momentary offensiveness to an unsuspecting listener supercedes the rights of the speaker and willing listener.[194] The burden is placed on the person seeking the free dissemination of speech rather than on one seeking to curtail its dissemination. Thus, it could be asserted that the Court has taken the position that, although offensive language can no longer be *defined* away, it can be *balanced* away given any plausible reason for doing so. Perhaps the labels have changed, but the contours of protected speech have not. If so, the Burger Court has not brought offensive speech within the mantle of the first amendment, but rather has affirmed its unprotected position.

A more positive analysis is that offensive language has been placed at some middle level of protection. It may be argued, however, that this middle tier should not exist; once the Court has recognized that certain speech deserves first amendment protection, it must perforce be given full protection. The Court's role may be to determine whether given speech has any value, but not to decide degrees of value once protection is admitted to exist. It is this latter role that has raised the specter of message-based censorship which previous courts have been so careful to foreclose.[195]

Even if constitutionally permissible, the institutional difficulties in allowing content-based time, place, and manner regulations upon certain speech seem insurmountable. *Pacifica* appears to authorize a state to determine whether given speech is sufficiently valuable to be heard, based on audience composition, time, and manner of expression.[196] But the Court has yet to deal with the question of how, assuming one is to evaluate the worth of speech in order to understand the extent to which it may be restricted, that evaluation is to take place and what elements are relevant to that decision. Consequently, the Court has also not established guidelines for reviewing decisions of regulatory agencies, such as the

194. *See* text accompanying notes 131-144 *supra*.

195. *See* Lovell v. Griffin, 303 U.S. 444 (1980); Saia v. New York, 334 U.S. 558 (1948).

196. 438 U.S. at 743, 746.

FCC.[197]

Analytically, there will always remain an inherent degree of speech-valuing if the two-tier approach is retained. But the task of assigning relative values to speech can be avoided by placing each form of speech, such as offensive expression, on one of those two levels. Thus, the Court could give offensive language full Constitutional protection, while retaining the equal protection approach set forth in *Mosley* and apparently reaffirmed in *Consolidated Edison.*[198] This approach would allow the state room to curtail certain speech explicitly based on message, content, or form, provided that the restrictions were narrowly drawn to protect compelling[199] and specific interests, most likely structured to protect the rights of minors. A regulation channeling the expression away from an audience whose peculiar composition threatened harm, while leaving reasonable accessability to receptive audiences, would seem the kind of narrowly drawn regulation that such an approach would approve.[200] This may be what was sanctioned in *Pacifica,* but the Court did not speak in terms of compelling interests nor narrowly drawn statutes. However, the difference is more than mere labelling, for the latter approach takes a speech-protective attitude in favor of the free dissemination of speech.[201] It would also provide all interested parties a more predictable analytical approach towards resolving their particular claims.

The present Burger Court's "cautious" approach, so long as it does not result in the valuation of all speech on a wide-ranging scale, may merit support. "Offensive" language has been so labeled by the court because the mere utterance of such words, even if they possess a certain worth, will offend some people. Even if such words should be deemed worthy of even the slightest degree of constitutional protection, and thus "balanced away" by their limited social value, the impact of their utterance would still be admitted. If the *Pacifica* case is evaluated as mere speech channeling, although the true impact was not discussed in terms of the resultant infringement on other free speech values, this approach could enable the

197. *See* note 110 *supra.*
198. *See* text accompanying notes 180-185, *supra.*
199. *See* 447 U.S. at 540.
200. *But see* notes 125 & 161 *supra.*
201. *See* McKay, *The Preference for Freedom,* 34 N.Y.U.L. REV. 1182 (1959).

Court to increase the protection of otherwise traditionally unprotected speech in a piecemeal but positive manner.[202] It is conceivable that the Court could ultimately bring other forms of unprotected speech, besides offensive language, into the outer limits of first amendment protection by conceding that such speech may pose harm, but affording it a quantum of protection that would minimize such harm. By alleging certain expression to be "offensive," the state could validly channel the communication in a manner most protective of the state's asserted, even if unproven, compelling interests. The Court would thus afford protection to state interests that previously rendered such expression totally unprotectable, while simultaneously recognizing the constitutional right of the willing recipient to receive such expression. Even if the Court erroneously placed certain speech at the outer limits of the first amendment, the expression would not be completely curtailed, although it would be made somewhat more inaccessible. Moreover, a present unwilling recipient may ultimately reconsider his or her initial decision, a factor which could someday facilitate presently unacceptable expression gaining the mantle of acceptance. Therefore, despite the absence of a detailed analysis of certain competing interests that arguably should have been condsidered, the outcome in *Pacifica* might have justifiably been the same.

VII. CONCLUSION

Although the Court's future course is uncertain, the decision in *Consolidated Edison* is reassuring. It makes clear the Burger Court's intent to adopt a one-way ratchet in favor of free speech interests. That is, even though certain forms of expression, such as offensive language, have not been given full protection, they certainly have been protected from total suppression. Although the Burger Court qualified *Cohen* in *Pacifica,* determining that some protected speech may not deserve the full first amendment protection afforded to traditional "first amendment" speech, the Burger Court has, in some cases, created an approach of partial or qualified first amendment protection. In so doing, the Court has made it clear that speech given full Warren Court protection will not

202. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 674-75 (1978).

be compromised by this attempt to work formerly unprotected speech into the penumbra of first amendment protection. So long as *Pacifica* reflects a Burger Court approach of speech valuing to justify a qualified protection of heretofore totally unprotected speech, the first ten years of the Burger Court may represent a timid step forward.