The First Amendment and FCC Rule Making under the 1992 Cable Act

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The First Amendment and FCC Rule Making Under the 1992 Cable Act†

by

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Introduction

This Article explores the First Amendment implications of the Federal Communication Commission's (FCC) regulations issued under the Cable Television Consumer Protection and Competition Act of 1992\(^1\) (1992 Cable Act). The 1992 Cable Act imposes numerous requirements that are beyond the scope of this Article. This Article analyzes only the FCC's exercise of rulemaking discretion under the 1992 Cable Act.

Additionally, it must be remembered that an under-staffed FCC was given an enormous amount of work to do within fixed time limits. Therefore, it must be expected that the rulemaking would be vulnerable to second-guessing. Nonetheless, whenever a governmental entity regulates communications, sensitivity to First Amendment concerns is mandatory. Moreover, the FCC serves in part as an explicator of electronic communications law. Thus, the FCC's analysis impacts on innumerable other discussions and decisions concerning free speech.

I begin my discussion with an analysis of the general scope of the power of agencies to consider the constitutionality of legislation. Next, I explore two particular areas of FCC rulemaking, indecent programming and home-shopping, to consider the impact of the FCC's rules and the underlying First Amendment implications.

I.
The Role of Agencies in Constitutional Interpretation

Like other administrative agencies, the FCC is bound to the role assigned to it by Congress. The FCC is permitted to issue only those regulations that are consistent with its congressional charter; the agency must do what Congress directs and is powerless to act unless it can point to a particular delegation of power by Congress. As a creature of Congress, an agency is prohibited from second-guessing its creator. It is Dr. Frankenstein, not his monster, who gets the last word.

This creates an uncomfortable position for an agency when it appears that its marching orders might be unconstitutional. In its regulation under the 1992 Cable Act, the FCC stated that it did not have the power to question the constitutionality of its mandate: "It is a well-rooted principle that 'regulatory agencies are not free to declare an

act of Congress unconstitutional."\(^2\) Insofar as this statement stands for the proposition that agencies must assume their governing statutes are valid, the principle is sound. One court stated that it was "impossible to recognize . . . any inherent power [in an administrative agency] to nullify legislative enactments because of personal belief that they contravene the constitution [sic].\(^3\)

It would be incorrect to argue, however, that the reach of such a principle could extend to the point where an administrative agency must refuse to take notice of all of the constitutional questions raised by its legislative mandate. Agencies are charged with interpreting the scope of their mandate,\(^4\) and the existence of a serious constitutional question is highly relevant to interpreting the breadth of the constitutional charter. Specifically, agencies should be hesitant to assume that there has been a "delegation of authority to take actions within the area of questionable constitutionality."\(^5\) In other words, if congressional language is unclear, agencies are required to choose an interpretation that will avoid serious constitutional questions.

The Supreme Court detailed what it considered the appropriate approach when an act of Congress "touches the sensitive area of rights specifically guaranteed by the Constitution."\(^6\) If there is more than one way to interpret such legislation, the Court favor[s] that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality . . . We must assume, when asked to find implied powers in a grant of legislative . . . authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.\(^7\)

Therefore, agencies must interpret ambiguous grants of power in favor of constitutional requirements. For instance, in \emph{Hampton v. Wong Mow Son},\(^8\) the Court held that even though the Civil Service Commission had been authorized to "establish standards with respect

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\(^3\) Panitz v. District of Columbia, 112 F.2d 39, 42 (D.C. Cir. 1940); accord Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936, 952 (D.C. Cir. 1943).


\(^6\) \textit{Ex parte} Endo, 323 U.S. 283, 299 (1944).

\(^7\) \textit{Id.}

\(^8\) 426 U.S. 88 (1976).
to citizenship . . . which applicants must meet,"9 the Commission was not justified in issuing a rule barring all noncitizens from federal service. The Court noted that because such a broad ban would likely result in unconstitutional discrimination, the Commission should not assume the total ban was authorized by federal policy:

[I]t would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule.10

In assessing the sensitivity of the FCC to First Amendment concerns in its rulemaking under the 1992 Cable Act, it is unfair to blame the FCC where its hands were tied by Congress. But in those areas where the FCC was given rulemaking discretion, it was responsible not only for exercising its discretion within the requirements of the statute, but, where possible, for construing the 1992 Cable Act so as to avoid infringing constitutional rights.

II
Indecency

In 1978, the Supreme Court upheld the FCC's ban on the broadcast of indecent programming, at least when there was a good chance that a large number of children were in the listening audience.11 This decision meant that legally obscene material could be barred from the airwaves as it had been outlawed in all other media,12 and broadcasters would risk losing their licenses for airing descriptions or depictions of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the average broadcast viewer or listener.13

12. See Miller v. California, 413 U.S. 15 (1973). In Miller, the Supreme Court announced a three-part test for determining whether material is "obscene," (so-called "Miller-obscenity") which is unprotected by the First Amendment:
(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
Id. at 24 (internal quotes and citations omitted).
In the ten years preceding the enactment of the 1992 Cable Act, federal courts repeatedly struck down attempts to require cable television operators to keep indecent programming off their systems. The primary basis for these decisions was that cable differed from broadcasting because cable television was viewed as being specifically invited into the home by the payment of a monthly fee. Equally, if not more important, there existed alternate means to protect the unwilling viewer. The wire that carried the offending program could be blocked easily by each individual homeowner. The technology of cable, particularly lock boxes and addressable converters, permitted each parent to serve as censor, rather than the government. In fact, the 1984 Cable Act had required cable operators to provide such devices to all who requested them, "[i]n order to restrict the viewing of programming which is obscene or indecent."15

The 1992 Cable Act contained many provisions dealing with indecent cable programming. Some were self-executing, requiring no action by the FCC. For example, cable operators were required to give advance notice to subscribers of any free preview of a premium channel which showed "movies rated by the Motion Picture Association of America as X, NC-17, or R," and block such programming for all who request it.16

The indecency section which most involved FCC discretion was Section 10. Although Section 10 is entitled "Children's Protection From Indecent Programming on Leased Access Channels," it is designed to deal with a wide range of potentially offensive programming on both leased and public access channels. The major provisions of this section permit cable operators to prohibit certain programming from access channels, require operators who do not block leased access programming to segregate indecent leased programming onto a single channel available only upon a subscriber's written request, and hold cable operators liable for obscene access programming.17

After announcing that it was not the role of administrative agencies to adjudicate the constitutionality of congressional enactments,

17. Section 10's grant of authority allowing cable operators to ban indecent programming was struck down in Alliance for Community Media v. FCC, 10 F.3d 812, 815 (D.C. Cir. 1993).
the FCC analyzed the constitutionality of Section 10 and found the challenges to be "without merit." The FCC's constitutional analysis reveals some misunderstandings that might have contributed to a decreased sensitivity to First Amendment interests within the FCC's regulatory purview.

Perhaps the most peculiar omission made by the FCC was in its discussion of the precedential value of earlier cases striking down cable indecency laws. The FCC stated that those challenging the constitutionality of Section 10 had argued that the broadcast analogy had been rejected and that "some federal courts have found that these characteristics [uniquely pervasive and uniquely accessible to children] do not apply to cable television." The FCC then cited to a string of cases, but left out any mention that the Supreme Court had summarily affirmed one of those decisions, Wilkinson v. Jones.

A summary affirmance by the Supreme Court should be treated as a holding reflecting the merits of the case. Certainly, a "summary affirmance ha[s] considerably less precedential value than an opinion on the merits," but lower courts and agencies are not free to disregard it. In Wilkinson, however, the Supreme Court's affirmance listed more than one reason for striking down the indecency laws. Because a summary affirmance cannot be read as supporting all of the different rationales of a lower court opinion, the Supreme Court cannot be viewed as having decided on the merits that the broadcast model cannot be applied to cable indecency laws. Nonetheless, the FCC at least should have explored the possible teachings of the Supreme Court's decision, rather than acting as if it had never occurred.

18. Indecent Programming, supra note 2, para. 6.
19. Id. (emphasis added).
20. Id. para. 8. The cited cases are as follows: Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (C.D. Utah 1985), aff'd per curiam, 800 F.2d 989 (10th Cir. 1986); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (N.D. Utah 1982).
23. The lower court had ruled that Utah's indecency law was preempted by the 1984 Cable Act, was unconstitutionally vague, and was an unconstitutional attempt to ban non-Miller obscene cable programming. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099, 1105-17 (C.D. Utah 1985). The Tenth Circuit's affirmance of the district court did not expand on its reasoning but "affirmed its judgment on the basis of the reasons stated in the opinion." Jones v. Wilkinson, 800 F.2d 989, 991 (10th Cir. 1986).
24. Cf. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (declaring that a summary affirmance "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved").
A second strange aspect of the FCC’s Indecent Programming analysis is its derogation of the federal cases striking down cable indecency laws. The FCC reasoned that the cases were “decided prior to [the] Supreme Court’s decision in Sable Communications v. FCC, 492 U.S. 115 (1989), which clearly indicates that regulation of indecent speech is permissible even though the medium is not broadcasting and, therefore, does not necessarily fit the exact blueprint the Supreme Court applied in Pacifica to broadcasting.”

It is disingenuous, at best, to treat Sable as charting new law in the treatment of indecent programming, and to discount earlier cases because a subsequent Supreme Court ruling “clearly indicates” the constitutionality of regulating indecent speech. The Court in Sable struck down a federal ban on indecent commercial telephone messages (so-called “dial-a-porn”) and expressly rejected pleas to announce a lower constitutional standard for indecency. Rather, the Court stated that the constitutional test was to retain the traditional standard whenever government wishes to “regulate the content of constitutionally protected speech.” That is, the government may regulate speech content only if “in order to promote a compelling interest [the Government] chooses the least restrictive means to further the articulated interest.”

The FCC’s Indecent Programming decision does eventually indicate its recognition that Sable commands use of the compelling interest test to evaluate indecency regulation in media other than broadcasting. Yet the FCC’s implication that the Court clearly indicated a special rule for indecency is troubling.

Similarly, the FCC discounts the earlier federal cases because “in each of the cited cases, the state or local prohibitions were found to be overly broad in terms of the content sought to be restricted and thus stand in stark contrast to the narrow definition of indecency we have proposed and shall adopt today.” In fact, the narrow definition the FCC adopted for the cable medium, which defines indecent programming as, “programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by

25. Indecent Programming, supra note 2, para. 10.
27. Id. at 126.
28. Id.
29. Indecent Programming, supra note 2, para. 10. “As Sable and its progeny indicate, regulation of indecent matter on other forms of expression is constitutionally permissible provided that it meets the ‘compelling government interest’ test and is ‘carefully tailored.’” Id.
30. Id. para. 9.
contemporary community standards"31 is virtually indistinguishable from the definition in the Miami ordinance struck down in Cruz v. Ferre: "[M]aterial which is a representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive."32 Had Miami utilized the FCC’s indecency definition, the court would still have found it overbroad based on its conclusion that the broadcast rationale is inapplicable to cable.

Finally, the FCC states:

[E]ven though cable is not now the universal service the telephone medium is, nor, as yet, as pervasive as broadcasting in our society, we note that over 60 percent of television households in this country now subscribe to cable. As pointed out . . . approximately 30 million of these homes are provided with an access channel . . . . It would thus seem that blocking is a reasonable, appropriate means to protect the well-being of children in the substantial number of households that now subscribe to cable services.33

This analysis is also misleading as it relies on a misinterpretation of the word “pervasive” as used in Pacifica Foundation. The Supreme Court did not mean “widely used.” If it had, telephone service would surely have been treated in Sable as “pervasive.” Rather, the Pacifica Foundation Court used the phrase “uniquely pervasive presence”34 to describe the specially intrusive nature of broadcasting. Not only does broadcasting “confront the citizen . . . in the privacy of the home,” but, “[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”35 Thus, “pervasive” in the Pacifica Foundation context refers to the inability of people to protect themselves from unexpected program content in the home. The number of viewers, listeners, or subscribers is irrelevant to this question.

Since the FCC acknowledges that any cable indecency rule must pass the compelling interest test in order to be constitutional, the FCC’s entire discussion in Indecent Programming, entitled “Permissibility of Regulating Indecent Cable Programming,” is arguably irrelevant for determining the constitutionality of the FCC’s indecency rules. The FCC’s analysis, though, reveals such an over-eagerness to restrict constitutionally-protected speech as to call into question the

32. 755 F.2d 1415, 1417 (11th Cir. 1985). The Eleventh Circuit found this law unconstitutional not because it exceeded the definition of indecency but because FCC v. Pacifica Found., 438 U.S. 726 (1978), could not be applied to cable television. Id. at 1419-20.
33. Indecent Programming, supra note 2, para. 11 (emphasis added).
34. Pacifica Found., 438 U.S. at 726.
35. Id. at 748.
degree to which the FCC was sympathetic to the constitutional concerns its rules raised.

A. State Action

This over-eagerness is best revealed in the FCC's off-hand dismissal of the argument that its regulations authorizing censorship by cable operators of the programming offered on leased and public access channels implicated state action concerns. The FCC's entire analysis of whether public or leased access channels could be considered public fora consisted of two statements: a) no federal cases have "held that cable access channels are public forums." and b) access channels are "similar in purpose and function" to communication common carriers. Thus, censorship of access by a cable operator was merely the voluntary decision of a private actor and not state action.

The FCC's reasoning is surprising for a number of reasons. First, the FCC ignored its own characterization of access channels as public fora. In removing an FCC rule imposing liability on cable operators for obscene access programming, the FCC declared:

[A] rule which requires the cable system operator to censor programming on a channel set aside as a public forum, to which the programmer has a right of access by virtue of local, state or federal law, would impose a system of prior restraint in violation of the Freedman requirement.

Second, the FCC's bald assertion that no case has held access to be a public forum appears disingenuous at best. In Missouri Knights of the Ku Klux Klan v. Kansas City, the court was faced with the City's closing of a public access channel in response to offensive, racist programming. The court rejected the City's motion for summary judgment on the ground that the complaint raised a First Amendment issue. Those challenging the City claimed that the access channel was created as a vehicle for public expression on a first-come, first-served basis, and that the City, not the cable operator, had ultimate

36. Indecent Programming, supra note 2, para. 22.
40. Id.
control over the channel’s existence. The court agreed: “[I]f the allegations in the plaintiff’s complaint prove true, [the access channel] was a public forum.”

Finally, the FCC never states why an access channel should not be treated as a public forum. The Supreme Court has held that a public forum is created when “the State has opened [it] for use by the public as a place for expressive activity.” The fundamental issue is whether “a principle purpose” for creating the forum was for “public discourse” and “the free exchange of ideas.”

Access channels seem to meet this requirement squarely. In the 1984 Cable Act, Congress specifically defined access channels as “designated for public . . . use.” Congress unmistakably intended that access channels be viewed as creating a forum for the free exchange of ideas when it termed such channels “the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet.”

If access channels are public fora, then the government has “an obligation to justify its discrimination and exclusions under applicable constitutional norms.” When policing the programming offered over this public forum, the cable operator is not acting as a private speaker but as “the repository of state power.” Whether it is the government or a cable operator specifically empowered by the government to engage in a content-based exclusion of speakers in a public forum, the constitutional mandates insulating protected speech are unchanged.

The crucial error made by the FCC was its assumption that the only “speaker” being affected by the access regulation was the cable operator. Once the FCC “rejected arguments that according cable operators additional control over their cable systems constitutes impermissible state action,” neither solicitude for constitutionally protected speech, nor procedural safeguards were found to be necessary.

41. Id.
42. Id. at 1351-52. The court rejected Kansas City’s claim that a municipality could eliminate a public access channel at its complete discretion by holding: “A state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment.” Id. at 1352 (emphasis added).
49. Indecent Programming, Second Report, supra note 37, para. 29 n.17 (emphasis added).
the FCC simply increased the editorial discretion of one speaker then, of course, there would have been no First Amendment issue. But by empowering cable operators to ban access programming, the FCC implicitly authorized the silencing of other speakers.

In simplest terms, consider if the FCC had specifically granted private citizens the right to remove from newspaper boxes any paper that they "reasonably believed" was offensive to morals. To say that the subsequent destruction of newspapers was nothing more than voluntary private action would be untenable. The blatant governmental encouragement of the nominally private parties brings the action within the First Amendment.

In a similar instance, the Supreme Court found state action where federal regulations authorized, without requiring, drug testing of employees by private railroads. The Court stated that "the fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." The Court stressed that such a simplistic test was inappropriate: "Whether a private party should be deemed an agent or instrument of the Government . . . necessarily turns on the degree of the Government's participation in the private party's activities." The Court concluded that by "remov[ing] all legal barriers to the testing," "indicat[ing] its desire to share the fruits of such intrusions," and "preempt[ing] state laws . . . covering the same subject matter," the Government had done "more than adopt a passive position toward the underlying private conduct." These regulatory provisions were held to be "clear indices of the Government's encouragement, endorsement, and participation, and suffice[d] to implicate the [Constitution]."

The identical situation is created by Section 10 and the FCC's regulations. First, from the very title of the section, "Children's Protection From Indecent Programming on Leased Access Channels," to its legislative history, the government is encouraging and endorsing the ban on indecent access programming. Second, Congress and the

51. Id. at 615.
52. Id. at 614.
53. Id. at 615.
54. Id. at 615-16.
55. The chief sponsor of § 10, Senator Helms, stated that the purpose of this section was to "forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs." 138 Cong. Rec. S642, 646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). See also 138 Cong. Rec. S647 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). "Mr. President, the bottom line is that this amendment will keep decent Americans from being victimized by the disgusting programs, and the strip shows, and all the rest [of] the sleaze that runs on leased access channels." Id.
FCC have “removed all legal barriers” to the cable operator’s censorship of access. Third, the FCC announced that Section 10 is to be read as preempting conflicting state indecency and obscenity laws.\[56\] The Government has done far more than adopt a passive position toward the censorship of access programming.

Section 10 and the FCC’s regulations constitute such encouragement, endorsement, and participation that a cable operator who censors access programming pursuant to the law must be deemed an agent or instrument of the government. Once state action is found, the constitutional norms must be observed. At a minimum, any censorship by the cable operator must provide the access programmer with procedural safeguards: the burden of proving the program is censurable rests on the censor; there must be judicial review of any decision by the censor; and any restraint must be for the shortest time necessary to obtain a final judicial ruling.\[57\] Moreover, the type of programming that can be censored is substantially limited.

B. Leased Access

The 1992 Cable Act’s provisions dealing with indecent leased access programming gave only limited discretion to the FCC. Congress directly permitted cable operators to prohibit leased access programming which the operators believed “describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.”\[58\] As the FCC correctly noted, the 1992 Cable Act “does not require, or grant specific authorization to, the Commission to implement [this] provision.”\[59\]

For those operators who did not voluntarily opt to use this power, the FCC was charged with issuing regulations requiring leased access programmers to inform those operators whether their programs “would be indecent as defined by Commission regulations,” and making requirements on cable operators to place all such identified programming on a single channel that would be blocked, “unless the subscriber requests access to such channel in writing.”\[60\]

To implement this section, the FCC made several decisions. First, the FCC devised a definition for “indecency” on cable television. Following the broadcast model, the FCC adopted what it termed its “generic definition of indecency”—programming that “describes or

\[56\] Indecent Programming, supra note 2, paras. 50-51 nn.42 & 44.
\[59\] Indecent Programming, supra note 2, para. 29.
\[60\] 47 U.S.C. § 532(j)(1).
depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." As with broadcast, a cable program is to be viewed in context, but unlike obscenity determinations, indecency is not based on the entire work. Additionally, the community standards to be met are not those of the locale where the program is shown, but rather those of the average subscriber to cable television.

In all likelihood, the FCC carried out the desire of Congress in using the broadcast model to define indecency. Additionally, particular issues, such as the decision not to base indecency on the work as a whole, had been long settled by the FCC as constitutional for the broadcast medium.

The choice of a national standard is more problematic. Cable operators strongly supported this standard because of the national distribution of many cable services. National programs likely would be reduced to standards satisfactory to the most sensitive community if a programmer had to pass a different standard in each cable system.

Nonetheless, there are problems with the FCC’s choice. First, the FCC’s stated reason was, at best, a non sequitur: “Keeping in mind that the purpose of ‘indecency’ regulation is to protect children from exposure to such materials, we believe that this interpretation, not confined to a specific geographical area or specific cable system, is reasonable and appropriate.” There is no connection between the stated purpose and the chosen interpretation. Knowing that the rule’s purpose is to protect children from “such” materials does not help select whether to define “such” materials locally or nationally.

Second, what is considered “indecent” for children is hardly an issue on which there is national consensus. In holding that the Constitution did not require a “national” community standard for obscenity, the Supreme Court noted:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City . . . . People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity.

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61. Id. § 532(n).
63. Indecent Programming, supra note 2, para. 37.
The FCC attempted to buttress its decision by citing to *Hamling v. United States*\(^{65}\) for the proposition that no precise geographic area is constitutionally required for the determination of community standards for obscenity. A closer reading of *Hamling*, however, reveals that the Supreme Court ruled that federal obscenity statutes are "not to be interpreted as requiring proof of the uniform national standards that were criticized in *Miller*," and that consideration of the "community standards of the 'nation as a whole'" was inappropriate.\(^{66}\) Instead, in federal prosecutions, a juror is to "draw on knowledge of the community or vicinage from which [he or she] comes in deciding what conclusion the 'average person applying contemporary community standards' would reach in a given case."\(^{67}\)

While the FCC has used a national standard for broadcast indecency, Congress does not appear to have considered the question for cable television. Moreover, the nature of cable communications would seem to permit a more localized assessment, at least where the program is only distributed locally. If, for instance, a leased access programmer only distributed programs on cable systems in a tolerant community, such as Manhattan, no interest is served by preventing programming that would be acceptable to the parents in that community merely because the nation of cable subscribers might disagree.

Recalling that indecent speech is still protected speech, a two-tiered standard might have been more appropriate. For programs broadly distributed, the national standard adopted would have been suitable. For locally distributed programming the relevant community standards could have been limited to the specific geographic community where the program could be viewed. This duality would have protected not only national distributors of leased access programming but also the interests of those communities either more tolerant or more sensitive than the national average.

C. Public Access

The FCC was given far more latitude in drafting its regulations for public access channels. Congress charged the FCC with issuing regulations "as may be necessary" to enable cable operators to ban public, educational, or governmental access to "programming the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner."\(^{68}\)

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\(^{65}\) 418 U.S. 87 (1974).
\(^{66}\) Id. at 105, 107.
\(^{67}\) Id. at 105.
Most notably, the FCC was made to provide an explanation of the scope of the categories for which access programming could be prohibited. The FCC was faced with the problem that Congress obviously did not mean that any of the enumerated categories were to be applied literally. For example, “promoting” unlawful conduct is fully protected speech unless “it is directed to inciting or producing imminent lawless action and is likely to produce such action.”69 In the words of Justice Brandeis, “even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement . . . . The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.”70

The FCC wisely chose a constitutionally permissible definition. It limited “soliciting or promoting unlawful conduct” to mean only that speech which would “constitute unlawful solicitation of a crime or would otherwise be illegal” under federal or local law.71

The FCC also had to define the congressional language dealing with sexually-oriented material. First, the FCC had to puzzle with the oxymoronic phrase “programming which contains obscene material.” In non-legal parlance, a program with a sexually graphic scene may well be said to “contain” obscene material. As a rule of law, however, the complete programming must be viewed in its entirety. Obscenity can only be determined by judging whether the work “as a whole lacks serious literary, artistic, political or scientific value.”72 Thus, programming as a whole is, or is not, obscene; it does not “contain” a part that is obscene material. The FCC correctly recognized this distinction and ruled that the phrase “programming which contains obscene material” was to mean Miller obscene.

The next category, “sexually explicit conduct,” is not as simple to resolve. It is easy to recognize that the First Amendment prevents literal application of congressional language. Unmodified, “sexually explicit conduct” is an overbroad category.73 All of the limitations on sexually-oriented material which the Court has upheld have required that the material be “patently offensive.”

71. Indecent Programming, Second Report, supra note 37, para. 16.
72. Miller v. California, 413 U.S. 15, 24 (1973); see also Pope v. Illinois, 481 U.S. 497 (1987) (stating that literary, artistic, political, or scientific value are to be determined by a reasonable person standard).
The FCC dealt with this problem by defining “sexually explicit conduct” as “indecent programming.” The Indecent Programming Court argued that Congress presumably did not mean all three categories to be coextensive and that each needed to have a separate meaning. The FCC concluded that “indecency” best fulfilled congressional intent.

Certainly it could be argued that Congress knows enough to say “indecent” when that is what it means. In fact, Congress was well aware of the legal meaning of the word “indecent” and had used the word repeatedly in both the 1992 Cable Act and other regulatory measures.

Again, keeping in mind that non-obscene programming is constitutionally protected, the FCC had an array of interpretive options. First, the FCC could have stated that the phrase “contains obscene material [or] sexually explicit conduct” should be read together to mean Miller obscene. As Justice Stewart had argued in Pacifica Foundation, “[u]nder this construction of the statute, it is unnecessary to address the difficult and important issue of the FCC’s constitutional power.”

An alternative tactic would have been to take seriously Congress’ deliberate refusal to explicitly use the term “indecent.” Under the maxim expressio unius est exclusio alterius, the use of a term other than “indecent” means that the statute must be interpreted to mean something different. The focus would then be on the words “sexually explicit conduct.” Under this approach, the FCC could have argued that something different from both “obscenity” and “indecency” was being targeted, specifically hard-core explicit sexual conduct. Thus, access programs could be banned if they explicitly depicted “ultimate sexual acts” without regard to the Miller requirement that the programming as a whole lacks serious literary, artistic, political, or scien-

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74. *Indecent Programming, Second Report, supra* note 37, para. 15.
75. *Id.* para. 14.
76. *Id.* para. 15.
77. *See, e.g.*, 47 U.S.C. § 532(j)(1) (Supp. IV 1992) (requiring the FCC to promulgate regulations designed to limit “the access of children to indecent programming” on leased access channels).
tific value and without proving that the programming arouses "a shameful or morbid" sexual response.\(^{82}\)

The interest in assisting those parents who want to control their children's viewing of indecent material on cable television is not frivolous. Lock-boxes and addressable converters empower parents to restrict their children's exposure. Regulation that either identifies indecency or otherwise enables parents to identify indecent access programming would further assist parents. It is regrettable that a constitutionally valid form of assistance was not given.

III

Must-Carry Rules and Home Shopping

In the 1992 Cable Act, Congress imposed mandatory carriage obligations on cable operators, requiring cable systems to carry local broadcasters.\(^{83}\) Congress severely limited the discretion of the FCC in determining whether cable operators should be subject to must-carry requirements and which broadcast stations would need to be carried, but Congress made a special exception for home-shopping stations. Section 4(g) of the 1992 Cable Act required the FCC to make a \textit{de novo} determination as to whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity.\(^{84}\) Somewhat asymmetrically, the statute states that if the FCC decided that "one or more of such stations" serve the public interest, they would qualify for must-carry rights, but if one or more did not serve the public interest, "the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials."\(^{85}\)

The FCC ruled in favor of the home shopping stations. The 1992 Cable Act had mandated that the FCC evaluate three factors: the viewing of home shopping stations; the level of competing demands for the spectrum allocated to them; and the role of such stations in providing competition to nonbroadcast services offering similar pro-

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\(^{82}\) This definition of prurient interest was adopted in \textit{Brockett v. Spokane Arcades}, Inc., 472 U.S. 491 (1985) (rejecting a standard of prurient which included normal sexual response).


\(^{84}\) \textit{Id.} § 534(g)(2).

\(^{85}\) \textit{Id.}
The FCC concluded that, based on all three grounds, as well as on evidence showing that these stations "adequately [address] the needs and interests to their communities" and that a required change in format would have a destabilizing impact on the minority ownership of television stations, home shopping stations, as a class, serve the public interest.\textsuperscript{87}

The only mention of the First Amendment came when the FCC considered the additional question of whether home shopping stations should be eligible for mandatory cable carriage. The primary concern of the FCC seems to have been ensuring that a ruling on home shopping "not contaminate the current litigation about must-carry rights of commercial stations generally."\textsuperscript{88} After concluding that the plain language of the 1992 Cable Act required must-carry status, the FCC stated "that the failure to qualify certain licensed stations based on their programming decisions would place the content-neutrality of the must-carry rules into serious doubt, thereby jeopardizing their constitutionality."\textsuperscript{89} FCC Chair James H. Quello was even more explicit in focusing on the court challenge to the must-carry rules: "I am concerned that a decision in this proceeding to exclude home shopping stations from must carry [sic] status solely because of their content would have jeopardized the legal defense of the must carry rules."\textsuperscript{90}

The FCC may have been overly cautious in this matter. The three-judge panel which upheld the must-carry rules emphasized that the rules were content-neutral, and thus not subject to strict scrutiny.\textsuperscript{91} The main concern, the court stressed, was whether the government was trying to "effect a degree of content-control."\textsuperscript{92} Favoring one set of speakers, such as broadcasters, would not create a First Amend-

\textsuperscript{86} Id.

\textsuperscript{87} In re Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992; Home Shopping Station Issues, Report and Order, 8 FCC Rcd. 5321 (1993) [hereinafter Home Shopping Station Issues].

\textsuperscript{88} Id. at 5371 (dissenting statement of Comm'r Ervin S. Duggan).

\textsuperscript{89} Id. para. 39. In an accompanying footnote, the Commission stated that the must-carry rules had been found content-neutral but that, "the court noted that the restriction of a particular type or character of speech might subject a regulation to strict scrutiny." Id. at 5364 n.11 (construing Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993), vacated and remanded, 114 S. Ct. 2445 (1994), reh'g denied, 115 S. Ct. 30 (1994)).

\textsuperscript{90} Id. at 5364 (statement of Chair James H. Quello). In a footnote to this sentence, Chairman Quello stated, "[I]f the Commission decided to deny must-carry status to a class of stations because of their content, it would undermine the court's bedrock assumption supporting the constitutionality of must [ ] carry rules." Id. at 5364 n.1.


\textsuperscript{92} Id. at 44.
ment problem unless the favoritism "is related to what the speakers are saying."93

These concerns would not have been any more implicated if the FCC had denied mandatory carriage rights to broadcast stations providing "23 hours of commercial programming per day."94 Commercial speech, even though protected by the First Amendment, holds a "subordinate position" to "fully protected speech."95 The current Supreme Court test for evaluating regulation of commercial speech is that such laws "need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny."96

In the recent case of *City of Cincinnati v. Discovery Network, Inc.*,97 the Supreme Court struck down a city's ban on newsracks selling commercial handbills but not newspapers.98 The city had attempted to argue that the "low value" of commercial speech justified the disparate treatment, but it was rebuked by the Court: "In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant."99

This statement cannot be read too broadly to imply that the "common sense" distinction between commercial and other speech is ending.100 The admonition given in *Discovery Network* relates to the fact that the city's distinction between commercial and noncommercial speech "bears no relationship whatsoever to the particular interests that the city has asserted."101 Since the only interests put forth were aesthetic and safety interests, the purely commercial nature of the pamphlets did not affect the city's interests differently than if they

93. *Id.* at 43.


98. *Id.*

99. *Id.* at 1511.

100. The FCC seems concerned that this statement restricts or prevents limitations of commercial time on television stations. See, e.g., *In re Limitations on Commercial Time on Television Broadcast Stations, Notice of Inquiry*, 8 FCC Rcd. 7277, para. 8 n.16 (1993). See also *Home Shopping Station Issues*, supra note 87, at 5365-69 (statement of Chair James H. Quello).

had been non-commercial. The Court concluded that the city had not established a reasonable fit between its goals and its treatment of commercial speech "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city."102

Granting must-carry rights to all broadcast stations other than those which are predominantly used to transmit sales presentations or program length commercials would bear a substantial relationship to the particular interests that the must-carry regulations are designed to serve. Congress found a "substantial [governmental] interest"103 in broadcasting because broadcasters engage in "the local origination of programming"104 and "continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."105 The first policy listed in the 1992 Cable Act, and the only one directly implicating must-carry, is to "assure that the widest possible diversity of information sources are made available to the public from cable systems."106

Unlike newsracks for commercial pamphlets which create the identical visual blight as racks for newspapers, broadcast stations consisting predominantly of program-length commercials do not affect the governmental interests in the same manner as other broadcast stations. The FCC has long been aware that excessive commercialization might "subordinate programming in the interest of the public to programming in the interest of its salability."107 In fact, even when the FCC deregulated commercial time for broadcast television, it was not because excessive commercials served the public interest as well as other programming but because it was expected that "marketplace forces should effectively regulate commercial excesses."108

102. Id. at 1516.

103. 1992 Cable Act, supra note 1, § 2(a)(8).

104. Id. § 2(a)(10).

105. Id. § 2(a)(11).


108. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076, 1104, para. 63 (1984), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987) [hereinafter Television Deregulation]. The Commission summarized the rationale behind its historic concern with over-commercialization by stating, "our regulation of commercial practices has been characterized by the concern that licensees avoid abuses with respect to the total amount of time devoted to advertising as well as the frequency with which programming is interrupted for commercial messages." Id. at 1101, para. 55.
Unless the Supreme Court is prepared to discard one-half century of jurisprudence, the First Amendment does not deprive the FCC of its "comprehensive mandate to 'encourage' the larger and more effective use of [broadcasting] in the public interest." In 1990, the Court reaffirmed that "the diversity of views and information on the airwaves serves important First Amendment values." It seems unlikely that the Court would hold that the First Amendment prevented the FCC from encouraging and supporting broadcasters who contribute to the "diversity of views and information" rather than show commercials most of the time.

The must-carry rules would not have been contaminated had the FCC declined to accord the commercial speech of home shopping stations the same encouragement as other kinds of programming. In fact, the FCC's own must-carry rules create a similar dichotomy. Not all municipally-owned stations are eligible for mandatory carriage rights. The FCC has ruled that only those municipally-owned stations that transmit noncommercial programming for educational purposes at least fifty percent of their broadcast week qualify for must-carry rights. One reason the FCC gave for this rule was its belief that "the 50 percent of programming threshold is an adequate safeguard to ensure that such station[s] cannot relegate their NCE [noncommercial educational] programming to undesirable hours." This apparently unremarkable Commission judgment did not lead to a finding that the must-carry rules were content-based. This judgment is based upon the lack of viewpoint or subject matter discrimination and not a hint that the distinction reflected "a 'deliberate and calculated device' to penalize a certain group."

It would be equally permissible to take the special commercial nature of home shopping stations into account for must-carry purposes. In fact, the FCC did Congress charged the FCC with deter-

109. NBC v. United States, 319 U.S. 190, 219 (1943). The Court also stated that the FCC is not merely a "traffic officer" supervising the airwaves but has "the burden of determining the composition of that traffic." Id. at 215.
mining "the maximum reasonable rates" that a cable operator may charge a leased access programmer.\textsuperscript{115} The FCC ruled that leased access programmers must be divided into three categories: those charging subscribers directly on a per-event or per-channel basis; those proposing to use their channel for more than fifty percent of their lease time to sell products directly to customers (e.g. home shopping networks and infomercials); and all others.\textsuperscript{116} The FCC concluded that it would "require cable operators to charge different maximum monthly access rates to each category of programmers."\textsuperscript{117} Thus, the FCC is already treating home shopping networks differently than other programmers, without so much as a whisper of unconstitutionality.

Finally, it is arguable that limiting must-carry rights to broadcasters who are not "predominantly utilized for the transmission of sales presentations or program length commercials," actually would have enhanced, rather than jeopardized, the constitutionality of the must-carry rules. In dissenting from the opinion upholding the must-carry rule, Judge Williams focused not so much on the editorial discretion of the cable operators as on the rights of the programmers who were not eligible for mandatory carriage. Judge Williams stated that broadcasters were being helped at the expense of other programmers who might now be unable to find channel space on overcrowded cable systems.\textsuperscript{118}

Arguably, home shopping networks do not provide the benefits sought by Congress because they are not "the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium."\textsuperscript{119} If home shopping networks are displacing potential cable programmers who do provide these benefits, it could be contended that the impact of the must-carry rules on competing non-broadcast programmers is "greater than essential to that furtherance of the [governmental] interest."\textsuperscript{120} Without necessitating a case-by-case, programmer-by-programmer analysis, the FCC could have ordered, as it did in its rate regulation rulemaking, different treatment for "home shopping networks . . . and all others."\textsuperscript{121}

\textsuperscript{116}  Rate Regulation, supra note 114, para. 516.
\textsuperscript{117}  Id.
\textsuperscript{119}  Id. at 46 (quoting H.R. REP. No. 628, 102d Cong., 2d Sess. 50 (1992)).
\textsuperscript{120} United States v. O'Brien, 391 U.S. 367, 377 (1968).
\textsuperscript{121} Rate Regulation, supra note 114, para. 516.
This would have lessened the competitive disadvantage suffered by non-broadcast programmers, and enhanced the discretion sought by the cable operators, without noticeable harm to the substantial interests Congress sought to further.

The First Amendment analysis, though, is not the only relevant concern. It is not at all certain that the suggested interpretation would have been statutorily permissible. The language of Congress appeared to limit the FCC to a dichotomous choice: either home-shopping stations are in the public interest and eligible both for broadcast licenses and must-carry or they are not in the public interest and need to be forced off the airwaves. If the FCC had thought otherwise, it might have argued that the public interest in the airwaves was not coextensive with the public interest to be served by mandatory carriage.

Alternatively, the FCC could have treated the public interest standard as having changed after the 1992 Cable Act. Specifically, those with broadcast licenses now are not only occupying scarce public airwaves, they are also occupying cable channel space as well. Maybe we should expect, and demand, more from those twice favored.

IV
Conclusion

The FCC was given a thankless task by Congress. The 1992 Cable Act is even more complex than its 1984 predecessor. Further, Congress has not always exhibited as much sensitivity to free speech concerns as is desired.

Rather than criticize the FCC, the goal of this Article was to explore ways of thinking about issues involving free speech and cable television. The Supreme Court may soon sharpen the questions, but the FCC of the future will undoubtedly need to fill in the blanks.