The Right to Speak, the Right to Hear, and the Right Not to Hear: The Technological Resolution to the Cable/Pornography Debate

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THE RIGHT TO SPEAK, THE RIGHT TO HEAR, AND THE RIGHT NOT TO HEAR: THE TECHNOLOGICAL RESOLUTION TO THE CABLE/PORNOGRAPHY DEBATE

Michael I. Meyerson*

Cable television brings many channels of programming into the home. Amid this cornucopia, some programs occasionally contain nudity or offensive language, "pornography" to those offended. There has been much debate over whether cable pornography should be regulated. Not only must policy makers decide if regulation is desirable, the courts must determine the appropriate legal standard for evaluating the legality and constitutionality of such regulation. In July 1986, by a "bare majority," the Attorney General's Commission on Pornography voted against applying to cable television the same standard used to bar "indecent" radio and television broadcasts.1 Two months after the issuance of the Commission's report, a federal judge endorsed, for the first time, the argument that "indecent" cable programming could be regulated and limited to nighttime viewing.2 On March 23, 1987, the Supreme Court summarily affirmed a decision striking down a Utah law that barred "indecent" cable programming.3 Because the Court did not issue an opinion, however, the precise basis for the Court's decision is not clear.

The new technology of cable television, thus, has resurrected an old problem: how should society balance the competing

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claims of those who wish to avoid exposure to "offensive" material in their homes with those who wish to communicate freely or to receive the material. The Supreme Court has discussed the issue of the right of privacy in the home many times, but it has not yet decided how the privacy interest affects the ability to regulate this new form of communication.

This Article will attempt to create a framework for analyzing the competing interests on each side of the cable/pornography debate. The goal is to construct an analysis that will be consistent with current Supreme Court teaching on how government, under the first amendment, may constitutionally regulate pornography, particularly in the name of protecting those who wish to avoid exposure to such material. Accordingly, this Article will presume the validity of all relevant Supreme Court decisions and their stated rationales. Thus, the current restrictive definition of obscenity and broader definition of indecency in broadcasting will be followed.

This Article will also accept the governmental interests found by the Court to support regulation of obscenity and indecency. The Supreme Court has held that the overriding societal interest in stemming the commercial distribution of obscenity permits the government to ban obscene material, even if only willing adults have access to it. This interest encompasses: "the interest


5. The commonly used term "pornography" does not have a specific legal definition. This Article uses the term to include material that is either obscene under Miller v. California, 413 U.S. 15 (1973), or indecent, as defined in FCC v. Pacifica Found., 438 U.S. 726 (1978). Cf. New York v. Ferber, 458 U.S. 747, 764 (1982) (referring to visual depiction of sexual conduct by children as "child pornography").

6. The first amendment states that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend. I.

7. See generally Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (stating that the Supreme Court's "institutional duty is to follow until changed the law as it now is").

8. Under Miller, the three-part test for obscenity is: (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 state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24 (citations omitted).

9. The Supreme Court defined indecency as "language that describes [or pictures that depict], in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." FCC v. Pacifica Found., 438 U.S. 726, 732 (1978) (quoting Pacifica Found., 56 F.C.C.2d 94, 98 (1975)). The Supreme Court held that indecent broadcasts may be barred in the middle of the afternoon. Pacifica, 438 U.S. at 750; see infra text accompanying notes 69-96.
of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."\textsuperscript{10}

In contrast, the Court has allowed the regulation of indecency only to protect unwilling viewers: adults who wish to avoid the material and children whose parents want to shield them from offensive material.\textsuperscript{11} This Article will proceed on the Court’s assumption that “vulgar” language and depictions of sexual activity are “‘patently offensive’ to most people regardless of age.”\textsuperscript{12}

Even with these assumptions, this Article concludes that the power of government to regulate cable pornography is limited to that which is legally obscene. Part I reviews Supreme Court cases delineating the relationship between the rights of privacy in the home and of freedom of speech. Part II demonstrates that the technology of cable television provides the solution to the pornography dilemma. Cable television preserves both privacy and speech interests because individual subscribers can be given the physical means to block out programming they find personally offensive without affecting the ability of others to receive that programming. Where such accommodation of interests is permissible, the first amendment prohibits censorship as an overbroad remedy that needlessly infringes on the rights of speakers and willing listeners.

Part III of the Article analyzes how the cable/pornography debate is affected by the Cable Communications Policy Act of 1984 (the Cable Act).\textsuperscript{13} The Cable Act, the first comprehensive federal legislation governing the regulation of cable television, mandates a policy towards cable pornography comparable to that required by the first amendment. The Cable Act limits the ability of all levels of government to regulate cable programming to the regu-

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\textsuperscript{10} Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).  
\textsuperscript{11} Pacifica, 438 U.S. at 748-49.  
\textsuperscript{12} Id. at 757 (Powell, J., concurring). Thus, this Article does not provide an analysis of the appropriateness of using majoritarian tastes to determine what is offensive. See Haiman, Speech v. Privacy: Is There a Right Not to be Spoken To?, 67 Nw. U.L. Rev. 153 (1972).  

Deference is being paid to the sensibilities and privacy claims of the prevalent groups in society who happen to find certain kinds of erotic communication or certain kinds of words deeply repulsive, while no comparable concern is shown for minorities who may have no “hang-ups” about those particular kinds of communication, but who may be just as deeply offended by different verbal and visual stimuli which few would seriously propose to exclude from a public forum.  
Id. at 191 (emphasis in original).  
\end{flushleft}
lation or banning of obscene cable programming, but also requires cable operators to provide devices to their subscribers that can block out programming.

Finally, the article explores the special congressional protection for access channels—channels set aside as a public forum for the use of all members of a community or for mandatory leasing to programmers who are not affiliated with the cable operator. On these channels, the Cable Act prohibits censorship not only by the government, but by the cable operator and even the entity managing the public access channels. In sum, both the first amendment and the Cable Act permit cable television to advance the public's interest in receiving "the widest possible dissemination of information from diverse and antagonistic sources."14

I. THE FIRST AMENDMENT AND THE PRIVACY OF THE HOME

Within the context of the home, the first amendment guarantee of freedom of speech has taken on an anomalous shape. In some instances, the Supreme Court has found the protection of free expression at its strongest in the home, barring regulation that would be permitted elsewhere.15 At other times, the Court has permitted constitutionally protected expression to be restricted or prohibited altogether, precisely because of the involvement of the home.16

The issue in all these decisions has been the determination of the effect "the unique privacy interests of persons residing in their homes"17 has on the fundamental principles of the first amendment. These privacy interests can encompass a desire either to receive or to avoid particular speech in the sanctity of one's home. The two types of privacy interests create quite different issues because the interest in receiving information coincides with the free speech interests of the speaker, although that of avoiding speech presents a direct conflict with the speaker's

15. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969) (overturning conviction for private possession of obscene material in the home); see also Frisby v. Schultz, 56 U.S.L.W. 4785, 4788 (U.S. June 28, 1988) (No. 87-168) (stating that "in many locations, we expect individuals simply to avoid speech they do not want to hear," but "individuals are not required to welcome unwanted speech into their own homes").
interests. When the interests coincide, the result could be termed "super-first amendment" protection that overpowers otherwise valid state interests. Sometimes, though, a person seeks refuge in the home from the speech of others. In explaining the "householder's right to be left alone," the Court has noted, "Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires."

As the Supreme Court has stated, conflicts between speakers and unwilling listeners "demand delicate balancing because: 'In the sphere of collision between claims of privacy and those of free speech or free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.'" In fact, when the privacy interest involves avoiding unpleasant or undesirable speech, the balance becomes even more delicate than this quote would indicate. The complexity increases because there are usually three, rather than two, interests involved. Not only does one party seek to speak and a second wish to avoid that speech, generally a third party also wants to receive the message in question. Thus, a speaker who desires to address a wide audience may only be silenced if the listeners include a "captive audience" that cannot escape the speech.

The nature of the audience differs with the method of communication used. Different media intrude in different ways into the home and present different degrees of difficulty for a person desirous of avoiding the messages they contain. Therefore, courts have devised different standards to govern the varied forms of

18. See infra text accompanying notes 27-34.
20. Id. (quoting Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 406 (1954)); see also Frisby v. Schultz, 56 U.S.L.W. 4785, 4788 (U.S. June 28, 1988) (No. 87-168) ("There is simply no right to force speech into the home of an unwilling listener.").
21. Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-09 (1975) (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975)). In quoting from Cox Broadcasting, the Erznoznik decision did more than merely add the bracketed reference to "free speech"; it changed the meaning of the word "privacy." The earlier case, dealing with publication of a rape victim's name, had involved the publication of private facts. Cox Broadcasting, 420 U.S. at 492. See generally Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 196 (1890) (discussing the desirability of protection from unwanted press coverage of personal information). By contrast, Erznoznik dealt with shielding onlookers from nudity displayed at drive-in movie theaters. Although the quote is still appropriate, it alters the context of privacy from freedom from unwanted publicity, Cox Broadcasting, 420 U.S. at 489, to protection against "unwilling exposure to materials that may be offensive." Erznoznik, 422 U.S. at 208.
communication, so as to maintain the balance between the com­peting interests. 24

A. The Basic Framework: Stanley and Kovacs

The protection of the right of individuals in their own homes to receive or avoid messages is best illustrated by two seemingly disparate first amendment cases that focus on rights of the listener, not the speaker. In Stanley v. Georgia,25 the home created an impenetrable wall, keeping government away from the private enjoyment of even legally obscene films. In Kovacs v. Cooper,28 the Court permitted the government to create a regulatory wall that kept otherwise constitutionally protected speech out of the home because it came from a loudspeaker.

In Stanley, the Court overturned the conviction for “possession of obscene matter” of a man who had kept three reels of eight millimeter film in a desk drawer in his upstairs bedroom.27 The Court stated that if the films were obscene, they would not be protected by the first amendment.28 Nonetheless, although the films and, therefore, presumably the filmmaker, remained outside the Constitution’s free speech umbrella and subject to governmental regulation, the recipient of the message—the film watcher—had an independent constitutional right: “the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.”29

Essentially a constitutional “alloy,” this right combined the first amendment right to receive information30 with the fourth amendment’s guarantee of freedom from “unwanted governmental intrusions into one’s privacy.”31 Just as steel is stronger than

27. 394 U.S. at 558. The police were searching the house for evidence of bookmaking activities. They apparently found no evidence of wrongdoing other than the film.
30. Id. at 564; see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).
31. Stanley v. Georgia, 394 U.S. 557, 564 (1969). The Court relied on Justice Brandeis’s statement about the rationale behind the fourth amendment: “The makers of our Constitution . . . conferred . . . the right to be left alone—the most comprehensive of
its component elements of iron and carbon, this compound constitu­
tional right outweighed governmental interests that justified regu­lation when only the first amendment was involved.32

The Supreme Court has held that government may ban ob­
scene material to safeguard broad societal interests such as "the quality of life and the total community environment" and "the public safety itself."33 Yet the Court has found these interests insufficient to permit a state to criminalize private possession of obscenity in the home:

Whatever may be the justifications for other statutes reg­
ulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or films he may watch.34

rights and the right most valued by civilized man." Id. (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

32. The Court explored the first amendment's impact on the fourth amendment's guarantee against unreasonable searches in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), holding that the first amendment did not totally prohibit the use of search war­rants to obtain information from newspaper offices. The Court stressed that the fact that a newspaper, and not some other commercial establishment, was the subject of the war­rant would affect the determination of the "reasonableness" of the search.

Where the materials sought to be seized may be protected by the First Amend­ment, the requirements of the Fourth Amendment must be applied with "scrupulous exactitude." "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." Id. at 564 (citations omitted); see also id. at 570 (Powell, J., concurring) ("While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . .").


34. Stanley, 394 U.S. at 565. The Supreme Court has held that Stanley is not con­trolling in a case involving only speech or only privacy interests. Rather than treating Stanley as involving the combination of speech and privacy interest, the Court has somewhat inconsistently argued that Stanley rested only on whichever interest was not in the particular case before it. For example, in holding that the right to possess obscene material in one's home does not give a corolla­ry right to purchase or import obscene material or to transport it in interstate commerce, the Court stated that Stanley "re­flects no more than . . . the law's 'solicitude to protect the privacies of the life within [the home].'" United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 127 (1973) (quoting Poe v. Ullman, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting)); see also Paris Adult Theatre I, 413 U.S. at 66 (Stanley was "hardly more than a reaffirmation that 'a man's home is his castle.'"). On the other hand, in rejecting an argument that Georgia's sod­omy statute violated the right of privacy, the Court stated that Stanley was not a case about privacy in the home but "was firmly grounded in the First Amendment." Bowers v. Hardwick, 478 U.S. 186, 195 (1986).
In contrast, although the State has no interest that would justify regulating the private consumption of books and films, the Supreme Court in \textit{Kovacs} held that a municipality could ban sound trucks in order to preserve a residential neighborhood’s peace and quiet.\textsuperscript{35} The governmental concern in \textit{Kovacs} focused on the home dweller who wanted to avoid the speech from the sound truck but could not shut out the noise: “[The unwilling listener] is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.”\textsuperscript{36}

In \textit{Kovacs}, the Court acknowledged that speakers have a first amendment right not only to speak, but also to attempt to locate those who wish to receive their messages.\textsuperscript{37} The Court concluded, however, that the interest in protecting people in their homes from receiving speech they wished to avoid outweighed this first amendment right. It did not matter to the Court that not every person in the community wanted to keep out the information provided by the sound trucks or that some might actually wish to receive the information being offered.\textsuperscript{38} The Court found it enough that “some” in the community might find the noise objectionable.\textsuperscript{39}

The basic framework constructed by the Supreme Court in \textit{Stanley} and \textit{Kovacs} thus gives a person at home both the absolute constitutional right to read books or watch movies and the right, protectable by government, to avoid exposure to undesired speech. The permissible role of government when these rights collide presents the next question.

\textbf{B. The Ideal Balance: The Post Office Cases}

The postal system represents the only form of mass communication entering the home that has been available ever since the

\textsuperscript{35} 336 U.S. at 87 (plurality opinion).

\textsuperscript{36} \textit{Id.} at 86-87.

\textsuperscript{37} Justice Reed stated, “The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.” \textit{Id.} at 87.

\textsuperscript{38} Although no Justice voting to uphold the ordinance discussed the "willing listener," it can be presumed that loudspeakers would not have been widely used or considered “essential to the sound thinking of a fully informed citizenry,” \textit{id.} at 102 (Black, J., dissenting), if some home residents did not receive and consider the messages being offered.

\textsuperscript{39} \textit{Id.} at 81.
After a long journey, the Supreme Court has finally reached a balance for the regulation of the postal system that protects the rights of speakers and the twin rights of home dwellers to see and not to see.

At first, the Court granted the Postal Service broad powers to regulate the content of the mail it carried. Because other, albeit less efficient, means always existed to convey one’s written messages, the Court granted the government great latitude in determining what messages to classify as unmailable: “The legislative body in thus establishing a postal service may annex such conditions to it as it chooses.”

Oliver Wendell Holmes attacked this permissive interpretation in a notable dissent. According to Justice Holmes, “The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.” In 1965, the Court agreed. Lamont v. Postmaster General struck down as violative of the right of free speech a federal law requiring that an addressee make a request in writing before the Post Office would deliver “communist political propaganda.” Significantly, the Court based its decision not on the right to distribute the publications, but on the rights of those who wished to receive them. For instance, in his concurring opinion, Justice Brennan declared the right to receive publications to be a fundamental right, stating that “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to

40. U.S. Const. art. I, § 8, cl. 7 (“The Congress shall have Power . . . To establish Post Offices and post roads . . . .”).
41. Ex Parte Jackson, 96 U.S. 727 (1877).
42. Public Clearing House v. Coyne, 194 U.S. 497, 506 (1904); see also Ex Parte Jackson, 96 U.S. at 736 (upholding the power of Congress to bar obscene, indecent, and immoral material from the mails, so that the mail “not be used to transport such corrupting publications and articles”). See I. Pool, TECHNOLOGIES OF FREEDOM 86-87 (1983) for a list of some of the materials that have, at one time or another, been declared unmailable. (The list includes liquor ads when liquor was illegal; solicitations appearing to be bills; unsolicited ads for contraceptives; prize fight films; fraudulent matter; lotteries; obscene matter; sexually oriented ads; pandering ads; securities offerings other than by an approved prospectus; matters inciting arson, murder, or assassination; and material obstructing conscription.)
44. 381 U.S. 301 (1965).
45. Id. at 307.
46. Id.
receive and consider them." He added, "It would be a barren marketplace of ideas that had only sellers and no buyers."

Although the problem of protecting "unwilling addressees" from offensive mail was merely a side issue in Lamont, the Court directly confronted the question in Bolger v. Youngs Drug Products Corp. Bolger involved a challenge to a ban on the mailing of unsolicited advertisements for contraceptives. The government attempted to justify its prohibition as necessary for shielding home dwellers and their children from potentially offensive materials. The Court dismissed this concern about offensiveness as one that "carries little weight." The Court held that suppression of speech is not justified merely because some may find it offensive. Even though it acknowledged the privacy interest in the home, the Court stated that recipients of objectionable mailings do not constitute a " captive" audience; unlike the home dwellers in Kovacs, the recipients can "effectively avoid further bombardment of their sensibilities simply by averting their eyes."

The Court also refused to consider children as a captive audience needing special governmental protection because of the ease with which parents can police a mailbox. Moreover, whatever "marginal degree of protection" the ban provided in helping parents control how their children learned about "sensitive" subjects like birth control, it was deemed insubstantial as compared to the harm resulting from keeping the material away from adults: "The level of discourse reaching a mailbox simply

47. Id. at 308 (Brennan, J., concurring).
48. Id.
49. See id. at 310 (Brennan, J., concurring). The majority opinion did not address this issue at all.
51. Id. at 71.
52. Id. As Justice Stevens pointed out, the "offensiveness" in this case involved the ideas expressed in the contraceptives advertisement, not the style or manner of expression. Id. at 84 (Stevens, J., concurring). Thus, the ban was essentially a constitutionally suspect viewpoint-based restriction. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 581 (1978) (stating that governmental action aimed at the communicative impact of speech "is presumptively at odds with the first amendment").
55. The Court distinguished offensive mailings from similarly offensive radio broadcasts by stating: "The receipt of mail is far less intrusive and uncontrollable." Id. at 74. See infra text accompanying notes 69-95, for discussion of regulation of broadcasting.
56. Bolger, 463 U.S. at 73.
cannot be limited to that which would be suitable for a sandbox. 57

In Bolger, the Supreme Court thus found that the right of a speaker to communicate through the mails outweighed a recipient’s interest in preventing entry into the home of objectionable material. 58 Although the Court in Lamont had held that requiring a recipient to request material unconstitutionally burdened the right to receive information, the Bolger Court stated that the “short, though regular, journey from mail box to trash can . . . is an acceptable burden” on the right to avoid offensive material. 59 This burden is only acceptable, however, when the combined rights of a speaker to send the material and of a willing home dweller to receive it balance against the rights of an unwilling recipient. When the willing recipient does not appear in the equation, the balance shifts in favor of the right to limit the material that enters one’s home.

In Rowan v. United States Post Office Department, 60 for example, the Supreme Court upheld a law prohibiting a mailer from sending further advertisements to people who had previously notified the Post Office that they considered that mailer’s advertisements to be “erotically arousing or sexually provocative.” 61 The Court stressed that the law did not allow the government to determine what mailings were objectionable but left this determination entirely to each individual’s “complete and unfettered discretion”; thus, the law preserved individual autonomy by permitting home dwellers to exclude mail they found offensive from their mailbox. 62 In upholding the ban, the Court refused to impose a burden on the citizen to “determin[e] on repeated occasions whether the offending mailer has altered its material so as to make it acceptable.” 63 Thus, the Court held that the “[regular] journey from mail box to trash can,” which it found sufficient for protecting individuals from “offensive” unsolicited contraceptive advertisements, constituted an unaccept-

57. Id. at 74.
58. See id. at 78 (Rehnquist, J., concurring) (“[I]ndividuals are able to avoid the information in Youngs’ advertisements after one exposure” by having their names removed from the mailing list).
59. Id. at 72 (quoting Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), summarily aff’d, 386 F.2d 449 (2d Cir. 1967), cert. denied, 391 U.S. 915 (1968)).
62. Rowan, 397 U.S. at 734, 736.
63. Id. at 738.
able burden on the "very basic right to be free from [unwanted] sights, sounds, and tangible matter" in Rowan.64

Though the Court has not explained the distinction between Bolger and Rowan, the fundamental difference between the two cases appears to be that, in Rowan, the government's protection of the right of another not to see did not deny any "willing listener" the right to receive information. The statutory scheme found constitutional in Rowan permitted those who wanted to avoid certain speech to do so without infringing on the ability of others to receive it. Even if some speakers may have been frustrated by their inability to convert "unwilling" listeners, the statute created a narrow and justifiable limitation on the right of free speech.

According to then Associate Justice Rehnquist, "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints."65 Such a requirement obviously would injure both speakers and willing, even arguably non-objecting, listeners. When the unwilling listener can be isolated, however, the "ancient concept that 'a man's home is his castle' into which 'not even the king may enter'"66 prevails over the right of a speaker to try to attract that listener's attention. There is simply no constitutional right to send unwanted material into the home: "[A] mailer's right to communicate must stop at the mailbox of an unreceptive addressee."67

In the postal cases, the Court has reached as close to an ideal solution as can be achieved in a complex world of competing interests and differing tastes. First, the government is kept out of the business of deciding what material is offensive.68 Second, the right to see and the right not to see are protected. Home dwellers are given the right to keep material they have found to be offensive out of their homes, but this protection will be provided in such a way as to leave unimpaired the rights of those who wish to receive those same publications. This scheme does not provide complete protection for the sensitive because they must

64. Id. at 736.
67. Id. at 736-37; see also Frisby v. Schultz, 56 U.S.L.W. 4785, 4788 (U.S. June 28, 1988) (No. 87-168).
endure an initial exposure to an offensive advertisement before receiving protection. Nonetheless, a significant difference exists between a one-time exposure to and continual confrontation with such material. Furthermore, considering the competing speech interests at stake in the balance, the Rowan solution seems to represent a workable compromise.

Unfortunately, not all forms of communication lend themselves as readily to this sort of accommodation of interests. Electronic communications present an especially difficult combination of interests to balance and one that advances in technology continually alter.

C. Broadcasting: The Pig in the Parlor

In *FCC v. Pacifica Foundation,* the Supreme Court faced the question of the Federal Communications Commission's power to protect radio listeners who wished to keep indecent, though not legally obscene, broadcasts out of their homes and away from their unsupervised children. At two o'clock on a Tuesday afternoon, a New York City radio station played a recorded monologue by a "satiric humorist," George Carlin, describing repeatedly, explicitly, and presciently "the words you couldn't say on the public . . . airwaves." The FCC did not impose any penalty on the station, but issued a warning that it would consider sanctions against the station if future indecent broadcasts occurred. The radio station appealed the warning issuance.

The Supreme Court upheld the constitutionality of barring constitutionally protected, though indecent, language from the airwaves in the middle of the afternoon. Unlike prior broad-

70. Ironically, the sole person to complain about the program at issue heard the broadcast while driving in his car. His child, rather than listening without parental supervision, sat next to him. *Id.* at 730. Nonetheless, both the FCC and the Court apparently acted on the assumption that the complaining parent spoke for those in the more vulnerable position at home.
71. *Id.* at 729. Justice Powell described the recording as "a sort of verbal shock treatment." *Id.* at 757 (Powell, J., concurring).
72. The Court stressed that the FCC order did not completely ban all indecent speech, or even the Carlin monologue, from the airwaves. *Id.* at 750. The FCC criticized the station for broadcasting the monologue "at a time when children were undoubtedly in the audience (i.e., in the early afternoon)." *Pacifica Found.,* 56 F.C.C.2d 94, 99 (1975). In a second opinion, the FCC emphasized that it had not established "an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." *Pacifica Found.,* 59 F.C.C.2d 892, 892 (1976) (petition for clarification or reconsideration). Thus, Justice
casting cases, however, the Court did not base its holding on the scarcity of airwaves and the subsequent need for government to regulate broadcast licensees in the public interest. Rather, the Court relied on the need to preserve the home as a sanctuary, safe from unwanted sounds. The Court emphasized this concern in its famous paraphrase of the zoning rationale that permits the isolation of an activity considered to constitute a nuisance: "[W]hen the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." The Court thus characterized broadcasting as posing a "unique" threat to the peace of the parlor because of its "uniquely pervasive presence" and unique accessibility to children.

Although it may appear somewhat contradictory to use analogies in discussing a "unique" form of communication, the Court compared the broadcast audience to the Kovacs home dweller who was unable to avoid a loudspeaker, rather than to a mail recipient who could effortlessly discard unwanted advertisements. The Court treated the radio listener as a member of a captive audience in need of governmental protection: because the audience frequently tunes in at the middle of a program, prior warnings cannot provide complete protection.

Powell wrote that the Commission order being reviewed did not prohibit "broadcasting the monologue during late evening hours when fewer children are likely to be in the audience." Pacifica, 438 U.S. at 760 (Powell, J., concurring). The FCC has recently decided, however, that even the hours between 10:00 p.m. and midnight might not be appropriate for such programming because, at least on weekends, a significant number of children are still in the broadcast audience. Pacifica Found., FCC 87-138, para. 16 (adopted Apr. 16, 1987) (LEXIS, Fedcom Library, FCC file).

73. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969); NBC v. United States, 319 U.S. 190, 226 (1943). The FCC made the argument that spectrum scarcity justified the ban on indecent speech both in its order, Pacifica Found., 56 F.C.C.2d at 97, and in its brief to the Supreme Court, Brief for the Federal Communications Commission at 37-40, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528). The Supreme Court did not even address the relevance of the issue. Yet as Justice Brennan argued, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." Pacifica, 438 U.S. at 770 n.4 (quoting Pacifica Found. v. FCC, 556 F.2d 9, 29 (D.C. Cir. 1977) (Bazelon, C.J.) (striking down FCC action) (emphasis in original)).

74. Pacifica, 438 U.S. at 750-51. The original quote was "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

75. Pacifica, 438 U.S. at 748-49.

76. See supra notes 53-54.

77. Pacifica, 438 U.S. at 748. In discussing the holding of Pacifica, the Court has since said that "the medium's uniquely pervasive presence renders impossible any prior warning for those listeners who may be offended by indecent language." FCC v. League of Women Voters, 468 U.S. 364, 380 n.13 (1984). Indeed, immediately prior to the broadcast of the Carlin monologue, the radio station had given a warning that the recording
In his dissent, Justice Brennan rejected any characterization of the radio listener as "captive" because "an individual voluntarily chooses to admit radio communication into his home" and could, therefore, prevent offensive speech from entering by simply removing the radio. The majority did not answer this argument directly but seemed to find unrealistic the solution of telling listeners to evict their radios to avoid offensive programming. The Court described radio as "a uniquely pervasive presence in the lives of all Americans." With 98.6% of all Americans owning radios and 97% owning televisions, the Court chose to treat the entry of radio and television broadcasting into the home as universal and inevitable. Once radio programs were viewed as invitees into the American home, it was a small step for the Court to require that programmers behave like invited guests.

Once a guest in the home, broadcasting can have an enormous impact on the parental and societal interest in protecting the welfare of children. The Court found the Carlin monologue, which "could have enlarged a child's vocabulary in an instant," particularly offensive because of the likely presence of unsupervised children in the audience. The Court regarded broadcasting as different from other forms of communication because of the ease with which children can receive broadcast programming. Moreover, because broadcasting is available to any child with access to a radio or television, it differs from other forms of communication, such as books and movies, that "may be withheld from the young without restricting the expression at its source."

The Court rejected an argument, similar to one later accepted in Bolger, that a ban of offensive material is unnecessary because offended home dwellers could avoid further offense by averting their eyes. According to the Court, applying such a concept to broadcasting "is like saying that the remedy for an...

contained "sensitive language which might be regarded as offensive to some." Pacifica, 438 U.S. at 730 (quoting Pacifica's response to the initial complaint).
79. Id. at 748 (emphasis added).
81. Justice Powell referred to the "right not to be assaulted by uninvited and offensive sights and sounds." Pacifica, 438 U.S. at 759 (Powell, J., concurring).
82. Id. at 749.
83. Id. at 750.
84. Id. at 749.
assault is to run away after the first blow." This right to avoid "the first blow" closely resembles the interest announced in Rowan of avoiding the imposition on home dwellers of "the burden of determining" the acceptability of each piece of mail. That interest superseded speech interests in the postal cases, but only when protection of that interest did not deny a willing third party the right to receive information. In Pacifica, however, the Court discounted the countervailing interest of home dwellers who wanted to listen to the "offensive" broadcast on the theory that they could easily receive the identical message through tapes, records, nightclubs, and, perhaps, late night broadcasts. As Justices Powell and Blackmun, who supplied the critical fourth and fifth votes for the majority, stated in their concurrence, "I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so."

This analysis underestimates the "willing" listener's interest in having access to uncensored broadcasts. The Court ignores the benefit to listeners of receiving programming at a convenient time at no charge through their radios, when the only alternatives require spending money for records or nightclubs. Additionally, the Court misidentifies the speaker: by tuning the dial to a particular station, the listener has indicated a desire to hear the speech of the broadcaster, who may well use other persons' taped messages to communicate the station's message. Thus, a limitation on a broadcaster's speech restricts desired communication between a willing speaker—the broadcaster—and a willing listener, to protect the unwilling listener.

87. Id. at 749; Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970).
88. In fact, the Pacifica Court cites Rowan for the proposition that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Pacifica, 438 U.S. at 748. This equation omits reference to the impairment of the right of those who wish to receive information.
89. 438 U.S. at 760 (Powell, J., concurring).
90. Id. at 762 (Powell, J., concurring). The concurrence acknowledged that the argument that the FCC ruling "prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours . . . [and] will have the effect of 'reduc[ing] the adult population . . . to [hearing] only what is fit for children'. . . . is not without force." Id. at 760 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)). Nonetheless, Justice Powell concluded that the interest was "not sufficiently strong" to overturn the ruling. Id.
91. As Justice Brennan stated, "The opinions . . . display . . . a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford . . . ." Id. at 774 (Brennan, J., dissenting).
Generally, the government may not silence a speaker to protect the squeamish. The government may not shield the unwilling viewer at the expense of the willing viewer if both viewers may be accommodated. Silencing speech is only permitted when "substantial privacy interests are being invaded in an essentially intolerable manner." Thus, the result in *Pacifica* can be justified only upon a finding that no alternative means exist to protect unwilling listeners from the offensive speech in their homes. Once a court rejects both the listener's options of removing the radio from the home altogether and of changing the channel after hearing offensive speech, there is indeed no way the broadcast audience can avoid offensive programming "without restricting the expression at its source."

Government cannot protect the right to avoid unwanted broadcast messages without simultaneously restricting the right to speak and the right to receive information in the home. When a speaker transmits the message via the mails rather than the airwaves, however, the unwilling recipient can be protected separately; thus, an accommodation of competing rights is required. To determine whether indecent material can be barred from cable television, it is therefore necessary to examine the physical characteristics of that medium to determine whether the right to avoid such material can be protected in such a way as to avoid limiting the first amendment rights of others.

II. CABLE TELEVISION AND PORNOGRAPHY: THE TECHNOLOGICAL SOLUTION

Although the pictures from both broadcast television stations and cable systems appear on the same home television screen, the technologies of the two media differ significantly. Broadcast signals travel through the airwaves, sharing the limited radio spectrum, and all who own radios and television sets may receive

94. "Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Consolidated Edison Co.*, 447 U.S. at 541-42.
these signals. In contrast, a cable system carries its signals through enclosed wires made of either a metal coaxial cable or a thin glass pipe known as optical fiber, and these signals only enter the homes of subscribers.

As a result of the technological differences between cable and broadcast television, a cable system can provide far more channels, and thus much more programming, than that offered by a broadcaster. Cable systems currently carry thirty-six, fifty-four or even one hundred channels: "an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broadcast system." Although this cornucopia obviously advances the

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97. See generally NBC v. United States, 319 U.S. 190, 210-13 (1943) (describing the chaotic proliferation of radio stations prior to federal regulation of airwaves). Some have argued that the FCC's division of the radio spectrum has actually increased the scarcity of signals by limiting the number of stations available. R. Posner, Economic Analysis of Law 547 (2d ed. 1977) ("The scarcity of television channels differs from the scarcity of other natural resources only in the fact that it is to a significant extent the product of deliberate governmental policies"); see also Schuessler, Structural Barriers to the Entry of Additional Television Networks: The Federal Communication Commission's Spectrum Management Policies, 54 S. Cal. L. Rev. 875, 988-91 (1981).

98. For an excellent discussion of the technology of a cable system, see S. Weinstein, Getting the Picture 17-40 (1986).

The cable system gathers signals from local and distant broadcast stations, satellites, and directly from local programming studios at the cable "headend," where the signals are each assigned a frequency and sent through the cable system. The cables that pass through the community are either laid underground or hung from utility poles.

The capital costs of constructing a cable system are quite high, with aerial construction costing between $7500 and $15,000 a mile and underground construction costing as much as $100,000 a mile. Id. at 17; see also Berkshire Cablevision, Inc. v. Burke, 571 F. Supp. 976, 986 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985) (estimating a cost of $7,000,000 to wire Newport County, Rhode Island). Accordingly, three federal appellate courts have termed cable television a "natural monopoly." Central Telecommunications, Inc. v. TCI Cablevision, 800 F.2d 711, 717 (8th Cir. 1986), cert. denied, 107 S. Ct. 1358 (1987); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); cf. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 n.8 (1974) (describing electric company as a natural monopoly "created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale").

99. "Unlike ordinary broadcast television, which transmits the video image over airwaves capable of bearing only a limited number of signals, cable reaches the home over a coaxial cable with the technological capacity to carry 200 channels or more." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

first amendment interest in the diversity of programming,101 it also creates some delicate problems. Cable programs generally are not sufficiently explicit to be considered legally obscene, yet they are often substantially more sexually explicit than anything on broadcast television.102 Such programming may contain nudity, depictions of sexual activity, and sexually explicit or profane language.103 Much of this type of programming would undoubtedly be classified as “indecent” and, thus, barred from the broadcast media.104

The availability of such indecent programming on the home screen for the first time has led to calls for regulation and censorship of indecency on cable.105 For such regulation to be valid, however, it must be permissible under both the federal Cable Act and the Constitution. Because the statutory scheme explicitly depends on the resolution of the constitutional issue,106 the constitutional analysis will precede the discussion of the legislative framework.

A. The Constitutional Balance: The Required Accommodation of Interests

Thus far, every court to consider the constitutionality of laws barring indecent programming from cable television has found the laws unconstitutional.107 Whatever the validity of the lower courts’ ultimate holding, their underlying legal analysis has
failed to incorporate the Supreme Court's teaching on the relationship between the form of communication used to transmit "offensive" messages and the scope of a government's power to protect a home dweller's right to avoid that message.

In *Wilkinson v. Jones,*\(^{108}\) the Supreme Court summarily affirmed a lower court's decision striking down Utah's cable indecency law. Although a summary affirmation constitutes the Court's holding as to the merits of a case,\(^{109}\) the Court has cautioned that such an affirmation has "considerably less precedential value" than an opinion on the merits.\(^{110}\) Most importantly, a summary affirmation does not affirm the rationale behind a judgment, only the judgment itself.\(^{111}\) Thus, especially when there is more than one rationale for a holding, it is impossible to tell the reasoning endorsed by the Court.

The lower court in *Wilkinson*\(^{112}\) found several defects in the indecency law. The court stated that the state law was preempted by the federal Cable Act,\(^{113}\) unconstitutionally vague,\(^{114}\) and overbroad because it regulated cable programming that was not obscene under the test set out in *Miller v. California.*\(^{115}\) The briefs filed with the Supreme Court reflected the variety of grounds on which the lower courts relied.\(^{116}\) Because the lower court's opinion rested on both the nonconstitutional ground of indecency and the previously established vagueness rationale,
the Supreme Court's affirmance cannot be relied upon as a groundbreaking precedent holding all regulation of cable indecency unconstitutional.\(^{117}\)

In addition to not announcing a standard for the regulation of cable television content, the Supreme Court has thus far failed to establish a framework for evaluating the constitutionality of any cable television regulation. In the only case in which the Court has issued an opinion, *City of Los Angeles v. Preferred Communications, Inc.*,\(^{118}\) the Court merely ruled that the construction and operation of a cable system "plainly implicate First Amendment interests."\(^{119}\) Of course, as the Court itself acknowledged, this characterization "does not end the inquiry. 'Even protected speech is not equally permissible in all places and at all times.'"\(^{120}\) The Court declined to decide whether Los Angeles had, as alleged, violated Preferred Communications' first amendment rights by refusing to grant it a cable television franchise. Instead, the Court remanded the case to the district court to resolve the underlying factual disputes between the parties.\(^{121}\)

The Court also declined to announce the legal standard for evaluating first amendment challenges to cable franchising.\(^{122}\) In comparing cable to other forms of communication with well-established first amendment standards,\(^{123}\) the Court stated that

117. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (stating 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"); *see also* id. at 180 (Brennan, J., concurring) (stating that judges must determine whether a summary disposition does "not even arguably [rest] upon some alternative nonconstitutional ground"). Because the District Court specifically found that the Utah law acted as a total ban on indecent programming and "does not channel indecency to specific viewing hours," *Community Television*, 611 F. Supp. at 1114-15, neither the Tenth Circuit's nor the Supreme Court's affirmance resolves the constitutionality of a statute that restricted indecency to late night hours. *See infra* discussion accompanying notes 176-88.


119. Id. at 494.

120. *Id.* at 495 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc. 473 U.S. 788, 799 (1985)); *see, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting) ("[T]o say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.") (emphasis in original); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) ("Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here.").

121. *Preferred Communications*, 476 U.S. at 496. The major factual disputes focused on whether cable systems cause "traffic delays and hazards and esthetic unsightliness" and whether sufficient economic demand exists to support competing cable operators. *Id.* at 493.

122. *Id.* at 495; *see* Central Telecommunications, Inc. v. TCI Cablevision, 800 F.2d 711, 714 (8th Cir. 1986).

cable resembled both the unregulated print media and the more regulated broadcast media:

Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers. [Preferred's] proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment . . . even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the government interests in regulating by reason of the scarcity of available frequencies.

As the concurring opinion of Justice Blackmun, joined by Justices Marshall and O'Connor, makes clear, the Court left "open the question of the proper standard." Moreover, the concurrence stressed that nothing requires the Court to limit its choice to one of the preexisting first amendment models; it could choose to create a new, more appropriate standard just for cable: "In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."

One other point must be noted. Whatever standard the Court eventually creates will not apply in the same way to every type of cable regulation. There are numerous types of possible regulation, including exclusive franchises, rate regulation, requirements for third-party access, and regulation of program content. Each form of regulation has a different effect on a cable operator's "speech," and each implicates a different governmental interest. Thus, the statement by one member of the Commission on Pornography that cable indecency regulation would inevitably lead to equal time requirements for cable programmers is

Co. v. FCC, 395 U.S. 367 (1969) (upholding the fairness doctrine as applied to broadcasters).

125. Id. at 496.
126. Id. (emphasis added).
in error. The physical scarcity rationale for the equal time requirement for broadcasters remains distinct from the concerns of pervasiveness and availability to children that support indecency regulation. Although broadcasting and cable may similarly implicate a particular rationale, this does not mean they have a similar impact on other concerns. Courts and legislators will, therefore, have to analyze each form of regulation separately, to see if it is constitutionally justifiable.

Lacking specific guidance from the Supreme Court, many lower courts have addressed the constitutionality of barring indecent cable programming and have tried to decide whether cable sufficiently differs from broadcasting, so that Pacifica would not apply to cable programming. One court distinguished cable from broadcasting because "[i]n the cable medium, the physical scarcity that justifies content regulation in broadcasting is not present." This distinction is irrelevant to the analysis of Pacifica because the Supreme Court did not rely on physical scarcity to uphold the regulation of broadcast indecency.

Other courts have tried a more comprehensive comparison between the two media. For example, several courts have relied on the following list of differences between cable television and

128. 1 COMM’N ON PORNOGRAPHY, supra note 1, at 104-05 (statement of Father Bruce Ritter)

[All]most all of the principal religious denominations and religious broadcasters unanimously fought such an equation of broadcast and cable television on the grounds that it might seriously impede their own religious freedom to control their programming as they saw fit and might compel them to grant equal time to atheist or agnostic or anti-religious presentations.

. . . The fact is . . . that unless we equate broadcast and cable television, the FCC has no constitutional right to regulate programming on cable using the indecency standard upheld by the Pacifica decision.


130. See, e.g., Quincy Cable TV v. FCC, 768 F.2d 1434, 1452-53 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986) (distinguishing “must-carry” rules, which mandated carriage of local broadcast signals, from public access requirements: “[U]nlike access rules, which serve countervailing First Amendment values by providing a forum for public or governmental authorities, the must-carry rules transfer control to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether.”).


133. See supra discussion accompanying notes 73-74.
broadcasting to conclude that reliance on *Pacifica* to support regulation of indecent cable programming is "misplaced":\(^{134}\)

<table>
<thead>
<tr>
<th><strong>Cable</strong></th>
<th><strong>Broadcast</strong></th>
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<tbody>
<tr>
<td>1. User needs to subscribe.</td>
<td>1. User need not subscribe.</td>
</tr>
<tr>
<td>2. User holds power to cancel subscriptions.</td>
<td>2. User holds no power to cancel. May complain to FCC, station, network, or sponsor.</td>
</tr>
<tr>
<td>3. Limited advertising.</td>
<td>3. Extensive advertising.</td>
</tr>
<tr>
<td>4. Transmittal through wires.</td>
<td>4. Transmittal through public airwaves.</td>
</tr>
<tr>
<td>5. User receives signal on private cable.</td>
<td>5. User appropriates signals from the public airwaves.</td>
</tr>
<tr>
<td>6. User pays a fee.</td>
<td>6. User does not pay a fee.</td>
</tr>
<tr>
<td>8. Distributor or distributee may add services and expanded spectrum of signals or channels and choices.</td>
<td>8. Neither distributor nor distributee may add services or signals or choices.</td>
</tr>
<tr>
<td>9. Wires are privately owned.</td>
<td>9. Airwaves are not privately owned but are privately controlled.</td>
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</table>

The most remarkable feature of this comparison is that none of these differences, alone or in the aggregate, adequately distinguishes cable from broadcasting for purposes of determining the constitutionality of indecent programming regulation. For example, points 1, 2, and 6 (the need to subscribe, the power to cancel, and the payment of a fee) seem to argue that a viewer volun-

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tarily allows cable, but not broadcasting, to enter and remain in the home. Broadcast viewers, however, can turn off or throw out the offending television set; thus, they possess the same choice as to whether or not to allow the programming into their homes. Pacifica hints that the universal use of broadcasting necessitates a remedy for indecent programming other than the discarding of radios and televisions, but this suggestion does not negate the voluntary nature of the choice to own devices that receive broadcast signals.

Moreover, viewers in many communities need cable television to receive broadcast signals, either because no broadcasting station operates nearby or because mountains or tall buildings prevent over-the-air reception. In such communities, cable television is as commonplace as television sets. If owning a radio and owning a television set do not constitute “voluntary” acts because they represent the only way to receive broadcast signals, subscribing to cable is not “voluntary” when it provides the only way to receive broadcast signals. If such “voluntariness” marked the only distinction between broadcast and cable, two different programming standards might exist for cable depending upon the location of the cable system. A strange result would indeed occur if cable systems could not carry indecent programs in communities with poor or no reception of over-the-air broadcast signals, but could carry such programming in communities with good broadcast reception and a low percentage of subscribers.

The remaining differences in the list also fail adequately to distinguish cable and broadcast television in the context of indecent programming. Point 7 (the availability of previews) not only applies to both media, but the Court found it irrelevant in Pacifica. If prior warnings cannot completely protect broadcast viewers from offensive programming because they constantly

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135. See supra text accompanying notes 78-81.
137. See S. Weinstein, supra note 98, at 1; see also H.R. Rep. No. 934, supra note 100, at 24, reprinted in 1984 U.S. Code Cong. & Admin. News at 4661 (in areas with inadequate over-the-air reception of broadcast signals, cable “was seen as an ‘essential’ service”). Indeed, aiding reception of over-the-air broadcasting was the original purpose of cable television. See generally D. Brenner & M. Price, Cable Television and Other Nonbroadcast Video § 1.02[1], at 1-2 (1986).
138. Additionally, an argument that cable television is not as ubiquitous as broadcasting rests on precarious grounds because many estimate that cable use will steadily increase over the coming years. Only 42% of American households subscribed to cable in 1986; by the end of the decade, that figure is expected to rise to 54%. See Cable Industry Growth Chart, CableVision, Aug. 18, 1986, at 82.
tune in and out, prior warnings will be equally ineffective in protecting cable viewers with similar peripatetic viewing habits. Likewise, points 3 and 8 (the amount of advertising and the number of channels available to the programmer) have no apparent relationship to the issue in question: the constitutionality of regulating indecent cable programs. Whether the cable programmer shows advertising and whether the programmer can choose to show indecent programming on more than one channel do not affect the concerns expressed by the Pacifica Court.

Finally, points 4, 5, and 9 (transmittal through privately owned cables vs. public airwaves) completely misconceive the structure of a cable system by attempting to portray cable systems as "private" modes of communication and broadcast systems as "public." It is true that the cables that carry the programs are privately owned, but so are the antennae and equipment that send broadcast signals. A correct analogy, however, can be drawn between the public nature of the airwaves, which justifies some broadcast regulation, and the public streets and public rights-of-way that a "private" cable operator must, by definition, utilize to construct and operate the cable system. Thus, both the cable operator and broadcaster use public resources to communicate with their listeners and viewers. Neither represents a completely public nor a completely private communications medium.

141. As explained by one court:
A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys and other public ways. Some form of permission from the government must, by necessity, precede such disruptive use of the public domain.
Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981) (emphasis added), cert. dismissed, 456 U.S. 1001 (1982). This is consistent with the Cable Act's definition of a cable system.

[T]he term 'cable system' means a facility, consisting of a set of closed transmission paths . . . that is designed to provide cable service which includes video programming . . . but such term does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way . . . .


142. As then Circuit Judge Burger explained: "The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely pri-
Additionally, it must be remembered that the “public interest” in using the airwaves did not represent the justification for the regulation of indecent programming in *Pacifica*.\(^{143}\) Rather, the Court permitted regulation because of broadcasting’s access to the home and the ease with which children can gain access to the programming. These rationales arguably are applicable to cable as well as broadcasting.\(^{144}\)

As an alternate tack, those opposed to the regulation of non-obscene cable programming may argue that *Pacifica* “should be confined to its facts, and eventually discarded as a ‘derelict in the stream of the law.’”\(^{145}\) Under this line of reasoning, *Pacifica* offers no precedential value when discussing cable television because it is a “deservedly . . . limited exception [to the traditional protection of non-obscene speech], for an extreme, virtually non-replicable case . . . . *Pacifica* truly is . . . a case about seven dirty words on radio and no more.”\(^{146}\)

This analysis does not suffice for two reasons. First, the Supreme Court does not appear ready to “discard” *Pacifica*. In 1984, the Court characterized the decision as “consistent with our other broadcast cases.”\(^{147}\) In 1986, the Court cited the case in support of the proposition that there is “an interest in protecting minors from exposure to vulgar and offensive spoken language.”\(^{148}\) Even when the Court limited *Pacifica* by holding that it did not apply to “offensive” mail because broadcast regulation did not “readily translate into a justification for regulation of other means of communication,”\(^{149}\) it was not at all clear that

\(^{143}\) See supra text accompanying notes 73-96.

\(^{144}\) E.g., Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982) (dictum) (stating that the rationale for regulating indecent programming “is independent of whether the television signal comes into the home over the air or through a coaxial cable”).

\(^{145}\) Krattenmaker & Esterow, *supra* note 105, at 627 n.138 (quoting L. Tribe, American Constitutional Law 67-68 (Supp. 1979)).

\(^{146}\) Id. at 627 (emphasis added).


\(^{148}\) Bethel School Dist. v. Fraser, 478 U.S. 675, 684 (1986). *Pacifica* was also cited with approval in Frisby v. Schultz, 56 U.S.L.W. 4785 (U.S. June 28, 1988) (No. 87-168). Thus, it is inaccurate to say, as one court striking down a cable indecency law argued, that “[r]ecent decisions of the Court have largely limited *Pacifica* to its facts.” Cruz v. Ferre, 755 F.2d 1415, 1421 (11th Cir. 1985).

the Court regarded all other electronic means of communication, as well as the mails, as distinguishable from broadcasting.150

Secondly, Pacifica should not be read as a case about "seven dirty words," but as one involving the protection of the right to avoid offensive material in the home.151 If one accepts the Court's basic assumptions about the "captive" nature of the broadcast audience,152 Pacifica remains consistent with earlier cases protecting the home dweller's right "to be let alone."153

The ultimate issue, then, becomes how cable television relates to the home dweller's right to be let alone. Is the cable viewer, like the home dweller in Kovacs, "practically helpless to escape this interference with his privacy . . . except through the protection of the municipality"?154 Is cable television, like broadcasting, one of those forms of communication that cannot "be withheld from the young [and unwilling adults] without restricting the expression at its source"?155

The very technology of cable television, however, distinguishes cable from these intrusive electronic means of speech because this technology provides the ability to block out "offensive" programming from one home without silencing it at the source. Because cable television transmits its programming through wires rather than through airwaves, individual viewers can keep programming out of their homes by selectively "blocking" the wire before the program reaches the television set. Indeed, cable technology offers two solutions that protect not only the right of the home dweller to avoid offensive material, but also the rights of the speaker and the willing viewer.

A device called a "lock box" or a "parental control device" offers the first way to protect the unwilling cable viewer.156 The device allows a viewer to use a key or numeric code to "lock out" certain channels and keep them off the home television screen.

U.S. 367 (1969), a decision based on spectrum scarcity, not on the intrusiveness of broadcasting. See supra notes 73-75 and accompanying text.

150. In fact, despite the Court's stated desire "to emphasize the narrowness of our holding," Pacifica, 438 U.S. at 750, the Court implied that indecent telephone calls could be analogized to indecent broadcasts. Id. at 749 & n.27.

151. See supra notes 92-95 and accompanying text.

152. See supra notes 76-84 and accompanying text.


154. 336 U.S. at 86-87.


156. See S. Weinstein, supra note 98, at 48. The Cable Act requires that all cable operators make these devices available to their subscribers. Cable Communications Policy Act of 1984 § 624(d)(2), 47 U.S.C. § 544(d)(2) (Supp. III 1985); see infra notes 193-98 and accompanying text.
It thus protects both adults wishing to avoid even a single glance at “offensive” material and children whose parents do not want them viewing such programs.

An “addressable converter” represents the second mechanism for keeping offensive programming out of the home.\(^\text{157}\) The traditional, or general, converter “converts” the electronic signals travelling through the cable so that they can be viewed on the television screen. Although an addressable converter performs the same function, it also enables the cable operator to determine which channels to send to a particular home.\(^\text{158}\) Thus, by notifying the cable operator ahead of time, subscribers can have the operator flick a switch and block a given channel from their sets until they reauthorize the channel.

The Report of the Attorney General’s Commission on Pornography stated that lock boxes do not resolve the constitutional issue. Although the Commission’s Report does not discuss addressable converters, the arguments made against lock boxes apply to both means of blocking channels. According to the Report, Pacifica Foundation had argued in its brief that technology existed so that television sets could be programmed to prevent certain channels from appearing.\(^\text{159}\) The Commission concluded that, because the Court upheld the broadcast regulation in Pacifica, “[t]he Supreme Court was obviously unimpressed by

\(^{157}\) See S. Weinstein, supra note 98, at 41-49.

\(^{158}\) Id. at 41-44. “Each subscriber has a unique electronic address, so that the cable headend has the opportunity to provide viewing authorization to each addressable converter.” Id. at 41, 44. The Cable Act does not refer to addressable converters explicitly, but leaves to franchising authorities the right to establish requirements for “facilities and equipment.” Cable Communications Policy Act of 1984 § 624(b)(1), 47 U.S.C. § 544 (b)(1) (Supp. III 1985). The Cable Act only requires that the equipment be “cable-related.” H.R. Rep. No. 934, supra note 100, at 68, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4705. Because an addressable converter is plainly cable-related, a city interested in keeping indecent programming away from the homes of unwilling subscribers can require that the cable operator offer addressable converters.

Addressable converters may only cost $20 more than non-addressable converters. S. Weinstein, supra note 98, at 44. Although some cable systems may need different wiring to be able to use addressable converters, a franchising authority can also require such “upgrading” of a cable system when the cable franchise is renewed. Cable Act § 626 (b)(2), 47 U.S.C. § 546(b)(2) (Supp. III 1985); see also H.R. Rep. No. 934, supra note 100, at 20, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4657 (stating that the Cable Act “[g]rants cities affirmative authority to require upgrading of facilities . . . during the renewal process”).

\(^{159}\) 1 Comm’n on Pornography, supra note 1, at 581 (quoting Brief for Pacifica Foundation at 49 n.40, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528)).
the 'lockbox' argument" and would consider it equally irrelevant in the context of cable television.\(^{160}\)

This analysis is wrong for several reasons. First, the reference to the lock box, which appeared only in a footnote of the brief,\(^{161}\) hardly constituted a major part of the argument and was never discussed by either the FCC or the Supreme Court. Moreover, the probable reason that the Court did not discuss the device, if it came to their attention at all, was that a device to control what a viewer sees on a television set is simply not relevant to an analysis of an FCC ruling on indecent radio programming. As the Court stressed, "the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast."\(^{163}\) Thus, Pacifica does not foreclose a finding that cable lock boxes provide an appropriate means for protecting unwilling viewers.

The Attorney General's Commission also criticized blocking devices because "the method is far from foolproof."\(^{163}\) The Report describes three instances in which "adult" programming "slipped through an electronic loophole."\(^{164}\) The very few instances when unwanted programming has slipped through, however, are insufficient to render the blocking technologies an inadequate solution. It is irrational to bar all indecent programming when virtually all offensive programs can be blocked, simply because of the freak possibility that an indecent program will both get through the technological barrier and be seen by an offended viewer.\(^{165}\) A cable system should not be purged of programming

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160. *Id.* Although the Commission on Pornography makes this observation in support of its argument that the FCC should regulate "obscene" cable programming, *id.* at 573, their argument would apply as well to a ban on "indecent" programming.

161. *Brief for Pacifica Foundation, supra* note 159, at 49 n.40. The appendix to the brief included an advertisement for a device called a "Video Protector." *Id.* at 20a.

162. *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978). There is also a difference between requiring parents to pay between $50 and $60 for the right to enjoy otherwise free broadcast television without fear of indecent programming, *Brief for Pacifica Foundation supra* note 159 at 20a, and requiring such an outlay in addition to other payments necessary to receive cable television. The first alters the fundamental concept of the medium; the second is perfectly consistent.

163. *1 COMM'N ON PORNOGRAPHY, supra* note 1, at 581.

164. *Id.* at 581-82. In one case, all residents of Tampa, Florida, received adult programming for two weeks due to a "technological anomaly that was triggered by certain weather conditions." *Id.* at 581. In a second case, the Playboy Channel mysteriously appeared in place of a "Rin Tin Tin" movie on the Disney Channel. *Id.* at 582. Third, a "scrambled" adult channel was insufficiently scrambled; sound could be heard and, occasionally, a picture could be seen. *Id.*

165. The ludicrous nature of this argument can be seen by considering its application to the following scenario: 10,000 records labeled as Lawrence Welk's "World's Greatest Polkas" mistakenly contained songs by the Sex Pistols, including "I Want to Be Your Dog." The record company reported receiving "several dozen" irate calls from those
“that is entirely suitable for adults” to achieve a “marginal degree of protection.” The Supreme Court has struck down similarly excessive regulations that would limit speech between willing adults and that lacked reasonable restriction to the harm addressed. Using another porcine analogy, the Court has warned us not “to burn the house to roast the pig.”  

A federal judge has offered an alternate objection to lock boxes as the remedy for indecent cable programming, which again applies equally to addressable converters. This objection notes that lock boxes require advance planning and thereby fail to protect those who scan from channel to channel and whose viewing of a given channel is “unplanned and incomplete.” A cable operator can alleviate this problem simply by notifying a new subscriber of the channels likely to contain occasionally “offensive” programming. Thus, the subscriber who wants to avoid the “single blow” of indecent programming can block out those channels from the start and still receive many other channels, such as broadcast channels, as well as special news and “family” channels. Such a subscriber will be able to “scan” without fear of encountering offensive programming; if a desired program will appear on one of the “suspect” channels, the subscriber complaining that the language was “awful... typical of a rock group.” Welk Disks’ Mislabeling Isn’t Just a Vicious Rumor, Wall St. J., Feb. 25, 1987, at 4, col. 1. Under the anti-lock box argument, no records could contain “indecent language” to spare the sensibilities of those who might be offended if this unlikely technological mishap were to recur.


167. See id. (striking down ban on unsolicited mailed contraceptive advertisements); Butler v. Michigan, 352 U.S. 380, 383 (1957) (striking down a law barring the sale to adults of reading material that was “unsuitable” for children).

168. Bolger, 463 U.S. at 74 n.27 (quoting Butler, 352 U.S. at 383).


170. Id.

171. Such channels might include not only “adult” channels, such as the Playboy channel, but movie channels, such as Home Box Office, that periodically show R-rated movies and, perhaps, access channels on which cable operator censorship is prohibited. See infra text accompanying notes 261-67.

172. Thus, cable viewers will receive even more protection than postal patrons who are only “able to avoid the information in [offensive] advertisements after one exposure.” Bolger v. Youngs Drug Prods. Co., 463 U.S. 60, 78 (1983) (Rehnquist, J., concurring).

173. Channels designed especially for children include the Disney Channel and Nickelodeon.
scriber can easily unlock the lock box or, in the case of addressable converters, notify the operator to allow the channel through.\textsuperscript{174}

If lock boxes and addressable converters can protect both unwilling listeners and unsupervised children, then no justification exists for a total ban on indecent cable programming. It would, therefore, not matter whether indecent cable programming was offered on the "basic tier"\textsuperscript{176} provided to all subscribers, or to a higher tier for which subscribers pay an extra fee. For either tier, individual subscribers have the technological power to restrict programming for their homes.

Some have suggested that, even if a total ban on indecent programming is unconstitutional, regulation could simply channel the indecency to a later time period.\textsuperscript{176} According to one proponent of this approach, though such channelling would not protect late night viewers, it would at least protect many households.\textsuperscript{177}

This proposal contains a major flaw because it ignores the basic constitutional principle that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."\textsuperscript{178} Time-channelling would prevent adults from viewing constitutionally protected programming during daytime and early evening hours, the only time some adults have available for watching television.\textsuperscript{179} Government simply cannot use channelling to limit access to protected speech, absent narrow exceptions that do not apply to regulation of indecency on cable television.

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\item[174.] It has also been argued that "the unwanted complexity these devices introduce into television viewing is attested to by their lack of use." Jones v. Wilkinson, 800 F.2d 989, 1006 (10th Cir. 1986) (Baldock, J., concurring), summarily aff'd, 107 S. Ct. 1559 (1987). One estimate is that fewer than one percent of cable subscribers have purchased lock boxes. \textit{Id.} at 1003. This conclusory statement ignores the myriad other possibilities for lack of use, including general subscriber satisfaction with programming and lack of publicity of the availability of the devices. Additionally, an addressable system, requiring only a telephone call to the cable operator, creates no such complexity.

\item[175.] \textit{See} Cable Act § 602(2), 47 U.S.C. § 522(2).

\item[176.] \textit{See} Jones, 800 F.2d at 1007 (Baldock, J., concurring) (stating that such channelling would be constitutional).

\item[177.] \textit{Id.} at 1006.

\item[178.] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

\item[179.] \textit{Cf.} FCC v. Pacifica Found., 438 U.S. 726, 774 (1978) (Brennan, J., dissenting) (stating that alternatives to afternoon broadcasts "involve[d] the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford"); Carlin Communications, Inc. v. FCC, 749 F.2d 113, 121 (2d Cir. 1984) (finding that channelling "dial-a-porn" telephone service to late hours "denies access to adults between certain hours").
\end{enumerate}
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For example, a content-neutral regulation that governs all speech may constitutionally impose time, place, or manner restrictions. Thus, the Court has upheld a restriction limiting the distribution and sale of religious material at a state fair to assigned booths because the rule "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds."\(^\text{180}\) By contrast, the Court struck down a ban on the inclusion by a public utility of discussions of controversial issues in its billing envelopes because the prohibition was not content-neutral.\(^\text{181}\) The channelling of only "indecent" cable programming resembles the billing envelope restriction and similarly does not constitute content-neutral regulation.

The Supreme Court has permitted the zoning of sexually-oriented movie houses, yet categorized such zoning as content-neutral because the regulations did not aim at the content of the films, but at the secondary effects of such theaters.\(^\text{182}\) These cases do not apply, however, to an analysis of the regulation of cable programming. Even when upholding such zoning, the Court has reaffirmed prior holdings that regulation is impermissible when "the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, 'offensive' speech."\(^\text{183}\) Because indecent cable programming creates no secondary effects to either a city, neighborhood, or individual home and because the possible exposure to unwanted "offensive" speech presents its only "effect,"\(^\text{184}\) such programming may not be "zoned" to a late night time slot.\(^\text{185}\)


\(^{182}\) City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The "secondary effects" that motivated the city of Renton, Washington, included crime prevention, protection of the city's retail trade, maintenance of property values, and general protection and preservation of the quality of the city's neighborhoods and commercial districts. Renton, 475 U.S. at 48; see also Young, 427 U.S. at 71 n.34 (Stevens, J., plurality opinion).

\(^{183}\) Young, 427 U.S. at 71 n.34 (Stevens, J., plurality opinion) (distinguishing zoning of movie houses from a ban on nudity in movies shown at drive-in theaters held facially invalid in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)). Professor Nimmer has termed the Young-Erznoznik distinction, "the difference between a non-speech restriction and an anti-speech restriction." M. Nimmer, Nimmer on Freedom of Speech 2-99 (1984).

\(^{184}\) See, e.g., Jones v. Wilkinson, 800 F.2d 989, 1006 (10th Cir. 1986) (Baldock, J., concurring) (stating that diverse programming should be available to all cable subscribers, regardless of whether they object to "patently offensive indecent material being presented during family viewing hours").

\(^{185}\) Cases upholding laws requiring that the covers of sexually oriented publications displayed for sale be concealed if they could be seen by minors, Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983), also do not apply to cable programming. Not
Such channelling also fails to represent the least restrictive means for advancing the goal of ensuring that the opportunity to enjoy the diversity of programming offered by cable television is, in the words of one judge, "available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours." The technology of cable television—specifically, lock boxes and addressable converters—permits the protection of this objecting subscriber without infringing on the rights of non-objecting subscribers.

Accordingly, any governmental attempt to limit the hours that a cable operator may offer constitutionally protected indecent programming must be struck down, just as a total ban would be. Each proposed limitation on speech, however valid the underlying governmental purpose, is "not reasonably restricted to the evil with which it is said to deal."

B. The Legislative Solution

The Cable Communications Policy Act of 1984 created a complex scheme for regulating pornography on cable television. Congress attempted to balance the competing interests of those who wished to keep such programming out of their homes with the first amendment rights of programmers and willing view-

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186. Jones, 800 F.2d at 1006 (Baldock, J., concurring).
187. See supra text accompanying notes 156-58.
ers.\textsuperscript{190} To protect the unwilling viewer, Congress mandated that the cable operator make "lock boxes" available to block out possibly offensive programming. The statute contains a complex scheme for regulating program content, which includes a variety of standards that depend on whether the material is "obscene" or "indecent" and on whether programming is offered on channels within the cable operator's editorial control or on access channels. The heart of the balance, however, provides that, except for obscenity, the speaker shall not be silenced, the willing viewer shall receive the programming, and the unwilling viewer shall be protected by technology, not by the censor.

1. The Right Not to See— In drafting the Cable Act, Congress was "extremely concerned" about the cablecasting of sexually explicit material, especially to children.\textsuperscript{191} At the same time, Congress recognized that the first amendment precludes a system of governmental censorship of cable programming.\textsuperscript{192}

Although permitting franchising authorities to ban obscene material completely,\textsuperscript{193} Congress devised a method for dealing with indecent, but not obscene, material.\textsuperscript{194} Section 624 of the Act requires that all cable operators make available to their subscribers the technological means for blocking out particular cable channels: "In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."\textsuperscript{195}

The requirement of so-called lock boxes demonstrates the congressional desire to protect the right to avoid certain kinds of programming in the home without restricting the rights of those who wish to receive the programs. Congress considered these devices a solution to the thorny cable indecency problem, stating that a lock box requirement "provides one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amend-

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\item 191. Id.
\item 192. Id.
\item 193. See infra text accompanying notes 199-203.
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ment rights of the cable operator, the cable programmer, or other cable viewers."\textsuperscript{196}

2. **Obscenity and the Cable Act**—All levels of government may ban obscene cable programming under the Cable Act. Section 639 makes it a federal criminal offense, subject to a $10,000 fine or imprisonment for up to two years, to transmit obscene programming over a cable system;\textsuperscript{197} section 638 permits state and local governments to impose civil and criminal liability for the cablecasting of obscene programming;\textsuperscript{198} section 624 permits franchising authorities to include in a franchise agreement either a ban on, or restrictions covering, obscene programming.\textsuperscript{199} When using the term "obscene" in these sections, Congress explicitly adopted the *Miller v. California* obscenity standard.\textsuperscript{200}

Some confusion exists over whether a franchising authority may permit obscene programming. Section 624 states that a franchising authority may specify in a franchise that obscene programming "shall not be provided or shall be provided subject to conditions." As the Commission on Pornography points out, however, "Section [624] seems to contemplate allowing the operator to provide obscene programming while Section [639] makes

\textsuperscript{196} H.R. Rep. No. 934, \textit{supra} note 100, at 70, \textit{reprinted in} 1984 U.S. Code Cong. & Admin. News at 4707. In an interpretive rule, the FCC attempted to undo this balance by stating that a cable operator need only provide a lock box able to block out "any channel over which [the cable operator] has editorial control," but not public and commercial access channels. Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act, 50 Fed. Reg. 18,637, 18,655 (1985) [hereinafter Implementation].

\textsuperscript{197} Cable Act § 639, 47 U.S.C. § 559.


\textsuperscript{199} Cable Act § 624, 47 U.S.C. § 544.

it a crime to do so." Thus, the question becomes whether a local franchising authority can permit, albeit subject to conditions, programming that federal law would otherwise bar.

If the programming expressly permitted by the local government would still be subject to federal criminal penalties, the statutory language "or shall be provided subject to conditions" would be meaningless. Although it would be unusual to allow a local government to immunize conduct from federal stricture, the field of obscenity regulation might be the area of law where such immunization makes the most sense. Perhaps Congress, aware of the importance of judging obscenity by "community standards," has decided to permit each community to have the final say on whether to allow, within its borders, cable programs that might meet the definition of "obscene." Thus, a program permitted by the local franchising authority would be protected against charges of violating the federal obscenity provision.

3. Is Indecency Prohibited?—Whether the Cable Act bans "indecent" cable programs and permits local governments to ban such programs presents an even more difficult question. Section 639 criminalizes the cablecasting of programs that are "obscene or otherwise unprotected by the Constitution of the United States." Similarly, section 624 permits franchising authorities to include provisions in their franchise agreement that bar, or subject to conditions, the cablecasting of programming

202. See, e.g., Hamling v. United States, 418 U.S. 87 (1974): [A] 'community' approach may well result in material being proscribed as obscene in one community but not in another . . . . But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

Id. at 107 (quoting Jacobellis v. Ohio, 378 U.S. 184, 200-01 (1964) (Warren, C.J., dissenting) (emphasis added)); see also Miller v. California, 413 U.S. 15, 33 (1973) ("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.").
203. Cf. Smith v. United States, 431 U.S. 291 (1977). Though holding that the lack of a state obscenity law would not bar federal prosecution for sending obscenity through the mails in that state, the Court stated:

Even though the State's law is not conclusive with regard to the attitudes of the local community on obscenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence . . . . On the contrary, the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law.

Id. at 307-08.
that is "obscene or . . . otherwise unprotected by the Constitution of the United States."\textsuperscript{205}

Congress did not explicitly define the phrase "otherwise unprotected" contained in these two sections. Furthermore, the House Report gives only two specific examples of this "otherwise unprotected" speech: "fighting words" and speech presenting "a 'clear and present danger' to public order."\textsuperscript{206} In its discussion of indecency, however, the Report noted that the Supreme Court had upheld the indecency standard for broadcasting in \textit{Pacifica}, but that lower courts had struck down the standard when applied to cable.\textsuperscript{207} Without taking a stand on the proper constitutional standard for cable television, the Report stated that the statutory language "would also permit changing constitutional interpretations to be incorporated into the standard set forth in [section] 624(d)(1), should those judicial interpretations at some point in the future deem additional standards, \textit{such as indecency}, constitutionally valid as applied to cable."\textsuperscript{208}

Congress's apparent attempt to create a flexible standard, one that will encompass indecent programming if and only if permitted to do so by "judicial interpretation" of the Constitution, contains several major problems.\textsuperscript{209} First, even in \textit{Pacifica}, the Court did not say that indecency was "unprotected by the Constitution."\textsuperscript{210} The Court held that indecent broadcasts could be

\textsuperscript{205} Cable Act § 624(d)(1), 47 U.S.C. § 544 (d)(1). The Act establishes a different regulatory scheme for programming shown on public and commercial access channels. See infra text accompanying notes 261-79.


Though the House Report never states that the federal criminal provision of § 639 and the regulatory provision of § 624(d)(1) have the same meaning, it is probably safe to assume that Congress intended the phrase "obscene or otherwise unprotected by the Constitution" to have the same meaning in both sections.

\textsuperscript{209} The House Report does not indicate to which level of court the phrase "judicial interpretation" refers. \textit{Id.} at 69, reprinted in 1984 U.S. Code Cong. & Admin. News at 4706. If a state or federal district court permits regulation of cable indecency, will that interpretation rewrite the statute, even if other courts disagree? In the name of certainty, at least, the only "judicial" interpretation that could matter would be that of the United States Supreme Court.

\textsuperscript{210} FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (Stevens, J., plurality opinion) ("Although [indecent] words ordinarily lack literary, political, or scientific value, they are
regulated despite their protection under the Constitution. Thus, even if the Supreme Court were to hold that the rationale in Pacifica could be applied in toto to cable television, thus permitting the regulation of the appearance of indecency on cable, the literal statutory language of the Cable Act prohibiting (or permitting regulation of) "unprotected" speech still would not encompass indecency. \(^{211}\)

A second problem is practical: the application of an "indecency" standard would bar much popular programming. As one member of the Commission on Pornography noted:

[If the "indecency" standard currently in force with regard to broadcast television were also imposed on cable television, most of the mainline Hollywood films currently on view in theaters across the country could not be shown on home television served by cable. It is hardly likely, even inconceivable, that the courts . . . would uphold such an extension of the indecency standard to cable television.\(^{212}\)]

A final, and related, problem comes from the question of whether section 639, a federal criminal provision, is unconstitutionally vague. It is hardly likely that Congress intended cable operators throughout the country to read section 639 as suddenly prohibiting them from presenting "most of the mainline Hollywood films." \(^{213}\) Yet it remains unclear how else courts would apply an "indecency" standard to cable programming. This uncertainty violates the precept issued by the Supreme Court: "[C]riminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful con-

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not entirely outside the protection of the First Amendment."); cf. Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

211. Brenner and Price have pointed out that Congress took the phrase "otherwise unprotected" from an earlier version of a bill that later evolved into the Cable Act. D. BRENNER & M. PRICE, supra note 137, § 6.09 [3][c], at 6-95 n.46 (citing S. 66, as reported by the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 67, 98th Cong., 1st Sess. (1983)). The report accompanying that bill stressed that "otherwise unprotected" did not mean indecency, but material such as child pornography that was unprotected, even if not obscene. Id; see, e.g., New York v. Ferber, 458 U.S. 747 (1982).

212. 1 COMM’N ON PORNOGRAPHY, supra note 1, at 104 (statement of Father Bruce Ritter).

213. Home Box Office, the most popular movie channel, with over 14 million subscribers, Cable Services Subscriber Count, CABLEVISION Sept. 29, 1986, at 64, shows many films containing "indecency," including Kramer v. Kramer, Coming Home, The Deerhunter, and One Flew Over the Cuckoo’s Nest. Krattenmaker & Esterow, supra note 105, at 612.
duct . . . ."214 The Court has further stressed that where a criminal law touches on first amendment rights, "government may regulate . . . only with narrow specificity."215 The Court requires this heightened degree of specificity in the area of free speech to avoid any potential chilling effect on constitutionally protected speech. With a vague statute, speakers may decide that they can only avoid breaking the law "by restricting their conduct to that which is unquestionably safe."216

The interpretation of section 639 described in the House Report thus appears too vague to pass constitutional muster. Imagine a cable programmer desiring to present George Carlin describing the "seven words you can’t say on television" or the movie *Carnal Knowledge.*217 A look at section 639 informs programmers that they may not show programming that is "obscene or otherwise unprotected by the Constitution of the United States." The term "obscenity," though imprecise, "is a term sufficiently *definite in legal meaning* to give a defendant notice of the charge against him."218 The Supreme Court, however, has found that neither the Carlin monologue nor the movie is "obscene,"219 despite the "vulgar and offensive"220 language contained in the monologue and the nudity and depictions of "ultimate sex acts"221 presented in the movie.

To determine the legality of presenting the two programs, then, the programmer must determine whether they qualify as "otherwise unprotected by the Constitution of the United States." Because neither program presents fighting words nor a clear and present danger to society, a programmer must decide

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214. United States v. Sullivan, 332 U.S. 689, 693 (1948); see also Musser v. Utah, 333 U.S. 95, 97 (1948) ("Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding . . . . ").

215. NAACP v. Button, 371 U.S. 415, 433 (1963); see Hoffman Estates v. Flipside, 455 U.S. 489, 499 (1982) (stating that if a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply").


221. *Jenkins,* 418 U.S. at 161.
whether section 639 prohibits them because of their "indecency."\textsuperscript{222} It would be utterly impossible for a programmer to know whether section 639 forbids indecency because Congress itself did not know. Congress has thus deliberately drafted a paradigm of vagueness.

Professor Laurence Tribe created the following hypothetical law to illustrate an unquestionably "patently vague" statute: "It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments."\textsuperscript{223} Though no legislative body would actually enact Professor Tribe's statute, section 639 accomplishes exactly the same result as would the statute. By criminalizing the cablecasting of all programming that is unprotected by the Constitution, Congress has made it "a crime to say anything [on cable television] unless the speech is protected by the first and fourteenth amendments."

Both the hypothetical statute and the Cable Act create the same problem:

\textit{The Constitution does not, in and of itself, provide a bright enough line to guide primary conduct, and ... a law whose reach into protected spheres is limited only by the background assurance that unconstitutional applications will eventually be set aside is a law that will deter too much that is in fact protected.}\textsuperscript{224}

Thus, to prevent unconstitutional vagueness—to meet the certainty required by the due process clause and to avoid deterring protected speech—courts and local governments should give a limiting construction to section 639 and interpret it as only criminalizing "obscene" speech.\textsuperscript{225}

\textsuperscript{222} The Court in \textit{Pacifica} did not decide whether the FCC's definition of indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," \textit{Pacifica Found.}, 56 F.C.C.2d 94, 98 (1975), was unconstitutionally vague. \textit{Pacifica}, 438 U.S. at 742-43. The Court did cite a dictionary definition of "indecent": "Webster defines the term as 'a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality; . . .'. \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} (1966)." \textit{Pacifica}, 438 U.S. at 740 n.14 (deletions in original).

\textsuperscript{223} \textit{L. Tribe, supra} note 52, § 12-26, at 716 (emphasis added).

\textsuperscript{224} \textit{Id.} (emphasis in original).

In sum, the phrase "obscene or otherwise unprotected by the Constitution," contained in both section 639's criminal offense provision and section 624's regulatory provision, should be read to comport both with its plain meaning and with constitutional requirements. "Indecent" programming, which remains indeed "protected" by the Constitution, should not be included within the phrase.

4. Indecency and Preemption— Confusion also exists as to whether the Cable Act preempts state and local governmental regulation of cable indecency. The Cable Act prohibits content regulation by state and local government except where the Act specifically preserves such power. Section 624(f)(1) bars all levels of government from "imposing requirements regarding the provision or content of cable services, except as expressly provided in this title." Section 638 preserves the ability of state and local governments to regulate "libel, slander, obscenity, incitement, invasions of privacy, false and misleading advertising, or other similar laws." It remains unclear, however, whether section 638 permits local regulation of indecent programming as well.

The ultimate question in interpreting section 638, of course, becomes whether indecency is "similar" to obscenity and, thus, covered by the section. Indecency and obscenity may appear "similar" in that both involve "offensive" depictions of sex. They remain fundamentally dissimilar, however, in the type of material they encompass: "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."
The legislative history of the Cable Act provides further evidence that Congress did not intend for section 638 to include "indecency." Although Congress did not use the term "indecency" in section 638, it used the term elsewhere in the statute.\textsuperscript{231} As one court commented: "These explicit indecency provisions strongly imply that Congress deliberately omitted indecency from Sec[tion] 638. It is unlikely that Congress would accidentally omit indecency from Sec[tion] 638, which defines important areas of federal, state and local power, and remember to include indecency in other sections of the Act.\textsuperscript{232} Thus, Congress may have intended to combat obscenity by authorizing state and local criminal and civil penalties in addition to providing federal sanctions. As for indecent programming, perhaps Congress intended the remedy to be the availability of lock boxes—a remedy with a less restrictive effect on free speech interests.\textsuperscript{233}

Alternatively, Congress may have preferred that negotiations between the cable operator and the city produce any ban on indecent programming, assuming the constitutionality of any such ban. Congress could possibly have decided that a franchise negotiated between the cable operator and the municipality represents a more appropriate place for working out difficult areas of content regulation than a unilaterally imposed state or local law. In section 624, Congress stressed that both parties have input into this sort of franchise provision: "Nothing in this title shall be construed as prohibiting a franchising authority and a cable

\textsuperscript{231} See, e.g., Cable Act § 624(d)(2), 47 U.S.C. § 544(d)(2) (requiring signal blocking devices, so-called "lock boxes," to be provided "[i]n order to restrict the viewing of programming which is obscene or indecent . . .") (emphasis added); Cable Act § 612(h), 47 U.S.C. § 532(h) (permitting local regulation of programming on commercial access channels if the programming is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent") (emphasis added).

\textsuperscript{232} Community Television, 611 F. Supp. at 1104. This analysis is strengthened by the requirement in one of those "explicit indecency provisions" that every cable operator make a lock box available to subscribers. § 624(d)(2), 42 U.S.C. § 544(d)(2). Congress intended this device, which allows a viewer to "lock out" certain channels and keep them off the home television screen, to provide "one means to effectively restrict the availability of [indecent] programming, particularly with respect to child viewers." H.R. Rep. No. 934, supra note 100, at 70, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4707; see supra discussion at notes 191-96. Thus, when Congress considered the question of "indecency," it did so in the context of lock boxes, but not when giving localities the power to impose liability for programming.

\textsuperscript{233} This balance is reflected in the language of the House Report that describes lock boxes as "one means to effectively restrict the availability of such [indecent] programming . . . without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." H.R. Rep. No. 934, supra note 100, at 70, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4707.
company from specifying, in franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if . . . obscene or otherwise unprotected by the Constitution of the United States." This language contrasts with other sections of the Cable Act, such as those covering public access and franchise renewal, that allow a municipality unilaterally to place certain requirements in the franchise.

Although Senator Goldwater stated that he understood Section 639 to cover indecency "if otherwise constitutionally permissible," his conclusion probably did not represent the intent of the full Congress. The House Report contains no similar declaration, and Senator Goldwater's remarks were not spoken during congressional debate but were instead inserted afterwards in the Congressional Record. Because of the impossibility of definitively determining whether Congress intended to include "indecency" among the "similar" laws preserved by section 638, it is probably best to use the reasoning of the Su-

234. Cable Act § 624(d)(1), 47 U.S.C. § 544(d)(1) (emphasis added). It is possible, however, that § 624(d)(1) does not encompass indecency either. See supra text accompanying notes 204-25.

235. See Cable Act § 611(b), 44 U.S.C. § 531(b) ("A franchising authority may in its request for proposals require as part of franchise . . . that channel capacity be designated for public, educational, or governmental use . . . .") (emphasis added); § 626(b)(2), 47 U.S.C. § 546 (b)(2) (requiring proposals for franchise renewal to "contain such material as the franchising authority may require, including proposals for an upgrade of the cable system") (emphasis added).


237. The House Report states that § 639 preserves:

the criminal or civil liability of cable programmers or cable operators with respect to . . . state and local laws not inconsistent with this title relating to libel, slander, obscenity, incitement, privacy, false or misleading advertising, or other similar areas of law. . . .

The Committee does not intend to affect liability which might result from other speech which may be held by the courts to be unentitled to constitutional protection (as discussed in relation to § 624(d)).

H.R. REP. No. 934, supra note 100, at 95, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4732 (emphasis added).

The reference to the earlier discussion can have two meanings. On the one hand, that discussion of § 624(d) did say that "obscenity" in § 624 will include "indecency" if the courts permit. Id. at 69, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4706. On the other hand, if the earlier discussion is meant simply to illustrate unprotected speech "other" than those (such as obscenity) that the preceding sentence listed, the reference would be to unprotected speech such as "fighting words" and that posing a "clear and present danger" to the public order. Id. The House Report discussion of "other" speech, therefore, does not establish whether Congress intended to include "indecency" within § 638.

preme Court in other cases involving obscenity laws written in unclear language:

[W]e do have a duty to authoritatively construe federal statutes where a "serious doubt of constitutionality is raised" and "a construction of the statute is fairly possible by which the question may be avoided." If and when a "serious doubt" is raised as to the vagueness of [statutory language]. . . we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California. Of course, Congress could always define other specific "hard core" conduct. 239

A "serious doubt" does exist as to the constitutionality of regulating indecent cable programming; 240 in fact, Congress expressed such doubts while drafting the Cable Act. 241 Additionally, there is a construction of section 638 that avoids the question of its constitutionality. Accordingly, the vague statutory language, "libel, slander, obscenity, incitement, invasions of privacy, false and misleading advertising, or other similar laws," contained in section 638 should be read to preserve local authority to regulate speech over cable television only if Congress understood such regulation to be constitutional when it drafted the Cable Act in 1984. Indecency, omitted from the statutory list, would not be subject to state and local regulation, unless and until Congress decided to add it to its list.

5. Access: Regulating the Electronic Soapbox— In drafting the Cable Act, Congress sought to protect the cable operator's right of free expression when presenting programming to the

239. Hamling v. United States, 418 U.S. 87, 113 (1974) (quoting United States v. 12 200-ft Reels of Film, 413 U.S. 123, 130 n.7 (1973)) (citations omitted). In Hamling, the Court construed the language in 18 U.S.C. § 1461 barring "obscene, lewd, indecent, filthy or vile" material from the mails as limited "to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California." Hamling, 418 U.S. at 114. The Court refused to place a similar limitation on statutory language in Pacifica. This holding does not affect the interpretation of § 638, because, the Pacifica statute, unlike § 638, expressly included the word "indecent." ("Whoever utters any obscene, indecent, or profane language by means of radio communication . . . ." 18 U.S.C. § 1464 (1976) (emphasis added)). As the Pacifica Court stated, "The plain language of the statute does not support [a limiting interpretation]. The words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning." FCC v. Pacifica Found., 438 U.S. 726, 739-40 (1978).

240. See supra text accompanying notes 107-88.

241. See H.R. REP. NO. 934, supra note 100, at 69-70, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4706-07; see also supra text accompanyng notes 207-08.
public; yet Congress remained equally concerned with protecting the rights of the members of a community to communicate via the cable system. Congress recognized that the technology of cable television could, for the first time, provide the public with effective access to a medium of mass communication, without infringing on the first amendment rights of the "owner" of the medium. Congress thus included third party access requirements in the Cable Act to ensure that many speakers would be able to communicate through a cable system, and that the single cable operator in town would not be able to exercise unlimited power as gatekeeper over the entire cable system. Congress stated that access requirements, like antitrust laws, constitute "structural regulations" that limit concentration of media control and increase the diversity of information sources, without imposing governmental control of content.

The Cable Act provides two ways for parties unaffiliated with the cable operator to obtain access to the cable system: public access channels that the franchise agreement itself can require, and commercial access, which the Cable Act mandates for systems with thirty-six or more channels. A major difference between these two forms of access is that the cable operator traditionally provides channel time on public access free of

242. See id. at 69, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4706 (stating that § 624 bars franchising authorities from requiring cable operators to carry "a particular news service, a specific program, etc.").

243. One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. Id. at 30, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4667.

244. See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.").

245. H.R. REP. No. 934, supra note 100, at 32, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4669. The most recent court case has found cable access rules to be constitutional. Berkshire Cablevision, Inc. v. Burke, 571 F. Supp. 976 (D. R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985). But see Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055-56 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979) (stating in dictum that the access rules imposed by the FCC were unconstitutional).

246. Cable Act § 611, 47 U.S.C. § 531. The franchise can also set aside channels for educational and governmental access. Id.

247. Cable Act § 612, 47 U.S.C. § 532. A system with between 36 and 54 activated channels—that is, channels available for use—must set aside 10% of its channels (not counting those whose use federal law and regulation mandate or prohibit). A system with between 55 and 100 channels must set aside 15% of such channels. A system with more than 100 channels must set aside 15% of all channels. Cable Act § 612(b), 47 U.S.C. § 532(b).
charge, while commercial access users must pay a rate negotiated with the cable operator.\textsuperscript{246}

\textit{a. The cable operator and access—} Before the passage of the Cable Act, many cable operators tried to keep obscene or indecent programming off both kinds of access channels by prescreening programming. Cable companies justified this practice as necessary to determine whether the programming would subject the cable system to legal liability for transmitting obscene or indecent programming.\textsuperscript{248} Past FCC practice made cable operators justifiably apprehensive about the possible imposition of such liability. In the 1970’s, FCC regulations had expressly made cable operators liable for obscene and indecent access programs, requiring them to keep such programming off the access channels.\textsuperscript{250} The FCC’s rules required operators to prescreen any programs suspected of including “questionable” programming and to refuse to allow the airing of the program if the programmer refused to delete the “offending portion.”\textsuperscript{251} The FCC also told operators that they might have to bar offending programmers from using the channel “for a considerable length of time.”\textsuperscript{252}

In 1978, the Eighth Circuit struck down the FCC rules.\textsuperscript{253} The court found the rules fatally flawed because they “created a corps of involuntary government surrogates, but without providing the procedural safeguards respecting ‘prior restraint’ re-
quired by the government." The Supreme Court has required strict procedural safeguards to reduce the risk that regulation of obscenity will lead to a burdening of protected expression. Any plan for administrative review of material for obscenity must: (1) require prompt judicial review of all administrative determinations of obscenity; (2) place the burdens on the censor of initiating review and of proving the material is unprotected; and (3) limit any administrative restraint on the material to the shortest time necessary for obtaining a final judicial review.

For a regulatory scheme for access channels to be constitutional under the Court's guidelines, therefore, the government must ensure that the final determination as to whether an access program may be cablecast rests with the independent judiciary. The censoring authority would bear the burdens of bringing the program before the judiciary as quickly as possible and proving that the program met the legal definition of obscenity. These are indeed heavy burdens. The Supreme Court has deliberately placed them on governments that are regulating nonprotected speech to "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." Furthermore, governments may not avoid this constitutional mandate by requiring that a nongovernmental party do the censoring. In 1981, the FCC recognized that its requirements for censorship of access programming by cable operators lacked the necessary procedural safeguards and removed its rules imposing liability on operators for such programming.

254. Midwest Video Corp., 571 F.2d at 1056.
256. Southeastern Promotions v. Conrad, 420 U.S. 546, 562 (1975) (concerning access to municipal theater); Blount v. Rizzi, 400 U.S. 410, 417 (1971) (discussing regulation of the mails); Freedman v. Maryland, 380 U.S. 51, 58-60 (1965) (considering motion picture censorship). These requirements are often referred to as "Freedman requirements," after the first case to enunciate them.
257. "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." Freedman, 380 U.S. at 57-58.
259. See Blum v. Yaretsky, 457 U.S. 991, 1009 (1982) (holding that one indicium of state action is whether private action has been "dictated by any rule of conduct imposed by the State").
260. Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of § 76.251, 87 F.C.C.2d 40, 42 (1981) ("[A] rule which requires the cable system operator to censor
In drafting the Cable Act, Congress agreed that protecting free speech rights over access channels requires that cable operators not interfere with access programming whether in response to governmental edict or on their own accord. Congress declared that "separat[ing] editorial control over a limited number of cable channels from the ownership of the cable system itself . . . is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment." To assure that cable systems "provide the widest possible diversity of information sources and services to the public," the Cable Act explicitly bars cable operators from censoring or exercising any control over the content of access programming. Congress stated that such freedom was integral to the concept of the use of access channels. Congress designed the Cable Act to prevent a recurrence of the situation where the cable operator had the power to limit the access programmer's first amendment rights. To remove the need for censorship, Congress specifically provided that cable operators could not be found legally liable for the content of access programming. Thus, for access channels, the law now regards the role of the cable operator as similar to that of a telegraph or telephone company—simply the owner of the wires that the public will use for transmitting information: "With regard to the access requirement, cable operators act as . . . conduits. They do not exercise their editorial discretion over the programming . . . ."
The Cable Act thus protects the operators from liability for access programming, and provides that operators may only act

this image of cable operators as conduits for access programming. The Cable Act states: "Subject to section 624(d), a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section." Cable Act § 611(e), 47 U.S.C. § 531(e) (emphasis added). It might seem that § 624(d) would contain the exception to the ban on operator editorial control over access. Section 624(d), however, consists of two subsections, neither of which give the operator any editorial control.

Section 624(d)(1) states that the Cable Act does not bar "a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if . . . obscene or . . . otherwise unprotected by the Constitution of the United States." Cable Act § 624(d)(1), 47 U.S.C. § 544(d)(1) (emphasis added). Section 624(d)(2) requires cable operators to make lock boxes available to subscribers. See supra text accompanying notes 191-96. The phrase, "specifying, in a franchise . . . that certain cable services shall not be provided," should not be interpreted to permit a franchising authority to require an operator to censor "obscene" access programs. Not only would such a requirement subject the operator to the stringent procedural demands imposed on governmentally authorized censors, see supra text accompanying notes 255-56, it would eliminate an important protection provided in the Cable Act for the cable operator—the provision that cable operators cannot be held liable by federal, state, or local government for any programming, including obscenity, shown on access channels. Cable Act § 638, 47 U.S.C. § 558. Congress explained this provision by noting that the law "prohibits the operator's editorial control over all such channels." H.R. Rep. No. 934, supra note 100, at 95, reprinted in 1984 U.S. Cod. Cong. & Admin. News at 4732. Liability may still be imposed, however, on the producers of access programs and on anyone, including a cable operator, who "exercise[s] control over the content of programs." Id. Any exercise of power over access programming by an operator would thus remove the protection from liability created by Congress. It is unlikely that Congress intended to contradict itself and expose cable operators to liability for access programming when it permitted "specifying in a franchise" that obscene programming would not be shown. See D. Brenner & M. Price, supra note 137, § 6.04[5], at 6-39.

The Cable Act prohibits all editorial control over access by the operator. See supra text accompanying notes 244-68. Section 624(d)(1), therefore, should not be read as permitting a franchising authority to require that a cable operator exercise "editorial control" over access programming by deciding which programs meet the definition of "obscene." Moreover, § 624(d)(1) can be given a far more plausible interpretation: a franchising authority may "specify" in the franchise agreement that programming that has previously been judicially determined to be "obscene" shall not be shown on the access channel. This would not place the cable operator in the prohibited position of censor. Rather, the operator would merely enforce a judicial determination that the programming is obscene.

Section 624(d)(1) can also be given "a literal reading"—permitting a franchise that "specifies" that obscene programming not be shown and thereby binding both signatories, the franchising authority and the cable operator, to keep such programming off any channel under their editorial control. See D. Brenner & M. Price, supra note 137, § 6.04[5], at 6-39; see also Meyerson, supra note 201, at 602-03.

A final, and not inconsistent, interpretation focuses on the other part of § 624(d), subsection (d)(2), which requires operators to provide lock boxes. Section 624(d)(1) can be read to permit a franchise to "specify" that the "lock boxes," which the operator must provide, be capable of blocking out the access channels. See supra text accompanying notes 193-96. This would explain the seeming exception to the ban on operator editorial control over access programming, which stated that the ban was "[s]ubject to § 624(d)." Cable Act § 611(e), 47 U.S.C. § 531(e). Under this interpretation, the only control a
as "conduits" for the provision of access programming. Cable operators, therefore, no longer have either a reason or the legal ability to prescreen access programming or exert any other influence over its content.

b. Content control of access programming by the government—As for governmental regulation of access programming, the Cable Act establishes different limits depending on whether a program appears on a commercial or public access channel. The Cable Act apparently gives local governments some control over the commercial access programming. Section 612(h) states that programming on these channels:

shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.

Although the statutory language, at first reading, may seem to give the franchising authority broad power to keep both obscene and indecent programming off the commercial access channel, Congress has supplied its own limiting construction. The House Report makes clear that the regulatory power conferred by section 612(h) is quite restricted: "[T]his subsection empowers franchising authorities to prohibit or condition the provision of cable services which are obscene or otherwise unprotected by the Constitution." Congress apparently intended the extraneous statutory language, "lewd, lascivious, filthy, or indecent," to be modified by the phrase, "otherwise unprotected by the Constitution of the United States." Thus, until such time as the Supreme Court declares this category of speech "unprotected," the stat-

cable operator may exercise over access programming would be to ensure that those subscribers who wished to avoid all "offensive" programming could use the lock boxes, required by § 624(d), to keep "offensive" access, as well as other programming, out of their homes. The three suggested interpretations are consistent with one another, and together they may delimit the ability of franchising authority to turn the cable operator into a watchdog over access programming.

268. H.R. Rep. No. 934, supra note 100, at 35, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4672; see supra text accompanying notes 242-48. The only exception might be when there has already been a judicial determination of obscenity. See supra note 267.

269. Cable Act § 612(h), 47 U.S.C. § 532(h) (emphasis added).

270. H.R. Rep. No. 934, supra note 100, at 55, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4692. Congress deemed such governmental power necessary because "leased access channels are not subject to the editorial control of the cable operator." Id.
ute limits franchising authorities to the regulation of obscene commercial access programming.

As for public access channels, the Cable Act prohibits local governments from regulating the content of this programming. Public access channels are available to the entire community, for use on a first-come, first-served, nondiscriminatory basis, and, by statutory definition, are "designated for public . . . use." Congress referred to public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." These channels constitute a facility that "the State has opened for use by the public as a place for expressive activity" and that therefore has the status of a governmentally created public forum. The Supreme Court has held that freedom of speech is protected within such a forum. The Court has required that any governmental content-based regulation be narrowly drawn to serve a compelling state interest and contain all necessary procedural safeguards.

Although the Cable Act is silent on this issue, the absence of a public access section comparable to section 612(h) suggests that Congress intended no governmental oversight for the public access channels. Similarly, the House Report indicates that Congress intended local governments to have editorial control over their own so-called government access channels, but not those channels designed for public use. The Report states, "There is

271. "Generally, public access is thought to be first-come first-served, with some modest efforts to assure continuity for some users." D. BRENNER & M. PRICE, supra note 137, § 6.04[3][c] at 6-32; see also Cable Television Channel Capacity and Access Channel Requirements Report and Order, 59 F.C.C.2d 294, 328 (1976) (detailing former FCC access requirements).


274. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). This public forum is not one "created for a limited purpose." Id. at 46 n.7. The government has created it specifically to enable the members of a community to speak. It thus differs markedly from limited purpose public fora, such as a state university with an educational "mission," Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981), or a military base with a special need to protect "security." United States v. Albertini, 472 U.S. 675 (1985).

275. E.g., Widmar, 454 U.S. at 267-68 (stating that a state university that accommodates student meetings has created a forum for students and "has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms").

276. Perry Educ. Ass'n, 460 U.S. at 46 (holding that when government creates a place for expressive activity by the public, the government is bound "by the same standards as apply in a traditional public forum"). See discussion at notes 255-58 for procedures required to regulate the content of speech in a public forum.

277. Section 611 describes three types of access channels: public, educational, and governmental (PEG channels). Although the statute does not define these terms, public access channels were obviously meant for the public at large; the House Report stated
no limitation imposed on a franchising authority's or other governmental entity's control over or use of channels set aside for governmental purposes."278 Because this sentence immediately follows the Report's statement that section 611(e) bars the cable operator from all editorial control "of the use of the PEG [public, educational and governmental] channels,"279 it can be inferred that Congress intended the other access channels, especially public access, to be free of supervision by the government, as well as by the cable operator.

c. Categorizing the entity that runs the access channel—Aside from the cable operator and the municipal government, there is one other party who may feel the temptation to censor access programming: the entity charged with administering the public access channels. In any system of public access, some entity must, at minimum, schedule programs and make sure that the access programs are cablecast. More frequently, access centers receive funding and equipment from the cable company or the municipal government’s franchise fee,280 hire staffs for training community members in the use of the equipment, and publicize the use of the channel.281

Certainly, the Cable Act permits some type of regulation of the access channel.282 An access manager may decide to reserve some time slots for hour versus half-hour programs, or to set aside some days for series as opposed to onetime program-

that public access channels “provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.” H.R. REP. No. 934, supra note 100, at 30, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4667. Congress intended the educational channels to bring “local schools into the home” and governmental access to show “the public local government at work.” Id. The statute does not describe how these latter two types of channels are to be operated.

278. Id. at 47, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 4684 (emphasis added).

279. Id.

280. See Cable Act § 611(c), 47 U.S.C. § 531(c) (permitting franchising authorities to enforce franchise provisions requiring the cable operator to provide “services, facilities, or equipment”); § 622(g), 47 U.S.C. § 542(g) (exempting certain costs for access facilities from the 5% franchise fee ceiling); § 625(e), 47 U.S.C. § 545(e) (barring modification of franchise requirement for access “services”).

281. "All [access] systems need funding, policy, staff, facilities, equipment, channels for cablecasting the productions, rules and guidelines, and a grievance procedure. Fairly administered, the result will be an effective public access system that is responsive to all citizens.” Thomas, Municipally Operated Public Access: Another Model to Consider, 8 COMMUNITY TELEVISION REV. 24, 24 (1985).

282. Section 611(b) permits franchising authorities to devise “rules and procedures” for use of the access channels. Cf. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (stating that, in a governmentally created public forum, “[r]easonable time, place and manner regulations are permissible”).
Similarly, the administrator can establish rules giving preference to community members and preventing any individual or organization from monopolizing channel time. An administrator may even impose some "content" regulation if, for example, a system has several access channels available and reserves one for use by senior citizens, one for children's programming, and others for general use. Such a division would encourage access use without preventing any individual from communicating at any given time to the public.

It is a different issue entirely, though, when the entity managing the access channel wants to censor the programming, place it in an unfavorable time slot, or ban it completely because an administrator believes the program is obscene, indecent, or otherwise "offensive." The characterization of the entity will then determine the legality of such censorship.

A tremendous variety of entities currently run access facilities across the country. These entities can be grouped into three main categories: (1) cable company-run access centers; (2) municipally run centers, including public institutions such as public libraries and schools; and (3) not-for-profit management corporations.

The first two categories create little difficulty for determining the limits of their regulatory power. When the cable company runs access, the cable operator obviously controls the access facility. The Cable Act prohibits the cable operator from exerting...
ing any editorial control over access programming, and this prohibition applies equally to the operator's employees who work at the access center. Similarly, the same constitutional limitations that apply to the governmental franchising authority apply to any governmental entity that runs access. Once again, discrimination based on content is prohibited.

The nonprofit corporations create a more difficult problem. To determine the limits of their ability to censor access programming and to discriminate based on a program's content, one must first determine whether to treat such corporations as cable operators, governmental entities, or independent private parties. Both the cable operator and the governmental entity are barred from censorship, but a purely private entity would be free to exert editorial control, including the right to censor access programming.

Although the Cable Act does not address the categorization of nonprofit corporations directly, guidance can be obtained by asking two related questions. First, would such censorship be consistent with the Cable Act? Certainly, when Congress described public access as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet," it envisioned a forum free from censorship. Congress intended liability for constitutionally unprotected speech offered on an access channel to rest where it rests when the orator speaks from the soap box—solely on the speaker who violates the law. The second question then becomes: in addition to the individual access programmer, is the not-for-profit corporation legally liable for the programming on the access channels it manages? If so, the access center must have the ability to censor access programming in order to protect itself; if not, it has no valid reason for censoring such programming.

To answer this second question, one should look to section 638, which covers the question of liability for access program-

289. See Cable Act § 611(e), 47 U.S.C. § 531(e); supra text accompanying notes 263-67.

290. Raleigh, North Carolina, is an example of a city with a municipally operated public access system. Thomas, supra note 281, at 24.

291. See supra text accompanying notes 271-79. Before a governmental entity can attempt to enforce valid obscenity laws by preventing the cablecasting of a particular access program or by previewing all access programming, all of the Freedman procedural requirements must be in place. See supra note 256 and accompanying text.

292. See supra text accompanying notes 261-79.

ming. That provision does not mention access organizations. Rather, it envisions a universe of access programming with only two species: "cable operators" and "cable programmers." This section exempts cable operators from liability for access programming and places the liability on "cable programmers."\footnote{294} The Cable Act itself does not define the term "cable programmer," but the House Report states that the term includes "all parties that exercise control over the content of programs, and would not only include program producers. . . ."\footnote{295} Thus, if an access center "exercises control of the content of programs," it would meet the definition of a "cable programmer" and become subject to liability for all access programming. An access center that does not exercise editorial control, therefore, would not qualify as a "cable programmer." Accordingly, that center, like the "cable operator," would avoid liability for the access programming. Moreover, while access centers are obviously not cable companies, the two share some definitional features. The Cable Act contains a rather broad definition of "cable operator: "[T]he term 'cable operator' means any person or group of persons . . . who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system."\footnote{296} Because the not-for-profit corporation is responsible for the management of at least a few of the channels of the "cable system," it could well fit this definition.\footnote{297}

A reasonable statutory interpretation of the Cable Act, then, would be to treat the access organization, in its role of managing the access channel and studio, as a "cable operator" for two related sections: section 611(e), barring its editorial control of access programming, and section 638, exempting it from liability for access programming.

Furthermore, the Constitution may well mandate this interpretation under the "state action" doctrine, insofar as it bars an access center from censoring access programs or discriminating based on content.\footnote{298} Although any state action analysis contains
a bit of uncertainty, it appears that not-for-profit corporations that manage public access facilities meet the criteria for state action. State or local governments create many of these corporations, including appointment of their original boards of directors, and these corporations continue to receive funding either directly from the municipal government's franchise fee or from the cable company acting under compulsion of the franchise agreement. Such a corporation constitutes not simply "a heavily regulated, privately owned utility," but an actual governmental entity. The contrast between governmental and private action is illustrated by a comparison of "a privately owned and operated" utility that the law does not consider a state actor and a utility directed by a Board of Commissioners appointed by a City Council and subject to the local government's ultimate control. The Supreme Court ruled that this second type of utility was a state actor bound by the fourteenth amendment.

A corporation created by the government, in which the government appointed its members and charged it with the duty of running the public access channel and facility, is not "pri-

mondson Oil Co., 457 U.S. 922, 924 (1982). The state action doctrine recognizes "the essential dichotomy" between deprivation of "life, liberty, or property without due process of law" by the state and by "private conduct 'however discriminatory or wrongful' against which the Fourteenth Amendment offers no shield." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

299. "[V]iewed doctrinally, the state action cases are 'a conceptual disaster area.'" L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1690 (2d ed. 1988) (quoting Black, The Supreme Court, 1966 Term—Foreword: 'State Action,' Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 95 (1967)).


Local governments often incorporate the non-profit group and appoint their original board of directors (sometimes they continue to control appointments to the board for all time). Many local governments are responsible for the access corporation's budgetary oversight; it is fairly common for the local government to allocate a portion of the franchise fee to access. In some instances, the government hires staff and is directly responsible for administering the use of the access channel.

Id. at 19.

301. Jackson, 419 U.S. at 358 (finding a privately owned and operated electric utility not a state actor).

302. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963) (holding threats by unpaid commission, appointed by governor and charged by law with investigating and recommending prosecution of obscene publications, "constituted acts of the State within the meaning of the Fourteenth Amendment").


305. See, e.g., Taylor & Brand, supra note 287, at 82 ("[A]n Access Management Corporation... is a corporation set up by city ordinance to handle access. It is granted
vate," but governmental. Such an entity is "bound to disseminate all views. For, being an arm of the Government, it would be unable by reason of the First Amendment to 'abridge' some sectors of thought in favor of others."^{306}

Some organizations that manage access centers are not so obviously public. For example, in Fayetteville, Arkansas, a consortium of arts, social service, and community groups formed a nonprofit organization that negotiated a contract with the local cable company to manage the public access channel established in the franchise between the company and the city.\textsuperscript{307} The first amendment binds even such a "private" access manager, however, in the operation of the access channels and facilities.\textsuperscript{308}

The access corporation presents a different question from whether a private party that receives government funding, such as a school or a nursing home, constitutes a "state actor" so as to have its personnel or medical decisions governed by the fourteenth amendment.\textsuperscript{309} It is also distinct from the question of whether state action exists when a private electrical utility discontinues service to a customer or when a warehouseman utilizes a state law to resolve a "private" commercial dispute.\textsuperscript{310}

Rather, a corporation managing public access facilities and channels must respect the first amendment rights of access users because, even if "private," the corporation manages a public facility. Public access channels are governmentally created,
originating in the municipal government’s franchise agreement and authorized by the federal Cable Act. The channels and the “services, facilities or equipment” provided for their use are public. When running this public facility, the access center acts as “the repository of state power.” Significantly, the center has not received the power of an electronic editor, but the power of the “traffic officer.” The center has been given the power to ensure that the public forum runs smoothly.

This situation, therefore, presents more than a case of a private party leasing public land for its own use. Congress expressly intended that the “[p]ublic access channels available under [the Cable Act] would be available to all, poor and wealthy alike.” The access channel is not “leased” for the use of the access management corporation. The corporation must run the channel for the “public . . . use,” and this “use” includes the exercise of the right of free speech by the members of a community.

The significance of this dedication of the access channel for public discourse can be seen in a comparison with the cases rejecting a first amendment right for the public to communicate in a private shopping center. In holding that private shopping center owners could bar picketing and distribution of handbills on their private property, the Court concluded: “[T]here has

312. See Cable Act § 611(c), 47 U.S.C. § 531(c). This does not necessarily mean that an access center is a “state actor” insofar as employee relations are concerned. Cf. Rendell-Baker, 457 U.S. at 840 (finding no state action in the employment decisions of a private school that received most of its funding from the government). Rather, the access center is subject to constitutional requirements in its operation of the public’s access channels, facilities, and equipment.
313. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 286 (1913).
314. Cf. NBC v. United States, 319 U.S. 190, 216 (1943) (finding that the Communications Act of 1934 did not limit the FCC’s responsibilities over broadcasting to “supervision of the traffic [on the airwaves]. It puts upon the Commission the burden of determining the composition of that traffic.”).
315. Cf. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (finding state action in racial discrimination practiced by private restaurant leasing public space and paying substantial funds for its use, because the State had “insinuated itself into a position of interdependence” with the restaurant).
been no such dedication of [petitioner’s] privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.”

Two critical differences distinguish the shopping center owner and the access management corporation. First, unlike the shopping center, the Cable Act legally requires dedication of public access channels, services, facilities, and equipment to “public use” as a public forum. Second, even if “privately operated,” the public access channels remain publicly, not privately, owned.

Thus, in some ways, a finding of first amendment rights on the access channels appears clearer than the finding in Evans v. Newton that the fourteenth amendment governs a public park, turned over to private trustees. That park was located on private property and granted, in trust, to the city of Macon, Georgia, for use “as a ‘park and pleasure ground’ for white people only.” As the dissent in Evans argued: “Bacon had its origin not in any significant governmental action or on any public land but rather in the personal social philosophy of Senator Bacon and on property owned by him.” By contrast, public access channels and facilities have their origin both in the “significant public action” of the government franchise and in their dedication to public use created by federal law.

In a state action analysis, the significance Congress has attached to public access becomes especially relevant. A public function is more likely to be found for activities that Congress considers of special importance. Congress has given such spe-
cial consideration to public access, emphasizing the critical public function that public access was intended to perform: "Thus there can be no doubt that the purposes of access regulations serve a most significant and compelling governmental interest—promotion of the basic underlying values of the First Amendment itself."\(^{328}\)

Even though both promote first amendment values, the governmental creation of a public forum on cable television access channels and the governmental licensing of broadcasters differ dramatically. In *CBS v. Democratic National Committee*,\(^{328}\) several members of the Court discussed whether broadcasters constituted state actors. Although the Court did not reach a decision on this question,\(^ {327}\) the discussion of those finding no state action remains particularly relevant.

Chief Justice Burger's plurality opinion found that, although each broadcaster acted as a "public trustee," the actions of broadcast licensees were not state action because such a conclusion would be inconsistent with the broadcaster's "traditional journalistic role."\(^{328}\) He then concluded:

More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. Application of such standards to broadcast licensees would be antithetical to the very ideal, of vigorous, challenging debate on issues of public interest.\(^ {329}\)

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\(^{327}\) Chief Justice Burger and Justices Rehnquist and Stewart found no state action. 412 U.S. at 114-21. Justice Douglas found no state action, but stated that such decision was not necessary to the case. See id. at 148-51. Justices White, Blackmun, and Powell refrained from deciding the first amendment issue. *Id.* at 148 (Blackmun, J., concurring); see *id.* at 146-47 (White, J., concurring). Finally, Justices Brennan and Marshall found state action. *Id.* at 172 (Brennan, J., dissenting).

\(^{328}\) *Id.* at 116-17.

\(^{329}\) *Id.* at 120-21 (emphasis added).
The very nature of the access channels dictates the opposite conclusion for those who manage the channels. There is no "journalistic discretion" involved in running a public access system; each individual access programmer exercises "journalistic discretion." Congress itself recognized that "the very ideal of vigorous, challenging debate" requires that the public access to cable television be free from any gatekeeper. Quoting Judge Learned Hand, the House Report explained how public access furthered first amendment interests:

The interest in diverse sources of information is "]"akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.["]^{330}

The state action doctrine thus restricts the power of an entity that runs an access channel and managing access facilities. Such an entity, supervising channels and facilities that are dedicated by the government for public expression, is subject to the strictures of the first amendment.

Public access has the potential for providing an electronic voice for a multitude of tongues. Neither the government, the cable operator, nor the access manager should be permitted to exercise "authoritative selection" over what those voices say.

CONCLUSION

The promise of cable television lies in its ability to bring an unprecedented variety of programming into the American home. The technology that carries this diversity also offers the means for giving subscribers and parents the power over what programming enters their home. Individual homes can be protected without silencing the speaker.

The first amendment requires that any plan for censoring speech to protect those who want to keep it out of their homes must reflect the specific technology involved.^{331} The legislative

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331. See supra text accompanying notes 40-96.
plan for regulating pornography on cable television, embodied in the Cable Act, fulfills this constitutional requirement. The statute protects the right not to see—to avoid "offensive" programming—by requiring that the cable operator provide each subscriber with the means to block out channels presenting such programming.332 This protection does not interfere with the rights of programmers and willing viewers. If not obscene, and therefore protected by the first amendment, the program may be presented over a cable system, free from governmental control.333 If the public access channel carries such a program, it may be shown free from governmental, cable operator, and access center control.334 The only power to censor resides with the individual programmer and the individual subscriber.

The issue of pornography will always be a difficult one, involving essentially irreconcilable viewpoints. The new technology of cable television presents the possibility of accommodating these interests, with respect for the valid concerns of all sides.

332. See supra text accompanying notes 156-74 & 191-96.
333. See supra text accompanying notes 97-188 & 197-241.
334. See supra text accompanying notes 242-330.