TO V OR NOT TO V — THAT IS THE REGULATORY QUESTION: THE ROLE OF THE V-CHIP IN GOVERNMENT REGULATION OF BROADCAST AND CABLE INDECENCY

INTRODUCTION

A mother in Columbus, Ohio found her two-year old child staring at the family's television set as the woman on screen described how she would like to administer electric shocks to the genitals of the bound man at her feet.[1] While parents may find such a story disturbing, they also realize that controlling their children's television viewing habits, even those of children as young as two years old, is difficult if not impossible. Television, whether in the form of broadcast or cable, has a pervasive presence in the American home.[2]

To assist parents in protecting their children from the unwanted intrusion of indecent material on television, Congress and the Federal Communications Commission ("FCC") have developed regulatory schemes aimed at curbing children's access to such programs. The government bases its authority to regulate such content-based speech, ordinarily protected by the First Amendment, on its articulated interest in supporting parental authority in the home and on its concern for children's well-being.[3] These objectives will survive court challenges and constitutional scrutiny if the government's regulations use the least restrictive means possible.[4] The government must balance these articulated interests with the First Amendment rights of adults who wish to view indecency on television.[5]

The government reasons, and courts have agreed, that television's uniquely pervasive presence in the home, coupled with its

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1 *See* Suzanne Oliver, *The Porn Mandate*, FORBES, Aug. 28, 1995, at 46.

2 *See* Laurence H. Winer, *The Signal Cable Sends, Part II — Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459, 519 n.312 (1987). Winer notes that 98% of American households have at least one television; this translates into more than 86 million television households in the United States. *See id.*

3 *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639-41 (1968).

4 *See, e.g.*, Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989); Action for Children's Television v. FCC, 59 F.3d 1249, 1253 (D.C. Cir. 1995) [hereinafter *South Fork*].

5 *See, e.g.*, Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969). The Court in *Red Lion* stated that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences[,] . . . [and t]hat right may not constitutionally be abridged either by Congress or by the FCC." *Id.*

unique accessibility to children, justifies indecency regulation on broadcast and cable television.[6] Broadcast and cable indecency regulation are, however, quite dissimilar. Because broadcast and cable television developed at different times and under different regulatory theories, their methods of regulating indecency are different. Broadcast television developed in the 1940s and 1950s under the theory of spectrum scarcity, whereby regulation was necessary because there was a limited number of channels available for use.[7] Broadcast regulation therefore embraced the policy that broadcast television existed for the public's use, to serve the public's interest, convenience and necessity.[8] These regulatory justifications survive today.[9]

Cable television, however, is regulated under a different scheme. Because the coaxial cable which enters a subscriber's home is privately owned, as opposed to a broadcaster's use of the publicly-owned spectrum, the government was slow to exert its regulatory control over cable television.[10] In the 1960s, cable technology advanced to the point where a cable operator could originate its own programming, thus becoming a program provider rather than a mere program transmitter, and the government began regulating cable television.[11] In content regulation of cable, however, the government used the physical distinctions between broadcast and cable to justify different regulatory schemes.[12]

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6 *See* FCC v. Pacifica, 438 U.S. 726, 748-49 (1978).

7 Under the spectrum scarcity rationale, "the government has a right and obligation to regulate broadcast content to ensure that those who are excluded will be given some measure of access and control." Jay A. Gayoso, Comment, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871, 883-84 (1989).

8 This policy is reflected in 47 U.S.C.A. § 303 (West 1995), which states:

> Powers and duties of Commission
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> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
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> (m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—
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> (A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention;
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> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . .

9 *See id.*

10 Cable television was unregulated on the federal level until the 1960s. *See* Wally Mueller, Comment, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DEPAUL L. REV. 1051, 1066 (1989).

11 *See infra* Part III.

12 *See, e.g.*, Turner Broad. Sys. v. FCC, 114 S. Ct. 2445, 2451 (1994).

The disparity between the government's methods of regulating broadcast and cable television is evident in its regulation of indecency. On broadcast television, the government has imposed a safe harbor whereby indecent programming may not be broadcast between the hours of 6:00 a.m. and 10:00 p.m., reasoning that the majority of children watch television during these hours.[13] Indecent programming is allowed after 10:00 p.m. This safe harbor regulation has been repeatedly challenged by those who want a broader safe harbor, those who would like to completely ban indecency on broadcast television, and those who argue that the safe harbor is unconstitutional because it is not narrowly tailored to serve the government's compelling interest of assisting parental supervision of children.[14] The most recent judicial challenge to this broadcast television regulation was raised in *Action for Children's Television v. FCC*,[15] in which the D.C. Circuit Court of Appeals held as unconstitutional a congressional regulatory distinction between public and other broadcasters, whereby public broadcasters who met certain criteria could broadcast indecency from 10:00 p.m. to 6:00 a.m., but all other broadcasters must restrict any airing of indecency between the hours of midnight and 6:00 a.m. Therefore, the court held, the safe harbor would stand at 6:00 a.m. to 10:00 p.m. for *all* broadcasters.

The government's regulation of cable television is far more lax. It allows indecency to be shown on premium channels, such as Home Box Office ("HBO") and the Playboy Channel, and on pay-per-view events at any hour. It does, however, regulate indecency on public access channels, reasoning that such channels are part of the subscriber's basic cable package and are not optional, as are movie channels and pay-per-view events.[16] Rather than focusing on

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[13] *See* William Banks Wilhelm, Jr., Note, *In the Interest of Children: Action for Children's Television v. FCC Improperly Delineating the Constitutional Limits of Broadcast Indecency Regulation*, 42 CATH. U. L. REV. 215, 227-28 (1992).

[14] *See, e.g.*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991); Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993).

[15] 58 F.3d 654 (D.C. Cir. 1995).

[16] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. Section 10 states in relevant part:

> Components of basic tier subject to rate regulation.
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> (A) Minimum Contents. Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:
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> (i) All signals carried in fulfillment of the requirements of sections 614 and 615.
>
> (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

the hours indecent programs are shown on public access channels, as it does with broadcasting, the government has developed a "segregate-and-block" scheme, whereby indecent public access programs are to be grouped on one channel and blocked from viewing unless the subscriber requests in writing that the channel be unscrambled.[17] This regulation was upheld by the D.C. Circuit Court of Appeals in *Alliance for Community Media v. FCC*.[18] The court's ruling was quickly challenged in New York in *Goldstein v. Manhattan Cable Television, Inc.*,[19] in which the federal court for the Southern District of New York issued a preliminary injunction

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(iii) any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted Additions to Basic Tier. A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this sub-section.

Id. § 10.

[17] *See id.* Section 10 further states:

Children's Protection from Indecent Programming on Leased Access Channels.

(a) Authority to Enforce. - Section 612(h) of the Communications Act of 1934 (47 U.S.C. 532(h)) is amended -

(1) by inserting "or the cable operator" after franchising authority; and

(2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

(b) Commission Regulations. - Section 612 of the Communications Act of 1934 (47 U.S.C. 532) is amended by inserting after subsection (i) (as added by section 9(c) of this Act) the following new subsection:

(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by -

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).

(c) Prohibits System Use. - Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct.

Id. § 10.

[18] 56 F.3d 105 (D.C. Cir. 1995).

[19] 916 F. Supp. 262 (S.D.N.Y. 1995).

preventing Time Warner Cable from imposing the segregate-and-block scheme pending judicial review. The Supreme Court's recent decision in *Denver Area Educational Telecommunications Consortium v. FCC*,[20] a case which challenged the constitutionality of indecency regulation on cable access channels, laid this issue to rest, at least for the time being.

What is the concerned parent to do? Because the government and courts still insist that physical differences between cable and broadcast television justify different content regulation, broadcast television continues to be regulated under a different scheme. Thus, so long as the government persists in regulating broadcast and cable television indecency differently, despite the fact that parents simply do not recognize such obsolete distinctions in the manner embraced by the government, the government fails to achieve its articulated objective of promoting children's well-being.

Instead, the government should cast aside its obsolete distinctions and initiate a regulatory scheme, whereby both broadcast and basic cable television would adhere to the safe harbor regulation. For premium channels and pay-per-view events, because the parent has made the affirmative decision to invite such programming into the home, the regulatory scheme should remain as it is today. Such channels are fundamentally different from the basic cable package a cable operator has assembled and offered to the parents on a take-it-or-leave-it basis; parents cannot choose whether or not to receive individual channels as part of a basic, or first-tier, package, as they can with premium channels and pay-per-view events.

Even if the government mandates that indecent programming be eliminated from television between the hours of 6:00 a.m. and 10:00 p.m., with an exception for premium cable and pay-per-view events, there remains a large window whereby children may be exposed to indecent materials. This is because children watch television after 10:00 p.m.[21] and because children may have access to

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[20] The Court consolidated two cases: *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) and *Denver Area Educ. Telecomm. Consortium v. FCC*, 10 F.3d 812 (D.C. Cir. 1993). *See* 116 S. Ct. 471 (1996). *Alliance for Community Media v. FCC* and the Supreme Court's decision in *Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374 (1996) will be discussed more fully *infra* Part III.

[21] *See, e.g.*, 5 F.C.C.R. 5138, 5303 (1990) (stating that "between 3% (for ages 2 to 5) and 8% (for ages 12-17) of children's weekly viewing occurs between 11:00 p.m. and 1:00 a.m."). *See also* 8 F.C.C.R. 704, 708 (1993) (stating that "from 11 p.m. to 12 midnight there still are at least 10,000 children viewing broadcast television on week nights and 14,000 on Saturday nights" in Salt Lake City; on any given Monday through Friday, there are "at least 10,000 children in the audience at 11:30 p.m. [and] on Saturdays, 70,000 children are watching broadcast television at 11:30 p.m." in Seattle).

premium channels and pay-per-view events without their parents present to monitor their viewing habits.

To help parents narrow this window, the 1992 Cable Act mandated that the lockbox, which enables a parent to block individual programs from being received in the home, be made available to all cable subscribers.[22] The lockbox proved problematic, however, because it could be costly to rent from the cable operator and because it only blocked a specific program based on its air time and channel. Thus, the possibility that undesired programs would make their way into the home at unforeseen times or on unanticipated channels was actually increased.

A far more viable alternative to the lockbox is the V-chip, which became part of the 1995 Telecommunications Act,[23] a bill passed by Congress and signed into law by President Clinton on February 8, 1996.[24] The V-chip is a small piece of circuitry which, by the end of 1998,[25] will be added to all new television sets sold in the United States and will allow a parent to block an entire category of undesired programming, such as indecency, whether a program is shown on broadcast or cable. It is an inexpensive and practical alternative to the lockbox, particularly because the lockbox is available only to cable subscribers. In tandem with a safe harbor provision governing both broadcast and basic cable television, the V-chip achieves what years of government regulation and judicial decisions have been unable to accomplish: a consistent and simple way to regulate the flow of indecency into the home. The V-chip is a solution which embraces the government's articulated interest of assisting parental supervision while ensuring that adults who wish to view indecency are not denied their First Amendment right to do so.

Indecency would thus be regulated according to two simple rules: first, indecency would be prohibited between the hours of 6:00 a.m. and 10:00 p.m. on broadcast and basic cable television; second, there would be no indecency regulation of premium and pay-per-view channels, with the V-chip acting as an indispensable tool to fill the inevitable gaps left by these regulations.

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22 *See* 47 U.S.C.A. § 544(d)(2) (West 1995) (stating in relevant part that "[i]n 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.").

23 *See infra* Part VI.

24 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

25 The bill gives television manufacturers two years before sets containing the V-chip must be sold. *See* Christopher Stern, *Clinton: V-chip Is Not Enough*, BROADCASTING & CABLE, Feb. 12, 1996, at 4.

Part I of this Note defines indecency and the First Amendment protection afforded it, outlines government limitations on it, and examines the policy behind the limited First Amendment protection afforded broadcasters. Parts II and III examine the history and development of indecency regulation on broadcast television and cable television, respectively. Parts II and III each conclude with an analysis of recent cases which illustrate the disparity between broadcast and cable regulation. Part IV discusses where these cases leave the parent, and argues that regulatory distinctions between broadcast and cable television are obsolete. Indecency on both broadcast television and basic cable should, it will be argued, be regulated according to the safe harbor currently in place for broadcast television alone. Exempted from this should be premium channels and pay-per-view events. Part V discusses the lockbox provision of the 1984 Cable Act and its inherent problems. Part VI examines the newest form of shielding children from indecency, the V-chip, which will fill the gap left by this new regulatory scheme. Part VI argues that, together with a safe harbor for both broadcast and basic cable television, the V-chip is the least restrictive means of accomplishing the government's dual objectives of supporting parental authority and providing for children's well-being. Part VII provides a brief summary and conclusion.

I. INDECENCY, FIRST AMENDMENT PROTECTION, GOVERNMENT LIMITATIONS, TELEVISION

The First Amendment of the U.S. Constitution protects an individual's right to free speech.[26] This right, however, is not absolute. The Supreme Court "generally has defined the parameters of the First Amendment by excluding certain types of speech from the sphere of the Amendment's protection."[27] For example, the Court has held that while the First Amendment protects indecent speech,[28] this protection does not extend to obscene speech.[29]

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26 *See* U.S. CONST. amend. I. The complete text of the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

27 Gayoso, *supra* note 7, at 880.

28 *See, e.g.*, Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989) (stating that "[s]exual expression which is indecent but not obscene is protected by the first amendment"); *South Fork*, 59 F.3d 1249, 1253 (D.C. Cir. 1995) (noting that "indecent speech is protected under the First Amendment").

29 *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 636 (1968) (stressing that "[o]bscenity is not within the area of protected speech or press"); Miller v. California, 413 U.S. 15, 22 (1973) (stating that "[t]his much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment").

Thus, "'[i]ndecency' and 'obscenity' are legal terms of art which have different definitions and different constitutional implications."[30]

In *Miller v. California*,[31] the U.S. Supreme Court set out a three-prong test for the trier of fact to determine whether speech is obscene,[32] one part of which is the requirement that the speech in question appeal to one's prurient interest. While the Supreme Court has not endorsed a specific definition of indecency, the FCC, in regulating content-based speech on radio and television, has established that indecency is "language or material that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[33] This definition has withstood numerous judicial challenges.[34] Thus, while "prurient appeal is an element of 'obscene,' it is not an element of 'indecent,' which merely refers to nonconformance with accepted standards of morality."[35] This is the primary difference between obscenity and indecency and is also a key element in determining whether questioned speech will receive First Amendment protection.

Protection for indecent speech is, however, not without limits. Because the government recognizes a need to assist parents in protecting their children,[36] and because it recognizes an independent interest in promoting children's well-being,[37] it may limit chil-

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30 Community Television of Utah v. Wilkinson, 611 F. Supp. 1099, 1104 (D. Utah 1985).

31 413 U.S. 15 (1973).

32 *See id.* at 24. The Court said:

> The basic guidelines for the trier of fact must be: (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.

Id. (internal quotations omitted). In order to be found obscene, the material challenged must meet all three prongs of the *Miller* test.

33 *In re* Enforcement of Prohibitions Against Broadcast Indecency, *in* 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n.10 (1993).

34 *See, e.g.*, Alliance for Community Media v. FCC, 56 F.3d 105, 129 (D.C. Cir. 1995); Action for Children's Television v. FCC, 932 F.2d 1504, 1508 (D.C. Cir. 1991); and Action for Children's Television v. FCC, 852 F.2d 1332, 1334 (D.C. Cir. 1988).

35 FCC v. Pacifica, 438 U.S. 726, 727 (1978).

36 *See, e.g.*, Community Television of Utah v. Wilkinson, 611 F. Supp. 1099, 1114 (D. Utah 1985) (stating that "legislators sought to assist parents in their supervisory role").

37 The Supreme Court in *Ginsberg* noted that the government "has an interest to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens." Ginsberg v. New York, 390 U.S. 629, 640-41 (1968) (internal quotations omitted).

dren's exposure to indecency.[38] But while "the detrimental effect that some material can have on unsupervised children . . . outweighs the substantial first amendment interests of broadcasters and interested audience members,"[39] the broadcasters' and television viewers' First Amendment rights cannot be completely abrogated.[40] The government must use the least restrictive means[41] of achieving its articulated interests because it must also balance adults' First Amendment right of access to such materials.[42] Thus, in regulating protected First Amendment speech, such as indecency, the government's means must be carefully tailored to achieve a compelling objective.[43]

While "[o]ther forms of offensive expression may be withheld from the young without restricting expression at its source,"[44] television, like radio, presents special problems since "a physical separation of [adults and children in] the audience cannot be accomplished in the broadcast media."[45] This is due to the fact that, "[d]uring most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children."[46]

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38 The Court in *Ginsberg* stated that two interests justify such a limitation: first, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. The second is that "[t]he State also has an independent interest in the well-being of its youth." *Id.* at 640.

39 Gayoso, *supra* note 7, at 906.

40 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) (stressing that "[i]f there is one bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

41 *See, e.g., Wilkinson*, 611 F. Supp. at 1117 (D. Utah 1985) (stating that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *South Fork*, 59 F.3d 1249, 1253 (D.C. Cir. 1995) (stating that indecent speech "may be regulated only by the least restrictive means necessary to promote a compelling state interest").

42 *See* Winer, *supra* note 2, at 521 (noting that the Court "consistently has maintained that it is improper to reduce the adult population to reading and viewing only what is appropriate for children, so as to protect children from sexually provocative material"); *see also* Butler v. Michigan, 352 U.S. 380, 383 (1957) (stating that "[t]he incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children").

43 The court in *Alliance for Community Media v. FCC* noted that, "in fashioning [indecency] regulation, the government must strive to accommodate . . . two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material." 56 F.3d 105, 124 (D.C. Cir. 1995).

44 FCC v. Pacifica, 438 U.S. 726, 749 (1978). The *Pacifica* Court noted that "[b]ookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children." *Id.*

45 *Id.* at 758 (Powell, J., concurring).

46 *Id.* at 758-59 (Powell, J., concurring).

The Supreme Court has recognized that, while all forms of non-obscene communication receive consideration for First Amendment protection, the protection provided to broadcasting[47] is the most limited.[48] The Court reasons that such a limitation is justified because of broadcasting's uniquely pervasive presence in the home and because of television's unique accessibility to children, "even those too young to read."[49] Because "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intru[sion]"[50] such as broadcasting.

Fifty years ago, when television became widely available to the American public, it was viewed as a luxury rather than a necessity.[51] Today, nearly all households have television,[52] and nearly all children watch television.[53] In some cases, children spend more time in front of the television than they do in school.[54] Weekly television viewing averages about twenty-seven hours per week for each child in the United States.[55] In addition, "there is significant unsupervised television viewing by children on a daily basis"[56] at all times of the day and night. By the time an individual is seventy years old, he or she will have spent approximately seven years watching television.[57]

Clearly, then, television is both pervasive and accessible to children and the government is justified in limiting television's First Amendment protection. Because broadcast television and cable television developed separately and exist under a dichotomous regulatory scheme, however, there are inconsistencies in the govern-

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47 The term "broadcasting" as used in this section refers to radio, broadcast television and cable television.

48 *See Pacifica*, 438 U.S. at 748. The Court in *Pacifica* also noted that "it is well settled that the First Amendment has a special meaning in the broadcasting context." *Id.* at 741.

49 *Id.* at 749.

50 *Id.* at 748.

51 *See Prophetic Pioneer*, BROADCASTING & CABLE, Nov. 6, 1995, at 82.

52 *See* Winer, *supra* note 2 at 519 n.312 (stating that "[t]here are more than 86 million television households in the United States, representing 98% of all households").

53 "[C]hildren have access to broadcast television in virtually every household, over 63% of homes have more than one television set, and between 25% and 50% of children have a set for their personal use." 8 F.C.C.R. 704, 707 n.10 (1993).

54 *See* Julia W. Schlegel, Note, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187, 197 (1993).

55 *See id.*

56 *In re* Enforcement of Prohibitions Against Broadcast Indecency, *in* 18 U.S.C. § 1464, 5 F.C.C.R. 5138, 5304 (1990). The estimated minimum unsupervised child viewing is 40 minutes per day, and the maximum is 213 minutes per day. *See In re* Enforcement of Prohibitions Against Broadcast Indecency, *in* 18 U.S.C.A. § 1464, 4 F.C.C.R. 8196, 8376 (1989). The statistics do not distinguish between broadcast and cable television viewing.

57 *See* 138 CONG. REC. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd).

ment's implementation of these objectives. An examination of the FCC's and courts' treatment of indecency in these two television delivery systems will clarify this disparity.

II. Broadcast Indecency Regulation and Litigation

In 1978, the Supreme Court for the first time addressed the FCC's authority to regulate the broadcast of indecent subject matter in *FCC v. Pacifica* ("*Pacifica*").[58] *Pacifica* involved a broadcast by comedian George Carlin, who presented a monologue entitled "Filthy Words" on a Pacifica-owned New York radio station.[59] Although the station had warned listeners prior to the broadcast that the upcoming material contained "sensitive language which might be regarded as offensive to some,"[60] a man driving with his son tuned in on his car radio *after* this warning was broadcast.[61]

In its analysis, the Court affirmed that "the First Amendment has a special meaning in the broadcasting context"[62] and that there are two reasons for broadcasting's limited First Amendment protection: its uniquely pervasive presence in the home, and its unique accessibility to children.[63] The Court stated that "the ease with which children may obtain access to broadcast material, . . . amply justif[ies] special treatment of indecent broadcasting"[64] and concluded that "the government could, under section 1464, constitutionally regulate indecent broadcasts."[65] The Court further suggested that "patently offensive language should be channeled to those times when children are not listening, rather than being prohibited altogether."[66]

In response to *Pacifica*, the FCC promulgated regulations imposing a children's safe harbor for television viewing between 6 a.m. and 10 p.m., assuming that broadcasts after 10 p.m. were unlikely to be heard by children.[67] When special interest groups in-

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58 438 U.S. 726 (1978).
59 *See id.* at 729-30.
60 *Id.* at 730.
61 *See id.* at 729-30.
62 *Id.* at 741 n.17.
63 *See id.* at 748-49.
64 *Id.* at 750.
65 Wilhelm, *supra* note 13, at 226. For a discussion of section 1464, *see supra* note 33 and accompanying text.
66 Wilhelm, *supra* note 13, at 225. The Court stated:
> [A] nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard. We simply hold that when 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.

FCC v. Pacifica, 438 U.S. 726, 750-51 (1978) (internal quotations omitted).
67 *See* Wilhelm, *supra* note 13, at 227-28.

sisted that the agency take stronger action,[68] the FCC broadened the safe harbor to prohibit indecent broadcasting between 6 a.m. and 12 midnight.[69]

This policy was challenged in *Action for Children's Television v. FCC* ("*ACT I*").[70] While the United States Court of Appeals for the D.C. Circuit[71] stated that "although indecent speech qualifies for First Amendment protection, [and] the state maintains extraordinary power to protect children's interests,"[72] it also said the FCC had "failed to substantiate its reasons for narrowing the 'safe harbor' during which indecent speech may be broadcast"[73] and had "used . . . [its] data to reach unjustifiable conclusions."[74] The court vacated the FCC's order requiring a 6 a.m. to midnight safe harbor[75] and remanded the case to the FCC with instructions to "substantiate its post-midnight channeling policy"[76] and to accommodate the competing interests of government, parents, broadcasters, and adult listeners in its future rules.[77] The court also stated that the government's and parents' interests coalesced because the "government's role is to facilitate parental supervision of children's listening."[78] Thus, the court concluded that the FCC's task upon remand was to "determine what channeling rule will most effectively promote parental — as distinguished from government — control."[79]

While the FCC was reviewing these policies, Congress passed the Helms Radio Amendment,[80] which required the FCC to pro-

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68 *See id.* at 228.

69 *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1334 (D.C. Cir. 1988) [hereinafter *ACT I*].

70 *Id.* at 1332.

71 The United States Court of Appeals for the D.C. Circuit "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission." 47 U.S.C.A. § 2342(1) (West 1995).

72 Wilhelm, *supra* note 13, at 232.

73 *Id.*

74 *Id.*

75 *See ACT I*, 852 F.2d 1332, 1335 (D.C. Cir. 1988).

76 Wilhelm, *supra* note 13, at 233.

77 The court stated:

> [A] channeling decision must accommodate these competing interests: (1) the government, which has a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; (3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene.

ACT I, 852 F.2d at 1343.

78 *Id.*

79 *Id.* at 1344.

80 The amendment required the Federal Communications Commission to "promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the

mulgate regulations enforcing a twenty-four hour ban on indecent programming. Because it had to implement this congressional directive, the FCC stayed the proceedings required by the court in *ACT I*[81] and passed the rule requiring a twenty-four hour ban, despite its concerns over the total ban's constitutionality.[82]

This twenty-four hour ban on indecent broadcasting was challenged in *Action for Children's Television v. FCC* ("*ACT II*").[83] In *ACT II*, the D.C. Circuit Court of Appeals granted a stay of the twenty-four hour ban pending further judicial review.[84] The court recognized the government's compelling interest in protecting children from exposure to indecent material, but noted that such an interest, "in the context of speech control, may be served only by carefully-tailored regulation."[85] Thus, the FCC was limited to *ACT I*'s 6 a.m. to 10 p.m. standard.[86]

While the FCC prepared for a full judicial review, the Supreme Court decided *Sable Communications v. FCC* ("*Sable*"),[87] which held that a complete ban on interstate commercial telephone messages was constitutionally impermissible.[88] The Court in *Sable* said that "[t]he government may constitutionally limit individual freedom of expression; however, it must use the least restrictive means necessary to achieve the state's articulated compelling interest."[89]

Based on this, the FCC requested, and received, a remand of *ACT I*.[90] This allowed the agency to "gather a more complete record of relevant data concerning children's viewing habits and the propriety of indecent broadcasting."[91] The FCC requested public comment, seeking data on "children's access to broadcast sources, . . . and the availability of indecent material for adults in non-broadcast media."[92] Based on its findings, the FCC concluded that, under *Sable*, its twenty-four hour broadcast indecency ban was constitutional[93] because there was a reasonable risk that significant

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provisions of such section on a 24 hour per day basis." 1989 Appropriations Act, Pub. L. No. 100-459, 102 Stat. 2228.

81 *See* Wilhelm, *supra* note 13, at 235.

82 *See id.*

83 932 F.2d 1504 (D.C. Cir. 1991) [hereinafter *ACT II*].

84 *See id.* at 1507.

85 *Id.* at 1509.

86 *See* Wilhelm, *supra* note 13, at 235-36.

87 492 U.S. 115 (1989).

88 *See id.* at 130-31.

89 Wilhelm, *supra* note 13, at 237.

90 *See id.* at 240.

91 *Id.*

92 *Id.*

93 *See id.*

numbers of children were watching television at all hours.[94] The agency also noted that "alternative sources for indecent materials were available to consenting adults."[95]

In *ACT II*, however, the court unanimously invalidated the ban because it did not pass strict scrutiny.[96] The court held that neither the congressional mandate nor the FCC ban could pass constitutional muster.[97] This returned the FCC "to the position it briefly occupied after *ACT I* and prior to congressional adoption"[98] of the twenty-four hour ban. While the court agreed in theory with the concept of a constitutionally-permissible safe harbor, the FCC had yet to implement one which would pass judicial scrutiny. The safe harbor remained 6 a.m. to 10 p.m.

The FCC resumed its task of gathering data on the number of children in television's viewing audience and of clarifying its policy behind indecency regulation.[99] Congress, however, intervened again, this time in the form of the Public Telecommunications Act of 1992 ("Telecommunications Act").[100] Section 16(a) of the Telecommunications Act[101] amended prior regulations and mandated a safe harbor between the hours of 6 a.m. and 12 midnight for all television broadcasting stations, with one exception: public television stations which went off the air before midnight could air indecent programming beginning at 10 p.m. Senator Byrd, who sponsored the amendment, stated that his policy behind the restricted safe harbor was the protection of children from unwanted exposure to indecent programming,[102] yet he never explained how permitting some stations to air indecent programming at 10 p.m.

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94 "The FCC concluded that neither time channeling nor ratings and warning devices permits effective parental control . . . and technologies that may permit control are not currently available." *Id.* at 240-41 (internal quotations omitted).

95 *Id.* at 241.

96 *See id.* at 242.

97 *See id.*

98 *ACT II*, 932 F.2d 1504, 1510 (D.C. Cir. 1991).

99 *See* Action for Children's Television v. FCC, 11 F.3d 170, 173 (D.C. Cir. 1993) [hereinafter *ACT III*].

100 Pub. L. No. 102-356, 106 Stat. 949.

101 Section 16(a) provided that:

> The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming -
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

Id.

102 Senator Byrd stated, "[w]hile my amendment would not accomplish all that I would like, by extending the restrictions to broadcasts that occur during the hours between 6 a.m. and 12 midnight, the risk of children in the broadcast audience would at least be lessened." 138 CONG. REC. S7308 (daily ed. June 2, 1992) (statement of Sen. Byrd).

while requiring others to wait until midnight furthered this interest.

The three-judge court in *Action for Children's Television v. FCC* ("*ACT III*"),[103] however, did not address this issue; rather, it only examined the First Amendment concerns raised by section 16(a).[104] The *ACT III* court concluded "the basic 6 a.m.-to-midnight ban, despite compelling interests regarding the protection of children, is not sufficiently narrow to meet constitutional requirements."[105] In addition, the court noted, "[t]he availability of alternative sources of information simply does not relieve the government from considering the First Amendment rights of the broadcast audience."[106] Because the government "did not properly weigh viewers' and listeners' First Amendment rights . . . in determining the widest safe harbor period consistent with the protection of children,"[107] the panel held section 16(a) unconstitutional.[108]

The FCC successfully petitioned the D.C. Circuit Court of Appeals to vacate its judgment in *ACT III* and rehear the case *en banc*.[109] The result was *Action for Children's Television v. FCC* ("*ACT IV*"),[110] in which the D.C. Circuit Court of Appeals declared that section 16(a) was sufficiently narrowly tailored to serve the government's compelling interest in the well-being of children.[111] As in previous *ACT* cases, the court recognized the importance of "protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."[112] In a deviation from prior policy, however, the court granted the availability of alternative sources of viewing material added weight in determining the constitutionality of broadcast indecency. The court stated that "parents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cas-

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103 11 F.3d 170 (D.C. Cir. 1993).
104 *See id.* at 173.
105 *Id.*
106 *Id.* at 181. This was in response to Senator Helms' argument that the availability of home taping technology would allow adults access to indecent material at any time they wanted. *See* Wilhelm, *supra* note 13, at 234.
107 *ACT III*, 11 F.3d at 177.
108 *See id.* at 183.
109 Action for Children's Television v. FCC, 15 F.3d 186 (D.C. Cir. 1994).
110 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 773 (1996) [hereinafter *ACT IV*].
111 *See id.* at 669.
112 *Id.* at 662.

settes."[113] Thus, the court concluded that the complementary government objectives of supporting parental authority and overseeing children's well-being were not in conflict.[114] Because of such alternative viewing sources, adult viewers' First Amendment rights were also not restricted.[115] Therefore, the court held, section 16(a) passed First Amendment scrutiny.

The court then examined the public broadcaster exception to section 16(a) and concluded that this exception was unconstitutional because "Congress imposed different restrictions on each of two categories of broadcasters while failing to explain how this disparate treatment advanced its goal of protecting young minds from the corrupting influences of indecent speech."[116] The court rejected the FCC's argument that the exception was necessary because public broadcasters who signed off the air before midnight would otherwise have no opportunity to air indecent programs.[117] The court stated that "Congress created the exception as a result of a misunderstanding of our directive in *ACT II*"[118] and that the court had never mandated that every broadcast station be given the opportunity to air indecent programming.[119] Thus, the court concluded that section 16(a) was "unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight."[120] Setting aside the "more restrictive"[121] safe harbor, the court seemed to settle the issue, thus leaving the FCC and broadcasters once again in the position they occupied after *ACT I*.

An examination of the development of cable television indecency regulation will reveal, however, that the FCC's regulation of cable indecency is quite different from its broadcast indecency regulation.

III. Cable Indecency Regulation and Litigation

Cable television has its roots in 1940s rural America.[122] The hills of Pennsylvania were interfering with broadcast signals from local television stations, and residents of low-lying areas found their

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113 *Id.* at 663.
114 *See id.*
115 The court stated that "[a]dults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors." *Id.* at 666.
116 *Id.* at 668.
117 *See id.* at 659.
118 *Id.* at 668.
119 *See id.*
120 *Id.* at 669.
121 *Id.*
122 *See* Mueller, *supra* note 10, at 1053.

television coverage sporadic and static-filled.[123] To remedy this situation, an antenna was built atop one of these hills to gather and retransmit these scattered broadcast signals via wire to individual households in the valley communities.[124] These antennas, known as community antenna television ("CATV") systems, quickly became popular in other remote areas.[125] Thus, CATV, the forerunner of today's cable systems, initially served only as a retransmitter of distant broadcast signals.[126]

Because of rapidly advancing technology, however, these CATV systems soon began expanding their role beyond that of mere retransmitters.[127] When "technology advanced so that the CATV operator could 'cablecast' programming produced by itself[128] or third parties,"[129] the term CATV became an anachronism. Thus, "cable television"[130] was born and the FCC extended its regulatory arm over this burgeoning industry.[131]

In 1972, the FCC promulgated rules requiring cable operators to carry public access channels.[132] These rules, however, were declared unconstitutional by the Supreme Court in 1979.[133] The Court held that it was beyond the FCC's jurisdiction to require

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123 *See id.* at 1054.

124 *See id.*

125 *See id.*

126 *See id.*

127 *See id.*

128 This is also known as local origination programming.

129 Mueller, *supra* note 10, at 1054. Today, there are four sources of cable programming: 1) "retransmission of broadcast stations"; 2) "access programming produced by local individuals and organizations not associated with the cable operator"; 3) local origination, defined as "origination of programming produced by the cable operator"; and 4) "satellite-delivered programming from professional vendors." *Id.* at 1056-57. Home Box Office ("HBO") became the first company to nationally distribute its own programming via satellite to CATV systems in 1975. *See id.* at 1054-55.

130 *Id.* at 1055-56. Cable television growth, particularly in the last decade, has been phenomenal. In 1984, cable was found in 35% of American television-viewing households. *See* Vicky Hallick Robbins, Comment, *Indecency on Cable Television — A Barren Battleground for Regulation of Programming Content*, 15 ST. MARY'S L.J. 417, 417 (1984). In 1992, more than 57 million households in America received basic cable television service, which amounts to over 60% of all households which own at least one television. *See* Bradley J. Howard, Note, *Pulling the Plug: Controversial Programming on Public Access Television and the Cable Television Consumer Protection and Competition Act of 1992*, 28 J. MARSHALL L. REV. 399, 401 (1995). In addition, about 45% of these households receive premium cable (additional channels above the basic cable package offered by a cable operator). *See* SYDNEY W. HEAD ET AL., BROADCASTING IN AMERICA 100 (7th ed. 1994). Cable television viewership shows no signs of slowing. Basic cable viewership rose 12% for the 1994-95 television season, representing a double-digit increase when compared with the previous year. *See Ratings Records*, BROADCASTING & CABLE, Sept. 18, 1995, at 41.

131 *See* Robbins, *supra* note 130, at 427-28.

132 *See* PATRICK PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 19 (1987). The FCC's rules "required cable operators to provide free access channels for use by the public at large, local government, and local educational institutions." *Id.*

133 *See* FCC v. Midwest Video, 440 U.S. 689 (1979).

cable operators to make public access channels available for the public's use.[134]

Congress addressed this issue in its 1984 amendment to the Cable Communications Act of 1934.[135] The result was the Cable Communications Policy Act ("1984 Cable Act"),[136] which granted the FCC jurisdiction to regulate all aspects of cable communications, including access channels.[137] The 1984 Cable Act included provisions granting cable franchising authorities the right to require that its cable operators provide access programming[138] in the form of "PEG," or "public," access channels for public, educational and governmental use.[139] The Act also required cable operators to provide leased access[140] channels "for commercial use by any entity not affiliated with the cable operator."[141] The number of leased

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134 *See* Howard, *supra* note 130, at 403 n.28.

135 *See id.* at 404.

136 47 U.S.C.A. §§ 521-559 (West 1985) [hereinafter Cable Communications Policy Act of 1984].

137 *See* Howard, *supra* note 130, at 404 n.33.

138 *See id.* The FCC's stated policy was to "promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public . . . ." 47 U.S.C.A. § 532(a) (West 1995). *See also Midwest Video,* which stated that access rules "promote the long established regulatory goals of maximization of outlets for local expression and diversification of programming." *Midwest Video,* 440 U.S. at 699.

139 *See* 47 U.S.C.A. § 531(b) (West 1995), which states:

> Authority to require designation for public, educational, or governmental use[.]
>
> A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

140 Leased access, also known as commercial access, programming "may be commercial itself (e.g., promoting a local business), or it may be noncommercial yet include advertising." Mueller, *supra* note 10, at 1066. Leased access users are charged an hourly fee for time on the channel by the cable operators. *See id.*

141 Alliance for Community Media v. FCC, 10 F.3d 812, 815 (D.C. Cir. 1993) [hereinafter *ACM I*]. The relevant statutory provision, 47 U.S.C.A. § 532(b)(1)(A)-(D) (West 1995), specifies the designation of channel capacity for commercial use:

> (1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:
>
> (A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.
>
> (B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise regulated for use (or the use of which is not prohibited) by Federal law or regulation.
>
> (C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

access channels a cable operator was required to provide was determined by each system's channel capacity.[142] The Supreme Court has thus stated:

> A "leased channel" is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties, . . . [whereas] "[p]ublic, educational or governmental channels" (which we shall call "public access" channels) are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way.[143]

In the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[144] Congress revisited the issue of access programming. This time, however, its objective was to "limit the access of children to indecent programming"[145] on access channels. Section 10 of the Act[146] granted cable operators the independent right to prohibit all indecent programming on both its leased access[147] and PEG access channels,[148] and the right to require leased access programmers to certify that their programs did not contain any such material.[149] It also required cable operators who did not prohibit indecent programming on its leased access channels to segregate such programming onto one channel and block it from being received in the viewer's home unless the viewer requested receipt of the channel in writing.[150] No limitations were placed on either the commercial cable channels included in the subscriber's basic cable package or the times during which inde-

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> (D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

Though nothing requires the cable operator to provide these channels free of charge, they do not charge the same rates to their leased access programs as they do to their commercial channels. For example, Time Warner Cable in New York City charges its leased access programmers only about $200 per half-hour of airtime. *See* Rich Brown, *Time Warner Regulates Indecency on Leased Access*, BROADCASTING & CABLE, July 24, 1995, at 66.

142 In 1992, 90% of cable subscribers had access to 30 or more channels and almost 30% had access to 54 or more channels. *See* HEAD ET AL., *supra* note 130, at 200.

143 Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2381 (1996).

144 Pub. L. No. 102-385, 106 Stat. 1460.

145 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(j)(1), 106 Stat. 1460. *See also supra* note 17.

146 *See id.*

147 *See id.* § 10(a).

148 *See id.* § 10(c).

149 *See id.* § 10(b).

150 *See id.*

cent programming could be shown on a blocked leased access channel.

The United States Court of Appeals for the District of Columbia addressed the constitutionality of section 10 in 1993 in *Alliance for Community Media v. FCC* ("*ACM I*")[151] and again in 1995 in *Alliance for Community Media v. FCC* ("*ACM II*").[152] In *ACM I*, a group of access programmers and viewers challenged section 10, arguing that the government could not "constitutionally permit cable operators to ban indecent materials"[153] from leased and PEG access channels and that the government could not "constitutionally require cable operators to segregate and block indecent material"[154] on leased access channels.

The *ACM I* court noted that, "[u]nder the statute and regulations, the cable operators have no incentive whatsoever to allow indecent access programmers onto leased access or PEG access channels";[155] and yet, "the very reason for mandating access . . . was that unaffiliated programmers are unable to gain access to regular, commercial cable channels."[156] The court then examined section 10(a) and (c) and concluded that, as content-based restrictions,[157] these provisions were presumptively invalid.[158] The court, however, also recognized that the government[159] may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[160]

Section 10's articulated interest is, of course, the protection of children from exposure to indecent programming. But since the identical kind of programming prohibited under section 10 could be transmitted freely on regular commercial cable channels,[161] the

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151 10 F.3d 812 (D.C. Cir. 1993).

152 56 F.3d 105 (D.C. Cir. 1995), *petition for cert. granted*, 64 U.S.L.W. 18 (U.S. Nov. 14, 1995) (No. 95-124).

153 *ACM I*, 10 F.3d at 816.

154 *Id.* at 819.

155 *Id.* at 822.

156 *Id.*

157 *See id.* at 822-23.

158 *See id.* at 823.

159 The court noted that, while it was the cable operators who were statutorily authorized to censor programming, under the First Amendment, the government could not "deputiz[e] cable operators with the power to effect such a ban." *Id.* at 815.

160 *Id.* at 823 (internal quotations omitted).

161 The court stated:

> [W]hile the [Federal Communications] Commission may be correct in noting that access channels, unlike pay channels, are part of the basic cable package and thus not individually invited into a customer's home . . . , the same thing certainly is true of the commercial channels that make up the basic cable package and are unregulated by section 10.

Id. at 828.

court was "unpersuaded that the authorization of a ban on indecent material present[ed] the least restrictive means of furthering"[162] that interest. The court then compared the instant case with *ACT II*[163] and concluded, "We have been presented with no evidence why the context of cable television should command a different conclusion."[164] Therefore, the court held that "the government may not constitutionally authorize a cable operator to ban indecent material from access channels."[165] While the court did not address the segregate-and-block provision of section 10(b), which "require[d] indecent material on leased access channels to be segregated and blocked, while leaving PEG access and regular commercial channels free from any regulation,"[166] it remanded the case to the FCC to "allow the FCC either to justify or to cure the underinclusiveness of the selective approach to the regulation of indecency represented by the remainder of the regulation after the total ban provision has been struck down."[167]

In *ACM II*,[168] the District of Columbia Circuit Court of Appeals, sitting *en banc*, examined the constitutionality of section 10(b), the leased access segregate-and-block provision of the 1992 Cable Act, which was challenged by a group of access producers, programmers and viewers. The court noted that "[w]hile the government may . . . restrict the showing of indecent programs, it may do so only in a manner consistent with the First Amendment."[169] The First Amendment allows the government to pursue its objective of limiting the access of children to indecent programming as long as it uses the least restrictive means of doing so.[170] The court held that section 10(b)'s segregate-and-block provision was the least restrictive means of achieving its objective and, thus, was constitutional.[171] The court rejected petitioners' argument that providing for a safe harbor was less restrictive than the segregate-and-

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162 *Id.* at 823.

163 *See* discussion *supra* Part II. The court in *ACT II* held that a total ban on indecent programming on broadcast television was unconstitutional. *See ACT II*, 932 F.2d 1504, 1509 (D.C. Cir. 1991).

164 *ACM I*, 10 F.3d 810, 823 (D.C. Cir. 1993).

165 *Id.* at 816.

166 *Id.* at 829.

167 *Id.*

168 Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995) [hereinafter *ACM II*]. *ACM II* was a rehearing of *ACM I* after the court vacated the panel's judgment in *ACM I*. *See* Alliance for Community Media v. FCC, 15 F.3d 186 (D.C. Cir. 1994).

169 *ACM II*, 56 F.3d at 112-13.

170 *See id.* at 124.

171 The court also held that section 10(b) was constitutional because it did not single out leased access programming for regulation, did not constitute a prior restraint on speech, and was not unconstitutionally vague. *See id.* at 129. An examination of these aspects of the court's reasoning is, however, beyond the scope of this Note.

block requirement, noting that "[e]ven during late hours, some unsupervised children"[172] will be in the viewing audience. Since adult viewers who wished to continue receiving indecent leased access programs could do so by written request to the cable operator, the court suggested that "segregation and blocking appear to accommodate the interests of those viewers who want indecent programming better than would a safe harbor system, under which cable viewers would be confined to watching such programming during designated, often inconvenient time periods."[173] Thus, "[g]iven its effectiveness in limiting the exposure of children to indecent programming and its insignificant restriction of adults' access to such material,"[174] the court held section 10(b) constitutional.

In addition, the *ACM II* court reexamined its decision in *ACM I* and reversed its position on the constitutionality of sections 10(a) and 10(c), provisions which granted the cable operator the power to prohibit indecent programming on its leased access and PEG access channels.[175] The court, stressing that state action must be present in any finding of a First Amendment violation, concluded that such action was not inherent in section 10(a) and (c).[176] This was because "sections 10(a) and 10(c) do not command" the cable operator to ban indecent programming.[177] The statutory provision leaves "[c]able operators . . . [free to] carry indecent programs on their access channels" or to choose not to do so.[178] The court further noted, "That section 10 is a federal statute authorizing action by private cable operators is therefore not itself sufficient to trigger the First Amendment."[179] *ACM II* found all three provisions of section 10 constitutional, thus allowing a cable operator to entirely ban indecency on both its PEG and leased access channels, requiring the cable operator who chooses not to ban indecency to segregate all indecency on leased access channels onto one channel and block these programs from being viewed unless the cable subscriber requests in writing that the channel be unblocked, and re-

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172 *Id.* at 125.

173 *Id.* Nothing in section 10 limited the time periods during which the segregated-and-blocked indecent programs may be aired on public access channels.

174 *Id.*

175 *See id.*

176 *See id.*

177 *Id.* at 113.

178 *Id.* The court also stated that that section 10's "immediate aim - all that can be discerned from the language of the statute - is to give cable operators the prerogative not to carry indecent programming on their access channels." *Id.* at 117.

179 *Id.*

quiring programmers to notify cable operators in advance when any of their leased access programs would be considered indecent.

On November 14, 1995, the Supreme Court granted certiorari, agreeing to hear arguments as to the constitutionality of section 10.[180] In addition, shortly after *ACM II* was decided, and in conjunction with the *ACM II* court's decision, Time Warner Cable in New York City announced its intention to begin segregating and blocking indecent programming on its leased access channels beginning October 1, 1995.[181] A group of leased access producers filed a petition for a preliminary injunction,[182] arguing that "making their viewers sign cards to unscramble the sex channel will hinder their ability to reach their audience, discourage advertisers and stigmatize people who, by sending in cards, are making it known that they watch the shows."[183] The federal court for the Southern District of New York granted the injunction, holding "that the producers of the [leased access] erotic shows . . . would suffer 'irreparable injury'"[184] if the segregation-and-blocking scheme were to be implemented[185] and that petitioners had sustained their burden of demonstrating "likelihood of success on the merits."[186]

On June 28, 1996, the Supreme Court decided *Denver Area Educational Telecommunications Consortium v. FCC* ("*Denver*").[187] *Denver* was the consolidation of two cases: Alliance for Community Media's appeal of *ACM II* and *Denver Area Educational Telecommunications Consortium v. FCC*.[188] Once again, the issue was the constitutionality of section 10. The Court briefly examined the history of leased and public access channels, stressing that the two are distinguishable in that a cable operator is required under federal law to carry leased channels while public access channels may or may not be required by a local government.[189]

The Court then analyzed section 10(a) and the D.C. Circuit Court of Appeals' decision in *ACM II*.[190] Noting that the language

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180 *See supra* note 20.

181 *See* Gary Levin, *Indecent Access Curbed: Time Warner's NYC Cabler Enacts New Policy*, DAILY VARIETY, July 18, 1995, at 9; *see also* Rich Brown, *Time Warner Regulates Indecency on Leased Access*, BROADCASTING & CABLE, July 24, 1995, at 66.

182 *See* Goldstein v. Manhattan Cable Television, 916 F. Supp. 262 (S.D.N.Y. 1995).

183 James C. McKinley, Jr., *Two Stars of Explicit Cable Shows Plead for Free-Speech Protection*, N.Y. TIMES, Sept. 19, 1995, at B3.

184 John Dempsey, *Risque Ruling: No Skin off TW*, DAILY VARIETY, Sept. 21, 1995, at 22.

185 This is because only 17% of Time Warner's 290,000 viewers had returned the leased access request cards it had mailed to its viewers. *See id.*

186 *Goldstein*, 916 F. Supp. at 268.

187 116 S. Ct. 2374 (1996).

188 *See supra* note 20.

189 *See* Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2381 (1996).

190 *See id.* at 2382. *ACM II* is discussed *supra* Part II.

of section 10(a) permits, rather than requires, cable operators to ban indecent programming on its leased access stations, the Supreme Court stated that the court of appeals had "likely . . . viewed this statute's 'permissive' provisions as not themselves restricting speech, but, rather, as simply reaffirming the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental agency."[191] Such an analysis, the Court stated, passed constitutional muster, because a cable operator acting as editor of the programs shown on its station was a constitutionally permissible exercise of that operator's First Amendment right to freedom of speech.[192] Since "the editorial function itself is an aspect of 'speech' . . .[,] a court's decision that a private party, say, the station owner, is a 'censor,' could itself interfere with that private 'censor's' freedom to speak as an editor."[193]

The Court also "closely scrutiniz[ed] [section] 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech" and concluded that section 10(a) "is a sufficiently tailored response to an extraordinarily important problem"; that is, "the need to protect children from exposure to patently offensive sex-related material."[194] Since "the provision's permissive nature brings with it a flexibility that allows cable operators, for example, not to ban broadcasts, but, say, to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children,"[195] the Court found section 10(a) constitutional.[196]

Next, the Court examined section 10(b), the provision of the 1992 Cable Act requiring cable operators "to restrict speech - by segregating and blocking 'patently offensive' sex-related material appearing on leased channels (but not on other channels)"[197] un-

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191 *Denver*, 116 S. Ct. at 2382-83.
192 *See id.*
193 *Id.* at 2383.
194 *Id.* at 2385-86.
195 *Id.* at 2387.
196 *See id.* at 2381. The Court further stated:
> [T]he permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984.

Id. at 2387.
197 *Id.* at 2391.

less the viewer requests in writing that the channel block be lifted. Noting that the statute calls for the cable operator "to unblock the channel within 30 days of a subscriber's written request for access; and to reblock the channel within 30 days of a subscriber's request for reblocking,"[198] the Court stated that "[t]hese requirements have obviously restrictive effects"[199] on the viewer. This is because "a subscriber cannot decide to watch a single program without considerable advance planning and without letting the 'patently offensive' channel in its entirety invade his household for days, perhaps weeks, at a time."[200] Although it "agree[d] with the Government that protection of children is a 'compelling interest,'"[201] the Court found that section 10(b) did not "properly accommodate the speech restrictions [it] impose[d] and the legitimate objective [it sought] to attain."[202] The Court stressed that part of the problem lay in the fact that indecent programming similar to that found on leased access channels could easily be found on non-leased access channels,[203] and that these other channels remained free of any segregate-and-block requirements. Thus, the Court could not "find that the segregate-and-block restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, sacrificing important First Amendment interests for too speculative a gain."[204] As such, section 10(b) was deemed unconstitutional.

Section 10(c) was the next provision examined by the Court. This provision was similar to section 10(a) in that it allowed a cable operator to choose whether or not to ban indecency on its channels. Section 10(c) was significantly different from section 10(a), however, in that it applied to the PEG, or public access, channels a franchising agent may require a cable operator to set aside for public, educational, or governmental use.[205]

The Court said this distinction was determinative and outlined "four important differences" between PEG and leased access channels.[206] These differences, stressed the Court, justified separate treatment of indecency on PEG and leased access channels.[207] First, the Court noted that, unlike leased access channels which

198 *Id.*
199 *Id.* at 2391.
200 *Id.*
201 *Id.*
202 *Id.*
203 *See id.* at 2392.
204 *Id.* at 2394 (internal quotations omitted).
205 *See supra* note 139 and accompanying text.
206 *Denver*, 116 S. Ct. 2374, 2394 (1996).
207 *See id.*

were subject to a cable operator's regulations and restrictions,[208] PEG channels are "channels over which cable operators have not historically exercised editorial control."[209] Thus, unlike section 10(a), section 10(c) "does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished."[210]

The second difference was one of control over the time slot during which a PEG access program will be aired.[211] With leased access programs, a lessee purchases a particular time slot and, in that slot, is the sole determiner of the program that is to be aired.[212] PEG channels, "on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements."[213] PEG programmers, therefore, do not exercise the same kind or amount of editorial control over their programs as do leased access programmers. In addition, PEG access channels often receive "public funds — through franchise fees or other payments pursuant to the franchise agreement, or from general municipal funds, . . . and are commonly subject to supervision by a local supervisory board."[214] It is "this system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, [which] can set programming policy and approve or disapprove particular programming services."[215]

The third important distinction between leased access and PEG access channels, the Court stated, was public access' important role in the community.[216] The fact that PEG access channels function as "a system aimed at encouraging and securing programming that the community considers valuable strongly suggests that a 'cable operator's veto' [similar to that of section 10(a)] is less likely necessary to achieve the statute's basic objective, protecting children, than a similar veto in the context of leased channels."[217]

In outlining the fourth difference between leased and PEG access channels, the Court turned to the legislative history and rec-

208 "When a 'leased channel' is made available by the operator to a private lessee, the lessee has total control of programming during the leased time slot." *Id.*
209 *Id.* at 2394.
210 *Id.*
211 *See id.*
212 *See id.*
213 *Id.* at 2394.
214 *Id.* at 2395.
215 *Id.*
216 *See id.*
217 *Id.*

ord[218] and concluded that "common sense suggests . . . that the public/nonprofit programming control systems now in place [for PEG access channels] would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming."[219] The Court failed to find "a significant nationwide pattern" of indecent programming of public access channels.[220] Thus, "in the absence of a factual basis substantiating the harm [of indecency of PEG access channels] and the efficacy of [the government's] proposed cure," the Court stated, "we cannot assume that the harm exists or that the regulation redresses it."[221]

Because of these four important distinctions between public and leased access, the Court thus found section 10(c) unconstitutional and violative of the First Amendment.[222] The Court stated that section 10(c) was "a law that could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract"[223] and concluded that "the need for this particular provision . . . is not obvious."[224]

Thus, the Supreme Court affirmed the D.C. Circuit Court of Appeals as to the constitutionality of section 10(a) and reversed the court of appeals in its conclusion as to sections 10(b) and 10(c)'s constitutionality. In sum, a cable operator may now choose to prohibit indecent programming on its governmentally-mandated leased access channels (section 10(a)). The government may not, however, require the operator to segregate and block indecent programs onto one channel, and it may not require the operator to obtain advance notification from programmers if a show is indecent (section 10(b)). Finally, a cable operator may not prohibit indecent indecent programming on its PEG, or public, access channels (section 10(c)).[225]

As is apparent from the foregoing, the government's regulation of broadcast and cable television is neither cohesive nor easily understood, particularly for the parent struggling to shield his or

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218 *See id.* at 2395.
219 *Id.* at 2395-96.
220 *Id.* at 2396. The Court examined comments solicited by the FCC on this subject and cited a two-year survey of "76 public access systems in New York . . . [which had found] 'only two examples of controversial programming and both had been settled by the producers and the access channel.'" *Id.*
221 *Id.* at 2397.
222 *See id.*
223 *Id.*
224 *Id.*
225 *See id.* at 2381.

her children from the intrusion of indecent programming into the home. The following section argues that the government's distinction between broadcast and cable television is unwieldy and outdated, leaving the parent to negotiate a maze of regulatory inconsistencies. As such, the current regulatory distinctions should be jettisoned in favor of a simpler, more comprehensive policy.

IV. WHY REGULATORY DISTINCTIONS BETWEEN BROADCAST AND CABLE TELEVISION ARE OBSOLETE & WHERE THIS LEAVES THE PARENT

As is evident from Parts II and III, *supra*, broadcast and cable television have developed different indecency regulatory schemes which, although historically understandable, lack viability in today's world where "[c]able television has become our Nation's dominant video distribution medium."[226] While broadcasting is "regulated under a separate statutory scheme limiting indecent programming to the late evening hours,"[227] cable's premium channels and pay-per-view events are "unfettered by federal regulation."[228] In addition, in light of the Supreme Court's decision in *Denver*, a cable operator may choose whether or not to carry indecent programming on its leased access channels[229] while it may not choose to do so on its PEG access channels.[230] Thus, the parent who wishes to monitor his or her child's television viewing is confronted with a confusing array of indecency regulations: indecency on any broadcast television station may be seen after 10 p.m; indecent programming may be shown on cable PEG access at any time; and cable leased access indecency at any hour may or may not be shown, depending on the decision of the individual cable operator.

In *Community Television of Utah, Inc. v. Roy City* ("*Roy City*")[231] Utah's federal district court outlined nine differences between broadcast and cable and used this table to justify different indecency regulations for the two media.[232] This list can be divided into two broad categories: technology and choice.

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226 S. REP. No. 92, 102nd Cong., 1st Sess. 1133, 1135 (1992). *See also* Turner Broad. Sys. v. FCC, 114 S. Ct. 2445, 2454 (1994) (stating that "cable has replaced over-the-air broadcast television as the primary provider of video programming").

227 *ACM II*, 56 F.3d 105, 125-26 n.24 (D.C. Cir. 1995).

228 *Id.*

229 *See* Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374 (1996).

230 *See id.*

231 555 F. Supp. 1164 (D. Utah 1982).

232 *See id.* at 1167.

Cable

1. User needs to subscribe.
2. User holds power to cancel subscriptions.

The fact that broadcast and cable television use different technologies to reach the viewer is frequently used to justify different regulatory schemes for television and cable. The argument is that "[b]roadcast stations radiate electromagnetic signals from a central transmitting antenna [and that] [t]hese signals can be captured, in turn, by any television set within the antenna's range."[233] Conversely, cable systems "rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers."[234] But when this argument is taken to its logical extension and applied to newspapers, its weakness becomes apparent. If the same newspaper were to be delivered to the same home at the same time, one by a newspaper delivery boy and the other by mail, the newspaper's regulations would certainly not be any different. In fact, the same "[e]lectromagnetic radiation distributes both [broadcast and cable signals], although broadcast signals are transmitted through space and cable signals travel through wires."[235]

Proponents of cable and broadcast's separate regulatory systems also argue that broadcast and cable are different because the broadcast signal uses the public airwaves whereas the cable signal travels through privately-owned wires to reach the viewer.[236] While this is true, "the distribution of cable programming relies on the same 'public' airwaves as broadcasting . . . because wires are run

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3. Limited advertising.
4. Transmittal through wires.
5. User receives signal on private cable.
6. User pays a fee.
7. User receives preview of coming attractions.
8. Distributor or distributee may add service and expanded choices.
9. Wires are privately owned.

Broadcast

1. User need not subscribe.
2. User holds no power to cancel. May complain to F.C.C., station, network, or sponsor.
3. Extensive advertising.
4. Transmittal through public airwaves.
5. User appropriates signal from the public airwaves.
6. User does not pay a fee.
7. User receives daily and weekly listing in public press or commercial guides.
8. Neither distributor nor distributee may add services or signals or choices.
9. Airwaves are not privately owned but are publicly controlled.

Id.

233 Turner Broad. Sys. v. FCC, 114 S. Ct. 2445, 2451 (1994).

234 *Id.*

235 Gayoso, *supra* note 7, at 908.

236 *See* Community Television of Utah v. Roy City, 555 F. Supp. 1164, 1167 (D. Utah 1982).

through the public right of way."[237] In fact, "[t]he only difference is that a step is added — local cable operators — to the process."[238] Thus, neither method of transmission, whether through space or via wires, is "more in the public domain than the other."[239]

The court in *Roy City* considered choice a "crucial factor"[240] in distinguishing the two media. The court stated that an individual chooses whether to subscribe,[241] whether and when to cancel, and which of the available services he or she desires.[242] Basically, "[t]he argument is that, by providing these choices, cable becomes more like a 'guest' invited into the home rather than the 'intruder' broadcasting is said to be."[243] There is, however, the choice of whether to have television at all. Whether an individual has broadcast or cable television, he or she still must make the decision to have this media in his or her home, purchase the necessary equipment, and connect it to the outside transmission source. Above all, the individual must make the affirmative choice to turn on the television set.[244] This is "equally an invitation into the home to broadcasting and to cable."[245] Therefore, "perceived differences in the effort or deliberateness of choosing to watch cable over broadcasting are largely vacuous and irrelevant to the indecency controversy because the deliberateness and effort in choosing not to watch either are the same."[246]

In addition, the court in *Roy City*, a Utah case decided a decade and a half ago, ignored some of the finer distinctions in the broadcast/cable choice. In large metropolitan cities, such as New York City, broadcast signals are often difficult to receive without cable because of the interference of high-rise buildings. This problem harkens back to the cable's original objective — to deliver clear broadcast signals to people whose television reception signals were interrupted by high hills. Whether because of natural or

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237 Gayoso, *supra* note 7, at 908-09. *See also* Winer, *supra* note 2, at 513 (stating that "[t]he entire distribution network for most cable programming, therefore, heavily depends on the use of the same 'public' airwaves as broadcasting").

238 Gayoso, *supra* note 7, at 909.

239 Winer, *supra* note 2, at 512.

240 Robbins, *supra* note 130, at 435-36.

241 *See, e.g.*, Winer, *supra* note 2, at 513 (stating that "[t]he standard argument is that a cable viewer must choose to subscribe to a cable system, undergo the initial equipment installation, pay originally for the service and continue paying a periodic subscription fee").

242 *See* Community Television of Utah v. Roy City, 555 F. Supp. 1164, 1167 (D. Utah 1982).

243 Winer, *supra* note 2, at 513.

244 *See id.* (stating that "[t]he only significant choice with respect to both cable and broadcast programming is whether to watch").

245 *Id.* at 514.

246 *Id.*

man-made obstructions, cable performs the important and utilitarian function of delivering clear signals to people whose television reception would otherwise be spotty and filled with static. Thus, when many people make the choice to have and use a television, the accompanying choice to have and use cable is motivated not by the distinctions suggested in *Roy City*, but by the simple desire to receive clear reception.

Accordingly, *Roy City*'s theoretical distinctions are irrelevant, as are the regulatory distinctions embraced by Congress, the courts, and the FCC because, above all else, they fail to fully consider the most important objective in content control: children's well-being. Most households have at least one television and, significantly, most have cable service.[247] In protecting their children from unexpected and undesired program content, parents neither distinguish among the sources of leased access programming, PEG access programming and broadcast television nor distinguish between indecent programming aired before 10 p.m. on cable and after 10 p.m. on broadcast television.[248] Thus, in order to assist parents in protecting their children from undesired access to indecent programming on both broadcast and basic cable television, the government should jettison its distinctions between the two and embrace a single regulatory policy whereby parents will easily be able to shield their children from indecency.

When parents bring cable television into their home, they choose from among several packages, or tiers, of programming offered by the cable operator. The first tier must include broadcast television and public access channels,[249] and often includes a number of non-premium channels, such as TBS, the Family Channel, and/or Lifetime, at a fixed price. If the parent wishes to order additional channels, such as HBO or the Playboy Channel, he or she can do so for an additional price. These channels are considered premium channels. In addition, special pay-per-view events may be ordered by the parent, regardless of the chosen service tier, for an additional one-time fee. These events are shown once, at a specified time. Thus, it becomes clear that basic cable more closely resembles broadcast television than it does cable's premium channels and pay-per-view events. Basic cable should therefore be regu-

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247 *See supra* notes 51-57 and 130.

248 The FCC has reported that "a considerable amount of children's total television viewing time takes place after prime time — between 3% (for ages 2 to 5) and 8% (for ages 12 to 17) of children's weekly viewing occurs between 11 p.m. and 1 a.m." 8 F.C.C.R. 704, 707 (1993).

249 *See supra* note 16.

lated like broadcast television and the government should extend the protection of its section 16(a) broadcast safe harbor to include basic cable television. This would mean that no indecent material would be aired on either broadcast or basic cable television between the hours of 6:00 a.m. and 10:00 p.m. Because premium channels and pay-per-view events are individually requested by the parent and are not part of a general cable package, they should be exempted from the safe harbor provisions. Because parents who have ordered the Playboy Channel have taken affirmative steps to receive this specific programming in their homes, they will not be confronted by unexpected indecent programming.

There still, however, exists a potential problem with shielding children from unwanted indecent programming. "Significant numbers of children" watch television at all hours of the day and night[250] and "a significant number of [these] children . . . are not subject to active parental supervision, even during the late evening and early morning hours."[251] Even if section 16(a)'s safe harbor provisions are extended to cover both broadcast and basic cable television, many children watch television past 10:00 p.m.[252] In addition, parents who wish to subscribe to premium channels must still attempt to maintain vigilance over their children's viewing to ensure that the child does not see these channels.

Parents must therefore choose whether to subscribe to premium channels, and potentially risk their children also viewing indecency, or not subscribe at all, thus denying themselves access to programming which they, as adults, should be able to view. As the following section illustrates, the government's first attempt at providing the parent with the technological tool to shield television indecency in the home has proved generally unworkable.

V. THE LOCKBOX

In 1984, the government took its first steps in giving parents the decision to regulate what their children watch on television while ensuring that adults who wished to have free access to indecent materials were not denied their First Amendment rights. The 1984 Cable Act[253] required cable operators to make lockboxes available to subscribers.[254] There was, however, no requirement that cable operators provide the box to subscribers free of charge.

250 5 F.C.C.R. 5138, 5303 (1990).
251 *Id.* at 5306.
252 *See supra* notes 21 and 248.
253 *See supra* Part III.
254 *See supra* note 22.

In fact, the statute specifically provides that the lockboxes be provided to the subscriber "by sale or lease."[255] Thus, under the regulatory scheme of leased access segregate-and-block, cable subscribers wishing to shield their children from indecent programming while retaining access to it themselves may have to pay twice: once for unscrambling of the leased access channel[256] and again for the lockbox to screen its programs from their children. In addition, the lockbox is available only to cable subscribers and works only on parentally-chosen channels during parentally-chosen time periods. This means that the cable subscriber must constantly monitor both cable and broadcast program guides to ensure that his or her family will not be confronted with unexpected program content. Finally, "few parents who are cable subscribers actually use such devices."[257]

There is, however, a relatively new technology which, while meeting the least restrictive means test, also cures many of the lockbox defects.

VI. THE V-CHIP

In 1995, Representative Edward Markey[258] introduced as part of the Telecommunications Act an amendment to the U.S. Code[259] establishing a "Requirement for Manufacture of Televisions that Block Programs"[260] and an accompanying "Television Rating Code."[261] This became known as the V-chip amendment[262] and was passed by Congress and signed into law by President Clinton on February 8, 1996 as part of the Telecommunications Act of

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255 *Id.*

256 The court in *ACM II* noted:

> Restricting indecent programming . . . to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator . . . [and] [n]othing in section 10 specifies that the costs associated with segregation and blocking must be borne by cable operators.

ACM II, 56 F.3d 105, 119 (D.C. Cir. 1995).

257 Gayoso, *supra* note 7, at 909. *See also id.* at 909 n.256 (noting that "although cable subscribers were advised of the availability of lockboxes . . . fewer than 1% of the cable company subscribers chose to obtain this equipment").

258 Markey stated that the V-chip would "arm parents in the battle to protect children against excessive violence and sexually explicit programming on television." Christopher Stern, *Broadcasters Seek V-chip-less Solution*, BROADCASTING & CABLE, July 24, 1995, at 17.

259 47 U.S.C.A. § 303.

260 H.R. REP. No. 104-223, at 157 (1995).

261 *Id.*

262 The "V" stands for "violence," although the technology allows parents to block a broad range of material, including indecent programming, on both broadcast television and cable. It has also been referred to as the C-chip, or "choice chip." *See Senate Sets Chip Hearing*, DAILY VARIETY, July 7, 1995, at 5.

1996.[263] The amendment requires that all television sets thirteen inches or greater in size, whether manufactured in the United States or abroad, contain "circuitry designed to enable viewers to block display of all programs with a common rating."[264]

As part of the amendment, the broadcast and cable television industry was required to develop a uniform ratings system for all shows within one year from the passage of the bill.[265] After nearly a year of development, this television ratings system was unveiled on December 19, 1996,[266] and the broadcast networks began rating shows on January 1, 1997.[267] The new system has "an MPAA-like ratings system for the more than 2,000 TV shows that can be seen daily on cable and broadcast TV."[268] The system uses a "rating icon [that] will appear in the upper left-hand corner of the TV screen for 15 seconds at the beginning of each show. The symbol will reappear during shows longer than one hour. It will also appear

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263 *See* Christopher Stern, *The V-chip First Amendment Infringement vs. Empowerment Tool*, BROADCASTING & CABLE, Feb. 12, 1996, at 20.

The text of the amendment as passed reads:

sec. 551. Parental Choice in Television Programming

(b) Establishment of Television Rating Code.

(1) Amendment. — Section 303 (47 U.S.C. 303) is amended by adding at the end the following:

(w) Prescribe —

(1) on the basis of recommendations from an advisory committee established by the Commission in accordance with section 551(b)(2) of the Telecommunications Act of 1996, guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children: Provided, That nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content; and

(2) with respect to any video programming that has been rated, and in consultation with the television industry, rules requiring that distributors of such video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

264 H.R. REP. No. 104-223, at 157 (1995).

265 *See* Jenny Hontz, *Congress Girding for Battle over Telecommunications Bill*, ELECTRONIC MEDIA, Sept. 4, 1995, at 4.

266 *See Questions and Answers on TV Rating System; Issues Remain to Be Ironed out, and the Debate Is Likely to Go On*, MILWAUKEE J. SENTINEL, Dec. 20, 1996, at 10.

267 *See* Sarah Cohen, *Trial TV Rating System Starts Amid Controversy*, CAHNERS PUB. CO. ELECTRONIC NEWS, Jan. 6, 1997, at 6. "ABC, CBS, NBC and Fox began implementing the new ratings system . . . on Jan. 1. . . . All other networks are expected to implement the system by the end of [January]." *Id.* In addition, "all cable stations are expected to begin rating their programming by February." Jim O'Connell, *TV Ratings System Debuts with New Year*, PITT. POST-GAZETTE, Jan. 1, 1997, at D-7.

268 Joe Flint, *TV Ratings Vex Exex*, DAILY VARIETY, May 7, 1996, at 1. The Motion Picture Association of America ("MPAA") is the organization which rates movies released in the United States.

on program promotions that are 30 seconds or longer."[269] Ratings will be assigned to a show by its producer or broadcaster[270] and all shows at all times, with the exception of sports programs, "news programs, public affairs programs, news magazine shows and financial news shows" will be rated.[271] A national survey of "1,207 parents with children under age 18" showed that "90 percent of America's parents favored the TV Parental Guidelines system as it has been created."[272]

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269 Sylvia Rubin, *TV Ratings System Unveiled - Critics Demand Content Base*, S.F. CHRON., Dec. 20, 1996, at A3. The ratings categories are as follows:

> The following categories apply to programs designed solely for children:
> TVY - All Children. This program is designed to be appropriate for all children. Whether animated or live-action, the themes and elements in this program are specifically designed for a very young audience, including children from ages 2-6. This program is not expected to frighten younger children.
> TVY7 - Directed to Older Children. This program is designed for children age 7 and above. It may be more appropriate for children who have acquired the developmental skills needed to distinguish between make-believe and reality. Themes and elements in this program may include mild physical comedic violence, or may frighten children under the age of 7. Therefore, parents may wish to consider the suitability of this program for their very young children.
> The following categories apply to programs designed for the entire audience:
> TVG - General Audience. Most parents would find this program suitable for all ages. Although this rating does not signify a program designed specifically for children, most parents may let younger children watch this program unattended. It contains little or no violence, no strong language and little or no sexual dialogue or situations.
> TVPG - Parental Guidance Suggested. This program may contain some material that some parents would find unsuitable for younger children. Many parents may want to watch it with their younger children. The theme itself may call for parental guidance. The program may contain infrequent coarse language, limited violence, some suggestive sexual dialogue and situations.
> TV14 - Parents Strongly Cautioned. This program may contain some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended. This program may contain sophisticated themes, sexual content, strong language and more intense violence.
> TVM - Mature Audience Only. This program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. This program may contain mature themes, profane language, graphic violence, and explicit sexual content.

The TV Parental Guidelines (visited Jan. 16, 1996) <http://www.tvguidelines.org>. This home page was set up by the TV Parental Guidelines Oversight Monitoring Board, headed by Jack Valenti, president of the MPAA. *See* Cohen, *supra* note 267, at 6.

270 *See* O'Connell, *supra* note 267, at D-7.

271 Rubin, *supra* note 269. "[E]ntertainment and talk shows, as well as tabloid-style shows such as 'Hard Copy'" will be rated. *Id.*

272 *TV Parental Guidelines*, *supra* note 269. Of this 90 percent, "58 percent [were] 'strongly' in favor and 32 percent [were] 'somewhat' in favor" of the current rating system. *Id.* A second poll found similar results: "[t]hree in five (62 percent) [of respondents] said a television ratings system would be 'very' or 'somewhat useful' to them." *Poll Finds Public Support for Content Over Age-Based TV Rating System; Parents Welcome V-Chip*, PR NEWSWIRE ASS'N, INC., Dec. 12, 1996. The poll also found that "[h]ouseholds with children would be more likely to use the technology (72 percent) than households with no children present (37 percent)." *Id.*

The system, however, is not without its detractors. Criticism has focused on two aspects of the new ratings system: producers and broadcasters determining the rating of their own shows[273] and the vague ratings categories.[274] Critics argue that the categories are too general and that they "fail to inform parents about [a program's] specific levels of sex, violence and profane language."[275] One of the most outspoken critics of the system is the original sponsor of the V-chip amendment, Representative Edward Markey. Markey "would prefer a rating system which screened for adult language, sexual content and violence."[276] A third criticism of the ratings system focuses on the fact that the ratings are displayed at the show's start for only fifteen seconds.[277] Many people argue that this time period is too short,[278] or that they tuned in too late to see the ratings because they were watching another show.[279]

While all of these criticisms are valid, it should also be noted that the television ratings system is operating on a ten-month trial basis[280] and that, while not perfect, it is an important first step in

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273 *See* O'Connell, *supra* note 267, at D-7. *See also* Rubin, *supra* note 269, at A3 (stating that "[u]nlike movies, which are rated by an independent board that includes parents, TV shows will be rated by producers, networks, cable channels, syndicators and others that originate programs").

274 *See* O'Connell, *supra* note 267, at D-7.

275 *Id.*

276 Cohen, *supra* note 267, at 6. Markey has said that the ratings system is a form of "hide-and-seek" because it "lump[s] objectionable content into categories so broad as to leave parents guessing whether it's violence, sex, language." *Questions and answers on TV rating system; issues remain to be ironed out, and the debate is likely to go on, supra* note 266, at 10. The National PTA, the American Psychological Association and the Union of Orthodox Jewish Congregations of America all join Markey in his criticism. *See id.*

277 *See supra* note 269 and accompanying text.

278 *See* Steve Hall, *TV Rating System Gets D for Dumb,* INDIANAPOLIS STAR, Jan. 9, 1997, at F01 (noting that "[b]y contrast, the networks regularly broadcast their identification icons—"ABC," "Fox," etc.—in the lower right hand corner of the screen at the top of a show and after every commercial break").

279 *See id.* The FCC has noted that this "random tuning behavior" or "grazing" may be an impediment to an effective ratings system. 4 F.C.C.R. 8196, 8363 (1989). As was noted in *Pacifica, see* discussion *supra* Part II, a father driving with his son failed to hear a content warning broadcast on his car radio at the beginning of a comedian's monologue. Similar problems are likely to occur with the television ratings system, since "[r]emote control devices are now found in 75% of TV households," making "the random tuning behavior referred to in *Pacifica* . . . more prevalent today." *Id.* The FCC further noted:

> In one recent study of adults 18 and over, almost one-half of the persons surveyed, engaged in 'grazing.' . . . The youngest age group surveyed (18 to 24 year olds) reported the highest amount of grazing (60%). Although no children were surveyed, it appears reasonable to infer from the data available that children under 18 are exposed to different programming in rapid succession without warning as to content either because they graze, or because they are coviewing with others who are grazing.

Id. at 8363-64.

280 *See* Cohen, *supra* note 267, at 6. President Clinton has also urged patience, suggesting that "all of the parents in the country . . . look at these ratings, . . . give [them] ten months to work, and then if they're inadequate or there needs to be some more content in

giving parents control over what their children watch. Finally, parents themselves must realize that the ratings system is intended to act only as their guide in determining what their children should watch, not as a parental substitute.

If the broadcast and cable television industry had failed to develop this uniform ratings system, an FCC-formed group of industry and public interest groups would have stepped in on a voluntary basis and would have had one year to develop the ratings system.[281] Section 551 of the Act requires that the FCC

> ensure that such [a] committee is composed of parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee.[282]

Supporters of the V-chip stress that "[n]either the FCC nor the advisory committee will ever rate a single TV program"[283] and that "[p]arents will be the final arbiters in deciding whether the TV shows are blocked"[284] by using their television remote control to block programming they do not wish their children to view.[285] It should be emphasized that the advisory committee, whether comprised of members appointed by the television industry or by the FCC, is not a necessary part of the V-chip system. This is because, by using the V-chip, parents are "to block any program on an individual basis regardless of whether it carried an advisory."[286] Thus, the ratings advisory committee is merely an educational tool the purpose of which is to instruct parents which programs they might wish to block.

The V-chip allows the parent to block individual programs and/or entire channels[287] and blocks programming based on its content rather than its time period or channel. It is inexpensive: "[a]ccording to the equipment manufacturers' estimates, it would

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the rating systems, then after a 10-month test period," the system can be adapted or altered. *Transcript of Clinton Press Conference*, U.S. NEWSWIRE, Dec. 13, 1996.

281 *See* Dennis Wharton, *V-chip's New Friends*, DAILY VARIETY, July 14, 1995, at 1, 20.

282 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

283 *Id.*

284 *Id.*

285 *See* Dennis Wharton, *Senate Panel OKs Two TV Anti-violence Bills*, DAILY VARIETY, Aug. 11, 1995, at 1.

286 Timothy B. Dyk & Barbara McDowell, *The Congressional Assault on Television Violence*, 11 COMM. LAW. 3, 6 (1993).

287 *See* Dennis Wharton, *Clinton Backs V-chip*, DAILY VARIETY, July 11, 1995, at 1.

take about ten cents . . . to make the chip [which is] . . . capable of carrying information on decoding."[288]

Critics of the V-chip note that, because it is to be added only to new television sets, the V-chip may take as long as ten years to reach every household in the United States.[289] This is, however, merely a problem inherent in placing new technology into the marketplace, analogous to automobile airbags which are taking several years to reach all drivers, and not a reason to delay or prohibit the V-chip's implementation. No one would argue that drivers should be denied the protection of automobile airbags because they are placed only in new cars. Similarly, parents should not be denied the protection of the V-chip because of the length of time it may take to reach all households. A 1989 Planned Parenthood study recorded "79,000 instances of sexual material"[290] on television each year. In addition, developers are "in the final stages of developing an external V-chip set-top box [similar to a cable converter box] to equip" older, pre-V-chip televisions.[291] This converter box is superior to the lockbox because, as discussed at Part V, *supra*, the lockbox is available only to cable television subscribers, whereas the converter could be purchased by anyone.

Thus, by providing the parents with the power to easily and inexpensively monitor their children's viewing, the V-chip easily fills the gap left by extending the safe harbor to include both broadcast and basic cable television. Parents must be given this tool to enable them to decide which programs their children should view, and it is the government's duty to assist them. In addition, the V-chip also passes the least restrictive means test because it does not unduly restrict adults' access to indecent material.[292] Adults would still be able to view indecency on broadcast and basic

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288 Symposium, *The Impact of the Mass Media Revolution Violence Panel*, 4 KAN. J.L. & PUB. POL'Y 39, 44 (1995).

289 Opponents of the V-chip say that "it will take more than a decade before the current generation of TV sets are replaced with V-chip sets." Dennis Wharton, *Solons Endorse TV Violence Ban*, DAILY VARIETY, July 13, 1995, at 1.

290 138 CONG. REC. S7308 (daily ed. June 2, 1992) (statement of Sen. Helms, citing Planned Parenthood study).

291 Cohen, *supra* note 267, at 6. The so-called V-chip converter should cost approximately $40, and it should be easy to use: "[u]sing the device's keypad, a parent enters a personal identification number (PIN) and chooses a rating limit for the TV. The V Chip Converter will read rating signals sent over the airwaves and block undesirable programming." *Id.* In addition, "if a child tries to disconnect or bypass the controller . . . power is cut off to the TV and a flashing light alerts the parent." *Id.*

292 The House report states that "[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual or other programming that they believe harmful to their children is the least restrictive and most narrowly tailored means of achieving that compelling governmental interest." H.R. REP. No. 104-223, at 157 (1995).

cable television after 10:00 p.m. and at any time on premium channels or pay-per-view events. Because the government will not be instituting or controlling the voluntary ratings scheme, the V-chip is also "generally considered to be the least constitutionally problematic"[293] of possible content-based regulation schemes. This is because "[t]he measure does not purport to regulate, or even condemn"[294] categories of programs, but rather "provide[s] parents with the technological capability to control their own children's access to particular programs or categories of programs."[295] Thus, the V-chip allows adults who wish to view indecency on television the access to which they are constitutionally guaranteed, while giving parents who wish to shield their children from this type of programming the assistance to which they are governmentally entitled.

Studies suggest that children are "affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children."[296] As courts have stated, "when it comes to umpiring the 'decency' of the communications permitted into our homes, the government's role should be restricted to one which supports not replaces society's primary institution for moral education — the family."[297]

VII. Conclusion

When it regulates a constitutionally protected form of speech, the government must use the least restrictive means possible and must demonstrate that it has a compelling objective. In indecency regulation, the government must balance the First Amendment rights of adults who wish to have access to indecent materials and its interest in protecting children's well-being. Television receives a uniquely limited form of First Amendment protection because of its pervasive presence in the home and its accessibility to children. Indecency on broadcast and cable television, however, has two distinctly different regulatory schemes. To remedy this, and to achieve the government's articulated goals, indecency on basic cable, including both PEG and leased access channels,[298] should be regulated in tandem with the broadcast television indecency model

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293 Dyk & McDowell, *supra* note 286, at 8.
294 *Id.*
295 *Id.*
296 H.R. Rep. No. 104-223, at 157 (1995).
297 *ACM II*, 56 F.3d 105, 136 (D.C. Cir. 1995) (Weld, J., dissenting).
298 Such channels "are not pay channels, they are [part of] . . . the basic cable package." *Id.* at 117 (internal quotations omitted). *See also supra* note 16.

which employs a safe harbor wherein no indecency is broadcast between the hours of 6 a.m. and 10 p.m. The V-chip will fill the gap left by broadcast and basic cable television after 10:00 p.m. and by the unregulated premium and pay-per-view channels.

Marie A. Ryan