The First Amendment And FCC Rule Making Under The 1992 Cable Act

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The purpose of this paper is to explore the First Amendment implications of the Federal Communication Commission's regulations issued under the 1992 Cable Act. This analysis is limited, therefore, to what the FCC did using its own discretion. The numerous requirements imposed directly by Congress in the Act are beyond the scope of this paper.

Additionally, it must be remembered that an under-staffed FCC was given an enormous amount of work to do with fixed time-limits. Thus, it could not be expected that the rule-making would be invulnerable to second-guessing. Nonetheless, whenever a governmental entity regulates in such a way as to affect communication, sensitivity to First Amendment concerns is mandatory. Moreover, the FCC serves, in part, as a explicator of the law of electronic communications for the nation. Thus, the analysis that the FCC presents impacts on innumerable other discussions and decisions concerning free speech.

I begin my discussion with an analysis of the scope of power agencies have, in general, to consider the constitutionality of Acts of Congress. Next, I look at two particular areas of FCC rule-making, indecent programming and home-shopping, to consider the impact of the FCC's rules and underlying analysis on the First Amendment.

I. The Role for Agencies in Constitutional Interpretation

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

This creates an uncomfortable position for an agency when it perceives that its marching orders might be unconstitutional. In its regulation under the 1992 Cable Act, the FCC stated that it did not have the power to question the constitutionality of its mandate: "It is a well-rooted principle that 'regulatory agencies are not free to declare an act of Congress unconstitutional.'"[1] Insofar as this statement stands for the proposition that agencies must assume that their governing statutes are valid, the principle is sound. One court stated that it was, "impossible to recognize any inherent power [in an administrative agency] to nullify

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[1]Indecent Programming and Other Types of Materials on Cable Access Channels, para 5,n.7, 71 R.R.2d 1177, 1183 (February 3, 1993).quoting, Meredith v. FCC, 809 F.2d 863, 872 (D.C.Cir. 1987), cert. den. 110 S.Ct. 717 (1988) See also Ostereich v. Selective Service System, Local Board 11, 393 U.S. 233, 242 (1968) (Harlan, J. concurring)("Adjudication of the Constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."). Despite this self-admonition, the FCC did discuss the constitutionality of its statutory commands and concluded they passed muster. See text accompanying notes, supra.

legislative enactments because of personal belief that they contravene the constitution."[2]

It would be incorrect to argue, though, to extend the reach of such a principle to the point where an administrative agency must refuse to take notice at all of constitutional questions raised by its legislative mandate. Agencies are charged with interpreting the scope of their mandate,[3] and the existence of a serious constitutional question is highly relevant in the interpretation of the breadth of the directive. Specifically, agencies should be hesitant to assume that there has been a, "delegation of authority to take actions within the area of questionable constitutionality...."[4] In other words, if Congressional language is unclear, agencies are required to choose an interpretation that will avoid serious constitutional questions.

The Supreme Court detailed what it considered the appropriate approach when an act of Congress, "touches the sensitive area of rights specifically guaranteed by the Constitution."[5] If there is more than one way to interpret such legislation, the Court, "favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality....We

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[2]Panitz v. District of Columbia, 112 F.2d ??, 41 (D.C.Cir. 19??). Accord, Engineers Public Service Co. v. SEC, 138 F.2d 936, 952 (D.C.Cir. 1943).

[3]Chevron, U.S.A., Inc. v Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984).

[4]Greene v. McElroy, 360 U.S. 474, 506 (1959).

[5]Ex Parte Endo, 323 U.S. 283, 299 (1944).

must assume, when asked to find implied powers in a grant of legislative ... authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[6]

Agencies, then, must interpret ambiguous grants of power so as to maximize their chances of surviving constitutional tests. One example of this rule of interpretation can be found in Hampton v. Wong.[7] In Hampton, the Court held that even though the Civil Service Commission had been authorized to "establish standards with respect to citizenship... which applicants must meet....",[8] the Commission was not justified in issuing a rule barring all noncitizens from federal service. The Court noted that such a broad ban would present a serious possibility of unconstitutional discrimination, and thus the Commission should not simply assume the total ban was authorized by federal policy:

> [I]t would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule.[9]

In assessing the sensitivity of the FCC to First Amendment concerns in its rule making under the 1992 Cable Act, it is unfair

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[6]Id.

[7]426 U.S. 88 (1976).

[8]Executive Order No. 10,577, quoted at 426 U.S. at 111.

[9]426 U.S. at 114, n.46 (emphasis added).

rights of those affected.

II. Indecency

In 1978, the Supreme Court upheld the FCC's ban on the broadcast of indecent programming, at least for those times when there was a good chance that a large number of children were in the listening audience.[10] This decision meant that not only would legally obscene material be barred from the airwaves as it had been outlawed in all other media,[11] but broadcasters would be risk losing their licenses for showing descriptions or depictions, "of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the average broadcast viewer or listener."[12]

In the 10 years preceding enactment of the 1992 Cable Act, federal courts had repeatedly struck down attempts to require cable television operators to keep indecent programming off their

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[10]FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[11]See Miller v. California, 413 U.S. 15 (1973). In Miller, the Supreme Court announced a three-part test for determining whether material is "obscene," (so-called "Miller-obscenity") which is unprotected by the First Amendment: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable ... law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24 (internal quotes and citations omitted).

[12]See e.g., Infinity Broadcasting Corp. of Pennsylvania, 3 FCC Rcd. 930, 933 (1987), remanded on other grounds sub nom. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C.Cir. 1988).

systems.[13] The primary reasons courts gave for applying a different rule was that cable was different that broadcasting. Cable television was viewed as being specifically invited into the home by the payment of the monthly fee. Equally, if not more important, there existed alternate means to protect the unwilling viewer. The wire that carried the offending program was capable of being blocked easily by each individual homeowner. The technology of cable, particularly lock boxes and addressable converters, permits each parent to serve as censor, rather than be forced to delegate that function to the state or federal government. In fact, the 1984 Cable Act had required cable operators to provide such devices to all who requested them, "[i]n order to restrict the viewing of programming which is obscene or indecent...."[14]

The 1992 Cable Act contained many provisions dealing with indecent cable programming. Some were self-executing without any action by the FCC. For example, cable operators were required to give advance notice to subscribers of any free preview of a premium channel which showed "movies rated by the Motion Picture Association of America as X, NC-17, or R," and block such

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[13]Community Television of Utah, Inc. v. Roy City, 555 F.Supp. 1164 (D.Utah 1982); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D.Utah 1985), aff'd per curium sub nom. Wilkinson v Jones, 800 F.2d 989 (10th Cir. 1986), summarily aff'd 107 S.Ct. 1559 (1987).

[14]47 U.S.C. 624 (d)(2). This provision was not amended in 1992 and remains in effect.

programming for all who request.[15]

The indecency section which most involved the FCC was Section 10. Although Section 10 is entitled, "Children's Protection From Indecent Programming on Leased Access Channels," it is designed to deal with a wide range of potentially offensive programming on both leased and public access channels. The major provisions of this section: i) permit cable operators to prohibit certain programming from access channels; ii) require that operators who do not block leased access programming segregate indecent leased programming onto a single channel that is only available upon a subscriber's written request; and iii) make cable operators liable for obscene access programming.[16]

After announcing that it was not the role of administrative agencies to adjudicate the constitutionality of congressional enactments,[17] the FCC analyzed the constitutionality of Section 10 and found the challenges to be "without merit."[18] The FCC's constitutional analysis reveals some misunderstanding that might have contributed to a decreased sensitivity to First Amendment interests within the Commission's regulatory purview.

Perhaps the most peculiar omission made by the FCC was in its

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[15]Section 15, Cable Act of 1992; 47 U.S.C. 624(d)(3)(B). This provision was struck down in Daniels Cablevision, Inc. v. U.S., --- F.Supp. --- (D.D.C. 1993).

[16]Section 10's grant of authority to cable operators to ban indecent programming was struck down in Alliance for Community Media v. FCC, 10 F.3d 812 (D.C.Cir. 1993).

[17]See text accompanying notes , supra.

[18]Para. 5-6, 71 R.R.2d at 1179.

discussion of the precedential value of earlier cases striking down cable indecency laws. The FCC stated that those challenging the constitutionality of Section 10 had argued that the broadcast analogy had been rejected and that, "some federal courts have found that these characteristics [uniquely pervasive and uniquely accessible to children] do not apply to cable television."[19] The Court then cited to a string of cases but left out any mention that the Supreme Court had summarily affirmed one of those decisions, Wilkinson v Jones.[20]

A summary affirmance by the Supreme Court is not to be treated as inconsequential, like a denial of certiorari, but as a holding reflecting the merits of the case.[21] Certainly, a summary affirmance has "considerably less precedential value" than an opinion on the merits, but lower courts and agencies are not free to disregard it either.[22] The major complicating factor here is that the opinion which the Supreme Court affirmed listed more than one reason for striking down the indecency laws.[23] Because a summary

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[19]Indecent Programming, para 8, 71 RR2d at 1180 (emphasis added).

[20]The complete citation reads: "10. See Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D.Utah 1985), aff'd per curium 800 F.2d 989 (10th Cir. 1986); Community Television of Utah, Inc. v. Roy City, 555 F.Supp. 1164 (D.Utah 1982)."

[21]Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[22]Illinois State Bd. of Elections v. Socialist Worker Party, 440 U.S. 173, 180-81 (1979).

[23]The lower court had ruled that Utah's indecency law was preempted by the 1984 Cable Act, unconstitutionally vague, and an unconstitutional attempt to ban non-Miller obscene cable

affirmance cannot be read as affirming all of the different rationale of a lower court opinion, the Supreme Court cannot be viewed as having necessarily decided on the merits that the broadcast model cannot be applied to cable indecency laws.[24] Nonetheless, the FCC should have, at minimum, explored the possible teachings of the Supreme Court's decision, rather than acting as if it had never occurred.

A second strange aspect of the FCC's analysis is its derogation of the federal cases striking down cable indecency laws because they:

> were decided prior to the Supreme Court's decision in Sable Communications v. F.C.C., which clearly indicates that regulation of indecent speech is permissible, even though the medium is not broadcasting and, therefore, does not necessarily fit the exact blueprint the Supreme Court applied in Pacifica to broadcasting.[25]

It is disingenuous, at best, to treat Sable as charting new law in the treatment of indecent programming, and to discount earlier cases because a subsequent Supreme Court ruling "clearly indicates" the constitutionality of regulating indecent speech. The Court in Sable struck down a federal ban on indecent commercial

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programming. Community Television, Inc. v. Wilkinson, 611 F.Supp. 1099, 1105-17 (D.Utah 1985). The Tenth Circuit's affirmance of the District Court did not expand on its reasoning but "affirmed its judgment on the basis of the reasons stated in the opinion." Jones v. Wilkinson, 800 F.2d 989, 991 (10th Cir. 1986).

[24]Cf. Mandel, 432 U.S. at 176 (declaring that a summary affirmance "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.").

[25]Indecent Programming, para 10, 71 R.R.2d at 1180.

telephone messages [so-called "dial-a-porn"] and expressed rejected pleas to announce a lower constitutional standard for indecency. Rather, the Court stated that the constitutional test was to remain the traditional standard whenever government wishes to, "regulate the content of constitutionally protected speech," that is only if, "in order to promote a compelling interest [the Government] chooses the least restrictive means to further the articulated interest."[26]

The FCC's decision does eventually indicate the Commission's recognition that Sable commands use of the compelling interest test to evaluate indecency regulation in media other than broadcasting.[27] Yet the Commission's implication that the Court "clearly indicated" a special rule for indecency is troubling.

Similarly, the Commission discounts the earlier federal cases because:

> [I]n each of the cited cases, the state or local prohibitions were found to be overly broad in terms of the content sought to be restricted and thus stand in stark contrast to the narrow definition of indecency we have proposed and shall adopt today.[28]

In fact, the narrow definition adopted by the Commission, "[programming that] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by

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[26]492 U.S. at

[27]The Commission stated: "As Sable and its progeny indicate, regulation of indecent matter is or other forms of expression is constitutionally permissible provided that it meets the 'compelling government interest' test and is 'carefully tailored.'" Indecent Programming, para 10, 71 R.R.2d at 1180.

[28]Indecent Programming, para 9, 71 R.R.2d at 1180.

contemporary community standards for the cable medium,"[29] is virtually indistinguishable from the definition in the Miami ordinance struck down in Cruz v. Ferre: "material which is a representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive."[30] Had Miami utilized the FCC's indecency definition, the court would still have found it overbroad based on its conclusion that the broadcast rationale is inapplicable to cable.

Finally, the Commission states that:

> [E]ven though cable is not now the universal service the telephone medium is, nor, as yet as pervasive as broadcasting in our society, we note that over 60 percent of television households in the country now subscribe to cable. As pointed out ... approximately 30 million of these homes are provided with an access channel....It would thus seem that blocking is a reasonable, appropriate means to protect the well-being of children in the substantial number of households that now subscribe to cable services.[31]

This analysis is also misleading as it relies on a misinterpretation of the word "pervasive" as used in Pacifica. The Supreme Court did not mean "widely used." If it had, telephone service would surely have been treated in Sable as "pervasive."

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[29]47 C.F.R. ???

[30]755 F.2d at 1417. The Eleventh Circuit found this law unconstitutional not because it exceeded the definition of indecency but because Pacifica could not be applied to cable television. 755 F. 2d at 1419-20.

[31]Indecent Programming, para. 11, 71 R.R.2d at 1180 (emphasis added).

Rather, the Pacifica Court used the phrase "uniquely pervasive presence" to describe the specially intrusive nature of broadcasting. Not only does broadcasting "confront the citizen... in the privacy of the home," but, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot protect the listener or viewer from unexpected program content." [32] Thus, "pervasive" in the Pacifica context refers to the inability of people to protect themselves from unexpected program content in the home. The number of viewers, listeners or subscribers is irrelevant to this question.

Since the Commission acknowledges that any cable indecency rule must pass the compelling interest test in order to be constitutional, the above errors, and, in fact, the FCC's entire discussion entitled, "Permissibility of Regulating Indecent Cable Programming" is arguably irrelevant for determining the constitutionality of the FCC's indecency rules. The FCC's analysis, though, reveals such an over-eagerness to restrict constitutionally-protected speech as to call into question the degree to which the Commission was sympathetic to the constitutional concerns its rules raised.

A. State Action

This is best revealed in the FCC's off-hand dismissal of the argument that its regulations authorizing censorship by cable operators of the programming offered on leased and public access

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[32] 438 U.S. at

channels implicated state-action concerns. The FCC entire analysis of whether public or leased access channels could be considered "public fora" consisted of two statements: a) No federal cases have "held that cable access channels are public forums..."[33] and b) access channels are "similar in purpose and function" to communications common carriers.[34] Thus, censorship by a cable operator of access was merely the voluntary decisions of a private actor and not state action.

The Commission's reasoning is surprising for a number of reasons. First, the FCC ignored its own characterization of access channels as public fora that was made not many years before. In removing a Commission rule imposing liability on cable operators for obscene access programming, the FCC declared:

> [A] rule which requires the cable system operator to censor programming on a channel set aside as a public forum, to which the programmer has a right of access by virtue of local, state, or federal law, would impose a system of prior in restraint in violation of the Freedman requirement.[35]

Secondly, the FCC's bald assertion that no case has held access to be a public forum appears disingenuous at best. In

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[33]Indecent Programming, First Report, 71 R.R.2d at 1182, para 22.

[34]Indecent Programming, Second Report, 72 R.R.2d at 276, para 7, n.5.

[35]Amendment of Part 76 of the Commission's Rules and Regulations Concerning Cable Television Channel Capacity and Access Channel Requirements. 87 F.C.C.2d 40, 42 (1981) (emphasis added). For a discussion of the so-called "Freedman requirement" see discussion accompany note 88.

Missouri Knights of the Ku Klux Klan v. Kansas City,[36] the court was faced with a city's closing of a public access channel in response to offensive, racist programming. The court rejected the City's motion for summary judgment on the ground that the complaint raised a First Amendment issue. Those challenging the city had claimed that the access channel was created as a vehicle for public expression on a first-come, first-serve basis, that the cable operator had no editorial control and that ultimate control over the channel's existence rested with the city. The court agreed: "If the allegations in the plaintiff's complaint prove true, [the access channel] was a public forum."[37]

Finally, the FCC never states why an access channel should not be treated as a public forum. The Supreme Court has held that a public forum is created when, "the State has opened [it] for use by the public as a place for expressive activity."[38] The fundamental issue is whether "a principle purpose" for creating the forum was for "public discourse" and "the free exchange of ideas."[39]

Access channels seem to meet this requirement squarely. In

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[36]723 F.Supp. 1347 (W.D.Mo. 1989).

[37]723 F.Supp. at 1351-52. The court rejected the City's claim that a municipality could eliminate a public access channel at its complete discretion by holding: "A state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment. 723 F.Supp. at 1352 (emphasis added).

[38]Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

[39]Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 112 S.Ct. 2701, 2706 (1992).

the 1984 Cable Act, Congress specifically defined access channels as, "designated for public ... use."[40] Congress unmistakably intended that access channels be viewed as creating a forum for the free exchange of ides when it termed such channels, "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."[41]

If access channels are to be viewed as public fora, then the Government has, "an obligation to justify its discrimination and exclusions under applicable constitutional norms."[42] When policing the programming offered over this public forum, the cable operator is not acting as a private speaker but as, "the repository of state power."[43] Whether the content-based exclusion of speakers in a public forum is made by the government or by a cable operator who has been specifically empowered by the government to engage in such discrimination, the constitutional mandates insulating protected speech are unchanged.

The crucial error made by the Commission was its assumption that the only "speaker" being affected by the access regulation was the cable operator. Once the FCC, "rejected arguments that according cable operators additional control over <u>their</u> cable systems constitutes impermissible state action," neither solicitude

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[40]47 U.S.C. §522 (13)(a).

[41]H.R.Rep. No. 934 at 100, reprinted in 1984 U.S. Code Cong. & Admin. News at 4667.

[42]Widmar v. Vincent, 454 U.S. 263, 267-68 (1981).

[43]Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 286 (1913).

for constitutionally protected speech, nor procedural safeguards were found to be necessary.[44] If all the FCC had done was to increase the editorial discretion of one speaker then, of course, there would have been no First Amendment issue. But in empowering cable operators to ban access programming, the FCC was authorizing the silencing of other speakers.

In simplest terms, consider if the FCC had specifically granted private citizens the right to remove from newspaper boxes any paper that they "reasonably believed" was offensive to morals.

To say that the subsequent destruction of newspapers was nothing more than voluntary private action would be untenable. The blatant governmental encouragement of the nominally private parties brings the action within the First Amendment.

In a similar instance, the Supreme Court found state action where federal regulations authorized, without requiring, drug testing of employees by private railroads.[45] The Court stated that, "The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one."[46] The Court stressed that such a simplistic test was inappropriate: "Whether a private party should be deemed an agent or instrument of the Government...necessarily turns on the degree of the Government's participation in the private party's

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[44] Indecent Programming, Second Report, 72 R.R.2d at 280, para 29 n.17 (emphasis added).

[45] Skinner v Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[46] 489 U.S. at 615

activities."[47] The Court concluded that, by "remov[ing] all legal barriers to testing," "indicat[ing] its desire to share the fruits of such intrusions" and "preempt[ing] state laws ... covering the same subject matter," the Government had done, "more than adopt a passive position toward the underlying private conduct."[48] These regulatory provisions were held to be, "clear indices of the Government's encouragement, endorsement and participation, and suffice to implicate the [Constitution]."[49]

The identical situation is created by Section 10 and the FCC's regulations. First, from the very title of the section, "Children's Protection From Indecent Programming on Leased Access Channels," to its legislative history,[50] the government is encouraging and endorsing the ban on indecent access program. Secondly, the Congress and the FCC have "removed all legal barriers" to the cable operator's censorship of access. Third, the FCC announced that Section 10 is to be read as preempting conflicting state indecency

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[47]489 U.S. at 614

[48]489 U.S. at 615.

[49]489 U.S. at 615.

[50]The chief sponsor of Section 10, Senator Helms stated that the purpose of this section was, "to forbid cable companies from inflicting their unsuspecting subcribers with sexually explicit programs...."). 138 Cong. Rec. S642, 646 (daily ed. Jan. 30, 1992) See also 138 Cong. Rec. at S647 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) ("Mr. President, the bottom line is that this amendment will keep decent Americans from being victimized by the disgusting programs, and the strip shows, and all the rest [of] the sleaze that runs on leased access channels.").

and obscenity laws.[51] The Government has done far more than "adopt a passive position" toward the censorship of access programming. Section 10 and the FCC's regulations constitute such "encouragement, endorsement and participation," that a cable operator who censors access programming pursuant to the law, must "be deemed an agent or instrument of the Government."

Once state action is found, the constitutional norms must be observed. At minimum, any censorship by the cable operator must provide the access programmer with procedural safeguards: the burden of proving the program is censurable rests on the censor; there must be judicial review of any decision to censor, and any restraint must be for the shortest time necessary for obtaining a final judicial ruling.[52] Moreover, the type of programming that can be censored is substantially limited.

B. Leased Access

The 1992 Cable Act's provisions dealing with indecent leased access programming gave the FCC only limited discretion. First, Congress directly permitted cable operators to prohibit leased access programming which the operators believed, "describes or depicts sexual or excretory activities or organs in a patently

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[51]Indecent Programming, First Report, para. 50-51; nn. 42 & 44, 71 R.R.2d at 1187.

[52]Freedman v. Maryland, 380 U.S. 51 (1965).

offensive manner as measured by contemporary community standards." [53] As the FCC correctly noted, the Cable Act, "does not require, or grant specific authorization to, the Commission to implement [this] provision."[54]

For those operators who did not voluntarily opt to use this power, the FCC was charged with issuing regulations requiring leased access programmers to inform those operators whether their programs "would be indecent as defined by Commission regulations", and requiring cable operators to place all identified programming on a single channel that would be blocked, "unless the subscriber requests access to such channel in writing."[55]

To implement this section, the FCC needed to make several decisions. First, the Commission needed to devise a definition for "indecency" on cable television. The FCC chose to follow the broadcast model and adopted what it termed its "generic definition of indecency" -- programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." As with broadcast, a cable program is to be looked at "in context," but unlike obscenity determinations, indecency is not based on the entire work. Additionally, the "community" whose standards are to be met is not the locale where the program is shown, but is to be

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[53] Sec. 10(a), Cable Act of 1992; 47 U.S.C. 532 (h).

[54]Indecent Programming and Other Types of Materials on Cable Access Channels, para 29, 71 R.R.2d 1177, 1183 (February 3, 1993).

[55]Section 10(b), Cable Act of 1992; 47 U.S.C. 532(j)(1).

based on the "average subscriber to cable television."

In all likelihood, the Commission was carrying out the desires of Congress in using the broadcast model to define indecency. Additionally, particular issues, such as the decision not to base indecency on the work as a whole, had been long settled for the broadcast medium by the FCC and had been found to be constitutional.[56]

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

Nonetheless, there are problems with the FCC's choice. First, the Commission's stated reason was, at best, a non sequitur: "Keeping in mind that the purpose of 'indecency' regulation is to protect children from exposure to such materials, we believe that this interpretation, not confined to a specific geographical area or specific cable system, is reasonable and appropriate."[57] There is simply no connection between the stated purpose and the chosen interpretation. Knowing that the rule's purpose is to protect children from "such" materials does not in any way help select

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[56]See e.g., Pacifica, 438 U.S. at ; Action for Children's Television, 852 F.2d 1332, 1340 (D.C.Cir. 1988)(stating that "merit" does not keep patently offensive material from being indecent").

[57]para 37.

whether to define "such" materials locally or nationally.

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

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.... People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity."[58]

Under the FCC's national standard, some conduct "found tolerable" in tolerant communities will nonetheless need to be blocked while parents in sensitive communities will be forced to accept programming they find indecent.

The FCC attempted to buttress its decision by citing to Hamling v. U.S. ,[59] for the proposition that no "precise geographic area" is constitutionally required for the determination of community standards for obscenity. A closer reading of Hamling, however, finds that the Supreme Court ruled that federal obscenity statutes are, "not to be interpreted as requiring proof of the uniform national standards that were criticized in Miller," and that consideration of the "community standards of the 'nation as a

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[58]See e.g., Miller v. California, 413 U.S. at ??? ("

[59]418 U.S.87 (1974).

whole,'" was inappropriate.[60] Instead, in federal prosecutions, a juror is to "draw on knowledge of the community or vicinage from which [he or she] comes in deciding what conclusion the 'average person apply contemporary community standards' would reach in a given case."[61]

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

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

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[60]418 U.S. at 105 & 107.

[61]418 U.S. at 105.

C. Public Access

For its drafting of regulation for public access channels, the FCC was given far more latitude The FCC was charged with issuing regulations, "as may be necessary" to enable cable operators to ban public, educational, or governmental access "programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[62]

One of the obvious issues for the FCC was to explain the scope of the categories for which access programming could be prohibited. The Commission was faced with the problem that Congress obviously did not mean that any of the enumerated categories were to be applied literally.

For example, "promoting" unlawful conduct is fully protected speech unless, "it is directed to inciting or producing imminent lawless action and is likely to produce such action."[63] In the words of Louis Brandeis, "[E]ven advocacy of violence, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement....The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in

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[62]Section 10(c), Cable Act of 1992.

[63]Brandenburg v. Ohio, 395 U.S. 444 (1969).

mind."[64]

The FCC wisely chose a constitutionally-permissible definition. The Commission limited "soliciting or promoting unlawful conduct," to mean only that speech that would "constitute unlawful solicitation of a crime or would otherwise be illegal" under federal or local law.[65]

The FCC also had to define the Congressional language dealing with sexually-oriented material. First, the FCC had to puzzle with the oxymoronic phrase: "programming which contains obscene material." In non-legal parlance, a program with a sexually graphic scene may well be said to "contain" obscene material. However, as a rule of law, the complete programming must be viewed in its entirety. Obscenity can only be determined by judging whether the work "as a whole" lacks serious literary, artistic, political or scientific value.[66] Thus, programming as a whole is, or is not, obscene; it does not "contain" a part that is obscene material. The FCC correctly saw this, and ruled that the phrase "programming which contains obscene material" was to mean " Miller" obscene.

The resolution of the next category, "sexually explicit conduct" is not as simple to resolve. The easy part is recognizing

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[64]Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[65]Indecent Programming, Second Report, para.16.

[66]See Miller v. California, 413 U.S. at 24 (stating that a finding of obscenity requires a determination that, "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") See also Pope v. Illinois, 482 U.S. 497 (1987) (stating that literary, artistic, political, or scientific value are to be determined by a reasonable person standard).

that the First Amendment prevents the congressional language from being applied literally. Unmodified, "sexually explicit conduct" is an overbroad category.[67] All of the limitations on sexually-oriented material which the Court has upheld have required that the material be "patently offensive." If sexually-explicit includes kisses and embraces, it obviously intrudes on protected speech.

The FCC dealt with this problem by defining "sexually explicit conduct" as "indecent programming."[68] The Court argued that Congress presumably did not mean all three categories to be coextensive, and that each needed to have a separate meaning.[69] The FCC concluded that "indecency" best fulfilled Congressional intent.

One major problem with this conclusion is that Congress was well aware of the legal meaning of the word "indecent and had used the word repeatedly in both the Cable Act[70] and other regulatory measures.[71] Certainly it could have been argued that Congress knows enough to say "indecent" when that's what it means.

Again, keeping in mind that non-obscene programming is constitutionally protected, the Commission had an array

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[67]See Erzoznik v. Jacksonville, 422 U.S. 205 1975)(striking down ban on drive-in theaters displaying films containing nudity).

[68]Indecent Programming, Second Report, para. 15.

[69]Id., para 14.

[70]See e.g. 47 U.S.C. §532(j)(1)(requiring the FCC to promulgate regulations designed to limit "the access of children to indecent programming," on leased access channels).

[71]See Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989)(striking down Congressional ban on "indecent" telephone services).

interpretive options. First, the FCC could have stated that the phrase "contains obscene material [or] sexually explicit conduct" should be read together to mean Miller obscene. As Justice Stewart had argued in Pacifica, "Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power...."[72]

An alternate tack would have been to take seriously Congress's deliberate refusal to use "indecent." Under the maxim expressio unius est exclusio alterius,[73] by using a term different from "indecent," the statute must be interpreted to mean something different. The focus would then be on the words, "sexually explicit conduct," that were chosen. Under this approach, the Commission could have argued that something different from both "obscenity" and "indecency" was being targeted, specifically hard-core explicit sexually conduct. Thus, access programs could be banned if they explicitly depicted "ultimate sexual acts,"[74] without regard to the Miller requirement that the programming as a whole lack serious literary, artistic, political or scientific value and without proving that the programming arouses, "a shameful or morbid" sexual response.[75]

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[72]Pacifica, 438 U.S. at --- (Stewart, J., dissenting).

[73]"The expression of one thing is the exclusion of another," Black's Law Dictionary 521 (5th Ed. 1979).

[74]Miller, 413 U.S. at .

[75]This definition of "prurient" interest was adopted in Brockett v. Spokane Arcades, 472 U.S. 491 (1985)(rejecting a standard of "prurient" which included "normal" sexual response).

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

III. Must Carry and Home Shopping

In the 1992 Cable Act, Congress imposed mandatory carriage obligations on cable operators, requiring cable systems to carry local broadcasters.[76] Congress severely limited the discretion of the FCC in determining whether cable operators should be subject to must-carry requirements and which broadcast stations would need to be carried, but made a special exception for home-shopping stations. Section (4)(g) of the 1992 Cable Act required the Commission to make a de novo determination as to whether "broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity...."[77] Somewhat asymmetrically, the statute states that if the FCC decided that "one or more of such stations" serve the public interest, they would qualify for must-carry rights, but if one or more did not

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[76]47 U.S.C. §§534, 535.

[77]47 U.S.C. § 533(g)(2).

serve the public interest, "the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials."[78]

The Commission ruled in favor of the home shopping stations. The Cable Act had mandated that the FCC evaluate three factors: the viewing of home shopping stations, the level of competing demands for the spectrum allocated to them, and the role of such stations in providing competition to nonbroadcast services offering similar programming.[79] The FCC concluded that, based on all three grounds, as well as on evidence showing that these stations "adequately [address] the needs and interests to their communities" and that a required change in format would have a "destabilizing impact on the minority ownership of television stations," home shopping stations, as a class, serve the public interest.[80]

The only mention of the First Amendment came when the FCC considered the additional question of whether home shopping stations should be eligible for mandatory cable carriage. The primary concern of the FCC seems to have been ensuring that a ruling on home shopping, "not contaminate the current litigation

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[78]Id.

[79]47 U.S.C.§ 533 (g)(2).

[80]Home Shopping Station Issues, Report and Order, MM Docket No. 93-8, para 2, 8 FCC Rcd 5321; 73 R.R.2d 355 (1993).

about must-carry rights of commercial stations generally."[81] After concluding that the plain language of the Act required must-carry status, the Commission stated, "that the failure to qualify certain licensed stations based on their programming decisions would place the content-neutrality of the must-carry rules into serious doubt, thereby jeopardizing their constitutionality."[82] The Chair of the FCC was even more explicit in focusing on the court challenge to the must-carry rules: "I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must carry rules."[83]

The FCC may well have exhibited an overabundance of caution in this matter. The three-judge court which upheld the must-carry rules did emphasize that the rules were content-neutral, and thus not subject to strict scrutiny.[84] The main concern, the court

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[81]Home Shopping Station Issues, dissenting statement of Commissioner Ervin S. Duggan, 8 FCC Rcd at ; 73 R.R.2d at .

[82]Home Shopping Station Issues, para 39, 8 FCC Rcd at ; 73 R.R.2d at . In an accompanying footnote, the Commission stated that the must-carry rules had been found content-neutral but that, "the court noted that the restriction of a particular type or character of speech might subject a regulation to strict scrutiny." Id, describing Turner Broadcasting System, Inc. v. FCC, 819 F.Supp. 32 (D.D.C. 1993)(3-judge court).

[83]Home Shopping Station Issues, statement of Chair James H. Quello, 8 FCC Rcd at ; 73 R.R.2d at . In a footnote to this sentence, Chairman Quello stated that, "[I]f the Commission decided to deny must-carry status to a class of stations because of their content, it would undermine the court's bedrock assumption supporting the constitutionality of must carry rules."

[84]Turner Broadcasting System, Inc., 819 F.Supp. at .

stressed, was whether the government was trying to "effect a degree of content control."[85] Favoring one set of speakers, such as broadcasters, would not create a First Amendment problem unless the favoritism, "is related to what the speakers are saying."[86]

These concerns would not have been any more implicated if the FCC had denied mandatory carriage rights to broadcast stations providing "23 hours of commercial programming per day"[87] Commercial speech, even though protected by the First Amendment, holds a "subordinate position" to "fully protected speech."[88] The current Supreme Court test for evaluating regulation of commercial speech is that such laws, "need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny."[89]

In the 1993 case of City of Cincinnati v. Discovery Network, Inc., the Supreme Court struck down a city's ban on newsracks selling "commercial handbills" but not "newspapers".[90] The city had attempted to argue that the "low value" of commercial speech justified the disparate treatment, but was rebuked by the Court:

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[85]Turner Broadcasting System, Inc., 819 F.Supp. at 44.

[86]Turner Broadcasting System, Inc., 819 F.Supp. at 43.

[87]Home Shopping, dissent

[88]United States v. Edge Broadcasting, 113 S.Ct. 2696, ---- (1993).

[89]Edenfield v. Fane, 113 S.Ct. 1792, ---- (1993). See generally Central Hudson Gas v. P.S.C. of New York, 447 U.S. 557 (1980); SUNY v. Fox, 109 S.Ct. 3028 (1989).

[90] 113 S.Ct. 1505, --- (1993).

"In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant."[91]

This statement cannot be read too broadly, to imply that the "common sense" distinction between commercial and other speech is ending.[92] The admonition given in Discovery Network relates to the fact that the city's distinction between commercial and noncommercial speech, "bears no relationship whatsoever to the particular interests that the city has asserted."[93] Since the only interests put forth were aesthetic and safety interests, the purely commercial nature of the pamphlets did not affect the city's interests differently than if they had been non-commercial. The Court concluded that the city had not established a reasonable "fit" between its goals and its treatment of commercial speech, "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city."[94]

Granting must-carry rights to all broadcast stations other than those which are, "predominantly utilized for the transmission

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[91]Id. at ----.

[92]The FCC seems to concerned that this statement restricts or prevents limitations of commercial time on television stations. See e.g. In the Matter of Limitations on Commercial Time on Television Broadcast Stations, Notice of Inquiry, MM Docket No. 93-254, para. 8, n.16, 8 FCC Rcd 7277 (1993). See also Home Shopping Station Issues, statement of Chairman Quello, 8 FCC Rcd. at .

[93]113 S.Ct. at --- (emphasis added).

[94]113 S.Ct. at ---.

of sales presentations or program length commercials," would bear a substantial relationship to the particular interests that the must-carry regulations are designed to serve. Congress found a "substantial governmental interest in broadcasting" because broadcasters engage in "the local origination of programming" and "continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[95] The first policy listed in the 1992 Cable Act, and the only one directly implicating must-carry, is to, "promote the availability to the public of a diversity of views and information through cable television and other video distribution media."[96]

Unlike newsracks for commercial pamphlets, which create the identical visual blight as racks for newspapers, broadcast stations consisting predominantly of program-length commercials do not affect the governmental interests in the same manner as other broadcast stations. The FCC has long been aware that excessive commercialization might, "subordinate programming in the interest of the public to programming in the interest of its salability."[97] In fact, even when the FCC deregulated commercial time for broadcast television, it was not because excessive commercials served the public interest as well as other programming but because it was expected that "marketplace forces should effectively

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[95]1992 Cable Act, §2(a)(10) & (11).

[96]1992 Cable Act, § 2(b)(1).

[97]En banc Programming Inquiry, 44 FCC 2203, para 149 (1960).

regulate commercial excesses."[98]

Unless the Supreme Court is prepared to discard one-half century of jurisprudence, the First Amendment does not deprive the FCC of its "comprehensive mandate to 'encourage the larger and more effective use of [broadcasting] in the public interest."[99] In 1990, the Court reaffirmed that "the diversity of views and information on the airwaves serves important First Amendment values."[100] It seems unlikely that the Court would hold that the same First Amendment prevented the FCC from encouraging and supporting broadcasters who contribute to the "diversity of views and information" rather than show commercials most of the time.

The must-carry rules would not have been "contaminated" had the FCC declined to accord the commercial speech of home shopping stations the same encouragement as other kinds of programming. In fact, the FCC's own must-carry rules create a similar dichotomy.

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[98]In the Matter of The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations (Television Deregulation), MM Docket No. 83-670; 98 FCC 2d 107, para 63; 56 Rad. Reg. 2d (P& F) 1005 (1984), aff'd in part and remanded in part sub nom Action for Children's Television v FCC, 821 F.2d 741 (D.C.Cir. 1987). The Commission summarized the rationale behind its historic concern with over-commercialization by stating, "[O]ur regulation of commercial practices has been characterized by the concern that licensees avoid abuses with respect to the total amount of time devoted to advertising as well as the frequency with which programming is interrupted for commercial messages," id., at para. 55.

[99]N.B.C. v. US, 319 U.S. 190, (1943). The Court also stated that the FCC is not merely a "traffic officer" supervising the airwaves, but has "the burden of determining the composition of that traffic."Id., 319 U.S. at ---.

[100]Metro Broadcasting v. FCC, 110 S,Ct. 2997, ---- (1990).

Not all municipally-owned stations are eligible for mandatory carriage rights. The FCC has ruled that only those municipally-owned stations which transmit noncommercial programming for educational purposes at least 50 percent of their broadcast week qualify.[101] One reason the FCC gave for this rule was its belief that, "the 50 percent of programming threshold is an adequate safeguard to ensure that such station cannot relegate their NCE [noncommercial educational] programming to undesirable hours."[102] This apparently unremarkable Commission judgment did not lead to a finding that the must-carry rules were content-based. This is because there was no viewpoint or subject matter discrimination and not a hint that the distinction reflected, "a 'deliberate and calculated device' to penalize a certain group...."[103]

It would be equally permissible to take the special commercial nature of home shopping stations into account for must-carry purposes. In fact, the FCC did indeed take the commercial nature of home shopping stations into account during its rate regulation rule-making.[104] The Commission was charged by Congress with determining "the maximum reasonable rates" that a cable operator

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[101]47 C.F.R.§76.55 (a)(2).

[102]Broadcast Signal Carriage Issues, MM Docket No. 92-259; para. 5, - FCC Rcd. ---, 72 R.R.2d 204 (1993).

[103]Medlock v. Leathers, 499 U.S. 439, --- (1991), quoting Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[104]Rate Regulation, MM Docket No. 92-666, --- FCC. Rcd. ---, --- P & F 2d. --- (1993).

may charge a leased access programmer.[105] The FCC ruled that leased access programmers must be divided into three categories: those charging subscribers directly on a per-event or per-channel basis, "those proposing to use their channel for more than fifty percent of their lease time to sell products directly to customers (e.g. home shopping networks, infomercials); and all others."[106] The FCC concluded that it would, "require cable operators to charge different maximum monthly access rates to each category of programmers."[107] Thus, the FCC is already treating "home shopping networks" differently than other programmers, without so much as a whisper of unconstitutionality.

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

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[105]47 U.S.C.§612(c)(4)(A)(i).

[106]Rate Regulation, para. 516, --- FCC Rcd. at ---.

[107]Id.

channel space on overcrowded cable systems.[108]

Arguably, home shopping networks do not provide the benefits sought by Congress, serving as "the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium."[109] If home shopping networks are displacing potential cable programmers who do provide these benefits, it could be plausibly contended that the impact of the must-carry rules on competing non-broadcast programmers is "greater than essential to the furtherance of the governmental interest."[110] Without necessitating a case-by-case, programmer-by-programmer analysis, the Commission could have ordered, as it did in its rate regulation rulemaking, "different" treatment for "home shopping networks ... and all others."[111] This would have lessened the competitive disadvantage suffered by non-broadcast programmers and enhanced the discretion sought by the cable operators, without noticeable harm to the substantial interests sought to be furthered by Congress.

The First Amendment analysis, though, is not the only relevant concern. It is not at all certain that the suggested interpretation would be been statutorily permissible. The language of Congress appeared to limit the FCC to a dichotomous choice:

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[108]Turner Broadcasting System, Inc., 819 F.Supp. at --- (Williams, J., dissenting).

[109]Turner Broadcasting System, Inc., 819 F.Supp. at --- (quoting 1992 H.R.Rep. No. 628 at 50).

[110]U.S. v. O'Brien, 391 U.S. 367 (1968).

[111]Rate Regulation, para. 516, --- FCC Rcd. at ---.

either home-shopping stations are in the public interest and eligible both for broadcast licenses and must-carry, or they are not in the public interest and need to be forced off the airwaves. If the FCC had thought otherwise, they could perhaps have argued that the "public interest" in the airwaves is not coextensive with the "public interest" to be served by mandatory carriage.

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

IV. CONCLUSION

The FCC was given a thankless task by Congress. The Cable Act of 1992 is even more labrynthian than its 1984 predecessor. Further, Congress did not always exhibit as much sensitivity to free speech concerns as might have been desired.

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