

Fall 1986

Contextual Regulation of Indecency: A Happy Medium for Cable Television

Jeffrey E. Wallace

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey E. Wallace, *Contextual Regulation of Indecency: A Happy Medium for Cable Television*, 21 Val. U. L. Rev. 193 (2011).

Available at: <https://scholar.valpo.edu/vulr/vol21/iss1/8>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



CONTEXTUAL REGULATION OF INDECENCY: A HAPPY MEDIUM FOR CABLE TELEVISION

I. INTRODUCTION

Cable television has expanded rapidly over the past decade.¹ Currently, over forty-seven percent² of all American households subscribe to cable TV³ and this figure is expected to almost double by 1990 as the medium's technology advances.⁴ This expansion is attributable to the wide variety of programs offered by cablecast,⁵ including several channels for "adults only," which show sexually explicit material.⁶ Because of its diverse entertainment potential, cable television has been hailed as a savior from the bland, ratings-oriented major network programming.⁷ Indeed, media authorities have lauded cable television as the medium which will revolutionize American communications.⁸ However, because of regulations introduced by several federal, state, and private organizations, society has not yet realized the full

1. For the purposes of this note "cable television" is subscriber or pay television that requires the user to pay a fee before desired programming is received. Cable television is received into the viewer's home via a wire that runs directly from a cable franchise.

2. Multichannel News, Sept. 1, 1986, at 14. This represents an increase from 45.7 percent as of September 1, 1985. According to data obtained from A.C. Nielson Co., cable is currently found in more than 41.2 million homes. There are 85.9 million U.S. TV homes. California had the three highest areas of penetration:

- A. San Angelo, 88.3 percent
- B. Palm Springs, 85.3 percent
- C. Santa Barbara, 84.9 percent

Id.

3. For the purposes of this note "cable TV," "cable television," "cablecast," and "cable" are all synonymous.

4. For a discussion of the extent to which cable is expected to become a part of the American way of life, see Robbins, *Indecency On Cable Television - A Barren Battleground For Regulation of Programming Content*, 15 ST. MARY'S L.J. 417, 418 (1984).

5. Transmission via cablecast is received through wires which run from the operator's station to subscriber's home. Cablecast is to be distinguished from broadcast whereby reception occurs through the airwaves.

6. Sexually explicit material shows extensive nudity, including the genital areas of the body, or sexual intercourse where a sexual act is explicitly shown.

7. See Note, *Obscenity, Cable Television and the First Amendment: Will FCC Regulation Impair The Marketplace of Ideas?*, 21 DUQ. L. REV. 965 (1983) for the proposition that cable TV will provide an alternative to what is currently programmed on the three major networks.

8. For examples of how cable will revolutionize American communications see Comment, *FCC Content Regulation of Cable Pay-Television: The Threat of Pacifica*, 9 CUM. L. REV. 811 (1979).

potential of cable TV as a new communications media.⁹

Cable television's success as a new media depends on the opposition it encounters from the Federal Communications Commission (FCC)¹⁰ and other regulatory agencies. Consequently, representatives of the cable industry and first amendment advocates vigorously oppose regulation. These advocates analogize cable TV to the print media, arguing that cable is protected by the first amendment's guarantee of freedom of speech and its theme of promoting an "unfettered marketplace of ideas."¹¹ Contrary to this position, advocates of regulation equate cable television with the broadcast media,¹² demanding stringent regulation because cable is uniquely pervasive in its extension into the privacy of the home and in its unique accessibility to children.¹³ Case law illustrates that individual freedom of speech has a long history of conflict with the right to privacy of others;¹⁴ the new-

9. See Note, *supra* note 7, at 966 (potential of cable television may go unrealized because of regulatory efforts of federal, state and private agencies).

10. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C.S. § 521 (Law. Co-op. Supp. 1985)), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4655 [hereinafter Policy Act], and its predecessor The Communications Act of 1934, 47 U.S.C. §§ 151-609 (1970 & Supp. IV, 1974), confer jurisdiction over the regulation of cable television upon the FCC.

11. The analogy to the newsprint media is the strongest part of most arguments asserted against the regulation of cable. Where it can be shown that cable and newsprint are similar in their editorial function, content, and non-pervasive entry into the home, the first amendment standards applied to newsprint should also be applied to cable. See, e.g., G. SHAPIRO, P. KURLAND & J. MERCURIO, "CABLESPEECH": THE CASE FOR FIRST AMENDMENT PROTECTION (1983); Hofbauer, "Cableporn" and the First Amendment: Perspectives On Content Regulation of Cable Television, 35 FED. COMM. L.J. 159-162 (1983); McFadden, *Inviting The Pig To The Parlor: The Case Against The Regulation of Indecency and Obscenity On Cable Television*, 8 COLUM. J. ART & L. 317, 323 (1984); Note, *Cable Television and Content Regulation: The FCC, First Amendment and The Electronic Newspaper*, 51 N.Y.U.L. REV. 133 (1976).

12. Where it can be shown cablecast and broadcast are both uniquely intrusive into the homes of unwilling viewers and uniquely accessible to children, the argument is that the first amendment standards which allow the FCC to regulate broadcast should likewise permit the FCC to regulate cablecast. See, e.g., Krattenmaker & Esterow, *Censoring Indecent Cable Programs: The New Morality Meets The New Media*, 51 FORDHAM L. REV. 606 (1983); Riggs, *Indecency On The Cable: Can It be Regulated?*, 26 ARIZ. L. REV. 269 (1984); Note, *Indecent Programming On Cable Television and The First Amendment*, 51 GEO. WASH. L. REV. 254, 255 (1983); Note, *supra* note 7, at 965.

13. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (regulation of broadcast upheld since broadcast is uniquely pervasive in its extension into the home and is uniquely accessible to children).

14. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (reversing conviction for showing movie which contained nudity and which was visible from a public place); Cohen v. California, 403 U.S. 15 (1971) (reversing conviction for wearing a jacket containing the words "Fuck the Draft" in a public place and recognizing freedom of speech often conflicts with the right to privacy).

est struggle has arisen in the area of indecency¹⁵ on cable television.¹⁶

Resolution of this issue requires an analysis of governmental regulation of indecency on cable television. Initially, such an analysis necessitates an examination of the history of cable TV and the various federal regulatory schemes. An examination of the current standards by which material is deemed obscene or indecent will further illuminate the first amendment concerns. Resolution of the issue also requires an appreciation for the differences between cablecast and broadcast as well as an appreciation for the similarities between cablecast and the newsprint media. Upon such an analysis, it will be asserted that cable regulation, in its current form, is unconstitutional. Alternatively, a contextual regulation approach will be proposed. Under a contextual regulation approach, indecent cable programming could be transmitted and received without forcing those not desiring to view such material to sacrifice programming on other cable channels.

The issue examined in this note is whether government has a substantial interest in regulating cable television in light of the argument that cable is so analogous to the newsprint media that similar first amendment protection is required. A brief overview of the cable television medium and of governmental efforts to regulate it provides the starting point for the resolution of this issue.

II. OVERVIEW OF CABLE TELEVISION AND CURRENT REGULATIONS

Cable television initially developed¹⁷ as a method of delivering broadcast signals to rural homes which could not receive such signals by conventional methods.¹⁸ Today, however, cable systems have multichannel capacity¹⁹ and are used both as "rural antennas" and as subscription television,

15. "Indecency" for the purposes of this note is sexually explicit material which does not rise to the level of obscenity as defined in *Miller v. California*, 413 U.S. 15 (1973); see *infra* text accompanying notes 76-80.

16. See Robbins, *supra* note 4, at 419 for the proposition that indecency on cable television appears to be the latest class of free speech to conflict with the right to privacy.

17. The first system, a community antenna system, was constructed in Lansford, Pennsylvania, by the Jerrold Electronic Corporation in 1950 and provided only three amplified signals to its subscribers. See M. HAMBURG, *ALL ABOUT CABLE* § 102, at 1-6 (Rev. ed. 1981); R. LEDUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* 67 (1973). See also Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85-88 (1981) for a discussion of the background and development of cable television.

18. Since cable television signals are received through a coaxial cable, there is little distortion as with broadcast signals which often have to compete for space on the electromagnetic spectrum. See Comment, *supra* note 8, at 812.

19. Improvements in cable technology have increased channel capacity of single systems to as many as 108 separate programming channels. M. HAMBURG, *supra* note 17, at 1-4. For a complete discussion of the technological workings of cable systems, see C. WOODARD,

which for a fee provides the consumer with a wider range of programs than network television.²⁰ Cablecast's most recent innovation concerns cable pay-television.²¹ Cable pay-television provides programs for a fee like subscription television, but uses cable rather than broadcast transmission.²² Since this type of cable TV does not rely on the electromagnetic spectrum, it is not affected by the limited capacity of the airwaves as is conventional television.

In some ways cable television may be called a revolutionary medium.²³ For example, cable TV provides near perfect reception and alleviates crowding of the electromagnetic spectrum.²⁴ So, unlike broadcasting, there seem to be little or no technical limitations on the potential number of channels available in a given locale.²⁵ In fact, current technology could increase capacity to transmit over 80 channels through a single cable.²⁶ Should all channels on a given cable be in use, technologically there is no reason why another cable could not be installed.²⁷ Additionally, foreseeable future developments will make cable's channel capacity almost infinite as well as economically feasible.²⁸ The biggest advantage of cable, however,

CABLE TELEVISION: ACQUISITION AND OPERATION OF CATV SYSTEMS 1-14 (1974).

20. First run movies and athletic events are broadcast on conventional TV channels using its equipment; however, the audio and visual signals are purposely distorted. To correct the image and receive the program, subscribers lease special decoding devices. See BLOCK, OVER THE AIR PAY-TV: FOR WHOM WILL IT PAY? 6-8 (1974).

21. Note, *The Cable Communications Policy Act of 1984 and Content Regulation of Cable Television*, 20 NEW ENG. L. REV. 779-783 (1984-85). Cable's two-way capacity is another recent technological advancement. Two-way capacity involves the use of a home computer terminal for such activities as banking and shopping. This separate cable service is called "videotext." *Id.* See also Stern, Krasnow, & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. L. REV. 529, 532-62 (1983) for a discussion of recent video technological innovations.

22. Subscribers to cable pay-TV are drawn from a pool of individuals already connected to the parent cable system. These people pay fees on a per-program or per-channel basis and lease decoding devices to insure clear reception. See R. ADLER & S. BAER, THE ELECTRONIC BOX OFFICE: HUMANITIES AND ARTS ON THE CABLE 30-46 (1974).

23. See Note, *supra* note 11, at 134-137 (cable's cost, simplicity and "talk back" capacity could turn the family television into a multifunctional societal tool).

24. The electromagnetic spectrum provides only a limited spectrum space suitable for broadcasting. This space, if divided randomly, may fall too close together and cancel each other out. Thus, available frequencies are limited. See Sloan Commission On Cable Communications, *On The Cable: The Television Of Abundance* 6-22 (1971) [hereinafter Sloan Commission].

25. See Comment, *supra* note 8, at 813 (major advantage over broadcasting).

26. Sloan Commission, *supra* note 24, at 37.

27. There is little physical space required and since the installation costs are minimal, more coaxial cables could be installed than could feasibly be used. See Comment, *supra* note 8, at 813.

28. Communications systems in various stages of development, such as laser and wave guide systems can, through a single cable, supply tens of thousands of channels. See, e.g., *Time*, April 12, 1971, at 59.

may be its potential for program diversity and innovative channel use.

In the highly competitive video market,²⁹ diversity and innovation appear very attractive to consumers. The various programs available to local cable operators include news, sports, and movies, as well as adult entertainment, educational, and public interest programs.³⁰ Such variety allows the cable operator to market specific programs to small viewing audiences.³¹ For example, entire channels can be devoted to health care information or market reports.³² The more diverse a cable system's programming becomes, the more subscribers it is likely to attract; the more subscribers it attracts, the more funds the system will have with which to expand.³³ Thus, cable's growth and ultimate success depend on its number of subscribers. Absent mass subscriptions, cable's success seems improbable. Since mass subscription depends on cable's diverse programming, specialized programming aimed at limited segments of a community is extremely important.³⁴ However, current regulatory efforts effectively suppress this specialized programming.

Cable systems are subject to the regulatory jurisdiction of federal, state, and local authorities as well as acts of Congress and the efforts of private organizations.³⁵ The principal source of governmental regulation is the FCC.³⁶ Generally, FCC control over cablecast is ancillary to that agency's regulation of broadcasting. Pursuant to the Communications Act of 1934, the FCC may regulate broadcast to promote the efficient development of a national communications network.³⁷ Until very recently, FCC

29. The video market in which cable TV competes also includes: multi-point distribution service (MDS), over-the-air broadcasting (radio and television), satellite master antennas (SMATV) and video cassettes, discs, and movie theaters. See G. SHAPIRO, *supra* note 11, at 9-10.

30. See Hofbauer, *supra* note 11, at 145 for other programming typically offered by cable operators.

31. See Note, *supra* note 23, at 137 (large number of channels available could provide specialized programming to limited segments of the community since the cost of each channel is minimal).

32. Sloan Commission, *supra* note 24, at 97-114.

33. *Id.* at 38-39 for proposition that cable's income is ultimately tied to its subscriber base.

34. The revenue from such specialized programming is not only used to continue services for that group, but is also used for expansion. Thus, this specialized programming is important to cable's financial survival. See Note, *supra* note 23, at 137.

35. This note does not deal with regulation of cable retransmission. For a discussion of the problems associated with regulation of this function, see STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th Cong., 2d Sess., *Cable Television: Promise Versus Regulatory Performance* 33-54 (Subcomm. Print 1976).

36. For a summary of events which led up to the first FCC cable regulation, see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 164-67 (1968).

37. 47 U.S.C. §§ 151-609 (1970 & Supp. IV 1974). See also *Southwestern Cable*, 392

regulation over cable was characterized by frequent reversal of policy. These policy changes resulted from the protection of radio and conventional television broadcast (at the expense of cable TV) and from ill-fated efforts to design cablecast according to preconceived notions.³⁸

Originally, the FCC disclaimed jurisdiction over cable systems³⁹ and only gradually asserted authority over some types of systems.⁴⁰ By the late 1960's, the FCC gained such extensive control that it seemed to rule the cable medium with an iron fist.⁴¹ Before long, though, a process of regulatory retrenchment set in, and by the mid 1970's, the FCC began to deregulate and lessen its stranglehold on cable television.⁴² The courts encouraged this position and impressed upon the FCC that it was the protector of the public's right to receive information, not the "guardian angel" of broadcasting.⁴³

The United States Court of Appeals for the Second Circuit upheld the FCC policy of deregulation. In *Malrite T.V. v. FCC*,⁴⁴ the court stated that deregulation did not threaten the broadcast industry as the FCC had previously contended.⁴⁵ Further, the court concluded that cable television might be the best possibility for special interest programming in the video communications market.⁴⁶ Although FCC regulation of cable TV is not as extensive as it previously had been, the effect of the current FCC position concerning the regulation of indecency on cablecast remains to be seen.

Recently, Congress and private organizations have seemingly advocated deregulation of some aspects of cablecast while stubbornly insisting on regulation in other areas. For example, Congress codified the current regulatory approach in The Cable Communications Policy Act of 1984 (the "Policy Act").⁴⁷ One Congressional purpose behind this statute is to insure

U.S. at 157 (FCC's authority to regulate cable under the Communications Act where cable operator sought to import Los Angeles television signals to a San Diego cable system upheld).

38. See G. SHAPIRO, *supra* note 11, at 15 (cable viewed as a threat to broadcast and the national communications network which is provided at no direct cost to the viewer).

39. *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), *recon. denied*, *Report And Order* in Docket No. 12443, 26 F.C.C. 403 (1959) (first case where FCC declined to extend its authority over communications to cablecast).

40. *Second Report And Order* in Docket Nos. 14895, 15233 and 15971, 2 F.C.C. 2d 725 (1966) (terrestrial microwave systems first, all microwave systems second, then all distant carriage systems, finally all origination program systems).

41. The FCC was imposing regulations on cable television almost at will. See G. SHAPIRO, *supra* note 11, at 16.

42. This was the result of a change in the regulatory philosophy of the FCC. *Id.* at 17.

43. See Note, *supra* note 23, at 139 (FCC charged with protection of public not of specific media).

44. 652 F.2d 1140 (1981).

45. *Id.* at 1151.

46. *Id.*

47. See Policy Act, *supra* note 10, 47 U.S.C.S. §§ 521(1)-(6) (Law. Co-op. Supp.

that cable systems provide the widest possible diversity of information services and sources to the public consistent with the first amendment.⁴⁸ Thus, the Policy Act's stated purpose appears to support cable's specialized programming, such as entertainment for adults, although subsequent sections specifically restrict these programs.⁴⁹

A private organization, Morality In Media, Inc.,⁵⁰ has undertaken the most extensive non-governmental crusade in favor of cable television regulation.⁵¹ This organization lobbies primarily for the regulation of obscene or indecent programming on cablecast and warns the government that pornography will be "downstairs instead of downtown" unless control over cable is asserted.⁵² In fact, under a model ordinance drafted by Morality In Media, the distribution of indecent material by cable franchising authorities would constitute a misdemeanor.⁵³ It is doubtful, however, that this proposed ordi-

1985). The Policy Act's stated purposes include: to establish a national policy concerning cable; to set up franchise procedures; to establish guidelines for federal, state, and local regulations of cable; to modify franchise renewal procedures; and, to minimize unnecessary regulation that imposes an undue economic burden on cable systems. *Id.*

48. Policy Act, *supra* note 10, at 4656.

49. See, e.g., Policy Act, *supra* note 10, § 612(h) which prohibits programming that is "obscene, or in conflict with community standards because it is lewd, lascivious, filthy, indecent, or otherwise unprotected by the Constitution." *Id.*

50. Morality In Media, Inc., is one of the most outspoken proponents of cable content regulation. Led by its president, Father Morton Hill, this organization is engaged in a nationwide campaign designed to alert communities to the threat of pornography in the home. See Bednarek, *Priest Decries Cable TV Porn*, Milwaukee Sentinel, Oct. 30, 1985.

51. Tell, *Cable TV's Sex Problem*, THE NATIONAL LAW JOURNAL, Feb. 15, 1982, at 28. (group made cableporn its "Target of the Month" and has been fairly successful in drawing attention to pornography problem).

52. See Hofbauer, *supra* note 11, at 141 (pornography will be downstairs instead of downtown unless a stand is taken now at state and local levels).

53. The Morality In Media Model Ordinance provides:

Section 1

- (a) No person (including franchisee) shall by means of a cable television system, knowingly distribute by wire or cable to its subscribers indecent material or knowingly provide such material for distribution.
- (b) "Person" shall include individuals, partnerships, associations or corporations.
- (c) "Distribute" shall mean send, transmit or retransmit or otherwise pass through a cable television system.
- (d) "Material" means any visual material shown on a cable television system, whether or not accompanied by a sound track, or any sound recording played on a cable television system.
- (e) "Indecent material" shall mean material which is a representation or verbal description of:
 - 1. A human sexual or excretory organ or function; or
 - 2. nudity; or
 - 3. ultimate sexual acts, normal or perverted, actual or simulated; or
 - 4. masturbation;
 which under contemporary community standards for cable television is patently offensive.

nance could withstand the various constitutional standards used to review the regulation of obscene and indecent material.

III. CONSTITUTIONAL STANDARDS FOR REGULATION OF OBSCENE AND INDECENT MATERIAL

The first amendment to the United States Constitution declares that Congress shall make no law abridging freedom of speech, or freedom of the press.⁵⁴ The rights embodied in this amendment are paramount to American constitutional law. Further, these rights are recognized as the foundation of our democratic society. The purpose of the first amendment is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”⁵⁵ The right of the public to receive access to social, political, moral and other ideas underlies the provisions of the first amendment.⁵⁶

Even though there is some authority for the proposition that first amendment rights are more important than other constitutional rights or guarantees,⁵⁷ the more generally accepted view is that all rights are on an

-
- (f) “Community Standards” shall mean the standards of the community encompassed within the territorial area covered by the franchise.
 - (g) “Provide” means to supply for use.
 - (h) “A person acts knowingly” if he has knowledge of the character or nature of the material if he has actual notice of the nature of such material whether or not he has precise notice of its contents.

Section 2

Violation of this statute shall constitute a misdemeanor and any person convicted of such violation shall be confined in jail for not more than [] months or fined not more than [] dollars, either or both.

Id.

The Model Ordinance is available upon request from Morality In Media, Inc., 475 Riverside Drive, New York, New York, 10015.

54. The first amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom speech; or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievance.” U.S. CONST. amend. I. Through the fourteenth amendment, the principles inherent in the first amendment apply to state and local as well as federal levels of government. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The fourteenth amendment states in pertinent part that:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

55. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

56. *Id.*

57. *Saia v. New York*, 334 U.S. 558, 562 (1948) (first amendment freedoms belong in a preferred position); *see also* *Marsh v. Alabama*, 326 U.S. 501, 509 (freedom of press and speech occupy preferred position to property rights).

equal footing.⁵⁸ As a result, individuals may exercise their constitutional rights only to the extent that such is consistent with the enjoyment of these rights by all.⁵⁹ The government may regulate how people exercise their first amendment guarantees in order to protect others' rights. Consequently, the government may restrict some types of speech because they invade substantial privacy interests in an intolerable manner or because they fail to contribute in any meaningful way to an interchange of ideas.⁶⁰ Types of speech subject to restriction include defamation,⁶¹ fighting words,⁶² obscenity,⁶³ and speech which incites others to imminent lawless conduct.⁶⁴ Yet, in their attempt to regulate speech, opponents must consider and weigh the competing first amendment interests.

The right which most often conflicts with the ideology of the first amendment is the right to privacy. The government may generally restrict communication to protect unwilling people from exposure in the privacy of their homes.⁶⁵ In addition, state or local municipalities may protect the right to privacy by passing legislation containing time, manner, and place restrictions.⁶⁶ The first amendment, however, strictly limits governmental authority to prohibit speech solely because the speech is offensive to some viewers or listeners.⁶⁷ These opposing principles illustrate that the conflict between the first amendment rights of speakers and the privacy rights of offended viewers and listeners is not easily resolved. In fact, it seems that the medium of cable television has introduced a new constitutional dilemma, particularly since the subject matter at issue is only indecent and

58. *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 561 (1976) (asserting that authors of Bill of Rights did not assign priorities).

59. Even the protection of the right to speak is subject to some limitation when it conflicts with a more important civil right. *See Robbins, supra* note 4, at 421.

60. *See Schenck v. United States*, 249 U.S. 47, 52 (1919) (for the proposition that the most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater).

61. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (public official may recover damages for defamation relating to official conduct only if it is proven statement was made with actual malice).

62. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (New Jersey statute punishing speech which is likely to cause breach of peace in public place upheld).

63. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 484 (1969) (obscenity unprotected by first amendment because it lacks any redeeming social value).

64. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (criminal syndicalism statute must distinguish mere advocacy from incitement to imminent lawless action).

65. *See Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 737 (1970) (holding that ancient concept that a man's home is his castle has lost none of its vitality).

66. *Erznoznik*, 422 U.S. at 209; *see also Cox v. Louisiana*, 379 U.S. 538, 556 (1965) (right of free speech does not mean a person may express opinions or beliefs to any group at anytime at any public place).

67. *Cohen v. California*, 403 U.S. 15, 21 (1971).

not obscene.⁶⁸

The underlying presumption of the first amendment is that communication is protected from governmental interference.⁶⁹ The judiciary has identified neutrality toward those who communicate as a paramount obligation of the government.⁷⁰ Consequently, government regulation of speech varies according to the expressive potential of such speech.⁷¹ For example, statutes which interfere with political speech are subject to strict scrutiny, while commercial speech may be curtailed simply if the asserted government interest is substantial and regulation is no more extensive than necessary.⁷² Nowhere are these variable first amendment standards more apparent than in the communications media.⁷³ The government, for instance, may regulate the content of broadcasting to a limited extent, but may not similarly regulate newspapers.⁷⁴ To deal with these many forms of communication, the Supreme Court has developed standards for reviewing government regulations which affect the exercise of first amendment rights. One such set of standards was developed to review the government's regulation of obscene material.

Since government regulations have frequently sought to prohibit the distribution of obscene material, the Supreme Court has faced this issue on numerous occasions.⁷⁵ As the Supreme Court has held, any discussion of

68. Currently, the only material which can be constitutionally regulated on cable television is that which rises to the level of obscenity. See Robbins, *supra* note 4, at 424.

69. Communication is speech or conduct which conveys ideas or consists of ideological overtones. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 581 (1978) (governmental action aimed at communicative impact is presumptively at odds with the first amendment).

70. See G. SHAPIRO, *supra* note 11, at 20 (there is a judicially recognized need for neutrality by the government when it regulates communicative activities).

71. Near v. Minnesota, 283 U.S. 697 (1931) (regulation of speech varies according to its communicative potential).

72. Central Hudson Gas and Electric Corp. v. Public Service Commission, 100 S. Ct. 2343, 2350-54 (1980). In ruling unconstitutional the Public Service Commission's temporary ban on all advertising by electric utilities, the Court held the regulation of commercial speech (advertising) is subject to the following four-part analysis:

1. Is the expression protected?
2. Is the asserted governmental interest in regulation substantial?
3. Does the regulation directly advance the asserted governmental interest?
4. Is the regulation more extensive than necessary?

Id.

73. *Miller v. California*, 413 U.S. at 22-23 (communications media demands variable regulatory standards).

74. *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (upholding right of access to broadcast media to reply to editorial attacks) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (denying similar right of access to print media).

75. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (to be obscene, material taken as a whole must appeal to a prurient interest; depict in a patently offensive way sexual conduct specifically defined by state law; and lack serious literary, artistic, political, or scientific value); *Roth v. United States*, 354 U.S. 476 (1957) (conviction of mailing obscene mate-

obscenity must begin with a definition of the term.⁷⁶ The current definition and the accompanying standard is found in *Miller v. California*.⁷⁷ Before speech is considered obscene and thus unprotected under the *Miller* test, a tribunal must find that:

- a) the average person, applying contemporary community standards would perceive that the work, taken as a whole, appeals to a prurient interest;
- b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law;
- c) the work taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷⁸

Although these standards are very exacting, if material is found obscene under *Miller*, it is not protected by the first amendment speech guarantee. In addition, even if material is declared obscene under this test, pursuant to *Freedman v. Maryland*, any regulatory scheme must provide the safeguard of prompt judicial review of the determination.⁷⁹ Effectively, *Miller* suggests that only obscenity is regulable.⁸⁰ The permissible boundaries of state regulation of offensive but non-obscene communication would seem to be confined by subsequent Supreme Court decisions concerning offensive expression.

The Supreme Court has consistently upheld the first amendment speech right of individuals over the temporary inconvenience to persons offended by the expression.⁸¹ For instance, in *Cohen v. California*,⁸² the Court reversed the appellant's conviction under a California statute⁸³ for wearing a jacket with the words "Fuck the Draft" inscribed on it. The

rial in violation of federal statute upheld).

76. To illustrate the Supreme Court's difficulty defining the term "obscene," see L. TRIBE, *supra* note 69, § 12-16 at 656-670.

77. 413 U.S. 15 (1973) (conviction under California statute for knowingly distributing obscene material to unwilling recipients vacated and remanded).

78. *Id.* at 24.

79. A prompt and final judicial determination as to some material's obscenity must be assured to check the unbridled discretion of an administrative agency. 380 U.S. 51, 61 (1965) (conviction reversed for violation of Maryland statute requiring board's approval before films can be shown).

80. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (conviction for showing the film "Carnal Knowledge" notwithstanding scenes of nudity reversed).

81. See Note, *supra* note 7, at 989 (state has no right to cleanse public debate to point where its palatable to the most sensitive individuals).

82. 403 U.S. 15 (1971).

83. CAL. PENAL CODE § 415 (West 1970), *repealed* by Act of Sept. 23, 1974, ch. 1263, 1974 Cal. Stat. 2742 (in pertinent part statute prohibited individuals from maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct).

Court rejected the proposition that mere offensive language, which does not rise to the level of obscenity, could be proscribed in a manner consistent with the first amendment.⁸⁴ Additionally, the Court held that before the public expression of ideas could be restricted, the state must show that an invasion of substantial privacy interests occurred in an essentially intolerable manner.⁸⁵ The majority believed that in *Cohen's* instance those offended by his message had a duty to avert their eyes since they were outside the sanctuary of their homes.⁸⁶ In the Court's eyes, there had been no invasion of substantial privacy interests. As a result, *Cohen's* freedom of speech outweighed any burden put on those who were compelled to turn away from expression they considered offensive.⁸⁷

Thus, *Cohen* seems to represent one boundary of impermissible state regulation of offensive speech. States can proscribe offensive material which rises to the level of obscenity. Regulation of anything less, merely because it may offend an unwilling viewer who could easily avoid sustaining injury, would be unconstitutional.⁸⁸ These confines appeared to be well-defined until 1978 when, in *FCC v. Pacifica Foundation*,⁸⁹ the Supreme Court departed from the first amendment precedent set in *Cohen*.

In *Pacifica*, the Supreme Court upheld the FCC regulation of "indecent" speech, at least in the area of broadcasting. In this case, a New York radio station owned by Pacifica Foundation broadcast a monologue by comedian George Carlin which contained several indecent words. A listener complained to the FCC which issued a declaratory order finding the monologue indecent as broadcast and therefore subject to regulation.⁹⁰ Having experienced definitional problems with obscenity previously,⁹¹ the Court defined the term "indecent speech" for the first time. According to the Court, indecent speech is expression which, although it may have social, political, or artistic value, fails to conform to accepted standards of morality.⁹² The Court concluded that the obscenity standards developed for print media might not afford enough latitude to regulators of the electronic media. The Court found broadcasting to be uniquely pervasive in its extension into the

84. 403 U.S. at 25 (mere offensive but not obscene language is protected by first amendment).

85. *Id.* at 21.

86. *Id.*

87. *Id.* at 24-26.

88. The first amendment rights of a speaker outweigh the privacy rights of the listener where the listener is outside his home and can easily avoid injury by turning away. *Cohen*, 403 U.S. 15.

89. 438 U.S. 726 (1978) (first case where FCC gained authority to regulate content of broadcast).

90. *Id.*

91. See *supra* text accompanying notes 76-78.

92. 438 U.S. at 739-41.

privacy of the home and to be readily accessible to children.⁹³ Furthermore, the Court upheld the FCC's regulatory power over indecency in light of broadcasting's unique characteristics of pervasiveness and accessibility.⁹⁴ Thus, these unique characteristics are of paramount importance when formulating a regulatory scheme.⁹⁵

Essentially, the *Pacifica* decision represents a "time, manner, and place" restriction on broadcast communication. This case simply states that certain types of programming may be acceptable at certain times of the day but not at others because of the pervasiveness of the broadcast medium. To date, *Pacifica* is the only decision permitting the regulation of indecent expression in any forum. A prudent reading of *Pacifica* illustrates that the characteristics of the mode of distribution are central to determining the constitutional parameters for authority to prohibit indecent material.⁹⁶ As a result, it would appear that the permissible extent of government regulation depends upon how cable television is characterized.

IV. CHARACTERIZATION OF CABLE TELEVISION: BROADCAST OR ELECTRONIC NEWSPRINT?

The wide variety of services that cable provides creates difficulties for a regulator both in characterizing cable television and in formulating constitutional regulations.⁹⁷ This characterization is critical to the determination of state power to regulate indecent programming on cable television.⁹⁸ To regulate cable as it does broadcast, the state must show that the unique characteristics of the cable medium compel application of the same strict standards imposed on the broadcast media.⁹⁹ Courts have historically created pecking orders of first amendment rights, shuffling the priorities of these rights in different media settings.¹⁰⁰ While it is true that the public's

93. *Id.* at 748.

94. *Id.*

95. *Id.*

96. *Id.* at 728-50.

97. For example, the same cable operator can be considered a public utility while carrying major network broadcast; acting as a broadcaster when it originates its own programs; and be a common carrier when it rents its equipment to public. See Recht, *Cable Television in Illinois: The Problems of Concurrent Jurisdiction*, 50 CHI.-[] KENT L. REV. 119, 121 (1973).

98. Whether cable television is treated as a broadcasting medium or electronic newspaper will affect the permissible scope of regulation. See Hofbauer, *supra* note 11, at 154.

99. See Note, *supra* note 12, 51 GEO. WASH. L. REV. at 259 for the proposition that states must show cable's unique characteristics require the same regulatory standards as broadcast.

100. Lively & Leahy, *Government and the Media: Regulating A First Amendment Value System*, 31 U. FLA. L. REV. 913, 916 (1978-79) (different communication mediums require different first amendment standards with the print media receiving the greatest protection and broadcast receiving the least).

right to be informed is paramount in an electronic forum,¹⁰¹ editorial discretion reigns supreme in the print media.¹⁰²

The characterization of cablecast determines the permissible extent of any regulatory effort.¹⁰³ As a result, proponents of cable TV regulation analogize the medium to broadcast, while opponents liken the medium to the print media. Justice White laid the foundation for both analogies when he observed in *Red Lion Broadcasting Co. v. FCC*¹⁰⁴ that various mediums of communication require different regulatory standards. Justice White concluded that the differences between cablecast and other communication forums justify differing first amendment standards.¹⁰⁵

Since the newspaper analogy, like any analogy, depends upon a comparison of specific aspects unique to both mediums,¹⁰⁶ some of cable television's most functional characteristics are overlooked. For instance, cable is uniquely capable of absorbing rapid technological change.¹⁰⁷ Although other mediums have benefitted from recent changes in technology, none have benefitted nearly as extensively as the cable medium.¹⁰⁸ Additionally, since cable is restricted to those viewers who are willing to pay for it, cable programming, like newspapers, can only enter the privacy of the home by the owner's consent.¹⁰⁹ Choice, as a result, is a major factor with cablecast. A consideration of these similarities illustrates that cable television is, in fact, more analogous to the print media than broadcast.

Judicially, the trend has been to dismiss analogies between cablecast and broadcast. In *Community Television of Utah, Inc. v. Roy City*,¹¹⁰ for

101. *Id.*, citing *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

102. *Id.*, citing *Tornillo*, 418 U.S. at 258.

103. See *supra* text accompanying notes 99-102.

104. J. White's majority opinion in *Red Lion Broadcasting*, 395 U.S. 367, 386 (1969) (Court upheld FCC orders requiring radio station to offer free broadcasting time to opponents of political candidates or views endorsed by station and to any person who has been personally attacked in course of a broadcast).

105. *Id.*

106. The facts which are analogized must be sufficiently similar so as to make the analogy result in a logical conclusion. See, e.g., G. SHAPIRO, *supra* note 11, at 4.

107. The minimal cost of cable installation allows new systems to be installed, or old systems updated, as fast as the new technology is available. In fact, cable may actually be leading these new technological advancements since it is part of the telecommunications market.

108. See G. SHAPIRO, *supra* note 11, at 4 (cable television has been transformed from a medium used solely to retransmit broadcast signals to a medium concerned with providing programming for hundreds of channels).

109. See Riggs, *supra* note 12, at 300 for proposition that cable can only enter the viewer's home through the owner's consent.

110. 555 F. Supp. 1164 (N.D. Utah 1982) (Roy City's prohibition of indecency on cable TV unconstitutional because it was based on the premise that city could impose restrictions on cable content to improve morals, protect children, control streets and to franchise and license).

example, the district court for the Northern District of Utah held that the essential differences between both mediums invalidated Roy City's ordinance.¹¹¹ In *Roy City*, the city attempted to regulate indecent programming on cable TV, claiming that it was justifiably exercising control over con-

Id. at 1166.

111. *Id.* at 1166 (citing UTAH CODE ANN. §§ 10-8-4,-8,-11,-41,-80 (1973); UTAH CONST. art. XI, § 5). Roy City's ordinance was enacted pursuant to UTAH CODE ANN. § 76-10-1229 (Supp. 1981). The full text of UTAH CODE ANN. § 76-10-1229 (Supp. 1981) provides:

- (1) No person, including franchisee, shall knowingly distribute by wire or cable any pornographic or indecent materials to its subscribers.
- (2) For purposes of this section "material" means any visual display shown on a cable television system, whether or not accompanied by sound, or any sound recording played on a cable television system.
- (3) For the purposes of this section "pornographic material" is any material defined as pornographic in sections 76-10-1201 and 76-10-1203.
- (4) For the purposes of this section "indecent material" means any material described in section 76-10-1227.
- (5) For the purposes of this section "distribute" means to send, transmit, retransmit, or otherwise pass through a cable television system.
- (6) Prosecution for violation of this section may be initiated at the instance of the attorney general or any county or city attorney of an interested political subdivision or at the instance of the governing body of any such political subdivision.
- (7) Any person who violates this section is guilty of a class A misdemeanor.

Id.

Additionally, UTAH CODE ANN. § 76-10-1203 (1978) defines "pornography" as any material if:

- (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to the prurient interest in sex;
- (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or excretion; and
- (c) Taken as a whole it does not have serious literary, artist, political or scientific value.

Id.

Finally, "indecent material" is defined by UTAH CODE ANN. § 76-10-1227 (Supp. 1981) as follows:

- (1) "Description or depictions of illicit sex or sexual immorality" means:
 - (a) Human genitals in a state of sexual stimulation or arousal;
 - (b) Acts of human masturbation, sexual intercourse, or sodomy; or
 - (c) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.
- (2) "Nude or partially denuded figures" means:
 - (a) Less than completely and opaquely covered:
 - (i) Human genitals;
 - (ii) Pubic regions;
 - (iii) Buttock; and
 - (iv) Female breast below a point immediately above the top of the areola; and
 - (b) Human Male genitals in a discernibly turgid state even if completely and opaquely covered.

Id.

tent.¹¹² According to the city this power of content control was an inherent part of its power to improve community morals and to care for children.¹¹³ To support its argument, the city analogized its power to the power vested in the FCC to regulate broadcast content.¹¹⁴

The *Roy City* court disagreed with the city and ruled that choice was the crucial factor distinguishing communication by cable from communication by broadcast.¹¹⁵ The elements of this choice can be encountered at varying levels: (1) the choice of whether or not to subscribe to cable; (2) the choice to cancel the subscription at any time; and (3) the choice to purchase any of a wide variety of offered services.¹¹⁶ In addition, the court recognized the following differences:

CABLE	BROADCAST
1. User needs to subscribe.	1. User need not subscribe.
2. User holds power to cancel subscriptions.	2. User has no power to cancel. May only complain to F.C.C., station, network, or sponsor.
3. Limited Advertising.	3. Extensive advertising.
4. Transmittal through wires.	4. Transmittal through public airwaves.
5. Reception via private cable.	5. Reception appropriated from public airwaves.
6. User pays a fee.	6. User does not pay a fee.
7. User receives preview of coming attractions.	7. User receives listing in public press or commercial guides.
8. Distributor or distributee may add services, signals or choices.	8. Neither distributor or distributee may add services, signals or choices. ¹¹⁷

A review of these differences illustrates that there is in fact little similarity at all between the cablecast and broadcast media. However, such differences do not prevent proponents of cable TV regulation from attempting to use the *Pacifica* rationale as support.

Advocates of regulation of indecency on cable television contend that

112. 555 F. Supp. at 1165-66.

113. *Id.* at 1166.

114. *Id.* at 1166-67.

115. *Id.* at 1168.

116. Robbins, *supra* note 4, at 435.

117. 555 F. Supp. at 1167.

cable is similar to broadcast because both are uniquely pervasive in their extension into the privacy of the home and both are readily accessible to children.¹¹⁸ This right to privacy is what the *Pacifica* court sought to protect.¹¹⁹ Essentially, proponents of this viewpoint argue that *Pacifica*'s "intrusiveness"¹²⁰ theory, which justifies regulation of broadcast to protect unconsenting adults and impressionable children, logically extends to regulation of indecent material on cablecast.¹²¹ Such proponents support this contention with three principle arguments.

First, cable television is no less pervasive than broadcast simply because its programming is transmitted over cable lines rather than the airwaves.¹²² As statistics show, cable is quickly establishing itself in a large number of American households.¹²³ For the viewer, the reception of cable into the home comes via his television set, electronic equipment almost all homes possess. Drawn to their logical conclusion by proponents of regulation, these facts indicate that viewers are entitled to the same protection from indecent cablecasts as from indecent broadcasts.¹²⁴ This conclusion follows from the fact that offensive material can be seen or heard by unconsenting viewers regardless of the nature of the communications medium.¹²⁵

Second, since cable is presented in the home like radio and television programming, cable is subject to greater restrictions than other communication occurring outside the home.¹²⁶ The rationale behind greater restrictions is that the viewer is a captive audience inside the home and thus, the first amendment tips in favor of the right to privacy.¹²⁷ When a viewer turns on cable programming, he is as equally captive to what the cable operators present as he is to the material that radio broadcasters present. This being the case, proponents of regulation contend that an unwilling viewer would be unable to avoid assault from an indecent cablecast. In

118. If it can be shown that cable television is uniquely pervasive into the home and uniquely accessible to children, the rationale for regulating broadcast would likewise apply to regulate cablecast. See Note, *supra* note 99, at 259.

119. See generally *Pacifica*, 438 U.S. at 726-48 (individuals should not be forced to listen to offensive broadcasting in privacy of their home).

120. *Pacifica*'s "intrusiveness" theory deems broadcast to be pervasive since it invades the privacy of the home without warning.

121. See Krattenmaker, *supra* note 12, at 624 for proposition that *Pacifica*'s rationale logically extends to regulation of indecent material on cable television.

122. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (FCC may regulate cable as broadcasters, but not as common carriers). *Id.* at 699-704.

123. See *supra* text accompanying notes 2-5.

124. Krattenmaker, *supra* note 12, at 622.

125. *Id.*

126. *Id.* at 623.

127. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (city policy banning political advertisements on city buses upheld while permitting advertisements of other types).

one's home, "the individual's right to be left alone plainly outweighs the first amendment rights of an intruder."¹²⁸

Third, cable television is as easily accessible to unsupervised children in the home as is radio.¹²⁹ This is an important element of the pervasiveness theory of *Pacifica*.¹³⁰ When minors are likely to be in the viewing audience the state has a substantial interest in regulating indecent programming to protect their well-being.¹³¹ Since cable appears as accessible to children as broadcast, and is potentially more harmful because of cable's visual component,¹³² the permissible state interests described in *Pacifica*¹³³ likewise justify the regulation of indecent cable programming.

Advocates of the regulation of indecency on cable television base their arguments on the belief that cable is just as pervasive as broadcast. Yet cable's pervasive impact demonstrates its importance as a source of free expression. Due to this potential for free expression, champions for cable's cause contend that governmental interference should be limited. After all, pervasiveness has never justified governmental regulation of the editorial content of a newspaper in a one newspaper town.¹³⁴

First amendment activists and representatives of the cable industry argue that for constitutional purposes, cable television should be compared to a newspaper¹³⁵ and thus afforded more liberal freedom of speech.¹³⁶ In sum, opponents of cable TV regulation maintain that *Pacifica* is only a limited exception to the general standards established in *Miller*. Since cable is analogous to the newsprint media, these opponents argue that the latter rule applies.¹³⁷ In support of this analogy, representatives of the cable industry

128. *Pacifica*, 438 U.S. at 748; see also *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 736-38 (1970) (individual's right to be left alone in his own home upheld).

129. Children can as easily tune in to indecent cablecasts as they can tune in to indecent broadcasts. Krattenmaker, *supra* note 12, at 623.

130. 438 U.S. at 749 (accessibility to unsupervised children is legitimate government concern).

131. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (conviction for selling magazines to children which were obscene to them but not adults was upheld because children are a group which government has a significant interest in protecting).

132. Cable's visual component is more harmful to viewers than radio's audio component is to listeners because without paying close attention, the cable viewer may be momentarily injured by the flash of any indecent programming.

133. See *supra* text accompanying notes 93-96.

134. See, e.g., *Tornillo*, 418 U.S. at 254-56.

135. Goldberg, Ross & Spector, *Cable Television, Government Regulation, and The First Amendment*, 3 COMM/ENT L.J. 577 (1981) (earliest use of cable television-newspaper analogy came from Sloan Commission *supra* note 24, at 42-46).

136. Traditionally, the newsprint media has been afforded extensive protection of freedom of speech. If cable television is shown to be analogous to newsprint, the same protection should be afforded both mediums of communication. See G. SHAPIRO, *supra* note 11, at 3-4.

137. See *Midwest Video*, 440 U.S. at 689 (likening cable television to "private elec-

point out three similar characteristics.

Primarily, opponents of regulation argue that cable TV operators, like newspaper editors, originate some of the expression communicated over their system.¹³⁸ Cable programmers must exercise editorial control and judgment in selecting programs for their channels since these systems typically offer several channels which appeal to a variety of audiences. Likewise, newspaper publishers must use their editorial control and judgment to determine what material to print in their publication.¹³⁹ Typically, both mediums of communication offer sections or channels devoted to entertainment, sports, weather, and local, national, and international news. Opponents of regulation argue that just as the editorial functions performed by cable operators and newspaper publishers are indistinguishable, so, too, are the expressions from which each have to choose.

Additionally, a cable system's content is limited in channel capacity only by the investment made by the system's owner since there are no absolute physical limitations governing its size.¹⁴⁰ Similarly, a newspaper's content is limited only by what its publisher decides to print; physically the paper can include as much or as little information as the publisher desires. Because the scope of permissible government regulation is premised on physical limitations¹⁴¹ and since neither the print nor the cable media suffer from these confines,¹⁴² the same first amendment standards applicable to restrictions on the content of print media should be applied to cable as well.

Finally, cable programming, whether indecent or otherwise, does not intrude into the privacy of the home unless the viewer chooses to subscribe to the service.¹⁴³ Cable subscribers receive programming only by voluntarily entering into a subscription agreement under which their television set is connected to the cable system. Moreover, the material at which cable indecency regulations are directed is found on special access channels which require the subscriber to pay a fee additional to the basic rate.¹⁴⁴ In like manner, newspapers usually do not come into one's home unless she subscribes to the publication or buys it at a newsstand and brings it home.

tronic publication" Court found no constitutional distinction between cable and newspapers).

138. See G. SHAPIRO, *supra* note 11, at 3-4 (cable operators produce their own programming; newspaper editors write their own columns).

139. *Id.*

140. See *supra* text accompanying notes 25-28.

141. See *Red Lion Broadcasting*, 395 U.S. at 376-77 for proposition that scope of permissible government regulations is premised on physical limitations of the medium.

142. The scarcity theory does not apply to cable television because cable is a medium of abundance. Comment, *supra* note 8, at 824.

143. See *supra* text accompanying notes 20-23.

144. *Id.*; see also *Erznoznik*, 422 U.S. at 210 n.6 (that a commercial enterprise directs programming only to paying customers presumably establishes that those customers are neither unwilling viewers nor offended).

Neither the cable patron nor the newspaper customer can advance claims of intrusion since each voluntarily brought the material into the home. As a result, if the individual is concerned about the presence of offensive material in the home, she may decline to purchase the services or cancel her subscription.¹⁴⁵ An examination of indecent programming in light of the aforementioned arguments follows to determine if the current regulation of indecency on cable TV survives constitutional scrutiny.

V. INDECENT PROGRAMMING ON CABLE TELEVISION

The current controversy surrounding the regulation of cable television concerns the government's authority to restrict indecent, but not obscene, programming. Because the first amendment does not protect obscenity in any form, or in any medium of expression,¹⁴⁶ material which rises to the level of obscenity is not protected on cable. However, despite its offensiveness to some, indecent speech is protected by the first amendment because it does not rise to the level of obscenity.¹⁴⁷ Additionally, since the regulation of any form of expression is inherently dangerous to promoting a marketplace of ideas, legislation curtailing expression must be carefully and narrowly drawn. Recognizing this, the Supreme Court in *Pacifica* sought to define indecency so men of common intelligence would understand what material is and is not prohibited.¹⁴⁸ In *Pacifica*, the Court cited the following definition from Webster's Dictionary:

INDECENCY. a: Altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable . . . b: not conforming to [the] generally accepted standards of morality . . .¹⁴⁹

The Court then found this definition unclear as applied to the broadcast context, so it clarified this definition, holding indecent speech to be expression which, although it has social, political, or artistic value,¹⁵⁰ fails to con-

145. See G. SHAPIRO, *supra* note 11, at 44 for proposition that individuals concerned about offensive programming entering their home can decline to subscribe to the channels they find indecent.

146. *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity not protected by the Constitution no matter what the medium).

147. *Pacifica*, 438 U.S. at 750; see also *Miller*, 413 U.S. at 24.

148. If men of common intelligence cannot understand what activity is prohibited by a statute or regulations, the law is unconstitutional as being "vague." A fundamental requirement of the first amendment is that people are aware of what activity is prohibited. See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 730-38 (1980).

149. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) as cited in *Pacifica*, 438 U.S. at 740 n.14.

150. These forms of expression are generally protected by the first amendment. See generally *Miller*, 413 U.S. 15.

form to accepted standards of morality.¹⁵¹

Regardless of how it is defined, indecency is nevertheless protected speech,¹⁵² as the Supreme Court's indecency and obscenity opinions indicate. One needs only to read the Court's opinion in *Miller* for a case-in-point. In *Miller*, the Court carefully distinguished obscenity, which is not considered protected speech, from indecency.¹⁵³ This meticulousness in distinction supports the contention by critics of cable television regulation that the *Pacifica* decision is actually inapplicable in the cable context. Absolute proscriptions based on an absolute definition of indecency, however, ignore the narrow fact-specific holding of the *Pacifica* Court.¹⁵⁴

In the cable television medium, *Pacifica* has little application because it only states that broadcast indecency may be channeled with reasonable time, manner, and place regulations.¹⁵⁵ In fact, the Court itself emphasized the narrowness of its holding,¹⁵⁶ even within the broadcast medium, and noted that the differences between radio and cablecast may also be relevant to the formulation of any regulations.¹⁵⁷ In his *Pacifica* dissent, Justice Brennan even argued that the majority's decision violated the first amendment rights of the broadcast media and the people who want to hear such broadcasts.¹⁵⁸ Justice Brennan's contention was based on the fact that *Pacifica* restricted the transmission and reception of material which did not rise to the level of obscenity.¹⁵⁹

When applied to cablecast, Justice Brennan's dissent in *Pacifica* is actually more convincing than when applied to broadcast. First, it is the subscriber who chooses to allow the programming into the home. The right to privacy can be protected, therefore, by either not subscribing to that partic-

151. *Pacifica*, 438 U.S. at 739-41.

152. See McFadden, *supra* note 11, at 338 (since indecency does not rise to the level of obscenity it is protected speech).

153. *Miller*, 413 U.S. 23-26.

154. *Pacifica* does not stand for proposition that indecency has no first amendment protection. Indecency is not a fixed concept and is, instead, a variable concept depending on the composition of the audience and time of programming. See Robbins, *supra* note 4, at 437.

155. 438 U.S. at 750; see also *Erznoznik*, 422 U.S. at 209 (states may pass reasonable time, manner, place regulations to protect individual privacy).

156. See also *Bolger v. Young Drugs Products Corp.*, 463 U.S. 60, 64 (1983) (special interest of federal government in regulation of broadcast does not translate into a justification for regulation of other means of communication); Cox, *The Supreme Court, 1979 Term; Forward: Freedom of Expression In The Burger Court*, 94 HARV. L. REV. 1 (1980) for proposition that *Pacifica* may come to be viewed as a "narrow, highly particular decision pushing a number of doctrinal exceptions to first amendment principles to their limits because the exceptions conjoin." *Id.* at 45.

157. 438 U.S. at 750.

158. 438 U.S. at 762, 766 (Brennan, J., dissenting).

159. *Id.*

ular channel or by turning off any programming found offensive.¹⁶⁰ Consequently, ascribing an intrusive nature to broadcasting fails to recognize the ease with which an individual can turn off his television set. Even though viewers may be momentarily offended by unexpected program content, such a fleeting annoyance does not justify complete suppression of the speech involved.¹⁶¹ In fact, the judiciary has long recognized that individuals offended by indecent material have a duty to avert their eyes rather than rely upon the government to suppress the offensive discourse.¹⁶²

Second, government's ability, pursuant to the Constitution, to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial individual privacy interests are being invaded in an essentially intolerable manner.¹⁶³ In the case of an individual who voluntarily allows indecent programming into his home, no intolerable invasion of privacy is present since an instance of exposure to offensive material "is a fact of social existence and is a small price to pay for the value of free expression."¹⁶⁴ Additionally, broadcast guides and movie reviews provide sufficient notice of upcoming programming to alert extremely sensitive individuals to potentially offensive material. When the limited privacy invasion is weighed against the decreased freedom of expression resulting from governmental restrictions on non-obscene cablecasts that others may wish to view, the cost of limiting these privacy expectations hardly seems substantial.¹⁶⁵

Third, as applied to cable television, the rationale of regulating indecent broadcasts to protect young children is overbroad¹⁶⁶ because it restricts the viewing of such material in homes that have no children. Many homes that subscribe to cable TV have no children and as the Supreme Court held

160. See Note, *supra* note 7, 984 (since individual permits broadcast into his home he can protect his right to privacy by turning off the discourse which he finds offensive); see also *Pacifica*, 438 U.S. at 765 (Brennan, J., dissenting).

161. See generally *Cohen*, 403 U.S. 15 (fleeting exposure to offensive material creates no lasting injuries since individual is free to turn away).

162. *Id.* at 21; see also *Bolger*, 463 U.S. at 61 (reaffirming *Cohen*); but cf. *Pacifica* 438 U.S. 760 n.2 (Powell, J., concurring) (to avoid further offense by turning off the radio is like being forced to run away from an assault after the first blow).

163. *Cohen*, 403 U.S. at 21.

164. See Note, *Pacifica Foundation v. FCC: "Filthy Words," The First Amendment and the Broadcast Media*, 78 COLUM. L. REV. 164, 174-75 (1978) for proposition that when an individual voluntarily allows indecent programming into the home there is no intolerable invasion of privacy.

165. See G. SHAPIRO, *supra* note 11, at 35 (cost of limiting privacy interest hardly seems high when individuals control what programs are seen or heard in the home).

166. An "overbroad" regulation reaches constitutionally protected activity. When such restricts the constitutional rights of expression, government bears the burden of proving there are no less restrictive alternatives. Thus, the government, not the cable companies, should consider alternative measures to protect children. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 917-18 (1970).

in *Butler v. Michigan*, the government cannot ban non-obscene programming reaching childless homes.¹⁶⁷ Even in those homes that do have children, parents may limit the cable channels to which they subscribe or restrict the programs available to their children if the material is objectionable. Thus, cable TV enables individuals to choose what they wish to view without intruding on the sensibilities of others. Governmental regulation of this choice, which occurs in the privacy of the home, represents control of individual moral decisions. Regulation of this nature departs from first amendment precedent.¹⁶⁸

Any attempt to restrict the showing of indecency on cable television must consider the first amendment interests affected. In this context, the relevant interests concern freedom to receive expression and the privacy rights of viewers or listeners. Representatives of the cable industry contend that because the viewer's interest arguably includes the speaker's interest, the former is entitled to substantial protection.¹⁶⁹ Moreover, the Supreme Court has ruled that the potential presence of unwitting viewers does not automatically justify curtailing all speech capable of being offensive.¹⁷⁰ The right of free speech does not embrace a right to cancel out the speech of others.¹⁷¹ Finally, although courts recognize that viewers are entitled to receive desired programming,¹⁷² any regulation of cablecast content protects only those who are offended by the material while ignoring the rights of those who want to receive such programming.¹⁷³ Implicit in the first amendment is not only the right to transmit ideas, but also the right to receive them, especially in the privacy of one's home.¹⁷⁴

The right to privacy includes the right to personal autonomy.¹⁷⁵ The

167. 352 U.S. 380, 383 (1957) (government should not "reduce the adult population . . . to reading only what is fit for children"); see also *Bolger*, 463 U.S. at 61.

168. See *Stanley v. Georgia*, 394 U.S. 557 (1970) (rejected as totally inconsistent with philosophy of the first amendment the concept that there is a compelling state interest in controlling the moral content of a person's thoughts). *Id.* at 565-66.

169. "The viewer who wishes to receive communications has the broadest first amendment interest because not only does it include the interest in receiving what the operator chooses to [send], but it also encompasses an interest in any messages access-seekers wish to transmit." Hofbauer, *supra* note 11, at 150.

170. *Spence v. Washington*, 418 U.S. 405 (1974) (conviction for improperly using American flag overruled).

171. *Associated Press v. United States*, 326 U.S. 1 (1945).

172. *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (responsible members of listening community entitled to present evidence to FCC regarding programming practices).

173. Note, *supra* note 7, at 988.

174. See *Red Lion Broadcasting*, 395 U.S. at 390 for proposition that the right to receive ideas is implicit in the first amendment.

175. *Stanley*, 394 U.S. 557 (1969) (no substantial government interest in regulating private possession of pornographic materials by adults); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (established fundamental constitutional right of privacy in one's own home).

Supreme Court extended this fundamental right to allow the viewing of pornography in one's own home.¹⁷⁶ Clearly, this personal autonomy permits an individual to bring indecent material into his home through cable television. The current regulations on cable programming, however, do not allow this and thereby infringe on the viewer's right to privately receive information within the confines of his home.¹⁷⁷ Thus, this regulation undermines one of the basic beliefs upon which the first amendment is premised: government should allow a wide range of discussion, letting the individual be free to choose those viewpoints by which he is persuaded.

In his dissent in *Pacifica*, Justice Brennan expressed concern over the lack of clear standards for the FCC to use when formulating regulations of obscene or indecent cable communications.¹⁷⁸ More important is whether the Supreme Court should have left this decision to the FCC at all when procedural safeguards were lacking to insure that protected speech was not unconstitutionally abridged. A precisely defined test against which to judge questionable material diminishes the danger of infringement on the constitutional rights of the cable operator and viewer alike.¹⁷⁹

Primarily, the establishment of precise standards would lead to the development of more consistent and rational criteria. For example, technical factors such as determining when most children are absent from the audience to permit programming of "adult" material and at what age children should be protected, could be more efficiently ascertained in a rulemaking rather than a judicial setting.¹⁸⁰ Furthermore, administrative agencies like the FCC are less than ideal forums for the determination of constitutional rights since in these agencies, decisions are made by political appointees with terms of limited duration.¹⁸¹ In sum, all these inherent dangers to the first amendment rights of cable television viewers disclose the weaknesses in the present trend to proceed on a case-by-case determination of whether offensive programming can be shown on cable television. A solution to this standardless quagmire may, however, be attainable.

176. *Id.*

177. Current cable regulations forbid the reception of pornographic programming in the privacy of the home. See Note, *supra* note 7, at 990.

178. 438 U.S. at 761 (Brennan, J., dissenting).

179. Such a precise test would tell the operator exactly what type of expression is prohibited and what type may be transmitted to the viewer. See Wing, *Morality and Broadcasting: FCC Control of "Indecent" Material Following Pacifica*, 31 FED. COMM. L.J. 145, 172 (1979).

180. *Id.*

181. *Id.* at 171.

VI. CONTEXTUAL REGULATION: A HAPPY MEDIUM FOR CABLE TELEVISION

The current ad hoc regulation of cable communications has resulted in confusion for the cable industry. Cablecasters fear programming indecent, but not obscene, material due to the standards originally developed for the broadcast medium in *Pacific*. The result is a "chilling effect" on protected speech.¹⁸² Therefore, a uniform approach must be developed which fairly balances the conflicting right to privacy and the protected speech interests at stake. The question we must now answer is whether the umbrella of the first amendment protects everyone, or has it sprung a leak where cable television is concerned?

Based on decisions in other media contexts, it is almost certain that indecent programming on cable television can constitutionally be regulated.¹⁸³ However, the rules must be narrowly drawn to support the substantial governmental interests in protecting the welfare of children and the privacy of the homes.¹⁸⁴ *Pacific* does not necessarily establish the regulatory standards for cable television since the Court itself recognized that various mediums require different standards.¹⁸⁵ Moreover, since cable has several manageable variables¹⁸⁶ while broadcast has only one,¹⁸⁷ the constitutional problems raised by the regulation of cable TV are more manageable than those associated with indecency on broadcast.¹⁸⁸ Not only do recent judicial decisions support the manipulation of these variables to regulate cable communications contextually,¹⁸⁹ but Congress also espouses contextual regulation in the Cable Communications Policy Act of 1984.¹⁹⁰

182. This chilling effect occurs when a person does not know exactly what activity a statute prohibits. Consequently, people forego constitutionally protected activity for fear of violating the statute. See generally LOCKHART, *supra* note 148, at 730-38.

183. See, e.g., *Red Lion Broadcasting*, 395 U.S. at 367.

184. Riggs, *Regulation of Indecency On Cable Television*, 59 FLA. B.J. 9, 12 (1985) for proposition that regulation of cable television content must be narrowly drawn to protect these interests.

185. 438 U.S. at 748.

186. With cablecast, the operator can segregate programming, introduce variable time programming, use addressable converters, unscrambling devices, and offer tiered services.

187. The only effective manageable variable for radio broadcasting is the time variable. See Riggs, *supra* note 12, at 326.

188. For example, because of cable's ability to segregate programming, cable operators could separate programming based on content. Cable operators could offer a basic package free of any potentially offensive material and an advanced package which contained sexually explicit material. By requiring subscribers to pay an additional fee for the advanced package, those who did not want to view offensive programming would not have to subscribe to this package.

189. See *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

190. 47 U.S.C.S. § 521 (Law. Co-op. Supp. 1985), *reprinted in* 1984 U.S. CODE CONG.

Any regulation which is premised on the context of the speech is obviously content based. However, where the regulation, though content-related, is directed at subject matter rather than point of view, the regulation is more constitutionally palatable.¹⁹¹ Consequently, a court may use a less exacting standard.¹⁹² In fact, content based regulations premised on separation of programming are permitted under the Court's reasoning in *Young v. American Mini Theaters*¹⁹³ since the regulation is not aimed at suppressing expression, but merely channeling it to those who wish to receive it. This potential to separate programming is what makes the cable medium regulable while still respecting others' privacy interests and protecting children from harmful exposure to indecent material. Specifically, this potential to separate cable programming allows for regulation at both the point of sale and the point of reception.

Initially, the point of sale provides the best opportunity to effectively control the distribution of cable programming. For example, cable operators could be required to offer tiered-service programming to insure that potentially offensive materials are received only by consenting adults. Such a service would provide a basic package to all subscribers that contained little or no potentially offensive programming. In additional packages, the cable operator could offer entertainment which included sexually explicit material. These additional programs would require the subscriber to pay an increased fee so the person would be receiving only those channels for which he paid. With these pay channels, the government and the cable operator alike would have some assurance that potentially offensive material would be received only in those homes that desire the service. If the consumer did not want to view erotic or indecent programming, she could restrict her subscription to the basic package.

Next, the subscriber could control the viewing of the channels received at the point of reception, that is, the home. Section 624 of the Policy Act espouses this method of regulation.¹⁹⁴ In Section 624(d)(2)(a) the Policy Act requires cable operators to offer "lockboxes," for sale or lease, upon request so that the viewing of any given channel at any given time could be restricted.¹⁹⁵ This device permits concerned parents to control their chil-

& AD. NEWS 4655.

191. This is because the underlying theme of the first amendment is that speech should not be suppressed merely because it espouses an unfavorable point of view.

192. *Id.*

193. 427 U.S. at 50.

194. In order to restrict the viewing of programming which is obscene or indecent, § 624(d)(2)(a) provides that "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." Policy Act, *supra* note 10, at § 624(d)(2)(a).

195. *Id.*

dren's access to offensive programming. Thus, a lockbox or similar device would allow parents to protect their children from viewing the adult channels obtained under the tiered service programming.¹⁹⁶ Additional controlling devices which would be effective at the point of reception are advance notices of erotic programming and published program guides. These would forewarn parents so the lockboxes could be used effectively.

When regulation at the point of sale is combined with restrictions at the point of reception, the opportunities for offending unconsenting adults or adversely affecting children are reduced to a minimum. Moreover, such contextual regulation respects the first amendment rights of adults who desire to view sexually explicit or erotic material. This type of programming may nevertheless be obtained by adults who pay the additional monthly charge. Still, for the regulation to be constitutionally complete, even if it only restricts the time, manner, or place of expression, there must be a specific definition of what is regulable¹⁹⁷ as well as procedural safeguards open to those desiring a review of this determination.¹⁹⁸

An appropriately narrow definition of indecency would have to include the *Miller* standards¹⁹⁹ modified to include those acts deemed indecent but not obscene. To achieve this definition, a statute should judge material against its potential harm to minors while not necessarily requiring the programming to be deemed appealing to a "prurient interest." *Pacifica* would support this type of statute since the Court there upheld the FCC's power to regulate material that was not erotic.²⁰⁰ Above all, such a definition would still permit the government to regulate cablecast to advance its substantial interest in the welfare of children.

Any specific definition would also have to incorporate the procedural safeguards set forth in *Freedman v. Maryland*²⁰¹ since the statute would arguably be aimed at the suppression of expression. The Supreme Court held in *Freedman* that all such regulatory schemes must contain the safeguard of prompt judicial review of whether the expression in question may be constitutionally prohibited.²⁰² Therefore, after the local governmental agency established a specific and narrow definition of indecency, for the law to pass constitutional muster, the cable operator must be given a chance to

196. See *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (Miami, Florida ordinance regulating cable distribution of indecent material found unconstitutional).

197. See *Miller*, 413 U.S. 15 (requiring specific definition of obscenity before regulations could be devised).

198. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (requiring the procedural safeguard of prompt judicial review for regulations which suppress expression).

199. See *supra* text accompanying notes 77 and 78.

200. 438 U.S. at 726.

201. 380 U.S. 51 (1965).

202. *Id.* at 52.

obtain a judicial determination of whether the material prohibited actually falls within this definition. This shield would protect the cablecaster from decisions of local agencies which possess unbridled discretion to determine whether the programming conforms to the legal standards.

While this approach would not eliminate indecency on cable television, it would limit the availability of potentially offensive programming by providing a system in which the viewer receives only that to which he subscribes and nothing more. Additionally, once cable programming is received into the home, this statutory scheme would assist parents by allowing them to utilize a lockbox by which to control their children's viewing. Therefore, this approach would protect the substantial government interests in the personal right to privacy and the protection of minors without forcing consenting adults to forego viewing sexually explicit or erotic programming in the privacy of their home.

VII. CONCLUSION

This note has drawn together the relevant bodies of precedent and developed a scheme whereby the regulation of indecent programming on cable television would be constitutionally acceptable. The Supreme Court has frequently stated that each medium of communication is unique. The rationale for regulating one medium may be inapplicable to another and cable television is no exception to this rule. It is improbable that any regulatory scheme would completely satisfy all concerned parties. However, if a contextual regulatory scheme was adopted, the constitutional guarantees of the cable operator, viewer, and unconsenting subscriber would be fairly and adequately balanced. Regardless of the type of regulation, a uniform approach is needed to end the chilling effect put on cable operators and allow cable patrons to receive the programming that they desire.

JEFFREY E. WALLACE