Public Access: Fortifying the Electronic Soapbox

Jason Roberts*

Conclusion

"America is a melting pot, and public access is the receptacle for the indigestible parts." **(note 1)**

Introduction

Most people would not think of public access as the cornerstone of cable television. The popular film *Wayne's World* helped solidify the widely held impression of what access has to offer - two teenagers in their poorly lit basement discussing babes, rock and roll, and the meaning of the word "schwing."(note 2) Community-based channels, however, have been a part of the cable industry ever since entering the broadcast medium. Public access has symbolized the goal of cable television - achieving diversity by providing a voice to anyone in the community who wants to share his or her message with others.

Over 2000 public access channels exist nationwide(note 3) allowing for more than 10,000 hours of original programming each week.(note 4) City council meetings, church services, and aspiring television stars make up most of these access schedules. Recently, though, alternative and minority viewpoints of a far more controversial nature have begun to appear. Viewers are watching or may soon be watching these programs in their communities:

- A white supremacist show hosted by Dr. Herbert Poinsett in Tampa, Florida, who speaks out against the Jewish-controlled media and the "black bucks" destroying American cities. One program concluded that most serial killers are white because "blacks don't have the brains to be serial killers."(note 5)
- A show called *It's Time to Wake Up* in which Ta-Har, a self-proclaimed high priest of the Black Israelites, brandishes a baseball bat and prophesies the day when blacks will beat "the hell out of" white people and bash their children against the stones for years of enslavement.(note 6)
- *Back Alley Bitches*, a program which follows the lives of prostitutes and includes allegations of unfair police harassment and features photographs covering the best sexual situations of the week.(note 7)

With this new wave of controversial material, the Federal Communications Commission (FCC or Commission), access users, and local cable operators have found themselves in a First Amendment battle over what material should be allowed on public access channels, when such material can be shown, and who should be liable when access regulations are violated.

Congress in 1984 passed the Cable Communications Policy Act in an attempt to create uniform content regulation of public access.(note 8) Under this Act, cable operators were allowed to set aside channels in their franchise agreements for public, educational, or governmental (PEG) use in exchange for franchise exclusivity.(note 9) The Act gave the operator no editorial control over these channels, except for the right to forbid obscenity, and granted the operator power only over what time the program aired.(note 10) With these limits, the cable operator was immune from liability for any show aired on public access.(note 11) These rules, at least in theory, helped public access symbolize "the widest possible diversity of information sources and services to the public."(note 12)

With the rising use of access for hate shows and indecent material, Congress returned to public access programming with the Cable Television Consumer Protection and Competition Act of 1992.(note 13) This Act modified the previous rules by removing a cable operator's immunity for programs that feature obscene material.(note 14) At the same time, the provision which barred cable operators from exercising any editorial control over content remain unchanged.(note 15) Congress also allowed the FCC to create rules that would prevent children from viewing indecent material on public access.(note 16)

The United States Court of Appeals for the District of Columbia Circuit stayed the FCC rules on November 23, 1993. In *Alliance for Community Media v. FCC*, the court held that it was unconstitutional to give an operator control of public access content because the operator becomes an agent of the government.(note 17) On February 16, 1994, the D.C. Court of Appeals vacated its judgment in *Alliance* and granted a rehearing en banc.(note 18) As all sides wait for the ultimate outcome in this case, public access producers attempt to maintain their hold in the expanding cable

channel spectrum.

This Note will argue that even though some viewers find programs such as those previously cited tasteless and indecent, this should not justify recent actions by the FCC and Congress which threaten to severely limit the diversity of public access. The trend towards governmental prohibition of program content takes the power of public access away from the people. As the number of cable channels continues to increase, the need for a channel that allows the public an outlet for expression becomes increasingly important. Part I of this Note will examine the history and underlying policies of public access, FCC attempts to regulate access, and the role access should fulfill in cable. Part II will examine the difficulties the FCC has had in prohibiting certain public access programming. The Note will show how regulatory difficulties stem in part from the problems the courts have had in defining the scope of indecent material on cable television. Finally, in Part III, this Note will explore ways of assuring that the needs of the FCC, operators, and access users are met.

This Note concludes that viewers should ultimately choose which public access programs should air, through effective counter-programming and the use of blocking devices. Because of the difficulties the courts have had in creating an indecency standard for cable, operators should be limited to controlling program schedules. This structure will adequately protect minors, while public access users can continue presenting programs with the greatest possible diversity.

I.The Evolution of Public Access

While broadcast television reached most American cities by 1948, rural and remote areas found themselves unable to receive transmission signals.(note 19) In 1949, a local television salesman in Lansford, Pennsylvania, solved this problem by creating the first subscriber-cable television service, where signals were passed over wires.(note 20) Since broadcasting signals are transmitted through the air, they weaken with distance and can be blocked by geographic obstacles. With cable service, however, cable operators use antennas to receive these broadcast signals, transfer them to wire, and then retransmit them to homes through the cable, thereby reaching areas that simple broadcasts could not. This method of signal transmission by cable gradually spread to all parts of the country, improving reception and expanding the channel capacity beyond the frequency limits of the broadcast spectrum. Technological advances have made it possible to transmit over 120 channels by cable wire, and channel capacity continues to expand.(note 21)

A. Public Access and its Inception on Cable Television

Operators soon realized that cable could be used not only to transmit pre-existing broadcast signals, but also as a medium to present shows produced by independent parties and other production companies. The idea of a public access channel for local communication found inspiration with the first centralized public television system created in Washington, D.C., in 1967.(note 22) Congress, however, asserted control over public television content during the Nixon administration, virtually eliminating any political or controversial programming.(note 23)

One Canadian television producer said public access "all began in Newfoundland."(note 24) In 1967, a Canadian group created the "Challenge for Change" program, producing documentaries that chronicled the effects of poverty in Canada.(note 25) The Canadian public initially responded with hostility to these stark displays of children looking for food in the Canadian ghettos.(note 26) The producers responded by putting the choice of what to film in the hands of the group they were studying. The people living and struggling in these areas were permitted to participate in all editing and production decisions to take an active role in showing what life was like from their point of view. The experiments gave the people oppressed by poverty the freedom and ability to have a voice. Many in Canada were deeply affected by the unfiltered view of this forgotten part of society.(note 27) Allowing public control highlighted the success of cable as a communicative medium, and helped influence the Canadian government to create programs for welfare and economic reform.(note 28) The documentaries also indirectly became the catalyst for public access in America.

Dale City, Virginia, became the first American city to incorporate public access through a channel made available to the Junior Chamber of Commerce.(note 29) The program lasted only from 1969 to 1970 because of a lack of funding.(note 30) Larger cities like New York implemented public access with greater success in 1971.(note 31) These

early access programs embodied a "guerilla television"(note 32) in which television became an instrument available to the subversive culture. Access proponents felt the potential for a shift in television control would help restore a "media ecological balance."(note 33) Instead of a medium that produced programming for a general audience, access users focused their programs at the individual. Communications professor Lee Thayer noted, "Communicational realities and the human institutions which are built out of them are ultimately the products of intercommunication between people, not of the mass production and mass distribution of messages."(note 34)

Cable operators have kept this "balance" between the cable system and the individual tipped in their favor because they still control the allocation of money for cable access. Limited funds have made it difficult for those involved in access to create programs that successfully meet the idea of participatory television. In order to save money, a majority of operators fill their access schedule with repeats of church sermons, community politics, and school plays. Families in Elmhurst, Illinois, had a contest to see which repeat was played more often on their access channelthe Calumet Beauty Pageant or the Elmhurst Pet Parade.(note 35)

Some operators actively promote their access channels. For example, cable operators in Dayton and Minneapolis have provided between $500,000 and $1 million for local production facilities, with over twenty portable cameras each for use by access participants.(note 36) In contrast, the "programming facilities" of many operations consist only of a bulletin board that lists events.(note 37)

Many minority groups who feel their viewpoints are not being expressed in the mainstream cable medium have pushed nationwide for facilitating the training process needed to operate and produce an access program.(note 38) These protests have led to the production of numerous community-based programs. Examples include a Chicago newsmagazine produced by and for homosexuals called *The 10% Show*;(note 39) a Houston show watched by hundreds of Vietnamese immigrants because it is the only program available in their native language;(note 40) and a talk-show hosted by a mother who lost two sons in a drive-by shooting, pleading for an end to gang violence in the "barrios" of Lynwood, California.(note 41)

The number of viewers of cable access channels varies in different cities. Surveys range from less than 1 percent viewership in Ventura County, California,(note 42) to 50 percent of adult viewers in Bloomington, Indiana.(note 43) Nationwide polls show that 25 percent of cable viewers have watched at least one cable access show within the last two weeks.(note 44) On average, operators and media analysts note that the number of viewers who tune in to public access is growing because the mainstream media, as exemplified by the film *Wayne's World*, continues to focus on the quirkiness of public-access programming.(note 45) For example, the show *Biker Bill Cooks with Fire* in Arizonafeaturing Bill talking about motorcycle safety tips and ways to cook jalapenoshas gained a loyal audience as Arizona newspapers have written articles on the program.(note 46) *Motorsports Unlimited* in Chicago has gained cult-like status with its cable viewers, featuring car aficionado Bill Wildt talking about crankshafts and the engine sizes of various carswhile his "girls," women dressed in bikinis, lie on and in the cars that are being discussed.(note 47) These programs demonstrate that the more unique the program, the greater chance it has for attracting viewers.

B. Regulation of Public Access

1. Early FCC and Congressional Attempts

The FCC originally ignored cable television, deciding instead to focus on the "national television service."(note 48) The Commission asserted jurisdiction over cable in 1972 after realizing that cable television, being able to both originate and distribute programming, created formidable competition.(note 49) One of the surprising promulgations by the FCC required cable operators in the top 100 cable television markets to provide three free access channelsone channel for public use, a second for educational programs, and a third for local government meetings.(note 50) The FCC set this mandatory rule as a trade-off: by allowing cable operators to have free use of commercial and public broadcast signals, the Commission could compel cable operators to open new outlets for expression, education, and information.(note 51)

Community access users praised the Commission's efforts. Proponents saw the rules as FCC recognition of public access, marking "cable as an institution within which the separate voices of the community may be heard."(note 52)

Operators were to offer public access to users on a non-discriminatory, first-come, first-serve basis, and program operators were to have no control over program content.(note 53) Congress realized, however, that completely open access might lead to an abuse of the First Amendment, so it required operators to screen access programs for indecent and obscene material and promulgate rules prohibiting such content.(note 54) Although the FCC noted that the First Amendment did not "safeguard against unpleasantness,"(note 55) Congress wanted the FCC to ensure that the public was protected from obscenity.

However, it soon became clear that public access was not creating the impact the FCC had anticipated, as the number of access viewers and users remained small. In 1976, the FCC ruled that access channels could be combined to offset the limited hours of available programming.(note 56) The Commission also delayed the deadline date for compliance with the channel capacity requirements, but expanded the coverage of the requirement to cable systems with 3500 or more subscribers, regardless of market location.(note 57)

2. *Midwest Video* and the Obstacles to Public Access

The Supreme Court held in *Southwestern Cable Co.* that because of the competitive threat cable posed to broadcast television, the FCC could assert jurisdiction over cable systems as long as it was "reasonably ancillary" to the Commission's responsibility for regulating broadcast television.(note 58) Relying on this holding, Midwest Video Corporation and the American Civil Liberties Union (ACLU) successfully appealed to the Eighth Circuit, and ultimately to the Supreme Court, to strike down the FCC requirements for public access.(note 59)

The Eighth Circuit held the mandatory access rules "burst through the outer limits" of the FCC's jurisdiction.(note 60) Because the concept of open access on separate cable channels had no relation to broadcast television or the "retransmission of broadcast signals on existing channels," the interaction between cable and broadcast was absent.(note 61) Therefore, the FCC's access rule was not reasonably ancillary to the delegated scope of FCC cable regulation. While the court of appeals commended the FCC's efforts to provide a variety of voices on cable, the court noted that "[r]hetoric in praise of objectives cannot confer jurisdiction."(note 62)

The FCC was also held to have imposed an unconstitutional burden on the cable operator by requiring the cable operator to create a channel for a public forum with non-discriminatory access, while placing an obligation on the operator to suppress obscene or indecent content.(note 63) The court held the Commission failed to provide the procedural safeguards required of governmental "prior restraints" which include judicial proceedings and a prompt determination of the content that is being prohibited.(note 64) The FCC's rule, in effect, made the cable operator both "judge and jury," and, coupled with the operator's personal desire to satisfy the Commission and avoid sanctions, would have hurt access users by enlisting the operator "on the `safe' sidethe side of suppression."(note 65)

3. The 1984 Cable Communications Policy Act

The Eighth Circuit's and Supreme Court's scrapping of the mandatory access rules did not end the growth of cable access, as most cable operators still included an agreement for access channels in their franchise proposals.(note 66) This was a direct result of the cable franchising system, whereby local governments would demand from cable franchises certain concessionslike an access channelin exchange for the cable system's use of public land to construct its facilities.(note 67)

In 1980, Congress began to push to amend the 1934 Communications Act. As demonstrated by cases such as *Midwest Video*, the courts and government were unclear about the scope of the FCC's power to regulate cable television. After four years and numerous requests from cities confused by the boundaries of allowed regulation, Congress passed the Cable Communications Policy Act of 1984, the first federal legislation for cable.(note 68) Congress wanted to relieve the cable industry from unnecessary regulationsuch as limits on cable rates and franchise fees(note 69)and declared prohibitions on "redlining," where cable operators would refuse to wire low-income areas.(note 70)

Congress also enacted the 1984 Act to ensure that cable systems remained responsive to the needs of the public.(note 71) Public access again became one of the focal points of regulation. Cable had evolved into the most prevalent form of broadcast transmission, which meant that the breadth of channel capacity could support diversity. The House Report

stressed a congressional desire that public access again become meaningful"the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet"(note 72) where cable operators act as a "conduit" for programming.(note 73)

Congress simply codified the common practice at that timefranchising authorities could (and almost always did) include in their proposals a statement that they would reserve channels for public, educational, or government use.(note 74) Operators were to treat access users on a first-come, first-serve basis. Congress further declared that a cable operator could not exercise any editorial control over the use of the designated access channel.(note 75) To avoid constitutional problems and operator liability, the 1984 Cable Act granted operators full immunity from any liability for any program carried on an access channel.(note 76) A cable operator, however, could still set forth limited technical standards, budgetary constraints, and regulations on the use of cable facilities.(note 77) Operators could also provide a scrambling device (usually a lockbox) on a subscriber's request, which allowed the subscriber to selectively block reception of material.(note 78)

4. The 1992 Cable Television and Consumer Protection Act

The cable television industry continued to grow after 1984. Over 60 percent (approximately 56 million) of American households subscribed to cable television in 1991.(note 79) This led to unforeseen problems of ownership,(note 80) cable rates,(note 81) and use of retransmitted broadcast television signals.(note 82) Cable operators had also reacted with growing nervousness toward public access after the 1984 Act provisions. Some access programs began to push the edge of indecency and obscenity. From images of stripteasers and sexual activities on the program *Dull-A-Vision* in Austin, Texas,(note 83) to a religious group's airing of an abortion in Ventura County, California,(note 84) cable subscribers in various communities wanted to choose what was being shown on public access. Bill Schricker, programming director for Jones Intercable in Tampa, Florida, spoke for many operators when he answered critics of certain access shows by "throwing up his hands and ask[ing], `[W]hat do you want us to do? We are powerless to prohibit or suspend.'"(note 85)

Congress attempted to appease both operators and subscribers by enacting the Cable Television Consumer Protection and Competition Act of 1992.(note 86) Congress created the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry.(note 87) One of Congress's goals was again to further the "substantial governmental and First Amendment" interests of promoting diverse viewpoints through "multiple technology media."(note 88) Congress gave the FCC authority to promulgate rules for operator prohibition of certain controversial programs and made the operator liable for the content.(note 89) Congress deemed these changes necessary to protect children from obscene and indecent subject matter.(note 90)

In late 1992, the Commission commenced informal rule making to set forth guidelines for cable operators in their prohibition of obscenity, sexual explicitness, or programs soliciting unlawful conduct.(note 91) The Commission defined sexually explicit conduct within a generic "indecency" standard.(note 92) These proposed rules and definitions set forth broad parameters within which programs could be prohibited.(note 93) Further, the FCC created a certification process where users would have to certify their programs did not contain any material that fit into one of the prohibited statutory categories.(note 94)

Access users and cable operators quickly objected to these rules. Arguments opposing the proposed rules ranged from the potential for "its chilling effect on the use of public access"(note 95) to the exorbitant costs required to pre-screen every program, even the "call-in astrology" shows, for statutory compliance.(note 96) In *Alliance for Community Media*, the ACLU and community access groups challenged the constitutionality of these access content regulations.(note 97)

5. Overturning the 1992 FCC Access Regulations

Access proponents appealed to the Court of Appeals for the D.C. Circuit in *Alliance for Community Media* that the public access of the 1992 Act and the ensuing FCC promulgations were impermissibly broad and enacted without proper procedural safeguards.(note 98) Even though it was the private operator who was to have the choice of content prohibition, the three-member panel of the court looked at the relationship between the operator and the FCC.(note 99)

When a government agency encourages a private actor to prohibit material that it could not do itself, that close influential nexus creates an unconstitutional state action.(note 100) The court used a three-part test to scrutinize the FCC regulations examining: the immediate objective, the context in which the specific authorization to ban indecency was issued, and the ultimate effect of the FCC regulations.(note 101) Because the operator was given such overt encouragement to prohibit material, the operator in essence acted like the FCC's private agent, which resulted in unconstitutional state action.(note 102) "[T]he government has stripped the cable operator of any editorial control over cable access channels except for programming the government wishes to suppress."(note 103)

The court recognized that the government had a compelling state interest in protecting children from viewing indecent material.(note 104) Relying on its 1991 decision in *Action for Children's Television*, however, the court held that a complete ban on indecent material, similar to what was attempted on broadcast television, was unconstitutionally overbroad.(note 105) The FCC had failed to show that cable television deserved any different regulation from broadcast, and the court held that providing some safe time harbor or other less restrictive alternative would have to be enacted by the FCC for effective protection.(note 106)

The court continued the stay of the FCC regulations until a resolution on remand. However, on February 16, 1994, the court vacated its November 23, 1993, ruling and granted a rehearing en banc for review by the full Court of Appeals for the D.C. Circuit.(note 107) While the three justices who decided the initial *Alliance* holding were President Carter appointees, the full court is comprised primarily of appointees of Presidents Reagan and Bush.(note 108)

As noted in the *Midwest Video* case, granting the operators authority to ban certain programming, while removing immunity for liability, creates the potential for overzealous prohibition. Striking down the 1992 rules would ensure that the original intent of public access remains, thereby giving a voice to those outside the mainstream to present their message in a way they see fit.

As cable's popularity and the number of child viewers continues to grow, the problem of protecting children from these controversial access programs remains. As one access system spokesperson put it, the courts, access users, and operators have only created a temporary solution "in search of a problem."(note 109)

An example of what some see as the reason for access and others view as the prime example of the need for greater content regulation is Channel V (formerly Channel J) of the Manhattan Cable System in New York. In 1976, New York created its public access channel without a great deal of publicity. One of the few who did attempt to use public access was former radio disc jockey Alex Bennett.(note 110) According to Bennett, "It wasn't like a gold rush to get on. Hardly anyone knew about it."(note 111) Bennett, along with Al Goldstein, the founder of the adult magazine *Screw*, launched the access program *Midnight Blue*, an exploration into the perverse side of New York City life.(note 112) Al Goldstein wanted to reach a part of society he felt went unnoticed. Goldstein said, "There is a stifling silence out there that doesn't authenticate my reality, the reality of men obsessed with sex."(note 113) Installments of the program included a 400-pound stripper, a double-jointed contortionist named Mr. Infinity, and a dominatrix who whipped a middle-aged Englishman dressed in a maid's costume.(note 114) *Midnight Blue* also launched the career of Robin Byrd, a sex-show performer dressed in a G-string, dubbed the "X-Rated Ed Sullivan" of cable access, who interviews strippers and pornographic film stars.(note 115)

Al Goldstein, who recently became a member of the National Press Club, faces constant allegations of obscenity and legal pressure to remove his programs from the cable access channel, but Channel V still airs *Midnight Blue*. Goldstein noted, "The courts have ruled that obscene is illegal but indecent is permitted. That's why I'm home free. No one knows the difference. One man's obscenity is another man's indecency. One man's perversion is another man's religion."(note 116)

One of the steps needed to reach a compromise lies in the area of disagreement raised by Al Goldsteinthe difficulty of defining obscenity and indecency, and the role of the FCC in regulating programs that fall within either category.

II. Obscenity and Indecency on Cable - Regulating the Great Unknown

The FCC has had difficulty placing cable television within a regulatory category. Cable incorporates aspects of the

broadcast medium, but also contains unique attributes that demand different standards. This hybrid structure has led to confusion between state statutes attempting to define who has control over content regulation and courts trying to assimilate these regulations with existing precedent.

A. Obscenity and Indecency Regulation under the Miller and Pacifica Holdings

The Supreme Court first dealt with delineating material protected under the First Amendment in *Roth v. United States*.(note 117) In *Roth*, the Court upheld a federal statute that punished the mailing of materials that were "obscene, lewd, lascivious, or filthy."(note 118) The Court held that ideas even having the slightest "redeeming social importance" are protected under the First Amendment, but rejected obscenity that is utterly without social importance.(note 119)

Nine years later, the Supreme Court in *Memoirs v. Massachusetts* altered the definition of obscenity under *Roth*, requiring that to prove obscenity, the prosecution must affirmatively establish that the material is utterly without value.(note 120) This forced the prosecution to prove a negative, which became "a burden virtually impossible to discharge under our criminal standards of proof."(note 121)

Miller v. California marked an attempt by the Court to further define obscenity, with the Court acknowledging the danger of regulating "any form of expression."(note 122) The case involved the arrest of an adult book salesman who was charged with violating a California statute for knowingly distributing obscene matter.(note 123) In a 5-4 decision written by Chief Justice Warren Burger, the Court confined the scope of obscenity to matter which depicted or described sexual conduct, to be defined by the applicable state statute.(note 124) The Court created a tripartite test for defining obscenity.(note 125) The test for the trier of fact is:

> (a) whether the average person under "community standards" would find that the work, taken as a whole, appeals to a prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by state law; and, (c) whether the work, taken as a whole lacks serious literary, artistic, or scientific value.(note 126)

Burger noted that while "the sexual revolution" had helped in removing some of the "prudery" in society, the Court saw no need to permit "hard core" material.(note 127) The Court warned states to use caution in not going beyond the test when enacting their obscenity statutes.(note 128) The material to be judged was to be very fact specific and examined from the standards of an average person, not a "particularly susceptible or sensitive person."(note 129) For material that was questionable, the Court noted, "[W]e must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide."(note 130)

In his dissent, Justice William Douglas noted the past difficulty the Court had in placing limits on regulating obscenity, an area that was vague and uncertain, with a scope that would vary among communities. He worried about the government becoming involved in an area of extreme emotion, crossing the fragile line of regulating expression into censorship. Regulation of expression should not, in Justice Douglas' eyes, be applied when the definition of obscenity too often became a rule of "I know it when I see it."(note 131)

Building on these allowances and limitations, states began to implement obscenity statutes. Questions began to arise, however, about regulating objectionable material that fell short of the obscenity standard. The Court returned to the area of controversial expression within the specific media of broadcast radio and television in *FCC v. Pacifica Foundation*.(note 132) A New York radio station broadcast in the daytime comedian George Carlin's "Filthy Words" monologue, a list of the seven words that "you couldn't say on the public, ah, airwaves, uhm, the ones you definitely wouldn't say, ever."(note 133) A man whose son heard the broadcast filed a complaint against the station, which prompted the FCC to issue an opinion that set a regulatory standard for the growing number of complaints about indecent speech on the airwaves.(note 134) The FCC had found that broadcast speech was different from other forms of expression because children had easy, unsupervised access to broadcasts, broadcasts invaded the privacy of a person's home without warning, and a scarcity of the broadcast spectrum existed as compared to the print medium.(note 135) Calling Carlin's speech "patently offensive" but not obscene, the FCC allowed channeling of the

content by time, place, and frequency.(note 136)

The FCC's authority to regulate indecent broadcasting was upheld.(note 137) The Court defined indecency within the context of protecting children, as anything patently offensive within community broadcast standards that describes sexual or excretory activities and organs, broadcast at times of the day when there is a reasonable risk children may be in the audience.(note 138) The Court agreed with the FCC that because of the uniqueness of the broadcast medium, its pervasiveness in American homes, and its accessibility to children, regulation of indecency was constitutionally permissible.(note 139)

As it had done in *Miller*, the Court in *Pacifica* stressed the narrowness of its holding by requiring regulation to be very context specific.(note 140) In order to avoid infringement on a broadcaster's First Amendment rights, the FCC was to weigh such factors as time of day, expected composition of audience, and mode of broadcast.(note 141) Factual context is important because indecency "may be merely a right thing in the wrong place - like a pig in the parlor instead of the barnyard."(note 142)

B. Regulation of Content on Cable Television

Cable television presented a new problem for the FCC and state governments. While cable television incorporates aspects of broadcast television, cable operators transmit signals over wire and require subscribers to pay a fee in order to receive programming. Similar to persons involved with other visual media, however, operators have expressed concern over how to regulate objectionable cable content. One of the primary battles over control took place with Utah's attempts to enact a statute prohibiting and regulating obscene and indecent cable programming.

The case *HBO, Inc. v. Wilkinson* involved the enactment of a statute by the Utah legislature in 1981 that imposed criminal sanctions on cable operators who knowingly distributed obscene and indecent programming on cable.(note 143) National and local cable television distributors and franchisees brought a class action suit challenging the constitutionality of the statute. The Utah District Court upheld the section of the statute prohibiting pornographic and obscene material by holding that the *Miller* test was a proper boundary for cable television.(note 144) The court drew the line at the Utah legislature's attempt to regulate indecency. Under the Utah statute, indecency was defined as portrayal of nudity and descriptions or depictions of "illicit sex or sexual immorality."(note 145) The court held that this definition was overly broad, as it would prohibit the portrayal of such material in art, literature, and scientific works.(note 146)

Merely because something offends one person does not mean it precludes another from finding some artistic or scientific value in the work. Judge Jenkins wrote:

> I think the appealing to the worst in all of us is indecent. Those who do ought to be ashamed of themselves. But that does not mean that what they do is proscribed. We put up with it. What we do if we have occasion to be offended by something in a program is we get up and turn it off. We do something else. We read a book. We refuse to purchase the sponsor's product. And if we're concerned parents and we're not overjoyed by the violence and stupidity of *The Dukes of Hazzard*, we turn it off and direct our children to something else.(note 147)

The Utah District Court in 1983 addressed the applicability of the *Pacifica* holding to regulating cable content.(note 148) The court struck down a city ordinance enacted in Roy City that banned cable programming that fell under a municipally defined version of indecency.(note 149) The court held that Roy City could not rely on *Pacifica* because of the inherent differences between cable and broadcast television.(note 150) Differences include the requirement of subscribing to cable, which the court likened to a contractual agreement, the greater choices of channel selection on cable, and the difference between television broadcast waves as public property and the private nature of cable wires.(note 151) A person could choose not to subscribe to cable, but could not cancel broadcast television. Cable content should only be limited under the tripartite test of *Miller*, as it provided a degree of flexibility at the community level for all forms of publicly available information.(note 152) Rather than let the government interfere in an area that is protected by the First Amendment, the choice of regulating indecent or objectionable material rests with the

individual, "a moral function for the parent and the family."(note 153)

Utah's last look at indecent cable programming arose in *Community Television of Utah, Inc. v. Wilkinson*, where the district court again asserted that only the *Miller* standard could apply to cable content regulation.(note 154) In striking down the regulation which would have made the broadcasting of indecent programming a criminal nuisance, the district court again stressed the difference between broadcasting and cable. *Pacifica* cannot apply to cable regulation because at best it "stands for the proposition that a federal regulatory agency can monitor consumer complaints directed at broadcasters who operate in the public domain."(note 155) Cable subscribers simply have more choices when dealing with programming they may find offensive: Subscribers may cancel their subscriptions to cable television or cancel certain channels through scrambling or lockboxes.(note 156) Limiting questionable programming due to fears of possible exposure to child viewers would unfairly restrict the rights of those consenting adults who subscribe to watch those programs.(note 157)

The Court of Appeals for the Eleventh Circuit supported this distinction in *Cruz v. Ferre*, holding that a Miami cable regulation statute exceeded the *Miller* test.(note 158) The proposed Miami statute ignored the rights of the majority viewing audience as subscribers. The statute also did not provide the *Miller* protections afforded to material with some social, artistic, and political value, which is necessary so that only the truly offensive material is prohibited.(note 159) The court suggested that *Pacifica* limitations were too excessive because cable operators would have more control over certain channels to restrict programming to certain times and days, and could warn viewers well ahead of time of potentially offensive programs with monthly programming guides. Applying *Pacifica* to cable would be an onerous burden for cable operators and viewers; *Cruz* relied on greater parental manageability and the choice of subscribing to certain programming instead of allowing further content regulation.(note 160) Re-evaluating Justice Sutherland's vivid analogy in *Euclid*, the Eleventh Circuit set forth the difference between cable and broadcast television, stating "that if an individual voluntarily opens his door and allows a pig into his parlor, he is in less of a position to squeal."(note 161)

Throughout these cases, and including the initial *Alliance* decision, court precedent has established that government cannot enact a statute for control of cable content that exceeds *Miller*. The 1992 Act provisions attempt to disguise government regulation through indirect control of the cable operator. Like government, an operator cannot prohibit sexually explicit conduct, or material soliciting unlawful conduct, without concern for its level of prurient interest or social, artistic, and political value. Under the FCC's proposed rules, an operator could ban an access show that explains the use of condoms for the sake of AIDS awareness. If the program involves a sexually explicit topic, an operator would not need to examine the possible social and artistic value of such a message. A complete ban of indecency is not the least restrictive alternative in balancing the needs of free expression on public access and the protection of children from objectionable material.

While the *Alliance* decision is pending a rehearing en banc, a recent California district court case provides a compelling argument as to how the District of Columbia Circuit Court should ultimately decide.(note 162) The California court enjoined Viacom Cable in San Francisco from attempting to segregate and utilize its editorial discretion in regulating indecent material.(note 163) Viacom had terminated episodes of the public access programs *Wax Lips* and *Erotica SF*shows that dealt with sex education, opinions, and "points of view not often heard on commercial tele-vision."(note 164) Cable operators relied on Section 10(c) of the 1992 Cable Act, which gave operators authority to prohibit indecent programming on public access channels.(note 165) The court acknowledged the *Alliance* holding and noted that in spite of its vacated judgment, the "underlying rationale for holding Sections 10(a) and (c) unconstitutional remains highly persuasive to the court."(note 166) While the protection of children was again recognized, the court wanted to avoid excessive prohibition because "the government can be assured that cable operators will institute bans on indecent material if only given the opportunity."(note 167)

Shows on public access may be controversialeither because of their message or contentbut those programs are the reason why public access exists. Whether one agrees or disagrees with the speaker on the electronic "soapbox," access provides a chance for the voices that go unheard in the mainstream to communicate their message. In order to address the concerns of viewers who are deeply offended by access programs and parents who want to protect children from objectionable material, steps other than prohibition can be taken that provide a less restrictive alternative.

III.Solutions to Access Regulation

Miller provides a fair test for determining obscenity on both a national and local level. It is a test narrow enough that diverse access users who address controversial topics may do so without fear of prohibition. It also provides enough flexibility to allow a community enough control to protect itself from truly offensive and obscene material. Those involved in public access have always been aware that they must abide by the *Miller* guidelines. As T. Andrew Lewis, executive director for the Alliance for Community Media said, "Public access has always had to comply with existing obscenity laws. Public access is not above the law."(note 168)

While it is undisputed that obscenity is a boundary applicable to access regulation, indecency remains an ambiguous area. The best way to avoid excessive prohibition in the area of indecent and objectionable material would be to restore operators' immunity from liability for program content and not allow prohibition of "indecent" programming. Reverting to the 1984 Cable Act provisions forbidding editorial control would help prevent the potential for excessive prohibition; operators would overregulate when threatened with criminal liability. An operator would still be expected to prohibit any program that clearly violated its state obscenity statute.(note 169) Criminal sanctions for obscenity would exist for the party who should have the greatest responsibility for the program's contentan access program's creator. The user would face liability for creating a program with obscene material and giving it to an operator without proper notification.(note 170)

The *Miller* test is by no means perfect, but it has consistently been held by the courts to be the best standard to balance competing interests. In cases of true controversy, the decision to prohibit will rest in the people of the community, instead of one operator under the looming shadow of the FCC.

A. Regulating Indecency - Creating Dual Channels

One suggestion for balancing the needs of expression and protection of indecent access programming is found in the 1992 Cable Act provisions for leased access programming.(note 171) This idea offers the possibility of creating two public access channelsone for the programs considered "safe" and the other for indecent programming.(note 172) The controversial channel would begin as a blocked or scrambled channel, and could only be available upon subscriber request.(note 173) Separation would help provide protection for viewers and further notice concerning channel content. Economics and municipal attitudes toward public access, however, would make this solution virtually impossible. As noted, users of just one access channel have plenty of trouble receiving enough funds for production and daily operations. Most systems also have difficulty receiving enough programming for their access channel. Two channels would only dilute the funds and increase difficulties already faced by those involved in access.

The Court of Appeals for the District of Columbia Circuit in *Alliance* remanded the segregation provisions for indecent programs on leased access promulgated by the FCC.(note 174) Leased access are channels offered for commercial use by any entity not affiliated with the operator.(note 175) The court held that singling out one channel for regulation, while leaving other commercial channels which carry the same material untouched, was an unconstitutional content-based restriction and was not the least restrictive means for protecting children.(note 176) The FCC would have to prove that the access channel is so prevalent and severe that it demands unique protection for children in comparison to other channels in order to pass First Amendment scrutiny. So far they have been unable to put forth evidence that makes access content any more problematic than that aired on other cable channels.

B. Controlling Access Content Through Local Limitations

Another approach would require that access programs contain at least 50 percent local production and that only people within the cable area could use access facilities.(note 177) Such a rule would effectively end the national access programs that are distributed by videotape to local communities. These programs have been the greatest source of controversy. Local limitations are not a viable alternative for both theoretical and practical considerations. Many users are not able to produce the funds necessary to create and produce their shows and need to rely on national offices for programming. Examples include a national animal rights group, a Vietnamese cultural group, and even the Ku Klux Klan. Public access acts as a soapbox for each community. A person within a community that sponsors a program

produced elsewhere should have the right to have others in that specific community see and listen to that viewpoint. Taking this "conduit" of communication away would violate the purpose of public access.

C. Certifying a Program for Access as a Way to Anticipate Indecent Programming

As previously noted, one of the powers an operator has over the access channel is deciding when to schedule a program. If operators know a program is offensive, they can schedule that program later at night to protect young viewers. Section 10 of the 1992 Cable Act authorized cable operators to require programmers to inform the operators if the shows produced would be indecent under Commission regulations.(note 178) The FCC proposed that the information should come through a certification process for programming, where an operator could be warned if any of the access material fell under that which was proscribed under Section 10(c).(note 179) While the FCC wanted the certification process to help enforce program prohibition, the certification process could also be an effective way for an operator to decide when to broadcast a certain program. The FCC notes that certification is a relatively easy process and that many operators already use such a mechanism.(note 180)

Access users voiced concerns about the original proposal that certification would create an enormous amount of paperwork and might hinder programming. A simple form could be created, however, that could be filled out by the program promoter and satisfy the goals of informing the operator. If operators felt a program was obscene, they could then in good faith refuse to air the program. If a dispute existed, it would be one for the trier of fact under the *Miller* test, instead of a solely subjective decision for the cable operator. Certification could effectively serve as a deterrent for obscenity. Indecent programs would not be prohibited, but only aired at a later time that corresponds with the show's content matter.

This certification would apply to live call-in access shows as well, a growing area of access programming. As the FCC proposed, the producer of a live show could use reasonable efforts to ensure against obscenity and measure the possibility for indecency.(note 181) Users would then not be deterred from experimenting with call-in shows, strengthening the trend towards "interactive" television.

D. Disclaimers and Programming to Inform the Viewers of Objectionable Access Material

Another tool that would help protect minors would be for operators to publicize their programs in a scheduled format, either through mailing guides to subscribers or through an electronic "calendar" between programs. Public access operators most likely would not have the benefit of knowing months ahead what shows would be submitted for airing. Requiring seven day advance notice from users, however, would not be unduly burdensome and would still provide a reasonable amount of time to make viewers aware of certain controversial programming. Compared to the alternative under the 1992 Cable Actwhere liability can be imposed for improper pre-screeningthe cost of such scheduling seems a small price to pay. As one access user put it, under the strict FCC content regulations an operator might "have to pay someone $10 an hour to pre-screen all that stuff."(note 182)

With a scheduling guide an operator could also air a disclaimer before any access program, warning viewers of potential indecent or controversial subject matter. The only way operators would have knowledge about program content would be through what they learned in the certification process, further emphasizing the importance of certification.

Successfully increasing viewer knowledge, then, ultimately rests on the honesty of the access user and effective use of the certification process. While nothing can be guaranteed, removing the operator's "discretion" to prohibit indecent material would help both sides clarify what type of programming can be banned. A further safeguard might be to require access programmers to indemnify an operator for any liability incurred by the programmer's failure to follow certification guidelines (provided the operators have not already been granted immunity). Cable operators would then be able to effectively use their scheduling authority to protect minors from indecent and controversial programming, while still allowing users the chance to be freely heard on public access.

E. Lockboxes

One of the key differences between cable and broadcast television is that cable subscribers have the means to block out or scramble a certain channel in their homes without affecting the availability of the channel to others. The most common type of blocking device is the lockbox. The box uses a type of numeric "key" to lock out a channel through the cable converter, which simply deletes that channel from the subscribers available system. The 1984 Cable Act promoted such a device as the least restrictive means by which to block a leased access channel.(note 183) The Act also included an "income neutral" provision so that the lockbox was not used as a tool for financial discrimination.(note 184) The court in *ACLU v. FCC* held that the lockbox provision was valid and ruled the FCC could not exclude a certain set of channels from being subject to a lock-out.(note 185)

Attempts to place control of content in the hands of the FCC and cable operators have led to constitutional and practical problems. Lockboxes provide a means for restoring the power of choice to the viewer. The problem is that operators are not required to advertise the availability of a lockbox to the subscriber. Therefore, lockboxes have not been adequately used in practice.(note 186) Cost provides another reason why lockboxes have not been widely used. The 1984 Cable Act stated that a subscriber needed to purchase or lease the box from the operator.(note 187) Perhaps in order to fully realize Congress's goal of cable being an "income-neutral" service, lockboxes should be provided free of charge by the operator. If this came into effect, however, the lockbox cost would be indirectly borne by subscribers through an increase in basic rates, thereby raising potential objections from those who do not want to pay the cost for scrambling devices.

The better result would be to increase viewer awareness about the availability of a lockbox. Since the cable regulations provide no guideline about proper rates for lockboxes, the FCC should become more involved in setting a type of flat fee across the board. If Congress intended public access to provide a voice for the people, provided that voice does not include obscenity, lockboxes allow each viewer a choice without infringing on the rights of the speaker.

Comedian George Carlin said after the *Pacifica* case: "On the radio there are two knobs. One turns it off; the other changes the station."(note 188) The court ultimately disagreed with Carlin's solution to "regulating" indecent broadcasting. His underlying logic, however, provides the easiest solution to concerns about access. With a lockbox, a parent can be sure that a child will not tune in to a program that may be offensive in that particular household, an option currently unavailable with broadcast media. The job of "censorship," then, can rest with the individual person or parent and not the government. The difficulty lies, however, in getting people to use their individual power. When Manhattan Cable offered and publicized free lockbox service for any of their 228,000 subscribers who wished to block Manhattan's Channel J (now Channel V), only nineteen homes replied.(note 189) Robin Byrd, who acknowledges her show is not for everyone, said, "If children watch [my program] it's because parents aren't doing their job."(note 190) Indifference should not be a factor in allowing stricter regulation of objectionable expression.

F. Aggressive Counter-Programming

Another way for viewers to effectively counter those shows con-sidered controversial or indecent is to respond with a show that attacks these viewpoints. Kansas City ACLU Director Dick Kurtenbach notes, "The proper response to speech you don't like is more speech."(note 191) People who find a certain program offensive, although not legally obscene, should solicit the franchising authority to allow them to present their message either before or after the objectionable program. TCI Cable of Westchester, New York, adopted this strategy with success by placing a show from the American Jewish Committee after an anti-Semitic program.(note 192) Because an operator has the authority to decide when to air a program, this remedy avoids any constitutional concern about content prohibition.

There would be benefits to a cable operator actively soliciting community members to respond on public access. Indecent and hate shows may actually help tie a community together. Administrative Director Robert Purvis of the National Institute Against Prejudice and Violence stresses that "public access is potentially far more valuable in improving intergroup relations than it is in harming them."(note 193) Responding to these racist shows in particular might help viewers realize the hatred and prejudice inherent in the disputed message, "as the televised reports of [CBS news reporter] Edward R. Murrow finally did in the 50's for the Communist-baiting Sen. Joseph McCarthy."(note 194) Martin Dyckman, a columnist in Florida, attempted to encourage people to use public access in his community to protest against anti-Semitic comments made on an access program, warning that "[s]ilence in the face of bigotry

condones it."(note 195)

It would also be far more effective to create a vigorous debate over shows that may contain nudity and sexual content, but also have a social or artistic value. Getting on the "soapbox" to talk about these programs, rather than suppressing them, will only educate. This knowledge becomes even more important in society where problems like teenage pregnancy, AIDS, and racial tension exist.

Conclusion

Since its inception, public access has been the medium for those whose message cannot be heard elsewhere. With the expansion of cable television, Congress and the FCC have attempted to assure that public access has a place in the channel spectrum. The result has been struggles between operators, users, and viewers over what content can be prohibited. This puts a strain on user involvement and diminishes any positive operator incentive towards the use of access. Because of the difficulty the courts have had in defining a proper indecency standard for cable television, access content should only be prohibited if it violates the *Miller* standard of obscenity. Placing the choice in the hands of the operator threatens to severely limit the power of access, no matter how beneficial programs may be behind possible rough edges.

As cable finds itself facing a future of almost unlimited channel capacity, the diversity found on the small "voice" of public access needs to be protected. The rules promulgated by the FCC under the 1992 Cable Act threaten the expression that is essential to access by placing the tool of censorship in a single person. The best way to preserve a channel that provides a voice for the people is to give the control over what to watch and what is received in the home to an individual viewer. Only then will the marketplace of ideas be able to succeed.

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Notes

*A.B. Duke University, 1992; candidate for J.D. Indiana University School of Law - Bloomington, 1995.Return to text

1. Richard Nilsen, *Do-It-Yourself TVChannel 22,* Ariz. Republic, Oct. 27, 1993, at D1. Return to text

2. Wayne's World (Paramount 1992). Return to text

3. Laura A. Kiernan, *`Public Access' Tests Limits of TV Tolerance; Cable Communities Grapple with Issues*, Boston Globe, Sept. 2, 1992, at 23, 30. Return to text

4. Michael Kiernan, *To Watch is O.K., but to Air is Divine,* U.S. News & World Rep., Oct. 16, 1989, at 112, 112. Return to text

5. Richard Zoglin, *All You Need is Hate*, Time, June 21, 1993, at 63, 63. Return to text

6. Joseph Berger, *Forum for Bigotry? Fringe Groups on TV*, N.Y. Times, May 23, 1993, 1, at 29. These are just 2 of over 57 reported "hate" shows produced nationwide. *Id.* Return to text

7. *Cities Fight Public Access Channel Nudity*, News Media & the Law, Spring 1990, at 43, 44. Return to text

8. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C. (1988)). Return to text

9. 47 U.S.C. 531(b) (1988). These channels could be separate or combined, usually labeled as the PEG channel. Return to text

10. 47 U.S.C. 531(e) (1988). Return to text

11. 47 U.S.C. 558 (1988). Return to text

12. 47 U.S.C. 521(4) (1988). Return to text

13. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. 521-611 (Supp. IV 1992)). Return to text

14. 47 U.S.C. 558 (Supp. IV 1992). Return to text

15. 47 U.S.C. 532(c)(2) (Supp. IV 1992). Return to text

16. 47 U.S.C. 532(j) (Supp. IV 1992). Return to text

17. *Alliance for Community Media*, 10 F.3d 812 (D.C. Cir. 1993), *vacated pending reh'g en banc*, 15 F.3d 186 (D.C. Cir. 1994). Return to text

18. *Alliance for Community Media*, 15 F.3d at 186. The court began holding the full panel oral argument on October 19, 1994. *Mass Media*, Comm. Daily, Oct. 19, 1994, at 8. A decision had not been made by the court at the time of publication. Return to text

19. Robert S. Oringel & Sue Miller Buske, The Access Manager's Handbook: A Guide for Managing Community Television 1 (1987). Return to text

20. *Id.* Return to text

21. *Time Warner Seeks Partners; Cable Looking to Future of Multimedia, even though Virtual Reality, NCTA is Told*, Comm. Daily, May 7, 1992, at 2. Return to text

22. *See* Ralph Engelman, *The Origins of Public Access Cable Television 1966-1972*, Journalism Monographs, Oct. 1990, at 1, 3. Return to text

23. *Id.* Return to text

24. *Id*. at 10 (quoting Patrick Watson). Return to text

25. *Id.; see also* Gilbert Gillespie, Public Access Television in the United States and Canada 21 (1975). Return to text

26. Engelman, *supra* note 22, at 10; *see also* Gillespie, *supra* note 25, at 21. Return to text

27. Gillespie, *supra* note 25, at 22. Return to text

28. Engelman, *supra* note 22, at 9. Return to text

29. *Id*. at 31; Gillespie, *supra* note 25, at 35. Return to text

30. Gillespie, *supra* note 25, at 35-36. Return to text

31. Engelman, *supra* note 22, at 20. Return to text

32. *Id.* at 24. Return to text

33. *Id.* at 26. Return to text

34. Gillespie, *supra* note 25, at 31 (quoting Lee Thayer, *On Human Communication and Social Development*, 5 Economies et societies: La communication II 51 (1971)). Return to text

35. Gary D. Christenson, *Smile, You're On Cable TV!*, Chi. Trib., July 30, 1989, (Magazine), at 26, 29. Return to text

36. Kiernan, *supra* note 4, at 114. Return to text

37. *Id*. Return to text

38. Judy Semas, *Smile, You're on Television; Public Access Television Programs*, Bus. J., Mar. 14, 1994, at 23. Return to text

39. Christenson, *supra* note 35, at 26. Return to text

40. Kiernan, *supra* note 4, at 114. Return to text

41. Howard Blume, *Media for the Masses*, L.A. Times, Mar. 31, 1994, at J8. Return to text

42. Stephanie Simon, *Viewer Challenges TV Station's Airing of Abortion*, L.A. Times, Feb. 24, 1993, at B1. Return to text

43. Ronald Taylor, *`People's TV' is HereOn Cable Systems*, U.S. News and World Rep., May 10, 1982, at 84, 84. Return to text

44. Kiernan, *supra* note 4, at 112. Return to text

45. Semas, *supra* note 38, at 23. Return to text

46. Nilsen, *supra* note 1, at D1. Return to text

47. Christenson, *supra* note 35, at 26. Return to text

48. *See* Frontier Brdcst. Co. v. Collier, *Memorandum Opinion and Order*, 24 F.C.C. 251 (1958). In *Frontier*, the complainant asked the Commission to apply the common carrier provisions of the 1934 Communications Act to operators of cable television, then known as community antenna television (CATV). *Id*. para. 2. The FCC dismissed Frontier's complaint, reasoning that CATV did not conform to the traditionally accepted concept of common carriers. *Id.* para. 7. Return to text

49. Oringel & Buske, *supra* note 19, at 5. Return to text

50. *In re* Amendment of Part 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys., *Report and Order*, 36 F.C.C.2d 143, para. 121 (1972) [hereinafter *1972 Cable TV Report*]. The FCC set a compliance date of March 31, 1977, for CATV operators to provide the designated channels. *Id*. para. 147. Return to text

51. *Id.* para. 121. Return to text

52. Engelman, *supra* note 22, at 39. The Court of Appeals for the Eighth Circuit later viewed the Commission's requirement as an attempt to "anticipate the course of communications advances" while racing against "our modern technological juggernaut." Midwest Video Corp. v. FCC, 571 F.2d 1025, 1031 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). Return to text

53. *1972 Cable TV Report*, *supra* note 50, para. 135. The Commission, in order to create enough channel capacity, also required cable operators in the top 100 markets to create systems with twenty-channel capacities. *Id.* para. 120. Return to text

54. *Id.* para. 135. Return to text

55. In Re Clarification of Section 76.256 of the Commission's Rules and Regs., *Clarification*, 59 F.C.C.2d 984, para. 8 (1976). Return to text

56. *In re* Amendment of Part 76 of the Commission's Rules and Regs. Concerning the Cable TV Channel Capacity and Access Channel Requirements of Section 76.251, *Report and Order*, 59 F.C.C.2d 294, para. 10 (1976). This rulemaking led to access channels being labeled as "PEG" channels. Return to text

57. *Id.* Return to text

58. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). Return to text

59. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). Return to text

60. *Id.* at 1038. Return to text

61. *Id.* Return to text

62. *Id.* at 1042; *see also* HBO, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (holding that the FCC lacked the authority to regulate pay-per-view cable). Return to text

63. *Midwest Video Corp.*, 571 F.2d at 1053-54. Return to text

64. *Id*. at 1056-57. Return to text

65. *Id.* at 1057. Return to text

66. Oringel & Buske, *supra* note 19, at 6. Return to text

67. *Id.* at 6-7. Return to text

68. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C. (1988)). Return to text

69. 47 U.S.C. 521(6) (1988). Return to text

70. H.R. Rep. No. 934, 98th Cong., 2d Sess. 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696. Return to text

71. 47 U.S.C. 521(2) (1988). Return to text

72. H.R. Rep. No. 934, *supra* note 70, at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667. Return to text

73. *Id.* at 35, *reprinted in* 1984 U.S.C.C.A.N. at 4672. Return to text

74. 47 U.S.C. 531 (1988). Return to text

75. 47 U.S.C. 531(e) (1988). Return to text

76. 47 U.S.C. 558 (1988). Return to text

77. 47 U.S.C. 531(c) (1988); *see generally* Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543 (1985). Return to text

78. 47 U.S.C. 544(d)(2) (1988). Return to text

79. S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135. Return to text

80. *See* Michael G. Oxley, *The Cable-Telco Cross-Ownership Prohibition: First Amendment Infringement through Obsolescence*, 46 Fed. Comm. L.J. 7 (1993). Return to text

81. *See* Nicholas W. Allard, *Reinventing Rate Regulation*, 46 Fed. Comm. L.J. 63 (1993). Return to text

82. *See* Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?*, 46 Fed. Comm. L.J. 469 (1994). Return to text

83. *Cities Fight Public Access Nudity*, *supra* note 7, at 43. Return to text

84. Simon, *supra* note 42, at B1. Return to text

85. Bill Duryea, *Cable TV Issue Flares*, St. Petersburg Times, Mar. 21, 1993, at 1B. The program in question involved a documentary of punk rocker G.G. Allin, who was filmed exposing his genitals and defecating on stage. Allin has since died of a drug overdose. Return to text

86. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. 521-611 (Supp. IV 1992)). Return to text

87. S. Rep. No. 92, 102d Cong., 1st Sess. 3-4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135-37. Return to text

88. 47 U.S.C. 521 (Supp. IV 1992). Return to text

89. 47 U.S.C. 531 (Supp. IV 1992). Return to text

90. 47 U.S.C. 531(j) (Supp. IV 1992). Return to text

91. *In re* Implementation of Section 10 of the Cable Consumer and Protection Act of 1992, *Second Report and Order*, 8 FCC Rcd. 2638 (1993) (to be codified at 47 C.F.R. 76.702) [hereinafter *1992 Cable Act Second Report and Order*]. Return to text

92. *Id.* paras. 14-15; *see also* Dial Info. Servs. Co. v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991) (setting forth the definition of "indecency" upon which the FCC relies); *In re* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, *First Report and Order*, 8 FCC Rcd. 998, paras. 33-37 (1993) (to be codified at 47 C.F.R. 76.701(g)) (incorporating indecency as material that "depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium"). Return to text

93. *1992 Cable Act Second Report and Order*, *supra* note 91, para. 19. The FCC set forth an obscenity standard based on the *Miller v. California* test. *See infra* text accompanying notes 121-23. Return to text

94. *1992 Cable Act Second Report and Order*, *supra* note 91, paras. 25-26. Return to text

95. Joe Flint, *Commentators Clash Over Cable Indecency Rules*, Broadcasting, Dec. 14, 1992, at 62, 62. Return to text

96. Duryea, *supra* note 85, at 1B. Return to text

97. Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), *vacated pending reh'g en banc*, 15 F.3d 186 (D.C. Cir. 1994). Return to text

98. *Id.* at 816. Return to text

99. *Id.* at 818. Return to text

100. *See generally* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (setting forth the close nexus and state involvement requirements in a state action case). For the argument that public access deserves even greater protection from governmental intervention as a designated public forum, see Missouri Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347 (W.D. Mo. 1989); Steven Siegel, *The Video Revolution and the First Amendment*, 7 N.Y.L. Sch. J. Hum. Rts. 257 (1990). Return to text

101. *Alliance for Community Media*, 10 F.3d at 819 (citing Reitman v. Mulkey, 387 U.S. 369, 373 (1967)). Return to text

102. *Id.* at 820. Return to text

103. *Id.* Return to text

104. *Id.* Return to text

105. *Id.* at 823 (citing Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied* 112 S. Ct. 1282 (1992)). Return to text

106. *Id.* Return to text

107. Alliance for Community Media v. FCC, 15 F.3d 186 (D.C. Cir. 1994). Return to text

108. *New Hearing for TV Decency Rules*, Chi. Trib., Feb. 19, 1994, at B1. The three were Chief Judge Abner Mikva and Judges Patricia Wald and Harry Edwards. *Id.* Return to text

109. Flint, *supra* note 95, at 62. Return to text

110. David Friedman, *The Fat Cat of Porn*, Newsday, Sept. 4, 1990, at 8. Return to text

111. *Id.* Return to text

112. *Id.* Return to text

113. *Id.* Return to text

114. *Id.* Return to text

115. Richard Corliss, *Turned On? Turn it Off*, Time, July 6, 1987, at 72, 72. Return to text

116. Friedman, *supra* note 110, at 8. Return to text

117. *Roth*, 354 U.S. 476 (1957). Return to text

118. *Id.* at 491. Return to text

119. *Id*. at 484. Return to text

120. A Book Named `John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts, 383 U.S. 413 (1966). Return to text

121. Miller v. California, 413 U.S. 15, 22 (1973). Return to text

122. *Id.* at 23. Return to text

123. *Id.* at 17. The salesman sent four brochures in the mail: *Man-Woman*, *Sex Orgies Illustrated*, *An Illustrated History of Pornography*, and *Intercourse*, along with a film titled *Marital Intercourse*. *Id.* at 18. Return to text

124. *Id.* at 24. Return to text

125. *Id.* Return to text

126. *Id.* Return to text

127. *Id.* at 36. "[P]eople do not allow unregulated access to heroin just because it is a derivative of medicinal morphine." *Id.* Return to text

128. *Id.* at 23-24. Return to text

129. *Id.* at 33. Return to text

130. *Id.* at 26. Return to text

131. *Id.* at 39 (Douglas, J., dissenting) (quoting Justice Stewart's concurring opinion in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)). Return to text

132. *Pacifica*, 438 U.S. 726 (1978). Return to text

133. *Id.* at 729. Return to text

134. *Id.* at 730-31. Return to text

135. *Id.* at 731 n.2. Return to text

136. *Id.* at 731-32. Return to text

137. *Id*. at 738. Return to text

138. *Id.* at 732. Return to text

139. *Id.* at 748-50. Return to text

140. *Id.* at 750. Return to text

141. *Id.* Return to text

142. *Id.* (quoting Justice Sutherland from Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)). Return to text

143. *HBO*, 531 F. Supp. 987 (D. Utah 1982). Return to text

144. *Id.* at 995. Return to text

145. Utah Code Ann. 76-10-1227(1) (1990). Return to text

146. *HBO*, 531 F. Supp. at 996. Return to text

147. *Id.* at 1001. Return to text

148. Community TV of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982). Return to text

149. *Id.* Return to text

150. *Id.* at 1167. Return to text

151. *Id.* Return to text

152. *Id.* at 1170. Return to text

153. *Id.* at 1172 (quoting Sydney Harris, The Best of Sydney T. Harris 194 (1976)). Return to text

154. *Community TV of Utah*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom.*, 800 F.2d 989 (10th Cir. 1986), *aff'd without opinion*, Jones v. Wilkinson, 480 U.S. 926 (1987). Return to text

155. *Id.* at 1115. Return to text

156. *Id.* at 1113; *see also* Cruz v. Ferre, 755 F.2d 1415, 1419 (11th Cir. 1985) (discussing the options of lockboxes and parental keys that help protect children from programming that adults consider objectionable). Return to text

157. *Community TV of Utah*, 611 F. Supp. at 1115; *cf.* Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding that a complete ban on indecent telephone messages was unconstitutional because a denial of access to adults exceeded that which was necessary to limit the access of minors). Return to text

158. *Cruz*, 755 F.2d at 1415. Return to text

159. *Id.* at 1418-22. Return to text

160. *Id.* at 1420. Return to text

161. *Id.* at 1420 n.6. Return to text

162. Altmann v. Television Signal Corp., 849 F. Supp. 1335 (N.D. Cal. 1994). Return to text

163. *Id.* at 1347. Return to text

164. *Id.* at 1339. Return to text

165. Cable Television and Consumer Protection and Competition Act of 1992, 10(c), 47 U.S.C. 531 (Supp. IV 1992). Return to text

166. *Altmann*, 849 F. Supp. at 1343. Return to text

167. *Id.* Return to text

168. Duryea, *supra* note 85, at 1B. Return to text

169. This view assumes the state statute does not exceed the boundaries for regulating obscenity defined in Miller v. California, 413 U.S. 15 (1973). Return to text

170. *See 1992 Cable Act Second Report and Order*, *supra* note 91, para. 25-26. Return to text

171. 47 U.S.C. 532 (Supp. IV 1992). Return to text

172. 47 U.S.C. 532(j) (Supp. IV 1992). Return to text

173. 47 U.S.C. 532(j)(1)(B) (Supp. IV 1992); Flint, *supra* note 95, at 62. Return to text

174. Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), *vacated pending reh'g en banc* 15 F.3d 186 (D.C. Cir. 1994). Return to text

175. 47 U.S.C. 532(b) (1988). Return to text

176. *Alliance for Community Media*, 10 F.3d 812. Return to text

177. *See, e.g., ACLU Complains About Access Channel Limits*, News Media & the Law, Fall 1990, at 34, 34. Peoria, Illinois was the site of the proposed regulations. The provisions were seen as a way to restrict white supremacist Tom Metzger in California from airing his program *Race and Reason*. *Id.* Return to text

178. Cable Television and Consumer Protection Act of 1992, 10(c), 47 U.S.C. 532(j)(1)(C) (Supp. IV 1992). Return to text

179. *1992 Cable Act Second Report and Order*, *supra* note 91, para. 25. The proscribed areas included indecency and unlawful conduct. Return to text

180. *Id.* para. 26. Return to text

181. *Id.* Return to text

182. Duryea, *supra* note 85, at 1B. Return to text

183. 47 U.S.C. 544(d)(2)(A) (1988). Return to text

184. *See* 47 U.S.C. 541(a)(3) (1988). Return to text

185. ACLU v. FCC, 823 F.2d 1554, 1579 (D.C. Cir. 1987), *cert. denied sub nom.* Connecticut v. FCC, 485 U.S. 959 (1988). Return to text

186. Jones v. Wilkinson, 800 F.2d 989, 1002 (10th Cir. 1986) (Baldock, J., concurring), *aff'd without opinion*, 480 U.S. 926 (1987). Return to text

187. 47 U.S.C. 544(d)(2)(A) (1988). Return to text

188. Corliss, *supra* note 115, at 72. Return to text

189. *Id.* at 73. Return to text

190. *Id.* Return to text

191. David Kaplan, *Is the Klan Entitled to Public Access?*, N.Y. Times, July 31, 1988, 2, at 25. Return to text

192. Berger, *supra* note 6, at 34. The show at issue is *It's Time to Wake Up*, hosted by Ta-Har. *See supra* text accompanying note 6. Return to text

193. Zoglin, *supra* note 5, at 63. Return to text

194. Christenson, *supra* note 35, at 30. Return to text

195. Martin Dyckman, *Silence Will Not Suffice*, St. Petersburg Times, Jan. 25, 1994, at 11. Return to text